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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**  
7

Case No: 1615/5/7/23

8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

Thursday 18th January 2024

15 Before:

16 Ben Tidswell

17  
18 (Sitting as a Tribunal in England and Wales)

21 BETWEEN:

22 **Claimant**

23  
24  
25 **Up and Running (UK) Limited**

26 And

27 **Defendant**

28  
29 **Deckers UK Limited**

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31  
32 **APPEARANCES**

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34  
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36  
37 **Dennis Macfarlane on behalf of Up and Running (UK) Limited**

38  
39 **Naina Patel (Instructed by Stobbs IP Limited) on behalf of Deckers UK Limited**

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Thursday 18 January 2024

(1.30 pm)

**Case Management Conference**

THE CLERK: Case number 1615, Up and Running (UK) Limited and Deckers UK Limited.

MR TIDSWELL: Good afternoon everybody. Just a quick announcement about the live stream. Some of you are joining us on our live stream on our website, so I have to start with the customary warning that you've heard before, I'm sure. An official recording is being made of the proceedings and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and a breach of that provision is punishable as a contempt of court. Thank you.

Hello, Mr Macfarlane, Ms Patel. Can you hear me?

MR MACFARLANE: Yes, sir.

MS PATEL: Yes, sir.

MR TIDSWELL: Thank you. We're starting at a slightly odd time, so thank you for making yourselves available to do that, that is much appreciated. What I propose to do is just to work off the agenda, unless there's anything either of you wanted to raise beforehand?

MS PATEL: There is one matter from our side, sir, which might impact the agenda at various points and it only came to light yesterday. So if I might raise it at the outset. I think it might be relevant to the defence, to disclosure and, generally, the decisions that have to be made today about the management and pace of the litigation. You will have seen that the defence relies on the terms and conditions that the HOKA products were supplied to the claimant under.

MR TIDSWELL: Yes.

1 MS PATEL: It came to light yesterday that HOKA products have not been distributed  
2 to all retailers, subject to those terms and conditions, although the bulk have been. It  
3 appears that in some, we think, limited cases, supply may have been subject to the  
4 retailers' terms and conditions. Now, there are upwards of 100 and close to 200  
5 retailers, as I understand it, so it has not been possible to get to the bottom of this for  
6 today's hearing. Clearly, the defendant will need to make inquiries into the terms of  
7 appointment of all its retailers' HOKA products to properly understand the position. It  
8 will also be necessary to understand what else might constitute part of the agreement  
9 with those retailers beyond the terms and conditions themselves, if, for example, there  
10 are supplementary terms that have been agreed in writing, in parallel with those terms  
11 and conditions. This process that the defendant will need to undertake is complicated,  
12 I'm instructed, by the email retention policy that I understand applies to the defendant.  
13 I mention this because it's also relevant to disclosure which is the topic for today. I  
14 understand that this retention policy provides for the automatic deletion of emails older  
15 than one year on active email servers, unless certain carve-outs are satisfied. And  
16 these are the sort of carve-outs that one might expect to do with, for example, legal  
17 matters that are of legal value. I am instructed that the policy has been imperfectly  
18 applied, such that information has not always been stored as it should have been. As  
19 such, the process of searching for these documents relating to appointments is going  
20 to be, perhaps, more time consuming than it would have been otherwise because  
21 there will be a number of places that need to be searched. I think where this takes us,  
22 sir, is that it's obviously important that I let the Tribunal and the claimant know about  
23 this at the earliest opportunity, as I have done, but that process is going to need to be  
24 undertaken, the defendant will then need to consider whether any amendments to its  
25 defence are necessary. These may be very limited if the substance of the agreements  
26 with these retailers are on, effectively, all fours with the terms and conditions. The

1 defendant will then also need to consider what should be disclosed to the claimant to  
2 give the claimant a fair picture of the appointment situation. I think at the moment, the  
3 claimant has asked for the disclosure of three sets of terms and conditions with  
4 retailers. I simply say it might be necessary to give the claimant more than that, to  
5 give the claimant a clear picture of the process that has been operated by the  
6 defendant. So that's all I want to say at this stage, sir, but I think it's probably important  
7 that I raise that at the outset because it departs somewhat from the position that you  
8 have on the papers for today's hearing.

9 MR TIDSWELL: Yes, that's helpful. Can I just ask you -- and I appreciate there may  
10 be lots of implications. I just want to get a sense of how that fits into the issues. Am I  
11 right in thinking that it might be relevant, for example, to things like the selective  
12 distribution system argument and what the wider picture of the method of distribution  
13 was and the terms and conditions of that. Is that the sort of thing that might be  
14 relevant?

15 MS PATEL: That's the sort of thing, sir. It might be, it might not be but it might be,  
16 yes.

17 MR TIDSWELL: Yes, I see. You're not suggesting, I think, that it has any impact on  
18 the actual contractual position between the claimant and the defendant though, that  
19 obviously --

20 MS PATEL: No, it couldn't. Indeed, sir, these are separate agreements with other  
21 retailers, so this position -- the situation vis a vis other retailers can't impact on the  
22 terms that were agreed between the claimant and the defendant.

23 MR TIDSWELL: Yes, I understand. Okay. That's helpful, thank you. Mr Macfarlane,  
24 that's obviously news to you and I'm sure that you'll want to think about it. Is there  
25 anything you want to say about that at the moment? I'm certainly not going to stop  
26 you saying something later about it in the hearing when it comes up as relevant or

1 indeed, later on, if it's relevant, I just want to see if there's anything you want to stay  
2 before we move on.

3 MR MACFARLANE: Yes, sir. The first thing that hits me on my thought pattern is this  
4 is another set of possible delays and I'm fearful, for want of a better word, that this  
5 maybe a ruse for, really, just delaying this and another way of getting it out of fast  
6 track, if we're thrown into an awful lot of irrelevant papers, where, on this occasion, as  
7 you quite rightly pointed out, it has little or no effect between the defendant and the  
8 claimant in this matter because the defendant and the claimant have terms and  
9 conditions that have already been referred to. And so that's my first fear, is that it  
10 could -- I think it's irrelevant anyway but nonetheless, I think it could just crop up. I do  
11 wonder if it cropped up yesterday, why we didn't have an email to that effect. I had  
12 emails this morning.

13 MR TIDSWELL: Let's not get too forensic about how it's happened. There may be  
14 time to do that later and it may be that a helpful thing would be to have a letter that  
15 explains it all, so you're in no doubt about what's being said. Of course, you'll get the  
16 transcript and so on. Just to your first point -- I don't know if you've got other points  
17 but just to your first point. I absolutely understand the point you're making and we will  
18 certainly address that. I'm sure it is going to now become a feature of the discussion  
19 in relation to the timetable in the case. So just so you know I have registered the point  
20 you've made and we will come back to that and I assure you we will come back and  
21 discuss it properly. Is there anything else you wanted to say at the moment?

22 MR MACFARLANE: No. In the interests of expediency, I think we should just move  
23 on, sir.

24 MR TIDSWELL: Just to be clear -- sorry, Mr Macfarlane -- I'm certainly not trying to  
25 stop you saying anything. I think probably the efficiency is served by saying it where  
26 it pops up on the agenda. I think that's exactly why Ms Patel told us about it in the

1 order that she has, so that we aren't going to be under any illusion in any of the things  
2 that we're talking about, that we have to deal with that issue and the implications of it,  
3 whatever they might be. So just to be clear, you'll certainly get plenty of opportunity  
4 to expand on the observations you've just made. Ms Patel.

5 MS PATEL: Just to clarify the answer I gave you, sir, what I have described wouldn't  
6 impact, I don't think, on the terms, the factual aspect of the terms between the claimant  
7 and the defendant but it could impact on the arguments about the legitimacy of those  
8 terms because as you will hopefully have seen from the defence, this question of  
9 whether there's a hardcore restriction in the context of a selective distribution  
10 agreement has to grapple with this tension between what are legitimate quality  
11 standards and what are not, effectively, and therefore, the points about what was the  
12 system and what were the standards are relevant to whether there is a hardcore  
13 restriction or not, indicated by one of the terms of the agreement between the parties.  
14 If that makes sense.

15 MR TIDSWELL: It does and it doesn't actually because I think -- that seems to me to  
16 be putting in another way the point about its relevance to the selective distribution  
17 system argument. But isn't it right -- and maybe it's useful to have this discussion now  
18 because it may colour quite a lot of things that come -- isn't it the case that the hardcore  
19 restriction trumps anything in the vertical block exemptions and what we're talking  
20 about, just to be very specific there because I think this is Mr Macfarlane's case, if the  
21 clause is actually resale price maintenance, then you don't need to get into the  
22 question of selected distribution, the whole thing falls away, doesn't it?

23 MS PATEL: I think that's strictly right, sir, but I think when you look at the Commission  
24 guidance and you look at the CMA guidance, what you see is what could be  
25 described -- there is a space within -- what the claimant describes as a hardcore  
26 restriction, the defendant describes as, in fact, legitimate standards for internet selling.

1 So while you're right, sir, if the claimant successfully proved that, in fact, the clause  
2 was resale price maintenance, then that would be a hardcore restriction. But what I'm  
3 trying not very eloquently to explain is that the other side of that argument, the  
4 defendant's response to it, is that it's not in fact resale price maintenance, it's a  
5 legitimate standard in the context of a selective distribution criteria. So it's quite hard  
6 to disentangle the two, sir, is all I am saying.

7 MR TIDSWELL: It's very helpful and very clear. Just to take it one step further and,  
8 again, I don't want to characterise this in any way that ties Mr Macfarlane down, so  
9 this is just my understanding of where he's coming from, but I think the consequence  
10 of what he's saying is he's saying -- he's not saying that on the face of it, the clause  
11 amounts to resale price maintenance but he's saying the way it was deployed. So  
12 therefore, the indirect rather than the direct application, in terms of chapter one. The  
13 attempt behind enforcement of the clause was actually resale price maintenance  
14 which is actually a factual question about what the circumstances were in which, in  
15 relation to Mr Macfarlane at least, your client's motives were in enforcing the clause.  
16 I think that's -- I don't know, Mr Macfarlane, if there's anything in there that you think  
17 I've got badly wrong. I don't want to tie you down but is that broadly what you're saying?

18 MR MACFARLANE: I'm absolutely totally in agreement, sir, yes. I say it's indirect  
19 means of RPM.

20 MR TIDSWELL: Yes. Thank you, Mr Macfarlane. To make sure that we're absolutely  
21 clear about what our terminology -- this is a terminology discussion, just to be clear  
22 that I am not expressing any view as to the rights or wrongs of any of these arguments  
23 but just in terms of when we talk about the hardcore restriction, I think there's -- at one  
24 end of this continuum there is Mr Macfarlane's argument that, actually, it is just resale  
25 price maintenance because it's indirectly applying clause 15 in order to prevent him  
26 from discounting -- retail price maintenance, he would say -- and then I think you say:

1 well -- and my point, I think, is that if that is the case, then that trumps everything.  
2 Really, the answer to whether or not it is the case is a factual inquiry into what it was  
3 that your clients were seeking to achieve in their dealings with Mr Macfarlane, with Up  
4 and Running. Then if you step a little bit further down the continuum, what I think you  
5 get is the point you're making which is that if Mr Macfarlane can't establish it's that sort  
6 of hardcore restriction, then there's a sort of broader discussion about what the clause  
7 actually does do and you're saying it's not a hardcore restriction at all, it's actually  
8 a selective distribution arrangement and in those circumstances, you're entitled to rely  
9 on case law and the provisions in the guidelines and the vertical block exemptions to  
10 that effect. Then I think you're saying, unless I'm misunderstanding, you're also saying  
11 there are other things in the vertical block exemption which help you, even if it's not  
12 a selective distribution system, although I'm not entirely clear how you say that works.  
13 That's in my mind. I had that sort of sequence or categorisation of the arguments.  
14 Does that sound broadly right?

15 MS PATEL: I think save that the second point bleeds into the first because in so far  
16 as the factual enquiry is concerned, the defendant's position, the response to that  
17 factual allegation that the claimant is making about RPM is that, factually, it wasn't. It  
18 was again, seeking to ensure that the website was linked to the website that had been  
19 authorised which was linked to the store that satisfied the quality standards. So it's  
20 about properly labelling the goods of an authorised distributor.

21 MR TIDSWELL: That's helpful. Absolutely, I see that and really, that's your positive  
22 case in relation to the extreme hardcore, if we can put it that way. It's your positive  
23 case in relation to that which, of course, amounts to the same thing as your  
24 selective -- because you say selective distribution is permitted and then you have to  
25 obviously justify that you've ticked the boxes for that.

26 MS PATEL: Which is why I say they are hard to unpack because I think it really is our



1 answer at each stage.

2 MR TIDSWELL: They may be hard to unpack as a matter of how they are tried but  
3 I think, conceptually, one probably has to think about them in the way that I have  
4 described. But I absolutely see the point you're making. Mr Macfarlane?

5 MR MACFARLANE: Yes. Sorry about the noise outside, sir, it's a snow plough.

6 MR TIDSWELL: I can't hear it.

7 MR MACFARLANE: It's gone now. While I was listening to what Ms Patel says, the  
8 fact is that relying on a website that even we hadn't seen as a quality standard is a bit  
9 of a headache for me. I don't know how on earth they could have seen a website that  
10 wasn't even developed.

11 MR TIDSWELL: Mr Macfarlane, I'm just going to have to stop you and whenever I do  
12 this, I don't want you to feel like I am trying to stop you running your case but we are  
13 just not talking about the merits at the moment. What you're doing is getting into the  
14 evidence and the merits. What I'm trying to do here and just so you understand, and  
15 this is something that I'm afraid judges do all the time because they quite like to see  
16 what the landscape looks like. I am just trying to categorise the issues so I understand  
17 how they fit together. And the reason we're doing this is because when we come on  
18 to talk about a number of things further down the list, like the fast track application,  
19 then a proper understanding, at least some sort of common sense of the terminology  
20 and the categorisation is quite helpful, so that we all know what we're talking about.  
21 So again, you're going be able to run all the arguments you like about whether or not  
22 the point that Ms Patel made is right or wrong, that all comes in the future, I'm afraid.  
23 For today, it's all about just how do we set this up so those arguments are properly  
24 and fairly canvassed between the parties in front of the Tribunal.

25 MR MACFARLANE: Okay, sir, I understand.

26 MR TIDSWELL: Thank you, that's helpful. Thank you for understanding that. Okay.

1 Look, I think that's a helpful discussion. We may need to revisit bits of that as we go,  
2 I think, because I suspect we've scratched the surface a bit on a couple of them. Shall  
3 we, in that context, move into the agenda. And item one, I think, is the claimant's  
4 statement of case. I think maybe, Ms Patel, the proper signing post here is to ask you  
5 just to run this first bit because, really, these are largely components you make about  
6 Mr Macfarlane's pleadings, absent one point which we will come back to, Mr  
7 Macfarlane, which is the point about Shopify which I have got. If the parties are happy,  
8 I will ask Ms Patel to suggest these and then Mr Macfarlane, to the extent you need  
9 to, we can ask you to deal with them. Before you do, Ms Patel, I would like you to  
10 think about how many of these things really matter and how many of them don't and  
11 in that, I'm inviting you to take a fairly broad approach to things not mattering. And the  
12 reason for that is that I think we know that the claim form is not in the format or indeed,  
13 the claim form or the letter on damages or the reply are probably not in the format that  
14 we would be seeing if Mr Macfarlane was represented. That's no criticism of him  
15 because he's absolutely entitled to come unrepresented to the Tribunal. We're not  
16 trying to -- there's no exercise - I'm sure you're not suggesting the exercise of  
17 perfection but even near perfection is not really, I think, a useful thing to do unless it  
18 is material to your client's interests and understanding of the case. That's really what  
19 I would like you to fix the discussion on. And you may say all these things are and  
20 that's fine. I just want you to understand that's where I am coming from.

21 MS PATEL: What I would say, sir, is that what it is really material to and I can say this  
22 having had to work on the documents that we've got, is that it makes it very difficult  
23 and very expensive. Because in order to understand what you are responding to or  
24 checking against the pleadings, you have to go to a number of versions, you have to  
25 try and remember what has been allowed in and what has not been allowed in. You  
26 also have to go to a number of exhibits. So what might normally take you five minutes

1 to check, ends up taking you 20 because of the number of versions that you have to  
2 go through. So all I think the defendant is asking for is to have a single claim form with  
3 a single set of exhibits and a single reply with a single set of exhibits that either refers  
4 back to the claim exhibits or it's own stand alone exhibits. What we have at the  
5 moment, sir, is we have two claim forms. One that was filed originally, and a second  
6 one that was filed following the CMC -- I think, in fact, several were filed but a last one  
7 that was filed following the last CMC which I think is, technically, not yet the claim form  
8 because it was to be dealt with as an application to amend today. There are, therefore,  
9 two sets of exhibits, one for each of those. You then have a reply which refers back  
10 to some of the exhibits in the claim form filed on 18 October. I think it refers to some  
11 of the exhibits filed in the second claim form and it also refers to its own exhibits. So  
12 it makes it extremely difficult for the defendant to deal with matters in an efficient way.  
13 And so I am not meaning to be critical. I appreciate that this litigation is complicated  
14 for the claimant, who isn't legally trained. I am just trying, the defendant is trying to  
15 get the proceedings on a sensible footing, so that the rest of the steps can be  
16 conducted in an efficient way. Because we have one claim form and one reply and  
17 everyone knows what the exhibits are.

18 MR TIDSWELL: I understand. I think that is a very desirable objective. Let's see how  
19 we go. I have got your skeleton with a list of things at paragraph 7. Is that the right  
20 place to start?

21 MS PATEL: That's the right place. You have the background. There are three  
22 categories of things that were ordered at the last CMC. On the first, the collateral use  
23 restriction. Obviously, the references to the witness statements everyone now agrees  
24 can be left in but you therefore have -- you've got the original claim form that they were  
25 in and the revised claim form that they've been excised from.

26 MR TIDSWELL: Yes. Sorry to interrupt you. Can I just say on that point, shall we

1 work on the basis that the document that we're -- I think we need to be very clear with  
2 Mr Macfarlane about exactly what document we want him to address.

3 MS PATEL: Shall we go to the document, the two claim forms and I can show you  
4 exactly what I am talking about.

5 MR TIDSWELL: You can. I have looked at them. The point I was going to make is  
6 that what I would like to do is to be able to be very clear with Mr Macfarlane which  
7 document he should be making amendments in and when. It seemed to me that  
8 probably the easiest place to start with that was actually the revised claim form.

9 MS PATEL: Yes.

10 MR TIDSWELL: Of course, some of those things may not go in because you may not  
11 accept them. But do you agree that is the best thing to work off?

12 MS PATEL: Happy to do it that way, sir. If I could ask Mr Macfarlane and, sir, you, to  
13 turn to --I am just going to first show you the claim form, the relevant page of the  
14 original claim form and what has come out and then I will show Mr Macfarlane where  
15 it needs to go back in.

16 MR TIDSWELL: That's helpful. Just so we're clear, I think, as I understand it,  
17 everybody agrees these things should go back in. So all we're doing now -- I don't  
18 think there's any contest on this, Mr Macfarlane, you presumably want it back in, don't  
19 you, the material about witness statements?

20 MR MACFARLANE: Yes, sir. Can I just say, sir, that I'm all in favour of anything that  
21 allows this case to proceed in a smooth and orderly manner. I am just wondering, sir,  
22 whether it's feasible, rather than going through paragraph by paragraph today, that the  
23 two parties get their heads together to agree a joint presentation of a much clearer  
24 document?

25 MR TIDSWELL: I think we might do that. We may well do that. It depends a little bit  
26 where we get to in relation to how we're going to try this. What often happens in a case

1 like this is we end up with a list of issues that the parties agree and that's actually the  
2 primary reference point for the Tribunal in deciding it. At some stage I think we will do  
3 that. I think at the moment, Ms Patel is right, that she is entitled to know exactly what  
4 it is she is shooting at and at the moment there is a little bit of confusion. This is, again,  
5 no criticism of you, Mr Macfarlane, but having done the exercise myself, it's not entirely  
6 straightforward to work out what's going on. If you forgive us just going through this  
7 process, we will try and make it as quick as possible. What I am very keen to do is to  
8 make sure that you're in absolutely no doubt about what I think are probably a very  
9 small number of things you need to do in order to turn the revised claim form -- you  
10 know which one I am talking about when I say that, don't you, the one that's in the  
11 bundle at tab 6. We want you to turn that into the final document that will never be  
12 touched again, I hope, or at least if it does, we will have a conversation before it is  
13 touched. If you bear with us, I think we will probably find that this is the most efficient  
14 way of doing it.

15 MR MACFARLANE: Okay, sir.

16 MR TIDSWELL: Ms Patel, just take us back to where you want to go.

17 MS PATEL: I was at tab 5 of the bundle, page 39. This is the original claim form.  
18 Paragraph 21, I think is the first text that came out, so that first sentence at  
19 paragraph 21.

