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5 **IN THE COMPETITION**
6 **APPEAL**
7 **TRIBUNAL**
8

Case No: 1615/5/7/23

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

14 Friday 1st December 2023

15
16 Before:

17
18 Ben Tidswell

19
20 (Sitting as a Tribunal in England and Wales)

21
22 BETWEEN:

23
24 **Claimant**

25
26 **Up and Running (UK) Limited**

27
28 And

29
30 **Defendant**

31 **Deckers UK Limited**

32
33 **A P P E A R A N C E S**

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

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

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1
2 (10.30 am)
3

4 **Case management conference**

5 THE CHAIRMAN: Yes, good morning, Mr Macfarlane, good morning, Ms Patel. I just
6 need to read something about our live streams. Not all of you are regular attendees,
7 so if you listen carefully, please, to this announcement.

8 Some of you are joining via live stream on our website, so I must start with a customary
9 warning: A official recording is being made and an authorised transcript will be
10 produced, but it's strictly prohibited for anyone else to make an unauthorised
11 recording, whether audio or visual, of the proceedings and a breach of that provision
12 is punishable as a contempt of court.

13 Can I just check you can hear me? Mr Macfarlane, can you hear me properly?

14 MR MACFARLANE: Yes, Mr Tidswell.

15 THE CHAIRMAN: You can leave your microphone on, if you wish. It probably makes
16 it a bit easier. Ms Patel, you can hear me as well?

17 MS PATEL: I can, sir. Yes.

18 THE CHAIRMAN: Thank you, Ms Patel, for your skeleton.

19 Mr Macfarlane, can I just confirm you're not represented today?

20 MR MACFARLANE: That's correct sir.

21 THE CHAIRMAN: We're going to be dealing with some quite complex matters in this
22 case from time to time. There's no question, if you were represented, it would probably
23 be more helpful for everybody, but that is a matter for you and I understand there are
24 a good practical reasons why you might decide not to instruct lawyers. I just want to
25 say a few things about that, if that's your position.

26 If you decide not to instruct lawyers, it's my duty to ensure that the matter is dealt with

1 | justly and proportionally and that means I can intervene, as I think appropriate, to
2 | assist you to present your case fairly, but I'm also impartial as between you and the
3 | defendants and I must be seen to be impartial. So there are limits on what I can do to
4 | assist you. Further, neither I nor the Tribunal staff can give you any legal advice. I just
5 | want it make sure that's clear.

6 | Now, defendant's counsel, Ms Patel, will, I'm sure, be conscious of you not being
7 | represented and she will be careful not to take unfair advantage of that and that
8 | includes an obligation on Ms Patel to inform me of any relevant cases on or legislation
9 | which might assist you and also seeking to avoid any procedural irregularity.

10 | Just to confirm, Ms Patel, I hope that does state your understanding as well as mine
11 | of your obligations.

12 | MS PATEL: Yes, sir.

13 | THE CHAIRMAN: Mr Macfarlane, does that make sense and can I ask you to confirm
14 | you are happy to proceed on that basis?

15 | MR MACFARLANE: Yes. I would just like to say it's not my choice to be a litigant in
16 | person, but, unfortunately, with the state of retail and the Covid and various issues, it's
17 | beyond affordability for us to be able -- it's not within our financial resources to be able
18 | to afford. So I'm afraid, as much as I do not enjoy this, I'm stuck with it.

19 | THE CHAIRMAN: Yes, understood. Thank you, that is helpful and completely
20 | understood.

21 | Mr Macfarlane, just in terms, I think you're familiar a little bit, as I understand it, with
22 | court proceedings, but just to deal with the practicalities of this. If there's anything you
23 | don't understand as we go along, then please do make it known in this hearing or
24 | indeed any hearing. So if you're not sure what's going on, then please say so.

25 | In these hearings, when we are virtual, you can do that by putting up your hand.
26 | I assume you're familiar with the function on Teams to do that.

1 MR MACFARLANE: Yes, sir.

2 THE CHAIRMAN: The ground rulings generally for this hearing and indeed all
3 hearings are that I will ask you when I want you to speak and generally you'll get the
4 right to respond to what the defendant says about anything, certainly anything fresh
5 that they say, but while we're online, while we're doing this virtually, it would be very
6 helpful if you want to say something that you indicate that with a raised hand rather
7 than jumping in. So please don't interrupt either Ms Patel or me and please be patient
8 if I take a bit of time to get to you, because there may be reasons why I want to explore
9 matters with Ms Patel before I come back to you. Is that all clear and you are happy
10 with that?

11 MR MACFARLANE: Fully understood, sir, yes, absolutely understood.

12 THE CHAIRMAN: Thank you very much.

13 Just in terms of the agenda, I've got the following items and then a couple of things to
14 add. So on the agenda we have confidentiality, fast track, allocation, costs
15 management, clarification and additional information or requirements, disclosure,
16 potential interim injunction application and then timetable for further steps and the
17 need for a further CMC. I've got one extra thing to add to that which is forum and
18 actually we can probably deal with that now.

19 I'm assuming these are proceedings in England and Wales for the purposes of rule
20 18, unless there's any contrary suggestion.

21 Mr Macfarlane, do you have anything to say about that?

22 MR MACFARLANE: Just a quick thought in my mind that we are actually a Scottish
23 registered company. I did wonder whether that would have any bearing upon these
24 proceedings just a couple of days ago.

25 THE CHAIRMAN: And where are you resident, Mr Macfarlane?

26 MR MACFARLANE: Harrogate in North Yorkshire and the head office is also in

1 Harrogate in North Yorkshire.

2 THE CHAIRMAN: And where are most of your customers?

3 MR MACFARLANE: 90 per cent are in England.

4 THE CHAIRMAN: Yes. Thank you, that's helpful.

5 Ms Patel, do you have a strong view on this. I must confess, having heard what

6 Mr Macfarlane say, I'm still inclined to have the proceedings in England and Wales,

7 but if you have a different view, we should certainly explore that.

8 MS PATEL: No, I believe -- I'll be corrected from those instructing me in I'm

9 wrong -- that our understanding had been that these were likely to be proceedings in

10 England and Wales, given where the claimant's business is.

11 THE CHAIRMAN: Yes, that's very helpful. Well, in that case, I will make an order that

12 the proceedings are in England and Wales for the purposes of rule 18.

13 I also picked up there were some other item that should go on the agenda, and

14 particularly, Ms Patel, there's a point you've got about collateral use restrictions of

15 documents and without prejudice privilege point and I was going to suggest we add

16 those as sub items into the confidentiality section, which I know is not precisely the

17 same thing, but it seemed to be a convenient place to deal with it; are you happy if we

18 do that?

19 MS PATEL: I am happy to do that, sir, and can I apologise for are my croakiness.

20 THE CHAIRMAN: Not at all. Not having heard you before I didn't know you were

21 croaky, so we'll do that. Is there anything else to go on the agenda for today?

22 Mr Macfarlane, anything else you would like to deal with?

23 MR MACFARLANE: Not that I can think of at the moment, sir.

24 THE CHAIRMAN: Good. Thank you. Just jump straight into -- we'll do it in the order

25 in which the agenda is set out. So let's jump straight to the confidentiality. Now, it

26 seems to me there are two aspects to consider here. The first is there's a point about

1 the confidentiality of information as shared between the parties, in other words what
2 restrictions there might be on information that's shared by one party to the other, either
3 in disclosure or witness statements or expert reports. I got the impression that the
4 parties didn't think that that was likely to be a problem at that stage, but would like to
5 leave it to be revisited later. I think that is how it was put in your skeleton, Ms Patel;
6 is that right?

7 MS PATEL: I think that's fair, sir. We don't think it is likely to be necessary, but we
8 think it would be prudent to park it, if I might say, for now until pleadings have closed.

9 THE CHAIRMAN: Yes. Mr Macfarlane, are you happy with that? We're just talking
10 about the way you treat the information that passes between you at the moment.

11 MR MACFARLANE: Yes, sir, I did have many some thoughts on the confidentiality
12 ring and that was maybe a suggestion of some limited confidentiality ring for certain
13 items that would be uncomfortable for us to be out in the public domain, such as
14 financial, and the possibility that there could be restrictions on certain disclosed
15 documents via the confidentiality ring. For instance, documents that we've been given
16 in the previous case that have been redacted that may not be required. So
17 maybe -- I'm just suggesting, sir -- maybe a confidentiality ring where both parties
18 agrees that that should not be in public in a limited sense for things that are sensitive
19 maybe on both sides, that both sides can agree that that shouldn't be out in public but
20 should nevertheless be considered in the tribunal.

21 THE CHAIRMAN: Yes. That's helpful actually, Mr Macfarlane, because actually that
22 was my second point which jumped neatly into, and I do know you have a concern
23 about the publication of sensitive material.

24 Now, just to set the scene a little bit for that, by their very nature these proceedings
25 are public, and that's an important consideration in the interests of justice for the
26 Tribunal. There are provisions which allow the prevention of wider publication of

1 sensitive documents and actually allow me to hear certain matters in private. But the
2 bar for that is really quite high and especially for any private hearing. So in order to
3 take advantage of that, you will need to satisfy me and that's even to take advantage
4 of the treatment of documents as confidential, you'll need to satisfy me that you meet
5 the requirements. Of course, you'll be aware that these proceedings are being live
6 streamed and it is therefore open to the public to attend.

7 Now, what I suggest is that, if there's a particular subject matter which is commercially
8 sensitive in your view and which if closed would cause you or your franchisees
9 significant harm, you should let us know about that and explain why and then we can
10 decide what to do about it.

11 MR MACFARLANE: Yes, sir.

12 THE CHAIRMAN: And I don't think we need to deal with that today, because, as far
13 as I can tell, there's not anything coming out that --

14 MR MACFARLANE: Oh dear. Technology.
15 I'm afraid it would appear you've frozen.

16 MS PATEL: I think if we just wait hopefully they will --

17 MR MACFARLANE: It will come back. They will have their IT men all over it.

18 THE CHAIRMAN: I'm sorry, that's never happened before. Can you hear me?

19 MS PATEL: We can hear you say, sir, but your image has frozen.

20 THE CHAIRMAN: Okay. Well, I don't know why that is, that's very odd and no doubt
21 our IT team are looking at that. Shall we keep going if you can hear me?

22 MS PATEL: Yes.

23 THE CHAIRMAN: I don't know where I lost you, but I think I was saying to you,
24 Mr Macfarlane, that if there was something particularly which would cause harm either
25 to you or your franchisees because of its commercial sensitivity, you should let us
26 know and I'll decide what to do with it. I don't think we need to do that today because

1 I don't think there is anything coming today, unless you tell me otherwise, that falls into
2 that category. Clearly, if there is, you should tell me when we get to it.

3 What I can't give you is any assurance that documents will be protected either initially
4 or in the long run. Obviously that's a matter for discussion and Ms Patel may have
5 views on any particular applications you may make about the disclosure of documents.
6 That is the lay of the land and I suggest we proceed on that basis, at least for today,
7 and if we have anything you want to say about that in terms of future hearings,
8 obviously can you get in touch with us about that.

9 MR MACFARLANE: Yes, thank you, sir.

10 THE CHAIRMAN: Ms Patel, are you happy to proceed on that basis?

11 MS PATEL: I am happy to proceed on basis, sir, in terms of how we move forward.
12 I simply have one observation as to what Mr Macfarlane said about documents from
13 the other proceedings which perhaps takes us into the collateral use point in any event.
14 I wonder, sir, if it might be helpful for you to outline the rules on collateral use for the
15 benefit of Mr Macfarlane so that he's aware of what the sort of landscape is. I think
16 there are two issues: one is about evidence and one is about documents from these
17 previous proceedings and just how those matters are normally dealt with as between
18 different sets of proceedings.

19 THE CHAIRMAN: Yes, of course. Well, it does take us into that subject, I think.

20 Just before we move onto that though, I just want to make sure we're finished on the
21 other confidentiality issues. Is there anything else that either of you want to say about
22 confidentially generally before we move on?

23 Let's move on to the collateral use point.

24 Mr Macfarlane, this is a matter of the rules that apply to the court that the previous
25 proceedings were in and those, as I understand it, will be governed by the Civil
26 Procedure Rules and they make provision that documents that are produced by way

1 of disclosure of those proceedings and also witness statements that are produced in
2 those proceedings are not, absent a contrary order of the court, to be used for any
3 other purpose. So that's why they're called -- that's why we talk about collateral use,
4 because if you use them for a purpose which is collateral to the proceedings
5 themselves, then, generally speaking, you need permission for that.

6 Now, I think that comes particularly into focus because of the deployment by of you
7 two witness statements that have been filed in previous proceedings. Maybe, before
8 we get into the detail of that, I just wanted to see whether you had any observations
9 on that general or, indeed, Ms Patel, is there anything else you think I should be saying
10 to Mr Macfarlane about that? Have I correctly summarised and is there anything else
11 you think should be added to that?

12 MS PATEL: I suppose maybe it's just helpful to explain to Mr Macfarlane that there
13 would be provision for the filing of witness statements in these proceedings and,
14 you know, to the extent the Tribunal deemed it necessary, documents would be
15 provided in these proceedings. So the effect of those restrictions under the CPR is
16 not to shut out material which is relevant to the determination of the dispute, it's simply
17 to keep sets of proceedings distinct and so clearly, to the extent evidence is necessary
18 in these proceedings, evidence will be filed by my clients and to the extent that
19 documents are necessary, they will be provided. So those -- you know, there shouldn't
20 be a concern that relying on these collateral use provisions is, you know, going to
21 make these proceedings unfair in any way.

22 THE CHAIRMAN: Yes, that's extremely help. Actually, the reason I didn't say that is
23 because I wasn't sure what your position would be on that. But it did seem to me,
24 maybe if we can just jump into the detail a little bit, it did seem to me that,
25 notwithstanding your position on the collateral use in relation to two witness
26 statements, they may well, if they were relevant, they would fall to be disclosed if there

1 were disclosure to be ordered in these proceedings and so you would be provided with
2 them anyway. Is that effectively what you're saying, Ms Patel?

3 MS PATEL: I hadn't given thought to the disclosure of the witness statements
4 themselves. What I was saying was that if these proceedings go to trial and there are,
5 you know, directions for the parties to file evidence, then witness statements would be
6 drafted for the purposes of these proceedings to deal with the matters which arise in
7 these proceedings. I hadn't given thought to whether witness statements in a previous
8 set of proceedings would fall to be disclosed, but I can imagine that might be the case
9 depending on the terms of disclosure and the issues in this case.

10 THE CHAIRMAN: Yes, okay. That's helpful, and that's very helpful clarifications. So
11 I think that -- yes, Mr Macfarlane, just to add, just so that's clear, I think what Ms Patel
12 is saying is that you should be comfortable that the evidence that's relevant to the
13 issues in these proceedings should some way or another find its way in front of me so
14 that they are determined on the merits of these proceedings and therefore their need
15 to rely on other proceedings may be lessened.

16 Now, that's not a complete answer, I don't think, to some of the points you're making,
17 because I know you may want to rely on some other things as evidence of their
18 occurrence rather than just simply in support of what you've said in these proceedings.
19 So there's distinction to be drawn. Just at a more general level, that, I think, is a helpful
20 addition to what I said earlier.

21 Is there anything you wanted to say about that general principle before we get in the
22 detail of the documents in particular?

23 MR MACFARLANE: Yes, sir, obviously this was new to me, the 32.1(2) CPR, so I've
24 done a lot of reading on it immediately to familiarise myself with the reasons behind it.
25 I would say, sir, that you've already covered off for me the issue of disclosure and
26 specific disclosure that these documents may well be requested under the heading of

1 disclosure anyway. But I would say this, sir, that in either case, although one could on
2 the surface say that this is different proceedings, in many respects it is the same
3 proceedings. All that's different is that the court is different on this occasion. I would
4 say that if the witness statements were to be redrawn, apart from the fact that it would
5 take more time and be time consuming, what would be the point. I would be very
6 surprised if the witnesses were to say anything other than what they said in the
7 previous proceedings because the arguments were all the same arguments and all
8 the evidence were the same as well.

9 So I think, correct me if I'm wrong, sir, but it may be within the gift of this tribunal to
10 allow these witness statements to be used, especially in view of the fact that it could
11 also save a huge amount of time in going round in a big circle to do exactly the same
12 at the end.

13 THE CHAIRMAN: Yes. Well, that may just illustrate some of the inefficiencies that
14 come in the justice system, Mr Macfarlane. I'm afraid that I don't think you are right
15 about that. I think it is the case that we are a different court and that is precisely what
16 the collateral use provisions are there for, in fact, and I know -- I'm not clear about
17 what has happened in the Central London County Court proceedings other than
18 seeing the order that was made by the judge.

19 I think as a matter of general principle, the point of CPR 31.2(2) and CPR 32.12 is to
20 stop precisely what you're trying to do. So that's not to say that you don't get the
21 benefit of it in other ways and I think that really is the point, the exchange between me
22 and Mr Patel, because there are two ways in which all of this can come out.

23 If these points are relevant in these proceedings, then they're going to be need to be
24 dealt with some way or another in these proceedings, and so you may be right that
25 that creates an inefficiency, but nonetheless it is an inefficiency that the law requires.

26 Separately from that, my observation to Ms Patel, there may be other ways in which,

1 | if, for example, you wished to rely on the fact of the witness statements having been
2 | made in the county court, there may be other ways in which you're able to do that,
3 | because it may be -- and I express no view other than this being a possibility -- that
4 | Ms Patel's clients would be obliged to disclose them to you in due course as
5 | documents which are relevant to these proceedings. Obviously, that is -- and unless
6 | Ms Patel thinks otherwise -- that is something that sits outside CPR 32.12 for these
7 | purposes because the documents belong to the defendant.

