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

CaseNo: 1637/5/7/24

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Tuesday 9th April 2024

13  
14 Before:  
15 The Honourable Sir Marcus Smith  
16 William Bishop  
17 Carole Begent  
18 (Sitting as a Tribunal in England and Wales)

19  
20 BETWEEN:

21  
22  
23 **Claimant**

24  
25 **SportsDirect.com Retail Limited**

26  
27 v

28 **Defendants**

29  
30 **Newcastle United Football Company Limited and**  
31 **Another**

32  
33  
34  
35 **A P P E A R A N C E S**

36  
37  
38 Tony Singla KC & Stefan Kuppen on behalf of SportsDirect.com Retail Limited (Instructed  
39 by Travers Smith)

40  
41 Tom de la Mare KC & Alison Berridge on behalf of Newcastle United Football Company  
42 Limited & Another (Instructed by Northridge Law)

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(10.34 am)

**Opening remarks**

**THE PRESIDENT:** Mr Singla, good morning. Before you begin, a couple of housekeeping matters. First of all, these proceedings are being live streamed. Although I know you will all be familiar with this warning, I make it nonetheless: the proceedings are being transcribed by our direction, but it would be a breach of the rules were anyone to seek to record, transmit, photograph or otherwise disseminate what is being live streamed, and a breach of that rule would be potentially punishable as a contempt, so I hope no one will do it.

More practically, can I thank the parties for their very helpful skeletons and the evidence that lies behind them. We have read the skeletons. We have gone into the statements and of course the pleadings. The exhibits rather less so and I think you can expect that we would need to be taken to that.

In terms of how we would like the day structured, it does seem to us that the parties are agreed that -- and it is trite -- that American Cyanamid provides the structure for the submissions today. I think we would be helped, if the parties are amenable to this, if we did it in four blocks. In other words, for us to hear from the parties as to whether there is a serious issue to be tried, then the question of adequacy of damages to Sports Direct, then the question of the adequacy of the undertaking in damages to Newcastle United, and then the balance of convenience and other factors, as it were, taking the rear.

I know that a degree of delay is relied upon by Newcastle United. That is something which clearly we will want to hear from you on.

Just to flag a few other concerns which don't fit into the standard template, so that you know we have not lost sight of them, if an injunction were granted, it would be

1 a mandatory injunction. For my part, I would require a degree of understanding as to  
2 precisely how that would work, because I know that junctions in the competition field  
3 do tend to be mandatory rather than simply preventative, but here it does seem to me  
4 that there are a number of open questions -- and I say that having read the evidence  
5 in response on the points raised by Newcastle as to why these are points of  
6 concern -- but it does seem to me that there is an issue about who would undertake  
7 the supply, at what price the supply would be undertaken, and quantities. These are  
8 things which are addressed in not granular detail, they are addressed in Mr Nevitt's  
9 second statement, but I am bound to say it is at the level of nothing to look at here,  
10 rather than here is the answer to these concerns. So that's something which I think  
11 we would want unpacked, but at the end rather than at the beginning.

12 A point which doesn't seem to be made with the force we think it should be is this: to  
13 what extent is this truly an interlocutory injunction? It does seem to us that if we were  
14 to decide that the interlocutory injunction should lie, we would effectively be deciding  
15 the outcome for the 2024/2025 season. We would not be saying anything about the  
16 season after that, but even assuming an expedited trial, the injunction would effectively  
17 determine what happens in the next season, and we would, I think, want that to be  
18 addressed by the parties in case that makes a difference as to the legal standard that  
19 we apply. But those, I think, are matters which I would rather we left to the end and if  
20 the parties are happy, I think a ping-pong approach through the American Cyanamid  
21 requirements would assist. I think it is fair to say that we all have questions which we  
22 will be asking at each stage and for our part it would assist if we had an ability to  
23 understand what the exact answer is at each stage.

24 That is an over-long introduction. Mr Singla, I don't want to stop you saying anything  
25 by way of general introduction, and of course if you want to do things differently, we  
26 will hear you, but I am just trying to articulate what we would find most helpful.

1 **MR SINGLA:** Sir, that's extremely helpful and I am very happy to adopt that sort of  
2 structure. Can I just check, in relation to the mandatory injunction point, things have  
3 moved on since we originally issued the application and also since Nevitt 2.  
4 Can I check that the revised draft order has made its way to the tribunal. If the tribunal  
5 saw Mr Silverstone's statement yesterday, you might have been scratching your  
6 heads collectively as to why he is addressing the Nevitt 2 proposal which by that  
7 stage had already been superseded.

8 We received a delivery schedule on Thursday and -- in the light of the delivery  
9 schedule we know now when the replica kits will be supplied to the club. In light of that  
10 information we have tailored our order, so as to overcome many of the practical  
11 difficulties.

12 **THE PRESIDENT:** I think that is something we have certainly seen, but not got on  
13 board the implications of it.

14 **MR SINGLA:** I am grateful.

15 **THE PRESIDENT:** That is, I think, something which you can take us to. Clearly  
16 a number of facts will be relevant to a number of stages.

17 **MR SINGLA:** Yes.

18 **THE PRESIDENT:** But nonetheless we would be grateful if one could try and deal  
19 with it in a --

20 **MR SINGLA:** Of course. I just want to put that marker down so that you had the right  
21 draft order in mind, as it were. If I can perhaps give you the bundle reference, it is now  
22 at core 3, page 772.7 --

23 **THE PRESIDENT:** I am trying to work out the reference --

24 **MR SINGLA:** Core bundle 3, sir.

25 **THE PRESIDENT:** I am grateful.

26 **MR SINGLA:** I will address you on the substance of it in due course, but just so that

1 you have to hand the order.

2 **THE PRESIDENT:** Which tab?

3 **MR SINGLA:** It is page 772.7. It is 22B, I think, in terms of tabs.

4 **THE PRESIDENT:** Thank you.

5 **MR SINGLA:** I will not get into the substance, but just to give you the headline point,  
6 we attached to our skeleton a delivery schedule that was disclosed on Thursday. In  
7 the light of that, what we've done is we've taken on board when the club is due to  
8 receive various tranches of replica kit and we say this actually cuts through a lot of the  
9 practical issues. Because what one can see is, from their own delivery schedule, that  
10 Sports Direct order amounts on average across all of the line items to about  
11 14 per cent on average of what the club itself has ordered. We now know when the  
12 club will receive its tranches of deliveries, so the draft order is designed to deal with  
13 the practical issue of when would the club receive its own stock from the manufacturer  
14 and what we are essentially saying is that for each tranche that the club is due to  
15 receive from Adidas, we would seek that which Sports Direct has ordered which  
16 amounts to, as I say, on average across all of the line items about 14 per cent.  
17 Just perhaps to deal with price -- but I will come back to the detail -- the price is the  
18 price that was put in the original Sports Direct order form and is the wholesale price.  
19 What they say is, they won't get their margin if they were to sell these kits themselves.  
20 So that's the latest draft order and it has been revised, as I say, from when the  
21 application was issued because of the new information we have.

22 **THE PRESIDENT:** That's helpful. Thank you.

23 **DR BISHOP:** I don't entirely understand the last point about margin. I am looking at  
24 schedule B, let's take the first item, Adidas Newcastle United Football Club shorts.  
25 Price is given at 16.55 in pounds. You say that price was in the last Sports Direct  
26 order? Is that what you said? And all the other prices?

1 **MR SINGLA:** Yes, those prices are the prices that Sports Direct was expecting to pay  
2 when it originally issued its order back in December. Those are the wholesale prices.  
3 This is explained in the evidence. Those prices are the wholesale prices that Sports  
4 Direct pays Adidas for replica kits generally.

5 **DR BISHOP:** I see. So this is reference to -- it might be Manchester United or  
6 something like that.

7 **MR SINGLA:** Yes. What the evidence says is effectively Adidas charges the same  
8 for wholesale price for a number of different kits, so this is what Sports Direct --

9 **DR BISHOP:** Would expect, yes.

10 **MR SINGLA:** -- is paying for other top clubs and would be paying Adidas if it were  
11 allowed to access these replica kits. That's where that price has come from. The point  
12 that is made is well, why should we have to effectively sell these to you at the  
13 wholesale price, because we would like to sell these kits to customers with our own  
14 retail margin, but that is covered by the cross-undertaking. I don't need now to get  
15 into.

16 **DR BISHOP:** I understand.

17 **MR SINGLA:** I just wanted to explain where we are now in terms of the order that we  
18 received.

19 **THE PRESIDENT:** That's helpful, thank you.

20

21 **Proceedings**

22 **MR SINGLA:** Sir, if I could just then introduce, in terms of appearances. Obviously, I  
23 appear on behalf of Sports Direct with Mr Kuppen, and Mr De La Mare appears with  
24 Ms Berridge on behalf of Newcastle. As the tribunal will be well aware, what this case  
25 concerns is the supply of Newcastle's replica kit. The club has decided to refuse to  
26 supply any of next season's replica kit with Sports Directs and has entered into an

1 exclusive arrangement with JD Sports. The result of that is that Newcastle kit will not  
2 be available for consumers to purchase through Sports Direct for the first time in  
3 decades.

4 By these proceedings, Sports Direct alleges that the club's refusal to supply is unlawful  
5 and the club's new exclusivity arrangement with JD Sports is anti-competitive. What  
6 we say is very striking is that, even based on the limited amount of evidence before  
7 the tribunal at this early stage, it is clear that the rationale underlying the club's decision  
8 to refuse to supply Sports Direct is a concern about Sports Direct's discounting  
9 practices. That's what the April 2023 Two Circles reports shows. That's the  
10 consultancy report which is the genesis of the new arrangements and that is also what  
11 Ms Staveley, one of the directors of the club, said in terms to Sports Direct in  
12 December. That evidence that we have put forward for this application has not been  
13 refuted by the club.

14 **THE PRESIDENT:** But why does that matter?

15 **MR SINGLA:** I am sorry, sir?

16 **THE PRESIDENT:** Let's suppose that we have a situation where we have a dominant  
17 undertaking -- Newcastle -- which has a product which it exclusively controls -- the  
18 replica kit -- and it elects to use that dominance to price higher than cost plus, let us  
19 say. So, let's assume that Mr De La Mare's clients are making larger profits than they  
20 might otherwise do in a competitive market. Why can't they do that? It is not an abuse  
21 in and of itself.

22 **MR SINGLA:** Not in and of itself, but it has to have an objective justification. I will  
23 come to this point --

24 **THE PRESIDENT:** No, hang on. I don't think you need an objective justification for  
25 pricing with an element of producer surplus in your price. That would be to rewrite the  
26 United Brands test of pricing to say, well, you have to justify your price by reference to

1 something. That's what the courts absolutely don't do.

2 So, I don't think the undercutting question, per se, cuts it. Because my starting  
3 point -- I am raising this so you can push back -- is that a dominant  
4 undertaking -- assuming dominance is not in argument and we will come to that I am  
5 sure -- can use that power without behaving abusively to price at above what it would  
6 price in a competitive market.

7 **MR SINGLA:** We say the effect of these new arrangements is to distort competition  
8 in the retail market. So, what the club is doing -- I wanted to come on to serious issue  
9 to be tried, because obviously these are merits --

10 **THE PRESIDENT:** This is where we are wanting to start, yes.

11 **MR SINGLA:** In relation to -- well, just let me answer the question. I will just come to  
12 that question now.

13 Ultimately -- and this is very important -- the effect of these new arrangements will be  
14 that an existing customer, wholesale customer, Sports Direct, will no longer be able to  
15 access the kits. Therefore, it will follow that at the retail level, there will be an effect  
16 on competition at the retail level because Sports Direct necessarily will not be able to  
17 provide or supply these kits to customers. We say the effect of these new  
18 arrangements, therefore, is to distort competition in the retail market.

19 What the club has done is really two things. One, they are trying to bring these  
20 operations in-house, so that they can expand the extent to which they provide these  
21 kits to customers directly. But as the material shows -- and I will come to this -- they  
22 have recognised that they need wider distribution, is what the materials show, and  
23 that's why they say they have done a deal with JD Sports because they want the ability  
24 to sell these kits more widely than they can do themselves through their retail  
25 operation.

26 What they positively don't want -- and again the material shows this -- is for Sports



1 Direct to be part of that distribution network. So that's the package of agreements.  
2 You have Adidas with some limited retail channels directly to consumers, but you have  
3 the club wanting to bring all of this in-house. Indeed, that features promptly  
4 prominently in Mr Silverstone's evidence that they want to launch a new retail  
5 operation. They then say to themselves, we need wider distribution to the retail  
6 channel, but they say they don't want to supply Sports Direct because of their  
7 discounting practices.

8 We say that is relevant for two reasons. One, so far as the club has decided to refuse  
9 to supply Sports Direct, we say that is a prima facie abuse which they need to be able  
10 to provide a justification --

11 **THE PRESIDENT:** Why is it an abuse? I suppose what I am interested in  
12 understanding is to what extent the fact that Sports Direct have been for a number of  
13 years selling Newcastle United replica kit is relevant to your abuse argument.

14 **MR SINGLA:** Yes.

15 **THE PRESIDENT:** Let's suppose you have a situation where you have a blank sheet  
16 of paper and Newcastle United are de novo trying to work out how they sell their replica  
17 shirts, and they select de novo an approach which doesn't include Sports Direct. So,  
18 Sports Direct is not being deprived of anything, they are simply not being given the  
19 opportunity in the future.

20 Do you have any complaint in that situation?

21 **MR SINGLA:** That's not our situation.

22 **THE PRESIDENT:** I appreciate that.

23 **MR SINGLA:** But that's very important. Because the law here, we say, is -- we say  
24 that we are an existing customer.

25 **THE PRESIDENT:** Right, okay.

26 **MR SINGLA:** So we say that as adidas makes clear, that's a question of substance

1 not form.

2 **THE PRESIDENT:** Mr Singla, that's very helpful.

3 I am trying to understand what matters and what doesn't matter.

4 **MR SINGLA:** Yes.

5 **THE PRESIDENT:** So the incumbency, the fact that Sports Direct have been involved  
6 in the market for a number of years is central to your abuse point.

7 **MR SINGLA:** It is central, (a) to the substance of the case, but (b), as you will  
8 appreciate, to the injunction.

9 **THE PRESIDENT:** We are on the substance at the moment, we will come to the  
10 injunction in due course.

11 **MR SINGLA:** You will appreciate it operates at both levels. Because the reason we  
12 say we are concerned about this is it is effectively the cessation of supplies to the  
13 wholesale customer -- just to make sure there is no confusion around the use of the  
14 word "customer" -- we are a wholesale customer who has been supplying Newcastle  
15 kit for decades. We say that means, for the purposes of Article 1 or Chapter 2  
16 jurisprudence, we are to be treated as an existing customer and we therefore say that  
17 if you are going to switch off supply you need to provide an effective justification. We  
18 have said --

19 **THE PRESIDENT:** How much weight are you putting on the word "suddenly"? Is the  
20 degree of notice a relevant consideration there?

21 **MR SINGLA:** One doesn't know what defences are going to be --

22 **THE PRESIDENT:** I am interested in what your case is, not what defences are being  
23 run.

24 **MR SINGLA:** No, we say what has happened is, without any notice, having supplied  
25 for decades, we are now being told we are being shut out for next season and we don't  
26 actually know the duration of these proposed new arrangements, and that may be

1 a point we will have to come back to --

2 **THE PRESIDENT:** The reason I am asking is suppose, hypothetically, we were not  
3 talking about 24/25, we were talking about 25/26, and Mr De La Mare's client said,  
4 look, we will carry on as before for 24/25, but for 25/26 that's it. You have more than  
5 a year's notice; would you have any arguable complaint in that situation?

6 **MR SINGLA:** I would accept that the circumstances would be different, but I would  
7 not accept that we would not have a case in those circumstances.

8 **THE PRESIDENT:** Okay.

9 **MR SINGLA:** Sir, you are obviously right that these cases raise complicated questions  
10 and ultimately that's why we say we are obviously over the triable issue threshold, but  
11 what I would urge the tribunal to focus on are the particular facts that we are concerned  
12 with. And the particular facts that we are concerned with are, in my submission, very  
13 striking.

14 So, you have Sports Direct -- I would like to come back as it were to introduce this in  
15 the way that I was planning to.

16 **THE PRESIDENT:** Of course.

17 **MR SINGLA:** But just while we are on this, we have very striking facts at this very  
18 early stage of these proceedings. As I say, we have the largest retailer in the UK, the  
19 so-called 'home of football', which supplies all of the top league replica kits, including  
20 Newcastle -- I will come back to the detail -- including Newcastle, as I say, for  
21 decades. They are told immediately that you will not be -- immediately in the sense of  
22 for the purposes of next season -- you will not be receiving our kit anymore. And  
23 what's more, they are not bringing the operations entirely in-house, they are doing  
24 a deal with the other main replica kit retailer, JD. And the material at this very early  
25 stage suggests that the only reason Sports Direct is being cut out is because of  
26 a concern about its discounting practices.

1 Let's just be clear about that, that is consumer harm, sir. That is, discounting practices  
2 means cheaper replica kit in Sports Direct stores. As I say, for the tribunal to have  
3 that sort of evidence at this very early stage makes, we say, this case rather  
4 straightforward.

5 **THE PRESIDENT:** Okay. So, the facts that you are relying upon for your abuse is  
6 that you are the largest sports kit retailer in the UK, that you have for years retailed  
7 amongst other -- it is 15 -- Premier League replica kits, Newcastle United replica kits,  
8 that you are on that basis a wholesale supplier of Newcastle United replica kits. You  
9 have been told, more or less without notice, that that supply will cease in  
10 circumstances where it is not being brought in-house to Newcastle United themselves,  
11 but where they are themselves, but with others, selling in substitution for Sports Direct  
12 in circumstances where you say one of the reasons for that occurring is because  
13 Sports Direct has a reputation for undercutting higher people in the market, and that's  
14 their -- part of their brand approach, including to replica kits.

15 Do I have that right?

16 **MR SINGLA:** That's a very good encapsulation of what we are saying, sir. We say  
17 that there are two sides of this. There is the refusal to supply and then there is also  
18 the exclusivity arrangement with JD.

19 I will come on to this in a moment, but we say that that is unlawful as well. Or at least --  
20 well, we say it is unlawful in the main proceedings, but for present purposes we say  
21 there is plainly a triable issue as to the anti-competitive effects of the JD arrangement  
22 because essentially you are shutting out Sports Direct from the consumer market.

23 To cut to the chase, a consumer will have no ability to go into a Sports Direct store or  
24 online and buy a Newcastle replica kit. If the evidence before you is that Sports Direct  
25 is generally the discounting retailer, we say that there is actually quite clear evidence  
26 at this stage of consumer harm.

1 Sir, I was just going to take you, before I come to the substance of serious issue to be  
2 tried, to what the evidence says in relation to some of these matters. I think, sir, in  
3 your summary just now you have the key points so far as Sports Direct is concerned,  
4 but just to navigate matters in terms of the evidence. This is all explained at Mr Nevitt's  
5 first witness statement, paragraphs 8 to 14, where he deals with Sports Direct's  
6 position in the market.

7 I think this point, although Mr De La Mare says in his skeleton, well, that's just your  
8 say-so and you have no objective evidence, well, in fact, the Northridge letter of 4  
9 March describes Sports Direct as having 'the preeminent position in the sports retail  
10 market'. So we say there can't be any serious dispute about that, they have 488 stores  
11 across the UK, and their focus is on football in particular. As Mr Nevitt describes it,  
12 football is the 'heartbeat' of the business and is absolutely essential to Sports Direct's  
13 business model. That is his paragraphs 11, 47 and 48.

14 **DR BISHOP:** Mr Singla, can you direct me to where I will find Mr Nevitt's statement --

15 **MR SINGLA:** Of course, I am so sorry, sir. It is in core bundle 1. It is tab 8. It starts  
16 at page 112.

17 **DR BISHOP:** Thank you very much.

18 **MR SINGLA:** So the key facts, sir, as regards Sports Direct, are as I say, paragraphs  
19 8 to 14 of Mr Nevitt.

20 In relation to replica kit specifically, it has consistently stocked replica kit of all of the  
21 major Premier League clubs for decades. At paragraph 12, he names the big six,  
22 Arsenal, Chelsea, Liverpool, Manchester City, Manchester United and Tottenham. He  
23 says at paragraph 14, Newcastle are also in this category. They have stocked their  
24 kit for decades and it is one of the clubs with the largest fan bases in the UK, and  
25 finished fourth in the Premier League last season.

26 At paragraph 7, in fact he says he can't recall a year when Sports Direct has not sold

1 Newcastle kit. Paragraph 12:

2 "Sports Direct presently stocks a replica kit of 15 of the 20 Premier League clubs and  
3 all of them except Newcastle have confirmed that they will supply Sports Direct next  
4 season." [As read]

5 **THE PRESIDENT:** This is normally done on an annual basis? Is it up in the air each  
6 season?

7 **MR SINGLA:** I am sorry, sir.

8 **THE PRESIDENT:** Is there is a tie-in of replica kits for longer than a year, or is it done  
9 in a season-by-season basis?

10 **MR SINGLA:** When you ask is there a tie-in, do you mean at which level of the supply  
11 chain?

12 **THE PRESIDENT:** What I mean is supply to Sports Direct by whichever replica kit  
13 vendor one is talking about, whichever club, is the supply annual or is it done in some  
14 cases over multiple --

15 **MR SINGLA:** I am not sure I have instructions on the specific contracts, but orders  
16 are placed every year, as it were.

17 **THE PRESIDENT:** Yes.

18 **MR SINGLA:** Yes, exactly. For example, when I just said 14 out of 15 have confirmed,  
19 that's because orders have been placed and confirmation has been given that they  
20 will be supplied.

21 **THE PRESIDENT:** Yes, but you are saying nothing about whether there would be an  
22 entitlement to place orders for the season after the next season?

23 **MR SINGLA:** I just don't have the information about that.

24 Paragraphs 23 to 25, Mr Nevitt explains that Sports Direct has a very specific strategy  
25 of price discounting, and it always looks to offer the lowest price for replica kits.

26 **THE PRESIDENT:** That is, just to be clear, a strategy that extends to replica kits? In

1 other words, you don't use replica kits as a way of drawing the customers in, sell them  
2 at a higher price, and use the draw-in to sell other products?

3 **MR SINGLA:** Sir, indeed it is the opposite, actually.

4 **THE PRESIDENT:** Okay.

5 **MR SINGLA:** It is discounting of replica kit -- and I will come back to this on adequacy  
6 of damages --

7 **THE PRESIDENT:** Yes.

8 **MR SINGLA:** But this is a very, very important point, sir. We actually -- all the  
9 evidence shows that Sports Direct uses its status as 'home of football' to draw in  
10 customers through the discounting of replica kits. I mean, it's a discounting retailer  
11 generally, but rather than, sir, the example you have just given to me whereby they  
12 make a huge margin on replica kits in order to sell others, they are drawing customers  
13 in through their discounting on replica kits.

14 Mr Nevitt also gives evidence about JD Sports at paragraphs 9 and 10. He says they  
15 are the other major national retailer with approximately 400 stores, but they are not  
16 a sportswear retailer. They are more a sports fashion retailer with a focus on lifestyle  
17 products. So what Mr Nevitt explains at paragraph 10, is there is very little overlap  
18 between their businesses, but replica kits and football products is the main area of  
19 overlap.

20 What you will also see at paragraph 18, Mr Nevitt says that for the top ten clubs in the  
21 UK by market size -- including Newcastle -- both JD and Sports Direct have stocked  
22 their replica kit for at least the last five years. We say that is significant because the  
23 effect of the decision to refuse to supply Sports Direct next season is that there will be  
24 a material and sudden change to the competitive dynamics between JD and Sports  
25 Direct.

26 Now, turning to the club's new arrangements -- and I am just going to go through some

1 factual material and then come to serious issue to be tried in terms of my  
2 submissions -- but if I could show you Mr Silverstone's statement which is core  
3 bundle 1.

4 It starts at page 173, but if I could ask you to look at paragraph 22, please.

5 **THE PRESIDENT:** Yes.

6 **MR SINGLA:** Paragraph 22 on page 177. Mr Silverstone explains that in April 2023  
7 the club and its ownership started considering some new arrangements which led to  
8 the engagement of the consultant Two Circles. If I could ask you to turn up the Two  
9 Circles report, please, which is in the second core bundle. That starts at page 584 of  
10 the bundle. If one looks at 585, you see the heading at the top:

11 "Newcastle and Two Circles have worked together to propose a recommendation for  
12 the future of Newcastle's retail strategy." [As read]

13 You will see that Mr Silverstone was involved, he's named in the box on the right-hand  
14 side of the page.

15 Then what one sees is various slides considering certain options, but if I could ask you  
16 to turn to page 20, so 603 of the bundle, you will see that at the top:

17 "On top of the in-house option ..."