20 MR TIDSWELL: Mr Macfarlane, have you got this somewhere and have you got  
21 a marker or a highlighter, so you can just mark up on this? Your original claim form,  
22 have you got that somewhere?

23 MR MACFARLANE: I have got my desk surrounded with papers, sir.

24 MR TIDSWELL: I will give you a minute to find it because what I would like you to do  
25 is to get a pen or a highlighter and where we ask you to put something back in, I would  
26 like you to mark it, so you know exactly what it is we want you to put back in.

1 MR MACFARLANE: Are we looking at the claim from that was submitted on  
2 5 December, is that the one?

3 MR TIDSWELL: No, the original one, please.

4 MS PATEL: I think it would be sensible if the claimant could work off the bundle for  
5 the hearing, to make sure that it is the same version we're all looking at.

6 MR TIDSWELL: How have you done your bundle, Mr Macfarlane, do you have it on  
7 the computer or have you --

8 MR MACFARLANE: It's on the computer, sir, because I am working with a tiny little  
9 printer.

10 MR TIDSWELL: That's fine. I suspect it is probably better. I think it will work all right,  
11 I don't think -- Mr Macfarlane, are you clear about the original version you filed, have  
12 you got that handy?

13 MR MACFARLANE: Yes.

14 MR TIDSWELL: Put your hands on that and tell me when you've got it.

15 MR MACFARLANE: Okay, sir, I will have a look for that now. The original bundle,  
16 I think I can pull it up from an email.

17 MR TIDSWELL: If you're going to do it online, you might as well do it out of the hearing  
18 bundle.

19 MR MACFARLANE: Yes.

20 MR TIDSWELL: Are you in the hearing bundle at the moment?

21 MR MACFARLANE: No, sir, I am just looking at the email where I sent the original  
22 documents.

23 MR TIDSWELL: Okay. I thought you had a hard copy which I would have thought  
24 might be easier but if you want to do it online, let's do it, as Ms Patel suggests, out of  
25 the hearing bundle. So can you pull the hearing bundle up on your screen?

26 MR MACFARLANE: I can. I'm just not very good on IT but I will do it, sir.

1 MR TIDSWELL: Don't worry, no, we've got plenty of time. Just take your time, that's  
2 fine. We've all been on this journey one way or another. When you get your hearing  
3 bundle, we want you to go to page 39 of the hearing bundle which is tab 5.

4 MR MACFARLANE: Yes. I'm working on getting there, sir.

5 MR TIDSWELL: It's okay, when you're ready.

6 MR MACFARLANE: What day was the bundle sent?

7 MS PATEL: I believe it was Tuesday the bundle was sent. Sixteenth.

8 MR MACFARLANE: Yes, yes, I have that.

9 MR TIDSWELL: Would you go to page 39. It may not be strictly -- you need to look  
10 at the bottom of the page, it's got in square brackets some bold numbers "CMC" and  
11 then a number. Do you see that?

12 MR MACFARLANE: I'm sorry, sir, I pulled up the wrong bundle.

13 MR TIDSWELL: Don't worry, you need to have it open anyway, so this is a productive  
14 exercise. You're going to need it later, I think.

15 MR MACFARLANE: I have got one here from -- 11 am I received it from the  
16 defendants and it just says "Authorities to the bundle." Is that the one?

17 MS PATEL: I am being told you should look at Monday, an email at 1640. That's my  
18 mistake. Apologies. It's a link to a bundle.

19 MR TIDSWELL: Click on it.

20 MR MACFARLANE: Where's that posted, I wonder.

21 MR TIDSWELL: I just wonder, Ms Patel, whether the answer to this might not be -- I  
22 appreciate this is a burden for your instructing solicitors. Would it be easier if they  
23 were to mark it and send it to Mr Macfarlane, so he's got a record of it? I am just a bit  
24 concerned --

25 MS PATEL: I don't think, sir, that -- my instructions are that the defendant does not  
26 wish to be involved in finalising the claimant's pleading. It's not a fair imposition of

1 costs. It's been attempted before in previous proceedings. I don't believe it reached  
2 a successful conclusion.

3 MR TIDSWELL: Okay, we will persist with what we're doing. Mr Macfarlane, have  
4 you got it up?

5 MR MACFARLANE: It's trying to load at the moment, sir. I'm in the middle of  
6 a mountain location, the Internet isn't exactly quick. I'm pulling that up as fast as I can.  
7 It's a link and it actually has to be uploaded by We Transfer.

8 MR TIDSWELL: You haven't got a hard copy of your original claim form in front of  
9 you? A hard copy of the original claim form?

10 MR MACFARLANE: I do believe I do have one, sir. I think I will be able to put my  
11 hand on that. Yes.

12 MR TIDSWELL: Okay. Would you turn to paragraph 21, please. It's not paginated in  
13 yours.

14 MR MACFARLANE: Is this "Lockdown number two" heading?

15 MR TIDSWELL: No, we're talking about your claim form. I'm so sorry, no, it's "Time  
16 to discuss survival." Bottom of that page is paragraph 21. Before "Lockdown number  
17 two", several pages before.

18 MR MACFARLANE: All the numbering was different. 2021, sir, I have got that.

19 MR TIDSWELL: "I refer the Tribunal to extracts from the witness statements of  
20 Mr Henderson and Mr Hagger." Is that what it says?

21 MR MACFARLANE: Yes, it does.

22 MR TIDSWELL: Would you get a pen and mark the side of that paragraph.

23 MR MACFARLANE: Yes.

24 MR TIDSWELL: I think we're all agreed that should go back into your revised claim  
25 form, okay? Does that make sense, you understand what I am saying? So you're  
26 going to take that paragraph that you've taken out of the revised claim and put it back



1 into the revised claim form. At the end of this I'm going to say to you I don't want you  
2 to make any other changes to the revised claim form except for the ones we discussed;  
3 okay? And I want you to be absolutely completely clear about that and I do not want  
4 you to change anything other than we've agreed in this conversation. Do not give in  
5 to temptation of adding anything because otherwise we are going to have the same  
6 discussion, we're going to waste a whole lot of time and a whole lot of money. Okay,  
7 is that clear?

8 MR MACFARLANE: Very clear on that, yes.

9 MR TIDSWELL: Thank you, that's helpful. So 21 is done. Sorry, Ms Patel, do you  
10 want to move on.

11 MS PATEL: Over the page, from where it says -- from the top of the page "In these  
12 witness statements".

13 MR TIDSWELL: You see that, Mr Macfarlane? The next page: "In these witness  
14 statements, Mr Henderson and Mr Hagger say"; have you seen that?

15 MR MACFARLANE: Yes.

16 MS PATEL: Down to the end of the italicised text, where it says  
17 "www.upandrinning.co.uk." Down to the end of that quote. That whole section needs  
18 to go back in.

19 MR TIDSWELL: That's effectively three paragraphs at the top there; do you see that,  
20 Mr Macfarlane?

21 MR MACFARLANE: I do, yes.

22 MR TIDSWELL: Mark those three paragraphs, they go back into the revised claim  
23 form, please.

24 MR MACFARLANE: Yes. Where do we go next, Ms Patel?

25 MS PATEL: One paragraph down, where it says "What is being said." The word "said"  
26 has been taken out of the revised claim forms, so the word "said" just needs to go

1 back in.

2 MR TIDSWELL: Do you see that, Mr Macfarlane? "What is being said here is the  
3 running issues", so just put a circle round the "said", so you know you have to put that  
4 back in.

5 MR MACFARLANE: Yes, sir, I have done that.

6 MR TIDSWELL: Good, thank you. Next, please.

7 MS PATEL: Then if you look at paragraph 22, above paragraph 22, the sentence that  
8 says "Up and Running says that this admission".

9 MR TIDSWELL: How much of that is blanked out?

10 MS PATEL: That whole sentence, up to "complainants", and then the sentence at 22,  
11 "Further from Mr Henderson's witness statement, he says." So up until the end of that  
12 sentence where the quote begins, all of that needs to go back in, so three lines.

13 MR TIDSWELL: I see. So:  
14 "Up and Running says the admission of RPM should result in summary judgment  
15 ...(reading to the words)... the complainant."  
16 22:  
17 "Further from Mr Henderson's witness statement, he says ... "  
18 Those three lines. Mr Macfarlane, got that?

19 MR MACFARLANE: Yes.

20 MR TIDSWELL: Super, thank you. Next, please.

21 MS PATEL: Then under the italicised writing, the paragraph that begins "In regard to  
22 this statement." It's just those words "in regard to this statement" that need to go back  
23 in.

24 MR TIDSWELL: Got that, Mr Macfarlane?

25 MR MACFARLANE: Yes.

26 MS PATEL: Then 23, the words "I refer the Tribunal to the witness statement of

1 Mr Hagger as follows below the quotation", and then the text below, up to and including  
2 "it is a total untruth." And then over the page, still going all the way up to "The question  
3 must therefore be posed." So basically, from the beginning of 2023, up to the word  
4 "posed."  
5 MR TIDSWELL: Yes, I see, the end of the first paragraph on the next page.  
6 MS PATEL: Yes.  
7 MR TIDSWELL: That includes "The question must therefore be posed"?  
8 MS PATEL: Yes, that includes "The question must therefore be posed."  
9 MR TIDSWELL: Got that, Mr Macfarlane?  
10 MR MACFARLANE: Yes.  
11 MR TIDSWELL: "I refer the Tribunal ...(reading to the words)... Mr Hagger ... "  
12 Then there's the extract from Mr Hagger's statement. Then you say:  
13 "It's a fact Up and Running had not developed the website, not even the logo had been  
14 agreed, nothing ...(reading to the words)... It's a total untruth. This is further evidence  
15 ...(reading to the words)... The question must therefore be posed."  
16 All of that goes back in.  
17 MR MACFARLANE: Yes, sir. I might mention, sir, that when the transcript comes to  
18 me, I can refer back to this, just in case I am making a mistake.  
19 MR TIDSWELL: Absolutely. That is helpful. I would hope that we are just making  
20 sure you have absolute clarity and you don't need to wait for it. I am very keen that  
21 you are really clear and you have on a bit of paper that you own, exactly what you  
22 need to do.  
23 MR MACFARLANE: Yes.  
24 MR TIDSWELL: Ms Patel.  
25 MS PATEL: That same page, where fourth paragraph "I refer the Tribunal to  
26 paragraph 8 of Mr Hagger's witness statement", and then the italicised text, all the way

1 to the end.

2 MR TIDSWELL: All the way to the end.

3 MS PATEL: Of the quote, yes.

4 MR TIDSWELL: Mr Macfarlane, got that?

5 MR MACFARLANE: Yep.

6 MR TIDSWELL: Then the quote afterwards, put all that back in as well. Next.

7 MS PATEL: That's it, sir.

8 MR TIDSWELL: That's pretty helpful. So let's see what else needs to be changed, if  
9 anything, so let's keep going on your list.

10 MS PATEL: On that topic, exhibits six and seven which are the witness statements  
11 themselves, need to go back into the set of exhibits with the revised claim form. In the  
12 hearing bundle that's been done but I understand that was done by those instructing  
13 me.

14 MR TIDSWELL: Mr Macfarlane, did you change the numbering at all? So if we call  
15 them DM6 and DM7 again. Have you allocated those numbers to anything else, any  
16 other document in the revised claim form?

17 MS PATEL: No, he hasn't, sir, they're empty.

18 MR TIDSWELL: In fact, that's pretty easy. That has just happened, hasn't it?

19 MS PATEL: Yes.

20 MR TIDSWELL: That's fine. When you put your exhibits together with the claim form,  
21 you need to put those two statements back in. That's the short point, Mr Macfarlane?

22 MR MACFARLANE: Yes.

23 MR TIDSWELL: Like they were before.

24 MR MACFARLANE: Yes.

25 MR TIDSWELL: Good, excellent. Okay. So that's item 7(a). 7(b), I think -- again, I'm  
26 taking as agreed. There's no suggestion that we should change the revisions to the

1 without prejudice material, Mr Macfarlane. So I think Ms Patel is saying we don't want  
2 you putting that back in because that's still subject to privilege in favour of the  
3 defendant. So just so you know, unless you've got something to say about that, the  
4 point that is being made is do not make any further changes about the without  
5 prejudice material. Is that right, Ms Patel, that's the point?

6 MS PATEL: Yes. So we are working off the revised claim form and its exhibits and  
7 DM14, I believe it is, had two redactions applied to without prejudice material and  
8 those redactions should stay.

9 MR TIDSWELL: Yes. Make sense, Mr Macfarlane?

10 MR MACFARLANE: I'm making a big note in here, "no WPs."

11 MR TIDSWELL: I guess the point is we just told you exactly what needs to be added  
12 back into the revised claim form and that's where I'm saying to you, please do not add  
13 anything else unless we discuss it and agree it from now on. I want the revised claim  
14 form to stay as it is, subject to any other changes we discuss. I don't want you making  
15 other changes as we go along, that's the key point.

16 MR MACFARLANE: Indeed, sir, yes. I have that.

17 MR TIDSWELL: Good, thank you. That's very helpful. Right. 7(c). Now we're back  
18 into the revised claim; is that right?

19 MS PATEL: I'm going between the two because that's the only way you can see the  
20 changes put yes. So paragraph 29 of the revised claim form.

21 MR TIDSWELL: Give me the page number again.

22 MS PATEL: 131.

23 MR TIDSWELL: The words that have been added are what?

24 MS PATEL: 29 is a deletion -- sorry, I have done them out of order. Sorry, let's go --

25 MR TIDSWELL: I'm looking at 7(c) still, maybe you've gone on from that.

26 MS PATEL: I'm at 7(c) but there are two items in 7(c).

1 MR TIDSWELL: Sorry, I see.

2 MS PATEL: My mistake, I skipped ahead.

3 MR TIDSWELL: That's fine. Somebody has marked this up, I think. Is this the wording  
4 in yellow? Oh, that's 26 in fact.

5 MS PATEL: So, at 25 which is on page 130.

6 MR TIDSWELL: I wondered if the reference was right because I don't think he had  
7 anything in here when I looked at it but maybe I got that wrong. The paragraph looked  
8 similar to me.

9 MS PATEL: The reference might be wrong. Can I deal with 29?

10 MR TIDSWELL: I wondered if the reference was to 26, in fact.

11 MS PATEL: It's to 26, sir, apologies.

12 MR TIDSWELL: No, that's fine. So that's where I think I've got some yellow marking  
13 up on my version. Part of the difficulty with this is there's more than one 26, I think.

14 MS PATEL: That is the text that begins "Here Mr Hagger's".

15 MR TIDSWELL: Exactly. So, I guess the question, Ms Patel, do you really care about  
16 this? Because without any disrespect to Mr Macfarlane, I am trying to discourage him  
17 from making more changes than are necessary to this document. Do you really care  
18 about it and is it not something that he might reasonably ask me to allow him to put  
19 in? I appreciate there's a change and he needs permission to do it but why shouldn't  
20 I give him permission? It's not really very consequential, is it?

21 MS PATEL: I don't think we have DM15.

22 MR TIDSWELL: 16, isn't it?

23 MS PATEL: No, 16 I think we maybe now do have.

24 MR TIDSWELL: 15, that's a different problem, isn't it, and we're talking about the  
25 addition of the words that refer to 16.

26 MS PATEL: Yes.

1 MR TIDSWELL: We can have this discussion -- if you're objecting to it, I can ask  
2 Mr Macfarlane to justify why he wants to put it in.

3 MS PATEL: No.

4 MR TIDSWELL: I think it's rather unlikely that I'm going to --

5 MS PATEL: It's fine, sir.

6 MR TIDSWELL: Thank you, that's helpful. Then 29, what is the issue here? Is that  
7 another one we need -- because we need to put some back. So if we go back  
8 again -- you get your original claim form out again, Mr Macfarlane. And the one we've  
9 been just been marking up.

10 MR MACFARLANE: Yes.

11 MR TIDSWELL: Can you tell me -- sorry, Ms Patel -- what page this is in the original  
12 one?

13 MS PATEL: Page 44.

14 MR MACFARLANE: Is this paragraph 29 we're talking about, sir?

15 MR TIDSWELL: Yes, exactly. This is another witness statement point. Why have  
16 you taken this out, Mr Macfarlane? Are you no longer alleging this? You've taken out  
17 the paragraph that says "Mr Hagger was made aware that for reasons"; paragraph 12.  
18 Is that because you thought it was privileged -- it was with reference to the statement,  
19 is that the point?

20 MR MACFARLANE: I think that was what I was fearful of, sir, yes.

21 MR TIDSWELL: Are you happy for it to go back in? There's no reason you wouldn't  
22 put it back in?

23 MR MACFARLANE: There's no reason why I wouldn't put it back in, sir.

24 MR TIDSWELL: It's that sentence that says:  
25 "Mr Hagger was made aware that for reasons set out [paragraph 12], you and I could  
26 not ...(reading to the words)... various reasons and refusal to supply a cancellation of

1 the U&R account."  
2 That should go back in. Is that right, Ms Patel?  
3 MS PATEL: Yes.  
4 MR TIDSWELL: There's also some wording at the end as well.  
5 MS PATEL: Yes.  
6 MR TIDSWELL: You see "I refer the Tribunal to Mr Hagger's email", do you see that,  
7 Mr Macfarlane, in the middle, between (b) and (c):  
8 "I refer the Tribunal to Mr Hagger's email of 23 July, when Mr Hagger subsequently  
9 ...(reading to the words)... DM19."  
10 MS PATEL: Sorry, what page are you on, sir?  
11 MR TIDSWELL: Still on 44. Do you see just see between (b) and (c). Maybe I have  
12 jumped ahead. There's a bit of text immediately after (a) as well, isn't there? 29(a),  
13 "U&R, as advised by the CMA, would not comply with the legal terms and conditions."  
14 Can you see that, Mr Macfarlane?  
15 MR MACFARLANE: My pages are not numbered.  
16 MR TIDSWELL: On the same page we've just been talking about, where I asked you  
17 to put back the bit about Mr Hagger being made aware for the reasons said in  
18 paragraph 12, you know that bit you've just marked? Go down the page, you see it  
19 says (a) immediately below that.  
20 MR MACFARLANE: Yes, it does.  
21 MR TIDSWELL: You see this in text, it's not in italics at the end of (a)?  
22 MR MACFARLANE: Yes.  
23 MR TIDSWELL: "U&R has advised." So you need to put that back in, you've taken  
24 that out. Unless you don't want to put it back in but I assume there's no reason why  
25 you shouldn't.  
26 MR MACFARLANE: No, I'm happy for it to go back, sir.



1 MR TIDSWELL: When you get to (b), you've got the material in italics and at the end  
2 of (b) you have the little paragraph that says "I refer the Tribunal to Mr Hagger's email.  
3 Mr Hagger subsequently denies ... " That should go back in as well.

4 MR MACFARLANE: Yes.

5 MS PATEL: It's the sentence under (c), "I present." Those two sentences actually.

6 MR TIDSWELL: Do you that one under (c). It's after (c), end of the line that says  
7 "U&R maintain this further dishonest statement." Then you go down and you've taken  
8 out these words:  
9 "I present to the Tribunal evidence ...(reading to the words)... there's a reason,  
10 followed by a denial that he had said in an email ...(reading to the words)... questions  
11 marks, here's undeniable evidence of the dishonesty of Mr Hagger."  
12 You put that back in as well; okay?

13 MR MACFARLANE: Yes.

14 MR TIDSWELL: Is that all, Ms Patel?

15 MS PATEL: One point right at the end of the claim form, revised claim form on  
16 page 136.

17 MR TIDSWELL: Yes, I have it.

18 MS PATEL: Which is just:  
19 "The further the claimant claims monetary damages at a later hearing for loss of profits,  
20 loss of reputation, other accumulative damages."  
21 That obviously wasn't in the original claim form and obviously, the damages calculation  
22 that's been provided only deals with loss of profit. So loss of profit is not controversial  
23 but to now have loss of reputation and other accumulative damages is controversial.

24 MR TIDSWELL: Let's come on to that in a minute. Can we just park that and come  
25 back to it and talk about the damages as well. Was that in your skeleton?

26 MS PATEL: No, sir, it was not, it was missed out of the skeleton. I apologise.

1 MR TIDSWELL: That's fine. So let's keep going through this list in the skeleton. Now,  
2 that deals with (c), as I understand it.

3 MS PATEL: If we turn to page 133, the reference to DM7 halfway up the page.  
4 "Further, I refer the Tribunal to." Just take it out for ease of reference because when  
5 you see a reference to an exhibit, you then go and look for it and then you realise it's  
6 not there and it's just very confusing.

7 MR TIDSWELL: Well, look, okay, this comes back to the point of how much  
8 amendment do we want for this document. I mean do you really care about it?

9 MS PATEL: I don't, but since we're doing it, it's a simple strike through. The other  
10 one, DM14, actually we can leave. I think it's a mistake.

11 MR TIDSWELL: The trouble with it is at the moment, Mr Macfarlane is working off the  
12 original claim form. I don't know if he's even got the revised claim form in front of him.  
13 What I am anxious to do is only to make changes to the revised claim form if they  
14 make a difference. I don't think that makes a difference. If you don't mind, I think we  
15 will just leave it in there. I appreciate we now all know that there isn't a DM7.