8 | So, without wanting to be unhelpful, I think we probably do have to treat with some care
9 | here and I think the point -- the reason I think for Ms Patel raising it in the first instance
10 | was just to put down a marker with you in relation to the use of other documents in
11 | those proceedings. I appreciate that this is not entirely straightforward, but I think
12 | she's right to raise with you just the point you need to be careful about how you deploy
13 | material that has been used in these proceedings by the defendant.

14 | Again, unless Mrs Patel does disagree with me, my provisional view is that this doesn't
15 | apply to anything that you've produced in those proceedings and you're entitled to
16 | recycle those, if you want to, but as far as the material you have received from the
17 | defendants in the form of witness statements or disclosure, you do need to be a bit
18 | careful. If you have concerns about that, then obviously we should discuss it in these
19 | forums or indeed in correspondence. Is that helpful?

20 | MR MACFARLANE: Yes, sir, it is helpful. I've taken that completely onboard. Just
21 | one question I only ask of that is: does that include documents as well as witness
22 | statements such as emails because I just suddenly feel that the carpet is suddenly
23 | being pulled from underneath my feet about what I can talk about. That's what my
24 | feeling is or what I can say to the court.

25 | THE CHAIRMAN: I understand that -- and again this is subject to anything Ms Patel
26 | wants to say -- but I think I can give you some reassurance about that, because I don't

1 think there's any suggestion that you should be restricted from deploying material in
2 your possession prior to the proceedings and so, if you received an email from the
3 defendant at some earlier stage and that sits on your server and you're able to print
4 that out, that's your document, not defendant's document.

5 MR MACFARLANE: Okay.

6 THE CHAIRMAN: So I do want you to have some comfort and I think this is the point
7 that Ms Patel was making that this is not trying to pull the rug out from underneath
8 your feet at all, it's just observance of the proper process and really making sure you're
9 conscious of your obligations to the county court, not here, and to the judge in that
10 case rather than feeling that you have a free hand to do that. That's really, I think, the
11 point that's being made.

12 I'm just going to pause there, because I've a number of things I said I'd check with
13 Ms Patel to make sure she didn't disagree with me.

14 Ms Patel, is there anything in there that you object to that I haven't got right?

15 MS PATEL: No, thank you.

16 MR MACFARLANE: I have the picture, sir. Thank you.

17 THE CHAIRMAN: We're going to go on and talk about these particular documents
18 and Ms Patel is going to address on those, I'm sure. So you can see how this plays
19 out and maybe that may be helpful in understanding the best way to manage this
20 process.

21 Now, it is open to you, if you wanted to, to go back to the judge, to His Honour Judge
22 Saggerson sitting in the county court and ask him for permission. I don't think I can
23 give that permission, again unless Ms Patel tells me otherwise, because I'm sitting in
24 a statutory tribunal and I don't have any inherent jurisdiction. So I don't think can I do
25 that and if you wanted me to, we can explore that further, and that's certainly my
26 immediate reaction to it.

1 The obvious thing to do, if you wanted the ability to do this, is to go back to the judge
2 in the county court and ask permission. I think that probably will look like a more
3 inefficient mechanism by the time we have had the discussion we are about to have,
4 because I think hopefully that will allow you to see how this might play out in practice
5 and you may feel more comfortable about that.

6 Just to finish the general picture before we dive into the detail, that's one other element
7 to think about.

8 MR MACFARLANE: Sir, I have the picture. Just because on this particular occasion
9 the witness statements may not be allowed does not mean that they're not going to
10 reappear at a later date.

11 THE CHAIRMAN: That's the short point. Exactly.

12 Perhaps shall we jump into that then, Ms Patel, and your point about the statements
13 of Mr Henderson and Mr Haggar(?). I think -- and it's not really clear to me
14 whether -- well, it's not really entirely clear to me why Mr Macfarlane wanted to rely on
15 them. I can see there are a number of reasons why he might, but precisely why he
16 does isn't entirely clear to me, but we have had that discussion if it's helpful. But I did
17 wonder, if I could short circuit it, because it did occur to me that it seems highly likely
18 that if they're of any relevance, they're probably are discloseable, assuming we did get
19 to some form of disclosure. I wondered whether that mightn't be -- I think on the face
20 of it your point in paragraph 6 of your skeleton seems right, but I wondered whether
21 they're going to turn up, as Mr Macfarlane says, in any event as to a matter of
22 practicality. I'm certainly not dissuading you if you want to take it effectively as a
23 pleading point by saying until that happens they shouldn't be referred to in
24 Mr Macfarlane's claim, and I understand that point. But I just wondered, in order to
25 short-cut things, whether that's where we are likely to end up.

26 MS PATEL: I think, sir, our position is that we would like them out in the normal way

1 at this stage. We haven't given thought to whether they would be discloseable and
2 indeed I don't think anyone has given thought to the extent of disclosure that's likely
3 to be ordered here.

4 If I can maybe just give some background to what lies behind the request that they
5 come out. These were prepared in proceedings in which my solicitors were not acting
6 in response to a counterclaim that eventually I think was taken out of the claim and my
7 understanding is the county court decided that the counterclaim that was based on the
8 Competition Act proceedings, Mr Macfarlane will correct me if I'm wrong, ought
9 properly not to be allowed as part of the defence and so the proceedings as a whole
10 never went to trial, which is why the collateral restriction bites because the witness
11 statements were not ventilated at trial.

12 The statements, therefore, were not prepared by those who instruct me and
13 I understand they don't actually have the correct statement of truth on them and so
14 potentially would have had to be refiled in any event. I think our position is it would
15 just be simpler and in keeping with the proper course of things for them to come out
16 at this stage, particularly as it's not obvious to us that Mr Macfarlane needs them at
17 this stage to be able to make the claim that he wishes to make, and obviously we will
18 apply our minds to disclosure once it's clear what the issues in dispute are and if they
19 do fall to be disclosed in due course then, you know, my clients will obviously be
20 complying with their disclosure obligations.

21 But I think our position today is that, for the reasons I've given and because of what
22 the rules provide, we would ask that they be taken out as annexes to the claim form
23 at this juncture.

24 THE CHAIRMAN: I think we'll come on to this, because we're going to talk a little bit
25 about what further work Mr Macfarlane needs to do to get the claim into a satisfactory
26 state, but your suggestions would that they just are removed from the annexes and I

1 think there's probably a reference in the text and that should be deleted and then that's
2 the issue.

3 MS PATEL: Dealt with. I think you've frozen again, sir.

4 MR MACFARLANE: It will come back, Ms Patel, I can confirm that they were excised.
5 You are absolutely correct on that point.

6 THE CHAIRMAN: Sorry, Mr Macfarlane, I'm sorry. We've done it again and actually
7 I do not think we know why it's happening, but hopefully it won't happen again or at
8 least too often.

9 MR MACFARLANE: Not a problem.

10 THE CHAIRMAN: Can you hear me again?

11 MS PATEL: We can.

12 THE CHAIRMAN: That is really helpful.

13 Just in terms of those earlier proceedings, I don't know if you know -- it seemed to me
14 that it was a claim -- it looked like it was a debt claim; is that right from your client, Ms
15 Patel --

16 MR MACFARLANE: Yes, sir.

17 MS PATEL: Yes, sir. Again, Mr Macfarlane will correct me if I'm wrong, but my
18 understanding is that it was a debt claim for unpaid invoices for product that I believe
19 was delivered in the autumn -- well, in 2021.

20 THE CHAIRMAN: Yes.

21 MS PATEL: I'll be corrected if I'm wrong, but that's my understanding.

22 THE CHAIRMAN: Yes, and so the position seems to be that the judge decided that
23 he didn't have any jurisdiction or was it that he just -- I'm a little bit surprised that the
24 judge wasn't prepared to deal with it, but obviously it may be a mystery to you as well,
25 Mr Macfarlane, you may be able to explain it. It wasn't entirely clear to me why the
26 judge would not allow a counterclaim to proceed.

1 MR MACFARLANE: Yes, sir. Somebody -- the court sends into me at one particular
2 stage -- that Ms Patel is absolutely right, that it was a claim for a debt and it was argued
3 by the solicitor's team for the defendant in this case that there was no relevance to my
4 cross claim for a competition law issue and the judge was persuaded that that was the
5 case, so therefore the whole of the competition arguments were excised in a hearing
6 on 31 August of this year.

7 THE CHAIRMAN: Sorry, to interrupt you, Mr Macfarlane, is that because you weren't
8 claiming for damages; is that position?

9 MR MACFARLANE: I was claiming for damages sir, yes, but the judge saw fit on that
10 particular occasion to only hear the arguments for the debt.

11 THE CHAIRMAN: Right. Yes.

12 MR MACFARLANE: So I accept what the courts say.

13 THE CHAIRMAN: Yes, of course. Well, we probably don't need to get into it any
14 further, it's probably more my curiosity than anything else, but let's just leave that for
15 now.

16 Mr Macfarlane, do you want to say anything in relation to the points that Ms Patel
17 made? I think she's saying, look, it may well be that the witness statements are going
18 to be turn up later on in disclosure, it may not be, she's not making any promises about
19 that, but she says that's the time to deal with whether these documents come into
20 those proceedings and you're effectively pre-empting that by referring to them in the
21 claim and we should have that discussion later, I think, is really the gist of what she's
22 saying and she's inviting you to -- or inviting me to require you to remove the
23 references for now and then we'll come back to that point later on.

24 MR MACFARLANE: Well, I would say, sir, that there is more in the claim on the draft
25 claim as all parties have seen so far to just the witness statements. There are quite
26 a number of emails and correspondence that actually refer to the detail of the witness

1 statements and it's going to be almost impossible for me to cross-reference what I see,
2 I don't know what the court may see, as inaccuracies and different versions of what
3 has been said and when, because if I'm only allowed to present, for instance, the
4 emails, then there is only one side of a story being presented and there isn't
5 an argument. If I am able to show the witness statements and what was said in there,
6 cross-referencing that with what was said earlier to reveal inaccuracies and --

7 THE CHAIRMAN: Yes, sorry to interrupt you. Just so I understand that, so from your
8 perspective the witness statements are helpful to you because they are one limb of
9 an inconsistency, you say; is that right?

10 MR MACFARLANE: Yes, sir.

11 THE CHAIRMAN: And are you saying that without the witness statements you don't
12 have the inconsistency or do you have other inconsistencies you can rely on?

13 MR MACFARLANE: No, sir, it's a substantial part of my submissions are that the
14 evidence in witness statements is in complete contrast with what has been said at
15 earlier dates.

16 THE CHAIRMAN: Yes, I see, and so another way of dealing with this would be for
17 you to -- I don't know whether Ms Patel would agree with this, maybe Ms Patel -- you
18 see the difficulty and I see the point he's making.

19 MS PATEL: Might I respond, sir?

20 THE CHAIRMAN: Of course, yes.

21 MS PATEL: We're at the stage of a claim form and so all the claimant needs to do is
22 to set out what happened in relation to his request for this second website, the fact
23 that it was refused, what he was told in correspondence about the reasons for that
24 refusal and he appears from what he's put in his claim form at the moment to have
25 material from correspondence that I assume is in his possession because it appears
26 to be correspondence with him to make good or to rely on in support of his claim that

1 the refusal was anti-competitive and then to set out what he says the consequences
2 of that have been.

3 So now is not really the time for inconsistencies. The way the proceedings should be
4 unfolding is that he sets out why he says what the defendant has done is
5 anti-competitive, we get a chance to reply and then at trial there is evidence and that
6 is the time at which, you know, following witness evidence and following any disclosure
7 the Tribunal deems appropriate, that is the time at which the claimant can then point
8 out, if that is his position, that there are inconsistencies.

9 It is not typically the case that in a claim form one is setting out inconsistencies
10 between, you know, what has been said in previous proceedings and what the
11 claimant says the true positions is. It's sort of backwards, if you like. Again, it's
12 pre-empting a stage of the proceeds that we're not at.

13 THE CHAIRMAN: Yes -- and just to explore that a little bit and that's really where my
14 thinking was going as well -- but if he wishes to say in his pleading that he was given
15 an explanation but he doesn't believe it's the correct explanation, for example, and I'm
16 slightly -- and I'm not entirely clear about how this works, but treat that as a hypothesis
17 for present purposes -- he might want to say, mightn't he, that he was given
18 an explanation in emails but he doesn't think it's the correct explanation for the real
19 motivation and that's because -- now, obviously at that stage you might ask him to give
20 particulars of that and he can't give them because he's tied up with 32.12. So
21 I suppose I don't have a problem with the suggestion you're making as long as we're
22 not going to end up just running back into a complaint about an unparticularised claim
23 to the extent that he wants to make that point.

24 Is that something that we could agree on, that he'll just have to do the best can he at
25 this stage in relation to the particulars and let me put it another way, it's not easy to
26 see how I would be very sympathetic to a claim for further particularisation until this

1 issue is resolved, which presumably is going come to a sharp point when we talk about
2 the disclosure.

3 MS PATEL: The witness statements are very, very short, they don't say very much.
4 I think I would just be encouraging the claimant to set out what he says his position is
5 and why he says the clauses are anti-competitive and to not be trying to pre-empt,
6 you know, what the defendant might be saying when the defendant has not even put
7 in a defence yet.

8 THE CHAIRMAN: Okay. I understand.

9 Mr Macfarlane, I think the best way to deal with this is for you remove the references
10 and I appreciate the point you make about the way that the claim is set up and there
11 may be a little bit of work for to you to do to tidy that up. But I think Ms Patel is right,
12 at least to this point, that you don't need to identify specifically the inconsistency you
13 say appears from these statements in order to be able to advance your claim at this
14 stage, and you're not going -- and the point that I'm exploring with Ms Patel is whether
15 you're going to suffer which prejudice for the complaints about the adequacy of what
16 you're saying and certainly my provisional view is that you shouldn't.

17 I think the easiest way, just to step back a little bit from this, I think what you're saying
18 is actually very plain, at least as regards the Chapter 1 complaint, I think that is plain
19 to all of us what your allegations are, and to the extent that you're trying to provide
20 further support for those by the provision of these statements, the message, I think, is
21 that you don't need to do that at the moment and we can deal later with precisely how
22 they fit into the picture and how useful they are.

23 Is that -- does that make sense?

24 MR MACFARLANE: Yes, sir, it does make sense and I understand the point you're
25 making. But one of the concerns that I have is that maybe I'm trying to jump the gun
26 a little bit here and speed up the proceedings because of our particular circumstances

1 with the business and the challenges that we're facing in the business nowadays.
2 Although I understand there are procedures that one must adhere to, I'm trying to
3 really get everything on the table as early as possible so that we can get some form
4 of, I don't know, rapid redress if that ever were to come about. I understand and I'm
5 not saying that there's any decisions made in any process at this moment in time.
6 All I would say, sir, is that it would seem to me that I can't -- I know what I was going
7 to say, that I did read somewhere just the other day a judge said in regard to CPR
8 32.12 that he said what I can't understand is how it is that the defendant can pave the
9 way to justice by claiming 32.7, in other words if the evidence is going to come out
10 sooner or later, why can it not come out now.

11 THE CHAIRMAN: The reason for that, I think, is that in order to do that we have to
12 get consent for the use of the documents and that's more inefficient, particularly with
13 the way we are dealing with it. I think that is really the point, we're all trying to deal
14 with the procedural problem and make the best of it. It's not within my power to solve
15 the procedural problem, so I just think the suggestion that has been put forward by
16 Ms Patel is a sensible one, because it sets that problem aside for present purposes.
17 I think we'll come on to discuss disclosure in a minute, but I think you should be
18 confident that the Tribunal will not be sympathetic to any attempt to prevent you, in the
19 words of the judge you just quoted, to put your case properly.

20 What I am going to do is direct you to remove references in the claim document to the
21 witness statements. I think, just for the sake of expedience, I'm going to order that you
22 do no more than that. So the claim document may look somewhat incoherent as a
23 result of that, but let's just get the references out for now and I appreciate there will be
24 bits in there where you're making comparisons between something where there will
25 now be a gap. By all means do it by way of a redaction, just put a blank space there
26 instead and we'll come back to this issue in due court. So that's my order in relation

1 to that.

2 MR MACFARLANE: I'll bow to your greater experience, sir.

3 THE CHAIRMAN: Thank you, Mr Macfarlane.

4 Shall we deal with the without prejudice material. Ms Patel, do you want to say
5 something about that first?

6 MS PATEL: Yes, sir, and I think, again, it simply might be of assistance to explain to
7 Mr Macfarlane that again this isn't an attempt to shut him out, it is a normal rule of
8 procedure that to the extent there have been without prejudice discussions between
9 parties they are not put before a judge and I understand there have been without
10 prejudice discussions in relation to previous proceedings and there is one reference
11 to such discussions that I was able to find in DM14.

12 THE CHAIRMAN: Yes, and I've got that from your skeleton. Thank you. Yes.

13 MS PATEL: And, again, it was just a request. I don't think anything more needs to
14 happen than that that be redacted and that any references like that, I don't believe I've
15 seen any others, but Mr Macfarlane will know what he's provided to the Tribunal better
16 than I.

17 To the extent there is anything that reflects a without prejudice discussion, unless the
18 parties have agreed that it can go in, it should just be blacked out and, again, I don't
19 believe that will prejudice Mr Macfarlane's ability to put his claim. It seems very
20 peripheral, in fact, to the document at DM14.

21 So it's a simple question of document management.

22 THE CHAIRMAN: Yes. Mr Macfarlane, Ms Patel's right that there is a restriction on
23 the use of material that's been deployed in without prejudice discussions. I see you
24 nodding, so I think you're familiar with that principle. There's a public policy behind
25 that which is to encourage discussions to settle matters.

26 I think there's two ways we can do this. We can talk through the legal bit of it and if

1 you want you can challenge whether or not this is without privilege and you may well
2 do that -- sorry, without prejudice, and you may do that on the basis that it wasn't in
3 the first place or you may do it on the basis that somehow the rules should be
4 disapplied, as I think you suggest in correspondence.