18 That's a reference to Newcastle selling replica kit itself directly to customers:

19 "... negotiations with JD Sports have uncovered a route for us to maintain most of the  
20 in-house benefit whilst de-risking our technical buy, increasing our wholesale  
21 distribution in the UK, providing other Adidas product range benefits as well as brand  
22 reach benefits." [As read]

23 If you could look at the middle column: "JD Sports offer". The first bullet:

24 "JD Sports has approached us with an offer to be our exclusive wholesale partner in  
25 the UK." [As read]

26 That's important, because Mr Silverstone says that JD were invited by the club to



1 participate in the tender -- paragraph 24 -- but that appears to be wrong. JD Sports  
2 have approached the club.

3 When Mr Silverstone talks about a tender process, if actually one looks at the other  
4 slides, what one sees is that it is not a tender process in terms of Sports Direct or  
5 JD Sports, they are actually focusing on other types of partners. I don't want to take  
6 up time, but the main two partners that are looked at in this context are Fanatics and  
7 Legends. They are not bricks and mortar retailers. It is a tender process designed to  
8 come up with a model which is very different.

9 In the end, they go for the in-house option with the JD Sports exclusive arrangement --

10 **THE PRESIDENT:** Adidas are simply supplying both the club and JD Sports?

11 **MR SINGLA:** And they have a limited right to sell to consumers directly as well, yes.

12 **THE PRESIDENT:** They are an extra wholesaler in that regard?

13 **MR SINGLA:** Exactly. But at this stage, sir, just in terms of the chronology, this report  
14 of April 2023, the Adidas agreement is October 2023. But you will be absolutely right,  
15 that's where things end up.

16 But, sir, critically, we say, if one looks at the third column under "Further implications":  
17 "Going down an exclusive route [that's the exclusive route with JD Sports] will limit our  
18 distribution options in the UK, most noticeably with Sports Direct whose discount  
19 pricing model would impact our own retail operating margin significantly." [As read]

20 So what this is saying is that they have a preference for an in-house model but they  
21 want to do a deal with JD Sports because that would give them wider distribution  
22 possibilities -- and that's actually explained by Mr Silverstone as well -- but what this  
23 is saying is that doing the deal on an exclusive basis with JD will inevitably limit our  
24 distribution options but the Sports Direct discount pricing model would impact our own  
25 retail operating margin significantly.

26 If you look, sir, in other places, one can see a concern about discounting risk in the

1 general sense, so at 596 of the bundle, for example --

2 **THE PRESIDENT:** Yes.

3 **MR SINGLA:** -- one can see in the heading:

4 "How we operate retail will be a huge part of our fan experience and central to the  
5 delivery of Newcastle's overall strategy. We have scored each offer out of five against  
6 numerous criteria." [As read]

7 You will see under the heading "Factor, control of strategic direction", you will see  
8 "discount risk" is the third one. You will see what is said, if they bring everything  
9 in-house on the far right-hand side of the page it there will be a low risk "we decide  
10 pricing".

11 And page 11, so 594 of the bundle, you will see a similar point. Number 2:

12 "Control of strategic direction."

13 You will see a reference on the far right-hand side to brand positioning and discount  
14 risk.

15 So we submit it is quite clear that the concern about Sports Direct was discounting, in  
16 circumstances where they recognise they wouldn't be bringing everything in-house.

17 What then happens, sir, is the Heads of Terms with Adidas are signed, I think in June  
18 2023, actually. Those Heads of Terms give Adidas the nonexclusive right to sell  
19 directly to customers in all territories -- nonexclusive right -- and then an exclusive  
20 right:

21 "... in all territories except the UK and Saudi Arabia to sell wholesale customers such  
22 as retailers." [As read]

23 So those Heads of Terms would not allow --

24 **THE PRESIDENT:** Sorry, which is the reference to that?

25 **MR SINGLA:** That is core bundle 2, page 205. The provision I have just referred to  
26 is clause 6 "Distribution rights". Sorry, it is core bundle 1, tab B2.

1 **THE PRESIDENT:** Yes, I see it. It is Heads of Terms.

2 **MR SINGLA:** Exactly, and it is June 2023.

3 At page 208, you will see the distribution rights that I have just referred to. Since we  
4 have opened up the Heads of Terms, the tribunal will see there is a minimum order  
5 commitment at clause 9 over the page. There are various, obviously, fee and royalty  
6 arrangements, and 227 has the royalty provisions.

7 **THE PRESIDENT:** Yes.

8 **MR SINGLA:** That's Adidas.

9 Then in October 2023, the club decides to do a deal with JD. The JD Heads of Terms  
10 can be found in the same bundle at page 238.

11 **THE PRESIDENT:** Yes.

12 **MR SINGLA:** At clause 4.1.1, JD is granted the exclusive right to purchase product  
13 from the kit provider. That's Adidas. It is also, importantly, given the exclusive  
14 marketing rights which include bill boards in the stadium and so on which, as the  
15 tribunal will understand, are extremely valuable rights. So it is exclusive rights to  
16 purchase product and at 4.1.3, you will see the reference to marketing rights as well.  
17 So 4.1.2 is the exclusive right to market and sell the products direct to consumers and  
18 then there is reference to the marketing rights. So the fee that's paid by JD is largely  
19 in relation to the marketing rights, but they have got this exclusive right to supply as  
20 well.

21 In order for JD to have this right to purchase product from Adidas, there needed to be  
22 an amendment to the Adidas Heads of Terms. That can be found, the amendment  
23 letter, at 234 of the bundle. What you will see there is, at clause 2:

24 "The club has notified Adidas that it wishes to appoint JD Sports as its official retail  
25 partner." [As read]

26 For the contract period. You will see, 4.2:

1 "The club shall grant to the official retail partner the co-exclusive right to sell the  
2 licensed products." [As read]

3 4.4 is also material:

4 "Any orders made by JD shall be deemed to contribute towards the minimum order  
5 targets." [As read]

6 Those are the minimum order targets in the Adidas arrangements. Just to explain, the  
7 club has said to Adidas, if we order X, at least X, we will receive some rebates. That's  
8 in the Adidas Heads of Terms, and to the extent JD places orders, those will contribute  
9 to the entitlement to the rebate.

10 That's the exclusive agreement. The net result obviously is that the club will not be  
11 entitled -- and will not in practice -- supply Sports Direct.

12 If one looks what the Mr Silverstone says about this, paragraphs 33 to 34 --

13 **THE PRESIDENT:** Can you remind us of the tab again?

14 **MR SINGLA:** Yes, I am so sorry, it is core 1, tab B1. It is page 180 of the bundle.

15 **THE PRESIDENT:** Yes.

16 **MR SINGLA:** I was going to show you 32 to 34.

17 **THE PRESIDENT:** Yes.

18 **MR SINGLA:** You will see, if one looks at the previous page, he's explained the new  
19 arrangements, but then he says -- actually, I should show you 31, he explains why the  
20 club wanted to in-house the retail operation.

21 But 32 is important because he says the club appreciates that wider distribution is  
22 beneficial. This is why he says that JD have been -- why an arrangement has been  
23 entered into with JD.

24 I will come back to some of these points in the context of serious issue to be tried, but  
25 if one looks at 34 --

26 **THE PRESIDENT:** Yes.

1 **MR SINGLA:** -- SD, Sports Direct, was not approached during the formal tender  
2 process, because the club was not aware of any clubs which had similar models with  
3 SD, SD does not have the premium retail brand experience in UK and Europe, and,  
4 three, there is negative fan sentiment towards Sports Direct. What he doesn't mention  
5 is anything about Sports Direct's discounting practices which we say is striking  
6 because, as I say, he was involved in the Two Circles process.

7 If we look at paragraph 36, he says:

8 "I note Mr Nevitt's comments on the differences between JD and SD being that SD will  
9 provide replica kit at a more competitive price. In my view such a basic comparison  
10 of retailers cannot be made based on competitive pricing alone." [As read]

11 So not only does he not address the reference in the Two Circles report, but he seems  
12 there to implicitly recognise that what Mr Nevitt is saying is correct.

13 **THE PRESIDENT:** (Inaudible) the trial.

14 **MR SINGLA:** Exactly, sir. That's our point. I can take a long time going through these  
15 points, sir --

16 **THE PRESIDENT:** We don't want to take a long time going through the points of fact,  
17 we want to get a sense of what your case is on the basis of a serious issue to be tried  
18 or real prospect of success. We are not trying the case.

19 **MR SINGLA:** Sir, as I say, in the pleading, what we have set out in the pleading, is  
20 that the decision to refuse to supply Sports Direct is a breach of Chapter 2, because it  
21 is a refusal to supply an existing customer without an objective justification.

22 **THE PRESIDENT:** Yes. To be clear, Mr Singla, if Mr De La Mare wants to say that it  
23 is simply not arguable or not a matter that we ought to be taking into account that at  
24 a trial you may establish that there is an undercutting by Sports Direct, then we will  
25 hear him and we will hear you in reply. But I would rather we heard exactly what are  
26 the points of contention, rather than have the trial, as it were, opened several months

1 in advance of the trial.

2 **MR SINGLA:** Sir, I am certainly not intending to open the trial. I would be happy on  
3 to move forward on the basis there plainly is a --

4 **THE PRESIDENT:** We are not going to push back. If Mr De La Mare wants to push  
5 back, then we will hear him and you can push back on that.

6 **MR SINGLA:** I am grateful. Because, in my submission, I was going to go through  
7 nine points as to why we say -- I will not go through them, but just to summarise -- at  
8 this early stage, on the basis of American Cyanamid which it is common ground  
9 applies, there is a very low bar. That is the first point.

10 The case has recognised that allegations of this nature, there is Court of Appeal  
11 authority in the form of Jobserve that suggests that these sorts of cases are so  
12 complicated that they are generally triable. We say specifically this case, against the  
13 background of replica kit findings, this tribunal will be well aware of where the CMA  
14 and indeed this tribunal has come out on replica kit arrangements, with all of that  
15 background, with the expert materials that we have put in at very short notice with the  
16 disclosure that we have had and the purported justifications that have been provided,  
17 we say that all of that amounts plainly to a triable case.

18 So, actually, we say that the real battleground -- although Mr De La Mare floats this  
19 idea that Sports Direct has not put sufficient evidence forward for the tribunal to be  
20 confident there is a real prospect of success, we say with respect that is hopeless, and  
21 we say the real battleground here is actually in relation to the injunction criteria,  
22 adequacy of damages and balance of convenience and so on --

23 **THE PRESIDENT:** That is very helpful. Is it then best if we hear what Mr De La Mare  
24 has to say about the strength of your case, and then you can respond on points that  
25 he does take?

26 **MR SINGLA:** Yes. If you want to take it block by block, then I am very happy to sit

1 down at this point because there is nothing --

2 **THE PRESIDENT:** I don't want to be tilting at windmills that are there for trial not for  
3 today.

4 **MR SINGLA:** I am very happy for Mr De La Mare -- I will sit down, he can try to  
5 persuade you that the case is strikeable. I am happy to --

6 **THE PRESIDENT:** Strikeable is not the test.

7 **MR SINGLA:** It is, sir. Serious issue to be tried, the cases say, is tantamount to real  
8 prospect of success.

9 **MR DE LA MARE:** My Lord, there are a fair few things I wanted to set out by way of  
10 background first. I think they are relevant to the issue of serious issue to be tried.

11 The first point to make is that this is a case founded on allegations in relation to the  
12 supply of replica kit. Replica kit is defined by the claim form in terms that closely follow  
13 the most recent CMA decisions, in particular the Rangers decision.

14 CMA decision and practice, which is what my learned friend founds his case on,  
15 identifies as replica kit, those items the players wear on the pitch. There are three  
16 shirts: the home shirt, the first main away shirt and the alternative away shirt for colour  
17 clashes. Socks, shorts. That's it.

18 The Leicester decision decides that so-called training kit, which is what you wear at  
19 your particular training ground perhaps when under the lens of the press, et cetera,  
20 that that is not replica kit, but rather is branded manufacturer clothing.

21 Then there are a whole branch of diffusion items, which you will see when we get to  
22 the schedules, like pre-match T-shirts, anthem jackets and matters of that kind. Forms  
23 of clothing, often T-shirts, hoodies, tops, tracks, et cetera, all emblazoned with club  
24 logos, those are not replica kit.

25 The injunction in this case and the pleaded cases is predicated on there having been  
26 orders for replica kit. In fact, the order goes very considerably beyond replica kit and

1 also notably -- and that is an issue of some relevance for trial when one gets to issues  
2 of market definition -- there are items of replica kit which simply are not ordered. There  
3 are no socks ordered, for instance, because they are not material lines, it seems. The  
4 ratio of shirts to shorts is 22 to 1. That's because the reason that you buy replica kit  
5 is to wear it on the terrace, to wear it in the pub, to wear it at home with your friends  
6 when you are around the telly watching the game to signify your support for the club.  
7 It is a badge of affiliation or loyalty. Almost the purest form of IP manifestation. It is  
8 that signal that you buy into the relevant brand in question.

9 Notwithstanding the reputation of the hardiness of the Toon Army, you don't see  
10 legions of people standing in shorts in the middle of winter in the stands at St James'  
11 Park because that's not what you need to do to support the club.

12 Now, the relevance of that is, first of all, for serious issue to be tried, there is no serious  
13 issue to be tried in relation to a number of the categories of item on the schedule for  
14 order, not least because they are not pleaded to be replica kit. The pleading alleges  
15 training jerseys and training pants are replica kit. That goes beyond the CMA decision,  
16 but there is a bunch of other things on the order that simply aren't.

17 Like the pre-match T-shirts we can have lots of really interesting arguments about.  
18 That's the first problem, definitional and how the claim explains the reach of the order  
19 it seeks to justify.

20 The second problem is, setting aside the issue of market definition -- and you have  
21 seen Mr Murgatroyd's report and Mr Chisholm's report -- there is plainly a very  
22 substantial dispute in relation to market definition. It is also plain that there is only  
23 limited guidance to be obtained from the CMA price fixing decisions because price  
24 fixing decisions as a source of rigorous market definition, particularly where there has  
25 been no appeal, are a somewhat suspect source because it tends not to be heavily  
26 tested in cases of object infringement where there is consultation on price. They really



1 | tend to turn on contested issues in market definition.

2 | But market definition aside, there is, we submit, a real problem with this case. The

3 | real problem is this: the complaint made about these arrangements is effectively

4 | a form of per se complaint. It is basically that the tripartite form of distribution that my

5 | clients have signed up for, by tripartite I mean independent club store, independent

6 | manufacturer and independent High Street retailer, each operating their own

7 | independent stores online and in bricks and mortar. That that type of arrangement is

8 | per se incompatible with the competition laws because it excludes the gorilla in the

9 | marketplace, which is Sports Direct, the biggest, largest chain, most stores, price

10 | discounting reputation, et cetera. That's the argument.

11 | The problem with that argument is that these tripartite arrangements have been in the

12 | market for up to ten years. They have never attracted any attention from the CMA,

13 | despite being the backdrop to the Leicester decision where such tripartite

14 | arrangements were in play. There are numerous prominent clubs that have adopted

15 | them with Adidas and JD Sports before my clients, first and foremost amongst which

16 | Celtic, the largest or equal largest club in Scotland, every bit as big as one of the

17 | large Premier League clubs. Leicester and Leeds, both now currently in the

18 | championship but last year they were in the premiership, equivalent size to Newcastle.

19 | Teams that come from a one-club city. There is only Leeds in Leeds; there is only

20 | Leicester in Leicester; and only Newcastle in Newcastle.

21 | Beyond that, there are also two football associations that operate the same tripartite

22 | model: the Scottish FA and the Welsh FA, and they have both qualified in the recent

23 | past or in the imminent future to major tournaments that are massive drivers of sales.

24 | The Welsh team got to the World Cup and the Scottish team is in the forthcoming

25 | Euros and both of those events will be large drivers of sales.

26 | Despite that fact, and despite the fact that Sports Direct has the wealth of data that it

1 has identified, it has identified that it sells every kit going and has done so for decades,  
2 it has advanced not a scintilla of evidence to show that arrangements of this kind  
3 actually produce meaningful effects on competition. That's what you would expect it  
4 to be able to do in circumstances where the perfect experiment, if you like, of Leicester,  
5 Leeds, Celtic, the Scottish FA, where cessation of supply would favour exclusivity of  
6 Sports Direct, has preceded it.

7 Instead, they launched this case against the club that was formerly in joint ownership,  
8 Sports Direct, not against any of the other clubs who have adopted these  
9 arrangements a number of years beforehand, and without adducing any form of  
10 evidence or putting any form of evidence before their experts to substantiate the case  
11 of foreclosure and effects that is at the heart of this case.

12 The competition dominance case is one of anti-competitive foreclosure, and it must  
13 meet the Microsoft test we set out in our skeleton argument. It has to eliminate all  
14 effective competition.

15 The reason this case fails the serious issue to be tried test is because there is nothing  
16 to suggest that three independent active operators, each with sophisticated bricks and  
17 mortar and online retail stores, will fail to provide any form of effective competition.

18 There is simply no evidence to begin to substantiate that contention. The most there  
19 is, is Mr Chisholm's surmise in his report that it's not a stretch to suppose that there  
20 may be some effects on competition. That, with respect, is not the same as meeting  
21 the Microsoft test of eliminating all effective competition.

22 Then when one comes to the agreements case, the problem with the agreements case  
23 is that agreements – exclusive vertical agreements because that's what we are talking  
24 about – are broadly procompetitive. That's why they are exempted by the vertical  
25 agreement block exemption orders, materials of that kind, that's why there is the  
26 literature in support of exclusivity, because exclusivity itself drives competition, and in

1 particular, it drives retail competition.

2 We have heard the narrative according to Sports Direct. Of course, the other side of  
3 the coin is that these types of exclusivities are effective means for a relative underdog  
4 in relation to replica kit, like JD Sports, effectively to compete with the biggest player  
5 on the market. It is through those exclusivities that they attract footfall into their stores  
6 and through that generate competition which can also be mediated on metrics other  
7 than price, like the quality of the offering, the quality of the staff, presentation, after-  
8 sales service, and all those kinds of matters.

9 That is where the evidence shows that Sports Direct has sought to position itself. It  
10 has wanted a premium retail outlet to support the fact that the clothing in question, that  
11 is the subject of these various agreements, extends well beyond replica kit and into  
12 fashion wear more generally, not just the pre-match T-shirts but maybe all kinds of  
13 other items, down to the coats worn on the touch line, anthem jackets and all those  
14 kinds of matters.

15 What my learned friend's case really amounts to is a clutching around in the Two  
16 Circles document for a swallow that does not a summer make, when the overall welter  
17 of evidence shows that there are a whole series of perfectly sensible, permissible,  
18 pro-competitive reasons behind the restructuring of the operations in question.

19 Then the last point that is necessary to look at from this perspective is the whole saga  
20 of the Castore agreement. That is going to be relevant, not just a serious issue to be  
21 tried but the topic of coming to the court with clean hands and the relevant levels of  
22 orders, because Sports Direct's case is that exclusivity of this kind is inimical to  
23 effective competition in the market. Yet the evidence is very clear that Sports Direct  
24 itself operated with Castore an arrangement at least in relation to Rangers and  
25 Newcastle where for the first month of launch, no other retailer was to have access to  
26 the relevant replica kit.

1 Now, the evidence is clear: something like a third of all sales of replica kit occur in the  
2 first month after launch. That's the evidence from JD Sports, the evidence from Sports  
3 Direct is it is something in the order of 40 per cent in the first two months of sale. That  
4 is, on any view, the critical period for getting footfall in question in relation to the kit,  
5 and during that period the prior arrangements -- the status quo that my learned friend  
6 would have you advert to -- was one in which there were, in effect, in substance, two  
7 undertakings operating in the market. There was Sports Direct and there was Castore  
8 which was one undertaking with two fronts. It's front as a manufacturer and the club  
9 store which it fully controlled and operated.

10 So the predicate of their case is, well this is a terrible change. In fact, when you look  
11 at the critical launch period -- and that's for the focus of this injunction it is the critical  
12 period because what this application for an injunction does, par excellence, is entirely  
13 disrupt all of my clients' plans for the launch of their nascent operation.

14 In that launch period, we are moving from a status quo of two operators, one having,  
15 if you like, a multi-brand exclusivity, a High Street exclusivity, to a situation in which  
16 there are three substantial undertakings and three substantial independent bricks and  
17 mortar and online outlets.

18 We say one of two things must follow from that: either exclusivity is not problematic,  
19 or certainly not problematic in the way that the case is formulated, in which case there  
20 is not a serious issue to be tried; or the prior arrangements themselves were unlawful  
21 and they taint the way that Sports Direct comes to this court. Not least because the  
22 level of product ordered is set directly by reference to the numbers of kit items sold by  
23 Sports Direct under the Castore agreement.

24 So, they have taken the volumes of kit they sold last year with the benefit of exclusivity  
25 for the first month during that critical one-month window, replicated that order with the  
26 wholesale prices taken from Adidas in its Arsenal and Man U kits, and asked for the

1 same order again. In other words, they have locked into their order and their levels in  
2 their order a level of sales generated by the very exclusivity about which they  
3 complain. We say that either impacts on the issue of serious issue to be tried, or on  
4 the issue of equity.

5 Where does it take us all? My ultimate submission is that there is not, for the reasons  
6 we have set out in the skeleton arguments, any evidence -- when you get down to the  
7 actual effects of these agreements -- of a case sufficient to amount to a serious issue  
8 to be tried.

9 I very firmly put down a secondary marker to this effect, which is that if you get into  
10 balance of convenience and the only test and the requirement in a case where there  
11 is substantively mandatory injunctive relief or highly intrusive relief, then at that stage  
12 you need a high degree of assurance as to the merits of the case in question requiring  
13 mandatory --

14 **THE PRESIDENT:** Mandatory balance of convenience is at least two steps down the  
15 line.

16 **MR DE LA MARE:** It is, but the issues that arise in relation to serious issue to be tried  
17 recycle when one gets to the issue of balance of convenience. That's why it is worth  
18 spending some time looking at the fabric of this case.

19 **THE PRESIDENT:** Can I just unpack what I think you have told me and you can tell  
20 me if I have got it wrong?

21 **MR DE LA MARE:** Yes.

22 **THE PRESIDENT:** Your first point is that there is an essential uncertainty about what  
23 it is that, in terms of product, this case is all about. Because we are using the term  
24 "replica kits" in a manner that might perhaps be better and more clearly defined.

25 Now --

26 **MR DE LA MARE:** There is uncertainty, my Lord.

1 **THE PRESIDENT:** Can I push back on this? It does seem to me that it will be a matter  
2 for trial and not for today just how far the significance of the Newcastle United brand  
3 stretches in terms of the clothing that is sold under that brand. It may very well be the  
4 case -- and I really don't think we want to be getting into it today, but you will, I am  
5 sure, correct me if I am overstating -- the fact is that what is being said is that there  
6 are customers in the market who will seek to purchase Newcastle United branded kit  
7 which they are -- well, the demand for that kit is inelastic in the sense that they want  
8 the Newcastle United brand not the city or the other united brands, they want just that.  
9 And that is therefore creative of your client's dominant position insofar as the clothing  
10 line -- to avoid replica labels -- is concerned.

11 **MR DE LA MARE:** In relation to that analytical question --

12 **THE PRESIDENT:** Yes.

13 **MR DE LA MARE:** -- I readily accept --

14 **THE PRESIDENT:** Right.

15 **MR DE LA MARE:** -- there is a question to be tried. But I put my case simply on the  
16 basis of the case pleaded against us.

17 The case pleaded against us, paragraph 19 of the claim form, has a definition of  
18 replica kit that confines it to the short and long-sleeve shirts, shorts, training wear and  
19 socks, home, away, third goalkeeper and special edition in adult, junior and infant  
20 sizes.

21 **THE PRESIDENT:** Paragraph 19, you say?

22 **MR DE LA MARE:** 19, to which a football club's trademark is applied and which are  
23 worn by the club's players when competing in professional football matches. That's  
24 the definition and it is a very close simulacrum of the definition used by the CMA in the  
25 most recent Rangers and Leicester City cases -- I can take you to that if you want -- but  
26 that's how they plead what is replica kit. For today's purposes --

1 **THE PRESIDENT:** What you are saying there is that there is a mismatch between  
2 that paragraph 19 definition and the remedy that is sought on an interlocutory basis in  
3 the draft order we have seen.

4 **MR DE LA MARE:** That's the first point I make. Exactly so.

5 **THE PRESIDENT:** Look, Mr De La Mare, can I say this: I am very keen that we get  
6 to the essential question of abuse on this first question, serious issue to be tried  
7 because it seems to me that this is something which is important but rectifiable.  
8 I would rather, if there was a fatal or lethal blow that you can advance against  
9 Mr Singla, that that be run --

10 **MR DE LA MARE:** I quite understand, sir. I don't want to pretend this point is the  
11 centre of gravity of the case, because when one looks at the schedules you will see  
12 that the centre of gravity of the order is in relation to first and foremost the home top  
13 and then it is the first away top and then to a lesser extent the alternate top. That's  
14 where the beef of the case is.