16 MS PATEL: Okay.

17 MR TIDSWELL: Thank you. Do you want to pursue any of the other points in (e), (f),  
18 (g) and (h)?

19 MS PATEL: I do in part to check that we're talking about the right document because  
20 some of them are not correctly labelled and so we just want to check that we are talking  
21 about the same one.

22 MR TIDSWELL: Surely you can tell that, can't you, because you can see that DM17  
23 has got the time on it and he's put the wrong time. Isn't it obvious?

24 MS PATEL: It's not if there's another email that's got the time that he's put.

25 MR TIDSWELL: He's put the email --

26 MS PATEL: He's put a very specific time so you then wonder whether the one with

1 the different time is the correct one. If it is the right one, that is very helpful to know.

2 MR TIDSWELL: He's put the email in as the exhibit, hasn't he, and the exhibit is the  
3 document he's wanting us to look at. I would have thought that's just plain, isn't it?

4 MS PATEL: So the exhibit is, in fact, a chain of five emails and we've picked the one  
5 that we think is the closest to it. But it's not an ideal way to be trying to decipher a claim  
6 form.

7 MR TIDSWELL: I think it's pretty obvious. I just think all of these points -- look, I don't  
8 criticise you at all, Ms Patel, because in the ordinary circumstances, if Mr Macfarlane  
9 is represented, you would want all this to be done but I just think we're trying to make  
10 this as easy as possible. This is what I mean about stuff, do you really care about any  
11 of this stuff? I appreciate it's not straightforward. If you want Mr Macfarlane to confirm  
12 that he's talking about the -- when he talks about DM17 in a standard form, he's talking  
13 about this email, then fine. Let's do that now.

14 MS PATEL: That would be helpful.

15 MR TIDSWELL: Are you with us on this, Mr Macfarlane? There's an email exchange  
16 which is --

17 MR MACFARLANE: I'm just looking through the claimant's skeleton argument. What  
18 page are we on, sir?

19 MR TIDSWELL: Ms Patel, this is going to take ages. I just really don't think it's worth  
20 it. If you don't mind --

21 MS PATEL: Sir, I hear what you're saying, sir. What I'm anxious to do is to figure out  
22 a way in which for hearings, we can make sure that Mr Macfarlane has the papers  
23 because I simply cannot see how we're going to make progress going forward in this  
24 case if at every hearing, we're not all able to refer to the hearing bundle.

25 MR TIDSWELL: I think that's entirely fair. Perhaps we can talk about that. Can we  
26 park that until the end of the hearing. If you remind me to bring it up, we'll just talk

1 about how we manage future hearings. For present purposes, as I say, what I am  
2 keen to do is to avoid Mr Macfarlane having to do anything in relation to the revised  
3 claim form that is not absolutely essential. By that I mean which really impacts your  
4 client or causes any degree of substantive unfairness. I am not trying to shut that out,  
5 this is all about getting it right and I actually do understand why but it doesn't really  
6 matter. That's the point. I'm inviting you to tell me which ones do and which ones  
7 don't. It may be that we have to pursue them by you writing -- probably a letter from  
8 you to Mr Macfarlane, saying -- or from your instructing solicitors to Mr Macfarlane,  
9 saying: is this the right email? I just don't want to treat it as a pleading point.

10 MS PATEL: The difficulty with that approach, sir, is that the costs for my client are  
11 ballooning by the way this is being litigated because the burden of most things is falling  
12 on my clients. I appreciate it is important to provide a forum for Mr Macfarlane to bring  
13 his claim, but it shouldn't be in a way which means that steps that should fall on him  
14 all, in fact, fall on my client, with attendant cost consequences.

15 MR TIDSWELL: That's entirely fair. There's a materiality (inaudible), isn't there, and  
16 if it's not material, then why would anybody spend any money on it? I am not  
17 convinced that anything in (e), (f), (g) or (h) or is material. If you want to argue the  
18 toss on that and tell me that it is, then that's fine, let's do it.

19 MS PATEL: Let's move on to the next one.

20 MR MACFARLANE: Can I just catch up a little bit when we move on to the next one.  
21 I don't know what the next page is.

22 MR TIDSWELL: Sorry, Mr Macfarlane, we're in the defendant's skeleton and it's  
23 paragraph 7 which is on page 4 of the skeleton and page 11 of the CMC bundle.

24 MS PATEL: It does matter. There's a reference to DM2 in the revised claim form.  
25 We're not sure what that is because it doesn't match what's in DM2.

26 MR TIDSWELL: Mr Macfarlane, do you have the page number?

1 MS PATEL: 124, but of course, Mr Macfarlane can't see it.

2 MR TIDSWELL: What is DM2, Mr Macfarlane, can you remember?

3 MR MACFARLANE: No, I can't remember, sir.

4 MS PATEL: There is a DM2 attached to (b), (c) and (d), but it wasn't obvious to us

5 that any of those is what he's referring to because none of them are about horizontal --

6 MR TIDSWELL: So, Mr Macfarlane, this is what you say about it:

7 "I refer the Tribunal to exhibit DM2. Here the CMA makes it very clear that competing

8 entities of the same level, horizontal, should ensure that no agreements are forced or

9 otherwise should impact the end user."

10 Do you recall what that document looks like. The trouble is that in your bundle, you've

11 got a number of DM2s, DM2 (a), (b) and (c). Do you remember which it is?

12 MR MACFARLANE: I believe, sir, that one of the reasons this came around, as I

13 explained a little bit earlier, is the way in which the claim was accepted. I really did not

14 expect that very rough copy that I sent to have been -- it was a surprise to me, sir, let's

15 put it that way and therefore --

16 MR TIDSWELL: That's understandable.

17 MR MACFARLANE: -- we didn't understand why.

18 MR TIDSWELL: That's fine. If you don't remember what it is. Looking at it, Ms Patel,

19 it's material published by the CMA, isn't it, and do we really care about this? If it has

20 any relevance, it's a matter for legal submission.

21 MS PATEL: Can we just strike it out then because I don't think it should be incumbent

22 on me to trawl through every single CMA document to work out what he's talking about.

23 MR TIDSWELL: If it's relevant, you'll get it anyway and he's put in here DM2, (a), (b),

24 (c) and (d) and if he raises anything else in relation to DM2, then you're entitled to say

25 you haven't been warned about it. It's the law. At least to the extent it's not the law,

26 it's commentary and he doesn't have to put it in his claim form. Why does it matter?

1 MR MACFARLANE: It's well known to everybody, sir, as well, the CMA guidelines, I  
2 believe you're absolutely right, that's what it was sent from.

3 MR TIDSWELL: Thank you, Mr Macfarlane. Ms Patel, I just don't think this is really  
4 getting us anywhere.

5 MS PATEL: Okay, sir. We have had to file a defence that annexes all of the legal  
6 documents that we rely on and therefore Mr Macfarlane can see exactly which  
7 guidance we're talking about, exactly which regulations we're talking about and exactly  
8 which orders. The same rules don't apply.

9 MR TIDSWELL: They don't because he's a litigant in person and there's no  
10 requirement for you to annex legal documents to your claim form, where has that come  
11 from? It's the law. You don't have to annex legal documents to your claim form.

12 MS PATEL: I think in the guide to proceedings for this type of claim it does ask that  
13 you do so.

14 MR TIDSWELL: Well, I don't want to go down that rabbit hole. If it does, it does but  
15 just to be absolutely clear, it's not helping me and I don't see how it's helping you for  
16 Mr Macfarlane to be annexing all the legal documents he relies on as a litigant in  
17 person. And it is different because he's a litigant in person and it's helpful, no doubt,  
18 for him to see what you annexed to yours. Really, just put the challenge back to you  
19 again. On the basis that I put to you that I'm not going to allow you to be surprised by  
20 him introducing things that you couldn't reasonably anticipate, why does it matter  
21 which of these pages of the four pages he's put in his DM2 is the particular one he's  
22 referring to? He's put them in, they are DM2, what's the problem?

23 MS PATEL: Okay, sir. I'm happy to leave it, provided that we are not going to be  
24 prejudiced because we've had to file -- I genuinely don't know which document he's  
25 talking about. We've had to file a defence that pleads to what he's saying, we've had  
26 to do our best to understand his case. He's obviously saying something about

1 horizontal agreements. Provided if some document is relied on by him at a later date,  
2 we're not precluded from amending our defence to deal with it or from taking a point  
3 to respond to it, I'm happy to drop it.

4 MR TIDSWELL: All right, I think that's absolutely the right approach to it and that  
5 would be very helpful if you would. Anything else you want to raise in relation to -- any  
6 of these other points in seven you want to raise?

7 MS PATEL: Well, with some trepidation, sir, because I think you may take the view  
8 that we ought to understand more than we do, but on page 130, there's a reference to  
9 DM15A, which is described as a series of emails confirming the cancellation of our  
10 account.

11 MR TIDSWELL: DM15A? Where's that?

12 MS PATEL: 130. A third of a way up the page.

13 MR TIDSWELL: "I refer the Tribunal to DM15A" - sorry, I thought you were saying  
14 DM15A. Sorry, yes, I see. And are they not in the bundle?

15 MS PATEL: They are but they don't confirm the cancellation of the account. Now I  
16 am happy to leave it as it is. It looks like it's the wrong exhibit but perhaps we just  
17 leave that.

18 MR TIDSWELL: Well, I mean, that's not even a pleading point, is it, really, it's just if  
19 he's got it wrong, he's got it wrong. You better have a look at that, Mr Macfarlane.  
20 Have you got the point?

21 MR MACFARLANE: Yes, sir.

22 MR TIDSWELL: Make a note. So this is your DM15. Are you sure you've got the  
23 right emails? And if you haven't, you need to let the defendant know as soon as  
24 possible.

25 MR MACFARLANE: I shall double check, sir, but I have to say that there isn't any  
26 doubt that the account was cancelled anyway. So --

1 MR TIDSWELL: Well, fine. I think they are alerting you to the possibility you might  
2 have the wrong emails. If you need to put something else, then we ought to be working  
3 off the right document. So would you check that, please, and then let them have any  
4 other copy you say should substitute for what's in there, if that is the case.

5 MR MACFARLANE: Yes, sir, I will double check that and confirm.

6 MS PATEL: I am happy to leave that. There appear to be a series of missing annexes  
7 but I'm happy to leave it. It's not --

8 MR TIDSWELL: It says in (g) "the following annexes are no longer missing."

9 MS PATEL: Well it's saying "should be directed to refile and serve a further revised  
10 claim form, such that."

11 MR TIDSWELL: I see. I'm sorry. I misunderstood. So DM16 isn't --

12 MS PATEL: 16, I think, is now in there but the others are not: 13, 18, 19 and 20.

13 MR TIDSWELL: Can you take me to where they are in the revised claim form.

14 MS PATEL: Yes. 20 is at page 132, a third of the way down the page.

15 MR TIDSWELL: So, Mr Macfarlane, this is in paragraph 29 in the revised claim form.  
16 Presumably it's in the original claim form at 29 as well, is it?

17 MR MACFARLANE: Yes, sir, I can offer -- again, if I can offer them an explanation of  
18 that, the DM19 and DM20, I'm 100 per cent certain didn't have any documents in that  
19 at all. So therefore, they were left out.

20 MR TIDSWELL: Could you explain that again. Are you saying there's no DM19 or  
21 DM20.

22 MR MACFARLANE: There is DM19 and there is no DM20.

23 MR TIDSWELL: When you said that "Mr Hagger is clearly suffering from memory  
24 black outs, as evidenced by copy emails disclosed herein", you're referring to  
25 a document, so there must be a document you're referring to, isn't there?

26 MR MACFARLANE: Yes, but it wasn't DM19 and DM20, sir, so I need to go back on



1 everything I have done and clarify that, I'm afraid. I'm sorry about that.

2 MR TIDSWELL: Well I think Ms Patel does have a good point, that you have to give  
3 them the documents you're referring to in here. And it is a bit of a mess,  
4 Mr Macfarlane. Again, not wanting to be critical but frankly, it isn't the easiest thing in  
5 the world to follow. Maybe what we might ask you to do is when you -- you're going  
6 to need to supply everything you refer to and it's going to have to be properly  
7 referenced -- in the order in which you've referenced them in the claim form. So what  
8 I don't want you to do is change the claim form, I want you to produce a bundle of  
9 documents that corresponds to what you say in the claim form. We want to identify  
10 one I think you've taken out which was, I think, a piece of legislation. That's fine. DM7  
11 was it? So you can just leave that out. It's absolutely the case that Ms Patel's clients  
12 need to have the document that you say relates to the claim form. So that's  
13 an exercise you're going to have to do when you serve this revised claim form with  
14 the changes we've discussed. Is that clear?

15 MR MACFARLANE: Yes, sir, I am clear on that. I repeat a little bit what I said earlier.  
16 You mentioned it in the first CMC, that we all understood why the first claim form was  
17 such a muddle.

18 MR TIDSWELL: We're talking about the revised claim -- sorry to interrupt you, Mr  
19 Macfarlane -- we're talking about the revised claim form now.

20 MR MACFARLANE: Yes, I understand that. I will, in this new revised claim form, offer  
21 clarity, as long as --

22 MR TIDSWELL: Sorry, again, let me stop you there. I don't want you changing the  
23 document again, beyond the changes we've talked about. I want to be absolutely  
24 crystal clear with you again. I do not want you changing this document, other than as  
25 we have expressly agreed you should add things back in. What I want you to do is  
26 wherever you've referred to a document in the claim form, I want you to make sure

1 | you've got the document in the right order in a pack that you can give to the  
2 | defendants, so that they know exactly what you're talking about. Do you understand  
3 | what I'm saying?

4 | MR MACFARLANE: Indeed, sir. For instance, would I be allowed to say in this newly  
5 | revised document DM19 and DM20 don't exist? Is that altering?

6 | MR TIDSWELL: Well, I'm a bit confused by that. You've referred to emails. You've  
7 | said that there's an email marked DM20. Are you saying there are no emails?

8 | MR MACFARLANE: I'm saying there are emails but they are probably indexed  
9 | wrongly, sir. So I'm proposing to put an explanation into the document to explain.

10 | MR TIDSWELL: No, I don't want you to do that. What I would like you to do is -- as I  
11 | say, I want you to produce a bundle of the documents -- what do we go up to? DM22.  
12 | Is that the top of it?

13 | MR MACFARLANE: I think so, yes.

14 | MR TIDSWELL: I want you to produce a clip of documents which go from DM1 to  
15 | DM22 and if, for some reason, you either haven't got the document because it was  
16 | a mistake or you don't want to refer to it, just put in a single page of paper saying "DM7  
17 | no longer in the bundle", and then we can argue later about what the implications are.

18 | MR MACFARLANE: That's fine, sir. That's clear.

19 | MR TIDSWELL: I think Ms Patel is absolutely right, that she is entitled to know what  
20 | the documents are you're actually serving with us and to have some correspondence  
21 | between those documents and the way they are referred to in the claim form. That's  
22 | the way you need to do it.

23 | MR MACFARLANE: Yes.

24 | MR TIDSWELL: Does that deal with the annex points?

25 | MS PATEL: Yes. The last point is just a duplication point, sir, you can ignore it.

26 | MR TIDSWELL: Yes. And actually, that's a classic example where you might put a bit

1 of paper in relation to DM8 which they say is (inaudible) and it's duplicated in DM11.  
2 You might say DM8 no longer -- in fact, you don't have a DM8, I think, do you? There  
3 is no DM8 in your claim form?  
4 MR MACFARLANE: No, sir.  
5 MS PATEL: There is, sir. It's been removed from the hearing bundle, again I think by  
6 my instructing solicitors. It is in the copy of the revised claim that the Tribunal has. It's  
7 also in DM11 and DM22 but I don't pursue the point.  
8 MR TIDSWELL: It's not referred to in the claim form; is that right? That's what I  
9 understood. It says it's not mentioned anywhere and anyway duplicated in DM11 --  
10 MS PATEL: Yes, it's not referred any more.  
11 MR TIDSWELL: I think, Mr Macfarlane, when you get to DM8 and you've got to work  
12 all this out as you go through it but I would have thought that DM8, you just put your  
13 single page in and say "No DM8, not referred to in claim form", or whatever, and then  
14 you can move on and do DM9. Can I come back and be very clear, Mr Macfarlane,  
15 about what you're going to do, and what actually -- Sorry, Ms Patel, is there anything  
16 else you want to raise in terms of the form of the revised claim form? Because what  
17 I'm going to do is invite Mr Macfarlane to put in the things that we've expressly agreed  
18 he should put in and then to conclude the exercise in relation to the documents we've  
19 just discussed and that's it. No other changes to the revised claim form. I just want to  
20 check you don't have any -- obviously, you've made all your points about that. Is there  
21 anything else you want to say about that?  
22 MS PATEL: Nothing further, sir.  
23 MR TIDSWELL: That's really helpful, thank you and I am sorry it's been tiresome. I  
24 understand why you pushed back on various things. I'm grateful for your approach to  
25 it.  
26 Mr Macfarlane, I want you to get out the revised claim form -- not now, but this is the

1 exercise I want you to do -- that the 5 December one, and into it I want you to put the  
2 things that we marked up in the original claim form just now. I want you put those back  
3 in. And I don't want you to do anything else to that document. I don't want you to  
4 touch, other than to redate it.

5 MR MACFARLANE: Yes, sir. I was just confused on how I could have explained, for  
6 instance, what's been happening to the exhibits. I would not alter the actual claim  
7 form.

8 MR TIDSWELL: Good. Forgive me for being just perhaps a little bit directive about it  
9 but actually, last time I asked you not to change it and you did, so I just want to make  
10 clear to you this is really important because you can see we've just spent an hour on  
11 this and just wasted a huge amount of time of the Tribunal and a huge amount of  
12 money of the defendant. We're going to be talking about a costs cap in a minute and  
13 if I'm going to approach costs in a way that recognises the nature of these  
14 proceedings, then you're going to need to be thoughtful about how you incur costs for  
15 the other side, as well as the time that you spend on things. We will come back to  
16 that. That's all for further discussion. I just want you to understand that this is  
17 an exercise I really want to just finish now. I don't want to be coming back to it. So  
18 what I want is just that single document with the changes that we've talked about and  
19 then I want you to apply your mind really carefully and thoughtfully to the DMs 1 to 22.  
20 As we've discussed, clip of documents, don't touch the revised claim form but just put  
21 it in a page explaining why anything isn't there or any other observation you want to  
22 make about that document by reference to the claim form. I don't want any  
23 commentary or anything like that, I just want you to say where it is in the claim form,  
24 and if it's not, then it's not.

25 MR MACFARLANE: Yes, sir, I've got a really clear picture on that now. I apologise, I  
26 did have a severe case of man flu at the time I was --

1 MR TIDSWELL: Don't worry, it's fine, no need to apologise. That's fine.

2 Okay. So, next thing, letter on damages. Can I make sure -- is the point you're making  
3 here, effectively a pleading point that he hasn't alleged the basis on which the supply  
4 would have been continued? In other words, you're saying he hasn't pleaded the  
5 counterfactual. Is that the point you're making or is it something more than that?

6 MS PATEL: No, it's that. It's that his position is that the agreement in its entirety would  
7 be void if there was a hardcore restriction.

8 MR TIDSWELL: Yes.

9 MS PATEL: The but for test then requires you to ask if the agreement was void, as  
10 you say, sir, what would the counterfactual be.

11 MR TIDSWELL: Isn't it obvious that the counterfactual is the defendant would have  
12 continued to supply on the same terms as previously; isn't that obvious?

13 MS PATEL: No, because those terms are void in their entirety.

14 MR TIDSWELL: It doesn't mean that they can't be applied in the counterfactual, it  
15 doesn't make any difference. They are the terms on which he's been -- the commercial  
16 terms we're talking about.

17 MS PATEL: I think the difficulty is if you read his pleadings as a whole, he now makes  
18 so many allegations about the terms and conditions, it's not just clause 14 he appears  
19 to be complaining about. The claimant's position appears to be that there are -- he  
20 uses the word "riddled", riddled with problems and as a whole they are void. And  
21 therefore, the defendant doesn't presently understand on what basis it is said the  
22 parties would have contracted.

23 MR TIDSWELL: It does seem to me the question about whether the Ts and Cs are  
24 void is obviously a matter for trial, isn't it?

25 MS PATEL: It's a matter for trial but that's his pleaded case. That is the default  
26 position under section 2 of the Act which is the basis on which his claim is put. So the

1 Chapter I infringement, he says that the agreement falls foul of Chapter I. One of the  
2 sub-paragraphs of section two says that the consequence of that is that the agreement  
3 is void. That is his pleaded position at various points in both his documents, that the  
4 agreement as a whole is void and therefore, it's incumbent on him to set out the basis  
5 on which he says that supply would have continued, so that the defendant can see if  
6 it takes issue with that.