5 So we can go down that path, if you like, I don't suggest we do that today, but you can
6 go down that path, if you like, or alternatively the question is does this really matter?
7 Is this a material point for you? I have to say my immediate impression was that, as
8 far this entry in the transcript of the discussion there is concerned, it didn't seem to be
9 terribly material because your case isn't really dependent on what they have or haven't
10 said. It's really what they have or haven't done, as I understand it.

11 I want to leave you with those two option. If you tell me you can live without this and
12 we don't need to have a fight about it at the moment, then that's the best outcome. If
13 you tell me we need to have a fight about it, I think we're probably going to do it on
14 another day and in the meantime we'll need to treat this as being something which you
15 are not able to rely on.

16 Now, how we deal with that in practice I don't really mind, but I want to give you the
17 opportunity to take either of those options.

18 MR MACFARLANE: I think we can deal with it fairly quickly today, sir, within a matter
19 of a few minutes, if it's helpful.

20 I fully understand the reasons why the without prejudice correspondence goes on and
21 it should quite rightly be kept with one possible and small exception and that is the one
22 of unambiguous impropriety.

23 THE CHAIRMAN: I saw you raise that. I have to say to you, Mr Macfarlane, I don't
24 think we're in that territory here. By all means go ahead and make the argument. I
25 just want to give you a clear steer at the start, it is a quite a difficult thing to get yourself
26 into the impropriety box. Just so you know that is where I'm starting from. I'm not

1 going to dissuade you from arguing it, if you want to, but I just want to give you a bit of
2 a steer and the question really I think is: do you want to have that discussion today
3 and determine that point or do we need to do that in order -- how much does this matter
4 to you, I think, is the real question.

5 Do you consider that this is an important part of your case which you need to leave in
6 the pleading or -- and no one's saying, if we park it today, no one's saying you can't
7 come back to it -- or is it something you could live without having in your claim
8 document, I think, is the short point.

9 MR MACFARLANE: I think from a point of view -- and I understand, sir, that the bar
10 is extremely high on my argument of impropriety -- but one can understand, sir, that
11 I find myself between a rock and a hard place in this particular sense, that my decision
12 not to go along with, shall we call it, a fictitious offer to settle is governed by the fact
13 that I've been advised that I myself would be committing a crime.

14 So that's where I'm coming from, is that we --

15 THE CHAIRMAN: Yes. No, look, that's the reason really why I don't think we can deal
16 with it today. We've got a couple of hours set aside, we're already I think an hour into
17 this, and if that's the path you want to go down, it's quite complicated, it's going to take
18 a bit of time and I am not sure Mr Patel would think it was right to deal with it, you
19 having raised the unambiguous propriety point quite recently, and I'm not saying you
20 can't raise it and I'm certainly very alive to the point that if you want to rely on this you
21 should be entitled to make your argument about it and we can deal with it at some
22 stage.

23 I think the point that is being made at the moment by Ms Patel is you don't need to
24 deal with it now, it doesn't need to be in your pleading, it doesn't need to be in your
25 exhibit, it's just a matter of evidence you can deal with later. So I'm inviting you really
26 to let us park it for a bit.

1 MR MACFARLANE: I'm in agreement with that, sir, because the last thing I want to
2 do, given that I've got a conflict of directions as well, I want this thing to be brought to
3 an end as soon as possible, and the last thing I want to do is go down pointless
4 arguments. I think the point is understood anyway. So I will agree to redact it.

5 THE CHAIRMAN: Yes, that's very helpful. Just to be clear, I'm not suggesting that
6 you can't run your argument about the use of it at some later stage, I'm not deciding it
7 today, but let's take it out of the exhibit and leave the rest of the exhibit in and then
8 we'll see what happens later on.

9 Ms Patel, are you happy if we proceed on that basis?

10 MS PATEL: Yes, sir. I would just invite Mr Macfarlane to consider if there are any
11 other references to without prejudice material and if there are any that he has spotted,
12 we would just ask for similar treatment, again at this stage without prejudice to what
13 he might decide to do later.

14 MR MACFARLANE: I will watch out for those, yes.

15 THE CHAIRMAN: Thank you. I am sorry, Mr Macfarlane, I'm sure you feel penned in
16 because I don't want you to feel penned in because this is just about the statement of
17 this document and all these issues remain at large for later on.

18 MR MACFARLANE: I fully understand, sir.

19 THE CHAIRMAN: Good. Can we move on from the confidentiality and the collateral
20 use and without prejudice; is that it on that? Good, thank you.

21 The next item is the fast track. Now, Mr Macfarlane, I suspect you've had a look at
22 this, rule 58 of the rules, and under the fast track procedure of the tribunal, I can
23 allocate it to the fast track. You haven't actually made an application to that effect, but
24 I can do it without an application and I rather anticipate that you will be keen for that
25 to happen.

26 Just to be clear about the consequences, the first thing is it does is it accelerates the

1 hearing, because it means hearing, the final hearing, in this matter must be heard
2 within six months. It also allows me to cap costs and potentially to reduce or eliminate
3 any exposure you might have for damages arising from a cross-undertaking in relation
4 to an interim injunction.

5 I just want to make sure you understand that second bit and also the relationship
6 between that and the final hearing. So your case sets out a claim which will be
7 determined at a final hearing which, if we allocate it to the fast track, should be within
8 six months. That doesn't stop you, as you have indicated you might, coming and
9 implying on an interim basis for relief, which in this case, as I understand it, would be
10 seeking continued supply, and that obviously is pending the outcome of the final
11 decision and we'll come back to how that works in a minute and why you might be
12 entitled to that or not entitled to it.

13 One of the elements that would ordinarily be applicable, if I were to grant interim relief,
14 would be to require you to give a cross-undertaking as to damages. What that means
15 is, if we get to the end and you lose and the defendant has suffered loss as a result of
16 the interim injunction, then they should be entitled to recover that from you.

17 Now, that is pretty much a standard application of the rules for obtaining injunctions.
18 However, it is, I think well accepted that once a case is in the fast track it is open to
19 the judge hearing the application for the injunction to cap the exposure under that
20 cross-undertaking or indeed to remove it all together. So that is the significance of it,
21 that is why it matters in relation to the fast track.

22 Just to be clear -- and I'm sure you've seen this in rule 58 -- but there are a number of
23 factors which are required to consider to decide whether or not it goes into the fast
24 track in this case. They include the size and nature of the business, the time estimate
25 for the trial, complexity and novelty of the issues, the number of likely witnesses, the
26 volume of likely relevant documents, the need for disclosure of those, and of course

1 the nature of the remedy that you're seeking.

2 That is the background to it. I just want to start off by getting your position on it. As
3 I say, I anticipate that you would like it to be allocated to the fast track, but I just want
4 to check and see that is your position.

5 MR MACFARLANE: Yes, sir.

6 THE CHAIRMAN: Good, thank you. Just other one point. Your case, as I understand
7 it -- and I think it's very helpfully summarised by Ms Patel in her skeleton at
8 paragraph 3 -- is both a case under what we call a chapter 1 prohibition and a chapter
9 2 prohibition.

10 MR MACFARLANE: Yes, sir.

11 THE CHAIRMAN: Chapter 1 is broadly anti-competitive agreements and chapter 2 is
12 anti-competitive conduct by a dominant entity, dominant undertaking.

13 MR MACFARLANE: Yes, sir.

14 THE CHAIRMAN: Now, the chapter 1 claim, as I think described by Ms Patel in her
15 skeleton, seems to me to be quite a contained set of issues and facts. Chapter 2,
16 I think, is a more complex case, at least on my initial review of it, and it does seem to
17 require more work to flesh that out, so probably more evidence, possibly expert
18 evidence that might be determinative of it or may not be.

19 One possibility that occurred to me is that we park the chapter 2 claim for now, to pick
20 up the terminology of parking things. So we would just put it to one side and not deal
21 with it immediately and we would actually proceed to deal with the chapter 1 claim in
22 the first instance and see how that turned out. It seemed to me that made some logical
23 sense because, as I understand it, essentially what you want is supply and that's really
24 what the chapter 1 case is about, about the legitimate basis for the withdrawal of that
25 supply.

26 I just want to see whether you have any views on that idea of parking the chapter 2

1 case and getting on with the chapter 1 case.

2 MR MACFARLANE: I think you summarised that very well, sir. I'm in total agreement
3 with that, is that we can argue chapter 2, which is mainly an argument, I believe, over
4 dominance in the market, but chapter 1 -- I would say, sir, that one of the reasons that
5 you're having to suffer my presence here and not somebody much more learned than
6 myself is the fact that we have as a result of, in my view -- I'm not suggesting it's
7 anyone else at this stage -- that there has been an infringement of competition law
8 and there seems to be, even if I were sitting neutrally, there seems to be no logical
9 reason for a company committing self harm on this occasion. But the harm, in my
10 view, has been done and we are as a business suffering. One might ask the question,
11 well, why, why don't you just sell somebody a pair of Nike, or something like that.
12 There is no obligation, I understand, for the defendant to supply me, it may be just that
13 they don't like me, there's no law against that. I fully understand that.

14 But we are the biggest independent specialist running company sitting right in the
15 middle of their market. So there are some serious questions, I would suggest, that
16 need answering in this sense.

17 Insofar's harm or loss suffered by the defendant by being effectively forced to supply
18 products --

19 THE CHAIRMAN: Mr Macfarlane, do you mind if I just -- sorry to interrupt you. I'm
20 sorry to interrupt you, but you're moving on to a subject which I'd like to come back to
21 a little bit later, if we may. Would you mind if we put that point to one side. Don't forget
22 your point about loss and damage and injunction.

23 MR MACFARLANE: Yes. Okay.

24 THE CHAIRMAN: But we'll deal with that when we get to that. I'm just quite keen, if
25 you're reasonably happy with the suggestion I've made, I want to get Ms Patel's views
26 on that and also generally on the application of the fast track process. So if you don't

1 mind, we'll do that and then we'll see if there's anything else we need to pick up on the
2 fast track. Let's just get fast track sorted out first.

3 Ms Patel, can he start with this idea of parking the chapter 2 case and proceeding with
4 the chapter 1 case and I appreciate I hadn't really thought about it until recently and it
5 hasn't been flagged up, so I know it comes as a bit of surprise no doubt and if you
6 want to take some time to have a think about it and then come back to me on it, then
7 obviously we could take a break and you could take instructions.

8 MS PATEL: I'm trying to take instructions, sir, and I think I might need a quick word
9 with those instructing me on it. But, I mean, generally on the fast track, you have the
10 submissions set out in our skeleton argument.

11 I think we understand why, sir, you've raised the point for consideration today. Our
12 concern is that it's just -- it's too early to be making a final decision and bearing in mind
13 that there are still quite a few things about what exactly the claimant is seeking that
14 remain unclear. So, for example, the position in relation to an injunction, interim
15 versus final and making sure the claimant is happy with his articulation of what he's
16 seeking in that regard, and similarly what he might or might not be seeking in relation
17 to damages, all of which will obviously shape the length of the proceedings and how
18 many hearings are likely to be necessary, which mean that today it's quite difficult to
19 be in a position to set any cost cap and we haven't been able to -- I don't think would
20 have been able to provide you one today, because of these things which remain
21 unclear about the shape of the proceedings.

22 There's also the issue about security for costs which we haven't, obviously, had a
23 chance to apply our minds to and it would be premature, I think, to do that again until
24 the shape of the claim is clear. Obviously, if you order it to be subject to the fast track
25 today, then that will effectively tie your hands somewhat or any future chair's hand
26 somewhat in relation to the security for costs.

1 We're just concerned that it's -- today is not the day to make a final decision on that,
2 albeit we can see why you've raised the matter for consideration today.

3 THE CHAIRMAN: Yes, that's helpful. Can I just check with you a couple of points that
4 came out of your skeleton, just the point about the claimant's status. I appreciate, as
5 you say, we haven't got any formal evidence that the application of the Commission
6 recommendation, but I think it's pretty clear, isn't it, I think you say it's likely to be the
7 case? I don't really want to invite Mr Macfarlane to start giving evidence at this
8 hearing, but I would have thought it would be extremely surprising if he replied more
9 than 250 people and turned over more than 50 million euros. I just wonder whether
10 there really is a point in dispute.

11 MS PATEL: I am not sure it is in dispute, the only reason for putting it in these terms
12 is that I don't believe we have total visibility on how the claimant's business is
13 structured, how all the branches work, the extent to which they're franchises or part of
14 his business. Ordinarily that sort of thing would be set out by a claimant when applying
15 for the fast track. I see Mr Macfarlane's got his hand up, so it might be that he's about
16 to provide clarification.

17 THE CHAIRMAN: Yes, Mr Macfarlane.

18 MR MACFARLANE: Yes, sir, I can provide clarification on that. Our business
19 accounts are very clearly able to be seen on Companies House and what I say now is
20 exactly how it is, the business turns over £11 million, does not employ in excess of
21 250,000 people. The franchisees that Ms Patel brought up are all independent
22 businesses with their own accounting service. So we do sit very neatly in that micro
23 SME business that we're referring to.

24 THE CHAIRMAN: Yes, I think it's 250, I don't know whether I said 250,000, or whether
25 you introduced that. It is 250, but I assume that's what you mean. You're under 250
26 as well as 250,000.

1 MR MACFARLANE: Yes, we employ around about 190 people now, right now, sir.

2 THE CHAIRMAN: Yes, and the franchisees are separate economic entities; is that
3 the point you're making?

4 MR MACFARLANE: Yes.

5 THE CHAIRMAN: That's helpful. Mr Macfarlane, I think that is helpful.
6 Can I ask you just a couple of other questions as well. I wasn't sure I completely
7 understood the pre-IP completion date point and I hesitate slightly to raise it, but it
8 wasn't clear to me what the point was. No doubt if there is a point, it is complicated,
9 as they all seem to be.

10 MS PATEL: So our initial understanding, obviously Mr Macfarlane hasn't, I don't think,
11 pleaded any detailed provisions of law, for example, any block exemption he might be
12 relying on, so on and so forth, and that was one of the things that we had indicated it
13 might be helpful if he could set out when he's actually revisiting his claim form because
14 rule 30 obviously requires that you set out propositions, provisions of law.
15 Our initial understanding is that this claim relates to matters which took place in the
16 year 2020. That appears to be the year in which the proposal for this second website
17 was made to the defendant and that is the year in which the defendant decided not to
18 authorise that second website. So our provisional view, subject to anything
19 Mr Macfarlane says, is that the questions that the Tribunal will need to determine at
20 any future trial are the compliance -- the compliance or non-compliance of the
21 defendant's terms and conditions and/or decision making in 2020 with the law as it
22 stood at that time.

23 THE CHAIRMAN: Yes, and that is the transition period, isn't it?

24 MS PATEL: And that is the transition period.

25 THE CHAIRMAN: So you would say that includes European, that would therefore give
26 rise to the application of European law in that period.

1 MS PATEL: So -- indeed.

2 THE CHAIRMAN: Yes. Does that -- and is the complication -- is that complication
3 therefore because we then have to get into things like the block exemption; is that the
4 point you're making?

5 MS PATEL: No, it's perhaps not as clearly worded as it might be in that paragraph of
6 skeleton argument. I think the point was making -- that's our understanding and I think
7 we will need to, if that's the correct legal analysis, get into -- we will be in parallel
8 exemption universe of the Competition Act as it understood at that time and one will
9 be needing to look at the block exemptions in relation to vertical agreements and the
10 EU version as in force at this time.

11 That is our initial understanding of what the position is. I don't know if Mr Macfarlane
12 intends to make any points about post 2020. As I say, because no legal provisions
13 have been set out, it's not immediately apparent whether there are any points about
14 post 2020.

15 THE CHAIRMAN: Well, I rather assumed -- we'll ask him in a minute, but I rather
16 assumed that he will be saying that it's a continuing infringement, so it does bite post
17 transition period. It may well that be we do have a pre-and post analysis to carry out.
18 But that certainly ought legally to be possible, oughtn't it?

19 MS PATEL: It's legally possible, but I think it does make it a degree more complex,
20 sir, because one effectively has two different regimes that one is having to look at. Of
21 course, one has a UK block exemption if one is at the the period post mid 2022.

22 THE CHAIRMAN: That's helpful, thank you.

23 Mr Macfarlane, that's rather a technical discussion and I'm not sure if you feel you can
24 add anything to that. The key point, I think, is whether you intend to rely on the
25 European legislation prior to the end of 2020, when we came out of the EU, so for that
26 period prior to that EU law applies as well as UK law, and there may be some

1 implications for the case generally, just the way we look at it, because EU law does
2 apply and in that period we have to take it into account as it were English law. So all
3 that's a little bit complicated and I have spent quite a lot of time looking at it and find it
4 quite complicated, so I expect you are probably going to find it complicated too. I invite
5 any observations you have, I don't think you need to comment in any detail on it.

6 MR MACFARLANE: Yes, sir. I'm beginning to wish that I hadn't voted to leave now,
7 but I am fully conversant with article 1011 and CA98 and the crossover and
8 December 31. I would agree with your analysis, sir, that it does bring in a continuing
9 claim for damages thereafter. My understanding is that the UK competition law
10 adopted 95, or even higher, percentage of the European laws under the block
11 exemption rules and therefore they're effectively talking about the same thing, but with
12 just a different title on it.

13 THE CHAIRMAN: Without getting into the detail of that, I understand the point you're
14 making, which is it might not be such a big thing to do. I understand that, that is helpful.
15 Ms Patel, just one last point, if I may, on your skeleton. The rule 39 point, the
16 cross-reference back and rule 58 or rule 39, it wasn't entirely clear to me why that was
17 relevant. I think you say no additional claims have yet been made, but I wasn't sure
18 whether you're anticipating there might be some. I think we're talking about
19 counterclaims and contribution, aren't we, broadly and I'm assuming you're talking
20 about counterclaim.