15 **THE PRESIDENT:** I understand --

16 **MR DE LA MARE:** The rest of the items on the order, you know, they are not the  
17 centre of gravity, and they are the very items that raise the issue about whether or not  
18 they fall within that special category of branded good that amounts to a must have in  
19 the kind of OFT/CMA definition.

20 **THE PRESIDENT:** So we are moving -- and I don't want to minimise the importance  
21 of this -- on this point quite closely to the difficulties of a mandatory injunction when  
22 there is a degree of uncertainty, I may be putting it a little high --

23 **MR DE LA MARE:** -- yes.

24 **THE PRESIDENT:** -- as to what it is that is being required to be done. I am not  
25 insensitive to that.

26 **MR DE LA MARE:** That will be a major plank of my submission.

1 **THE PRESIDENT:** It may be. We will need to come back.

2 Moving on, then, from replica kits and branded products more widely, your second  
3 point was that essentially the tripartite arrangements that you have described are not  
4 foreclosure. I think the point that you are making -- but I am wondering how far it is  
5 not a point that Sports Direct are advancing -- is this: if one was starting with a blank  
6 sheet of paper, in other words you have the trademark, the brand which you can  
7 exclude everyone else from because it is your brand -- like a patent but not -- if you  
8 were setting up without the prior history, then I am not sure that Mr Singla is saying  
9 that's a problem.

10 I think his point --

11 **MR DE LA MARE:** It is very important to identify whether or not he is saying it is  
12 a problem. Not least because we are all agreed that one characteristic of this market  
13 is that there are many clubs that managed all of their own supplies of products that  
14 are manufactured for them. There are clubs that simply operate a club shop online,  
15 bricks and mortar and don't supply to anyone else. So unless my learned friend's case  
16 is that it is the characteristic of prior supply that generates the case, his beef has to be  
17 with every club conducting that type of operation as well.

18 **THE PRESIDENT:** Yes. That's why I am raising this. Because my understanding of  
19 Mr Singla's point, when I was summarising his argument, was that there had  
20 been -- let me just go back to my note -- that there was a prior history here and  
21 effectively what had happened was that without sufficient or proper or  
22 any -- depending on how want to put it -- notice, Sports Direct were deprived of that  
23 which they had in prior years been doing. And it was that fact which was the driver of  
24 the abuse that is being alleged.

25 **MR DE LA MARE:** Yes. So where we get to, for present purposes in terms of serious  
26 issue to be tried, is my learned friend's reliance on At The Races. Because there is



1 no doubt that Castore, the previous supplier, was a separate undertaking. There was  
2 no doubt it had the full gamut of rights to conduct wholesale operations. So it would  
3 have been the party sitting in the shoes that we are now said to sit in in relation to the  
4 period from 21/22 onwards. It is a distinct undertaking and it had its distinct supply to  
5 my learned friend's client.

6 The question that arises is, I suppose if one put it in IP terms, Hag Coffee and all that  
7 stuff which has been discredited now, is it enough that the products have a common  
8 origin in terms of the IP that's been licensed to them. That's really my learned friend's  
9 case. Because in all cases, shirts containing IP ultimately licensed by Newcastle, and  
10 I have been selling such shirts, I am an existing customer, and the At The Races cases  
11 gets nowhere close to substantiating that that is an existing supply case.

12 If you turn it up, authorities bundle 1, tab 9, the relevant passage at 2546 Mr Justice  
13 Atherton's judgment, as he then was, page 452. You can see the context from that  
14 very paragraph -- 452 to 453 -- it is one in which there was a pre-existing direct and  
15 indirect supply by the British Horse Racing Board to At The Races of the very same  
16 product. This will be familiar to the President from Sports Radar amongst other things.  
17 It is betting data, once again. It is the same betting data being supplied directly and  
18 indirectly.

19 So identity of product and identity of undertaking. If the purpose of a substantive  
20 approach is to reflect the competition rules, the critical thing when you are investigating  
21 matters substantively is to investigate the product and the undertakings involved. If  
22 there is a material change in the product or a material change in the undertakings,  
23 then it can't substantively be existing customer supply.

24 Our simple answer is whatever cosy arrangements were entered into between Sports  
25 Direct and Castore -- and they plainly were cosy given the one month exclusivity -- they  
26 were with a different undertaking and they do not, in any way, carry across to an

1 entitlement to be treated as an existing customer --

2 **THE PRESIDENT:** I see. In fact, this is a rather different point to the point I was  
3 coming to, the coming with clean hands point. What you are saying is even if there  
4 was no clean hands question, the fact is that it is Castore that has the complaint, if  
5 there is a complaint, and not Sports Direct. Because all that has happened is that  
6 Castore's arrangements have been terminated. So far as Sports Direct is concerned,  
7 that is nothing to the point as regards its complaint against you.

8 **MR DE LA MARE:** It can no longer obtain supplies of products manufactured by  
9 Castore with their brand, with their logos, with their fabrics, with their attributes, their  
10 own trademarked and proprietary goods. It can no longer source those -- goods that  
11 also display my client's IP -- they want access to a different but similar product also  
12 incorporating the same IP, but in all other respects different, because it is Adidas  
13 fabrics, Adidas registered designs and Adidas logos, et cetera, and it is supplied by  
14 a different undertaking.

15 The only common thread in that is the IP that is licensed at the end of the day and this  
16 case doesn't come close to saying that because there is the same upstream party  
17 supplying some of the IP in question, you are entitled to be treated as in substance an  
18 existing customer. It doesn't begin to fly.

19 **THE PRESIDENT:** I see. But just to test how far you are going on this -- I entirely  
20 understand the point you are making regarding the distinctiveness of Sports Direct  
21 and Castore, but even if you remove Castore from the equation, say there was  
22 a supply -- let's hypothetically assume by Newcastle United using Adidas  
23 manufactured products -- from year to year to year, which in the final year ends, not  
24 a breach of contract, there is no obligation to supply, but it just ends in a position of  
25 dominance, that, you would say, is also not an abuse of a dominant position? That  
26 you can choose as a dominant undertaking to restructure your means of selling.

1 **MR DE LA MARE:** Of course.

2 **THE PRESIDENT:** I am being slow about this, but the Castore point is an extra point  
3 above your --

4 **MR DE LA MARE:** It is an extra point, because the scenario you just described to  
5 me, sir, is exactly the scenario is in AAH where effectively the pharmaceutical  
6 company was restructuring its operation to remove wholesale supply and effectively it  
7 was pairing up with the logistics partner to enable it to supply straight to retail, straight  
8 to the chemist, cutting out the intermediary wholesale suppliers. That case was a case  
9 where an injunction was refused, and yes it does come down to objective justification,  
10 but in those circumstances, wanting to restructure your organisations to generate  
11 better efficiencies for you, including better reward on the IP that's being licensed and  
12 underpinned on those products, are perfectly obvious objective justifications.

13 **THE PRESIDENT:** Including the exclusion on that basis of a separate undertaking  
14 that I had previously been a customer on a wholesale basis.

15 **MR DE LA MARE:** Absolutely. What one has to reach for --

16 **MR SINGLA:** Before we go any further, on AAH there was actually a serious issue to  
17 be tried. Let's be very clear as to what that case stands for. He cites it in his skeleton  
18 on delay. There was a serious issue to be tried.

19 **MR DE LA MARE:** Agreed.

20 **THE PRESIDENT:** It is quite clear that Mr Singla is going to be taking us to that case.  
21 To the extent that you get any mileage out of it, you would probably be best to take us  
22 to it as well.

23 **MR DE LA MARE:** I accept my learned friend's point because the facts of that case  
24 were that is much more stark because an entire, if you like, level of distribution was  
25 being cut out.

26 **THE PRESIDENT:** Yes.

1 **MR DE LA MARE:** The points I was going to go on to make is that it is therefore much  
2 more closely a kin to the kind of IMS software case where effectively the foreclosure  
3 that's complained of is the removal of the possibility of producing a novel or important  
4 product or service. Obviously, the wholesalers were providing a service and they were  
5 precluded from providing that service generally in relation to those drugs by the new  
6 arrangements introduced.

7 Compare and contrast the present case, there is nothing that's going to interfere with  
8 Sports Direct's ability to carry on its multi-brand operation. The idea that it is a £5.5  
9 billion company foreclosed --

10 **THE PRESIDENT:** No one is saying it is an essential service.

11 **MR DE LA MARE:** But that's a fundamental problem with the case. That's the  
12 problem. That's the problem. The obtaining of pharmaceutical supplies for AAH was  
13 a fundamental point and its business was not viable without it. No one is suggesting  
14 that Sports Direct's business is not viable without access to the Newcastle kit, any  
15 more than it is not viable without access to the Leicester, Celtic or Leeds kits.

16 **THE PRESIDENT:** Let me test it this way. Let's stick with patents rather than  
17 trademarks because they are a bit easier to --

18 **MR DE LA MARE:** My Lord knows a lot more about those than I do.

19 **THE PRESIDENT:** Plainly. But let's suppose one has an invention that is in high  
20 demand, so the monopoly created by the patent is a commercially very significant one.

21 **MR DE LA MARE:** Yes.

22 **THE PRESIDENT:** Starting with a blank sheet of paper, you have a dominant position,  
23 but a right to exploit that provided it is not abusive.

24 **MR DE LA MARE:** Yes.

25 **THE PRESIDENT:** And you are perfectly entitled, as I understand it, to sell it yourself  
26 or to exclusively license it.

1 **MR DE LA MARE:** That's right. That's right.

2 **THE PRESIDENT:** And that is writ large in intellectual property law and there is a nice  
3 tension between competition law and intellectual property law, but you can do that.

4 **MR DE LA MARE:** That, with respect, is exactly the issue we had in the  
5 SportRadar/Betgenius litigation and it is endemic when you are dealing with products  
6 that are characterised by the IP that is in support.

7 **THE PRESIDENT:** So your position is that if one is starting with a newly minted patent  
8 application, you can structure the way you sell it and the way you exploit your product  
9 in a way that you wish.

10 Now, let's suppose that you have had your invention, the patent, for ten years, and  
11 you have chosen to deal with matters by actually licensing ten undertakings to sell,  
12 and that's how you choose to do it, and for years, that's been rolled over. There is no  
13 right to it being rolled over, it's an annual thing which happens.

14 Then, from one year to the next, you say "well, I am going to change matters and  
15 I don't care about the investment that has been made by my licensees, they haven't  
16 tied me in, I can choose to change matters and that's what I am going to do".

17 **MR DE LA MARE:** I am going to vertically integrate.

18 **THE PRESIDENT:** Yes. Would you say that there is an arguable abuse there?

19 **MR DE LA MARE:** No.

20 **THE PRESIDENT:** No.

21 **MR DE LA MARE:** Not unless there is evidence of some form of anti-competitive  
22 foreclosure of all effective competition on the related market. And that's the problem,  
23 there is not any evidence of that.

24 **THE PRESIDENT:** Would you say that the case, if you chose to --

25 **MR DE LA MARE:** It is important to note in that respect, my Lord, that Microsoft -- the  
26 case we have cited and the case from which that test cited in our skeleton comes

1 from -- is a termination of supply case as well.

2 **THE PRESIDENT:** So you would say it is a fortiori, if you were choosing in your  
3 restructuring just to axe, say, four of the ten licences and continue with the six, that  
4 would be not arguably an abuse of dominance in those circumstances; is that your  
5 position?

6 **MR DE LA MARE:** Yes.

7 **THE PRESIDENT:** Yes, I am grateful.

8 So that, I think, was your second point. I am very grateful to you for that.

9 The third point is one which I think has been light-pedalled by Sports Direct, which is  
10 the question of an arguable Chapter 1 prohibition. The heavy lifting, I think, is being  
11 done here on Chapter 2 rather than Chapter 1.

12 **MR DE LA MARE:** You can see why they concentrate on Chapter 2 rather than  
13 Chapter 1, given the nature of the provisions they had in place with Rangers and  
14 Newcastle via Castore because there was exactly the same sort of exclusivity in place.  
15 It is pretty striking, isn't it, when you go to read Mr Chisholm's second witness  
16 statement to see how he attempts to grapple with the issue. He simply avoids it. The  
17 evidence is absolutely plain, there is an email from Castore referring to a distributor in  
18 Dubai called Noon, saying effectively this is evidence of the one-month exclusivity in  
19 which we can't supply and you can't put the products on display.

20 There is also evidence -- if you want me to, I can take you to it in the JD Sports letter  
21 exhibited to my instructing solicitor's witness statement, Mr Eighteen's witness  
22 statement -- where they say they couldn't obtain supplies of Newcastle kit for the first  
23 month because of the exclusivity in place in favour of Sports Direct.

24 What does Mr Nevitt says in response to this? He exhibits the Rangers agreement,  
25 clause 5 of which shows the exclusivity agreement which has been agreed with  
26 Rangers, which is exactly akin, we say, to the kind in place with Newcastle, and then

1 he says there are no other written arrangements in place. That evades the question  
2 as to whether or not in practice the same operations were carried over.

3 He evades dealing with the relevant emails from the individuals at Castore or the  
4 JD Sports evidence, and he doesn't say that there was no practice to like effect in  
5 Newcastle. The evidence is absolutely plain that's what they did. That's what makes  
6 this case so utterly unattractive.

7 **THE PRESIDENT:** It is fair to say, I think, I don't think I have really pressed Mr Singla  
8 to the Chapter 1 case. We have been focusing on the Chapter 2 case. So what we  
9 will do is see what he says by way of reply. If he makes further points on the chapter  
10 1 case, obviously we will want to hear further from you.

11 **MR DE LA MARE:** I am grateful.

12 **THE PRESIDENT:** But I think we will light touch that.  
13 So that's the third of your five points. The fourth point is coming with clean hands.

14 **MR DE LA MARE:** Yes.

15 **THE PRESIDENT:** Yes. The fact that there is a suggestion that the prior  
16 arrangements are in themselves dubious.

17 **MR DE LA MARE:** On the claimant's case.

18 **THE PRESIDENT:** On the claimant's case.

19 **MR DE LA MARE:** On the claimant's case.

20 **THE PRESIDENT:** Finally, there is your point that actually even if you are  
21 wrong -- which of course you say you are not -- about the absence of an abuse, even  
22 assuming a direct supply to Sports Direct, you have the interposition of Castore as  
23 a separate undertaking and that is your final point in terms of why --

24 **MR DE LA MARE:** Then I recycle all of those points to say if they don't get me over  
25 the hurdle for serious issue to be tried, they are compelling points when you get to  
26 serious (overspeaking).

1 **THE PRESIDENT:** I quite understand. I am not shutting out anybody from telling us  
2 more about those when we reach that point. But I am just trying to work  
3 out -- Mr Singla, you are on your feet, but understanding that these proceedings are  
4 being transcribed, would now be a convenient point for a transcriber break?

5 **MR SINGLA:** Yes, of course. I have a fair bit to say in response.

6 **THE PRESIDENT:** I am sure you do. In which case all the more so a time for a break.  
7 We will rise then for ten minutes and resume at 10 past.

8 **(11.59 am)**

9 **(A short break)**

10 **(12.14 pm)**

11 **THE PRESIDENT:** Mr Singla.

12 **MR SINGLA:** Sir, I have quite a bit to say because we actually think this is clearly  
13 a case which meets the serious issue to be tried threshold. I would like to take this in  
14 stages, if I may.

15 **THE PRESIDENT:** Yes.

16 **MR SINGLA:** Not necessarily in the same orders of the points.

17 Can I start, actually, by just reminding the tribunal of the legal principles which apply  
18 in this context? We set them out at paragraph 14. These are non-competition cases.  
19 But they are at paragraph 14 of our skeleton. So you can see the -- we say we are  
20 comfortably over the threshold, but we set out at 14 that really the question is --

21 **DR BISHOP:** Mr Singla, can I ask you where your skeleton is in these bundles?

22 **MR SINGLA:** That's a very good question, Dr Bishop. I have it loose. I think they are  
23 in the bundle 3.

24 **DR BISHOP:** Bundle 3?

25 **MR SINGLA:** Core volume 3, section G, I am being told. Paragraph 146 of our  
26 skeleton sets out the test and it is not an onerous requirement, the authorities make



1 clear. For reasons which I shall come onto, we say actually we are comfortably over  
2 that low bar which applies. Some of the points about well, you need evidence of  
3 anticompetitive effect, so at this early stage we say it is just actually not how these  
4 injunctions work. We say we have done a lot of work actually --

5 **THE PRESIDENT:** I think you can take this quite lightly, Mr Singla, you can take a --

6 **MR SINGLA:** I would like to take it lightly, sir, but the problem is if Mr De La Mare  
7 wants to say, when we come to the back end of our analysis, that somehow the  
8 weakness of our case should count against us on discretion, then it is rather important  
9 for me to respond because we say a lot of what he just said is actually just wrong.  
10 Wrong in terms of the legal principles and wrong in terms of the evidence with which  
11 we are putting our case.

12 **THE PRESIDENT:** As I understand it, you are putting your case this way -- we went  
13 through it the first time round and we have heard what Mr De La Mare says about  
14 this -- what he says is that even if there is a degree of incumbency, in other words  
15 taking Sports Direct's position as a supplier, being supplied by Newcastle United  
16 products, and leaving out of account the Castore cut out, as we can call it, it is open  
17 to a dominant undertaking to readjust its supply arrangements in the market such that  
18 it may cut out one route of supply and substitute it for another or take it in house. That  
19 is not an abuse unless you meet rather more stringent requirements than you can in  
20 this case meet.

21 As I understand it, you are saying that it is an abuse -- an arguable abuse -- to say  
22 that I have been supplied over the years and you have, without adequate notice, cut  
23 me out.

24 **MR SINGLA:** Sir, yes. But the point that's being made is it is such a high level of  
25 extraction. That's the difficulty. I just want to come back to some of the points, if you  
26 will allow me to --

1 **THE PRESIDENT:** No, of course. But do you agree with this point -- if you don't, then  
2 I would like to know why -- if we are starting with a blank sheet of paper, in other words  
3 there is no prior supply, is it prima facie open to the dominant undertaking to structure  
4 how they go to market in whatever way they wish?

5 **MR SINGLA:** At that level of abstraction, I accept the proposition.

6 **THE PRESIDENT:** Okay.

7 **MR SINGLA:** Sir, that's the difficulty. I am conscious of time because I want to make  
8 submissions on the other points which I say is where the real battle ground is, but I just  
9 want an opportunity to correct some of the things which have been said.

10 First of all, let me just take this in stages, serious issue to be tried is a low bar. That's  
11 been recognised in general terms, that's been recognised by the Court of Appeal in  
12 Jobserve paragraph 12 in relation to abuse of dominance cases. It is in Barclays, the  
13 judge says -- applies Jobserve, tab 15 of the authorities, and applies that to market  
14 definition as well as abuse.

15 AAH is a case that Mr De La Mare cited. Serious issue to be tried there. Software  
16 Cellular. Serious issue to be tried there. These cases are complex.

17 Chapter 2, if I can turn to the Chapter 2 case --

18 **THE PRESIDENT:** If you are arguing about dominance, don't.

19 **MR SINGLA:** Sorry, sir?

20 **THE PRESIDENT:** If you are arguing about dominance, don't. We are not pressing  
21 you on that.

22 **MR SINGLA:** No, but let me come to Chapter 2, because on Chapter 2 and effects  
23 he relies on Microsoft. Can I show you why that submission is wrong as a matter of  
24 law? Because in Purple Parking that's --

25 **THE PRESIDENT:** All right. Let's also make that a little bit easier. If we have an  
26 arguable abuse, then I think it is going to be quite hard to say that there are no possible

1 effects to that.

2 **MR SINGLA:** I am grateful.

3 **THE PRESIDENT:** Right. We say that the reliance on other arrangements with other  
4 clubs doesn't get Mr De La Mare where he needs to get for today's purposes. The  
5 clubs in question, we say, are not comparable. One would need to understand the  
6 precise facts and circumstances surrounding those arrangements. It is no good, in  
7 our respectful submission, to say, well, what's going on here must be okay because  
8 Leeds and Leicester are doing the same.

9 We say, well, one would need to understand what those arrangements look like.  
10 That's why it is important to come back to the specific facts of this case. So that's  
11 Chapter 2. We say prima facie case or serious issue to be tried as regards dominance  
12 and abuse on the basis that they are cutting us out after decades of supply.

13 When we come to Chapter 1, sir, we are not soft-peddling Chapter 1 because in one  
14 sense is, insofar as they are saying the reason we are not supplying you is because  
15 we have done an exclusive deal with JD, we say that is an anti-competitive agreement  
16 with JD and a full effects analysis will be required in line with the CMA guidance.

17 The submission that is being made is that it is obviously procompetitive because it  
18 helps JD as the underdog. We say, with respect, that is a hopeless point and certainly  
19 doesn't allow the club to say that there is no real prospect of the chapter 1 case  
20 succeeding. Mr Chisholm has provided expert analysis, to the extent he can at this  
21 very early stage, of why there is reason to believe that there is going to be  
22 anti-competitive effect arising out of an arrangement with JD which means that Sports  
23 Direct, the largest sports retailer in the UK, will not be able to provide these shirts to  
24 customers.

25 One is talking -- there is a debate between the experts about market definition, but on  
26 the assumption that the relevant market definition is the market for Newcastle replica

1 kit, which is the way on which the case is put, in my submission it is a completely  
2 obvious point that if the Newcastle fans cannot buy replica kit from Sports Direct, then  
3 that is evidence of anti-competitive harm.

4 They have no evidence to contradict, at this stage, that we are, in fact, the leading  
5 retailer who discounts replica kits. So the tribunal on the material available before the  
6 tribunal, the position is going to be that Newcastle kit will be available in JD, but not in  
7 Sports Direct. We say, therefore, there is evidence of anti-competitive effect at this  
8 early stage.

9 Then one comes to the Castore agreement on which much reliance is placed.  
10 Mr Nevitt does deal with this in his second witness statement and he exhibits the  
11 relevant agreement which is, in fact, an agreement in relation to Rangers kit. So the  
12 case being put -- and all of this will have to be investigated at trial -- is that, in fact, it  
13 operated on a de facto basis as an exclusive agreement vis- à-vis the club's replica  
14 kit.

15 Now, that may or may not be right, it is certainly something that can't be determined  
16 at this stage. To try and use that sort of arrangement, a contract concerning Rangers  
17 kit and one-month period of exclusivity, they are trying to extrapolate from that that it  
18 doesn't lie in our mouths -- or that the claim must be unsustainable, or that we don't  
19 have clean hands. We respectfully submit that is a submission the tribunal should  
20 have no truck with at all. It is just not an analogous arrangement.

21 Then that takes me to the definitional point, if I can just deal with that, because there  
22 is no issue there of substance or in terms of the injunction. If one looks at  
23 paragraph 19 of the pleading, it refers to replica kit as including all manner of things,  
24 including training wear. Ultimately, it is an obvious point, but the replica kit is the kit  
25 over which the club has the trademarks and the IP.

26 We have referred to that in paragraphs 13 and 26 of the pleading. I mean, the replica

1 kit -- it is utterly obvious what the replica kit is. It is not just the match kit that the  
2 players wear when playing matches. As we defined it in paragraph 19, it includes  
3 training wear as well. It is adult, junior and infant sizes to which a football club's  
4 trademark is applied.

5 So when we come to the form of order we will see that there is actually no difficulty  
6 because Adidas is manufacturing the replica kit, the kit over which the club has the  
7 trademarks. The club has ordered the kit -- all of the orders, we will come to this in  
8 detail when we look at the delivery schedule -- but all of the kit that Sports Direct has  
9 ordered is a subset of what the club itself has ordered from Adidas.

10 **THE PRESIDENT:** Do you accept, though, that paragraph 19 of the claim form is quite  
11 narrowly framed given the relief you are seeking in the order?

12 **MR SINGLA:** No, I don't accept that, sir. If it were the case, I would say that that --

13 **THE PRESIDENT:** I accept it can be changed. I hope I have made it pretty clear  
14 I don't regard this as a point that is anything other than peripheral at this stage.

15 **MR SINGLA:** I am grateful. But first of all, it was Mr De La Mare's first point on the  
16 substance and also it is relevant because we will have to come back to it.

17 **THE PRESIDENT:** We will have to come back to it. We are trying to do this in stages.  
18 I am trying to understand the arguable case you are putting rather than the mechanics  
19 of getting the injunction going. I appreciate we are going to have to come back to this.  
20 Mr De La Mare made that clear and I have made that clear, but at the moment I am  
21 trying to understand what the essence of your stage one argument is.

22 **MR SINGLA:** The essence of the case, as regards abuse and Chapter 1 is that Sports  
23 Direct is the leading retailer of sportswear and replica kit in the UK. It has a reputation  
24 and is well known for its discounting practices. It will be excluded entirely from what  
25 we say is the relevant market, which is the sale of Newcastle kit.