7 MR TIDSWELL: Let's see what he says about it. It seems to me pretty obvious that  
8 he's saying that -- I can't remember how many years, Mr Macfarlane, you've been  
9 trading with Deckers. How many years have you been trading with them?

10 MR MACFARLANE: Five years, sir.

11 MR TIDSWELL: What are you saying is the basis on which they should be continuing  
12 to supply you at the moment?

13 MR MACFARLANE: They should be continuing on the original terms of the agreement  
14 put sir --

15 MS PATEL: Those are the terms that --

16 MR TIDSWELL: Ms Patel, please don't interrupt. Mr Macfarlane.

17 MR MACFARLANE: I was going on the CMA's guidance, where they themselves said  
18 that any contract that falls foul of a hardcore restriction especially, is void.

19 MR TIDSWELL: So, what Ms Patel is putting to me is that because that is the legal  
20 consequence of your argument, when you say that they should be supplying you, the  
21 question is on what basis. Because if the agreement is void, it can't be on that basis,  
22 it's an unlawful agreement. Now I put to her that it seems to me to be somewhat  
23 an abstract point because it seems to me what I think you're saying is that the  
24 defendant will continue to supply you on, essentially, the same commercial terms.  
25 Which is that you would follow the same custom and practice as you have done for  
26 the five years in which you've been dealing with them. Now, if you're saying something

1 different, then I think you ought to say that but if that's what you're saying, then I can  
2 have a discussion with Ms Patel about how that needs to be recorded, if at all. Is that  
3 broadly what you're saying?

4 MR MACFARLANE: Yes, sir. That's what I am saying, is that the defendant should  
5 have been supplying us on the same terms and that because they're not, then those  
6 damages are accruing.

7 MR TIDSWELL: I just think I have to say that is really pretty obvious that that's what  
8 he's saying.

9 MS PATEL: I have to say, sir, I have a real difficulty with it as an argument because  
10 these sort of damages claims are typically brought by third parties to agreements in  
11 a cartel context. It will be third party, typically, that brings a claim. The damages basis  
12 is therefore very clear. It's relatively unusual that it's actually one of the parties to  
13 an agreement that is saying that the agreement as a whole should be void. Because  
14 the terms and conditions here --

15 MR TIDSWELL: Ms Patel, I'm sorry to interrupt you but that is a matter for trial. The  
16 question is whether you're left in any doubt or embarrassment, at risk of  
17 embarrassment on the pleadings by what Mr Macfarlane is already saying. It's  
18 abundantly obvious, isn't it, that he's saying that in the counterfactual, he wants you to  
19 continue to supply, your client to continue to supply on the same commercial basis as  
20 before.

21 MS PATEL: What is that commercial basis, can I be clear, because the terms and  
22 conditions that we've pleaded are the commercial basis on which the parties  
23 contracted and that included choosing Mr Macfarlane's company because it satisfied  
24 various criteria. His position is that those criteria don't even exist, that that wasn't  
25 a legitimate basis to choose people. We are left in quite a degree of uncertainty as to  
26 what the commercial terms that, sir, you've just described are that we would have

1 | contracted on.

2 | MR TIDSWELL: Well I mean, let's just explore this. You're suggesting that

3 | Mr Macfarlane should go through the terms and conditions and pick out those which

4 | are not void; is that what you're saying?

5 | MS PATEL: No. Can I show you where he says they are all void because maybe it

6 | will be a little clearer. If you could look at the claim form.

7 | MR TIDSWELL: Revised claim form?

8 | MS PATEL: I hope it's the revised claim form. I have written down paragraphs 14.

9 | MR TIDSWELL: Page number, please.

10 | MS PATEL: Page 126 of the bundle. The last sentence above 15. Then paragraph 30

11 | is perhaps a bit clearer which is on page -- let's go to the reply. This is paragraph 5

12 | on page --

13 | MR TIDSWELL: I think I understand the point you're making. Yes, he has not been

14 | at all selective about what he says the consequence is, in terms of the --

15 | MS PATEL: It's more than that, sir, he says "as a whole", page 284.

16 | MR TIDSWELL: I understand the point you're making about "as a whole", I understand

17 | that point. My question is what are you expecting to do, what is it that you want him

18 | to do?

19 | MS PATEL: I suppose it is to plead the counterfactual so that one can understand, so

20 | that everyone can understand what the basis of any loss is and so that everyone can

21 | understand whether it has any merit.

22 | MR TIDSWELL: But are you saying that in order for that to be satisfactory to you, he

23 | has to select those bits of the terms and conditions that he says are severable and

24 | therefore not void; is that the point you're making? Is that what you're asking him to

25 | do?

26 | MS PATEL: Well, that's a matter for him but I think his position is the agreement as



1 a whole is void, so he has to be positing some agreement that the parties would have  
2 contracted in the counterfactual which doesn't contain any of the things he's  
3 complaining about.

4 MR TIDSWELL: Well, isn't another way of looking at this that, at least as far as the  
5 hardcore issue goes, the illegality arises on Mr Macfarlane's case because of the way  
6 in which the clause 15 has been used rather than the clause itself?

7 MS PATEL: I'm not sure that's right for Chapter I, sir, because -- I see that for Chapter  
8 II. But for Chapter I, it's about the agreement and it's about it's objective meaning and  
9 the intent of the parties is not really relevant. I entirely see the position for Chapter II.

10 MR TIDSWELL: I thought we had that discussion. I thought we'd agreed that  
11 "indirect", that's what indirect means in Chapter I. You can have a clause that's, on its  
12 face, not objectionable but the way it's used, because it's an indirect abuse, amounts  
13 to an infringement. That's really the whole point of the discussion at the start, isn't it,  
14 that Mr Macfarlane is saying that a clause that allowed your client to withdraw supply  
15 to him has been used in a way to prevent him from discounting and that's all about  
16 motive, isn't it? That's what this case is about, isn't it?

17 MS PATEL: I have to confess, I had not understood it that way until you put it that way  
18 this morning, sir.

19 MR TIDSWELL: In that case, it's a helpful discussion. Again, I advance the caution  
20 that ordinarily, I would say to Mr Macfarlane: is that your case? I just think we have to  
21 be a bit cautious here because Mr Macfarlane is unrepresented. I think, as best I  
22 understand the point he's making, and I don't want to commit him in any way to this at  
23 the moment, but I think he is saying if you look at clause 15 and it says you can cease  
24 supply, he's saying that the way in which that has been done has been motivated by  
25 a desire to stop him discounting and that is resale price maintenance.

26 MR MACFARLANE: It's exactly that, sir.

1 MR TIDSWELL: Really, Ms Patel, that's why I can absolutely see your point about  
2 selective distribution, but you don't get anywhere near that if it turns out that that is  
3 what motivated your clients to do it. And that's a question of fact that will only be  
4 resolved when your client's representatives are in the witness box.

5 MS PATEL: I see that, sir. In terms of where that goes in relation to damages, his  
6 pleaded case remains, see page 284 and the terms and conditions is void as a whole.  
7 That is his pleaded case repeatedly. He is not making a case as to severance, he's  
8 making a case as to the entire terms and conditions being void.

9 MR TIDSWELL: I don't think he is making a case as to severance. It may be that he  
10 should be but in a way, I'm wondering whether that is necessary at all. Where if he's  
11 saying that it's the way in which the clause is being used rather than just the plain  
12 reading of the clause -- so in other words, it's indirect rather than direct, the wording  
13 of Chapter I -- then there's no obvious inconsistency. If your clients were not to use it  
14 in the way that was indirectly a breach of Chapter I, then it wouldn't be void.

15 MS PATEL: We've pleaded in our defence to what was in the case. So we've pleaded  
16 to the allegation that the agreement is void and that's what our defence says.

17 MR TIDSWELL: You also say that clause 15 is severable, as I recall; is that right?

18 MS PATEL: I think we say it's not but were it to be, this is what would happen.  
19 Because I think the position is hardcore restrictions are not severable.

20 MR TIDSWELL: Right. Well, in a way that just takes us back to the point for trial  
21 because if you're right, then Mr Macfarlane can never succeed. That's strikes me as  
22 being a slightly odd proposition but actually, you're entitled to argue it. I think  
23 Mr Macfarlane's position which is that there is a pretty clear course of conduct of  
24 economic trading which would be the natural basis on which one might assume the  
25 counterfactual would work, that's his position and if you want him to write that down  
26 so you understand it, then this question goes off to trial, doesn't it? But I think that's

1 | what he's saying. One way or another, we are going to have to deal with this at trial,  
2 | not now. We're not going to deal with it now.

3 | MS PATEL: So I had not understood that that was what he was saying until today, sir,  
4 | and that's the problem.

5 | MR TIDSWELL: That's entirely fair, Ms Patel. Nothing I say and please don't take  
6 | anything I say as being a criticism of you, we're all having to deal with a situation which  
7 | is a bit unusual. Mr Macfarlane dealing with a court system that's not familiar to him  
8 | and you and I dealing with Mr Macfarlane not being represented. So I'm not criticising  
9 | you in the slightest, what I think it does illustrate though is that there are some things  
10 | which are bound to be a little bit unsatisfactory as a result. And we come back to this  
11 | point of how do we resolve that unsatisfactory nature and to what extent do we do that,  
12 | bearing in mind that your clients are entitled to defend themselves and to know what's  
13 | coming at them. And so this is all about trying to get that on the table, isn't it?

14 | MS PATEL: I think all my client was asking, sir, was if Mr Macfarlane could commit to  
15 | a paragraph, three lines, since he says the consequence of what has happened is that  
16 | the agreement is void, what is the basis on which he says we would have -- what is  
17 | the basis of that commercial relationship that he says the parties would have continued  
18 | to trade.

19 | MR TIDSWELL: Yes. Mr Macfarlane, what about this. Obviously, as you say, you're  
20 | going to get the transcript, and when you get that, how comfortable would you be to  
21 | write a paragraph -- this is quite different from the revised claim form. We're going to  
22 | treat it as part of your case but I don't want you playing with the revised claim form,  
23 | but I would like you to think about whether you'd be comfortable writing a paragraph,  
24 | putting it in an email or a letter, copying in the Tribunal and sending it to Ms Patel's  
25 | solicitors, just summarising as best you can, the question that Ms Patel just asked.  
26 | And I think if you go back and look at the exchange we've just had, I have asked you

1 about something, you've given some confirmation. Hopefully you've got the words  
2 there that allow you to put that paragraph together. Would you be comfortable to do  
3 that?

4 MR MACFARLANE: Yes, sir. I would be perfectly comfortable doing that. Are we  
5 going to set a time scale on that?

6 MR TIDSWELL: You tell me when you sensibly think you could do it and we will see  
7 whether that makes sense. The transcript will come in the next 48 hours, I imagine.

8 MR MACFARLANE: I would need a week after that, sir.

9 MR TIDSWELL: If we could give you until Monday, 29th. Ms Patel, would you be  
10 comfortable with that?

11 MS PATEL: Yes.

12 MR TIDSWELL: Thank you, that's helpful. While we're here, Ms Patel, you pick up  
13 this point at the end of the claim form, about the claim for loss of reputation and other  
14 accumulative damages. Mr Macfarlane, I think it's a fair question, what do you have  
15 in mind in terms of your claim of loss of reputation and other accumulative damages?  
16 Are you anticipating providing more detail about losses you've suffered and if so, when  
17 are you going to do that or are you really just relying on the financial claim you've put  
18 in. What's your intention?

19 MR MACFARLANE: I'm very happy to put together a much more detailed explanation  
20 of the loss of reputation and the damages as well, if that's helpful.

21 MR TIDSWELL: I'm not saying you can't bring out a claim for damages, but I think  
22 ordinarily, one would expect a claim of this sort to be reflected in the sort of damages  
23 you've set out in your letter. So I'm not encouraging you to do this, because I rather  
24 think you might be getting yourself into some quite deep water and making this case  
25 a bit more complicated than it needs to be. On the other hand, it's your claim and I  
26 can't stop you doing it. But I think the point Ms Patel makes at the moment is that it's

1 | slightly unsatisfactory because you've said loss of profits, loss of reputation and others  
2 | accumulative damages. You've given us some information about loss of profits, and  
3 | obviously there's some discussion to come about disclosure and so on. I don't think  
4 | we have any idea what you mean by loss of reputation --

5 | MS PATEL: I was saying something else, sir, sorry, I was not quite saying that. I was  
6 | saying that that sentence wasn't a sentence that was permitted in the revised claim  
7 | form, it was an amendment that was added without the permission you gave at the  
8 | previous CMC and it was added after the letter that we received from the claimant,  
9 | following your order that he particularise his damages claim.

10 | MR TIDSWELL: I understand that, Ms Patel. But cutting to the chase, if it just stopped  
11 | at loss of profits, you wouldn't be making a point about it, would you?

12 | MS PATEL: Correct. The objection is to the other heads of loss that have been added,  
13 | after you asked him to particularise his damages claim and he did so.

14 | MR TIDSWELL: Yes. What you're saying, he should not be allowed to add anything  
15 | else now?

16 | MS PATEL: Not at this juncture. Loss of profit is fine because that's what was pleaded  
17 | in response to your last direction, but not the other heads.

18 | MR TIDSWELL: If he wants to add it, he needs to make an application of course,  
19 | doesn't he, and what I'm asking him is whether he wants to do that. We can't stop him  
20 | making an application.

21 | MS PATEL: No, sir.

22 | MR TIDSWELL: Mr Macfarlane, that's the position, I think. Ms Patel rightly points out.  
23 | So you need to decide whether you want to claim these other heads and if you do, you  
24 | need to tell us what they are, because at the moment, none of us know what they are  
25 | and then, of course, you're going to have persuade me, I'm sure Ms Patel is going to  
26 | have some things to say about it, that you should be allowed to pursue them. So I

1 leave that with you, really, at the moment. I think for present purposes, I think we all  
2 agree if you put a full stop after loss of profits, then everything is fine. If you intend to  
3 persist with loss of reputation, other accumulative damages, you need to tell us what  
4 they are and then we will decide whether you can add that in, if I can put it that way.

5 MR MACFARLANE: Yes, sir. Without wishing to jump the gun, would this matter not  
6 be also something that we could deal within quantum, if this trial, if this trial were to be  
7 split?

8 MR TIDSWELL: Well if it were, then that is a perfectly fair point, so I am not requiring  
9 you to do anything at the moment. It may be you decide you don't need to do it or we  
10 can talk about the timing of it later. I think the points just been made and we're just  
11 recording where we've got to with that and no doubt. But at the moment you're  
12 absolutely fine to be running a loss of profits claim, not fine to be running anything else  
13 until you tell us a bit more about it and we can decide whether you can. Whether that  
14 happens in relation to a unitary trial or whether it happens in a second bit of a trial, if  
15 that ever happens, to be discussed later. You're quite right.

16 MR MACFARLANE: I'm quite happy, sir, to put a full stop in, as long as I'm not losing  
17 the opportunity to further put forward other possible quantum.

18 MR TIDSWELL: I think Ms Patel is saying and I think quite fairly saying you need to  
19 nail your colours to the mast sooner rather than later. I don't think we can allow you  
20 just to keep on adding things as we get closer to the trial. The whole point of this  
21 process is that everybody knows where they are and so we can then use that so Ms  
22 Patel's clients know exactly what they're facing and they can assemble the evidence  
23 they need and so I can make decisions about how this case should be tried. So I can't  
24 really have you adding bits all the time and the further we get through the process, it's  
25 going to be harder for you to persuade me that that's a fair thing to do. I think with  
26 something like this, you need to decide pretty quickly whether you want to pursue this.

1 Now as you say, if we ended up dealing with quantum at a different time, then that  
2 might take the pressure off a bit, so let's just leave the timing for now. I just want to  
3 disabuse you of the idea that you can just keep adding things to the pile as we go.  
4 That's not the way it works.

5 MR MACFARLANE: Absolutely. I wouldn't have the intention of doing that. If I did, it  
6 would be just this point of loss of reputation, sir.

7 MR TIDSWELL: That's very helpful. Now, I'm conscious of the time and the  
8 stenographer needs to have a break, particularly since we're running slightly longer  
9 after this session. So can we take ten minutes, please, and resume at ten past three.

10 Ms Patel, when we do that, still on the pleadings points, we've got a lot of really quite  
11 difficult stuff to discuss. I think --

12 MS PATEL: Can I pre-empt what you're about to say which is, I'm sure, to tell me to  
13 focus on what really matters and to --

14 MR TIDSWELL: I was going to say something slightly different. I think possibly there  
15 may be some confusion in Mr Macfarlane's reply about dominance that arises from  
16 the reference in your defence to safe harbour percentages. I think this may actually  
17 be slightly ships in the night and actually in that case, I'm not sure -- again, maybe it  
18 doesn't really matter but I will leave that with you.

19 MS PATEL: There is one point which is not in the skeleton which may be I will just  
20 raise before we break, which is, I'm afraid with so many things flying around in this  
21 case, one had rather lost the wood in the tress but one very important point about the  
22 reply is that it appears to plead Article 101 TFEU in various places for the first time,  
23 whereas the claim form is just a Chapter I UK competition law claim. We do take issue  
24 with that in the reply.

25 MR TIDSWELL: Yes. We ought to have a look at that.

26 MS PATEL: I'm afraid that's not in the skeleton but we ought to look at it.

1 MR TIDSWELL: Yes, okay, thank you. Let's deal with that when we come back. We  
2 will start again at 12 minutes past. Thank you very much.

3 **(2.02 pm)**

4 **(Short break)**

5 **(2.14 pm)**

6 MR TIDSWELL: Ms Patel, shall we jump on because I am really conscious of the  
7 time. We're going to have to move quite quickly now I think because we've got some  
8 quite chunky things to get through. So can we just tidy up these last pleading points.  
9 What do you want to do about the reply?

10 MS PATEL: So, there are two points about the reply and at some point, sir, we're  
11 going to need to timetable I think some work for the defence as well because, having  
12 taken instructions over the adjournment, we have not pleaded to the case that you  
13 have articulated this morning, we have understood the case as being that the term  
14 itself is objectionable. Page 280 of the reply says: here's the term and it's contrary to  
15 Guess case authority. So that is how we had understood the case, not indirect means  
16 as articulated this morning. Obviously the claimant has confirmed that your  
17 understanding is what he intended to plead. But it's not how it's currently pleaded, it's  
18 not how the defence, therefore, deals with the case.

19 MR TIDSWELL: Yes, well, okay. We can talk about that. I have to say I'm not sure  
20 I'm convinced that's not how it's currently pleaded. It may not be pleaded in the  
21 clearest terms it didn't take me very long to work out that's what he was saying but we  
22 need not have an argument about that now and I'm certainly not going to discourage  
23 you from providing more clarity in relation to that point because I think it is the key  
24 point in the case. So let's come back to that. Can we just deal with the -- so in relation  
25 to the reply, is the 101 point the only point you want to deal with now?

26 MS PATEL: So, article 101 appears at the top of the reply.



1 MR TIDSWELL: Mr Macfarlane, can you explain this, I think -- two questions really.  
2 One is: you see at the top of your reply you've put in Article 101 TFEU and I think  
3 Ms Patel is saying that that's not the basis on which you put your claim in the claim or  
4 advice claim because you're just relying on Chapter I of the UK Competition Act. So  
5 the question is are you actually -- first question: is that right? Is your understanding  
6 that you were just relying on the Competition Act and now you're seeking to rely on  
7 the treaty? That's the first question: are you deliberately changing position or do you  
8 think you've always had that position?

9 MR MACFARLANE: I think I have always had that position, sir. I put it in because of  
10 my own uncertainty because I don't -- didn't know whether the case was going to be  
11 decided on the date of cause of action. In other words, when the damage first  
12 occurred, in which case we would have been inside the European Union at that time  
13 pre-December 2020 so I put in either Article 101 or CA 98 Chapter I.

14 MR TIDSWELL: Yes.

15 MS PATEL: Perhaps, sir, you could explain --

16 MR TIDSWELL: Ms Patel, please.

17 Mr Macfarlane, when you say you put it in, you put it in to the reply. Am I right in  
18 thinking, Ms Patel says it's not in your original claim, I haven't been through it to have  
19 a look, do you refer to Article 101 in your original claim?

20 MR MACFARLANE: Yes, I have referred to Article 101 in the original claim, sir, yes.

21 MR TIDSWELL: I appreciate you may not be able to do that right now, are you able  
22 to tell us where or are you going to need some time to do that?

23 MR MACFARLANE: I would need some time to do that, sir. There's that many  
24 documents here and --

25 MR TIDSWELL: That's fine. Don't worry. I'm just trying to work out the landscape at  
26 the moment, so don't worry, I'm not about to sort of launch something at you.

1 The second point, and I think you've answered this already, is: do you actually want to  
2 be advancing a claim under the Competition Act and under the treaty if you can?

3 I think you're saying that is your desire. Is that right?

4 MR MACFARLANE: What I'm saying is, sir, is that I wanted to ensure to include both  
5 Article 101 and CA 98 because I wasn't clear under which legislation -- under which  
6 country this claim was being proceeded. So, I wasn't certain, sir, so I put both of them  
7 in, we can just delete the one that's just not applicable.