21 MS PATEL: Yes, I think the position, sir, is it's unlikely. It was drafted in that way
22 because the matter was still being considered. I think technically it is still being
23 considered, but at the moment it looks unlikely.

24 THE CHAIRMAN: That is helpful. Thank you.

25 Coming back to the chapter 2, chapter 1 point -- and I'll give you an opportunity,
26 Ms Patel, if I may, just to take some instructions on that and we'll take a little

1 break -- I just want to be clear about why that occurred to me. It does seem to me that
2 it is much easier to be clear that the fast track procedure applies to and indeed would
3 be very suitable for the determination of that chapter 1 point and that's really the
4 reason for making the distinction. In doing that obviously I'm effectively splitting the
5 case in two and I appreciate that may well have all sorts of ramifications, but it did
6 seem to me that actually, looking at the thrust of Mr Macfarlane's case, that that was
7 probably the most efficient way to deal with this, so that he can get swiftly to an answer
8 on the chapter 1 position. If Mr Macfarlane's successful, that probably resolves
9 substantially what he wants and if he's not, there really is a question as to whether he
10 wants to pursue the chapter 2 arguments. So that's how I saw it all tying together, just
11 so you're clear about why I've raised it in this context, I'm sure you are, I just wanted
12 to make sure you were clear about that.

13 Then one other point really. Your point on timing, again, just to give you a sense of
14 what my thinking is on that at the moment, and again please do push back on this
15 once you've taken instructions.

16 The point you made is there might be things that happen that cause me to think again
17 about whether or not it should be a fast track procedure. Now, certainly my
18 understanding is that if we were to reach the conclusion that it was unsuitable for fast
19 track, we could take it out of it, and just to be clear I would consider myself to have the
20 power to do that.

21 I think the other flip side of that is there are some things which might well occupy quite
22 a lot of time and cost which would not occupy that time and cost if they were in fast
23 track and security for costs is quite a good example. One can look at it the way you've
24 put it or we can put it this way, that if we know it's in the fast track, then you may well
25 have this incentive -- well, I think you probably know, you're very unlikely to get security
26 for costs.

1 MS PATEL: Yes.

2 THE CHAIRMAN: And so there is some advantage, I think, in everybody knowing
3 where we are from the start of these proceedings and it will flow through into all sorts
4 of other things we're going to talk about in a minute, rather than waiting until later when
5 it may be more difficult. There may be some things that have been done or money
6 which has been spent which is wasted or it makes it more difficult to apply the fast
7 track.

8 That's the other way of looking at it. I'm not saying you're wrong, I'm saying there are
9 two sides to that and I'm certainly happy to hear further from you on that or indeed
10 after the break, if you would like to say something about it.

11 MS PATEL: May I just ask two questions, sir? The first is: On your contemplated
12 possibility of splitting the proceedings into chapter 1 and chapter 2, would you be
13 envisaging that the claim form and the defence in response still cover the full territory
14 and that the proceedings then be split subsequently; or would you be effectively just
15 requiring the defendant to respond to the chapter 1 point at this stage? I ask because
16 I suppose it's relevant to what the cost implications of your decision are going to be,
17 you know, to the extent things are split today.

18 THE CHAIRMAN: Yes, look, I think that's a very good question. I have to confess
19 I thought about it in relation to the items like disclosure and witness statements, but
20 I haven't thought about it in terms of pleading.

21 I think I'm probably a little bit in your hands on that, Ms Patel, and obviously I'll hear
22 from Mr Macfarlane. If you were to say to me it would make life a lot easier and would
23 work perfectly well just to plead to the aspects of the claim that deal with the chapter
24 1 infringement allegations, I think I would be open to that suggestion. I think asking
25 Mr Macfarlane to redraft the claim to that extent is something --

26 MS PATEL: No, unnecessary.

1 THE CHAIRMAN: I think we know what he's saying. I think it's reasonably clear and
2 to the extent it's not -- and you've raised some perfectly good points -- we should
3 explore with him. But I think that's probably my immediate reaction to your point, if
4 that's helpful.

5 MS PATEL: The second was about your point about it can be taken out the fast track
6 at any future juncture. Do I understand from that, that even if were you to order it to
7 be subject to the fast track procedure today, we would not be barred from making any
8 application from security, for security for costs if they deemed it appropriate at a later
9 date and that you would be willing, if you were the chair considering that application,
10 I suppose, to consider whether the fast track remained the appropriate place for the
11 case alongside that application rather than treating the fact that it had been made
12 subject to the fast track as a reason why that application couldn't be granted.

13 THE CHAIRMAN: So that's again a good question. I think it's very clear from rule
14 58.1 that I can make an order, or indeed any chair, that the proceedings cease to be
15 subject to the fast track. I think it follows from that that your hands are untied on that,
16 you could make that application at any time, if you wish, if you thought there was a
17 good reason to do so and the Tribunal would consider it on its merits. Absolutely, that
18 is clear.

19 I think, if it helps a little bit, I am conscious that the proposal to put it into the fast track
20 is very early and I do want to make it very plain that I've not seen your client's defence,
21 I've no idea what they're going to say, obviously Mr Macfarlane has his views about
22 the case and, to be clear, I'm expressing no views on that on the basis I haven't even
23 seen the defence and I have no sense of what your client's answer is to the point. To
24 be absolutely clear, I'm conscious that we're doing it probably at an unusually early
25 stage, but I think there may, arguably, be some benefits for doing that which is the
26 reason for the debate we have had.

1 MS PATEL: Sorry, I have one more last point which I am afraid probably segues into
2 the next issue, given the earliness in which we're considering this, what is your current
3 thinking as to how any cost cap to be addressed today if your inclination is to try and
4 address it today in the event that a decision is made to put the case into the fast track
5 today?

6 THE CHAIRMAN: Yes, of course. So I think -- and again subject to anything
7 Mr Macfarlane might say when we get to it -- that my inclination, my provisional view,
8 would be that I should make an order that if were to go into the fast track, I think it
9 would be logical to make an order that there should be a cost cap. I fully accept that
10 you're not in a position to deal with that today and I think the correct way to proceed
11 in that circumstance would be to ask you to provide an estimate, based on the
12 construct that we've come up with, if that's when we decide to do, and then for that to
13 be dealt with in correspondence, I would hope, if necessary a short hearing.

14 MS PATEL: Thank you, sir.

15 THE CHAIRMAN: Would it be helpful if I give you ten minutes, Ms Patel; is that
16 enough?

17 MS PATEL: I think five minutes is probably sufficient, sir.

18 THE CHAIRMAN: We will make it ten, because I'm conscious the transcription
19 providers will value a break as well. I hope we can move a bit more quickly, but I rather
20 suspect we're going to go past 1 o'clock. Is that going to cause a difficulty for either
21 of you?

22 MS PATEL: No, sir.

23 THE CHAIRMAN: Well, thank you. That's helpful. So let's take ten minutes, we'll
24 resume at 12.25.

25 MR MACFARLANE: Thank you.

26 THE CHAIRMAN: Thank you.

1 (12.16 pm)

2 (A short break)

3 (12.29 pm)

4 THE CHAIRMAN: Mr Macfarlane, we're just waiting for Ms Patel. I think she's left the
5 call, so there may be a technical issue. So we'll just keep waiting, if you don't mind,
6 until she manages to rejoin.

7 MS PATEL: Apologies to both of you, we've gone slightly over our allotted time.

8 THE CHAIRMAN: Not at all, Ms Patel, and I'm sure the time has been available.
9 Always better to get good instructions. Thank you.

10 Where have you got to?

11 MS PATEL: I'm afraid, sir, probably not as far as you would like for the time that we
12 took.

13 The position is this that it's actually very difficult to give you a view today on splitting
14 and we can see reasons for doing both courses and it's very difficult to reach a view
15 without, in particular, speaking to our client.

16 I mean, the position on chapter 2 is that Mr Macfarlane's position is that the market is
17 HOKA and that we are dominant because we own the entirety of the market.

18 Now, obviously we haven't filed our defence, but there is likely to be a dispute as to
19 the definition of "the market". But we are not in a position at the moment today to be
20 able to say whether it will be possible to address the question of what the relevant
21 market is and what our share of it might be, with or without expert evidence or how
22 much expert evidence, and therefore the extent to which that's going to add cost or
23 complexity to the proceedings.

24 Obviously, the onus is on Mr Macfarlane to make good his claim that the market is
25 HOKA and that we are 100 per cent dominant in it. I don't know to the extent that he's
26 thought how he's going to evidence that. But we can see that there may be a universe

1 in which, you know, taking chapter 2 out of the proceedings at the moment makes
2 chapter 1 more self contained as you indicate and therefore more capable of being
3 subject to the fast track procedure. But what would be very regrettable from our point
4 of view would be, you know, to be in a position where the two aspects of the claim
5 have been split and, in fact, there wasn't a huge amount of complexity to the chapter
6 2 aspect, and we end up having to have effectively two sets of proceedings which is,
7 in fact, then more expensive and more time consuming for everyone.

8 It may be that the chapter 2 matters can, in fact, be addressed alongside chapter 1
9 without adding too much cost or complexity to the proceedings. But I'm afraid we are
10 not in a position to give you a view on that, a concluded view on that today, because
11 we just haven't had sufficient time to consider what might be necessary evidentially for
12 the chapter 2 point to be determined.

13 THE CHAIRMAN: Yes. Okay. That's very helpful. Can I ask you on the point about
14 your pleading, does it follow then that it might be helpful for you to plead out the chapter
15 2 cases as well? Is that probably --

16 MS PATEL: Yes, I think that probably does follow, sir, and the other thing I've been
17 asked -- I can see that Mr Macfarlane has got his hand up, but just before you get to
18 him, we are reluctant, as I'm sure Mr Macfarlane is reluctant as well, to add
19 unnecessary cost to the proceedings. We don't particularly wish to put things off to
20 future hearings, we don't particularly want to come back for regular hearings where
21 matters can be dealt with, you know, without the need for further hearings. So it's sort
22 of reluctantly that we're saying it is actually quite difficult to form a view as to the
23 suitability of fast track today.

24 One suggestion is if a cost budget is something that the Tribunal would find helpful to
25 do in writing to submit following this hearing in any event, we can take away the
26 question of splitting and give some thought to whether it might be appropriate; and to

1 give some thought to whether we might consent to the fast track procedure on the
2 basis of a split trial; or whether our position remains that we think it should be kept
3 together, but we think it could still be subject to the fast track; or we think it should be
4 kept together and we think that means it can't be subject the fast track.

5 I think those are the three options and we're happy to take it away to give you a slightly
6 better answer than I'm able to give orally now and to write in with our position in the
7 event that that obviates the need for us to come back.

8 THE CHAIRMAN: That's really helpful. Thank you.

9 Mr Macfarlane, is there anything you wanted to add?

10 You're on mute, Mr Macfarlane.

11 MR MACFARLANE: My apologies. Yes, sir, I would like to add that I am of the view
12 that you first indicated that the splitting of these procedures actually would be more
13 useful. My understanding of chapter 2 is the argument of a dominance in the market.
14 I would ask the question, our point to make is, that if we were successful under chapter
15 1, that's all we need to do anyway and therefore there's infringement, full stop, if we
16 are successful. Therefore, any argument over chapter 2 becomes superfluous after
17 that particular point. So I would say that your suggestion, sir, is the more sensible way
18 forward, the quickest way forward and the least expensive way forward as well.

19 So I'm with you on this, sir, that I think it would be a sensible manoeuvre or move
20 forward on this matter to split, and I'm very much in favour of that.

21 In fact, another point is that can we bear in mind that as yet I haven't made a claim
22 and if I make a claim I have sill to decide whether I actually remove my allegations of
23 a chapter 2 infringement and I may well be prepared to do that.

24 THE CHAIRMAN: Just on that last point, Mr Macfarlane, I think we're all proceeding
25 on the basis that you have made a claim and I appreciate you might have drafted, but
26 I think the registry of the Tribunal are faced with the alternative of asking you to

1 conform -- and we'll come onto this in a minute -- but to conform more strictly with the
2 requirements of the Tribunal or allow you to proceed on the basis the document filed
3 chose the latter course, and I understand Ms Patel's clients have very helpfully not
4 taken a particular point on that and have been very instructive about how they deal
5 with it.

6 So I think we probably are treating your claim as the claim. That doesn't mean you
7 can't change it and if you are going to change it, the sooner you do that the better,
8 because the longer you leave it, there may well be cost consequences and indeed
9 there may be some cost consequences that come just simply from the defendants
10 having to address that point in their defence, because if that is so and then you later
11 draw and you're going to have to pay their costs, or at least it will be said you will have
12 to pay their those costs of the part of the case.

13 We'll come back to that in a minute, but just on the fast track point, before we go any
14 further, I'm going to make a ruling on that today. Ms Patel, I do understand the point
15 you make, but I will make a ruling on it and that is as follows.

17 **Ruling**

18 THE CHAIRMAN: I initiated the question of whether these proceedings should be
19 allocated to the fast track under rule 58 of the Competition Appeal Tribunal rules and
20 I was mindful in doing so that Mr Macfarlane was not represented. He has supported
21 my suggestion and I've heard helpful submissions from Ms Patel for the defendant
22 which have set out a number of different considerations which are very relevant to the
23 view that I have reached.

24 I have reached the view that this case is for the moment suitable for allocation to the
25 fast track. As a preliminary matter, in reaching that view, I am going to direct that for
26 the moment the case proceeds by way of the determination of the chapter 1 issues at

1 | this stage with the chapter 2 issues being parked until a later stage.
2 | That means this is not a formal separation of chapter 1 and chapter 2 issues, but for
3 | present purposes, subject to the defence, which we will discuss shortly, all directions
4 | given in this these proceedings will apply only to the progression of the chapter 1 case
5 | unless otherwise provided.
6 | Ms Patel indicates that it is possible that the defendants may reach the conclusion that
7 | the chapter 2 case should be progressed alongside the chapter 1 case even within or
8 | without the fast track and it is absolutely open to the defendant to come back and
9 | make submissions to that effect, having considered the matter further, including in the
10 | preparation of the defence.
11 | The reasons for reaching the view that the case is suitable for allocation to the fast
12 | track are based on that direction as to chapter 1 and chapter 2 that there is no real
13 | question that the claimant was a small or medium sized enterprise.
14 | The core issues in the case seem to be relatively narrow, as succinctly and helpfully
15 | summarised in Ms Patel's skeleton at paragraph 3 and in particular 3(1) which deals
16 | with the chapter 1 case. I anticipate those issues can be tried in three days and that
17 | there will be a suitably limited amount of witness evidence and documentary evidence
18 | and disclosure required.
19 | The claim as pleaded is for an injunction, so at the moment no assessment of
20 | damages is required. Ms Patel raised in her skeleton and has developed in argument
21 | points about the overlap of the claim with pre-IP completion day law, so the application
22 | of EU law and the transition period prior to leaving the European Union.
23 | Ms Patel also raised a point about the potential application of rule 39, which deals with
24 | additional claims, in particular the possibility of a counterclaim, but she did indicate
25 | that that was unlikely. Neither of those points seemed to me to weigh heavily in the
26 | question as to whether or not the case should be allocated to the fast track.

1 In reaching this conclusion, I have not seen the defence, I am conscious I have not
2 seen the defence, that's at the moment due on 8 December, but it's subject to
3 a request to extend until 11 December, and if, contrary to my expectation, this alters
4 the analysis particularly, then my decision can be revisited, as it can be if the case
5 otherwise warrants that and that may be, for example, if it is decided that the chapter
6 2 case is to be dealt with at the same time as the chapter 1 case and that the two
7 together are not suitable for fast track. If that is a conclusion that the defendants reach
8 and if they make an application to that effect.

9 All of that remains at large, but for the meantime we will proceed on the basis that we
10 are proceeding with the chapter 1 issues in the case and that those are allocated to
11 the fast track.

12

13 THE CHAIRMAN: Shall we move on -- and, Ms Patel, just to be clear, obviously if
14 there are further observations you want to make about that at any stage, then of course
15 you should either raise them on a formal basis in this CMC or if you want to make
16 an application, then please feel free to do so.

17 MS PATEL: Thank you, sir.

18 THE CHAIRMAN: Shall we move on to costs management.

19 I think from the discussions we had earlier I indicated that it followed from the fast track
20 allocation that I would provisionally expect to cap costs, but obviously at a level to be
21 determined and we need to find a way to do that. I just want to see, Ms Patel, whether
22 you had any further observations about the principle that there should be some form
23 of costs here before I make any formal order to that effect, and then we can work out
24 how we're going to deal with it.

25 MS PATEL: Well, I think the principle follows, sir, from your determination. I mean, if
26 it is a case which is now subject to the fast track proceedings, then it follows that there

1 ought to be a cap. So I'm not sure it's open to me to make much submission to you
2 on the point of principle. The question obviously of quantum is one that I've adverted
3 to already and one we would very much like the opportunity to apply our minds to the
4 level at which any cap should be set.

5 THE CHAIRMAN: Yes. Thank you. That's very helpful and so I will impose a costs
6 cap in relation to the chapter 1 aspect of the case. That seems to me the proportionate
7 way to deal with a case like this on the fast track and Ms Patel has accepted the
8 principle, which has been very helpful. Thank you.

9 In terms of the amount of the cap, what I suggest is that we proceed as follows.

10 Firstly, Ms Patel, your client should provide an estimate. Now, I much prefer a high
11 level estimate, I do not want detailed cost estimates because I don't think that's
12 particularly helpful. What I have in mind is something that sets out the main steps
13 anticipated in the proceedings and the estimated costs alongside it, plus any
14 disbursements. So really a very simple table of what you think the costs are going to
15 be at each stage.