26 The justification, so far as they stand before you today, appear to be that they want to

1 partner with JD because of wider distribution, but that's no answer because Sports  
2 Direct has over 480 bricks and mortar stores in the UK, so why wouldn't one want -- if  
3 one is really looking for distribution, it would be entirely irrational not to engage Sports  
4 Direct.

5 Then they say there is a reputational issue with Mike Ashley. We say that is hopeless  
6 because in fact the evidence shows that Sports Direct sold out of all Newcastle kit last  
7 year.

8 The third point is, which they don't address, the material shows they don't like the  
9 discounting practices.

10 If that is the real motivating factor here, which will be a matter to be investigated at  
11 trial, then in our submission that may not be a sufficient objective justification for  
12 Chapter 2 purposes, nor when one comes to Chapter 1 will they have a case, because  
13 we will say that's clear consumer harm. The anti-competitive effect is that you are  
14 excluding entirely from the relevant market the retailer that offers consumers the  
15 lowest prices. That's why we say that the case is well over this threshold on both  
16 Chapter 1 and Chapter 2. That's also why we say, when we come on to the balance  
17 of convenience and so on, the injunction would protect consumers pro tem because  
18 what is not going to be available at the moment are Newcastle kits from the retailer  
19 that offers the lowest prices. That's an attempt to encapsulate why we say --

20 **THE PRESIDENT:** That's very helpful, Mr Singla. What I have tried to do is articulate  
21 what your case is in the abstract. I would be grateful if you could mark my homework  
22 and tell me how far I am off beam.

23 Is what you are saying this: where a dominant undertaking has historically supplied  
24 a non-substitutable product in a certain way, for example to wholesalers A and B, it is  
25 arguably an abuse of dominance for that dominant undertaking to change the manner  
26 in which it supplies the market in the future if that involves ceasing to supply a single

1 | previously supplied undertaking such as A?

2 | **MR SINGLA:** Sorry, sir --

3 | **THE PRESIDENT:** I will read it again. I threw that at you quite quickly.

4 | **MR SINGLA:** Yes. At that level of abstraction, we do agree with the proposition  
5 | because it is well known -- as is recorded in, for example, At The Races -- refusing to  
6 | supply an existing customer will amount to an abuse of dominant position even if they  
7 | are contractually entitled to do so, unless the act is objectively justified. So that is the  
8 | basis, the legal principle we rely upon, yes.

9 | **THE PRESIDENT:** Okay. So I need to add into this a reference to objective  
10 | justification.

11 | **MR SINGLA:** Yes. Exactly. That's where all my points today about what we can see  
12 | on the evidence so far as regards the motivating factors or the rationale, that's exactly  
13 | where that comes in, sir.

14 | **THE PRESIDENT:** All right. Simply changing the arrangements to make more money  
15 | does not amount to objective justification; is that fair?

16 | **MR SINGLA:** That would be one of our points, yes. But that seems to be -- exactly.  
17 | But, sir, just to explain, what is particularly relevant in this context is that they have not  
18 | said "we want to bring all of this in-house". So the changing of the arrangements, with  
19 | respect it is important factually that the changing of arrangements here is bringing  
20 | most of it in-house but wanting to continue to engage wholesaler A.

21 | So the onus will be on them -- and as a matter of law, the onus will in fact be on  
22 | them -- in terms of objective justification. The onus will be on them to explain to the  
23 | tribunal at trial why it is they wanted to engage JD and not Sports Direct because we  
24 | are not saying it should be just Sports Direct, they are the ones who have chosen to  
25 | have the exclusive deal.

26 | **THE PRESIDENT:** It is not quite exclusive, as we explained, with Adidas --

1 **MR SINGLA:** No, exclusive with JD, sir. In terms of the like-for-like bricks and mortar  
2 retail, there is JD and SD and they are going with JD only. That's why, for justification  
3 purposes, they will need not only to explain, well, we are changing our arrangements  
4 in a loose sense, they will need to explain with precision -- the burden being on  
5 them -- why have you chosen JD to the exclusion of SD, and saying, well, JD has  
6 a shop in Paris, we say, with respect, they are going need to do a lot better than that  
7 at the trial.

8 **DR BISHOP:** Can I just ask a supplementary question? The President's formulation  
9 there did not include a phrase that the existing suppliers is a discounter, or is the  
10 lowest price. Is that an essential part of your case or not?

11 **MR SINGLA:** That will come into objective justification.

12 **DR BISHOP:** Objective justification.

13 **MR SINGLA:** Because what the material shows is the real reason, in circumstances  
14 where they do recognise the value of wholesale distribution, that slide 20 of Two  
15 Circles is so important because they have said we are doing a deal with JD to get the  
16 benefit of wider distribution, but we are very concerned about SD, Sports Direct's  
17 discounting practices because those will eat into our margin. That's the real vice.  
18 That's why we say this is, in fact, a rather striking case because in many of the  
19 injunction cases that one sees the serious issue to be tried threshold overcome, one  
20 doesn't actually have the benefit of the insight that we have.

21 Of course, in that context we have the evidence of the discussions with Ms Staveley  
22 as well where she said in terms to Sports Direct we are concerned about your  
23 discounting practices, and that evidence is not contradicted at this stage. I think,  
24 actually, sir, I mentioned that at the beginning of the hearing this morning, you asked  
25 why is that relevant. Well, that is why it is relevant because if they are going to justify  
26 this decision to refuse to supply an existing customer after decades and to engage



1 with JD to the exclusion of Sports Direct, then they are going to need to explain what  
2 was driving that and it is no good to justify that on the footing that they don't like Sports  
3 Direct's discounting practice. That's the sort of point this tribunal should be very  
4 concerned about because that is direct consumer harm.

5 **DR BISHOP:** Yes.

6 **MR SINGLA:** So I hope that encapsulates what we are saying in relation to both  
7 Chapter 1 and Chapter 2. I do just make clear that we are not in any way soft-peddling  
8 the criticisms of the JD agreement. It is a very similar point, actually, when one steps  
9 back and one looks at the mischief --

10 **THE PRESIDENT:** The two are linked, aren't they?

11 **MR SINGLA:** Exactly.

12 **THE PRESIDENT:** You wouldn't be saying that to practice its dominance that JD could  
13 be criticised in any way, shape or form?

14 **MR SINGLA:** They are linked, sir, because of the block exemption. You will be well  
15 aware that the market definition and market share question will then come into the  
16 block exemption, exactly. So these points are linked.

17 Factually they are linked too, because obviously they are two sides of coin. They are  
18 refusing to supply Sports Direct because they have done an exclusive deal with  
19 JD Sports. So we advance the case on both --

20 **THE PRESIDENT:** What I am saying is the significance of the refusal to supply and  
21 the significance of the decision to supply JD Sports both derive their force from the  
22 fact that Newcastle United are, for sake of argument, dominant in regard to the supply  
23 of these particular products.

24 **MR SINGLA:** Exactly.

25 **THE PRESIDENT:** Going back to my point, your Chapter 1 case is essentially  
26 parasitic on your Chapter 2 case.

1 **MR SINGLA:** Yes. Whether it is quite parasitic or not, but they are very closely linked,  
2 yes.

3 **THE PRESIDENT:** Okay.

4 **MR SINGLA:** Sir, I hope without taking up too much time --

5 **THE PRESIDENT:** That has been very helpful in terms of articulating what is in issue.  
6 Thank you.

7 **MR SINGLA:** Shall I move on to adequacy of damages? Are we onto the next topic?  
8 Sir, on adequacy of damages, again just to take a step back, the principles are such  
9 that if damages would be an adequate remedy for a claimant who ultimately succeeds  
10 at trial, then no interim injunction should normally be granted.  
11 Whereas, if damages would not provide an adequate remedy for the claimant but they  
12 would adequately compensate a defendant, there is no reason to refuse. That's the  
13 American Cyanamid principle.  
14 I would like to show you an authority and which we rely upon specifically in this context  
15 of adequacy of damages.  
16 Could I ask the tribunal to turn up the Adidas v Draper case, which is authorities 1,  
17 tab 8. It starts at 369 of the bundle.  
18 Sir, this was a competition law challenge arising out of effectively a change of rules in  
19 the tennis world. This was a change in terms of what logos could be displayed on  
20 players' kit while playing tennis and the size of the logos. Adidas' case in a nutshell  
21 was that this was anti-competitive because it limited Adidas' ability to display its very  
22 distinct logo. That was the factual background.  
23 There are various parts of the judgment which are not relevant. There was an attempt  
24 to say the claim was defective and so on. What I would like to show you is the  
25 argument as regards adequacy of damages.

26 **THE PRESIDENT:** Yes.

1 **MR SINGLA:** You will see, if one turns to paragraph 54 of the judgment, you can pick  
2 it up there. This is the only section which concerns -- part of the application concerning  
3 interlocutory injunctions.

4 **THE PRESIDENT:** Yes.

5 **MR SINGLA:** At the bottom of 54, it was clear that the injunction -- so Adidas was  
6 seeking to stop the relevant regulators from implementing the rules pending trial -- and  
7 it was clear that such an injunction would have an effect in relation to Wimbledon and  
8 the US open. In other words, the players would continue to wear the logos for those  
9 tournaments.

10 You then see at 67, just jumping ahead, counsel for Adidas submitted conventional  
11 American Cyanamid. You see 68:

12 "The first question is whether, if I grant no injunction but Adidas is successful, whether  
13 damages would be an adequate remedy. During this period Wimbledon and the US  
14 Open will have taken place. If it is assumed that dress code is enforced against Adidas  
15 at those tournaments its sponsored players will have to wear clothing which does not  
16 bear the three stripes motif or a size in excess of 3 or 4 inches. The cost of alternative  
17 clothing is obviously quantifiable, but what of the knock-on effect on the sales of its  
18 fall-winter range in the period June to October."

19 "Adidas disputed that that could be adequately estimated." [As read]

20 The key paragraph:

21 "In my judgment, damages would not be an adequate remedy. Sales of different  
22 clothing in past periods are a very certain guide to the likely sales in the period June  
23 to October. The market is different, the fashions are different, and the attractive force  
24 of any particular distinctive design element on an article of clothing worn by a particular  
25 sponsored player at either of the Grand Slam tournaments is impossible to gauge. It  
26 may, for example, depend on who wins." [As read]

1 So that's what the judge finds in relation to damages not being adequate for Adidas.  
2 Then he goes on to consider the position as regards the defendants who said that they  
3 feared that if an injunction was granted against them, they would lose authority in the  
4 eyes of the players and the public and so on. He says:  
5 "The fears expressed by the relevant defendants are exaggerated, but I do not doubt  
6 that in circumstances they would of suffer some loss for which money could not provide  
7 adequate compensation." [As read]  
8 Then at 72 you see a reference to the status quo.  
9 **THE PRESIDENT:** Yes, that's something I do want to ask you about.  
10 **MR SINGLA:** Yes. I am not intending to address you on status quo under the heading  
11 of adequacy of damages, but just whilst the case is open, perhaps I can show you  
12 what was said to save me time later.  
13 **THE PRESIDENT:** Yes.  
14 **MR SINGLA:** 72, turn to what is conventionally known as the status quo:  
15 "The present position is that Adidas has been permitted over the last few years to  
16 incorporate into its clothing a distinctive design element. It seeks injunctions now in  
17 order that that position may be perpetuated until after the trial." [As read]  
18 There was an argument on the facts as to what then was actually the status quo at 74.  
19 At 75:  
20 "The status quo ante bellum is that prevailing before this dispute arose." [As read]  
21 Then there was an argument about delay because the parties had tried to reach  
22 a settlement.  
23 So we rely upon that actually for the two purposes: adequacy of damages, which is  
24 what I am focusing my submissions on now. It was held there that damages would  
25 not be adequate for Adidas and I will come back to status quo in due course.  
26 Can I also show you another authority which is more directly relevant? It is a case

1 involving Sports Direct which was added into the bundle, I believe, at tab 36.

2 **THE PRESIDENT:** Yes.

3 **MR SINGLA:** Now, this was a dispute concerning -- or as between Sports Direct and  
4 Rangers. The underlying facts or the underlying dispute was different. I don't want to  
5 suggest that it was the same sort of case that was being brought, but in relation to -- let  
6 me just show you the introduction to the case, it is at page 1857 of authorities.

7 **THE PRESIDENT:** Yes.

8 **MR SINGLA:** Authorities 3. Sir, you will see at paragraph 1, the hearing in front of  
9 Mr Justice Bryant, interim injunction, the claimant was a division of Sports Direct  
10 against Rangers. You will see at 2 that the dispute arose out of a retail operations  
11 distribution agreement.

12 At paragraph 3, what is explained is essentially there was a provision in the contract  
13 that gave Sports Direct a matching right if a third party distributor approached the club.  
14 So that was the substance of the dispute. It was to restrain the club from entering into  
15 agreement with a third party because of a so-called matching right.

16 But if one looks at what is said on the American Cyanamid principles, first of all  
17 can I direct you to paragraph 13? Damages may be found to be inadequate where  
18 they are difficult to assess such as, for example, the loss of good will. We rely upon  
19 that. You see reference there to the Prosecco case. I make my submissions on the  
20 fact in a moment, but we do rely upon that.

21 Then, if one looks at how Mr Justice Bryant dealt with this, paragraphs 40 to 49.

22 Turning on to the next question, whether damages are an adequate remedy --

23 **THE PRESIDENT:** Yes.

24 **MR SINGLA:** -- you will see what's said at 40, and then 41, if we can pick it up at 41:  
25 "It is submitted that the agreement provides for the possibility of infinite numbers of  
26 renewals. Were the agreement not to be properly performed, a variety of financial

1 losses are in principle likely to flow from the non-performance and those are identified  
2 in the witness statement of Mr Cram. Those can be summarised as financial loss from  
3 the being denied the entitled to match and/or renewing the agreement." [As read]

4 Then it said:

5 "Such financial loss could include and, depending on the offer rights match, lost profits  
6 from selling replica kit, branded products and additional products by various means  
7 and other financial losses such as lost sales on non-Rangers branded products as  
8 a result, for instance, of lost footfall arising from FDRI no longer selling Rangers replica  
9 kit or branded products.

10 "42. In addition, other more difficult to quantify losses, such as reputational harm  
11 and/or loss of good will arising from losing rights contained in the agreement to  
12 a competitor." [As read]

13 Then 43, because of the possibility for a indefinite number of renewals, harder still to  
14 determine what the quantum of loss would be.

15 44, difficult to make predictions because it all depends on the fortunes of the club in  
16 competition.

17 Then there is a point about an exclusion clause which doesn't concern us.

18 Then at 49 -- let me pick it up at 48:

19 "The real question is what profits would have been made going forward. What  
20 difficulties arise in relation to the calculation of profits. I consider there to be very  
21 considerable potential difficulty in quantifying the damages said to have been suffered  
22 by the claimant in this matter for the reasons identified by Mr Cram." [As read]

23 Who's witness statement was referred to at paragraph 41 of the judgment.

24 "Set against that backdrop, it does seem to me, for the purpose of today's hearing  
25 anyway, in the context of a potential return date, that damages would not appear to be  
26 an adequate remedy." [As read]

1 So when I come on to the facts of this case and the evidence before you here, we  
2 obviously say that that bears a very close similarity to the argument that's being put  
3 forward here as to why damages would not be adequate.

4 So can I turn to that? In principle, absent an injunction, Sports Direct would suffer  
5 three types of loss. There is the immediate harm, in terms of lost sales of replica kit,  
6 then there is indirect loss of sales and loss of reputation. Whilst the first would be  
7 quantifiable --

8 **THE PRESIDENT:** Let me just get these down. So direct losses.

9 **MR SINGLA:** Sorry, sir. Exactly, yes, of replica kit.

10 Then there is indirect loss of sales.

11 **THE PRESIDENT:** Indirect loss of sales.

12 **MR SINGLA:** And thirdly loss of reputation.

13 **THE PRESIDENT:** Loss of reputation.

14 **MR SINGLA:** It is really the second and the third which are related where we say  
15 damages would not be an adequate remedy.

16 This is explained in detail by Mr Nevitt in the evidence, paragraphs 49 to 53 of his first  
17 witness statement, which I would invite you to turn up, but I have tried to distil the  
18 crucial points.

19 **THE PRESIDENT:** Mr Nevitt's first statement?

20 **MR SINGLA:** Yes, sir, paragraphs 49 to 53.

21 If I may try to capture what Mr Nevitt is saying, and just to perhaps assist the tribunal  
22 to understand in the real world how these things work, the starting point is that the  
23 whole business model is premised on being the home of football. Mr Nevitt describes  
24 football as being the heartbeat of Sports Direct's business and they stock the replica  
25 kits of all the major clubs, Arsenal, Manchester United, Chelsea and so on, and they  
26 have done that for decades.

1 So what Mr Nevitt explains is if that if Sports Direct is unable to provide the kit of  
2 a leading Premier League club such as Newcastle, that will obviously lead to  
3 a diminution in footfall and those lost customers will obviously not be replaced by fans  
4 of a different club. That is just an obvious common-sense proposition.

5 But the reason that that means that they will lose much more than the direct sales of  
6 the replica kit is because, as Mr Nevitt describes it, there is a halo effect from selling  
7 replica kit which extends to other products.

8 **THE PRESIDENT:** Right. That's the indirect points.

9 **MR SINGLA:** Exactly, sir. Customers who buy replica kits also buy other football items.

10 **THE PRESIDENT:** Right. So why can't one quantify that loss by reference to the  
11 sales that are made of other non-Newcastle replica kits? In other words, you go  
12 through the Sports Direct sales of, say, the last year -- or last two years -- and say,  
13 well, the halo effect, so far as City or the other United or whatever is concerned, is  
14 this: that is a way of quantifying the halo effect so far as the Newcastle United sales  
15 which haven't taken place on this hypothesis are concerned?

16 **MR SINGLA:** The critical point, sir, is that what Mr Nevitt explained is the way in which  
17 football fans behave. So consumer behaviour means that there is an association that  
18 one makes with Sports Direct as the seller of your replica kit. That leads you to going  
19 into Sports Direct stores or going online --

20 **THE PRESIDENT:** Yes.

21 **MR SINGLA:** -- and that leads you to buying -- not necessarily on the same  
22 occasion -- but the association means that Sports Direct is where you go to buy your  
23 football products, and then by extension your other sporting products.

24 What Mr Nevitt explains is these customers, if one loses -- in the eyes of the Newcastle  
25 fans, if one loses the association or the credibility of the offering, if you are not any  
26 longer the place where you can buy your replica kit, then that starts to represent a real



1 hole in the offering.

2 Because if you sell yourself as the home of football and for decades you have been  
3 selling all the top clubs' kits, then the expectation by customers is that you can go to  
4 a Sports Direct store and be serviced for all of your replica kit but also football, but  
5 other sporting goods.

6 Mr Nevitt's key point is that customers may never come back. Because of the way  
7 things operate in the real world once you say, well, I can't get my replica kit from Sports  
8 Direct, effectively you switch, and you switch elsewhere for all your products and  
9 perhaps for a very long period of time.

10 **THE PRESIDENT:** Mr Singla, I do want to be clear what exactly you are saying.  
11 There I think one has a bleed across between your indirect loss of sales and your  
12 general loss of reputation.

13 **MR SINGLA:** Correct.

14 **THE PRESIDENT:** I don't think you mean loss of reputation, when you say "loss of  
15 reputation".

16 **MR SINGLA:** Loss of goodwill.

17 **THE PRESIDENT:** Let me try and articulate what I understand you to be saying and  
18 you can tell me how far I have it wrong. But I think it is important we get it clear so  
19 Mr De La Mare can address exactly the case that you are making.

20 Let's start with the indirect loss of sales. What I am understanding by that is that I am  
21 a Newcastle United fan, I go into Sports Direct on one or more occasions and because  
22 I have that desire to go into Sports Direct shops because of the Newcastle United  
23 replica kit, I spend more than just on the replica kit, I spend on other items. That is  
24 what you call the halo effect.

25 **MR SINGLA:** Yes.

26 **THE PRESIDENT:** So my question on that -- and you can come back when I have

1 unpacked the loss of good will point -- the point I was making there is that surely you  
2 can ascertain the halo effect using other clubs' replica kits as proxies for what you sell  
3 by reference to Newcastle United replica kit, which on this hypothesis -- because we  
4 are assessing adequacy of damages -- won't be sold because there won't be an  
5 injunction.

6 That indirect loss of sales is altogether distinct from the loss of reputation or goodwill  
7 point which I understand to be this, which is Sports Direct are selling themselves, as  
8 you just told us, as the home of football. That is something which involves selling  
9 yourself as the place where you can get any replica kit.

10 What I think you are saying -- but do correct me if I am wrong -- is that the loss of even  
11 one Premier League club, if it is an important one, as Newcastle United is, is damaging  
12 even if you continue to have the other 14.

13 What you have is you have a reputation that if you want a replica kit of whatever  
14 Premier League club, go to Sports Direct and you won't be disappointed.

15 Have I captured the goodwill or reputational point?

16 **MR SINGLA:** Yes. Can I just add --

17 **THE PRESIDENT:** Please do.

18 **MR SINGLA:** On the first point, the qualifications is it is subject to the data. You are  
19 right in theory that replica kit lost sales can be quantified. Other sales may or may not  
20 be able to be quantified. So I don't want to accept, as it were, all that data exists to  
21 quantify the indirect sales. But you are also right, sir, the really critical point is what  
22 Mr Nevitt says about how Sports Direct is perceived by customers in the market.  
23 That's the point that, with respect, Mr Justice Bryan accepted in the Rangers case.

24 In circumstances where Sports Direct is the home of football and stocks 15 out of the  
25 20 Premier League clubs, and for the top ten clubs by size has had their replica kits  
26 for decades, fans and customers are simply not going to understand why there is now

1 a hole in the offering.

2 You can see that what Mr Nevitt says about that is some of these fans will never come  
3 back. They are not going to understand that there is a hole in the offering pending  
4 a trial, that means nothing in the real world. It's not something that is easily  
5 quantifiable because it is not just let us look at customer X who would also have bought  
6 Y on that same occasion. It's a much more unquantifiable loss which is over time,  
7 over widening customers that people start to lose faith in the credibility of the offering.  
8 That we respectfully submit in line of the Prosecco case cited in Rangers, for example,  
9 that is a classic loss --

10 **THE PRESIDENT:** I don't think this is a case where authority helps, I think it is a  
11 factual question, Mr Singla.

12 Again, can I try to articulate what you are saying on the facts? If I am, hypothetically  
13 speaking, a Newcastle United fan, I obviously will want Newcastle United branded  
14 products.

15 Your point is that I will go to a Sports Direct shop not because I know that it will sell  
16 Newcastle United products, but because I know it will sell replica kits generally.

17 If I go in, anticipating, therefore, that I will get Newcastle United replica kit, if the  
18 injunction is not granted I will for this season be disappointed, and I will therefore  
19 source the kit that I want, which will on this hypothesis not be the kit of another football  
20 team, but it will be the Newcastle United kit, I will source that from somewhere else.

21 So I am attracted to the shop not because I know that Newcastle United kit is being  
22 sold from a Sports Direct shop, it is because I know that that's where to get replica kit.

23 **MR SINGLA:** That's where to get replica kit. It is wider than that, sir. So the Newcastle  
24 fan goes in to buy replica kit. It may at the same time buy other football products, it  
25 may at the same time buy --

26 **THE PRESIDENT:** That's your halo point, I understand that.

1 **MR SINGLA:** Yes. But the point is it is not simply at the time when you are buying  
2 your replica kit where do you go? It is more, that's the shop I bought my replica kit,  
3 and have been buying my replica kit for the last few years, so I need a pair of football  
4 boots, where am I going to go? I am going to go to the home of football, Sports Direct.  
5 If there is suddenly a hole in the offering with a very substantial club -- Newcastle  
6 being one of the leading clubs -- if it is no longer offering the full suite of these top  
7 clubs, it starts, in the eyes of the consumer, not to be the home of football. So where  
8 does that customer then go to buy shin pads, or just wants some running trainers.  
9 Suddenly, the association with Sports Direct starts to be undermined, that is what Mr  
10 Nevitt's --

11 **THE PRESIDENT:** That much I do understand.

12 **MR SINGLA:** Can I take you through Mr Nevitt's evidence? He explains it is the  
13 reality of customer behaviour in this field. I think maybe I should just take you through  
14 49 to 53.

15 **THE PRESIDENT:** Yes.

16 **MR SINGLA:** He talks about 49: reputation meeting the expectation of customers.  
17 Then he refers to the collapse in the reputation of JJB Sports. He talks about, halfway  
18 through 49:

19 "Sports Direct has built its reputation, customer experience and credibility as the  
20 leading sports retailer as being the retailer that football fans can go to to meet all of  
21 their football needs. It is essential to the business model, biggest sport in the UK. So  
22 it is obvious that if Sports Direct were to be unable to supply the club kit of one of the  
23 biggest and most supported football clubs this would result in reputational damage.  
24 To understand why it is so important, one needs to understand the passion of fans."