8 MR TIDSWELL: Well, that gives rise to the next question really, which is: why does  
9 anyone think it makes any difference? It may well be that it does, it's not immediately  
10 apparent to me that it would. But I do think that it's something we need to have some  
11 clarity on. I can't advise you on this, Mr Macfarlane, I'm afraid, this is something you're  
12 going to have to reach a conclusion on either yourself or by asking someone else if  
13 you've think you've got someone you can ask advice about. But what I think we need  
14 to know, and I think Ms Patel rightly asks, is: are you actually relying on one or the  
15 other or both? And, if so, can you show us where you've put it? And if you haven't  
16 put it then you are going to need to ask me to include it and Ms Patel has got to be  
17 entitled to argue about that. I'm not saying it's a significant issue, I don't want to  
18 suggest that I think this makes an enormous difference to your case because at the  
19 moment I don't think it does. Ms Patel may tell me I am wrong about that. But I think  
20 we just need to understand how you're putting it and what the basis is. I think, if it  
21 makes any difference at all, one of the features of the post-Brexit legislation is that it's  
22 rather complicated and it may be that that's what Ms Patel is getting at, that we need  
23 to know whether we need to diverse the complexities of that because I suspect the  
24 timings may involve a little bit of that. But, anyway, I don't think I need to say anything  
25 more at the moment about it other than if you could work out, firstly, if you can find us  
26 a reference in your revised claim form could you please let us know, and, secondly, if

1 it's not in there and you do want to add it in, which you would have to apply for  
2 permission for, could you explain -- you'll need to write and say that and you'll need to  
3 explain why it needs to go in. As I say --

4 MR MACFARLANE: I'm inclined to be going with Chapter I, sir.

5 MR TIDSWELL: Fine. You don't have to make a decision now, I'm not pressing you  
6 to make a decision now, but I think Ms Patel is entitled to clarity about that.

7 Ms Patel, I don't know whether you are going to say to me that you think it makes more  
8 difference than I've suggested, you may well not want to say anything at all but I accept  
9 that you do need some clarity on it.

10 MS PATEL: I was simply going to say in case it helped Mr Macfarlane that Chapter  
11 I and Chapter II are about competition within in the UK and Article 101 is about  
12 competition within the EU and he will obviously need to take a view but if the position  
13 is that he trades mostly in the UK, or exclusively, then he might be of the view that  
14 Chapter I and Chapter II are where the focus is. If the position is otherwise, he may  
15 take a different view. But I think he might be confusing things to do with the territorial  
16 scope of the legislation with the temporal aspect of it.

17 MR TIDSWELL: Yes. I think that's a fair point. We will leave that with you,  
18 Mr Macfarlane, unless you want to say anything else. That's something for you to do.  
19 Is that it with your reply, Ms Patel, is there anything else you want to raise?

20 MS PATEL: Just on the Chapter II point.

21 MR TIDSWELL: Yes.

22 MS PATEL: I just I wanted to clarify where we're landing because there are various  
23 allegations in the two skeleton documents that the claimant filed in response to our  
24 skeleton which I think say that the defence has raised Chapter II and they refer to my  
25 comments in the transcript at the last CMC where I suggested that the defence might  
26 deal lightly with Chapter II but that you were leaving it up to us and the skeletons say

1 that that is why the reply deals with Chapter II and I just want to make absolutely clear  
2 that the defence doesn't deal with Chapter II at all and so the reply shouldn't be dealing  
3 with Chapter II at all so that we're all agreed that Chapter II has been stayed and  
4 remains stayed.

5 MR TIDSWELL: That's right, Mr Macfarlane, so the defence doesn't deal with Chapter  
6 II. It's possible that you may have been led astray because there are references in  
7 there to market share which you might be interested in --

8 MR MACFARLANE: Yes, that's what I --

9 MR TIDSWELL: -- in relation to Chapter II, but actually that's for a different purpose,  
10 that's all to do with the way the that vertical block exemptions works. So, are you  
11 comfortable with that understanding that Ms Patel articulates? We're not doing  
12 Chapter II, that's been completely parked. The defence doesn't deal with it and to the  
13 extent there's anything in your reply about it, I will be ignoring it.

14 MR MACFARLANE: Yes.

15 MR TIDSWELL: Unless you tell me that you want to argue it to the contrary.

16 MR MACFARLANE: I'm clear with that. I just was a little bit confused if it was -- not  
17 the quantity, sorry, the market domination had been mentioned and Ms Patel has said  
18 that it is to be treated with a light touch. My reference to Chapter II was only in  
19 response to what I thought -- and if I'm mistaken, I apologise.

20 MR TIDSWELL: No, no need to apologise but I think you were mistaken. But that's  
21 fine. Okay. Right. Moving on. The last thing I have got on this list of pleadings is  
22 about Shopify. I think the point that you are raising there --

23 MS PATEL: Sorry, sir, before we do that, there's one point on the exhibits, only one,  
24 which is there is one exhibit which I think it's titled in the list of exhibits but it's blank,  
25 DM6. I think it is meant to be there but the text of it is not there. DM6 is referred to on  
26 page 278 and it is place marked in the bundle at 348, but it's blank. The header of the

1 | email is there, but the text of the email is not there.

2 | MR TIDSWELL: I see. That's right. Mr Macfarlane, could you take a note of that:

3 | your email DM6 hasn't got any text, it's just got the heading, so somehow it's not made

4 | it's way in. I don't know why that is. Would you mind just following that up?

5 | MR MACFARLANE: My technical inability at copy and pasting, sir.

6 | MR TIDSWELL: Don't worry, that's fine. Just to make sure everybody is on the same

7 | page with that. That's good.

8 | MS PATEL: The last point, sir, is just to ask that -- this is paragraph 15 -- there are

9 | lots of reference in the reply to a bundle filed on 18 October and so we can get to a

10 | position where everyone is working off one claim bundle and one reply bundle, we

11 | would just ask that everywhere where the reply refers to a bundle of the 18 October,

12 | which I assume is the original claim bundle, if those references could be updated to

13 | the revised claim exhibits that Mr Macfarlane is filing, we will then all have one claim

14 | form and exhibits and one reply and exhibits that we're all working from.

15 | MR TIDSWELL: So you want him to go through and change the references in the

16 | reply, is that what you're saying?

17 | MS PATEL: To a bundle that nobody is going be looking at again, yes.

18 | MR TIDSWELL: I'm just wondering whether it's better to ask him just to do the same

19 | thing with reply bundle, which is to produce a bundle which has got all the documents

20 | referred to in the reply in the right order. Is that not better?

21 | MS PATEL: So I think what he's doing in the reply is referring to a mixture of claim

22 | form exhibits and reply exhibits. But where he is referring to the claim form exhibits,

23 | he is referring to the earliest set of claim bundle exhibits that he filed, which have now

24 | been superseded.

25 | MR TIDSWELL: Okay.

26 | MS PATEL: Twice.

1 MR TIDSWELL: Okay. Mr Macfarlane, how about this? Would you be happy to go  
2 through your reply and where you refer to DM anything, could you please check the  
3 document, make sure the reference is right to the revised claim form if it's to the claim  
4 form? So you know that pack you're putting together, just make sure that's the right  
5 cross-reference and you can change the reply to that effect and serve it again, but  
6 please don't make any other changes to the reply.

7 MR MACFARLANE: Yes, sir. Can I just ask one bit of clarification as well. Some of  
8 the paragraph numberings have been duplicated. Would it be helpful --

9 MR TIDSWELL: I think it probably wouldn't actually. I think I'd rather you just left it. I  
10 think we've all learnt to live with that I think.

11 MR MACFARLANE: Very well.

12 MR TIDSWELL: Very quickly, Mr Macfarlane -- sorry, Ms Patel, are we done with the  
13 reply?

14 MS PATEL: Yes, thank you.

15 MR TIDSWELL: Mr Macfarlane, just very quickly, this business about Shopify, so  
16 you've written a letter about this, what's your intention in relation to that? Are you  
17 raising that as an issue in these proceedings and, if so, are you asking to somehow  
18 include it in -- for permission to include in your claim or what's the point you're making?

19 MR MACFARLANE: I think I was a bit impetuous, sir, a reaction on the day at the  
20 time. Shopify has 2.3 million platforms, a Canadian company, and our website  
21 runningshoes.co.uk is but a tiny speck in the picture of these platforms. By  
22 coincidence, there was only one product on that website. In fact, I'm not quite truthful,  
23 two products on that website from two manufacturers, one being Brooks and one being  
24 HOKA.

25 MR TIDSWELL: Mr Macfarlane, I'm sorry to interrupt you but do you mind if we just  
26 cut to the short point. Are you saying there's a problem here that you want us to deal

1 with or are you saying the problem has gone away?

2 MR MACFARLANE: No, I'm saying that I haven't got sufficient evidence today to  
3 present to you because of the delay with it being in Canada, so I would rather drop it  
4 for now and maybe bring it up later.

5 MR TIDSWELL: Okay, well, you've certainly marked our card. And obviously if you  
6 bring it up later then Ms Patel may have things to say about whether it's appropriate  
7 to include it or not. But I think just to avoid an argument about it now, I think we can  
8 probably leave it on that basis.

9 MR MACFARLANE: Okay.

10 MR TIDSWELL: Ms Patel, anything you want to say?

11 MS PATEL: No.

12 MR TIDSWELL: Right. Next item on the agenda is, Mr Macfarlane, your application  
13 for an interim ruling. Just before we get into this, I just want to check something with  
14 you, because I think again this is maybe a little bit of a cross purposes point. I think  
15 your application for an interim ruling is all about this idea that somehow the defendant  
16 is saying there's a separate agreement, separate from the terms and conditions, which  
17 justifies their argument about selective agreement. Is that what you'd understood?

18 MR MACFARLANE: That's what I am trying to understand myself.

19 MR TIDSWELL: Yes.

20 MR MACFARLANE: They started off calling it a policy, it became a system and then  
21 it's simply become an agreement and I don't know which one I'm looking for, I'd just  
22 love to see any one of those three.

23 MR TIDSWELL: I think, as I understand it, Ms Patel, you're not suggesting there's any  
24 separate agreement, this is all about pleadings, all about there being a system and  
25 obviously it may or may not be documented but not with Mr Macfarlane. Is that the  
26 position?

1 MS PATEL: The position is that -- can you just bear with me, sir, for two minutes on  
2 this because I think it's really important I set it out clearly.

3 MR TIDSWELL: Of course.

4 MS PATEL: A selective distribution system is defined in the Commission Regulation  
5 and the order that we rely on in the defence as "A distribution system with two  
6 components; firstly, the supplier undertakes to sell contract goods or services only to  
7 distributors selected on the basis of specified criteria. Secondly, the distributors  
8 undertake not to sell such goods or services to distributors not authorised by the  
9 supplier within the geographical area reserved by the supplier in the agreement in  
10 order to operate that system."

11 If you just look at the terms and conditions that these parties contracted on, they in  
12 themselves contain those components. So clauses five and six say that the supplier  
13 will undertake to sell to certain stores that comply with certain criteria: having sufficient  
14 trained staff, clean areas for trying on shoes et cetera, and clause 14 contains the  
15 obligation not to resell to unauthorised distributors. So even if you look just at the  
16 terms and conditions on their own, they would satisfy the definitions in the order and  
17 in the Commission regulation. The claimant already has those terms and conditions.  
18 The defence then refers to criteria which are not set out in the terms and condition, I  
19 do accept that and you're right, sir, that we don't say those are embodied in some  
20 separate agreement. So we say partly the claimant has the document, that to the  
21 extent a document is relied on, an agreement is relied on, he has it. And to the extent  
22 that other criteria are relied on, they're not in a separate agreement.

23 MR TIDSWELL: Yes. That's very helpful and certainly that is what I understood,  
24 Mr Macfarlane. So I don't think there is a separate agreement that anyone has and  
25 has not given to you. The only agreement, I think, that is said to be relevant to this  
26 between you and the defendant is the terms and conditions. And Ms Patel has



1 indicated which bits they rely on. Then of course there may well be other documents  
2 that evidence what the defendant's view was of the application of the criteria and so  
3 on. But they're not suggesting that's part of any agreement with you. So I think on  
4 that basis, as I understand what Ms Patel says, and if I've got it right, then actually  
5 your application falls away because I think you're application anticipates that there is  
6 some other agreement, doesn't it?

7 MR MACFARLANE: I'm going by the words of the claim where the defendant used  
8 the word "Agreement".

9 MR TIDSWELL: Don't worry, I'm not trying to do any post mortem of how it's  
10 happened, I would just like to cut through. If we can avoid dealing with the point  
11 because I think it's gone away then I'm very happy to do that. It's good news not bad  
12 news.

13 MR MACFARLANE: Yes.

14 MR TIDSWELL: But I don't want to do that unless I've misunderstood the position.  
15 What I want to know is if there's no other agreement, then, obviously, you're asking  
16 for an order that I ask them to produce that and then we make some decisions about  
17 it, but if there's no other agreement, that all falls away I think, and I think the things  
18 that -- the question or not as to whether they're right about all that is a matter for trial.  
19 Obviously we will have an argument about that at some stage about whether that is  
20 right and whether the agreement -- the terms and conditions justify the points that  
21 Ms Patel has made and whether the other points are consistent with the requirements  
22 of the selective distribution block exemption.

23 MR MACFARLANE: I agree, sir, and I agree with you, I think it falls away.

24 MR TIDSWELL: Good, that's helpful. I think you did mention in your application the  
25 point about hardcore and actually that falls into exactly the same category, that is  
26 definitely a matter for trial. We've discussed that a bit as well. I hope that's clear.

1 Good, okay. Well, unless either of you have anything to say about that, I think we can  
2 move on from your application, Mr Macfarlane, that is I'm not going to grant your  
3 application but for the reasons I have explained.

4 MR MACFARLANE: Yes.

5 MR TIDSWELL: Thank you. Similarly in relation to your application for interim  
6 payment, and again in the spirit of short circuiting a bit, I'm not sure whether you'd had  
7 a chance to have a look at the rules in relation to this. The basis on which I can make  
8 an interim payment order, as set out in Rule 66(4)(c), which you probably don't have  
9 in front of you, but I'm just going to read out the relevant bit to you, is that I need to be  
10 satisfied that if the claim were to be heard, the claimant would obtain judgment for a  
11 substantial amount of money other than costs against that defendant.

12 Now, I'm happy for you to say whatever you want, I want to give you my provisional  
13 indication, that I don't see how I can do that where the big issue here is this hardcore  
14 restriction we've talked about and the things that Ms Patel has talked about, selective  
15 distribution and the vertical block exemptions, and those things all turn on facts and  
16 context that I don't have in front of me. So I am not really in a position where I can  
17 make a decision about whether or not you're going to obtain a judgment for a  
18 substantial amount of money, it's too early to do that, indeed I don't think I could do  
19 that until much closer to the trial, if not until the trial. So, my starting point on this is  
20 I think that's quite a hard box for you to get into, but I don't want to stop you, if you  
21 want to have a go at arguing that I'm wrong about that, then by all means do so.

22 MR MACFARLANE: No, I go along with your superior knowledge in this, sir, and I will  
23 just allow that one to fall away again.

24 MR TIDSWELL: Look, two things about that. One is I'm not sure it's superior  
25 knowledge, it's just that I don't want -- I might have missed something and if you think  
26 I have missed something, you should tell me, in their framework, and I don't have

1 a problem if you tell me I'm wrong you want to tell me why, but I think you have to have  
2 some reasons for that.

3 MR MACFARLANE: I think the very thought that I would even stand half a chance of  
4 getting that sort of thing is fanciful.

5 MR TIDSWELL: Well, the other thing I wanted to say to you was that you can, and  
6 the rules are clear on this, you can apply again at a later stage. So, it may be that the  
7 position does change and who knows what might happen in terms of documents that  
8 might be obtained through disclosure or things that might be said in the witness  
9 statements or indeed, if there is any preliminary or split trial, what might come out of  
10 that and your ability to apply for that. So I just want to be absolutely plain with you,  
11 this is not a go away and forget about it, it's a this is not now because it's not possible  
12 to flip that box. You may at some later stage, I express no view on whether you will or  
13 not, but just so you know, it's not a no forever point.

14 MR MACFARLANE: Sir, if I can give you my thought processes behind it, is that it's  
15 very clear from a substantial part of today that I probably added to the confusion in this  
16 case and I would like nothing more than to be able to afford to appoint a team of  
17 solicitors and barristers to represent us and then we could all probably move on much  
18 more rapidly. However, we're not in that position financially to do so and my thought  
19 processes were: well, maybe if I could get some sort of an award for what I see, and  
20 it's only me that sees this, then I could do exactly that, but when I think about it later,  
21 it's stretching it a little bit expecting the defendant to fund my claim.

22 MR TIDSWELL: Well, look, I think we understand the thought process, Mr Macfarlane.  
23 Just to be absolutely clear with you, we are in the situation we're in, I understand your  
24 reasons why you aren't in a position to instruct legal advisers. You're entitled to do  
25 that, this is you exercising your entitlement to come to the Tribunal and seek to secure  
26 the outcome you want and it's my job to make sure we do that as efficient and sensibly

1 as we can and that is a fact of life that we all live with. I don't want you feel in any way  
2 that you shouldn't be or are not entitled to do what you're doing. What I think is  
3 important, and we will come back to this again in a minute when we talk about costs,  
4 is that you do try as hard as you can to help us make the system as efficient as possible  
5 bearing in mind that there are going to be things that you do know the answer to and  
6 things that you don't and you are operating at a disadvantage of knowledge, and no  
7 one blames you for that disadvantage, but I think if you can bear in mind that part of  
8 the aim here is to get to the sharp point of the problem efficiently, and just try and keep  
9 focused on that point and the sharp point of the problem here is the point we have  
10 been talking about and how can we work out whether you're right or not about whether  
11 the hardcore infringement has been committed, and how can we work out whether  
12 Ms Patel is right or not that the block exemptions apply otherwise and particularly on  
13 basis of selective distribution.

14 So that is what the case is about and it's not actually that complicated in those  
15 respects, there may be some tricky bits in there, but I think we should all try and keep  
16 our eyes on that ball. So that's just really to help you think a little bit about how you  
17 manage it. But you're absolutely entitled to be doing what you're doing and I make no  
18 criticism whatsoever.

19 MR MACFARLANE: Thank you, sir. I am happy to drop that fanciful application for --

20 MR TIDSWELL: I don't think you need to describe it as fanciful, but that's helpful to  
21 withdraw it.

22 Ms Patel, I don't know if you want to say anything about that but I think that resolves  
23 it?

24 MS PATEL: Nothing further from me, sir.

25 MR TIDSWELL: Thank you. Right, next item on the agenda is fast track. Now, Ms  
26 Patel, this is your application. But actually you will have seen, I'm sure, that I asked

1 | you both to think about the possibility of a split trial as well, so you may want to deal  
2 | with both those points.

3 | MS PATEL: I'm happy to start with that, sir.

4 | MR TIDSWELL: Yes, thank you.

5 | MS PATEL: So the letter of yesterday set out your proposal, sir, to try infringement of  
6 | Chapter I, including the issue of hardcore restriction and the application of the vertical  
7 | agreement to block exemption and the question of injunctive relief in one trial to be  
8 | heard late April/early May with a trial of questions of causation and quantum of the  
9 | damages claim in a second trial at a later date if required. The defendant has the  
10 | following points in response. Firstly, it's our understanding that injunctive relief is not  
11 | claimed in either interim or final form any more. See the letter of 11 December on  
12 | interim relief. I think that's tab 15 of the bundle.

13 | MR TIDSWELL: Just so I understand what you're saying, are you saying he's not  
14 | seeking --

15 | MS PATEL: Any form of injunctive relief any more, that is our understanding.

16 | MR TIDSWELL: Because of that letter or because of the pleadings?

17 | MS PATEL: Because of that letter and the pleadings. The reply. That's certainly how  
18 | we've read it.

19 | MR TIDSWELL: I must confess I hadn't read it like that. I may be completely wrong  
20 | about this but I had thought that he had pleaded injunctive relief because he's asking  
21 | for continuation of supply, isn't that what he means by that?

22 | MS PATEL: I thought he was asking for damages for loss of profits? He obviously  
23 | can't have both because they --

24 | MR TIDSWELL: He could have damages for the period in which he wasn't supplied  
25 | and then --

26 | MS PATEL: He could, yes. We pleaded in the defence on the assumption that he still

1 sought a final injunction and the reply appeared to us to say that we had  
2 misunderstood the position because he did not seek a final injunction.

3 MR TIDSWELL: Can you take me to the provision and the reply on that?

4 MS PATEL: Yes. Reply paragraph 16 on page 283 and page -- have you got that  
5 one, sir?

6 MR TIDSWELL: Yes.

7 MS PATEL: Then page 33, which is page 309 of the bundle. Up from the bottom  
8 above issue six where it says second F. F is the section in the defence that responds  
9 to a final injunction.

