



**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1615/5/7/23

BETWEEN:

**UP AND RUNNING (UK) LIMITED**

Claimant

- v -

**DECKERS UK LIMITED**

Defendant

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**REASONED ORDER (AMENDMENT OF CLAIM FORM)**

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**UPON** the Claimant's Application dated 14 March 2024 for permission to amend its Claim Form to rely on clauses 1, 4 and 20 of the Defendant's terms and conditions (the "T&Cs")

**AND UPON** the Defendant's response to the Claimant's Application dated 19 March 2024

**IT IS ORDERED THAT:**

1. The Claimant's Application is dismissed.

**REASONS:**

2. The Claimant seeks to amend its Claim Form to incorporate reference to several clauses in the Defendant's terms and conditions. Each of these clauses is referred to in the

Reply, but the Defendant has noted that they have not been pleaded as part of the Claim Form. In response to this, the Claimant has sought permission to amend.

3. By way of background, the Claimant has pleaded in its Claim Form reliance on clause 15 of the T&Cs, which it says has been exercised by the Defendant for an anticompetitive purpose which amounts to a hardcore restriction. Clause 15 provides:

“Retailer may only sell Products on a website it owns and/or operates if Retailer has been granted permission to make on-line sales of Products and the website is fully compliant with the Company’s website requirements as are communicated from time to time by the Company, and the contents of the website have been approved in writing by the Company.”

4. The Defendant objects to the proposed amendment to the extent that it is intended to introduce new allegations of infringement.
5. For the reasons that follow, the Claimant’s Application is dismissed. The Claimant remains entitled to rely on clauses 1, 4 and 20 in support of its existing claim, and it is not necessary to amend the Claim Form in order to rely on those clauses.

**1. CLAUSE 1**

6. The first clause (clause 1 of the T&Cs) provides as follows:

“These terms and conditions shall apply to the sale by Company of all Products to Retailer to the exclusion of all other terms and conditions (including any terms and conditions which Retailer purports to apply under any purchase order, confirmation of order or other document). Any variation to these terms and conditions shall have no effect unless expressly agreed in writing and signed by an authorised representative of Company. Company will notify general changes in these terms and conditions through regular communication with Retailer. “

7. To the extent that the Claimant relies on this clause as context for its claim of a hardcore restriction centred on the purported exercise by the Defendant of rights under clause 15 of the T&Cs (which is clearly pleaded), it is sufficient for the Claimant to have referred to the clause in his Reply. To the extent that the Claimant relies on the clause as a self-standing hardcore restriction (which appears to be its contention, at least in part), I see no basis on which such a claim could be made out in relation to the wording of the clause, which simply deals with the basis on which the relevant contract is formed and varied.

8. Accordingly, I refuse permission to amend in respect of this clause. For the avoidance of doubt, the Claimant remains entitled to rely on the clause as context for its arguments about clause 15.

**2. CLAUSE 14**

9. Clause 14 of the T&Cs provides as follows:

“Retailer shall not transfer or sell any Products to any unauthorised re-distributor, reseller or retailer, or through any internet auction/consignment site and or any internet mall/marketplace, nor shall any Retailer sell any Products to a customer who is located outside of the European Economic Area. Retailer may only actively sell Products within the European Economic Area (active selling shall include but not be limited to advertising or setting up any distribution or agency arrangement outside the United Kingdom or Ireland).”

10. This clause has been pleaded by the Defendant in its Defence as part of its assertion that it has been operating a selective distribution policy. The Claimant says in its Reply that clause 14 has as its object a distinct (from the hardcore restriction alleged in relation to clause 15) anti-competitive purpose. However, it is not alleged by the Claimant or the Defendant that clause 14 has been exercised by the Defendant in any way at all in relation to the Claimant.

11. It is therefore sufficient for the Claimant to raise the question of the legality of the clause by way of its Reply. The Claimant does seem to suggest that it relies on clause 14 as founding a hardcore restriction in its own right, but (given there is no suggestion that clause 14 has been exercised in relation to the Claimant) that is entirely irrelevant to the matters at issue in these proceedings.

12. Accordingly, I refuse permission to amend in respect of this clause. To the extent that the Defendant has any further point it wishes to plead in relation to the status of clause 14, it may do so by way of a short additional statement of case (that is, a rejoinder).

**3. CLAUSE 20**

13. This is the termination clause in the T&Cs. It provides as follows:

“Company may, at its discretion, suspend or terminate any account for any reason with immediate effect on written notice. For avoidance of doubt, suspension or termination does not relieve a Retailer of its responsibility to pay for Products it has ordered or fulfil its other obligations to Company.”

14. As I understand it, it is part of the Claimant’s case in relation to clause 15 that the Defendant has, pursuant to clause 20, unlawfully terminated the Claimant’s account with it by wrongful reliance on clause 15, which the Claimant says has been operated as a hardcore restriction. The Claimant has not expressly pleaded clause 20, but it is implicit in that the cessation of supply by the Defendant is pleaded and the Claimant seeks an injunction requiring the Defendant to resume supply to the Claimant. Further, the Defendant pleads the cessation of supply at [51] and [52] of the Defence.
15. It is no doubt correct that the Claimant should have articulated the part played by clause 20 more clearly in its pleaded claim. However, I do not consider it likely that the Defendant could be in any real state of uncertainty about the relevance of clause 20 and the part it plays in the Claimant’s assertions about the exercise of clause 15.
16. Given that the Claimant is unrepresented, there are many aspects of the pleaded claim which might be improved if the Claimant was represented, and this is one of them. While it is correct that the Defendant is entitled to know what the case against it is, there is only so much that can sensibly be achieved in a case like this by taking pleading points.
17. I do not therefore consider it necessary for the Claimant to amend its claim to refer expressly to clause 20 and I refuse it permission to do so. The Defendant is alive to the point, the clause is referred to expressly in the Reply and if the Defendant remains in any uncertainty about the significance of the clause in the Claimant’s case (which seems unlikely) it can request further information. To the extent that the Defendant has any further point it wishes to plead in relation to the relevance of clause 20, it may do so by way of a short additional statement of case (that is, a rejoinder).