16 The estimates should assume that the chapter 2 case is parked and, subject to what
17 we do about the pleadings, there will be no further steps required in relation to that at
18 this stage. So the focus will be very much on the chapter 1 case. Then Mr Macfarlane
19 will have the opportunity to respond and I would allow you a short reply and then
20 I would decide on the papers, unless I felt that it was necessary to have a hearing and
21 then we could come back and talk about the timings and then talk about the timetable.
22 That's the proceed process that I anticipated.

23 Just before I come to you, Ms Patel, I will just ask Mr Macfarlane if he has any
24 observations on that process.

25 MR MACFARLANE: No, sir. I've got all that and I understand that those costs
26 estimates will be coming through and then are subject to your interpretation thereafter

1 and I'm comfortable with that.

2 THE CHAIRMAN: And, indeed, your input if you want to make any observations about
3 any aspects of them as well.

4 MR MACFARLANE: Yes, sir.

5 THE CHAIRMAN: Ms Patel, how does that sound? I'm very open to different ways to
6 doing it, but that's certainly the way I've done it before and that works perfectly well.

7 MS PATEL: It sounds perfectly sensible, sir.

8 THE CHAIRMAN: Shall we agree that that's the process and then we'll come back,
9 when we talk about the timetable, we'll come back to talk about timings. I'm conscious
10 of the intervention of the holiday period at the end of the month as well, so let's come
11 back to timetable.

12 MS PATEL: Just one point, sir, Mr Macfarlane I think has said, he's obviously in
13 person today and his intention is to be in person, but I do not know if he has applied
14 his mind to the question of whether he might be instructing counsel or solicitors at any
15 later stage, for example, for the trial. Obviously, if there any thought that he might in
16 due course seek legal representations, even if only for parts of the proceedings, then
17 obviously that would be something that be helpful to know now to the extent that he
18 was then able to put in any reciprocal budget, if that was in mind.

19 THE CHAIRMAN: Yes, I think -- I got the impression, Mr Macfarlane, that wasn't your
20 plan, but if it is your plan, it will be helpful to know and indeed even if it isn't your plan,
21 if we get to that point, to be clear, we would expect you to do some budgeting as well
22 and go through the same process.

23 MR MACFARLANE: Indeed, sir, yes. No, it is not my intention. As I said earlier, we're
24 just not in a position to be able afford this, so I have to run the gauntlet, I'm afraid.

25 THE CHAIRMAN: Thank you. That's helpful. So unless there's anything else on
26 costs, we'll move on.

1 No, good, thank you.

2 The next subject is clarification and requests for information. Now, Mr Macfarlane,
3 I hope you won't be offend by the observations that the claim is not in the form that we
4 would normally expect and there's obviously good reason for that. You've offered to
5 supplement it I know, but I think the message from the Tribunal was don't do that until
6 we've had this discussion because what I'm anxious not to do most of all is to have a
7 lack of clarity about what document and what claim we're proceeding on.

8 Just to be absolutely clear with you, I don't want any new claim documents being
9 generated other than we agreed to and in order for you to change your claim, your
10 pleading, you're generally going to need to seek permission from me to do that, which
11 of course you are free to do.

12 The main thing is that we have fixed point of reference and the reason for that is that
13 it's not fair for the defendants to have to deal with shifting goal posts and we need to
14 know and the Tribunal is assisted by and the defendant is assisted by, understanding
15 what the claim is and if it is going to change, we understand why it's going to changed,
16 and you've been through a process of an explanation of that to us.

17 Hopefully that's clear. I'm sure there's a temptation to fix things up or change some
18 things, but I would ask to you resist that unless we've actually agreed you will do it.

19 MR MACFARLANE: No, sir, I have been working solidly for the last month in
20 preparation for what I fully expected to be a much clearer explanation than the draft
21 one, which I've always made clear was a draft, and it doesn't deviate substantially in
22 any way from the draft copy. So I'm quite comfortable with that and I'm quite happy,
23 if necessary, to throw it across your bows, if you would like me to do, to throw it across
24 your bows prior to actually submitting it.

25 THE CHAIRMAN: I think at the moment I'd really rather you didn't submit it at all and
26 I think we are treating your claim -- your draft as being the claim document. So if we

1 | just forget about the draft for a moment and treat that as the claim document. If you
2 | want to supplement that, then of course you're entitled to ask to do that. You're also,
3 | I think -- and I'm probably going to ask you in a minute -- to do some things to tidy it
4 | up.

5 | What I don't want you to do, really precisely to my earlier point, I don't want you
6 | producing another document which purports to be your claim document, no matter
7 | how much better it is.

8 | MR MACFARLANE: Okay.

9 | THE CHAIRMAN: And just to be clear, I imagine that you've had some exposure to
10 | the way this process works, but most of the interesting bit, as far as you're concerned,
11 | I think, is about the documents and the evidence and that's all to come and really the
12 | purpose of the claim form is to make sure that the defendant and the tribunal
13 | understand very clearly what the basis of your case is: what are the propositions you're
14 | putting forward; what's the legal case you're putting forward; and what are the key
15 | facts that support that. I certainly believe, subject to the points that Ms Patel is going
16 | to address in a minute, I certainly believe we've got most of that and a further
17 | document is not going to help us very much with that. So really I suspect the things
18 | you're doing to your document are enhancing it for the purposes of what might be a
19 | witness statement later or something like that, and so it won't be wasted, I'm sure, but
20 | I don't really want it launched into the proceedings as a variant of the claim form, if that
21 | makes sense.

22 | MR MACFARLANE: I fully understand, sir, and therefore probably the best way
23 | forward will be for me to take up the requested clarifications, the later pages on the
24 | skeleton argument where Ms Patel was stating there what clarification and bits of
25 | pieces, I'm quite happy to go along with that.

26 | THE CHAIRMAN: Good. Well, let's go through those and I will ask Ms Patel to take

1 us through them.

2 Just one other point, as a general point, and again, I invite Ms Patel's observations on
3 this. I wonder if it might be helpful at some stage, I'm not quite sure how this is going
4 to be constructed, but it will quite helpful to have something which is a list of issues
5 which makes it really plain what are the key points we do need to address for the
6 purposes of the claim.

7 Now, it may be, Ms Patel, I don't know how you're dealing with this in the defence, but
8 it may be that one way of dealing with this problem is actually restating, as best you
9 understand it, the claim in the allegations and in answering that and the defence. In
10 that way, at least we have in one document a clear statement that effectively will be
11 the issues and the response.

12 I appreciate that probably adds a bit of a burden to your efforts and I know we're close
13 to the deadline for it. I don't know if you've thought about the way in which we might
14 crystallise the key pleading points without having to ask Mr Macfarlane to do
15 something which he's not really used to be doing.

16 MS PATEL: I'm hoping, sir, that we can revisit the question of when the defence is
17 due once we've settled everything else, but I'm perfectly happy to seek to address the
18 defence in that way if, for no other reason, that we are anxious obviously to be seen
19 to be pleading to what the issues actually are and we will, I think, have some anxiety
20 as to whether we have correctly understood the issues.

21 Mr Macfarlane hasn't jumped up and down as to my formulation of paragraph 5 of the
22 skeleton argument, so I am hopeful that that does capture the essence of the claim,
23 but obviously if there is any wild sense that we've deviated or missed anything, it would
24 be very helpful to know that now.

25 THE CHAIRMAN: You mean paragraph 3, I think.

26 MS PATEL: I'm sorry, I do, yes.

1 THE CHAIRMAN: It certainly looked to me to be a good summary of what you were
2 saying, Mr Macfarlane. Is there anything you think is missing from paragraph 3 that
3 struck you when you read it? You didn't think this is not my case on or they have left
4 something out?

5 MR MACFARLANE: No, I thought the summary was very fair, sir.

6 MS PATEL: Fine.

7 THE CHAIRMAN: Thank you. I think there's the question of what are the actual factual
8 allegations that Mr Macfarlane is making to underpin those and I absolutely
9 understand the point you are making about how you meet the case and how you deal
10 with that and I certainly -- the Tribunal would find it very helpful, I think, if you were
11 able to undertake the best that you could in terms of trying to match those things up
12 and then I think you could expect consider leeway if there is any difficulty if it turns out
13 not to be as accurate as Mr Macfarlane would like and obviously you should expect
14 leeway in the way one deals with that. I don't want you to feel like that by doing that
15 you're ending up in worse position.

16 MS PATEL: I suppose the one question, sir, is Mr Macfarlane's document is, I think,
17 I would describe as it's a mixture of between a witness statement and a pleading and
18 in fact it's headed "Statement of Mr Macfarlane" and has the beginnings of how you
19 would introduce a witness statement. It obviously goes into quite a lot of detail.

20 We weren't necessarily intending to put in a defence in as quite as much detail
21 because that would involve, I think, covering some the territory that you would normally
22 expect to see covered in a witness statement. But we wouldn't wish to be, I think,
23 prejudiced by the fact that we haven't necessarily answered every single point.

24 So can I ask if the leeway will extend so far as to allowing us to make a sensible
25 judgment as to the level of detail that's needed to the defence?

26 THE CHAIRMAN: Well, that's exactly the point I was making actually, you've identified

1 exactly the point I was making. What would you like to end up, what I think would be
2 most helpful is if we actually had a list of issues which captured the cause of action
3 and the essential factual propositions that needed to be dealt with, and then we could
4 really use that as the reference point for pleading purposes and actually Mr Macfarlane
5 no doubt in due course will provide a witness statement to sweep up the other bits.

6 So I entirely agree with you that it's undesirable to have you responding to every
7 factual point put in the letter -- in the claim and I think I'm inviting you to make a
8 judgment --

9 MS PATEL: As to the key ingredients.

10 THE CHAIRMAN: Yes, exactly, and respond to those only and you will absolutely
11 would have leeway, if it turns out not to be right, Mr Macfarlane says that's not right,
12 you will absolutely have leeway to correct the position.

13 MS PATEL: Thank you.

14 THE CHAIRMAN: Mr Macfarlane, does that make sense to you? So what we are
15 saying is we are going to ask -- Ms Patel has very kindly agreed that she's going to
16 have a go at effectively summarising the legal cause of action and the key facts
17 underpinning it that emerged from your letter.

18 You'll have an opportunity to comment on that and see whether you think if anything's
19 been missed out or you put it in a different way, it's just a convenient way of us getting
20 in one place a list of the real key issues coming out of your claim. That is the proposal.
21 Ms Patel is saying quite clearly that she doesn't want to make a mistake in that regard
22 and if you say something's been missed out, then she ought to have the opportunity
23 to correct it later and have some leeway effectively -- in the way in which pleadings
24 work, she might not normally have that leeway and I'm indicating I would give it to her.
25 Does that all make sense?

26 MR MACFARLANE: Yes, it does make sense, sir. I would just say in regard to

1 paragraph 3, item 2, then we need to be dropping that paragraph because of your
2 decision, I think, of the fast track procedure and sticking to chapter 1.

3 THE CHAIRMAN: Yes. So just to be clear, at the moment it's not dropped, I've used
4 the expression parked and I hope there's not ambiguity about that.

5 MRS MACFARLANE: Yes.

6 THE CHAIRMAN: It's still there and actually there is this question, I think we'll come
7 to it in a minute, as to whether the defendant needs to plead to that point. Just to
8 reiterate the point, if the defendant pleads to that point, they're going to struck
9 an expert and spend a lot of money on that, Ms Patel is spending a lot of time to
10 looking at it, clients are going to look at it, there's going to be quite a lot of time and
11 cost involved in that.

12 Now, either we don't ask them to do that, in which case that point is really just properly
13 parked in its entirety. If we do ask them to do it, in which case we'll have some more
14 clarity about exactly what the issues are in relation to that, and I think Ms Patel has
15 raised one of those which is there's clearly quite a lot of interesting maybe quite
16 complex issue of market definition that comes out of the pleading, out of the claim, so
17 we are going to have to make a bit of a judgment. But I want it to be clear that at the
18 moment the fast track does not apply to this.

19 MR MACFARLANE: Yes, sir. Fully understood.

20 THE CHAIRMAN: So you're on cost risk in relation to this and obviously it will stop
21 after the defence, but if they were to spend time working on defence, do you have a
22 costs liability if were you then to withdraw or if indeed you are unsuccessful later.

23 MR MACFARLANE: Okay, sir. I understand.

24 THE CHAIRMAN: And, just to be clear, if you wanted to withdraw, you could,
25 of course, do that and that would minimise your cost exposure. I just want to be
26 absolutely clear with you, I'm not encouraging you to do that and I think it's very

1 dangerous for you to be taking any indication from me about whether you should
2 pursue this aspect of the case or not. That's not my role here and I can't do that. So
3 I'm not giving you any encouragement or discouragement about it, I'm just saying
4 we're dealing with it in a different way.

5 MR MACFARLANE: Totally understand, sir. It's a clear as day to me.

6 THE CHAIRMAN: That's very helpful. Thank you.

7 Ms Patel, can we walk through -- and most of this is pretty straightforward and I am
8 anticipating Mr Macfarlane would think the same -- but would you mind taking us
9 through the points that follow from paragraph 9 of your skeleton?

10 MS PATEL: Yes, sir.

11 THE CHAIRMAN: Sorry to interrupt you, having invited you to do that, I think probably
12 the first one is the simplest, we can probably take that -- I don't know whether Mr
13 Macfarlane has had a chance to look at it, but it's all very straightforward and I have
14 no questions about it. It seems quite plain that Mr Macfarlane should fill in these gaps
15 if he can.

16 Ms Patel, sorry, I've interrupted you, I should let you be doing this but I didn't think it
17 was very controversial.

18 MS PATEL: No, sir, I'm very happy to come in where you need me to and otherwise
19 for you to take us through it. I'm happy to do it whichever way you prefer.

20 THE CHAIRMAN: Let's just check and see whether Mr Macfarlane thinks he would
21 have any difficulties doing it. I don't know if you have had a chance to look at this,
22 Mr Macfarlane. It all looked to me as if it was filling in the gaps of that. This is
23 paragraph 9, I'm just talking about paragraph 9.

24 MR MACFARLANE: Yes. I've read paragraph 9 and I don't think it's necessary here
25 to go through it, I am sure Ms Patel and I can agree exactly the clarifications that are
26 required and I'm more than happy to go through all these, DC0, DM2, DM4, et cetera,

1 for clarification purposes and where clarification is required, I'm very happy to provide
2 that.

3 THE CHAIRMAN: Yes, sorry, go on.

4 MR MACFARLANE: So the original -- we all know that the original draft document,
5 full of highlighted yellow, were all there to remind me that I need to put documents in
6 there to back these things up. I admit that it's far from clear, which is why I'd been
7 working on the full claim that I call it.

8 THE CHAIRMAN: Yes.

9 MR MACFARLANE: So most of these I've probably already done in the other
10 documents, so I am more than happy to go through all these with Ms Patel in
11 correspondence or by telephone, whatever means is necessary, that we can add
12 clarity to the claim in whatever way she requires.

13 THE CHAIRMAN: That's helpful. I think probably it won't be Ms Patel. I think your
14 communication line is probably stops at her instructing solicitors. I'm sure you've
15 got -- if you haven't got details there, I'm sure they'll be in touch or someone can
16 provide you with the right contact point. You've probably already been in touch, but
17 just that's clear.

18 I think the point, Mr Macfarlane, just so we're clear on this, we need to resolve all these
19 points that have been raised. I think it's entirely fair they're raised. It may be that
20 some of them already exist and are badly cross-referenced, it may be that some of
21 them need to be added because they weren't, because it was a draft, it may be that
22 some of them you actually no longer want to rely on. We just need complete clarity
23 about what they are and where they are, and I think Ms Patel is entitled to a direction
24 that should you do that.

25 I'm not asking to you to do the impossible, so if you find there's a reference you don't
26 know the answer to, then obviously you just remove the reference and I don't want you

1 to feel like you have to, as I say, do the impossible, but I think you do need to deal with
2 all the points made in paragraph 9 one way or another.

3 MS PATEL: As a note of caution, sir, I think we're obviously content to liaise with
4 Mr Macfarlane generally in the proceedings, but just a word of caution, I'm not sure
5 that clarifying these points in correspondence with us is the appropriate way to go.

6 This is his claim form and it would be slightly odd for us to be assisting him with
7 clarifying, you know, which are the correct references in his claim. I think probably
8 there ought not to be much need to liaise with us on this, I think he needs to look
9 through his claim form, see where he's referenced annexes and then check that the
10 document that's referenced there has the correct name in the annex. I think we're just
11 asking for a correct set of annexes with the correct names in the claim form; it's not
12 really more complicated than that.

13 THE CHAIRMAN: Yes. So as you go through the claim form, Mr Macfarlane, you
14 would see a cross reference and you would make sure it was the right cross-reference
15 on the right document. Equally, if you've got documents attached to the claim form,
16 you need to make sure there is a cross-reference to them in the claim and that that's
17 clear where that is. So those are the two parts of the exercise, I think.

18 MR MACFARLANE: I think that is work that I've already done, sir. I fully expected
19 this to be done and it's already in place.

20 THE CHAIRMAN: Just to be clear, I do not want you to do it on a new document,
21 I want it do it on the existing documents. I don't want any other changes, other than
22 the things we talk about, I do not want you making any other changes to what's been
23 called the draft claim form. I don't want you to start adding in new sentences or things
24 like that. All I want you to do is make sure the right documents that it refers to are
25 attached and make sure that if it is attached has a cross-reference in the text. But
26 otherwise no new text, no new documents, please.