25 [As read]

26 You will see there he goes on to refer to the halo effect.

1 **THE PRESIDENT:** Mr Singla, I understand that. It is predicated on the customer to  
2 Sports Direct being disappointed in not getting the replica kit that they are looking for.  
3 If you go into the shop, having purchased in the past your Newcastle United replica kit  
4 and you go in solely to buy shin pads, because that's where you have always gone,  
5 well, that's not going to change simply because Newcastle United is no longer  
6 available as a replica kit if you are not buying it. That's a bit of a stretch.

7 I can see the point that if you are a Newcastle United fan going to the home of football,  
8 because it's the home of football so you say and it provides replica kit essentially  
9 across the Premier League board, and I go in and I get my desire, the branded product  
10 you are talking about, well then, I will just go back for other kit because that's the habit  
11 that I have got into.

12 But if, therefore, I go into the shop, it being the home of football, and I am disappointed,  
13 if I don't get my Newcastle United branded kit, then of course I will buy that kit and  
14 start my habit elsewhere. But if I --

15 **MR SINGLA:** If I am interested in buying a replica kit to begin with, yes, I agree. It all  
16 starts --

17 **THE PRESIDENT:** Yes, I don't think there is much difference there.

18 **MR SINGLA:** I think we're agreeing.

19 **THE PRESIDENT:** Okay.

20 **MR SINGLA:** I think we are agreeing. You are absolutely right: what is going to  
21 happen, absent the injunction, is that we will not be able to sell next season's  
22 Newcastle kit.

23 **THE PRESIDENT:** Yes.

24 **MR SINGLA:** So the most proximate loss, as it were, is the direct sales of that kit.  
25 You are right, it is those customers. But crucially, as Mr Nevitt then says, those  
26 customers will not come in to buy other goods, but also on other occasions they won't

1 | come into Sports Direct to buy other goods to meet their sporting needs. So there is  
2 | even almost a spiral effect --

3 | **THE PRESIDENT:** If I have been disappointed once.

4 | **MR SINGLA:** It is a spiral effect, exactly, so that is right.

5 | **THE PRESIDENT:** If one assumes that a sort of poor Newcastle United supporter  
6 | who buys replica kit every five years, and they bought their kit last year and they are  
7 | not going to look for it for the next couple of years, then presumably the habit of buying  
8 | their shin pads or whatever else it is will persist. My point is it is the disappointment  
9 | of not getting that which you are looking for which produces the change in habit which  
10 | produces the loss of the inertia of buying from Sports Direct when previously you would  
11 | have done. In other words, you need that element of disappointed expectation in order  
12 | for this point to run.

13 | **MR SINGLA:** Exactly.

14 | **THE PRESIDENT:** Okay.

15 | **MR SINGLA:** But (a) I would say in your example it would be a very eccentric  
16 | customer; but in circumstances where (b), Sports Direct's evidence in Mr Nevitt's  
17 | second statement is they sold out last season. So we are talking about a substantial  
18 | volume of sales --

19 | **THE PRESIDENT:** No, I'm just trying to understand exactly what your point is.

20 | **MR SINGLA:** Yes --

21 | **THE PRESIDENT:** Your point is that if I go into a Sports Direct store expecting to get  
22 | the full range of replica kit, but only wanting one sort -- which is in this case Newcastle  
23 | United -- and I leave disappointed not having made a purchase, then I am going to  
24 | switch to a different means of getting that which I want and I will use that means to  
25 | buy other stuff which is not Newcastle United branded. That is your point.

26 | **MR SINGLA:** Exactly. And on other occasions.

1 **THE PRESIDENT:** And on other occasions, I am accepting the inertia point.

2 **MR SINGLA:** Crucially, at 52, sir, Mr Nevitt says these customers might never come  
3 back to Sports Direct, or at least might for the foreseeable future shop at Sports Direct  
4 less often than they otherwise would have done.

5 Then he refers to tribalism point in football that causes Sports Direct so much concern  
6 about reputation and he gives the Celtic/Rangers example there.

7 One has to understand -- this is evidence from the chief supply chain officer at Frasers  
8 Group -- this is real evidence of consumer behaviour on the High Street, as it were, or  
9 online.

10 So that's really the nub of why we say damages would not be inadequate. Sir, you  
11 say authority is not helpful, but with respect by analogy we say we are in a much  
12 stronger position than Adidas were in the Adidas v Draper case, for example, because  
13 one can see here how it is so much at the centre of the business model to have the  
14 offering of all the clubs.

15 The club's answer to these points we make about unquantifiable damage, they have  
16 really two answers so far as I can understand. One is, well, Sports Direct has a difficult  
17 relationship with the club's fans already because they dislike Mr Ashley; but with  
18 respect I have made this point a number of times, they sold out last year. So that's  
19 a massively overstated point.

20 Of course we wouldn't be here -- my clients wouldn't be here seeking interim relief -- if  
21 in fact anyone thought that they wouldn't sell this kit in the interim.

22 So if one looks at the figures in Mr Nevitt's second statement, paragraphs 19 to 20,  
23 they are selling huge volumes of this kit. So to say that a small minority of fans dislike  
24 Mr Ashley, well we would say the vast majority of fans would like cheaper replica kit.  
25 So that point is not a good one, or not a good answer to the unquantifiable damage  
26 argument.

1 Then the other point is to say there already are some other clubs -- you don't stock the  
2 kits of Celtic, Leicester and Leeds, for example, the Scottish FA. But Mr Nevitt deals  
3 with that in his evidence, saying they are obviously not comparable to Newcastle.  
4 Newcastle is publicly pronouncing that it aspires to be the number one club in the  
5 world.

6 So we want to be realistic about this, sir, in terms of the scale and the profile of the  
7 club that we are talking about. In relation to this, Mr De La Mare made this point on  
8 his feet and it is in his skeleton, he says, well, Newcastle kits are a very small  
9 proportion of the total turnover of Sports Direct.

10 With respect, that misses the point. The point I have just been making is that we are  
11 talking about a hole in the offering. Once you start not to have a replica kit of a leading  
12 club, then one can see that things get much worse for Sports Direct going forwards.

13 Sir, I was going to then turn to why we say conversely the damage that would be  
14 suffered --

15 **THE PRESIDENT:** That is a separate point.

16 **MR SINGLA:** Exactly. So I wonder looking at the time --

17 **THE PRESIDENT:** No, that is helpful.

18 Just one further point. Is there any evidence as to how damaging let's say a year's  
19 absence from the market on Sports Direct's part would be? In other words, suppose  
20 you don't get the injunction but you do get the expedited trial: quite clearly the trial,  
21 unless it is very expedited, will come too late for the next coming season, but let's  
22 suppose you win at trial and therefore the supply would resume for the season after  
23 next, is there any evidence that assists us in just how far the loss of reputation or the  
24 inertia point could be recovered.

25 **MR SINGLA:** Yes, there is. Mr Nevitt, paragraph 52, makes the precise point that  
26 even a short period can be enough to put fans off from using a particular store.



1 **THE PRESIDENT:** Yes, thank you.

2 **MR SINGLA:** That's the same paragraph that he talks about the boycott by the fans --

3 **THE PRESIDENT:** You have taken me to it.

4 **MR SINGLA:** A very short period is the evidence from Mr Nevitt.

5 **THE PRESIDENT:** Thank you, Mr Singla.

6 What I am going to suggest is we will obviously rise now and resume at 2 o'clock.

7 Mr De La Mare, I think obviously you are going to respond to this and then Mr Singla

8 will reply. I think, just to manage expectations, it will probably be helpful if you started

9 on why the undertaking in damages is not enough to compensate for harm --

10 **MR DE LA MARE:** If you will forgive me, sir, what I had been proposing to do anyway

11 was to look at the two issues together.

12 **THE PRESIDENT:** Okay.

13 **MR DE LA MARE:** Not least because -- and this is quite easily illustrated by the Sports

14 Direct case that has been suffered -- in some respects the losses or difficulties of

15 quantification are the same. So if there is a difficulty for my learned friend, there is

16 a difficulty for the quantification of ours.

17 Not least because the Sports Direct case was about running the shop, and we say the

18 effect of the injunction is we are going to be estopped from effectively running the

19 shop, so there is a very strong similarity.

20 That leads to the observation that what really is important are the asymmetries. I will

21 try to address the three topics my learned friend has addressed and then point out the

22 asymmetries in terms of the impact.

23 **THE PRESIDENT:** That is helpful.

24 In which case, Mr Singla, shall we proceed this way: you set out your stall very clearly,

25 if I may say so, on why damages would not be adequate for SD. If Mr De La Mare

26 then responds globally on both sides, you can then deal with both sides in reply and

1 then Mr De La Mare can have a short reply on his undertaking not being sufficient.

2 Does that work?

3 **MR SINGLA:** If you wish to proceed in that way, then of course that is fine. Could  
4 I just perhaps in ten seconds foreshadow what my point will be?

5 **THE PRESIDENT:** Yes, of course.

6 **MR SINGLA:** Because the critical point, if one is looking conversely at their  
7 position -- and I will develop this in more detail -- but they, on the numbers that we  
8 now see from the delivery schedule, will be able to operate their club retail operations  
9 to the tune of 86 per cent of what we have ordered. So we have ordered 14 per cent  
10 of what the club has ordered: they have ordered 360,000 units; we have ordered  
11 51,000.

12 So the idea that there would be any stifling -- we would actually say even if one was  
13 in the world of stifling a nascent operation, the authorities make clear that status quo  
14 prevails. But we are actually not even in that world. We are in a world where the  
15 injunction would allow them to continue to the tune of 86 per cent but just allow  
16 consumers to have the 14 per cent through Sports Direct stores.

17 So really what we are talking about on their side of the equation is just a loss of volume.  
18 It is just we sold fewer shirts because they were sold by Sports Direct pursuant to the  
19 injunction. So we say that is the position if one is looking at both sides.

20 **THE PRESIDENT:** That's very helpful. Mr Singla, to be clear, I don't want to force  
21 a structure on your submissions that you are unhappy with. If you want to deal with  
22 both the adequacy of damages and the undertaking then I am not going to stop you.  
23 It just seemed to me neater if we pivoted to Mr De La Mare to deal with both and then  
24 you sandwiched your response to him --

25 **MR SINGLA:** I do have a preference for continuing. I am in your hands, sir.

26 **THE PRESIDENT:** If that is your preference, we will do that.

1 **MR SINGLA:** I am grateful.

2 **THE PRESIDENT:** In that case, Mr De La Mare, you will respond together but in one  
3 go after --

4 **MR SINGLA:** I am very happy if he wants to respond to the club --

5 **THE PRESIDENT:** No, no, I am trying to be helpful here. Your preference is to deal  
6 with both. That is fine.

7 **MR SINGLA:** Only because Mr De La Mare wishes to respond globally, so in a sense  
8 I would like to get my point --

9 **THE PRESIDENT:** Sure, get your fire in in advance. That is absolutely fine. We will  
10 resume at 2 o'clock on that basis.

11 **MR SINGLA:** I am grateful.

12 **(1.09 pm)**

13 **(The short adjournment)**

14 **(2.03 pm)**

15 **THE PRESIDENT:** Mr Singla.

16 **MR SINGLA:** Sir, having made my submissions on why damages would not be an  
17 adequate remedy so far as Sports Direct is concerned, I was just going to turn -- and  
18 I can deal with this relatively briefly -- in relation to the club's position conversely.

19 **THE PRESIDENT:** Yes, the undertaking.

20 **MR SINGLA:** Exactly. We say the club's loss would be a much more straightforward  
21 inquiry than Sports Direct's loss. That's because obviously, you have the point, the  
22 way in which Sports Direct would suffer, including in relation to other products,  
23 long-term reputation and so on, conversely we say that the club will still be able to run  
24 its retail operation.

25 A helpful way of just quickly --

26 **THE PRESIDENT:** Mr Singla, doesn't it matter what undertaking you are actually

1 prepared to offer? You have very helpfully indicated that you are authorised to offer  
2 an undertaking that goes beyond Newcastle United to extend to JD Sports and Adidas.

3 **MR SINGLA:** Yes.

4 **THE PRESIDENT:** Can I just test how far it does actually go? I think that's the starting  
5 point, what it is that you are undertaking or prepared to undertake.

6 Let me run through, in no particular order, aspects of the undertaking that I think may  
7 matter. First -- not logically first but first -- to hold Newcastle United harmless against  
8 any claims against it arising out of the arrangements it has reached between JD Sports  
9 and Adidas; you see where that is going?

10 **MR SINGLA:** Can I just check I am in the same place as you in terms of the  
11 cross-undertaking?

12 **THE PRESIDENT:** Yes, of course.

13 **MR SINGLA:** The cross-undertaking that we have inserted as extended, it is 772.10?

14 **THE PRESIDENT:** Yes. I was not reading out your cross-undertaking, I was reading  
15 out the cross-undertaking I was interested in. Let's look at yours. Which volume of  
16 the core?

17 **MR SINGLA:** It is volume 3.

18 **THE PRESIDENT:** 772, you say?

19 **MR SINGLA:** 772.10, behind tab 22B.

20 **THE PRESIDENT:** Yes.

21 **MR SINGLA:** The only reason I hesitated was because the "hold harmless", wording,  
22 for example, I was not clear, sir, where you were reading --

23 **THE PRESIDENT:** I wasn't reading from this.

24 **MR SINGLA:** I am sorry, the cross-undertaking was not intended to be limited, for  
25 example, to claims made by --

26 **THE PRESIDENT:** No, what I want to understand -- because I think it is important to

1 be clear about this, because we have had in the past a number of cases where the  
2 cross-undertaking has been limited in a manner that subsequently has been  
3 unfortunate, so however it is worded, I want us to be looking at what I think ought to  
4 be considered --

5 **MR SINGLA:** I see.

6 **THE PRESIDENT:** -- as falling within it, so you can push back and say "yes, of  
7 course", or you can say "no, you must think we are idiots".

8 **MR SINGLA:** Sorry, I misunderstood.

9 **THE PRESIDENT:** That's what I am getting at.

10 **MR SINGLA:** I apologise.

11 **THE PRESIDENT:** No, no. So we have certain arrangements which have been  
12 reached between Newcastle United, JD Sports and Adidas, which are in place.

13 **MR SINGLA:** Yes, the Heads of Terms are in place, yes.

14 **THE PRESIDENT:** So there is the potentiality of a claim by JD Sports and/or Adidas  
15 against Newcastle United saying, "what are you doing letting these interlopers, Sports  
16 Direct, in, we have an exclusivity?"

17 That might generate a claim against Newcastle United and it seems to me that it would  
18 be part of the undertaking -- or we at least ought to be debating whether it is part of  
19 the undertaking -- that Sports Direct hold Newcastle United harmless against all losses  
20 arising out of that eventuality. That's one thing which it seems to me it is worth putting  
21 on the table.

22 **MR SINGLA:** Absolutely. For what it is worth, we say there is no basis on which  
23 Adidas could allege breach, but, yes --

24 **THE PRESIDENT:** Yes.

25 **MR SINGLA:** -- I understand. Just to put that marker down.

26 **THE PRESIDENT:** Okay.

1 **MR SINGLA:** But, yes, that's covered.

2 **THE PRESIDENT:** That's covered.

3 Secondly, I think you are undertaking to hold JD Sports and Adidas themselves

4 harmless against losses suffered by them as a result of the granting of the injunction.

5 **MR SINGLA:** Exactly, caused by the order, yes.

6 **THE PRESIDENT:** Yes.

7 Then thirdly, to hold Newcastle United itself harmless against losses that it suffers as

8 a result of the injunction being granted?

9 **MR SINGLA:** Yes.

10 **THE PRESIDENT:** So I have sort of three different heads which I am unpacking.

11 **MR SINGLA:** Yes, exactly, they are all intended and covered I think by the courts --

12 **THE PRESIDENT:** I think they are probably covered by the strict wording.

13 **MR SINGLA:** Yes.

14 **THE PRESIDENT:** It may be enough to have them on the transcript.

15 **MR SINGLA:** No, I understand.

16 **THE PRESIDENT:** I would not want those -- and there may be others -- but the fact

17 is unless we know what undertaking you are offering, the holding of harmless has

18 a certain circuitry about it which one needs to discharge because otherwise, if you are

19 not prepared to offer certain undertakings, which of course --

20 **MR SINGLA:** I really don't believe there is an issue there. It is standard form wording.

21 Obviously, it is subject to causation and that can be a matter that becomes litigated.

22 I totally understand where you are coming from.

23 **THE PRESIDENT:** Yes.

24 **MR SINGLA:** You will understand that I can't really go beyond -- or we can't go

25 beyond -- at this stage the causation point because obviously the loss has to be

26 caused by the order itself and that would be subject to proof and so on.

1 **THE PRESIDENT:** Yes.

2 **MR SINGLA:** But in terms of the principles, sir, there is no issue in terms of the losses  
3 we described --

4 **THE PRESIDENT:** That's a further problem of undertakings, the fact that they involve  
5 a mini trial in themselves in order to work out whether they have generated the loss  
6 that triggers them, but we will come to that.

7 **MR SINGLA:** Yes. Although obviously that's pretty standard form wording in terms  
8 of the causation, the cross-undertaking.

9 **THE PRESIDENT:** Yes.

10 **MR SINGLA:** We have sought to be pretty pragmatic here by extending it to JD and  
11 Adidas to try to cut through a lot of these debates. So we actually say the long and  
12 the short of it is the cross-undertaking will be sufficient.

13 But it is quite important to understand that the losses that will be suffered by the club  
14 are not actually as involved as the losses that I described before the adjournment.  
15 Because what is going to happen, so far as the retail operation is concerned -- and  
16 this is really what Mr Silverstone started in his witness statement by saying "the effect  
17 of the injunction is going to kill off..." are the words he used in his paragraph 71, "...  
18 the retail operation".

19 That's actually completely wrong. One can see that easily from the schedule --

20 **THE PRESIDENT:** Can I reframe the way I think it is being put? First of all, Mr De La  
21 Mare will tell me how far I have got it wrong, but it seems to me the point is rather  
22 similar to your loss of reputation point. What we have is an attempt, which this  
23 application is threatening, to restructure the way in which Newcastle United sells its  
24 branded produce. They have a particular vision of doing it in a particular way, and  
25 what they are saying is that that has long-term benefits for them.

26 What you are doing is, you are maybe not driving a coach and horses, but you are

1 materially changing that which they want to do and that is harmful because they want  
2 to structure their business the way they want to.

3 I think what they are saying is that that is something which is just as unquantifiable as  
4 your Newcastle United customer emerging disappointed from the Sports Direct store.

5 **MR SINGLA:** I am seeking to persuade you that it is not two sides of the same coin  
6 because what we have ordered amounts to 14 per cent, on average, across all of the  
7 line items. You have the club's 359,000 of kit or stock that they have ordered, of which  
8 Sports Direct has ordered 51,000. There is obviously a difference in terms of particular  
9 line items, but on average – and this is common ground -- Sports Direct has ordered  
10 14 per cent of what the club has ordered. So, it follows from that that whilst of course  
11 there will be some impact in the sense that they can't sell 100 per cent of what they  
12 have ordered, in fact, the vast majority of the nascent retail operation can continue.

13 I will come onto status quo in due course, later this afternoon, because the point about  
14 the retail operation is that actually we would say as a matter of discretion what you  
15 should be doing is holding the ring, preserving the status question, in circumstances  
16 where we have had these shirts for decades and they have a nascent retail operation.  
17 But parking that point to one side, what they are going to lose is the ability -- in relation  
18 to this 14 per cent of the stock -- if you are minded to make the injunction, Sports Direct  
19 will be selling some kit and so the impact on their new arrangements is not so profound  
20 as to kill them off, it is actually that they will have reduced volume.

21 Because, I think jumping head ahead to the order we are seeking, sir, maybe just to  
22 explain what we are seeking, what we are seeking is an order which requires them to  
23 supply Sports Direct out of what they have ordered. It is actually very straightforward  
24 in terms of how the injunction is supposed to work.

25 They have ordered X -- and we will come to the detail of what they have ordered in  
26 due course -- but we are saying what they should do is essentially divert, supply us



1 out of what they are due to receive from Adidas. What that means is that all they will  
2 be losing out, pending trial, is a small portion of what they themselves have ordered  
3 from Adidas. They will not be able to sell themselves everything, but 86 per cent of  
4 the kit will be completely unaffected.

5 That's why we say, in fact, the reputation -- I will come onto some more detailed points  
6 in a moment, but insofar as they say the new arrangements are going to come  
7 crashing down and we are going to suffer the same sorts of very serious goodwill  
8 reputational points that Mr Nevitt explains, we say it is actually very different because  
9 for a limited time between now and trial they will be able to go ahead with their retail  
10 operation, but consumers will be able to get shirts and kit from Sports Direct stores.  
11 But it is a fraction of what the club itself was intending to sell through its own  
12 operations.

13 So that's the critical point. We say it's a much more straightforward loss of volume  
14 claim. Of course, we don't know whether they are also intending to sell those shirts or  
15 kits at a higher price than Sports Direct. It may say they are going to lose revenue on  
16 that 14 per cent through loss of volume and also potentially having to charge lower  
17 prices as a result of the 14 per cent being available --

18 **THE PRESIDENT:** That would be quite easy to compute, you would say?

19 **MR SINGLA:** Sorry, sir?

20 **THE PRESIDENT:** That would be quite easy to compute.

21 **MR SINGLA:** Precisely. That's the point on the direct loss. We say it is much less  
22 complicated than the Nevitt evidence.

23 The claims by -- they also say --

24 **THE PRESIDENT:** Sorry, do we have a table showing which bits of the Newcastle  
25 United purchase you want to have? Yes, where is that?

26 **MR SINGLA:** Yes, it is attached to our schedule. There are different versions of this

1 table, but for present purposes, to keep it simple, I will just point you to what we  
2 appended to our skeleton which is what we received from the client on Thursday,  
3 which is in core 3, page 800.

4 Helpfully, this is all common ground. This table comes from the club. What they have  
5 helpfully done -- just to explain that this is very important when we come back to the  
6 form of injunction as well, but let's deal with it now -- what they have done is they have  
7 taken the order form which we submitted in December, and you will see the SD order  
8 product code, product description, SD quantity, and then club quantity. So from the  
9 witness statements all you get is the club ordered 359,000 items including replica kit,  
10 but here you see on a side-by-side basis what we have ordered and what they have  
11 ordered. Just to be clear, there are all sorts of other things that they have ordered  
12 which don't appear on this schedule. So this is an overlap schedule.

13 If one runs the numbers -- and this is common ground, it is in my learned friend's  
14 skeleton -- it averages out at 14 per cent. There are wrinkles because there are  
15 different tranches and so on, but 51,000 is the total SD order and the total club order  
16 is 359,000.

17 **THE PRESIDENT:** Let's take the first line then. You have the Adidas --

18 **MR SINGLA:** That's the home shirt. We have ordered 610. They have ordered from  
19 Adidas 3678.

20 **THE PRESIDENT:** Right.

21 **MR SINGLA:** Then they are being delivered in two different tranches.

22 **THE PRESIDENT:** Okay, yes, I see. So you are saying take 610 out of the 3678.

23 **MR SINGLA:** Exactly. If you do that for all of the items, including the items where SD  
24 has ordered nothing but the club has ordered kit, it averages out at 14 per cent.

25 So that you understand the form --

26 **THE PRESIDENT:** The 610 is based upon the previous years sales?

1 **MR SINGLA:** It is what Sports Direct ordered based on, yes, its past practice, as it  
2 were.

3 **THE PRESIDENT:** Yes. Were all those shirts sold?

4 **MR SINGLA:** Everything was sold out. That is in Mr Nevitt's statement. Whether it  
5 was exactly 610, I am not sure I can answer on my feet.

6 **THE PRESIDENT:** No.

7 **MR SINGLA:** But Sports Direct obviously makes an order every year, not just for  
8 Newcastle, but for other kits as well.

9 **THE PRESIDENT:** I appreciate that.

10 **MR SINGLA:** The order form is in the bundle elsewhere. That's what they were  
11 intending to, in an ordinary world, as it were, but for the change of arrangements, this  
12 is what they were ordering from Adidas.

13 **THE PRESIDENT:** I am sure it matters in the points that we will want to be coming to  
14 later, but let me put it down here as something to think about.

15 Clearly the injunction, if it is granted, should only do the minimum necessary to avoid  
16 the harm that is needed. There is no particular reason why we need make an order  
17 that precisely incorporates these figures, is there?

18 **MR SINGLA:** I am happy to make submissions about that later. Obviously, you are  
19 right in the sense that there is a spectrum between getting nothing and getting  
20 everything. I understand that point. Quite where one draws the line is obviously  
21 a difficult exercise. I can come back to that later.

22 But just the principle for present purposes, we say, is I have started down this road  
23 because of the adequacy of damages point, but it is very important that you understand  
24 actually ultimately what we are asking the tribunal to order. What we are asking, it is  
25 not going to hobble the retail operation, because you can see the vast quantities they  
26 have ordered.