10 MR TIDSWELL: That's obviously referring to an interim injunction though, isn't it, when  
11 he talks about not being applied for at this stage?

12 MS PATEL: Except that he's responding to a defence which is only talking about  
13 a final injunction because he had already filed a letter saying that he didn't seek  
14 an interim injunction.

15 MR TIDSWELL: Yes, okay, but I mean, I think, look -- well, I think there's obviously  
16 some room for Mr Macfarlane to be confused about the distinction between interim  
17 final but I don't think -- I had not understood anything he had said to withdraw his claim  
18 for injunctive relief to obtain further supplies.

19 MS PATEL: Can I take you, sir, to the defence, because I confess I am finding this  
20 very difficult because we are pleading to what we understand the position to be and  
21 then obviously we attend a hearing and we are told that we've misunderstood the  
22 pleading and it's very difficult.

23 MR TIDSWELL: No, I appreciate that, I think we share the difficulty, Ms Patel. I am  
24 not saying I'm right, I am just telling you what I thought was going on. Let's have  
25 a look. Where are we in the defence?

26 MS PATEL: 272 is the defence. You'll see paragraph 99 under issue five the claimant

1 is not entitled to an injunction and we say very clearly if a final injunction is still sought,  
2 footnote it being unclear from the claimant's letter of 11 December whether the  
3 claimant no longer pursues only an interim or also a final injunction.

4 MR TIDSWELL: That's fine.

5 MS PATEL: Then we say why he's not entitled to a final injunction and then in his  
6 reply he says to us that everything that we've said there is not applicable because  
7 an injunction is not being applied for this at stage, but we're only talking about a final  
8 injunction, so I don't know how that's understood other than that he's not seeking  
9 a final injunction.

10 MR TIDSWELL: Would you give me the second reference again, the section F  
11 reference in the reply? Sorry, I've lost it.

12 MS PATEL: Yes. Page 309 of the bundle.

13 MR TIDSWELL: Okay, I absolutely take your point, I absolutely take your point, but it  
14 is pretty plain in the reply where he says not applicable, an injunction is not being  
15 applied for at this stage, the claimant could not run the risk of adverse costs, he's  
16 talking about the interim injunction, isn't he?

17 MS PATEL: I don't agree, sir, because the pleading -- the defence is only talking about  
18 a final injunction.

19 MR TIDSWELL: Well, that is entirely fair, but that doesn't mean that he can't  
20 misunderstand the position, does it?

21 MS PATEL: Could we ask him, sir?

22 MR TIDSWELL: Certainly. We are absolutely going to do that.

23 Mr Macfarlane, do you understand the point that is being made? What's being  
24 suggested is that do you recall we had a conversation at the last CMC about whether  
25 you were going to apply for interim relief which means that you would ask the court to  
26 provide an order for continuation of supply pending the outcome and the trial? Do you

1 remember that was the discussion?

2 MR MACFARLANE: Yes, I do remember that conversation and absolutely, sir, you  
3 enlightened me that a temporary injunction would have been a permanent injunction  
4 if we were to apply for it. I think that is what was said.

5 MR TIDSWELL: Well, I think the discussion was about how difficult it might be and  
6 what the consequences might be. You then wrote your letter of 11 December and  
7 Ms Patel is saying that on one reading, certainly her reading of that letter, where you  
8 say at the end you've decided not to pursue an injunction in the stated proceedings,  
9 you've created at least ambiguity and possibly the expectation that you're withdrawing  
10 your injunction application altogether so that your claim is just for damages and you  
11 are no longer seeking an order that they should continue to supply you if you're  
12 successful at trial and then Ms Patel says in their defence they weren't sure about that  
13 to the extent they felt they should plead about the question of whether you should be  
14 entitled to an injunction at trial, in other words whether the Tribunal should order  
15 continued supply if you make your case out, but they record there they're not really  
16 clear about what your position is and they put that in the footnote. Then you come  
17 back in your reply and you say everything they say in there about injunction is not  
18 applicable because you're not applying for it at this stage, the reason is the claimant  
19 could not run the risk of adverse costs.

20 So Ms Patel is saying that her understanding of all of that put together, your letter of  
21 11 December, the defence with the footnote which puts the point directly to you  
22 effectively and then your response from your reply has led them to believe that you're  
23 now not asking for an injunction at all and even once we get to trial, if you win, all  
24 you're asking for is damages. Now, is that your position? Are you still intending to  
25 seek an order that they continue to supply you if you win at trial?

26 MR MACFARLANE: Absolutely, sir. I didn't realise that when I'm applying for -- when



1 I'm changing and not applying for an injunction in December last year, I didn't realise  
2 that that was going to have an impact upon the possibility of an injunction at the end  
3 of the trial as well. Is that --

4 MR TIDSWELL: No, that's not quite the point, it's actually the way you've described  
5 your intentions has led them to believe that is what you are doing. So it's not the fact  
6 you didn't apply. If you hadn't applied, that wouldn't have made any difference. It's  
7 what you've said about your non-application and what you're actually doing that's led  
8 them to believe you're giving up on not just the interim injunction but the final. Does  
9 that make sense?

10 MR MACFARLANE: Yes.

11 MR TIDSWELL: Do you understand what I'm saying they are saying?

12 MR MACFARLANE: I think I'm getting there slowly, sir. But I would not want to not  
13 be in a position of getting an injunction at the end of proceedings.

14 MR TIDSWELL: Your intention is still to seek an injunction at the end of the  
15 proceedings if you're successful?

16 MR MACFARLANE: Yes.

17 MR TIDSWELL: So notwithstanding what you say in your reply about section F, that's  
18 your position.

19 MR MACFARLANE: That's my position.

20 MR TIDSWELL: I'm taking it that you've said that in section F because you  
21 misunderstood the position, you didn't understand the position I've just described to  
22 you.

23 MR MACFARLANE: I didn't understand the position that I was effectively killing  
24 injunction applications altogether, I just thought it was December only.

25 MR TIDSWELL: That's helpful.

26 So, Ms Patel, there may be all sorts of things that come out of that but the one point

1 I think is that Mr Macfarlane is still saying that he intends to pursue a final injunction.  
2 So let me come back to your point, you may have some things you want to say about  
3 that, we're not going to deal with them now. I would like to get on with this question of  
4 the split trial and the fast track and you can come back and make observations about  
5 that if we have time. Otherwise it will have to be dealt with in correspondence at  
6 a further hearing. But that's the position that he articulates now and he says the  
7 reasons why he's in that position.

8 MS PATEL: The second point that the defendant makes is that the question of  
9 damages and indeed injunctive relief, if it's a continuous supply, raises complicated  
10 questions of either causation or the terms of any continued supply which are likely to  
11 involve evidence from those giving evidence on liability such that it would be more  
12 appropriate to keep certainly causation with liability. So, for example, this why I placed  
13 emphasis on the need for a letter setting out the basis on which the claimant says that  
14 supply would have continued, or indeed the basis on which the claimant says supply  
15 should continue, because if the position is that the entire agreement is void because  
16 of a hardcore restriction, then it will be necessary to understand whether there is any  
17 basis, based on the findings that the Tribunal makes about any selective distribution  
18 system and indeed other terms and conditions clauses of the contract, whether there  
19 is any basis on which the parties would have dealt and that will involve evidence from  
20 the defendant as to the importance to it of certain criteria, the importance to it of  
21 retailers that did certain things and had certain profiles, the importance to it of  
22 branding, the importance to it of a variety of shoe stocks, the importance to it of trained  
23 staff knowledgeable about products and so on.

24 MR TIDSWELL: Sorry, just so I am clear, that's all going to be in trial one as postulated  
25 because of the selective distribution that is in there. Are you saying -- I think you're  
26 saying --

1 MS PATEL: They are relevant to causation.

2 MR TIDSWELL: Yes, but of course -- are you saying then -- I'm sorry, I'm just not sure  
3 I completely understand the point. You are saying if we were to deal and determine  
4 those issues in trial one isn't that helpful because we don't need to do them again or  
5 are you saying --

6 MS PATEL: No, you've proposed, sir, splitting off causation and quantum to a second  
7 hearing. I haven't gone on to quantum yet but I'm saying it would not make sense to  
8 split off causation because causation is in fact going to involve needing to hear from  
9 exactly the same witnesses or many of the same witness that will be giving evidence  
10 on liability because you will be needing to understand the basis on which -- you will be  
11 needing to understand what would have happened in the counterfactual and that will  
12 involve evidence from the defendant's witnesses, likely the same or overlapping with  
13 the witness who are given evidence on liability.

14 MR TIDSWELL: I'm still not completely sure I understand. I understand the point  
15 you're making, I'm not sure how it fits into the analysis. Is it helpful, I don't know  
16 whether you -- and perhaps I should have identified this last night, but I'm sure you're  
17 familiar with the sort of standard set of factors that are applied to these decision about  
18 split trails. I don't know whether you have looked at either Electrical Waste or Daimler.  
19 Are they familiar to you, Ms Patel?

20 MS PATEL: I didn't look at them before today. I have looked at them before. But the  
21 simple point I am trying to make, which I think is one of those criteria, is about the  
22 overlap between the witnesses because if --

23 MR TIDSWELL: Precisely. Sorry to interrupt you. So there are two ways your point  
24 may come in under these and I actually happen to have them in front of me but we  
25 don't need to proceed in this format, but just so I'm clear, I think there are two ways  
26 they might come in. You may say it's both. But one of them is whether the split trial

1 will impose an unnecessary inconvenience or strain on witnesses who may be  
2 required in both trials. So that's about the burden on the witnesses. But then are you  
3 making a separate point beyond that about some form of complication in relation to  
4 the evidence? Because that's the thing I don't understand, if you are saying it's more  
5 than just the burden on the evidence. Are you saying somehow we're going to go  
6 wrong because we're dealing with two issues at different times in relation to the same  
7 evidence?

8 MS PATEL: I'm saying it's inefficient. I'm saying that if you need to hear from someone  
9 who can give evidence on liability and causation, and causation is not going to be very  
10 much more, it doesn't to me make sense to call that witness twice to two separate  
11 hearings if that evidence can be disposed of in phase one.

12 MR TIDSWELL: That's very helpful. Thank you.

13 MS PATEL: Quantum of damages, if you're with me, sir, that causation properly sits  
14 with liability here because of the very substantial overlap between the witnesses in  
15 understanding the counterfactual and what would have happened in the absence of  
16 an agreement to the commercial relationship between the parties, then quantum of  
17 damages is only a little bit more. All we're talking about is two experts, on the  
18 assumption that the claimant calls a forensic accountant, as I think he has indicated  
19 he might, and on the assumption that the defendant does too. So my submission, if  
20 that is a day of evidence and one and a half days, it doesn't make sense to split it off  
21 to an entirely separate trial.

22 But in any event, I hope, sir, that you can see, even based on where we've got to  
23 today, that even if you did think it were appropriate to split the trial, and I would like to  
24 come back to the factors on your list to make sure that I have covered them all off, but  
25 even if you did think that a split trial was appropriate, the defendant cannot see any  
26 universe in which late April/early May is now realistic given the steps required before

1 now and then, which I think now include for the second time a revised claim and set  
2 of exhibits despite the fact that that was all asked for on 1 December, a letter to clarify  
3 the basis on which it is said loss of profits flow from the claim, from the void agreement,  
4 possible clarification of other heads of loss or an application to rely on other heads of  
5 loss, amendments to the reply, amendments to the defence, and although we've all  
6 prepared for disclosure based on the pleadings as they stand, since we're now in a  
7 position where pleadings haven't closed, it might be necessary to look at that.

8 I have already indicated that the defendant needs to do quite a lot of work to look at  
9 the position of somewhere between 100 and 200 retailers to understand the terms of  
10 appointment to make sure that the position that it presents in any amended defence  
11 is an accurate one and to make sure that it provides fair disclosure to the claimant  
12 insofar as necessary to meet the issues that are raised by the case. That is going to  
13 take some time, as I have indicated, because of the email retention policy and because  
14 of the sheer number of retailers and the need to look not just at the terms and  
15 conditions that might be in place between the parties but any agreements set out in  
16 the context of those terms and conditions that supplement them.

17 Typically one would then do the factual evidence first and then any expert evidence  
18 so that the experts have the benefit of the factual evidence which will likely set out  
19 things to do with who the competitors are in the market and help with things on what  
20 the relevant market is and will also need the disclosure in any internal documents the  
21 parties may have that are relevant to market share.

22 Then you get on to hearing preparation. So even if you assume very optimistically  
23 one month for each step, I mean, just bear in mind this claim was issued in October,  
24 we're now in the middle of January and we don't have closed pleadings and I am still,  
25 and it may be my failing and, if so, I apologise, but I am learning entirely new things  
26 about what this case is about, including whether injunctive relief is still claimed

1 several months after the claim's been filed and after we've already had one very  
2 intensive CMC and we're almost at the end of another.

3 So even if we assume that pleadings will be closed in another month, that takes us to  
4 the middle of February. Well, sorry, even if we assume that the claimant's claim form  
5 and reply and letter on damages are finalised by the end of February, the defendant  
6 will need time to then amend its defence by reference to this work that it has to do,  
7 which I expect can hopefully be done in the first half of March if the claimant sticks to  
8 what you've instructed it to do in relation to it's pleadings.

9 Disclosure is going to then take some further time. Even if we say a month from that  
10 for disclosure, we're into early April. Time for witness statements. There will be three  
11 to four on our side. That will take some further time and then experts will take some  
12 further time. So we're way past May already and with the best will in the world, its not  
13 in my client's interests to keep haemorrhaging costs on CMC's every month to try and  
14 work through this. There's certainly an argument for saying it should be dealt with  
15 quickly and as efficiently as possible. But with the best will in the world, sir, despite  
16 the efforts of yourself, the claimant and myself and those behind us all, all doing their  
17 best, I cannot see how April/barely May is realistic even if you were to split them off.  
18 And if you are not going to split them, if you cannot meet April/May then it seems to  
19 me that it would make more sense and be more efficient to try everything together  
20 later in the year because quantum doesn't actually add very much to it time-wise and  
21 because not a great deal is lost time-wise if we are realistically looking at the autumn,  
22 early autumn for a trial on liability and quantum anyway, which I think we would be if  
23 you are going to be giving, sir, the parties sufficient time to deal with what are actually  
24 very serious allegations.

25 We need to have sufficient time to do our disclosure properly, given what I've told you  
26 this morning, and we need to have sufficient time to prepare factual evidence and we

1 have need to have sufficient time to prepare expert evidence because market share,  
2 despite, I think, everyone hoping that it might not be relevant at the last CMC, it is in  
3 fact relevant, even to Chapter I.

4 MR TIDSWELL: Just on that point, can you help me just a bit with the market share  
5 point. You're talking about the safe harbours here, are you?

6 MS PATEL: Sort of, sir. Market shares comes in two ways. There is obviously the  
7 de minimis restriction, which is trumped by a hardcore restriction. So, if the aggregate  
8 market share of the parties does not exceed ten per cent, then the agreement falls  
9 outside of Chapter I. But that is subject to a hardcore restriction. So, if the claimant  
10 was correct that there was a hardcore restriction, that wouldn't take you anywhere.  
11 Now, there's then separately the vertical block exemption market share where the  
12 market share of the claimant and the defendant does not exceed 30 per cent of the  
13 exemption from -- sorry, 30 per cent of the relevant market on which they respectively  
14 purchase or sell the goods, then there is exemption from the Chapter I prohibition  
15 again, subject to any hardcore restrictions. So that's again is trumped by a hardcore  
16 restriction. But what is not trumped by the hardcore restriction is this point about  
17 a selective distribution agreement. So a selective distribution agreement typically has  
18 to satisfy various criteria, the Metro criteria, I think, as I've set out in the defence, and  
19 they are various things including that the criteria is uniformly applied in  
20 a non-discriminatory way.

21 MR TIDSWELL: Sorry, Ms Patel, just before you get onto that, I just want to stick with  
22 this expert point a bit and I would like to come back to that, if I may, this point about  
23 what doesn't trump what. But just on the expert point, so the point about experts, the  
24 permission for which you would be seeking an expert would be to determine whether  
25 the market shares form 10 per cent of the 30 per cent that you've just described, that's  
26 the expert evidence?

1 MS PATEL: Yes.

2 MR TIDSWELL: How contentious is that as a subject? It must be pretty obvious,  
3 mustn't it, what the market shares are?

4 MS PATEL: Given that the claimant has defined the market as the market for HOKA  
5 products in which we are 100 per cent dominant, in the Chapter II claim that we've  
6 parked, and we define the market as the market for running shoes, where we have  
7 a much smaller market share within both of those thresholds, it seemed to me that it  
8 was contentious, but if the claimant is going to say today that it's not contentious then  
9 we will obviously be delighted to hear that.

10 MR TIDSWELL: So you're saying that in order to work out the market share, we need  
11 to go through a market definition exercise, is that what you're saying?

12 MS PATEL: It appears to be in dispute.

13 MR TIDSWELL: Sorry, I wonder whether -- the question I'm asking you, I don't know  
14 the answer to this, is whether the assessment of the 10 per cent or the 30 per cent  
15 under the de minimis or vertical block exemption provisions involves a market  
16 definition exercise of the sort that would be required for a 102 Chapter II case or  
17 whether it's something much more agricultural than that. I would have thought, and I  
18 haven't looked at the way it's put, but I would have thought that it was something much  
19 simpler than that, wasn't it?

20 MS PATEL: It's two things, sir. The market definitions in dispute. It might be that that  
21 can be dealt with without going through a wholesale market definition exercise. But  
22 the market share exercise is not straightforward based on the data that -- we have not  
23 gone to -- we have not yet instructed an expert because we obviously have not  
24 progressed that far with you, sir, in terms of having the necessary permission to do so.  
25 But in terms of the data that is available in order to assess market share, it seems us  
26 to that it will be beneficial to go to an expert to assist with the question of what market



1 share is because --

2 MR TIDSWELL: I'm pretty sceptical about the need to go through that exercise. It  
3 serves a completely different purpose, doesn't it, really, framing the market for the  
4 purposes of Chapter II. I just wonder, can we have a look at the -- would you mind  
5 taking me to either the vertical block exemption or the de minimis order just so that we  
6 can have a look and see how it's put.

7 MS PATEL: The vertical block exemption is in the authorities bundle at tab 4. Tab 4.

8 MR TIDSWELL: Where do we find the 30 per cent?

9 MS PATEL: Sorry, that's the guidance. The market share threshold is in Article 3 on  
10 page 18. It's the relevant market services.

11 MR TIDSWELL: Okay. That's helpful, thank you. Can I ask you just one other point.  
12 Just coming back to these 200 retailer contracts, I can see at least a degree of  
13 relevance of what it is that the defendant does by way of contract with other people if  
14 it goes for contracts on a basis other than the terms and conditions, I can see how that  
15 might have some relevance, but it doesn't seem to me to be terribly central to any of  
16 the arguments. Could you explain to me why it matters so much?

17 MS PATEL: Yes. Can I take you to the defence?

18 MR TIDSWELL: Yes, please.

19 MS PATEL: Page 260 describing the Commission guidelines in relation to the block  
20 exemption regulation.

21 MR TIDSWELL: Yes.

22 MS PATEL: Paragraph 77 explains that purely qualitative selective distribution is  
23 generally considered to fall outside Article 101 for lack of anti-competitive effects,  
24 provided that three criteria are satisfied. Paragraph 78 explains how the Commission  
25 guidelines explain that qualitative selective distribution is exempted by the  
26 Commission regulation as long as the market share of both buyer and supplier do not

1 each exceed 30 per cent regardless of the nature of the product concerned, the nature  
2 of the selection criteria, and the nature of the selection criteria unless combined with  
3 a hardcore restriction.

4 If I can just take you to the equivalent provisions, the similar provisions that are  
5 described under the UK -- the more recent UK regime, which is page 263. Page 88  
6 again explains:

7 "The criteria used by the supplier to select distributors can be qualitative, imposing  
8 conditions that cannot be met by all distributors, for instance the training of sales  
9 personnel, the service to be provided at the point of sale, the product range to be sold,  
10 advertising presentation. Purely qualitative distribution is generally considered to fall  
11 outside the scope of the Chapter I prohibition where those three criteria are satisfied."

12 Then at 89:

13 "The CMA guidance explains that irrespective of whether they do fulfil these criteria (  
14 ... reading to words ...) hardcore restrictions."

15 Now, the defendant's case is that what the terms and conditions here are doing is  
16 setting out criteria and that clause 15 that the complainant has complained about is in  
17 fact about maintaining quality standards. The clause is at paragraph 15 of the defence  
18 on page 249:

19 "A retailer may only sell products on a website it owns and operates if a retailer has  
20 been granted permission to make online sales of products and the website is fully  
21 compliant with the company's website requirements as are communicated from time  
22 to time by the company and the contents of the website have been approved in writing  
23 by the company."

24 Some of those requirements that were communicated from time to time are set out at  
25 paragraph 29 of the defence:

26 "All accounts are free to sell HOKA on their websites, which should have a domain

1 name identical or similar to the name under which its bricks and mortar shops, if any,  
2 exist operate."