1 MR MACFARLANE: Yes. That's fine. I'm comfortable with that.

2 THE CHAIRMAN: How quickly do you think you can -- I'm sorry, keep going.

3 MR MACFARLANE: The only thing I'm uncomfortable about is the 4 pm, by Monday
4 4 December, being the next working day --

5 THE CHAIRMAN: Well, I was just going to come onto that, and let's talk about it in
6 the timetable. I think probably Ms Patel is going to say, well, we would like to have it
7 before we finalise the defence, which is not unreasonable. So the longer it takes, the
8 more delay the defence is. But let's come back to timing in a minute, and we'll work
9 out what everybody needs to do and when they need to do it, if that's all right.

10 MR MACFARLANE: Yes.

11 MS PATEL: I'm sorry, I gave two tasks, there was a third one which is one exhibit at
12 least which is incomplete, which is the transcript of the call with the CMA. So it's in
13 fact to go through the claim form, check the references are correct, go through the
14 annexes, check the annexes are correct, but also check the annexes are complete.
15 The CMA transcript, I think, has alternate pages only, so...

16 THE CHAIRMAN: Yes. And I envisage the output of this, Mr Macfarlane, is you
17 providing everybody with this updated version of the draft claim form with all the
18 documents attached to it, so that we can all see exactly -- we can see it as one
19 composite thing.

20 I think Ms Patel is right, there's no need for the correspondence or explanation, we
21 just want to see what the document in its finalised draft form, if one can put it that way,
22 looks like.

23 MR MACFARLANE: Yes, no problem.

24 THE CHAIRMAN: That's very helpful. Thank you. We'll come back to timing in a
25 minute.

26 Ms Patel, shall we go on to paragraph 10? I will let us take us through these ones, I'm

1 going to hand over to you, if that is all right, rather than jumping in.

2 MS PATEL: Yes, sir.

3 I think our understanding -- and I think, sir, you said a moment ago in your ruling on
4 the fast track procedure -- there is a claim for an injunction not a claim for damages.

5 That was certainly our understanding as well, but I think, in correspondence with us in
6 relation to the CMC agenda, Mr Macfarlane said something which just caused me to
7 doubt whether that was correct. So I have put as 10.1 just seeking confirmation that
8 the claimant doesn't seek damages --

9 THE CHAIRMAN: Yes.

10 MS PATEL: -- because it now appears to be slightly unclear.

11 THE CHAIRMAN: So Mr Macfarlane, my understanding of the claim form is that you're
12 not seeking damages. Obviously no one's saying you can't. If you do, it may have
13 some implications for the decision I've just made about the fast track and of course
14 you will need to explain what they are as well. The question really is are you intending
15 to do that either at the moment or some stage in the future, or are you leaving it as the
16 sort of claim it currently is -- I'm not necessarily asking --

17 MS PATEL: Sorry, sir.

18 THE CHAIRMAN: I was just going to say I'm not necessarily asking you to answer
19 that question now, because you may want to think about it, but we do need to know
20 the answer to it pretty smartly because it does make a difference to how we approach
21 the case. Just to give it a bit of extra colour, if you're proceeding just with the claim for
22 an injunction, the answer to that really by and large follows from whatever finding
23 I make might make or the tribunal might make about the infringement. So if there's
24 an infringement, I think the question would then be much more about what's the nature
25 of the order for injunction that might be made and is it proper to require supply and, if
26 so, in what terms and that sort of thing. That's a different sort of discussion from the

1 liability discussion, but not dramatically different.

2 If you're making a claim for damages, then we need to understand all the factual
3 material that gives rise to that, in other words: what's the position you're in now; what
4 position would you have been if supply hadn't been withdrawn; if it's dependent on
5 other people like the franchisees, how does that factor into your economic position;
6 and would you need to provide quite a lot of disclosure about your financial position
7 and quite possibly there may need to be some expert evidence just to draw that
8 together.

9 That's an endeavour we would want to know we needed to deal with and we would
10 want to understand how you were putting that and that would feed into the questions
11 of disclosure, feed into the questions of what sort of evidence we need. So that's the
12 reason for pressing you on that.

13 No one's saying that you can't bring a claim and no one is saying that if you don't bring
14 it now you can't bring it another time, but I think it would be helpful to know what your
15 current view on that is.

16 MR MACFARLANE: Yes, sir.

17 THE CHAIRMAN: So you don't need to answer that question now, but we do need to
18 know the answer pretty smartly.

19 MR MACFARLANE: My thought process, sir, is that we would be looking to bringing
20 a claim for damages, but I'll be guided by you on this. But I was hoping that we could
21 deal with that -- oh, my thing is saying I should leave.

22 THE CHAIRMAN: Yes, that's probably just the timing in the court. Don't worry, just
23 ignore that.

24 MR MACFARLANE: Okay. But I was hoping that we could deal with any damages
25 claim in a separate hearing that might be able to be -- because the whole thing, for
26 instance, may be a complete waste of time me making a claim for damages or even

1 pouring cold water, as you said earlier, on the fast track procedure if, at the end of the
2 day, the defendant is found to have not caused an infringement or there is no case to
3 answer, for instance. So the claim for damages in itself will be somewhat of a waste
4 of time if that is the conclusion. So I would hope that we could deal with damages by
5 a statement maybe we do claim damages to be assessed at a separate and different
6 hearing.

7 THE CHAIRMAN: I think you identify -- well, there are two different things here. One
8 is that the defendants are entitled to know if this is a claim just for an injunction or if it
9 is a claim for damages as well and if it is a claim for damages, you need to say so.

10 What the implications of that are in terms of the way the case is managed is a different
11 thing, and it is open for discussion as to whether we deal with liability first and damages
12 later, and that is not unusual, not always the case though. So there are ways of dealing
13 with the point you make about whether if unnecessary evidence is put in until one
14 knows whether the liability exists or not.

15 The difficulty, I think, is that, as I say, the defendant is entitled to know what your
16 position is with you making that claim, and in order for you to do that, I think you need
17 to do more than just say I'm claiming. You're going to need to give some indication of
18 what the basis of that claim is, so for example, I have earned less, or the company,
19 who is the claimant, has earned less because, and you're going to need to do some
20 rudimentary work to tell us what the likely quantum of that is going to be.

21 MR MACFARLANE: That's already been done.

22 THE CHAIRMAN: So there then can be a debate about what that means in practice,
23 about whether we should be asking you to produce disclosure, produce evidence
24 about that and whether it's dealt with in the first half of the case or whether it's put off
25 to some other part. That's all for later discussion. I think the main point is it seems to
26 me you're suggesting you do have an intention to bring that sort of claim.

1 MR MACFARLANE: Yes, sir.

2 MS PATEL: Sir, can I --

3 THE CHAIRMAN: Carry on.

4 MS PATEL: Can I suggest that I talk through the other points in paragraph 10,
5 because they are, in fact, all about remedies. I wonder if it might help Mr Macfarlane
6 identify what actually he's seeking, because it seems that what Mr Macfarlane is really
7 seeking is resupply and it might be helpful for you, sir, to know the defendant's terms
8 and conditions in fact allow for termination of an account on notice for any reason at
9 all. And so there would be, I think, quite a bit of work for Mr Macfarlane to do in actually
10 pleading a damages claim because he would need to set out what he says the loss is
11 and why he says the loss flows from the actions which he says are anti-competitive by
12 reference to both the terms and conditions and by reference to what he says happened
13 in practice.

14 Now, 10.2 is about an injunction.

15 I think the Tribunal has listed the case as one for final injunction, sir, as you have
16 indicated and that's the basis on which you've made the fast track ruling.

17 There's obviously a reference in the claim form to an interim injunction although, as
18 I indicated in skeleton, there isn't a proper application for one. One of the
19 points -- I think it's the defendant's submission that an application for an interim
20 injunction would be quite difficult to succeed on based purely on the two points that
21 have been made in the skeleton.

22 One is that an interim injunction application would be being made very late in relation
23 to a breach, which is said first took place, I think, in 2020 and delay is obviously a
24 factor the Tribunal would need to take into account.

25 But two, because actually the interim injunction that the claimant would be seeking in
26 terms of how he's described it in the claim form, which is immediate resupply, seems

1 to be effectively the same as the final injunction that he would be seeking and so that
2 really was the point of 10.2, to ask whether the claimant really is seeking an interim
3 injunction or whether really, in fact, what he's seeking is a final injunction determined,
4 you know, relatively speedily, as would be done if the case is to be remain on the fast
5 track because there will be a final hearing within six months, and in those
6 circumstances does it really add anything to be seeking an interim injunction if the
7 relief is going to be the same in terms of final remedy sought.

8 THE CHAIRMAN: So, Ms Patel, just on that point, are you saying that this is one of
9 those cases where it would be difficult to give the interim injunction because it's
10 effectively deciding the outcome; is that the point you're making?

11 MS PATEL: That is one of the points and also there is a three-year delay.

12 THE CHAIRMAN: I understand the delay point, just putting that to one side for a
13 minute, I'm just focusing on the second point. Is that right? I don't think that does
14 follow, does it? It's no different from any other case where you're maintaining, if you
15 like, the status quo before what is said to be the infringement. I don't see why it has
16 anything to do with determining the final outcome, it would be perfectly open for the
17 tribunal at the end to decide that he's not entitled to supply and -- because all he has
18 to do is to satisfy -- to get the interim injunction, he's got to satisfy the serious question
19 and the balance of convenience --

20 MS PATEL: It's a factor which weighs quite heavily in the balance of convenience and
21 both the CAT guide to proceedings, although it references it as one of the special
22 considerations that applies where an interim injunction will effectively give the final
23 outcome as a factor to be considered, and I think I cite a case in the skeleton as well.

24 THE CHAIRMAN: I'm just struggling why -- maybe I'm being a bit dim -- I'm just
25 struggling as to why that is the case, because we can quite sensibly get to the position
26 where he gets interim supply but then doesn't get an order for an injunction at the end.

1 MS PATEL: The way that the case that I've cited deals with it, it's paragraph 19.5,
2 they cite the case of Plessey(?). But really what you're doing is you are
3 effectively determining -- an interim injunction is obviously determined without hearing
4 any live evidence, so you are effectively hearing -- you are making a decision on
5 effectively the evidence that you would be hearing at trial but without hearing from any
6 live witnesses. So you are effectively determining the final issue on an interim basis.

7 THE CHAIRMAN: In some cases, yes, but I don't see why that's the position in this
8 case. I may be missing something, but it seems to me you're not determining it at all,
9 you're making an order that supply be continued pending a decision as to whether he's
10 entitled to that on a longer term basis. Isn't that right, or am I missing something? All
11 you're doing is saying that on the basis of a serious issue to be tried you're ordering a
12 supply to take place for three months pending the outcome of whether he's entitled to
13 permanent supply, if one could put it that way, or rather --

14 MS PATEL: You are effectively making a determination as to the likelihood that the
15 clauses are anti-competitive.

16 THE CHAIRMAN: Well, that's a different point though isn't, it? If one puts it as a
17 resale(?) price(?) amendments point. I appreciate it's not as straightforward as that,
18 but if one does that and applies the serious question, you're right, you may well get a
19 long way down that track just as a matter of legal analysis. As we know, that's not the
20 answer to the question, you've got to view the clause in the economic and legal context
21 and I assume that means there must be some degree of evidence about why the
22 clause is there and how it comes into being.

23 Now, that may be a relatively thin scintilla. You may be right that once you -- if there
24 was an interim injunction application and you lost it, you may be right, but it doesn't
25 leave an awful lot more to be determined at the final hearing. I don't think it resolves
26 it entirely, does it? That's your submissions, is it, that is what you are saying happens?

1 MS PATEL: I don't think it resolves it entirely, but it seems to be a factor that weighs
2 quite heavily in why you shouldn't grant one because of where it leaves the balance of
3 convenience and that the injustice to the defendant is then quite significant if it turns
4 out to be wrongly granted, especially if there's no cross-taking in damages.

5 THE CHAIRMAN: Yes, I understand all that, that's fine. I think we are on the same
6 page, that's helpful.

7 MS PATEL: The reason for raising it was simply because I just wanted to put to
8 Mr Macfarlane whether he really was seeking an interim injunction given it's three
9 years since this happened and given that, if the case is subject to the fast track, then
10 there ought to be a decision on a final injunction relatively promptly, because it
11 obviously will take up quite a bit of time and cost dealing with an interim injunction
12 application which time and energy could be put towards a trial. So the question was,
13 you know, what sort of an injunction are we seeking; is it interim or is it merely final or
14 is it -- you know, is it both?

15 THE CHAIRMAN: Yes. Well, let's ask Mr Macfarlane that. Mr Macfarlane.

16 MR MACFARLANE: Thank you, sir. I would say, sir, that there can be no harm -- first
17 of all, I'm not asking for a final injunction. I think that would be unreasonable.
18 I actual disagree that the amount of costs, I think the opposite -- the amount of costs
19 on a temporary injunction would be less, if anything else, because the defendant in
20 this case would be earning money from us --

21 THE CHAIRMAN: So, Mr Macfarlane, I'm sorry to interrupt you, but I think you may
22 be proceeding on a misapprehension. You can't get an interim injunction without
23 seeking a final injunction.

24 MR MACFARLANE: Oh right, okay.

25 THE CHAIRMAN: So the point is, as I understand what you're saying, you're saying
26 that the defendant has ceased supply for reasons which are unlawful, there's no

1 reason why they shouldn't supply you and therefore, if one takes away any suggestion
2 of the unlawfulness, then the status quo, the counterfactual to the unlawfulness says
3 that you get continued supply and they should be ordered to do that. Unless there's
4 some other valid reason why they're entitled to stop and obviously that valid reason
5 would have to be distinguished from the invalid reasons which would include
6 disciplining you for failing to do what any want. So there is a whole load of complicated
7 things to talk about there and one talks about what the injunction looks like at the end.
8 As I understand it, what this is all about, and I think we proceed on this basis today, is
9 that you want supply and you want some assurance of continued supply and you
10 certainly want to achieve the objective that if the refusal is unlawful, if the withdrawal
11 of the supply is unlawful, you would like that unlawfulness remedied.

12 MR MACFARLANE: Yes, sir, shall and should I --

13 THE CHAIRMAN: Yes.

14 So on that basis it's a perfectly sensible thing for you to have done to seek
15 an injunction and it would be consistent with that if you were to seek an interim
16 injunction, but you may not succeed on that. As Ms Patel says, that's all to organise
17 for.

18 What we need to know is whether you want to have a go at that, in which case, as Ms
19 Patel says, there's been quite a lot of delay but you need to get on with it, I think, and
20 make an application -- we'll come on to this in a moment and talk about it, but I think
21 we need to talk about it perhaps in a slightly more structured way, but I think the real
22 point is that Ms Patel is trying to get from you an indication of whether you intend to
23 apply for an interim injunction or just let this go through to a trial and get whatever you
24 get then. That is the question. It understood that you want a remedy sooner rather
25 than later is your approach.

26 MR MACFARLANE: Yes, sir. I do intend to apply for an interim injunction and the

1 reasons for this apparent delay is I wasn't aware that I was able to, in the previous
2 court hearings, apply for that and let's not forget that there was an argument going on
3 for a year and a half nearly on competition law issues that I was hoping was going to
4 be resolved at the last hearing.

5 THE CHAIRMAN: Yes, we will get into all that, I am sure, if you do make your
6 application.

7 Ms Patel, you have an answer, it's not really a pleading point, is it? We're really going
8 to come and talk about what he is going to do about an interim injunction hearing
9 because it's on the agenda, but do you need anything more than that at the moment?

10 MS PATEL: Well, 10.2, I think, is clear. 10.3 is relevant to the terms of the injunction,
11 I think that is a pleading point. The question at 10.3 is that the claim form says that he
12 seeks an injunction -- it's the last page of the claim form -- seeks the
13 resupply -- requests an interim injunctive relief order from the Competition Appeal
14 Tribunal to resupply the complainant business on the same terms as existed. But
15 elsewhere in the claim form he says that the entirety of the terms and conditions are
16 void and unenforceable.

17 THE CHAIRMAN: I don't think that's necessarily inconsistent. I think it's pretty
18 obvious, what he is saying is that the rest of the contract works perfectly well for him
19 and he's happy to agree those terms. He says if offered, he would take the supply.
20 I mean, is it really a pleading point?

21 MS PATEL: It would be helpful to have -- I mean, if that's the position, it would be
22 helpful to have Mr Macfarlane confirm what you have just said, sir, because it wasn't
23 clear to me that what he was saying was void and unenforceable was just that term, it
24 appeared to be broader.

25 THE CHAIRMAN: I don't think he necessarily has to commit to that, because
26 obviously there may be all sorts of questions as to what was unenforceable. Broadly

1 speaking, the commercial terms on which he is supplied at the moment I would have
2 thought would be what he would anticipate being the basis of supply under an order.
3 Is that right, Mr Macfarlane? Is that --

4 MR MACFARLANE: Yes, sir, there is a reason why I included on the existing terms.
5 We do have to -- I understand Ms Patel's point on this in actual fact is that I'm saying
6 the contract is null and void, so therefore I want it on that same null and void contract.
7 But I'm not really saying that, what I'm really meaning is the payment terms and the
8 supply of product as it existed there. The only thing in truth we're disputing about the
9 contract is paragraph 14 and that has yet to be determined by this tribunal.

10 THE CHAIRMAN: Yes, that's helpful thank you. I think that does deal with the point,
11 does it not, Ms Patel?

12 Shall we move on? I'm just conscious of the time. I think we're going to drift well
13 past -- we are obviously past 1 o'clock and we're moving reasonably slowly, perhaps
14 unsurprisingly. I think we probably do have a bit to get through yet. I'm just wondering
15 whether you would prefer to take a break and come back at 2 o'clock and in that I'm
16 just conscious that the shorthand providers may well have a view on that as well.

17 MR MACFARLANE: I am comfortable with whatever you want, sir.

18 THE CHAIRMAN: Ms Patel, do you have a preference?

19 MS PATEL: Again, I can be flexible, sir. If the shorthand writers need a break, then
20 I'm happy to come back at 2 o'clock and we can --

21 THE CHAIRMAN: I do not know whether the shorthand writers have a particular view.
22 Why don't see how much progress we make in the next ten minutes, otherwise, I think
23 if we make some progress, we might keep going. If we don't, I might take a bit of a
24 break. It's been quite a long session already.