1 We say it is not going to be difficult to fulfil the order, because they are due to receive  
2 the same kits on specified dates from Adidas, and what we are saying is, well, we will  
3 pay the wholesale price that we were intending to pay in any event. We will pay that  
4 to you, and we will receive a small fraction of your order.

5 **THE PRESIDENT:** Just pausing there, when you say "wholesale price", shouldn't you  
6 be paying, whether it is higher or lower, the price that Newcastle United are paying to  
7 Adidas?

8 **MR SINGLA:** We don't know that price, sir.

9 **THE PRESIDENT:** Well, that may be so.

10 **MR SINGLA:** We are prepared to pay that price, but they have not told us. What they  
11 have told us in their evidence -- we are trying to be very --

12 **THE PRESIDENT:** No, I am just trying to understand how this all works.

13 **MR SINGLA:** It may be the same wholesale price because maybe the manufacturer  
14 charges the same price. It may not be. We have said we are prepared to pay that  
15 which they are paying.

16 **THE PRESIDENT:** Okay.

17 **MR SINGLA:** That their complaint seems to be, so far as we can infer from the  
18 evidence, they don't actually seem to say that your wholesale price is different to ours,  
19 they say if we were to go down this route, we would forego the margin -- the very hefty  
20 margin -- that they would charge if they were to sell these shirts on. They are saying,  
21 if we have to supply them to you and we can't supply them to customers, we will then  
22 lose that margin. But the answer to that is the cross-undertaking.

23 On our side, we thought quite carefully about this to try and make -- we are obviously  
24 aware of mandatory injunctions, the need to keep it as simple as possible. What we  
25 think we have come up with is incredibly simple because we have now helpfully this  
26 delivery schedule where they have ordered exactly the same stuff -- in fact more than

1 these line items -- and we are saying, well, just divert a portion.

2 I will come to this later, sir, but perhaps to reassure the tribunal, in the case called  
3 Software Cellular v T Mobile, it was, the High Court mandated to provide services to  
4 the customer.

5 So, these mandatory injunctions there are precedents where, in the competition  
6 context, mandatory injunctions have been ordered which, if I may say so, are more  
7 dramatic or have a bigger consequence in practical terms. Mandating T Mobile to offer  
8 company services is, we say, much more intrusive, to use Mr De La Mare's word, than  
9 simply saying well, if you are with us on everything else, the injunction criteria all being  
10 satisfied, it is absolutely plain that it is workable because we are all interested in the  
11 same items and we have only ordered a fraction of them.

12 **DR BISHOP:** I am puzzled by this. Looking at this table, there are nine lines in red.  
13 Their common characteristic seems to be that these were items that are ordered by  
14 Sports Direct but no quantity ordered by the club.

15 **MR SINGLA:** Dr Bishop, you are right to ask me about the red lines, but I can reassure  
16 you -- as I said earlier, there are a number of versions of this schedule. When it was  
17 first produced, the club said certain rows are in red because we can't identify or we  
18 believe they are duplicate. The parties have been corresponding, I think we are now  
19 down to two, perhaps, where there is a lack of clarity as to what it is we are ceding.

20 **DR BISHOP:** I simply very roughly added them up, but it looked to be between 4,000  
21 and 5,000 items, other than the 51,000 items you mentioned, that looked to be items  
22 that were not being supplied to -- but that's not the case?

23 **MR SINGLA:** No, sir, I can assure you I think it is two items. Off the top of my head,  
24 I don't know exactly which ones, but I can come back to you. That's not a significant  
25 problem at all, because actually very helpfully, the parties have been corresponding,  
26 since this first came over to us on Thursday, there has been a lot of correspondence.

1 So, the red rows can be dealt with and have been dealt with, with the exception of two.

2 **MS BEGENT:** Can I just ask a question about the quantity to be delivered column?

3 Is that the quantity to be delivered to Sports Direct?

4 **MR SINGLA:** No, that's the quantity to be delivered to the club. Sorry if I didn't make

5 this clear.

6 If one looks at the fourth column, that's club quantity. You will then see in the fifth

7 column -- I am just on the first row -- tranche 1 and tranche 2.

8 **MS BEGENT:** Yes.

9 **MR SINGLA:** And then the 3678 is broken down into two numbers, and you will see

10 the estimated delivery dates.

11 **MS BEGENT:** It is the sixth column I was interested in.

12 **MR SINGLA:** Yes, exactly. So that's the 3678, that's the club quantity --

13 **THE PRESIDENT:** You add them up and you get to club quantity in column 4. All

14 that happens is that one is delivered on 9/4 and one is delivered on 7/8.

15 **MR SINGLA:** Exactly so. Exactly. So column 4 onwards is all about what the club

16 has ordered and is due to receive from Adidas. Then what they have added in, as it

17 were, the first three columns, to overlay what Sports Direct has ordered. The order

18 that was refused in December and so on.

19 **MS BEGENT:** So the third column, for example, in relation to Adidas NUFC eight

20 jersey, gives a number for Sports Direct, a single number.

21 **MR SINGLA:** Exactly.

22 **MS BEGENT:** And then you can see in column 5 that there are six tranches that the

23 club is to receive.

24 **MR SINGLA:** Yes.

25 **MS BEGENT:** So how does Sports Direct receive a share?

26 **MR SINGLA:** I can take you through the draft order.

1 **MS BEGENT:** Okay.

2 **MR SINGLA:** In summary, what we have tried to do is we have tried to group these  
3 items. We now know the launch dates.

4 Broadly speaking, there are 29 line items and broadly speaking they divide into home  
5 kit and associated items, away kit and associated items, and a third kit and associated  
6 items.

7 We know that the launch dates are different, so there is the earliest launch date at 7  
8 June for the home kits and then there is one in July for the away kit and August for the  
9 third kit -- so what we have proposed in the draft order -- obviously you will understand  
10 there are different ways in which this could be cut, I think is probably where your  
11 question is coming from, madam, but what we have said is because we are ordering  
12 a fraction, we effectively should be supplied out of what they are due to receive before  
13 the relevant launch dates.

14 So I am jumping ahead, but, for example, the club has ordered, let us say, 3,000 home  
15 shorts, or 3,678 and the vast majority are due to arrive in April with a balance, I think,  
16 of 626 coming in August.

17 What we have proposed in our draft order is that by the end of April -- so what we have  
18 proposed is that the club should provide us, by the dates that we have specified in the  
19 draft order which I can come back to, but in other words to ensure that by the relevant  
20 launch date we have our supply.

21 What the club is doing, if one just looks at that first item.

22 **THE PRESIDENT:** Launch date is which date?

23 **MR SINGLA:** 7 June for the home and then there is a date in July and a date in August  
24 for the away and the third kits.

25 So on the first items, the club, for the launch purposes, one can see that in April they  
26 are due to receive 3,000-odd and that will give them 3,000-odd in time for the 7 June

1 launch. Obviously all of these things are not sold on day one, so they have reserved  
2 626 to come to them in August.

3 **MS BEGENT:** I suppose my eye was drawn to lower down where the club is due to  
4 receive 18,816 in total.

5 **MR SINGLA:** Yes. But you will see from the dates that they are coming --

6 **MS BEGENT:** Several tranches.

7 **MR SINGLA:** Yes, but most of those tranches are pre the launch date of 7 June.

8 **MS BEGENT:** Yes, and my question was about the percentage that Sports Direct  
9 would receive in that early tranche.

10 **MR SINGLA:** I think what we are proposing is that all the Sports Direct's orders -- so  
11 5,840 -- should come before 7 June, as it were. You are absolutely right that the club  
12 will have two tranches coming in in August and September respectively. But that's  
13 tranches 5 and 6.

14 So, if one thinks about it, the club is going to get 19 -- the club has ordered 19,000-odd,  
15 and it is going to get two tranches in August and September, whereas Sports Direct  
16 has ordered 5,840 and our proposed draft order at the moment has those coming  
17 before the launch date.

18 Obviously, one could cut this a different way, which is to say a proportion of everything  
19 they are getting on the relevant dates. I totally accept, I think, the premise of that  
20 question.

21 **MS BEGENT:** Yes.

22 **MR SINGLA:** Hopefully that has been a helpful exercise in terms of slightly jumping  
23 ahead because we started on adequacy of damages.

24 **THE PRESIDENT:** Indeed, it has been very helpful.

25 **MR SINGLA:** That is the shape of the mandatory order that we are seeking. So I will  
26 be very brief on the other heads of loss --



1 **DR BISHOP:** Can I ask one question before you move on? You laid great emphasis  
2 on Sports Direct as the "home of football" and the potential reputational damage. But  
3 it looks as though, at least in the planning for next year, about -- well, your own  
4 figures -- it is only about 14 per cent or something would go through Sports Direct,  
5 86 per cent of this stuff would go through other channels.

6 Now, in what sense can it be said to be the home of football when five sixths of the  
7 stuff goes through other channels. How could Sports Direct be said to be the obvious  
8 place and special place people go to and five out of six people apparently buy it  
9 elsewhere.

10 **MR SINGLA:** Sir, with respect, I would say that highlights the importance of having  
11 some of the replica kit because it is about having the full range across all of the leading  
12 clubs and it is about drawing fans in through the sale of replica kit.

13 The alternative pending trial is that we have zero and that's really the evidence on -- on  
14 quantifiable damage is just imagine if we didn't have a single piece of replica kit. That's  
15 the issue.

16 It is having all of the leading clubs. That's the critical point about the home of football;  
17 the offering.

18 **DR BISHOP:** But nobody goes in and buys two. They go to buy Arsenal or Newcastle  
19 or something, do they? Having all of them, that matters, I suppose, only if you just  
20 decide you want to buy an Arsenal kit and you don't want it to go to Arsenal for some  
21 reason. At least I know that at Sports Direct they will all be there, that's the idea, is it?

22 **MR SINGLA:** If you are a Newcastle fan you will not be able to buy your replica  
23 kit -- you will see there is a range of different items here as well -- one mustn't think  
24 we are just talking about the shirts. There is actually a range of different kit and for  
25 decades Sports Direct had been selling Newcastle fans this full range of kit and, we  
26 say, at generally cheaper prices.

1 Now, pending trial -- we say we have an arguable case until trial -- pending trial,  
2 a Newcastle fan will not be able to buy any of these 29 line items. That's the vice, we  
3 say. That is what leads into the -- I am conscious of going over the evidence that  
4 I covered before the adjournment --

5 **MR DE LA MARE:** Forgive me for rising, I am just getting a bit concerned about time  
6 and the equity of the allocation of time. My learned friend has had an hour on this now  
7 and I feel like I am going to get nothing like as much time. I have quite a bit to say,  
8 and I just want to put that marker down.

9 **MR SINGLA:** Sir, that's fair, but I spent a lot of time on the serious issue to be tried  
10 because of trying to respond to some of the lengthy submissions. I am trying to be as  
11 brief and quick as possible, but I hope this has been helpful and hopefully save time  
12 at the back end in terms of the order I am seeking, but I am doing the best I can.

13 So, we say the starting point on the adequacy of damages, the so-called unquantifiable  
14 damage to the club, we say primarily it is loss of volume. They will not be able to sell  
15 the 14 per cent. To the extent they prayed in aid potential claims by JD and Adidas,  
16 leaving aside any scepticism about those claims, they are covered by the  
17 cross-undertaking.

18 What other points have they put in play? There is a reference in the Silverstone  
19 evidence to the financial fair play rules. What is very important to see about that  
20 evidence is that it is all very carefully couched, so they don't actually say that the  
21 injunction, if granted, will cause them to be in breach of the financial fair play rules,  
22 and we respectfully submit that it is a purely in terrorem point and in fact it is fanciful  
23 to think the injunction, as modest and narrow as it is, is going to make the difference  
24 in terms of their financial sustainability. They don't actually say that but also if one  
25 steps back --

26 **THE PRESIDENT:** It is not financial sustainability, it is a ceiling that controls the

1 amount they can spend on other things.

2 **MR SINGLA:** Yes, but there is no evidence that the injunction will actually cause them  
3 to hit that ceiling, sir, that's my point.

4 **THE PRESIDENT:** No, but then it is rather difficult to work out what the effects of the  
5 injunction will be when its terms are wholly unknown.

6 **MR SINGLA:** But the terms are not wholly unknown, sir, because we have made clear  
7 what the price is we are prepared to pay them. Therefore, it follows that they will not  
8 be able to earn the retail margin on those --

9 **THE PRESIDENT:** Yes, the price that you are paying is net flat, isn't it.

10 **MR SINGLA:** Is?

11 **THE PRESIDENT:** Flat. In other words, what they paid --

12 **MR SINGLA:** That's certainly where we are aiming to get to, yes. What they are going  
13 to lose, we know, because they have told us what the margin is -- Mr De La Mare says  
14 it is a confidential figure -- but there is a percentage figure in the witness statement of  
15 Mr Silverstone. So, if one actually takes a step back, we can see roughly what they  
16 are going to lose in financial terms if they have to supply 50,000-odd kits to Sports  
17 Direct. It is that loss margin. So, one takes the 50,000 and you multiple it by the  
18 percentage in Mr Silverstone. It's not a material figure in the context of the tens of  
19 millions that are spent by clubs buying and selling players and so on. It is a very  
20 modest figure indeed.

21 One also has to remember that they tell us that their financial year end is 30 June and  
22 the first launch date of the home kit is 7 June. So, in fact, what we are actually talking  
23 about in terms of any consequences for financial fair play would be the lost margin,  
24 which is a very low 7 figure sum, I think it works out as, but it is a modest figure. Then  
25 that has to be looked at in the context of the three-week period, because the rules  
26 work on a financial year basis. That's why we say it is an in terrorem point that is not

1 actually specified or even said in terms, we will breach -- they should know this  
2 because their financial year end is around the corner.

3 If they are in a position to say, if it were the case, that the order, the injunction that we  
4 are seeking would put them in breach of the financial fair play rules, they would say  
5 that.

6 **THE PRESIDENT:** I think the point is related to the business development point  
7 because what they are saying is the reason they are moving away from the old model  
8 is to embed more of the revenue and profit in the club than elsewhere, which in the  
9 medium run will have an effect on the ceiling in which they can spend money.

10 **MR SINGLA:** Yes.

11 **THE PRESIDENT:** But it does go to the quantifiability question because you are  
12 talking about a model of monetising the club's brand which is -- I think we can all agree  
13 this -- antipathetic to the way in which Sports Direct do business, because their model  
14 is one that doesn't embrace the presence of Sports Direct.

15 **MR SINGLA:** Sir, you have my submission on that which is in the meantime they will  
16 be able to get on with this retail operation. To the extent that the Sports Direct order  
17 eats in, that will be a very limited effect for a very limited period of time because, as  
18 you know, we are asking for an expedited trial. The question is whether the tribunal  
19 should attach any weight to this idea that the new arrangements in the long run were  
20 intended or they say were created with a view to the financial viability rules.

21 **THE PRESIDENT:** Yes, I understand.

22 **MR SINGLA:** The question is for you, on the injunction, what would this limited supply  
23 to Sports Direct do, vis-à-vis the financial fair play rules, we say nothing at all.

24 The other point, I take them quickly, they say if the injunction is order they would suffer  
25 unquantifiable harm because of their inability to engage with fans by making sales  
26 through the retail shop. They say they want data on fans' purchases and so on.

1 The answer to that again is overstated because the retail operation will be up and  
2 running to a very large extent in any event, but also it is very difficult to see what the  
3 financial loss is there, because there will be various ways in which they engage with  
4 fans anyway. For years they have not had these internal arrangements, internal  
5 in-house retail operations, so we say that is again not a very substantial unquantifiable  
6 loss.

7 Then they say there will be some reputational issues of trading with Sports Direct. We  
8 are talking about between now and trial. We say we don't accept there is this wide  
9 reputational issue, you have my point on that. But if they are supplying Sports Direct  
10 pursuant to an injunction from this tribunal, it is very difficult to see how that translates  
11 into any real loss. They also say in certain places they will now have insufficient stock  
12 to meet the needs of customers if they have to supply to Sports Direct.

13 We say, with respect, that's a complete non-point because if some of the kits are  
14 diverted from the club to Sports Direct, the demand is the demand. So the consumers  
15 will still -- the club has ordered as many kits as it thinks there is demand for on the  
16 market. Those customers will therefore still be able to buy the kits, whether from the  
17 club or Sports Direct.

18 If they want more stock, they can always order more stock. We know that they can  
19 have more stock, if they placed an order today, they would certainly have more stock  
20 in before Christmas -- I think it is November -- subject to any accommodation by the  
21 manufacturer.

22 We say again, these arguments about why they are going to suffer losses which can't  
23 be quantified, we say they really don't amount to very much at all. Certainly, in  
24 comparison with the points I was making before the adjournment, the harm to Sports  
25 Direct, we say at the very least this is one of those cases which we say we certainly  
26 meet the criteria of adequacy of damages. If the tribunal thinks that they may suffer

1 | some unquantifiable damage, then the debate becomes balance of convenience.

2 | **THE PRESIDENT:** Yes, because when one is looking at --

3 | **MR SINGLA:** Exactly.

4 | **THE PRESIDENT:** -- two unquantifiable, as it were, centres, one of the things you do  
5 | is weigh them up.

6 | **MR SINGLA:** Exactly.

7 | **THE PRESIDENT:** But you take into account all the other factors.

8 | **MR SINGLA:** Exactly.

9 | **THE PRESIDENT:** Yes.

10 | **MR SINGLA:** I will come onto that later, if I may. That's all I want to submit.

11 | **THE PRESIDENT:** Thank you very much.

12 | Mr De La Mare.

13 | **MR DE LA MARE:** Can I deal very quickly with two cases my learned friend kicked  
14 | off with. Adidas has nothing to do with the price of fish. It is about as different a case  
15 | as you can imagine. The essential complaint was effectively preclusion of advertising.  
16 | The players' dresses, kit, et cetera, were a form of advertising hoarding. The clothing  
17 | was not even necessarily the clothing that would be available in the shops. Very often  
18 | the clothing had to be adapted in order to comply with or get round the rules.

19 | There is no loyalty to a particular player. There is no inelastic demand of people  
20 | following a particular player. Players' fortunes rise and fall, Boris Becker emerges at  
21 | 16, unexpected things happen. It is about as different a market as can be imagined.  
22 | You can well understand why in those circumstances they said that the impact of  
23 | a restriction on logo advertising is difficult to model. So that case is a complete  
24 | irrelevance.

25 | The Sports Direct case is about the situation in which my learned friends were the  
26 | incumbent shop operator and were effectively complaining about the fact that they

1 | may lose through the non-honouring of a contract to them of the matching rights to run  
2 | the shop. They were complaining that their losses as the shop operator would be  
3 | difficult to quantify and the party in that analogous position, in my submission, only  
4 | a fortiori, is my client, because my client is effectively a new market entrant who wants  
5 | to set up and run from scratch a retail operation.

6 | You have seen the evidence, they have no data about past sales, they have no data  
7 | about past volumes. They are very much making the best informed guesses and  
8 | estimates as to the levels of demand based on the sources of intelligence that they  
9 | have. They are at a profound disadvantage. So that case does not assist my learned  
10 | friend.

11 | I rather suggest that the question of adequacy of damages has to be approached on  
12 | the facts. There are three categories that my learned friend pointed to: direct loss.  
13 | There wasn't really any attempt to suggest that direct losses are anything other than  
14 | childishly simple to evaluate.

15 | Indirect loss. Indirect loss is the sale that occurs at the time you walk through the shop  
16 | to buy your replica kit. You buy a replica kit and, say, a football or a pair of boots or  
17 | a top. How hard is that going to be to quantify? Sports Direct have decades -- that  
18 | was my learned friend's word -- decades of relationship in selling Newcastle kit. They  
19 | have decades of data about the purchasing patterns of Newcastle fans when they buy  
20 | their replica kit. If that were not enough, they have decades of data in relation to Man  
21 | United and Arsenal. Man United and Arsenal, given the WSP provisions and given  
22 | the fact that they have Adidas, given the fact that Adidas will be running the same type  
23 | of product lines and have the same types of strategy is about as close a comparator  
24 | as you can make.

25 | The idea that this tribunal cannot as a matter of simplicity assess rapidly and  
26 | accurately the indirect sales when faced with what is, by comparison to the usual

1 | circumstances that faces it, a dearth of data, the wealth of data that is plainly extant to  
2 | assess the indirect losses that is fanciful.

3 | So what it really boils down to is this case about reputation. It is a pretty peculiar case  
4 | to be making in circumstances where perhaps the only thing that is going to lower  
5 | Sports Direct further in the estimation of the Newcastle fans is an attempt to raid the  
6 | Newcastle shop for the stock that it would otherwise have to sell and service its own  
7 | fans with. But there we have it.

8 | The idea is this. Because you are a fan of Sports Direct's price competitive offer, the  
9 | home of football, all of those mantras, incantations my learned friend mentioned, the  
10 | idea that you can't go in to buy replica kit means you will never cross the threshold of  
11 | Sports Direct again and you will end your trading relationship with Sports Direct. That's  
12 | a proposition advanced in circumstances where my learned friend pointed out very  
13 | carefully this morning that JD Sports and Sports Direct are the main multibrand  
14 | competitors, and the competitive offering doesn't overlap except in relation to replica  
15 | kit and a few other elements.

16 | JD Sports is a fashion oriented sports retailer; Sports Direct is a sports oriented  
17 | retailer. You don't go to JD Sports to buy a football, you don't go to JD Sports to buy  
18 | a cricket bat, you don't go to JD Sports to buy sporting equipment or general sporting  
19 | clothing for those sports.

20 | In my learned friend's thesis -- his client's thesis based upon the assertion of Mr Nevitt,  
21 | which is entirely unaccompanied by any form of evidence to substantiate it -- again in  
22 | circumstances where you would imagine they would have a wealth of such data, is  
23 | that customers who don't or can't shop for one item will not cross the threshold again.

24 | If there is any truth in that proposition, once again it would be easily substantiatable  
25 | by references to all the other tripartite arrangements that have been entered into, all  
26 | the other clubs that have vertically reintegrated their suppliers, et cetera.



1 There is not a trace of it. It is a proposition that flies in the face of the reason, the  
2 reason being that their attraction is as a sports discounter. If you are interested in  
3 them as a sports goods discounter, but you can't get a particular product from them, it  
4 doesn't follow that you don't cross the threshold again. Quite the reverse, you shop  
5 there when you can.

6 That's really the reputation case --

7 **THE PRESIDENT:** I take your point about evidence, but it is not just JD Sports, it is  
8 Adidas online at least as a rival as well.

9 **MR DE LA MARE:** Yes, but their offering --

10 **THE PRESIDENT:** Is only Adidas.

11 **MR DE LA MARE:** Is only Adidas.

12 **THE PRESIDENT:** It is the same point, but --

13 **MR DE LA MARE:** It is exactly the same problem that they have in trying to explain  
14 why their customer will migrate to where they do. Of course, the club shop is only  
15 going to be club items. You are not going to be getting cricket bats or generic sporting  
16 items of the kind that stack the shelves in Sports Direct from the Newcastle club store.  
17 So really their case to damages not being an adequate remedy comes down to this  
18 reputation point. It is wafer thin, even before you get to the fact that the reputation of  
19 Sports Direct with the Newcastle fans is, for want of a better word, toxic. You have  
20 seen the evidence of Mr Silverstone's first and second witness statement. The  
21 unpopularity of Mr Ashley and Sports Direct with the Newcastle fans was so bad it led  
22 to fan boycotts not just of Sports Direct but of Newcastle season tickets. There were  
23 protests, all manner of problems.

24 You have also seen the evidence -- anecdotal, I accept -- about the fan reaction about  
25 this action being brought and it has not gone down well, it is fair to say. In those  
26 circumstances, it is a bold submission to be basing your claim on the impossibility of

1 estimation of loss based upon reputational considerations.

2 Then the last point I would make in this connection is some measure of realism about  
3 the sums we are talking about is probably in order. We are talking about sales -- this  
4 is Mr Nevitt's second witness statement, footnote 11 -- of 1.2 million-odd in the full last  
5 complete season -- sorry, 1.4 million-odd in the last complete season, 1.2 million in  
6 the current season to date. That's the level of sales that we are talking about on the  
7 basis of which this highly intrusive relief is going to be leveraged on reputational  
8 grounds. It is a paltry sum, particularly when you consider that Sports Direct's turnover  
9 is £5.5 billion.

10 You would have thought that unless you can present some form of logically coherent  
11 basis for arguing differently -- and I will attempt that forensic task -- you would have  
12 thought that what is sauce for the goose is sauce for the gander. My learned friend  
13 advances the argument that notwithstanding the fact that we are competing effectively  
14 over the same items for retail operations, he takes the argument to say, because we  
15 are the home of football it is reputationally kryptonite for us if we don't have the  
16 material, but if you don't have the items or you don't have the full stock, that's no  
17 problem for you, you can just sell whatever you have.