3 You'll have seen at paragraph 26 that there are various criteria for stores. So the  
4 defendant's case is that this clause was really just trying to make sure that it was  
5 possible for people to see that what they were buying online was referable to the stores  
6 that they have chosen to supply because they fulfil various criteria. So we say it's not  
7 a hardcore restriction.

8 The claimant has said in his reply that there are various complaints about our criteria,  
9 that he's never seen them, that they're not applied consistently et cetera. If we're right  
10 that there's no hardcore restriction, and we're right that our criteria have been applied  
11 fairly, for which it's necessary for the position in relation to other retailers to be properly  
12 before the Tribunal, then there's no issue with the selective distribution system that  
13 we've been operating. Even if our criteria have not been applied fairly, then if we  
14 satisfy the 30 percent market share threshold, then it's not anti-competitive as long as  
15 there's no hardcore restriction.

16 MR TIDSWELL: So are you saying that the need to look at the 200 retailers is to prove  
17 that it is laid down uniformly, in the words of the CMA guidance?

18 MS PATEL: I don't know that we need to disclose the whole 200 to the claimant. But  
19 I think the defendant needs to understand the position in relation to what's just come  
20 to light. Because we have pleaded that everyone -- I think our defence, properly  
21 understood, suggests that everyone contracts on the terms and conditions that the  
22 claimant has contracted on and as I described this morning. So we need to review the  
23 position.

24 MR TIDSWELL: I understand why you might want to do that. That is why I say I can  
25 see the relevance of it. I'm trying to bring home the point as to why this matters.  
26 Where is it, what's the provision that you are tying it back to. I thought you were saying

1 it's because part of the requirement for qualitative distribution is uniform and applied  
2 in a non-discriminatory manner.

3 MS PATEL: That's right unless you satisfy the 30 per cent market share, in which  
4 case you don't need to satisfy those criteria.

5 MR TIDSWELL: But Mr Macfarlane is not saying, is he, that you're discriminating, he's  
6 not running that argument. Where in issue in the pleadings is the point about that? I  
7 understand why you want to establish it.

8 MS PATEL: I thought he was because he's made, for example, the point that another  
9 retailer has three websites and is allowed to run three websites but he's not been  
10 allowed to run two.

11 MR TIDSWELL: Okay.

12 MS PATEL: But I will be corrected by Mr Macfarlane if that's wrong.

13 MR TIDSWELL: No, I do think I recall. So that's the point. I just want to make sure  
14 I understand this. You're saying you need to be sure about the basis on which you  
15 contract with all of your customers because it's being said you have to -- because  
16 you're saying you acknowledge you have to apply consistency and in  
17 a non-discriminatory way and the claimant is saying that you have actually  
18 discriminated because other people are allowed other websites. Is that it?

19 MS PATEL: He has said that, yes. I think he's going further in saying that the reason  
20 we've discriminated is because in fact we were conducting RPM in relation to him.

21 MR TIDSWELL: He is certainly saying that. But I think if he's right about that then you  
22 don't get into any of that because it's a hardcore restriction, which comes back to the  
23 point -- I interrupted you and I'm sorry for doing that but I just wanted to focus on this  
24 point. I think you were actually saying at the time that I interrupted you that the  
25 hardcore restriction didn't trump the selective distribution. I struggle a bit with that.  
26 I don't know whether this goes to the back to the earlier conversation where you say it

1 trumps it because as a matter of fact it's not hardcore a matter of proper assessment  
2 of the clause in its context.

3 MS PATEL: I think that's the better way of putting it, sir, yes.

4 MR TIDSWELL: That's fine. So if it turns out as a matter of proper assessment in its  
5 context it is hardcore then the selective distribution argument doesn't arise?

6 MS PATEL: Yes.

7 MR TIDSWELL: That's really helpful, thank you. I don't know whether you're done on  
8 split trial. I have certainly got all those points you have made. Do want to say anything  
9 more about that and also could you just address the fast track point? I'm conscious of  
10 the time. I think we can go a bit past 4.30 but we really need to get this point nailed  
11 before we go any further.

12 MS PATEL: Can I check, sir, if there are any criteria in your list on split trial that I  
13 ought to address you on and haven't?

14 MR TIDSWELL: Absolutely. So, the first factor is the prospective advantage of saving  
15 costs on quantum outweighs the extra costs of having to have a second trial.

16 MS PATEL: I think I have sought to address you on that.

17 MR TIDSWELL: You definitely don't want that. Advantages and disadvantages in  
18 terms of trial preparation and management which you have as well. Inconvenience  
19 and strain on witnesses which you have as well. Excessive complexity and diffusion  
20 of issues which I think you've put in. You have certainly raised that in relation to  
21 causation. Particularly prejudice to one of the parties by delaying an award of  
22 compensation for example; obviously a point for Mr Macfarlane if it delays things.  
23 Difficulties in defining an appropriate split and whether a clean split is possible. I think  
24 you've raised the causation point in that context. Weight to be given to the risk of  
25 duplication, delay and disadvantage of a bifurcated appellate process. In other words,  
26 might it all go for an appeal in the meantime. What's the best course to ensure the

1 whole matter is adjudicated fairly, quickly and as efficiently as possible which you have  
2 addressed as well.

3 MS PATEL: I think I have mostly addressed it, sir. If I can just say I can see the  
4 attraction to the Tribunal of keeping it within the fast track. I can see an argument that  
5 that is helpful to the claimant and that one wants to try and provide a solution to the  
6 claimant as quickly as possible. But can I emphasise that this is quite a complex case,  
7 as I hope is evidenced by the fact that we all are still understanding it today. I do say  
8 that in order to try it fairly to both parties, because it is important that it's tried fairly for  
9 both parties, because it is a serious allegation, a timetable which splits and seeks  
10 a first hearing in April/May is not going to be a fair way of disposing of the first part of  
11 the trial.

12 MR TIDSWELL: And there are two other factors which fall off the bottom because  
13 they're just dealt with in a different way. One is whether a split trial would assist or  
14 discourage mediation and settlement. The last one is whether or not an order later in  
15 the day, after expenditure of time and cost, might actually increase costs which I think  
16 you have dealt with.

17 MS PATEL: So just on mediation, sir, the only one I have not addressed you on, I  
18 think in my submission, keeping it all together, so that both parties' minds are clearly  
19 focused on what can or can't or is likely to be recoverable, both in terms of damages,  
20 as well as injunctive relief, is likely to encourage or make mediation settlement more  
21 likely than splitting it.

22 MR TIDSWELL: Yes. Thank you.

23 MS PATEL: Fast track then, very quickly.

24 MR TIDSWELL: Yes. We will come to you in a minute, Mr Macfarlane. I just want to  
25 get this out from Ms Patel and then you'll get a chance to respond to all of this.

26 MS PATEL: So we've asked to take it out for these main reasons. Firstly, the time

1 estimate for the main substantive hearing is not three days or less because of the  
2 complexity of the issues involved and I have invited, sir, you to look at the Bell case.

3 I don't know if you had a chance to look at it previously.

4 MR TIDSWELL: Yes, I have.

5 MS PATEL: You'll have seen that involved an allegation of RPM as well and an online  
6 sales ban, paragraph 9 and obviously --

7 MR TIDSWELL: Quite a different set of facts, I think. I take the point about the  
8 context. I understand.

9 MS PATEL: These cases are all fact-specific, aren't they, fast track applications, so I  
10 don't place too much weight upon it.

11 MR TIDSWELL: Can I ask you what is your time estimate, what is your best guess at  
12 a time estimate, how many days?

13 MS PATEL: If it was liability only, the costs budget that we submitted. I think we said  
14 four days. I think it would be very tight on four days. I think it will be certainly a day  
15 on opening, because the law is complex, and it will be necessary to make sure that  
16 the claimant is keeping with us. Two days for factual and expert evidence because  
17 I think the estimate is six to eight factual witnesses, three to four on each side, and  
18 expert evidence. So I think two days for six to eight factual witnesses and at least one  
19 expert is tight actually.

20 MR TIDSWELL: Help me with six to eight factual witnesses. Mr Macfarlane will help  
21 me on his side but if we're not doing quantum, you've still got three or four witnesses,  
22 you're saying?

23 MS PATEL: Yes. So we've got Mr Hagger, Mr Henderson. We've got someone to  
24 deal with strategy and with the overview. Because Mr Henderson is in legal and  
25 Mr Hagger was dealing with a specific account, so neither of those two have the  
26 overview of the companies' commercial dealings and strategy. Then we've said

1 someone dealing with account terms and credit history which I think is relevant to  
2 causation. Even before you get to quantum, it's relevant to causation because I don't  
3 know if you saw in the defence there is a point about the very significant credit line  
4 that the claimant had been advanced and he said that he needed to buy a lot of stock  
5 to launch his new website and the defence pleads that even if the website had not  
6 been --

7 MR TIDSWELL: I saw all of that. I think just in the interests of time, I understand that  
8 point.

9 MS PATEL: Those are the three to four from the defendant.

10 MR TIDSWELL: Carry on on fast track then, please.

11 MS PATEL: That would be a tight four days. More likely five on liability only. I do  
12 appreciate that a fast track doesn't have to be limited to three days but when we're  
13 four and swaying into five, then like in Bell, where it was going to be five, paragraph 51,  
14 we would say that it's not appropriate for fast track, bearing in mind that every time in  
15 this case that we estimate a certain amount of time for a hearing like today, we go  
16 significantly over because of the challenges of this particular piece of litigation. So  
17 I think those are optimistic estimates and one has to build in a significant margin of  
18 error around them. So the complexity of the issues. Three separate bodies of law.  
19 We've pleaded in the defence, EU law applicable prior to 31 December 2021, when  
20 the defendant decided to cease trading with the claimant.

21 MR TIDSWELL: I have seen all of that.

22 MS PATEL: You've seen that.

23 MR TIDSWELL: You don't need to go through it.

24 MS PATEL: There are some differences between those bodies of law and there are  
25 issues about what regard is to be had to various Commission documents like the  
26 guidelines and the Guess decision that the claimant relies on, both pre and post Brexit.



1 So the legal issues are not straightforward and some time will be needed to go through  
2 it, given that we have three versions. Various issues of market share that we've dealt  
3 with. Questions of the hardcore restriction. Given the context of a selective  
4 distribution system and the entitlement of a supplier to require quality standards are  
5 not actually a straightforward area of law at all. There are conflicting decisions at  
6 different levels that will need to be looked at. There are then issues of relief and the  
7 effect of a hardcore core restriction on the agreement between the claimant and the  
8 defendant. Obviously, we see what the claimant -- there's an issue of severance that  
9 has come up today. The Commission guidelines suggest that hardcore restrictions  
10 are not severable. I don't know if the claimant is going to take issue with that. That  
11 will raise complicated legal issues if he does. Causation, as I have discussed, I don't  
12 think is straightforward. I think there will be a very significant argument about what the  
13 counterfactual would have been. And then loss. Now if it's not a split trial, I think we  
14 are looking at -- I said four to five for a liability trial. I think it follows that I'm saying six  
15 to seven if we include quantum because I think I said it was a day and a half more  
16 probably, to do quantum.

17 MR TIDSWELL: I think you said a day and it seems to have turned into two but  
18 anyway, never mind, keep going.

19 MS PATEL: Let's say six to seven and a half then. I think I said a day and a half. I  
20 said a day for experts and half a day for submissions. So six to six and a half -- is that  
21 what I mean?

22 MR TIDSWELL: I think you're talking about five and a half to six and a half, aren't  
23 you?

24 MS PATEL: Yes. Five to six and a half, I think I'm talking about.

25 MR TIDSWELL: Thank you. Got that.

26 MS PATEL: The determination of the claim, I think we've dealt with this. Three to four

1 witnesses of fact for the defendant. We had understood from the claimant that it would  
2 be himself. I said in my skeleton Mr Yates. I think that was my mistake, we meant  
3 Mr Midwood Mr Leonard is one of the people who used to work for us that  
4 Mr Macfarlane has said he is going to subpoena. Then we had thought he might be  
5 calling a director because he makes various statements about things that happened  
6 at board meetings. So that's how we got to up to eight witnesses of fact in total. That  
7 was similar to the Bell case. Paragraph 41. The defendant's expert on market share.  
8 Claimant and defendant expert on forensic accounting. So if it's not split, it's four  
9 experts. If it is split, it's one expert. Time consuming back and forth on disclosure. If  
10 the way we have had to go back and forth on the pleadings is any indication. Possible  
11 confidentiality issues. We've said we don't think that it's necessary to have a ring at  
12 the moment. Obviously, the issue has come up about other retailers. We don't know  
13 at the moment if there are going to be confidentiality issues vis a vis terms and  
14 conditions that belong to other retailers and we also have not bottomed out the data  
15 on market share sufficiently to know whether there might be confidential issues there.  
16 We're hoping that there won't be because obviously, a normal confidentiality ring will  
17 be very difficult, given that Mr Macfarlane is the person --

18 MR TIDSWELL: I understand the point. Forgive me for interrupting. I'm conscious  
19 Mr Macfarlane needs a fair chance to respond to this. I don't want to hurry you but  
20 you are -- I completely get that point. I think you don't need to get into that level of  
21 detail.

22 MS PATEL: The last two points then. Relevance of the sum at stake. It's £3 million  
23 which is not insubstantial and not dissimilar to Bell again, where the lower limit was  
24 three and a half. Paragraph 56. And I think I have mentioned the way that the  
25 proceedings are being conducted. The skeleton talks about various pleading issues.  
26 We've mentioned how much correspondence there has been, 65 pieces back and forth

1 between the parties since 10 November. Allegations like contempt of court vis a vis  
2 Shopify being made and then not pursued. Applications today for interim payments  
3 and interim rulings that we have to respond to in skeleton arguments that are then not  
4 pursued. Two skeleton arguments for this hearing. I think the claimant's now  
5 suggesting a preliminary hearing to deal with certain issues in advance of a trial on  
6 liability. Obviously, that will require further time out of a timetable as well. So, for  
7 those reasons, we simply don't think a trial within six months is a fair or reasonable  
8 way or realistic way of disposing of this claim, even if it is split into liability only.  
9 Sorry, I just need to address the claimant's case, Socrates, that he relies on. That was  
10 an abuse of dominance case. It was a damages claim for £112,500. Very, very  
11 different in terms of its sum. You can see that at paragraph 4. It was split, the  
12 damages to be heard later and I think it was a three to four day estimate for liability.  
13 On any view, it's less than what we're looking at here. It's worth much less than what  
14 we're looking at here. I don't believe it was being run in the way that this one is being  
15 run. So for all those reasons, we don't say it's a good analogy.

16 MR TIDSWELL: Thank you. Mr Macfarlane, there's a lot there. And I don't expect  
17 you to respond to every point. But I would like you to have the chance to say anything  
18 you want to, both about the idea of splitting the trial up and also about keeping within  
19 the fast track. So maybe that's the way to do it, is to start by whether you would prefer  
20 to have it in one unitary trial or would like to split it up and then you can go on from  
21 there to tell me -- once you've got that sort of framework set, you can tell me about  
22 what you think about it being in the fast track and anything you want to say about what  
23 Ms Patel said.

24 MR MACFARLANE: Yes, sir, if I can start with the fast track if I am able to.

25 MR TIDSWELL: If you prefer, do that, yes.

26 MR MACFARLANE: If I can start with that. I think it would eminently suit the defendant

1 to take this out of the fast track. We are but a small to medium business. We've  
2 already expressed that we don't have the money to throw at this with a team of  
3 lawyers. And indeed, I firmly believe that the defendant is very keen on the fact that  
4 we're probably not going to be in business to be able to pursue this matter any further,  
5 if it's taken out of fast track. Quite simply, being bombarded here, whilst I am on  
6 holiday, with over 1,000 documents to print off, to read, to respond to, many of which  
7 have come from the defendant's side of the argument, and I can see clearly that what  
8 the defendants are trying to do is to bombard us and brow beat us to death on this  
9 matter. I would say that it's quite a simple case, as far as I see it, despite all the fog  
10 that's thrown in there, that hardcore restriction is the focus, as I've set out in my  
11 skeleton argument, the brief one, where I tried to focus in just on the main issue.  
12 Nothing trumps a hardcore restriction at all. Once we've proven that, the roadway is  
13 clear from that point onwards. If that is proven by the court. I think it's just a simple  
14 case of the Tribunal being prepared, as you've proposed, to hear the argument over  
15 a hardcore restriction or not and whether or not an agreement exists. An agreement  
16 that I would have thought would have needed to be at least known about before  
17 somebody, on December 14, discovered they might have one. We had another  
18 hearing on these issues. Let's talk about the discovery arguments. If there were any  
19 more information to go into discovery, surely it should have gone into the previous  
20 case or have they discovered more things to throw into there, like they have discovered  
21 they might have a contract that's been signed by nobody prior to --

22 MR TIDSWELL: Sorry, Mr Macfarlane, just so I understand you, I think we've  
23 disposed of the idea there's any other agreement, we're just talking about the terms  
24 and conditions and about the way they implement them. So just so we're clear, and I  
25 don't know whether that's what you're referring to, but I don't think that's taking us  
26 anywhere, that line of argument.

1 MR MACFARLANE: I see that point, sir. The terms and conditions are, in my view,  
2 easily disposed with because the terms and conditions say that they have the right to  
3 vary these terms and conditions without notice. The terms and conditions have never  
4 been signed, they're implied. That was part of their argument in the previous court  
5 case. But in those implied terms and conditions they have the right to vary them. That  
6 means they can switch a selective distribution system without informing anybody and  
7 these things are supposed to be legally binding.

8 MR TIDSWELL: I don't think that is what they're saying, I think they're just saying  
9 they're entitled to run a distribution arrangement which is based on qualitative factors  
10 and so I don't think it's about an agreement. I think they're just saying if they do that,  
11 they're not breaking the law. Now you're quite right, and I think Ms Patel accepts, that  
12 if the Tribunal were to find there was a hardcore restriction, none of that matters and  
13 there is a bit of a point here about what your position is if you lose on the hardcore  
14 restriction. Do you still intend to fight the arguments on selective distribution? I'm not  
15 going to force you to answer that question now. You might want to think about what  
16 your position is. I'm not sure I completely understand your position on selective  
17 distribution arguments and that's partly because I think we established earlier you  
18 weren't completely sure how that operated because you thought there was another  
19 agreement and there isn't.

20 MR MACFARLANE: I think I have the picture, sir, that they're saying that the selective  
21 distribution system is incorporated into the terms and conditions.

22 MR TIDSWELL: Well I think even that's possibly giving it a bit too much of a  
23 contractual framework. I think they just say they're entitled to make decisions about  
24 who they supply to, based on their assessment of whether the quality of their product  
25 is maintained and they have enough provisions in the terms and conditions to allow  
26 them to exercise the right to refuse to supply you, if those conditions aren't met and

1 that not unlawful. It's a combination -- I want to give you a sense -- I may be  
2 misunderstanding what Ms Patel is saying but I think this is the thrust of it. It's  
3 a combination of what's in the terms and conditions that allow them to exercise some  
4 rights about supply or not supply and also sets out some basic parameters about what  
5 they say they're supplying. Then they say: if we then decide not to supply for those  
6 reasons and our assessment of the quality -- in this case, the attributes of the  
7 website -- then that's not unlawful because of the way the law works. So it's not really  
8 an agreement with you. Part of it is based on an agreement that you're agreeing to  
9 do certain things and the certain things matter; part of it's based on the access to, if  
10 you like, the excuse under what they call the block exemptions. I appreciate that's not  
11 straightforward, so I just want to try and give you a bit of a sense of how that works.

12 MR MACFARLANE: Whilst I do understand most of what you're saying there, sir,  
13 when it turns on quality standards, I look forward to the day when Deckers are able to  
14 bring themselves up to the quality standards that we set in retail already.

15 MR TIDSWELL: I think you've made that point in your reply. I understand that you  
16 say that. Can I just ask you to come back to this point about -- I think you're saying  
17 that you need to get on with this in a hurry because of the financial pressures, that you  
18 feel like the defendant's approach is actually just a stone wall to delay. You think the  
19 case is quite simple because really, you're focused on the hardcore restriction, as we  
20 discussed earlier. So therefore, I'm taking it that you would like to stay in the fast track  
21 and I think that's evident you would like to. Is there anything else you want to say  
22 about, for example, just your sense of how many witnesses you think you might call.  
23 Do you have view on that at the moment?

24 MR MACFARLANE: The witness statements are down to a bare minimum, sir. It's  
25 me, in reality, and maybe one other. I think that in itself is quite doubtful. Mr Midwood  
26 no longer is with the company and there hasn't been anybody else who has been

1 involved, so there's only myself --

2 MR TIDSWELL: That's helpful. And then just one other thing to ask you about. I don't  
3 need you to address the question of the complexity of the issues because I can form  
4 a view on all that. I think that's probably all I need to ask you about fast track unless  
5 there's anything else you want to say about it.