25 That's been helpful. Thank you.

26 Can we move through these a bit more quickly and I've no criticism, I appreciate it's a

1 taking a bit of time, but I think we've certainly covered five.
2 I mean, five is really a matter for evidence, isn't it?
3 MR MACFARLANE: Yes, sir, that's fine. So I think it's just (iv).
4 THE CHAIRMAN: Where did "covenant" come from? I couldn't find covenant in the
5 document.
6 MS PATEL: It's the last sentence of the claim form before the statement of truth.
7 THE CHAIRMAN: Maybe I'm looking at the wrong thing, but mine doesn't say that.
8 Oh, I see. Well, maybe it is. Is that a different document.
9 It may be my fault, I've confused with the documents. Fine. Okay, I can see it now
10 and I've got it. Okay.
11 Mr Macfarlane, have you got this point? In the last sentence in your claim form you
12 say:
13 "In any case Up and Running would agree to a covenant to be limited to a 100,000 in
14 any event."
15 I think the question is what does that refer to?
16 MR MACFARLANE: I was meaning on account of costs, sir.
17 THE CHAIRMAN: Yes. I understand. So the question that's put is that in relation to
18 any proposed cost cap; is that the point you're making?
19 MR MACFARLANE: Yes, sir.
20 THE CHAIRMAN: Yes, I see. That is helpful. Is that helpful for the defendant's
21 purposes?
22 MS PATEL: Yes, sir.
23 THE CHAIRMAN: Good. So have with dealt with all these.
24 MS PATEL: There's the question of damages, sir. I don't know where we left the
25 question of damages.
26 THE CHAIRMAN: Well, I think we've left it that Mr Macfarlane needs to tell us what

1 he's doing with that and I think that probably -- I mean, that is, I think, an amendment
2 of the claim, Ms Patel, and you obviously are in the process of providing your defence
3 and so you no doubt have some things about how you would like to see that work.
4 It seems likely that it is helpful to understand what Mr Macfarlane is saying sooner
5 rather than later, so if we asked him to set out in a letter exactly what he is saying
6 about his claim for damages and then we can perhaps consider, if that comes relatively
7 quickly, you may be able to deal with it in your defence, and if you can't deal with it,
8 then we will have to see what needs to be done to make it work and how it fits into the
9 bigger picture.

10 MRS MACFARLANE: I can deal with it fairly (overspeaking) --

11 MS PATEL: -- (overspeaking) about the ruling that you've just made, sir.

12 MR MACFARLANE: Yes, I can deal with the damages fairly quickly. It is something
13 I've been preparing for for the last month, sir.

14 THE CHAIRMAN: Well, why don't we tie it into the rest of this activity. We will talk
15 about the timing of that. That is something that I direct that you do, Mr Macfarlane,
16 you set out your position on damages and we've talked a little bit about -- hopefully
17 you can go back and look at the transcript if you're not sure about what you need to
18 cover in there, you can go back and have a look at the transcript and see -- remind
19 yourself about the conversation we've had.

20 MR MACFARLANE: Yes, I can give a clear indication as to damages; is that what
21 you're seeking really, just an indication?

22 THE CHAIRMAN: The fact that you're claiming it, the basis on which it's being claimed
23 and what your estimation of that is.

24 MR MACFARLANE: Would you require some outline evidence at all, sir?

25 THE CHAIRMAN: No, at this stage, just the facts you rely on, just the things you rely
26 on and what the consequence of that is.

1 MR MACFARLANE: Okay, yes, sir.

2 THE CHAIRMAN: And if we need anything more, if Ms Patel needs anything more,
3 she will let us know.

4 Good, okay, so that deals with paragraph 10, Ms Patel; is that right?

5 MS PATEL: I think it may mean we've, in substance, dealt with most of 11 as well.

6 THE CHAIRMAN: Good. I think we've dealt with 11 sub 1, haven't we, and I think it's
7 pretty clear that we are dealing with a chapter 1 section 2 case and an article 101
8 case. I don't think he needs to plead the buck(?) exemption, does he?

9 MS PATEL: I haven't understood it as article 101, sir, I had only understood it as
10 chapter 1 and 2.

11 THE CHAIRMAN: I thought you -- as a consequence of the IP completion point you
12 were at least recognising that he was putting it that way.

13 MS PATEL: No, sorry, all that means is that under the pre-brexit legislation for chapter
14 1 and chapter 2 --

15 THE CHAIRMAN: No, I understand that point --

16 MS PATEL: -- the EU block exemption applied.

17 THE CHAIRMAN: Yes, I thought you were putting it more broadly.

18 MS PATEL: That's what I meant to say.

19 THE CHAIRMAN: Okay, that is fine. In that case, unless Mr Macfarlane has anything
20 further to say about that.

21 MR MACFARLANE: No, sir, I'm clear enough on that.

22 THE CHAIRMAN: And then we've got sub 3 as well. We've done that, haven't we?
23 Good.

24 So we'll come back to timing. Just one thing, Mr Macfarlane, when the defence is filed,
25 I just want to raise with you the concept of a reply. Once the defendant is filed, you
26 would be entitled to file a reply. You don't have to do that, but if you wish to you can.

1 Just to be clear with you, it's not intended to allow you to repeat your case, it's not
2 about repetition. The point is that it does allow you to make it clear where you disagree
3 with anything that's said in the defence that you feel you formally need to admit or
4 deny. So you accept or disagree. So it's a formal process so we're clear about what
5 you say about what is said in the defence. So there may be some things said in the
6 defence, like, for example -- this is entirely hypothetical, because it may not arise -- but
7 it's possible that the question of the block exemption might apply, it might be said that
8 has some consequence and you'd be entitled to say what you thought about that.

9 MR MACFARLANE: Yes, sir.

10 THE CHAIRMAN: That's the sort of thing, obviously not limited to that, but just give
11 you a sense of that, and so I'd like you to think quite carefully about whether you want
12 to put something in and, if so, what it addresses. What I don't want to do is find you've
13 repeated a whole lot of material that we already know about because that won't help
14 me and anybody else in terms of the process.

15 I think you are familiar with some of the material about pleadings, the CPR and the
16 Tribunal's guidelines. So have a look at those and they will help you a bit just how to
17 characterise that document and the way you should proceed with it.

18 MR MACFARLANE: Yes, sir. Nobody wants this case to be over more quickly than
19 I, sir.

20 THE CHAIRMAN: The sharper and more focused you can make that, the easier it will
21 be for everybody.

22 Good. Let's move. Disclosure.

23 Just to be clear, here we're just dealing with the chapter 1 allegations.

24 Mr Macfarlane, just in terms of framing this for you, and obviously I think you've been
25 through this before so you know a bit about it. The first thing is it's really important
26 that you've preserved all your documents.

1 MRS MACFARLANE: Yes.

2 THE CHAIRMAN: Including electronic documents, so you have to make sure you've
3 kept those somewhere safe and they can be produced if need be. That is the first
4 point.

5 Secondly, just a bit of a question, do you have a sense of what sort of volume of
6 material you've got that might be relevant to this case? I appreciate you haven't seen
7 the defence, so you don't know what they're saying, but thinking about the chapter 1
8 case we're talking about here now.

9 MR MACFARLANE: Yes, sir. I think that the whole thing could be limited to -- I have
10 the work I've done over the last month, 20 pages of documents.

11 THE CHAIRMAN: And you have emails -- including all the emails and other things
12 you've got?

13 MR MACFARLANE: Yes, sir. I've gone past the stage of the emotional stage and I'm
14 trying to just be factual about what it is that I present.

15 THE CHAIRMAN: Good. Okay. Well, look, one thing I might suggest, I'll see what
16 Ms Patel thinks about this, but it might be helpful for the defendant to write and explain
17 what they expect, just to give you a bit of a sense of what that might look like. Would
18 you object to that? Would that be helpful to you, do you think?

19 MR MACFARLANE: It would be very helpful to me, yes. Again, the more clarity on
20 both sides, the sooner we're going to come to a conclusion.

21 THE CHAIRMAN: Yes, good. And just to be absolutely clear, you'll have to take
22 responsibility for that process. So you're going to have to sign a document that says
23 I've disclosed all the things that whatever it is that I order should disclose. We haven't
24 got on to what that should be and we won't decide that today, I don't think. I am really
25 talking about an exploratory exercise, so that it's clear what sort of things the parties
26 want and what sort of documents they might have.

1 MR MACFARLANE: Yes, sir. I'm quite comfortable with that. I've been going through
2 it. There's very little -- there may be four or five documents only that I will be adding
3 to the documents that I've already forwarded to the defendants in this case, which
4 they've already seen and got.

5 THE CHAIRMAN: Okay. That's helpful. They may have some other things they want
6 to see and they will write to you about those.

7 MRS MACFARLANE: Yes.

8 THE CHAIRMAN: Ms Patel, as you will have picked up, I don't think I necessarily want
9 to make an order today about the nature of disclosure, what sort of regime we're under
10 because I think it would be better if we had a bit of backwards and forwards between
11 the parties just to understand what's out there. Is that sensible, do you think?

12 MS PATEL: I think it's very sensible. I think primarily the pleadings should close first
13 and then we are happy to pick up that exchange.

14 THE CHAIRMAN: That would be very helpful and obviously I don't need to remind
15 you or your clients about preservation of documents, and I think it would be quite
16 helpful to get a bit of a sense of what you think are potentially discloseable documents
17 and just make that clear to Mr Macfarlane.

18 Also whether there are any privilege issue as well, it would be quite good to surface
19 those sooner rather than later.

20 As I say, we're focusing on chapter 1 here, so we're trying to keep this reasonably
21 contained. So what I would suggest is that, if we had a regime earlier, perhaps earlier
22 in the new year, we'll come back to the final timing of the defence in a minute, if there
23 was an change of correspondence earlier in the year about what you each think is
24 important and useful, and actually that may be that I don't need to make an order
25 because it's fairly obvious -- I mean, I suspect we're probably just talking about a
26 relevance test, a simple relevance test here to what is a discrete set of issues, but

1 I won't go any further than that. Obviously, as you say, we need to see the defence
2 and so on, but I'm hoping that there might actually -- I am sure there's going to be
3 some -- there's going to be a need to make sure that everybody understands what's
4 required as a result of that, but I rather hope that we could agree roughly what we are
5 talking about without there being a lot of extensions for the Tribunal.

6 MS PATEL: That would certainly be our preference, I'm sure.

7 THE CHAIRMAN: Good. Okay. Anything else on disclosure before we move on?

8 No, thank you.

9 Interim relief, next on the list, and I think we have covered a lot of this, I hope, and
10 Mr Macfarlane, will you have seen in Ms Patel's skeleton at 19 there's a good summary
11 of the way -- of a test, if you like, that can be applied if you're going to make an interim
12 application -- an application for an interim injunction.

13 Just to give you a sense of what you need to do for that, you need to write to us,
14 copying in the defendant's solicitors, making your application and stating that and you
15 need to say exactly what you want me to order and you need to provide any evidence
16 in support of that and whether that's what you say or what maybe franchisees say or
17 whatever it is, you need to provide that and it will be helpful if you could separate the
18 evidence from the application.

19 In other words, if you write a letter that says this is what I want and then refer to the
20 evidence you've got and then give us just some short witness statements, with a
21 statement of truth, of whatever it is you want to say in support of that by way of
22 evidence. Does that make sense?

23 MR MACFARLANE: Yes, sir. Again, a lot of that is already prepared.

24 THE CHAIRMAN: Good, and then we will need to have a conversation about the
25 question of an undertaking.

26 Now, just so you're clear, we talked about it before. I think you understand that there

1 is a potential for you to be liable for the losses that the defendant must suffer if
2 I granted the injunction and then it turned out not to be required.

3 There's also the potential for you not to do that because we're in the fast track and I'm
4 not going to have that discussion today, that should be part of the discussion that
5 comes with we know you're making the application, but I just want you to be clear that
6 there is no decision on that and there's at least a theoretical exposure to you for making
7 this application. It's not a free pass.

8 I haven't made that decision yet, but clearly I'm sure that Ms Patel will want to make
9 some submissions about whether there should be some degree of exposure from you
10 to the defendant if the Tribunal were to grant the application.

11 So just so you know, that's there.

12 If I were to order that, you'd have to provide some evidence that you could actually
13 comply with it, so those are all things that would have to be dealt with at some stage.

14 But in the meantime, let's just get your application -- if you're going to make one, let's
15 just get it in with the key evidence that you want to put in to support it. Normally we
16 would ask you to provide a draft order but I'm going to suggest we dispense with that,
17 given you're not represented and we can deal with that at a later stage and it may be
18 that Ms Patel will be able to help with that as well. So I imagine the Tribunal can
19 provide a draft and Ms Patel can comment on it.

20 So we come back to --

21 MR MACFARLANE: I've already done a draft order as well.

22 THE CHAIRMAN: Oh good. Well, that's good.

23 So we actually really come back to a question of timing, and I'm getting an impression
24 from you, Mr Macfarlane, you consider this to be quite urgent, is that right.

25 MR MACFARLANE: Yes, sir. Yes.

26 THE CHAIRMAN: I suppose, Ms Patel, I mean, I think it's clear from what you've said

1 already today, but I should ask, is there any prospect of any voluntary supply of
2 Mr Macfarlane while this case is proceeding or is that not something that the defendant
3 would contemplate?

4 MS PATEL: Can I have a moment to answer that?

5 THE CHAIRMAN: I don't need an answer necessarily to it now, I just wanted to float
6 the point with you, and, of course, if it was something that you wanted to pursue, then
7 it probably ought to be done on a without prejudice basis, in which case I don't need
8 to know anything more about it. But it just seemed to me at least that we ought to
9 know that there's some consideration given to that and I'm not suggesting in any way
10 what the outcome of the application might be. It's just that we're trying to avoid costs
11 and no doubt there are considerations for your client as to whether that's a good thing
12 or a bad thing and they need to make their own decision on that. But I just raise it for
13 further discussion.

14 So no need to come back on it now, but just if I could can float that point for to you
15 think about.

16 Sorry, Mr Macfarlane, just before you come back in, I want to check if Mr Patel's got
17 anything to add to what I've just said to you or anything else on this point?

18 MS PATEL: Just one point, sir, which is I think we've now got a few tasks for
19 Mr Macfarlane in relation to the claim form tidying up.

20 THE CHAIRMAN: Yes.

21 MS PATEL: The particularisation of any damages claim.

22 THE CHAIRMAN: Yes.

23 MS PATEL: And the interim injunction application and maybe just to draw attention to
24 the inter-relationship between two and three, because obviously one of the questions
25 for an interim injunction is why damages would be an inadequate remedy.

26 THE CHAIRMAN: Yes.

1 MS PATEL: So he just may want to give some thought together to his damages claim
2 and to his interim injunction application because there's an interrelationship there that
3 he'll want to give thought to.

4 THE CHAIRMAN: Yes, that's a point well made. Mr Macfarlane, just so I make sure
5 you understand that, one the factors that I would be looking at in any application you
6 made would be whether damages would be an adequate remedy, because, if you
7 could compensated by damages at the end of the case, it wouldn't matter if you didn't
8 get the supply, and so there's a little bit of a tension between your interim injunction
9 application and the damages. That's not to say you couldn't get it, either the injunction
10 or the damages. You can't get the two of them together, but just so you know there's
11 a relationship there that I think Ms Patel is very fairly pointing out you might want to
12 think about.

13 MR MACFARLANE: Yes, I understand that point, sir, but I think that I'm experienced
14 enough to know that one can get over these disagreements in court and be
15 professional about it and just carrying on for the common good of both parties. That's
16 my view anyway, but that's an approach I prefer to take on it.

17 THE CHAIRMAN: Yes, that's understood. Thank you.
18 Is there anything else you wanted to say about the injunction at the moment,
19 Mr Macfarlane? I mean, I think the message is that you need to get on with it. We'll
20 just talk about timetable in a minute, and, if you get on with it, then we'll get on with it
21 as well.

22 MR MACFARLANE: I shall focusing on it all this weekend, sir, as an overriding
23 priority.

24 The only thing I would say about it is any such injunction would be a no lose situation
25 because we would be intending -- even if this matter went to the full course, we would
26 be by that time probably have spent the best part of half a million pounds with the

1 defendant in the matter and therefore it's a win win for both sides in the meantime.

2 THE CHAIRMAN: Yes. When you say no lose, I think you mean for them, do you?

3 MR MACFARLANE: For all parties, sir, because we'll have the benefit of the product.

4 THE CHAIRMAN: Okay. I see. Sorry to cut you off. It's just really that's not really for
5 me to get involved in this. If there is a commercial discussion to take place on a without
6 prejudice basis, then obviously that is fine and you should do that. But I mustn't be
7 involved in that, Mr Macfarlane, just to be clear.

8 MR MACFARLANE: No, the reason I mention that, sir, is based around your question
9 to Ms Patel as to whether it would be a voluntary position that they might adopt.

10 THE CHAIRMAN: Exactly. No, I appreciate that, but just so it's clear that that's
11 something that I've floated and left. We don't need to discuss is any further in this
12 forum. But clearly Ms Patel's clients no doubt will think about it and, if they want to
13 talk to you about, it, they'll talk to you about it.

14 MR MACFARLANE: Yes.

15 THE CHAIRMAN: So we're on the home strait. Timetable. Is there anything else
16 on interim injunction. We've dealt with that, I think.