18 That doesn't wash. What the relevant difference between the parties is, is really this:  
19 Sports Direct is a fully mature operator with a fully mature market developed over  
20 decades, as identified and it therefore has a very good idea of who its customers are,  
21 how many there are, what their interests are, what data pertains. I would doubt very  
22 much that they don't have full intelligence about modes of payment used by customers,  
23 they can track customers through credit cards, debit cards, loyalty cards, customer  
24 online accounts, et cetera. They will have a wealth of data about their customers, how  
25 many visits they have made, when they made them, what they purchased, what  
26 triggers for purchases were, what discount offers worked, what promotional material

1 worked, et cetera.

2 My client, by contrast, is a new entrant retailer that has, as you have seen from  
3 Mr Silverstone's evidence, very little idea about the shape of the demand for the  
4 club-specific products, and wishes to internalise the operations in the club as far as  
5 possible precisely in order to get better data, in order to better service, target, market  
6 to, et cetera, its fan base. In other words, it wants to improve its commercial operation  
7 based on data. That's why the first and foremost objective behind this restructuring is  
8 to take back the club shop, to make it the main point of sales and to generate data  
9 with it which can then be used, if you like, progressively to improve the commercial  
10 offering it pertains.

11 If you ask in those circumstances who is going to suffer asymmetrically from a denial  
12 of access to these customers, to this footfall, it is plainly the nascent new entrant retail  
13 operation. That's the first asymmetry that exists: it exists between a mature operation,  
14 which can predict losses, et cetera, and has a multi-brand offering to fall back on, and  
15 a new entrant.

16 That's the second point of distinction. Sports Direct calls itself -- labels itself -- the  
17 home of football or whatever. The Newcastle United store is the home of Newcastle,  
18 so it is the home of Newcastle FC, and yet the impact of the order being sought is to  
19 strip Newcastle, the home of Newcastle's branded goods, Newcastle FC, of the levels  
20 of stock it requires in order to service its own fan base.

21 Now, my learned friend's answer to that is to say, well, none of this matters very much.  
22 Even if you don't get everything you have ordered, you will get most of it, so what is  
23 the harm? You will still get all the benefits of your nascent operation.

24 There was this magical 14 per cent figure trotted out time and time again. The  
25 14 per cent figure is arrived at by dividing 60,000-odd by 360. Of course, the 360,000  
26 items we have included in our order include all manner of items, branded clothing,

1 et cetera, that they have not ordered, so there is no overlap in relation to it, and it also  
2 includes so-called Becks items, which are the items the club requires for its own  
3 purposes, the uniforms and materials it has to hand out to its staff and players on the  
4 current basis.

5 So that 14 per cent figure, isn't a safe figure. What we suggest is the relevant analysis  
6 is to look at the impact of the order sought upon the flow of products into the Newcastle  
7 shop. That's what we sought to do by these two tables that should have been put on  
8 your desks and they were handed to my learned friends over lunch.

9 Let me explain these. These are an unpacking of the table that Mr Singla took you  
10 through, the delivery schedule, so that line by line you can see the delivery date  
11 sought, for instance, column G. If your eyesight is as bad as mine, I have gone for the  
12 larger print one, the easier one to read. The delivery date is taken from my learned  
13 friend's draft order. The item description, you probably heard my whispering that  
14 SHRT is short, not shirt. Those two entries, these are the only shorts ordered.

15 You have the total in the various sizings, and then you have the club order, column H,  
16 the percentage of the club order constituted by the amount sought by Sports Direct  
17 and you can trace the numbers down that column, and then you have aggregated in  
18 this spreadsheet and broken out in the more detailed one the timeline.

19 In order to be helpful, because in some cases there is no stock available by the 15  
20 May date sought but it arrives later, let's say on the 16th or 17th, in the last column we  
21 have identified the percentages that will arrive seven days before launch.

22 So that last column tells you what percentage of the products the club will have, and  
23 have had delivered to it by launch that are taken away by the Sports Direct requests.

24 Now, let's interrogate this sheet by reference to what matters in it. You have my  
25 primary submission that not all items or entries on this order list are created equal.

26 Let's rank them by reference to size which is a pretty sensible place to start. Top of

1 the list, item 5, Adidas NUFC 8 Jersey SN51. That's the home Jersey and it is senior  
2 Jersey, in other words adult Jersey. That is unsurprisingly the most popular item by  
3 a factor of two.

4 The club's order, 76,621. Sports Direct want overall 22 per cent of that order, but  
5 when you consider the timing by reference to launch date, they want nearly  
6 37 per cent -- 30 per cent, 27.20 by the time of launch. You will remember the figures  
7 I gave you this morning about a third of all sales occur within the first month of launch.  
8 The next item in terms of popularity, Adidas A Jersey, SN34. That's the away Jersey.  
9 35,000 there. 36,000-odd --

10 **DR BISHOP:** Which number is that?

11 **MR DE LA MARE:** Number 6. 16.5 per cent overall, 22 per cent by launch.

12 Item number 3, unsurprisingly making my thesis that it is the jerseys that matter, it is  
13 entry 8. It is the 3 Jersey SN, so the third strip senior Jersey, 26,000 of those. They  
14 want 19 per cent overall, 24 per cent a quarter by launch.

15 Then the next item, staying within the replica kit that is, number 4, item 4, home Jersey  
16 junior. You see of that there were 18,000 ordered by us. They want 31 per cent of  
17 that, but they want a whopping 50.28 per cent of the products available by launch date.  
18 In other words, half of our offering.

19 Item number 5, a little bit tricky --

20 **THE PRESIDENT:** Just pausing there. Assuming -- and I am making an assumption  
21 because I want to test what the injunction would look like if it was granted -- so assume  
22 we grant an injunction, I don't think it would be looking like this. I think it would be  
23 looking much more like the minimum necessary to prevent the harm that, on this  
24 assumption, we have been persuaded needs remedying.

25 It seems to me that we would likely approach the matter by saying that a fixed  
26 percentage of whatever the club has ordered, say 10 per cent, is to be delivered to

1 Sports Direct when they hit the estimated to delivery to intermediary warehousing that  
2 one sees on page 800 of the original schedule that Mr Singla took us to. So the way  
3 it would work is you would say that there would be, of the -- looking at page 800, the  
4 3,052 items comprising tranche one, let's say 10 per cent of that would be diverted  
5 when they go into the intermediate warehousing facility on, in this case, 9 April.

6 That would, I think, immediately eliminate one of the problems which is that you would  
7 cut both the tie-in between imposing all together new schedules for delivery on the  
8 club, you would instead tie it to the club's own scheduled delivery which would  
9 minimise the problem, and you would equally have a rate which would be not of Sports  
10 Direct picking on the basis of a business model that was fine last year but clearly no  
11 longer --

12 **MR DE LA MARE:** Generated by exclusivity.

13 **THE PRESIDENT:** I have that point also. So you would have a percentage and it  
14 would be across the board on all of the club's orderings, as per your schedule. Then  
15 we just have to talk about the price. But it would be something that would be tied into  
16 as minimal invasion of the club's model as would be possible. In other words, you  
17 would just divert a specific percentage on the basis of the timelines created by the  
18 club, not the timelines imposed by SD.

19 Now, that's on the assumption we are granting the injunction. What I am trying to do  
20 is --

21 **MR DE LA MARE:** I understand.

22 **THE PRESIDENT:** -- deal with the mechanical issues.

23 **MR DE LA MARE:** That as a mechanic works much better than what Sports Direct is  
24 proposing, I readily accept. There are still the problems about the logistics of and the  
25 payment of delivery, for instance.

26 **THE PRESIDENT:** I agree.

1 **MR DE LA MARE:** Why should we have to set up a logistics business or undertake  
2 the risk of breach and delivering the -- it could turn up and, you know, present  
3 themselves for surrender on the day after, or something like that, rather than us having  
4 to set up a logistics operation to ship to them. That is a point they have never  
5 answered.

6 There is obviously the whole issue on what terms we are dealing, because we are not  
7 contracting with them and so this will be a relationship created by the order whose  
8 terms will have to be wholly supplied by whatever order the court makes.

9 The primary position I would say in relation to that is, whilst I understand where the  
10 court is coming from, it has a whiff of the judgment -- forgive the pun -- the judgment  
11 of Salomon as opposed to the judgment of Solomon, because you are going to leave  
12 both parties unhappy in those circumstances and both parties saying that the world  
13 that has been created means that I have suffered loss in consequence.

14 My learned friends can say we are going to run out of that 10 per cent in no time and  
15 we would say that will still hobble our retail operation and still mean we have  
16 imponderables of loss and indeed the losses may be more imponderable in those  
17 circumstances.

18 So my primary submission is you have to grasp the nettle and ask yourself whether or  
19 not damages is an adequate remedy for my learned friend. It plainly is. Whether the  
20 order he seeks -- and that's what one has to go by, the order he seeks -- would impose  
21 unquantifiable losses on us. We say this order would.

22 If you carry on through the list, you will see -- I was just doing item 7 -- that is about  
23 31 per cent of the relevant jerseys in question. I just wanted to show you some other  
24 entries to show you then how, having dealt with those issues -- and if you look at  
25 entries 1 and 2 which are the only other bits of kit, those are the shorts -- and you see  
26 the point I was making this morning -- how few shorts there are relative to home

1 jerseys.

2 **THE PRESIDENT:** Yes.

3 **MR DE LA MARE:** 3,678 ordered by us, as against 72,621 tops. There is going to  
4 be a lot of people without shorts.

5 Then you have the ladies' Jersey at item 3. You can see how low the numbers of the  
6 orders are there: 4,400-odd of which they want 900.

7 Those are the replica kit items. Then beyond that, you get into items 9, 10, 11 and 12  
8 which are training kit, pants and jerseys, senior and junior. There is no female version  
9 of that. These are obviously very popular items at Sports Direct. You can see both  
10 from the clients that there is that problem of availability by the time sought. We just  
11 simply don't have those items, so how can we be compelled to deliver them? We will  
12 never have them in the time-frame envisaged. That's because they are part of a rolling  
13 launch.

14 You launch with your home kit, then you launch your away kit, then you launch your  
15 third kit and then after that you launch all your related branded products so you have  
16 something new over the course of the whole season. So they are asking for something  
17 to be delivered that won't be ever available in the time-frame sought. And having  
18 something that doesn't amount to replica kit at least as defined by the Rangers  
19 decision, although it is within their paragraph 19 definition, and then beyond that, all  
20 these hard to identify items, with various exceptions I will point out to you, these are  
21 all pre-match T-shirts, unfortunately shortened to PMTs, and they are various tops --

22 **THE PRESIDENT:** Yes.

23 **MR DE LA MARE:** -- that are not replica kit, but are (inaudible) they are just branded  
24 clothing. None of this, and the item numbers are relatively low compared to the core  
25 replica kits, those items are the items that fall outside the scope of the injunction.

26 The one exemption, entries 15 and 18, you see the words "AU" in relation to those,



1 those are the authentic kits. Authentic kits differ from replica kits in the sense that they  
2 are exactly the same kits worn by the players. Replica kits are, in fact, very similar but  
3 made from different materials. Maybe they don't have the same wicking properties or  
4 figure hugging properties and things of that nature. They are, in consequence,  
5 cheaper to manufacture and cheaper to sell. The authentic kits would fall within replica  
6 kits as a definition, but everything else after that run through does not.

7 Now, our submission in relation to why damages is not an adequate remedy for the  
8 club is that the effect of this order is to raid the shelves of the warehouse and the club  
9 shop at the critical moment of launch. Everyone accepts that the first month or so is  
10 absolutely the critical window in the market.

11 **THE PRESIDENT:** Yes.

12 **MR DE LA MARE:** And to leave us short of product in our first season of our nascent  
13 operation, such that inevitably fans who turn up wanting to buy at the club shop will be  
14 turned away disappointed.

15 We know that because the orders have been pitched at the level we understood that  
16 Castore achieved when it was running the club store. So we are trying to replicate the  
17 level of stock that they had. That's what they managed to sell in the period of the  
18 previous operation.

19 The question that then arises: where is the real damage to reputation? The real  
20 damage to reputation is someone who is setting up a new operation and cannot meet  
21 demand; can't service the extant demand for the product in question. So people who  
22 have been in the habit of going to the club store, whether it is run by SD International  
23 or Castore, whether it is run by us, will now turn up at the club looking as they have in  
24 previous years to buy the kit, and they will be told, no, I am sorry, because of the  
25 position with Sports Direct, they have taken some of the orders, we don't have the  
26 ability to service your order. We don't have enough of the relevant items. Whether it

1 is the core shirts, whether it is in particular the junior jerseys for which they will take  
2 50 per cent of the product for launch, the fourth most popular item on the list.

3 That's the problem. That's why there is an obvious asymmetry, because we are  
4 the one-brand shop. We are Newcastle United products. Someone who comes to the  
5 shop looking for replica kit and not finding replica kit is unlikely to buy anything else at  
6 all. It is not like the situation with Sports Direct where it's got offerings of all kinds of  
7 products beyond the replica kit that you will attract people into the stores for. This is  
8 the only show in town as far as we are concerned.

9 What they are proposing to do is to take the stock that we would otherwise sell, use it  
10 themselves, and sell it, in situations where, Mr Nevitt says -- look at his second  
11 statement paragraph 8 -- effectively, at least during the launch period, the demand is  
12 relatively inelastic. Why is that? Because it is all the loyal fans turning up just as they  
13 do at the beginning of every season and buying the replica kit as they do at the  
14 beginning of every season.

15 So that's the first reason why there is an absolute asymmetry in terms of the impact  
16 on the club.

17 **THE PRESIDENT:** Yes.

18 **MR DE LA MARE:** The second reason, of course, is that the effect of the order is to  
19 mandate us to breach our contracts. There is no equivalent to that head of loss on  
20 their side of the equation. We have the same issues on direct, indirect loss and loss  
21 of reputation with a different factual outcome I have explained, but two completely  
22 different heads in relation to the club.

23 The first head is that it will be exposed to claims for breach of contract. Most  
24 realistic -- they accept this, most likely from JD Sports -- JD Sports have said look at  
25 the letter exhibited to Mr Silverstone's -- Mr Eighteen's witness statement, they have  
26 said that any supply will be a breach of contract, as it obviously will be given the

1 exclusivities given to them. That will expose the club to all manner of claims up to  
2 effectively the value of the consideration provided under the contract.

3 I am not going to reveal those numbers in open court, but I invite you to go to the  
4 JD Sports contract and look at the numbers and see how much are paid effectively by  
5 signing-on fees, royalty fees, et cetera, and to ask yourself, therefore, what does that  
6 expose us to in terms of potential loss, if they take the breach of contract that's  
7 occurred and say, we terminate, as they would be entitled to do at first sight, because  
8 they have lost the exclusivity for which they are paying. The whole essence of the  
9 agreement is to pay for the exclusivity in order to use that exclusivity to compete more  
10 effectively with Sports Direct in the market by having products that Sports Direct  
11 doesn't have.

12 Once the exclusivity has gone, the benefit of the contract they have paid for has gone,  
13 why wouldn't they sue for it? Of course they would. Then the question is what heads  
14 of loss flow from that?

15 It is at that point that the FFP issue comes into play. The next asymmetry. Because  
16 the potential problems that arise from this case are not just from the loss of retail  
17 income from the store, although that is appreciable, not least because we have the  
18 totality of these items and it's affecting our ability to sell those items. It is not just the  
19 loss of data that would flow from the loss of sales, although that is important to a club  
20 trying to reconstruct its commercial offering or build it afresh, it is the fact that you are  
21 then exposed to potential claims which is revenue that you have in the bank, that you  
22 think you have in the bank, that you might then have to act on the basis of being at  
23 risk.

24 If there is a substantial seven figure delta, as there is, just flowing from the JD Sports  
25 contract, if there is that kind of delta in play, and if you are a club with the turnover of  
26 Newcastle's of in the order of 200 to £250 million, latest published accounts, that is

1 highly material to decisions that you make about which players you recruit, what  
2 expenditure you undertake, and how you keep an eye on financial fair play, because  
3 it requires you to stay in control of your revenues at all times. It is not just a three-week  
4 window as my learned friend sought, quite incorrectly, to suggest. The rigour will exist  
5 into the next window, because obviously it will affect the revenue position of the club  
6 in the next window.

7 FFP works by reference to rolling revenue periods. If you think you are at the risk of  
8 losing, let's say -- and these are notional numbers for confidentiality reasons -- let's  
9 say you are at the risk of losing £10 million on a turnover of 200 or £250 million, that  
10 is going to affect the decisions you make as to which players you sign, what fees or  
11 salary you are willing to pay, what other expenditure you engage in which will then  
12 affect competitive performance, potentially, which will then potentially affect where you  
13 lie in the Premier League table, which affects how far you get paid for broadcasting  
14 rights. It will affect all manner of matters, qualification for competitions. There has  
15 been a mass of cases involving litigation about these very issues arising even from  
16 improper player transfers like the Carlos Teves case.

17 So the idea that there isn't a potential for all manner of losses to be caused by the  
18 throttling of revenue and the exposure of the clubs to claims in a FFP context or  
19 beyond is unreal. There is, in fact, only one party with damages that cannot be  
20 assessed or adequately provided for by the undertaking, and that is my client. By  
21 contrast, the exercise for my learned friend's client is really for the reasons I have  
22 described simplicity itself in comparison. It has three heads of loss, two of which are  
23 real and can be readily calculated, and one of which is not.

24 Unless there is anything else I can help you with on that topic, that's what I wanted to  
25 say.

26 **THE PRESIDENT:** Nothing of substance. Just a couple of points of detail. If we go

1 back to your very helpful and very legible spreadsheet.

2 **MR DE LA MARE:** Yes.

3 **THE PRESIDENT:** Just taking the first item.

4 **MR DE LA MARE:** Yes, the shorts.

5 **THE PRESIDENT:** The shorts. First of all, if the club found that these items were  
6 rolling off the shelves, what's the lead time for ordering more from Adidas? Is there  
7 any evidence to that effect?

8 **MR DE LA MARE:** Yes, the lead time is contained in Mr Silverstone's first witness  
9 statement, page 182 of the bundle.

10 **THE PRESIDENT:** I am very grateful.

11 **MR DE LA MARE:** Which is extremely helpful from the back.

12 There you can see the deadlines for August. We are in April now. Now, running up  
13 the April order, we will be in the run-up to November 2024, which may or may not  
14 arrive in time for black Wednesday or Christmas, whichever next lower bumps along  
15 the road in terms of peaks of sale.

16 It is important to appreciate in relation to this there is a dispute on the evidence. These  
17 are indubitably the windows available for clubs to make orders. Indeed, if you go to  
18 the Newcastle/Adidas Heads of Terms, at page 222, clause 10, you will see that these  
19 windows, as communicated to us, have effectively contractual status because they are  
20 the windows within which Adidas agrees to supply.

21 The dispute on the evidence is that Sports Direct says that different windows can be  
22 given to it as a retailer, because it's not disorganised. Commercially disorganised are  
23 the words Mr Nevitt used in the way that clubs are. They can order, it seems, up to  
24 two to three months later.

25 That evidence from Mr Nevitt is rejected by Adidas itself. That was the effect of  
26 Mr Silverstone's evidence and the exhibit it contains from the general counsel of

1 Adidas saying no, that's not the case. It is pretty surprising as a contention in any  
2 event to suggest that someone trying to organise a manufacturing production run in  
3 the Far East or something like that --

4 **THE PRESIDENT:** I think what you are saying -- and I don't want to be too  
5 (inaudible) -- but the figures in your schedule are supply side inelastic --

6 **MR DE LA MARE:** Yes.

7 **THE PRESIDENT:** -- in that your lead time is more than -- Yes.

8 **MR DE LA MARE:** Yes, there is some elasticity if you are willing to pay for air freight  
9 as opposed to container shipping, but that is about it and obviously that is extremely  
10 expensive --

11 **THE PRESIDENT:** I understand.

12 **MR DE LA MARE:** -- as we know from a cargo cartel.

13 **THE PRESIDENT:** I understand, that is helpful.

14 That leads actually onto my second question. Again, sticking with this first example,  
15 we see a price per unit of 16.55 for shorts.

16 **MR DE LA MARE:** Yes.

17 **THE PRESIDENT:** Now, what is that price?

18 **MR DE LA MARE:** That is what is called in the Newcastle/Adidas contract, the WSP.  
19 And the WSP is the wholesale price. The wholesale price that has been used to  
20 populate this is the wholesale price that is common, as I understand it, to all of the  
21 Adidas clubs. So correctly anticipated by Sports Direct in their December order, the  
22 Man U, Arsenal wholesale prices are the same as the wholesale prices for the  
23 equivalent items from the relevant Newcastle catalogue.

24 There is, if it is of any interest, an MFN clause in the agreement saying that the  
25 wholesale price for Newcastle shall be no higher than the wholesale price for tier one  
26 clubs, and tier one clubs means Arsenal and Man U.

1 **THE PRESIDENT:** I see. That's helpful.

2 Just in terms of what that price includes, we see -- going back to the other schedule

3 on page 800 -- that we have all sorts of stages for delivery. I mean, are there costs

4 from the club additional to the WSP which relate to, for instance, delivery into the

5 intermediary's warehouse?

6 **MR DE LA MARE:** Forgive me for turning my back.

7 **THE PRESIDENT:** Yes, of course.

8 **MR DE LA MARE:** We can treble check. I suspect Mr Silverstone -- the WSP is

9 inclusive of cost of delivery to my client.

10 **THE PRESIDENT:** I see. But there would be, inevitably, costs of making the

11 injunction work if we were to go down that route, which would be not included.

12 **MR DE LA MARE:** Of course. In that respect, if you look at paragraph 3 of the order,

13 it requires the respondents to supply and deliver the items to them.

14 **THE PRESIDENT:** Yes.

15 **MR DE LA MARE:** And the delivering part is the logistics that we don't have, that we

16 would almost certainly have to contract out. Then it is going to create policing and

17 other dangers all of its own.

18 **THE PRESIDENT:** Then that would mean there are two sorts of costs one would be

19 thinking about. One would be the simply administrative costs of making this work.

20 **MR DE LA MARE:** Yes, we will have to hire staff to go through the orders and pull

21 out --

22 **THE PRESIDENT:** Yes. Say one went for a 90/10 split, whatever.

23 **MR DE LA MARE:** Yes.

24 **THE PRESIDENT:** You just have to have bodies on the Newcastle United side to

25 make that work.

26 **MR DE LA MARE:** That's right, yes.

1 **THE PRESIDENT:** Whether you delegated it or did it yourselves matters not, it is  
2 a cost. Then, in addition to that, there would be the cost of diverting whatever amount  
3 it was out of your intermediary's warehouse to wherever they are to be delivered.

4 **MR DE LA MARE:** Yes.

5 **THE PRESIDENT:** That might be borne by Sports Direct. They could come and  
6 collect, I suppose, or it would be borne by Newcastle, they would have to endure the  
7 costs of doing so.

8 **MR DE LA MARE:** The terms of the order --

9 **THE PRESIDENT:** Not included in the order.

10 **MR DE LA MARE:** The terms of the order sought require us to deliver to them  
11 effectively at our expense. The only answer to the cost is, well, you will be able to  
12 recover it through cross-undertaking in damages, which seems rather unsatisfactory,  
13 one would suggest.

14 **THE PRESIDENT:** Yes. Because what you are doing is you are actually shouldering  
15 a cost that would be incurred irrespective of the outcome of the trial, in order to enable  
16 Sports Direct to carry on business in the ordinary way.

17 **MR DE LA MARE:** The reality is we are having to add a logistics or wholesale  
18 component that was never any anticipated part of our business in order to simply  
19 comply with the order.

20 **THE PRESIDENT:** Just finally, the last area of general inquiry, in terms of how these  
21 products are sold assuming no injunction, so the Newcastle shop is a physical shop  
22 and it is an internet operation as well; is that how it works?

23 **MR DE LA MARE:** That is correct, yes.

24 **THE PRESIDENT:** So, there would be logistical issues in terms of if I were to go online  
25 and buy whatever products there were, there would be a means of ensuring that the  
26 delivery of whatever it was I ordered came to me in the appropriate way.



1 **MR DE LA MARE:** If you get a volume of internet demand that you can't service, you  
2 are going to have to stop selling the items. But, yes, there is separate logistics for the  
3 online and bricks and mortar and retail.

4 **THE PRESIDENT:** Yes. But that's the way. Do you have any idea of the split between  
5 physical sales, as it were, through bricks and mortar and internet sales through the  
6 Newcastle?

7 **MR DE LA MARE:** I will be corrected if I am wrong. I don't think there is any evidence  
8 on that specific to Newcastle. That's because we don't have the historic data.

9 **THE PRESIDENT:** You are starting out --

10 **MR DE LA MARE:** The evidence, such as it is, is that it is a 60/40 split at Sports  
11 Direct. That's over a seven-year period.

12 **THE PRESIDENT:** 60/40 physical --

13 **MR DE LA MARE:** Bricks and mortar 60 per cent, 40 per cent internet. But that's  
14 over the seven years from 2017 to date. One would rather suspect that those numbers  
15 are moving ever inexorably towards online sale, particularly for something that is  
16 ultimately, if you like, a commodity item from the perspective, they are going to buy  
17 the kit, they don't need to try it on, they have the size they had last year, they are in  
18 for the kit or they are not in for the kit.