6 MR MACFARLANE: No, sir. I think you know the criteria for fast track as well as  
7 anybody else and no one needs to tell you about that. I can see very clearly and I  
8 have read these things myself, is that this case is eminently suitable for fast track. I  
9 do think that if we don't get fast track, then that's the case over, as far as I'm concerned,  
10 because we simply cannot go there.

11 MR TIDSWELL: Okay. In relation to this idea we might split the trial in half, is there  
12 anything you want to say about that? I just frame that a bit for you. One of the  
13 consequences would be we'd argue about all these -- what we call the liability points  
14 and possibly, Ms Patel says, put the causation point in as well, it hasn't caused any  
15 consequence. If you won on that and only if you won on that, would we then go ahead  
16 and look at the questions of damages. And so there's some advantages and  
17 disadvantages for you in that. You get, obviously, a finding early on as to whether or  
18 not you're entitled to relief but you might have to wait a bit longer for your money if you  
19 are, because it means the damages hearing would be put off a bit. I want to get a  
20 sense of how you feel about that trade off. Would you rather keep it all together, and  
21 accept it's probably going to have to be later in the year as a result because the  
22 damages bit is going to require a fair amount, I think, of back and forth in relation to  
23 evidence and documents and so on, and accountants getting involved in things. I think  
24 inevitably, Ms Patel is right. If we keep it all together, it ends up being a bit later. Or  
25 would you rather separate the two and get some finding on whether you've got a case  
26 or not on liability and then we can come back later and work out what your damages

1 | might be. What's your sense of your preference on that?

2 | MR MACFARLANE: Well bearing in mind, sir, that I'm also acutely aware of the  
3 | possibility that we might lose as well and, therefore, I want to keep the possible  
4 | consequences and the costs of losing in mind as well. So therefore, having a split  
5 | hearing is much more suitable as far as we're concerned because once liability is -- if  
6 | it were to be determined that there is liability to Up and Running, I can actually sell that  
7 | claim. I can actually raise funds against that claim to be able to sustain our existence  
8 | ongoing thereafter and therefore, at the end of the day, if the determination, and I say  
9 | a big if, is in our favour, then we will be able to afford. Because at the end of the day,  
10 | it will be the defendant who'll be paying anyway. So we will be able to raise money to  
11 | keep ourselves alive whilst that's going. So it's my preference that it should be a split  
12 | trial because we can reach the -- to what seems to me to be an obvious outcome but  
13 | that's to be determined by you, sir. But it would be much better, as far as we're  
14 | concerned, to be a split trial, so that we can actually focus on the units without throwing  
15 | so much fog in there -- focus on the issues, I meant, sorry, without throwing so much  
16 | fog into there.

17 | MR TIDSWELL: Yes, thank you, that's really helpful. Did you want to say anything  
18 | else about split trial? Ms Patel made a whole load of points about experts and market  
19 | share and these retail contracts and I don't think I need anything from you, unless you  
20 | want to say something about it? There's quite a lot there, Mr Macfarlane, I don't want  
21 | to rush you.

22 | MR MACFARLANE: I thought that question was to Ms Patel. Sorry, my apologies.

23 | MR TIDSWELL: Whether you want to say anything else about all those points she  
24 | made about -- she talked about the questions of how you manage liability and  
25 | causation. She talked a little bit about the number of witnesses and the timetable and  
26 | experts and market share and then she talked about retail contracts. So there's a



1 bunch of things she said and as I say, I don't think you need -- this is quite technical  
2 points, so I am not sure that I'm going to be assisted much by what you say but if you  
3 do want to say anything about them, I'm very happy to hear them.

4 MR MACFARLANE: No, sir. I think that it's sufficient to say that I just see this as  
5 an attempt to stretch this matter out beyond affordability for Up and Running and for  
6 the business.

7 MR TIDSWELL: I've got that point. I've got that point very clearly. So I understand  
8 that.

9 MR MACFARLANE: Thank you. I have no more to say.

10 MR TIDSWELL: Okay. That's really helpful.

11 MS PATEL: Sir, might I say just two things in reply.

12 MR TIDSWELL: Yes, of course.

13 MS PATEL: Thank you. Those two points are obviously -- if there is a concern about  
14 speed and if there is a concern about costs, then the fast track is one way of catering  
15 to those concerns but, of course, even if the case comes out of the fast track, a faster  
16 than usual timetable can be set to bring this matter on at a time which is manageable  
17 and so not April and May but still faster than would be usual. And of course, costs can  
18 still be managed, either through a costs cap or through costs budgeting and detailed  
19 assessment, as you can see from the Bell case. So we would say that those reasons  
20 on their own are not reasons why the case should stay in the fast track, when for the  
21 reasons I have said, April and May just will not be possible because there are other  
22 ways of managing those concerns.

23 MR TIDSWELL: Mr Macfarlane, strictly speaking, you don't get an answer but I'm  
24 going to let you but I just -- remember that if there's something new raised, then that's  
25 fine, but otherwise this could go on for ever.

26 MR MACFARLANE: I have just realised you've already covered it off by saying the

1 Bell case is a completely different matter all together. It was an international argument  
2 and therefore the complications were big indeed between supplying Canada and the  
3 USA.

4 MR TIDSWELL: Thank you. You can take it I've had a good look at the Bell case and  
5 I'm familiar with it. That's helpful. Ms Patel, that was it, was it?

6 MS PATEL: Yes, sir.

7 MR TIDSWELL: Thank you very much. Okay. So, that's been helpful. I'm conscious  
8 of the time and also there's quite a lot of material for me to digest, so I'm going to  
9 reserve my decision on both of those points which are connected, the fast track point  
10 and the split trial point and I will try and get you a ruling on that as quickly as possible.  
11 Given where we are in the day, I'm afraid we're pretty much out of time and I'm sure  
12 you feel the same. I'm just conscious there's one point that is consequent on that  
13 judgment that I have reserved and that is the question of cost management. And  
14 obviously, it arises in any event, in slightly different ways, I think, depending on what I  
15 decide about the fast track procedure. I think the question is whether -- clearly, if I  
16 agree with you, Ms Patel, we're going to start again in terms of thinking about what the  
17 timetable looks like and how it goes outside the fast track. If I decide that it stays in  
18 the fast track in part or in whole, then I will need to address the question of a costs  
19 cap. I've got your submissions on that. I wonder whether -- would you be happy for  
20 me to deal with that as part of the judgment, if it arises, my decision, or would you  
21 prefer that we had -- would you like to make further submissions once you've seen the  
22 outcome of what I've said?

23 MS PATEL: May I have a moment to take instructions, sir?

24 MR TIDSWELL: Yes, of course.

25 MS PATEL: Sir, I think the instructions are we are -- if the options are shall we deal  
26 with the cap on the papers, or would we like to come back, I think we would like the

1 claimant to avoid incurring unnecessary costs. So our preference would be for it to be  
2 dealt on the papers. I wonder if, given that we sent in a revised cost budget -- would  
3 you be proposing to deal with the costs cap after your ruling on the fast track or before?

4 MR TIDSWELL: Well, I think it has to follow after, doesn't it?

5 MS PATEL: Yes.

6 MR TIDSWELL: I suppose the question is -- one thing I could do is I could prepare  
7 my ruling and if I were to decide it stays in the fast track, I could include in that my  
8 views on what the cost cap should be. Alternatively, I can produce a ruling and if I  
9 decide it stays in the fast track, then I could invite you to say anything more you wanted  
10 to say about it in writing. Maybe that is the way to deal with it.

11 MS PATEL: I think that's the way, sir, because of course, we might wish to  
12 say -- suggest another way of managing it or we might wish to suggest a cap. We  
13 might wish to make some other points on the revised cost budget that we put in. So  
14 I think that would be the most efficient way.

15 MR TIDSWELL: That probably chimes, I think, with -- I did have some questions for  
16 you about the costs budget but actually, maybe the answer would be at that stage, if  
17 we get to that position, I could ask you those questions. I should ask you the questions  
18 in any event, whichever stream we're in.

19 MS PATEL: Either way we will respond in writing. Either to an indicative costs cap or  
20 to make submissions on what should happen if it's not in the fast track.

21 MR TIDSWELL: Yes. That's right. Mr Macfarlane, I just want to check something  
22 with you. Firstly, are you happy with that arrangement, that I'm going to make  
23 a decision about which stream we're in and how the trial is configured, whether it's  
24 split or not, and then I will invite a further round of discussion but it will be in writing,  
25 not of a hearing, and after that, I will decide what the cost cap should be. And I may  
26 give some indications in the course of that, so you know where I'm coming from. Are

1 | you happy with that?

2 | MR MACFARLANE: Yes, sir.

3 | MR TIDSWELL: Can I ask you just one thing that emerged -- I think this is right but I  
4 | want to check it is right, that in Ms Patel's skeleton, she said you indicated earlier on  
5 | in the proceedings that you would be agreeable to a cost cap of £100,000 pounds. I  
6 | just want to check with you whether that is the claimant's position or whether you  
7 | expect you might say something different. In other words, are you committed to that  
8 | figure or would you like to leave it open for further discussion? I would like to know  
9 | what the frame of reference is, if I'm going to come back to you on this.

10 | MR MACFARLANE: If the defendant is going to correspond over the costs cap, then  
11 | I would like to have the same option to be able to correspond on it as well, so I would  
12 | like to leave it open but my initial thoughts are I placed everything within the realms of  
13 | affordability. We can afford to lose to the tune of £100,000. It would be difficult but  
14 | we can afford that. Anything above that, we'd have to reconsider our position.

15 | MR TIDSWELL: Yes. That's extremely helpful, thank you.

16 | MS PATEL: Sir, before we leave, those behind me --

17 | MR TIDSWELL: I wasn't quite leaving yet.

18 | MS PATEL: On the topic of costs, before we leave the topic of costs.

19 | MR TIDSWELL: Yes, of course.

20 | MS PATEL: Those behind me would like me to just make you aware, sir, of the costs  
21 | incurred just for this CMC, when you go away and reach your decision or indicative  
22 | decision. So the costs of preparing just for this CMC for solicitors and counsel are  
23 | £44,930 plus VAT.

24 | MR TIDSWELL: It might be quite helpful to have a breakdown of that, Ms Patel.  
25 | Would you ask your instructing solicitors to put in a letter what the hours and the rates  
26 | are, including your time. Because I'd quite like to understand how that's broken down.

1 Just with a very short narrative. I don't want to cause cost on costs. I would like to  
2 understand where that money is being spent. If it's possible to extract it from the  
3 accounting system, just to give me an indication of what the work streams are, that  
4 would be very helpful.

5 MS PATEL: Certainly, sir.

6 MR TIDSWELL: So, mainly on the agenda, not for discussion now because we've  
7 really run out of time, we have disclosure. What I propose to do is I will let you have -- I  
8 propose to treat that on the papers by reference to the very helpful schedule that  
9 you've given me, Ms Patel. I'm giving an indication of thinking on that and if we have  
10 to have a hearing on it, we do. I am conscious I haven't heard from the parties on it  
11 but it did seem to me that actually, there wasn't an awful lot there that couldn't be  
12 reasonably swiftly dealt with. If you're both comfortable with that, I will deal with that  
13 in writing and where I can't deal with it, I will ask you for any further submissions on it.  
14 Confidentiality I think doesn't arise particularly at the moment but you've put down  
15 a marker about that, Ms Patel, which I understand and we'll come back to it. Expert  
16 evidence I think we've dealt with as far as we can today and we will need to revisit that  
17 as and when we next get directions and equally, the timetable, trial date are really  
18 entirely dependent, I think, on the decision I make as to the form of the trial. I will just  
19 put one point down, Ms Patel, really particularly in relation to your draft directions.  
20 There's going to be a limit on my ability to deal with a case after the summer because  
21 I am going to be in a trial for a good part of the end of this year and the beginning of  
22 next year and that's only, obviously, part of the picture of when this case is going to  
23 be heard but just so you know, my availability come the autumn is quite constrained.

24 MS PATEL: Does that give us really only up to July, sir, or where does that take us?

25 MR TIDSWELL: It certainly may mean that trying the case in July may be the latest  
26 sensible option that arises. I can't say that with certainty at the moment but that is a

1 possibility. I just wanted to give you a sense that my time is not unconstrained. Once  
2 we get into the autumn, I have a couple of trials in my diary already.

3 MS PATEL: That's helpful.

4 MR TIDSWELL: Is there anything else that either of you would like to raise now.  
5 Mr Macfarlane, anything else you want to raise at the moment?

6 MR MACFARLANE: No, sir, I think we've covered everything off, given -- thank you  
7 for all the extra time that you've put into this beyond --

8 MR TIDSWELL: Thank you and I appreciate that, obviously, you're away and that's  
9 not straightforward. So thank you for that. Ms Patel, anything that you would like to  
10 raise?

11 MS PATEL: Just in terms of the order from today about the steps that we have agreed.  
12 We've agreed, I think, one week for the letter on damages. I'm not sure we agreed  
13 dates for the claim form or the reply or indeed, an amended defence.

14 MR TIDSWELL: In relation to the dates for the claim form and the reply,  
15 Mr Macfarlane, I think we've said -- actually, it wasn't quite a week, it was a week and  
16 a bit, wasn't it, because we gave you until Monday the 29th for the letter on the  
17 damages. When can you tidy up these documents in the way we discussed right at  
18 the beginning of this call? When can you get those done? We're talking about the  
19 claim form and all the attachments and also the reply.

20 MR MACFARLANE: If I can be given a week beyond that one, sir, I should be able to  
21 do that.

22 MR TIDSWELL: Ms Patel, I don't think -- this is an exercise in clarity rather than any  
23 sense of understanding. I think you understand the case perfectly well from what's  
24 there, so I don't think it matters terribly, does it?

25 MS PATEL: Those dates? No, sir.

26 MR TIDSWELL: That's fine. So that would then be the following Monday, whatever

1 that is. 5 February for those exercises, Mr Macfarlane?

2 MR MACFARLANE: Yes, sir.

3 MR TIDSWELL: Then, just in relation to the defence, the amendments you're talking  
4 about are not consequential on what we've done with the claim form or the reply, are  
5 they? Really you're talking about introducing new material and I'm not suggesting for  
6 a moment you shouldn't do, but is there anything that actually is consequential? I don't  
7 think there is, is there?

8 MS PATEL: No, I don't think there is. I think they fall into two categories. One is in so  
9 far as it's -- amendments which flow from what I addressed you on at the start of the  
10 hearing and the other is amendments which might flow from the discussions we've  
11 had today. It may be that it is not necessary to add anything to address indirect RPM  
12 but we would like the opportunity to look at it.

13 MR TIDSWELL: The appropriate way to proceed is that you should -- so that's the  
14 question of 200 (inaudible) contract and the question of whether you want to say  
15 anything more about indirect hardcore restriction. So I think the proper way forward  
16 is for you to produce a draft of that for permission to amend and really, I --

17 MS PATEL: We do that as soon as we can.

18 MR TIDSWELL: I think that's right, isn't it? I'm not going to put a timetable on that for  
19 you. The sooner you do it, the easier it is to get it resolved, isn't it? Good, okay.  
20 Anything else?

21 MS PATEL: The last thing from me is on experts. Are you expecting formal  
22 applications. These proceedings obviously have been proceeding in a more informal  
23 manner than perhaps might normally be the case, with applications without formal  
24 witness statements in support and so on. Are you expecting a formal application for  
25 expert evidence or how should we proceed with that?

26 MR TIDSWELL: Yes, so the answer is I don't -- and this is the case, I think, for much

1 of the activity in the Tribunal. We don't need applications supported by witness  
2 statements. What we do need first and foremost is the parties to have discussed  
3 matters before they make applications and that is something, Mr Macfarlane, just to  
4 register with you, that we're trying to -- there are some provisions in the rules that  
5 require the parties to cooperate to get things done. So the mindset in front of this court  
6 which is different from other courts, is that we expect you to get together and work out  
7 the best way and the most efficient way to sort it out. I appreciate you won't always  
8 agree on that but that's what we expect you to do. In relation to expert evidence,  
9 permission is always required in front of the Tribunal, and a case will need to be made.  
10 It can be made in a letter. I don't know, Mr Macfarlane, whether you agree with  
11 Ms Patel that experts are necessary. You don't need to answer that now but that's  
12 something for you to think about. You may take the view they're not but in that case,  
13 you need to address the point that Ms Patel is making about how do you work out  
14 whether the 30 or the ten per cent apply. Maybe you can agree on that which would  
15 be quite helpful. But maybe you can't, in which case it's fine. I think the answer, Ms  
16 Patel, is a letter is fine but it needs to set out properly the basis on which the expert  
17 evidence is sought and it would be very helpful if, in those circumstances, you had  
18 spoken to a potential expert and you were able to relay their views about how they  
19 would go about it, if it's anything other than completely conventional.

20 MR MACFARLANE: Sir, if I may say so, I can't imagine that the witness statements,  
21 especially from Mr Henderson and Mr Hagger, could be that much different from the  
22 ones from the previous case that need to be sent. I imagine that the vast majority of  
23 any expert witnesses would be required in the quantum and market share argument  
24 more than it was in the liability case.

25 MR TIDSWELL: Yes, just to be clear, I'm talking about experts in the context of the  
26 liability case put only on a relatively narrow point about the market share point and



1 Ms Patel talked about it a bit. You might have a look at the transcript, Mr Macfarlane,  
2 and you'll see how it all pieces together and also, if you just go back and look at the  
3 provisions in the skeleton that Ms Patel took us to, basically the point is there are some  
4 provisions in these block exemptions and in the de minimis notice which are things  
5 which if there's no hardcore restriction, then relax the restrictions that might otherwise  
6 apply. And the question is, how do we work out whether they apply or not because  
7 we need to calculate the percentages and that's all about what's the right market and  
8 what's the market share within it. I have to say, I would have thought it was a fairly  
9 straightforward exercise unless the parties are taking extreme views. And I think,  
10 obviously, you'll need to decide whether you are able to agree or at least avoid a big  
11 fight about that, in which case an expert might not be necessary at all for liability.  
12 Clearly an expert is going to be, I suspect, needed for quantum, as and when we get  
13 to that, whether it's an integrated or later part of this case. Does that make sense?

14 MR MACFARLANE: Yes, sir, because the data on market share is actually held by  
15 the defendant.

16 MR TIDSWELL: I think there's a preliminary point. I think the point that Ms Patel is  
17 actually making is not so much what the numbers are, it's what the market is. I think  
18 she's saying; you're saying the market is a market just for these shoes, these particular  
19 shoes made by the defendant and I don't think that is the defendant's position. The  
20 defendant's saying there's a much broader market and now, obviously, that matters  
21 for the purposes of the Article 102 case but we've parked that. You may feel your  
22 obliged to maintain your position in relation to that Mr Macfarlane, in which case, we  
23 will have to deal with it.

24 MR MACFARLANE: I'm open to it, sir. I know that a wider market of specialist shoes  
25 and I'm confident -- when we were a retailer for them, they required us to supply them  
26 with the data compared with other suppliers.

1 MR TIDSWELL: I understand. Look, I think -- sorry to interrupt you -- what I can't do  
2 is one of those things, I can't advise you on how you should position your market  
3 analysis, but actually, I do think you should think very hard about -- and again, if there's  
4 anyone you can just bounce the idea off because it does, obviously, have implications  
5 if we ever get to the Article 102 case, Chapter II case, but actually, for the purposes of  
6 this case, I would have thought the answer was relatively straightforward but it's not  
7 so straightforward that I can say to you: oh, this is the right answer. I think you need  
8 to work it through yourself. When you've done that, it would be quite helpful if you  
9 were to engage as constructively as you can with the defendant, to see if you can  
10 agree this point.

11 MR MACFARLANE: I will try that, sir.

12 MR TIDSWELL: That's entirely a matter for you. I am not telling you, I'm not directing  
13 you in one direction or another, I'm just saying there's something there for you to have  
14 a look at and think about.

15 MR MACFARLANE: Yes, sir.

16 MR TIDSWELL: Excellent. Thank you very much. I'm afraid that has been a very long  
17 hearing and we haven't really covered nearly as much, perhaps, as we might have if  
18 we had moved a bit quicker but I think it has been helpful, I hope, in clarifying some  
19 matters and we certainly got some issues out of the way. I will let you have a ruling  
20 as soon as I can and we will also just set up some timings for the processes that will  
21 then follow after that, whatever the outcome is, so we'll be touch with you about that.

22 MS PATEL: That will include setting the directions to whatever trial you order?

23 MR TIDSWELL: Yes, once we know what the shape of the proceedings looks like, I  
24 will give you a provisional suggestion of -- I'm not going to set the trial timetable without  
25 further input is the short point. I will ask you for views, Ms Patel, before I do that, of  
26 course.

1 MS PATEL: Thank you.

2 MR TIDSWELL: I will do that probably in the form of a provisional position which I will  
3 ask you to push back on, both of you, obviously.

4 MS PATEL: Thank you very much, sir.

5 MR TIDSWELL: Thank you.

6 **(5.02 pm)**

7 **(The hearing concluded)**

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