17 MS PATEL: No, sir.

18 THE CHAIRMAN: Thank you. Let's just whistle through this. So the response -- so
19 things for you to do. As Ms Patel says, some things for you to do. SO, Mr Macfarlane,
20 one of them is the response to the request for clarification and I think you indicated
21 4 December was a bit tight for you. You've got to produce some particularisation of
22 damages and you also want to make your application for interim injunction. When do
23 you think you can do all those, bearing in mind that some of those may reasonably
24 delay the defence later and that obviously slows the whole process down? But I don't
25 want to you be working unreasonably hard and certainly not all the weekend.

26 So what's a sensible time frame to ask you to do those things and there may be

1 different dates for them? Shall we take specifically, bearing in mind you've got al that
2 to do, when do you think you can do the particularisation -- sorry, the clarification
3 points, which is really --

4 MR MACFARLANE: I think we can cover all of these things by Wednesday
5 6 December, sir. I'm in the fortunate position where my wife, who's listening in on this
6 at the moment, will be working with me on this so we can do it together. She'll get me
7 through it. SO I think Wednesday 6th is a more realistic timetable for me.

8 THE CHAIRMAN: Ms Patel, would you be happy with that? I actually think that's quite
9 tight for Mr Macfarlane. I think he's got quite a lot to do by then.

10 MS PATEL: I wonder if might be better to give Mr Macfarlane one deadline for tidying
11 up -- staggered deadlines. I wondered whether it might just help matters.

12 MR MACFARLANE: Yes.

13 THE CHAIRMAN: How would you feel about that, Mr Macfarlane? If we asked you to
14 tidy up the claim form, how quickly could you do that, if that's the first --

15 MR MACFARLANE: Well, I can do that by Monday the 4th, as Ms Patel required,
16 because it isn't a great deal of work, it's all prepared, and the application for the
17 injunction five days later.

18 THE CHAIRMAN: So what about -- so if I could ask you to give the particularisation
19 of damages, this point about, whether you're claiming damages, what they are. SO
20 I think you've done quite a lot of on work on that. Could you do that by the 6th?

21 MR MACFARLANE: Yes, sir.

22 THE CHAIRMAN: And then if you're going to make your application for injunction,
23 then we say -- I think that's helpful, because those are probably the things that are
24 most useful for the preparation of a defence, and then we could push your application
25 for the injunction up to the 11th, would it?

26 MR MACFARLANE: Yes, sir.

1 THE CHAIRMAN: Okay. So, Ms Patel, does that sound -- that sets you up. Now your
2 defence is due on the 8th at the moment but you want a bit longer. I think you
3 suggested the 11th. Is that still the target or do you think you need a bit longer, given
4 what we've discussed?

5 MS PATEL: I think we might ask for a little bit longer. Not very much, but a little bit
6 longer.

7 THE CHAIRMAN: Such as?

8 MS PATEL: Such as -- might I have a moment to exchange a message with those
9 instructing me. Can I also just ask, sir, where we've landed on whether the defence is
10 going to be dealing with just chapter 1?

11 THE CHAIRMAN: Good point. Well, what's your position on that? I think it was your
12 position that you actually would be quite keen -- you're quite to deal with that, is that
13 what I took from you --

14 MS PATEL: I wonder if the best thing, sir, is for it to be left to us.

15 THE CHAIRMAN: Yes. I have to say the only reason I can see to do it at this stage
16 is because you want to form a view on how it all fits together and, if it's helpful for you
17 to do that and therefore to present that to me and any application or discussion you
18 wanted to have, then I'm fine. I suppose you will have picked up I'm nervous about
19 exposing Mr Macfarlane to costs in relation to that exercise, because I don't think it's
20 a particularly -- otherwise I don't think it's a particularly useful exercise and it may turn
21 out to be, and you may be right, that somehow it needs to be woven into the fast track
22 discussion. But I'm just a bit nervous about the cost exposure that is running against
23 that.

24 So if your position was that you felt you really had to do it but you really to do it in the
25 most efficient and least costly way, then I might be persuaded on that.

26 MS PATEL: I wonder if, sir, you might order that the defence only need cover chapter

1 1 and that you leave to us whether, for example, if we are going to be seeking that you
2 revisit the split of the two prohibitions, then we might -- it might obviously then be
3 helpful for us to deal with lightly in the defence so that you can see the shape of the
4 argument. But obviously if we are going to take the view that the split should remain,
5 then it seems, unless there's some other reason for dealing with it, sensible to leave
6 the defences just covering chapter 1.

7 THE CHAIRMAN: Yes. Okay. I think that's very sensible Mr Macfarlane, are you
8 happy with that?

9 MR MACFARLANE: Very happy with that, sir.

10 THE CHAIRMAN: The defence only need cover chapter 1 but they have an option if
11 they want to do more.

12 MR MACFARLANE: Yes.

13 THE CHAIRMAN: Good, and then date, Ms Patel, have you got that yet or do want to
14 come back --

15 MS PATEL: I'm just -- let me just -- so I think the request is that we have until the 15th
16 for the defence, which would effectively mean about four working days after the
17 injunction application comes in.

18 THE CHAIRMAN: Yes. I mean, I don't think you need to see the injunction application
19 to do the defence. My only hesitation is that I don't think it affects anything else very
20 much unless Mr Macfarlane wants us to try and get the injunction application to be
21 heard earlier rather than later, in which case it would obviously be helpful to have the
22 defence and there's that very narrow window before we find ourselves in January and
23 of course, then it's a question of finding a date. It is possible I could hear an injunction
24 application on the week of 18 December, for example, and I think it would be a little
25 bit tight to get the defence on the 15th, if that did eventuate.

26 MR MACFARLANE: I agree, sir, and I have a family holiday booked on the 19th.

1 THE CHAIRMAN: So you'll be away from the 19th, will you?

2 MR MACFARLANE: Yes, sir. So that's really tight for me on the 18th.

3 MS PATEL: I mean --

4 THE CHAIRMAN: Yes -- sorry, Ms Patel, go on.

5 MS PATEL: No, no, go ahead.

6 THE CHAIRMAN: I was going to say, I would struggle to do it on the 14th or the 15th,
7 so I'm not sure -- and then it's sort of really gone, hasn't it? So I think maybe, Ms Patel,
8 maybe we could ask to you do it by the 14th and that still leave opens the sort of
9 scintilla of a possibility --

10 MS PATEL: That's fine, sir.

11 THE CHAIRMAN: I'm not putting down any firm marker on the 18th. I appreciate that
12 may turn out to be something entirely unrealistic and not something that anyone would
13 want, but I think I do have to leave open for Mr Macfarlane the possibility, if he can
14 convince the Tribunal that it is genuinely urgent and needs to be dealt with, there
15 needs to be some facility to deal with it.

16 MS PATEL: We can manage the 14th, sir.

17 THE CHAIRMAN: Good. That's helpful. Thank you. Are you happy with that,
18 Mr Macfarlane?

19 MR MACFARLANE: Yes, sir.

20 THE CHAIRMAN: Good, and then, Mr Macfarlane, I'm going to suggest -- I think
21 you're going to be away then, so asking you to do a reply -- when are you back? If
22 you've got the thing on the 14th.

23 MR MACFARLANE: Oh, I'll be working every day on holiday, sir. So any day after
24 that. It's just that I'm travelling between the 19th and the 21st with flights that are
25 booked. But every other day up to then I work. I've never had a holiday yet that
26 doesn't entail working.

1 THE CHAIRMAN: Well, I don't think we need to make it any worse for you. So when
2 are you back at your desk.

3 MR MACFARLANE: That's the problem, sir. I'm probably not back until January.

4 THE CHAIRMAN: Right. Okay. Well, there's no particular hurry for the reply. It's not
5 a particularly critical document. I think -- Ms Patel, is there a reason really why it
6 couldn't go over to January, is there?

7 MR MACFARLANE: Sir, if I can say, I will be working. It's normal for me to be working.
8 It's my own home in France anyway so I will be working from home. So it's normal, is
9 that, for me to work. So I'm happy to reply within a week or whatever.

10 THE CHAIRMAN: Well, I think we might -- no one's going to look at it if you do, so
11 why don't we suggest 3 January. Would you have any objection to that Ms Patel?

12 MS PATEL: That's fine, sir.

13 THE CHAIRMAN: 3 January for the reply, Mr Macfarlane, so you've got a bit of time
14 on that.

15 Costs budget: when do you think you could come back, Ms Patel, with the cost
16 information and estimate?

17 MS PATEL: We had suggested in the draft order 12 January.

18 THE CHAIRMAN: I think it will be helpful if we could do a little bit earlier than that. As
19 I say, I really want it quite high level. I don't want a lot of detail in it.

20 MS PATEL: No, but it will obviously be important to see the reply first.

21 THE CHAIRMAN: Well, I'm not sure it will, will it? It's not going to make a lot of
22 difference to it. Shall we -- can we say the 8th? Could you live with that?

23 MS PATEL: I'm just trying to take instructions. Hang on, sir. Sorry.

24 THE CHAIRMAN: I'm just quite keen to get on it with that bit of it, Ms Patel, if you
25 forgive me. That's just a little unhelpful if it drifts too much, because nobody knows
26 where they are in terms of what's been spent.

1 MS PATEL: Those remotely behind me have reminded me that we haven't got an
2 opportunity to reply to the injunction application.

3 THE CHAIRMAN: Oh, well, if he makes one, then you'll obviously have to do that.
4 Yes.

5 MS PATEL: Yes. But we don't need to timetable that.

6 THE CHAIRMAN: Well, I don't think so until we see it. If we see, then obviously we'll --

7 MS PATEL: Timetable it at that stage.

8 THE CHAIRMAN: It's an entirely fair point to make, but I think that's probably one
9 degree of complication we don't need to deal with today. If it turns up, we will obviously
10 set a timetable for that.

11 MR MACFARLANE: Can I say, sir, that these dates we're setting are of course
12 deadlines rather than actual dates. So if I can provide them earlier and quicker,
13 including the injunction application, then they would be able to respond quicker as
14 well. So I'm prepared to put the work in.

15 THE CHAIRMAN: Okay. Absolutely.

16 MS PATEL: 8 January is fine for a costs budget, sir.

17 THE CHAIRMAN: Good. Thank you, and then, Mr Macfarlane, I will ask you to
18 respond to that by the 15th.

19 MR MACFARLANE: Yes.

20 THE CHAIRMAN: That's the costs material and, Ms Patel, if you wanted any further
21 response to that, that should be in on the 19th. Is that all right?

22 MS PATEL: Yes.

23 THE CHAIRMAN: And then I will determine that on the papers unless there's any
24 reason to hear from you.

25 Then just in relation to the disclosure, that sort of corresponds -- I think it would be
26 quite helpful if you could have written to each other by, shall we say again, 8 January

1 | just to progress that point and I won't make any further order on that. I'd like there to
2 | be some sensible correspondence about what sort of documents you've got and what
3 | sort of documents you're expecting from the other side. I think it would be helpful if
4 | you could update the Tribunal on where you are with that by, say, 25 January.

5 | MR MACFARLANE: Yes.

6 | THE CHAIRMAN: Ms Patel, security for costs. You may not be able to say anything
7 | at the moment, and I rather suspect it's a less attractive option, given the fast track.
8 | I mean, I don't want to preclude the possibility you might apply for it, but it's clearly not
9 | what we would normally do. Is there any chance of that -- or would you like to ponder
10 | that further?

11 | MS PATEL: I think we would like to ponder it further, not least because you've
12 | obviously made the fast track ruling on the basis that it was a claim for an injunction
13 | and it's obviously now a claim for damage as well, that we don't quite know the shape
14 | of that. So it may be --

15 | THE CHAIRMAN: Yes. understood.

16 | MS PATEL: Yes.

17 | THE CHAIRMAN: Could I ask you to let us know -- let Mr Macfarlane know what the
18 | position on that is by 5 January? Not an application, just an understanding of the
19 | position?

20 | MS PATEL: Yes.

21 | I don't know, could we ask for the 8th, which is the same day as the cost budget,
22 | because we will have obviously form a view at that stage as to how much --

23 | THE CHAIRMAN: Yes, of course. That makes good sense. What I suggest is that
24 | we pencil in another CMC for the week of 15th January and that will deal with the costs
25 | management, if it hasn't been dealt with already, disclosure to the extent that we've
26 | got any. Actually we haven't really -- you may still be talking about disclosure, but at

1 | least we can talk about it if there are any serious issues. Confidentiality and any issues
2 | that have popped up. We deal with the timing of any security for costs applications
3 | and at that stage we'd want I think just to set the timetable to trial and fix a trial window,
4 | given that we need to fit that into six months and I think we will probably be in touch
5 | with you in advance of that to suggest some dates for the trial window.

6 | Does that sound sensible and is that something that your diaries could manage, the
7 | week of 15 January?

8 | MS PATEL: Yes, sir.

9 | THE CHAIRMAN: Mr Macfarlane, 15 January? Are you --

10 | MR MACFARLANE: I'm comfortable with that, sir, yes.

11 | Just a question for my own sake on security for costs issue, because I know my wife
12 | will be asking this of me, what does that entail? What are we looking at?

13 | THE CHAIRMAN: So in circumstances where the defendant could establish that the
14 | claimant isn't able to pay its costs if the defendant succeeds -- so normally in litigation
15 | as you know, the loser pays.

16 | MR MACFARLANE: Yes.

17 | THE CHAIRMAN: So if there was a question about that and that's particularly the case
18 | because the claimant has a limited company, so clearly the balance sheet of the
19 | company would play a part in that, then it is open to the Tribunal to order you to put
20 | forward security to cover the ultimate payment of those costs and that might be in a
21 | variety of different forms but most obviously putting money into a bank account so we
22 | knew it was there.

23 | Now, because we're in the fast track, if you look at the cases and the guide in relation
24 | to this, you'll find that the indication is that it is unlikely that a defendant will obtain
25 | security for costs against a claimant when the case is in the fast track but certainly not
26 | prohibited, and so it is open to Ms Patel, if she wants to make an argument to that

1 effect, to have a go at it. So, if she does, obviously the Tribunal will consider it on the
2 merits.

3 MR MACFARLANE: That's fine, sir. I ask that question purely because of what I have
4 to face in terms of business liabilities on a monthly basis which we budget for fairly
5 carefully. So I need to know of possible things that I need to cater for.

6 THE CHAIRMAN: Yes. No, I understand, and we'll know I think by 8 January whether
7 there's any prospect of that application being made and I would hope that we will also
8 have a sense by then of what level of costs might be -- well, I think we've already had
9 some -- you've had some correspondence already about what the costs exposure
10 might be if they were capped and clearly that's my decision, not yours. But you might
11 have some views as well. But, anyway, I think that's probably about as far as i can
12 take it, Mr Macfarlane, unless we see if they apply for it and, if they do, what they say
13 about it.

14 MR MACFARLANE: I fully understand, sir.

15 THE CHAIRMAN: Ms Patel?

16 MS PATEL: Just in relation to the listing of the future CMC, those behind me
17 are -- would only be able to do the 18th or the 19th in that week.

18 THE CHAIRMAN: Okay.

19 MS PATEL: Due to a --

20 THE CHAIRMAN: With all respect I'm afraid they're not going dictate -- we do do our
21 best to accommodate the availability of counsel, but I'm afraid availability of instructing
22 solicitors is not something we normally take into account. As it happens I can't do the
23 19th and the 18th is quite difficult. It might be possible to do the afternoon of the 18th
24 but we will write with some suggested dates for that and, as I say, we would like to
25 take into account everybody's availability but, for practical reasons, we will constrained
26 by other things, including the availability of court space here.

1 MS PATEL: Yes, sir.

2 THE CHAIRMAN: Good. Thank you. Is there anything else we need to cover as far
3 as timetable is concerned?

4 Ms Patel, will be possible to ask your instructing solicitors if they were able to have a
5 go at the order.

6 MS PATEL: I'll be happy to do it, sir. It's fine.

7 THE CHAIRMAN: That's very kind. That's very kind.

8 MR MACFARLANE: Thank you.

9 THE CHAIRMAN: Is there anything else that we need to deal with generally in relation
10 to the case? Have we covered everything on everybody's agendas?

11 MS PATEL: I'm just checking with those behind me, but from my side that's all I think
12 we need to cover.

13 MR MACFARLANE: I'm comfortable that where we are, sir. I have nothing else to
14 bring up.

15 THE CHAIRMAN: Good. Thank you. We'll just wait for Ms Patel to get instructions.

16 MS PATEL: I think just one point of clarification. If there were any desire to ask you
17 to revisit the fast track ruling in light of where the pleadings land, for example, you
18 would just ask that any such application is made in good time before the next CMC,
19 I assume.

20 THE CHAIRMAN: Yes. Look, I think actually you can make the application at any
21 time, because it may be that the circumstances justify it at any time.

22 MS PATEL: Okay.

23 THE CHAIRMAN: And so I'm not going to put any time limit on that. If you don't make
24 it as soon as you could do, then it clearly has quite significant consequences, because
25 we will be running on one prayer and you'll be asking me to make a decision that's not
26 really consistent with what we've done.

1 So I think it's absolutely open if you think that it's the wrong decision and that it ceases
2 to meet the requirements or be consistent with the factors in the rule or for some other
3 practical reason why we shouldn't be doing that. But I would obviously expect there
4 to be something materially different from what we've looked at today in order to reach
5 that conclusion.

6 MS PATEL: Yes. That's clear, sir. Thank you. I don't think there is anything else
7 from our side.

8 THE CHAIRMAN: Good. That's very helpful.

9 Can I thank you both, lots to get through there and it's not perhaps as straightforward
10 as it might ordinarily be and so I'm very grateful for both you of for the way you
11 conducted the hearing and for your assistance with that and also particular thanks to
12 the transcription service for working extra hours and indulging us.

13 Thank you very much for all your assistance.

14 MR MACFARLANE: Thank you, sir.

15 MS PATEL: Thank you very much.

16 THE CHAIRMAN: Thank you.

17 **(2.04 pm)**

18 **(Hearing concluded)**

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