19 **THE PRESIDENT:** Yes.

20 **MR DE LA MARE:** So that rather suits an internet sale.

21 The evidence in relation to Newcastle is rather interesting. If you go to Mr Nevitt's first  
22 witness statement you will see the revenue split is 7 million to in-store sales in the  
23 Newcastle area, 2.5 million to stores outside Newcastle, and 9 million online.

24 So that means that 9 million out of 18.5 million is online. So online for Newcastle, by  
25 contrast to all their other operations, is much nearer 50/50.

26 **THE PRESIDENT:** Yes.

1 **MR DE LA MARE:** Why that is, is not explained. It may be something to do with the  
2 relationship legacy with the fans. Maybe they don't want to be seen in the shops, who  
3 knows what the issue is, but there is something statistically appreciable going on with  
4 the data there.

5 What the club's position is -- I will just double check -- I am told this is not in evidence,  
6 but I am told by Mr Silverstone, who is watching online, that on the best of our limited  
7 analytics we are expecting --

8 Silverstone one, 16. 35 per cent online, 65 per cent shop. Page 176 in the bundle.

9 **THE PRESIDENT:** That is a projection?

10 **MR DE LA MARE:** That is a projection.

11 **THE PRESIDENT:** Unless you have anything further, those are our questions.  
12 Thank you.

13 **MR SINGLA:** Sir, I was going to reply very briefly on this question of the club's  
14 damage, whether that is really quantifiable or not. I can do so very briefly.

15 **THE PRESIDENT:** Yes, thank you.

16 **MR SINGLA:** The point is really as follows. Mr De La Mare tries to highlight that this  
17 is a paltry sum, he says 1.5 million or the figure in Nevitt 2, footnote 11. With respect,  
18 that rather demonstrates why the point is so important to us in terms of going back to  
19 the submissions I made about the need to have some of these kits in the stores. It is  
20 not about, as it were, just looking at what the value of the kit themselves are, it has  
21 much greater significance. That indeed rather demonstrates our point. If one is  
22 looking only at direct sales, it may be a small number in the context of the overall  
23 business, but there is a much larger issue that Sports Direct is concerned about.

24 Secondly, he talks about asymmetry. But of course, losing customers there is  
25 asymmetry in that respect because the club is not going to lose fans, as it were,  
26 because those fans will be club fans probably for life. Whereas what we are talking

1 about is losing a customer that comes in for a Newcastle replica kit and then is unable  
2 to buy other products. So there is asymmetry there in terms of the way in which we  
3 potentially stand to lose customers.

4 Thirdly, he makes much play of the hobbling of the retail operations. You have the  
5 point, having now gone through that material, that what we are seeking is  
6 a fraction -- I hear what the tribunal is saying about the irreducible minimum, as it were,  
7 but that really is the position. They are trying for the first time to launch the in-house  
8 operations and they will still be able to do that to a very large extent.

9 Then he says, this is my fourth point, well, customers will be disappointed if they can't  
10 supply every one of the 359,000 items that they have ordered.

11 Of course, insofar as Sports Direct is going to supply some of those customers  
12 pursuant to any order from the tribunal, those customers will not be disappointed at  
13 all, because the demand for these shirts is out there and that will be met either by the  
14 club or by Sports Direct.

15 Then he says, well, the JD arrangements could be terminated, and so on and so forth.

16 But, of course, between now and trial is the question that we are really focused on.

17 Now, pending trial there is going to be an open issue as to the validity of those  
18 arrangements. So they won't -- in a sense, the real question is whether it is really  
19 realistic that JD is going to terminate its arrangements in the face of an interim  
20 injunction. If Sports Direct is able to supply pursuant to the injunction, then what will  
21 happen is the arrangements will be up for grabs at trial in any event. So it is rather  
22 dramatic to say that in the face of an injunction JD are going to terminate and the club  
23 will stand to lose millions and millions of payments that they are due to receive under  
24 the JD agreement. I mean, it is all completely speculative at this stage.

25 **THE PRESIDENT:** It is clearly a risk, though.

26 **MR SINGLA:** First of all, it is right to say --

1 **THE PRESIDENT:** It might be covered by the undertaking.

2 **MR SINGLA:** It is covered by the undertaking. What is the position is that JD have  
3 been notified of these proceedings and all they have said so far as is that they would  
4 regard this as a breach, but they have said nothing about termination.

5 So what one is really being faced with is an argument that potentially, in the period  
6 between now and the trial, JD, with all the extensive marketing rights under their  
7 agreement, are going to terminate between now and trial. The club will then lose  
8 millions of pounds which will then in the long term have financial fair play  
9 consequences. We say that is wholly speculative and indeed we are the ones pushing  
10 for the expedited trial, so that there can be clarity as regards --

11 **THE PRESIDENT:** Fair enough, Mr Singla. Even if we have an extremely expedited  
12 trial, the sales pattern, the template for the next season, will have been determined by  
13 this order; do you accept that?

14 **MR SINGLA:** Yes, yes.

15 **THE PRESIDENT:** So we are taking a whole year out of the relationship between  
16 Newcastle United and Adidas and JD Sports. And we are saying, contrary to what  
17 you expected, it is going to be done on a different basis, on a materially different basis  
18 for a whole season. So it is not going to be trial dependent, it is going to be outcome  
19 of this order dependent. The trial, even if it goes completely against you, will not be  
20 able to change that which we do as a result of today's interlocutory application.

21 So it does seem to me that there is a commercial risk here which may not eventuate,  
22 but which is nevertheless -- if it does -- quite potentially significant.

23 **MR SINGLA:** Yes. In response to that, I would say first of all there is actually, just to  
24 be clear, there is nothing from JD indicating that they would terminate. That's the first  
25 point. Mr De La Mare, therefore, is speculating in circumstances where JD have  
26 actually provided information to the club.

1 So first of all, the tribunal does not have evidence that the JD will terminate. Secondly,  
2 it will be covered by the cross-undertaking. Thirdly, if where the tribunal comes out in  
3 this analysis is that there is unquantifiable damage on both sides, we are then in the  
4 world of balance of convenience as to which we say manifestly the proper thing to do  
5 is to preserve the status quo, which is that if one is looking at this from the perspective  
6 of a customer, for decades, as I say, customers have been able to go into SD's shops  
7 to buy a Newcastle kit. What the club now wants to do is launch the in-house retail  
8 operation and we say the status quo should be preserved.

9 Perhaps if I could just move onto balance of convenience at this point, because these  
10 points are all linked.

11 **THE PRESIDENT:** They are linked.

12 **MR SINGLA:** They are. In relation to balance of convenience, can I just show  
13 you -- and I know the tribunal will be familiar with this, but if one actually goes back to  
14 American Cyanamid, which is tab 1 of the authorities bundle, using the pagination of  
15 the bundle, page 13, one sees at F:

16 "If there is doubt about the adequacy of the respective remedies and damages  
17 available to either party or to both, the question of balance of convenience arises." [As  
18 read]

19 Then:

20 "Where other factors appear to be evenly balanced, it is a counsel of prudence to take  
21 such measures as are calculated to preserve the status quo. If the defendant is  
22 enjoined temporarily from doing something that he has not done before, the only effect  
23 of the interlocutory injunction in the event of his succeeding at this trial is to postpone  
24 a date on which he is able to embark upon a course of action which he has not  
25 previously found it necessary to undertake. Whereas to instruct him in the conduct of  
26 an established enterprise would cause much greater inconvenience to him since he

1 | would have to start again to establish it in the event of him succeeding at the trial." [As  
2 | read]

3 | So we say, with respect, that it would be a counsel of prudence here to preserve the  
4 | status quo pending trial.

5 | **THE PRESIDENT:** Is that right in this case? If this was an application being made by  
6 | case management then I can see the force in that. But aren't we in a situation where  
7 | actually the situation is different for both sides, and that even if you get the injunction  
8 | that you seek, you are actually getting product that comes from Adidas not Castore,  
9 | you are getting a product which is defined by reference to another person's  
10 | specifications? The status quo doesn't really exist, does it?

11 | **MR SINGLA:** With respect, no. With respect, the Castore point is a false one that  
12 | Mr De La Mare made. You have to understand that ultimately the club will still be  
13 | a supplier, albeit it outsources the supply to Castore but one has to think about the  
14 | status quo in the real world. The status quo is that from Sports Direct's perspective it  
15 | has traditionally been able to supply customers with Newcastle kits and from the  
16 | customer's perspective, they have been able to access those kits from Sports Direct.

17 | **THE PRESIDENT:** That much I see. But the supply chain, and I think the product, is  
18 | different. That much is right.

19 | **MR SINGLA:** It is manufactured by a different manufacturer. But again, one has to  
20 | introduce -- the reality of the situation is we are talking about the Newcastle replica kit.

21 | **THE PRESIDENT:** Yes, to that extent, if one was defining the status quo ante as the  
22 | existence of some form of Newcastle replica kit broadly defined, but indifferent as to  
23 | who manufactures it and who supplies it, then yes, it is the case of the status quo.

24 | **MR SINGLA:** Yes. If one just thinks about this, assuming for present purposes we  
25 | are over the serious issue to be tried threshold, we have an arguable case that there  
26 | are anti-competitive effects caused by these new arrangements, specifically we say

1 higher prices to consumers as a result of Sports Direct not being able to sell these  
2 replica kits.

3 So we say the status quo is to hold the ring, as it were, to preserve the position as if  
4 this was not the case. So it is the holding of the position, as if consumers can still get  
5 kits.

6 Yes, the reason I am pressing you on this, Mr Singla, is not because I am  
7 unsympathetic to the point about status quo, but because it operates, it seems to me,  
8 in a somewhat more nuanced way.

9 **MR SINGLA:** Yes.

10 **THE PRESIDENT:** I mean, for example, there are additional suppliers in the new  
11 regime than there were under the other one --

12 **MR SINGLA:** That's right, that is the nuance --

13 **THE PRESIDENT:** -- So one can't just say, well, you had this level of sales last year  
14 when it was through Castore because Castore is not providing it at all and you have  
15 other people who are selling.

16 If what you are saying is viewing the status quo as having some form of product in  
17 some amount in SD stores is a preservation of the status quo, then I am with you.

18 **MR SINGLA:** Yes, that's the point.

19 **THE PRESIDENT:** But I think going any further than that could be problematic.

20 **MR SINGLA:** No, I completely accept there is a nuance, but my answer is the nuance  
21 is form over substance. That's the point. I think we are on the same page, as it were.  
22 The other point that we pray in aid, so in relation to balance of convenience, status  
23 quo is the first point, but we do also pray in aid consumer harm.

24 **THE PRESIDENT:** Yes.

25 **MR SINGLA:** We are talking about the periods -- I keep coming back to how modest  
26 the order is, because we are talking about the period between now and trial and what

1 we are saying is that on the evidence before the tribunal, Sports Direct is the  
2 discounter. That's the very point that the club was concerned by. It therefore follows  
3 that there is a -- to put it in this way -- a very real risk of harm being caused to  
4 consumers insofar as they are now having to buy their replica kit elsewhere. We have  
5 seen the club's desire to earn its high margins and so on, and that is a relevant factor  
6 that weighs in the balance.

7 If I could perhaps -- I am not sure one actually needs any real authority on this point,  
8 but we have included in the bundle an extract from Mr Gee on injunctions, which just  
9 makes good the point that in this context consumer harm is a relevant factor because  
10 there is a public interest element.

11 If the tribunal has the authorities bundle 3, tab 38, if one could turn to 1884 of the  
12 bundle, please.

13 **THE PRESIDENT:** Yes.

14 **MR SINGLA:** You will see the heading involved "Public policy in competition  
15 infringement cases".

16 **THE PRESIDENT:** Yes.

17 **MR SINGLA:** Over the page, 1885, first paragraph:

18 "There is a public policy involved in pleading of competition and the public ...(Reading  
19 to the words)... to benefit would be competitors and the public generally who through  
20 competition may have lower prices and better products. The interests of third parties  
21 are relevant to the exercise of discretion on whether to grant an injunction. The public  
22 interest is relevant to whether to grant an injunction prior to final determination of the  
23 merits. Compensation and damages paid to a claimant does not compensate the  
24 public." [As read]

25 So we say this is a relevant factor given the material before the tribunal at this stage,  
26 there is a very real risk that customers will have to pay more for replica kits than they



1 would otherwise. The only answers that the club can put forward to this point, Mr De  
2 La Mare's skeleton paragraph 47, first of all he says, well, the case on the merits is  
3 thin -- as you know we don't accept that -- and if we are over the serious issue to be  
4 tried threshold, then at the very least it is arguable that there will be consumer harm  
5 and anti-competitive effects.

6 Secondly, he says, well, don't worry about this because consumers can bring a class  
7 action. We say that's not a serious submission that should be made before this  
8 tribunal, because the tribunal should take steps to ensure that this sort of outcome  
9 doesn't materialise in the first place. Leaving consumers to put together a class action  
10 for the period between now and trial would be, in my submission, a completely  
11 inappropriate way to proceed.

12 So those are the submissions on balance of convenience, which I think actually are  
13 the only two issues left, as it were, are delay and the form of order.

14 But just perhaps in light of some of the exchanges with Mr De La Mare, just to make  
15 the point that he says it is a judgment of Solomon he was describing, he was saying  
16 you would leave neither party happy, as it were. That's obviously not our position  
17 because if the tribunal is not with us on the 50,000, of course, given the evidence  
18 about the need to have some of these kits in the stores between now and trial, of  
19 course we would accept a lesser proportion. We can address you on the precise  
20 extent and so on.

21 Really the difficulties that they are saying exist in terms of the order that we are seeking  
22 they are more theoretical than real and we have sought at every turn to make this as  
23 workable and straightforward and workable as possible and their answers to all these  
24 issues. Logistics, for example, it would be very easy for the club just to direct Adidas  
25 to deliver us directly or Sports Direct to go and collect them. They are answers to all  
26 of these points. They are, as I say, unrealistic in the real world.

1 I will come back to this perhaps later, but the Software Cellular case, where the  
2 High Court is forcing T Mobile to purchase services from a customer, that's  
3 significantly more intrusive than what we are dealing with here.

4 Of course we are willing to accept points on the detail or the mechanics --

5 **THE PRESIDENT:** Yes, as I understand it, you wouldn't be opposed to an adjustment  
6 to the wholesale price to reflect the costs of administering a mandatory injunction in  
7 the club.

8 **MR SINGLA:** If there are costs incurred then of course --

9 **THE PRESIDENT:** There clearly are.

10 **MR SINGLA:** There don't necessarily need to be is really my point, because in  
11 practice it is actually very straightforward, as I understand it from those behind me, for  
12 Adidas simply to send whatever proportion the tribunal orders to Sports Direct.

13 So we don't actually accept that it is necessary.

14 **THE PRESIDENT:** No, because it would have to be the club communicating with  
15 Adidas, and themselves dealing with matters because Adidas are not here before the  
16 tribunal.

17 **MR SINGLA:** Of course not, of course.

18 **THE PRESIDENT:** So it may not be very much.

19 **MR SINGLA:** No.

20 **THE PRESIDENT:** But there is clearly a cost.

21 **MR SINGLA:** Of course, we are prepared to meet those sorts of costs. I hope that  
22 the general tenor of my submissions conveys that we are looking to ensure continuity  
23 of supply, pretty much at all costs. We have extended a cross-undertaking, we are  
24 willing to accommodate mechanics on the order. The principle is what matters here.

25 **THE PRESIDENT:** Indeed. Mr Singla, you are showing all the characteristics of an  
26 applicant who wants an injunction and therefore is willing to give such undertakings

1 and accommodation as you are advised in order to make it work. The mood music  
2 usually changes after the injunction has been granted and then suddenly the  
3 cross-undertaking limits become more important than scope. But I am grateful for your  
4 assistance on that.

5 **MR SINGLA:** I am grateful, sir.

6 I did want to address you on the delay allegation.

7 **THE PRESIDENT:** Yes.

8 **MR DE LA MARE:** That is a separate topic.

9 **THE PRESIDENT:** It is a separate topic. I think we will try to sweep them up together  
10 if we can.

11 I have under balance of convenience and other things a series of points, most of which  
12 you have addressed me on. I will go through them and then you can deal with the  
13 rest.

14 So status quo and holding the ring, you have addressed me on. Benefit to the  
15 consumer, you have addressed me on. The terms of the relative unquantifiability of  
16 harm of the injunction, that's something which we take into account, but you have  
17 addressed us on that. But it is a factor, if one is harder to quantify than the other or if  
18 the consequences are worse, that is something to go into the account but that's really  
19 only addressed as a matter of principle.

20 To what extent, when you are considering convenience, do we need to consider the  
21 actual scope of the order that we are minded to grant and the actual scope of any  
22 undertaking that we are minded to extract as the price of the injunction? Just to be  
23 clear, it seems to me that these are factors which are relevant to the discretion  
24 generally and the balance of convenience in particular. Because how we shape the  
25 undertaking, and what order we are minded to make, obviously go to the extent to  
26 which the injunction is inconvenient. To that extent, provided you are happy that we

1 have that on our list of things, I think you have addressed us sufficiently on mechanics  
2 so far.

3 **MR SINGLA:** Yes.

4 **THE PRESIDENT:** Difficulties of a mandatory injunction, the policing of it again we  
5 have covered, but that is something which we regard as relevant at this sort of stage.  
6 The only two points which I don't think you have addressed us on, one you have  
7 already mentioned is delay and the other is the question of whether the fact that it is  
8 not a trial but this hearing that is going to be determinative of the position for the  
9 2024/2025 season, whether that fact means we ought to be applying a different test  
10 to the American Cyanamid test or whether that is simply a factor that goes into our  
11 general consideration. That's what I had on my list.

12 **MR SINGLA:** I am very grateful. Can I mention one other point? Let me just deal  
13 with the trial point. Both parties are proceeding on the basis of American Cyanamid  
14 because this will be dispositive, as it were, of the next season, but clearly the  
15 arrangements are intended to continue for some time into the future, the new proposed  
16 arrangements. So we respectfully suggest that there is no need, as it were, to  
17 investigate the merits more closely. This is not an *NWL v Woods* type scenario where  
18 there will not be a trial. This is actually a pretty vanilla situation where one is talking  
19 about holding the ring for a modest period of time. That's that point.

20 Delay I will come back to in a moment because that will take some unpacking. Could  
21 I just mention on the list the fact that, at the moment anyway, the club is resisting  
22 expedition?

23 **THE PRESIDENT:** Yes.

24 **MR SINGLA:** In my submission, that is a relevant point. I am not addressing you on  
25 expedition now, but we submit in essence they can't have it both ways. They can't  
26 say, let's kick this into the long grass and you can't have any remedy in the short term.

1 We submit the question of when a trial will take place is also part of the overall  
2 picture --

3 **THE PRESIDENT:** It is, you are absolutely right, Mr Singla, I agree. But I wonder if it  
4 is not operating this way: if we grant the injunction, then you aren't particularly worried  
5 about expedition, the club may be. But I can't actually see, provided that the  
6 undertakings are appropriately protective, that we need bust a gut to do a trial  
7 superfast.

8 This is where the determinative nature of 2024/2025 comes in. The fact is we do need  
9 to get this resolved quickly but for the season after that rather than the next season.

10 On the other hand, if we don't grant the injunction then I am not sure that even if we  
11 move with phenomenal speed we can get this matter resolved in time to rescue the  
12 2024 season so that you would have a supply assuming you won. In other words,  
13 doesn't the same apply and that actually again expedition, whilst desirable, isn't in fact  
14 essential? What we are looking at -- unless we can have a trial in June or July, and  
15 I don't think anyone is suggesting that is possible -- is there any point in having a trial  
16 in September or October?

17 **MR SINGLA:** I think the difficulty is the lead times that are being quoted against us  
18 mean that in order for the 2025/6 season, in order for everything to be resolved before  
19 orders are placed with the manufacturer in time for that season, then the judgment  
20 from the tribunal would need to be out in sufficient time. So I think we have suggested  
21 September for a trial because of the need to place orders in this year -- I don't want to  
22 get into the debate about windows and so on, but that's what is driving the proposal.

23 **THE PRESIDENT:** Right.

24 **MR SINGLA:** We can perhaps come back to expedition, but I didn't want to lose sight.

25 **THE PRESIDENT:** No, it is on my list of things to cover. Let's bear that in mind. It  
26 does seem to me that expedition in that sense, in order to ensure that there is certainty

1 for the season after next, is a different point. It may be we need to just think about the  
2 extent to which lead times can be shaved back --

3 **MR SINGLA:** Well, indeed.

4 **THE PRESIDENT:** -- to give more room to manoeuvre, because September is in itself  
5 quite tight --

6 **MR SINGLA:** Yes.

7 **THE PRESIDENT:** -- depending on just how much pressure we put the parties on to  
8 produce the evidence that is required.

9 **MR SINGLA:** If I can put it like this, we want to ensure continuity in supply. We are  
10 doing everything to make sure that happens, that's really where we are coming from,  
11 but of course there are different ways in which one could arrive at that outcome.

12 **THE PRESIDENT:** That's helpful, thank you.

13 **MR SINGLA:** Sir, I am conscious we need to take an afternoon break.

14 **THE PRESIDENT:** Yes. I don't want anyone to be cut off, but we will run until 5 o'clock  
15 at the latest. We will take our break now.

16 I think, Mr Singla, on the question of delay -- I know you want to unpack it, but  
17 can I suggest that you do so quite quickly. To the extent that Mr De La Mare makes  
18 inroads into the point, we will obviously ensure that you have the chance to reply. But  
19 it seems to us that the question of delay is quite closely related to what we were  
20 debating this morning in terms of the serious issues to be tried, in that it shapes the  
21 question of expectation.

22 There is a degree of messiness in terms of the history. It is no one's fault. The fact is  
23 it may well be that the intentions of the club were clear to themselves, but they became  
24 clear to Sports Direct over time; it may be that there is a debate about when that should  
25 or was clear. But these are areas of fact to which we will be quite reluctant to stray  
26 because this is an interlocutory matter and the points are contentious, and therefore

1 I think you are entitled to a considerable following wind in terms of how we see the  
2 facts.  
3 So --  
4 **MR SINGLA:** I am very grateful.  
5 **THE PRESIDENT:** If you could address us on that basis.  
6 **MR SINGLA:** I am very grateful.  
7 **THE PRESIDENT:** If Mr De La Mare lands some major points which we really do have  
8 to take into account in considering the overall factual picture, then of course we will let  
9 you know.  
10 **MR SINGLA:** I am grateful. I don't know whether during the break the tribunal would  
11 like to look at one item of correspondence which might speed things up?  
12 **THE PRESIDENT:** By all means. Give us the reference.  
13 **MR SINGLA:** Core bundle 2, page 500, which is a letter from the club on 25 January  
14 2024. So January of this year. If I could perhaps ask you to just look at that and also  
15 the letter at 508, which will be the key points.  
16 I will just say something about the Pfizer case as well, but I hear what you say and  
17 I will be short on the point. But it is important just to explain what the club was saying  
18 as late as January and February to us. I would ask you just to look at those letters.  
19 **THE PRESIDENT:** Yes. We will read those two letters and resume in ten minutes,  
20 thank you very much.  
21 **(3.55 pm)**  
22 **(A short break)**  
23 **(4.22 pm)**  
24 **THE PRESIDENT:** Yes, Mr Singla.  
25 **MR SINGLA:** Sir, I promised to take delay quickly.  
26 **THE PRESIDENT:** Yes.

1 **MR SINGLA:** And I will do so.

2 Really, this boils down to the following points. It is relied upon heavily by the club.

3 They say in places we have acted unconscionably late and so on and so forth. We

4 say essentially this is a complete mischaracterisation of the chronology. We say we

5 didn't delay, either in making the order in December or in issuing the proceedings.

6 Perhaps just by way of context, obviously the starting point from Sports Direct was

7 that they wanted to obtain these shirts. So insofar as therefore they didn't place the

8 order until December, I think one can infer that that's as a result of the confusion

9 caused by the sudden change of arrangements rather than Sports Direct sitting on

10 their hands, as it were.

11 Another contextual point is, of course, it is quite difficult to see what difference any of

12 this would have made, because even if we had asked to be supplied in

13 September/October they would have said no, we have our new arrangement. So it is

14 actually quite hard to see where the delay point, as regards the placing of the order,

15 takes matters.

16 But perhaps fundamentally, we say it doesn't really lie in the club's mouth to accuse

17 us of delay in circumstances where Ms Staveley, a director of the club, was saying in

18 December that a final decision had not been taken. Then even worse, the letters

19 I asked you to look at during the break, on 25 January they said in terms, in response

20 to our letter before action, so our letter before action was on 19 February, you will see

21 from that letter that what really prompted it was the Fenwick arrangement. I mean,

22 that actually goes to show that matters were so unclear at that stage. But in response

23 on 25 January, page 500 of the bundle, they say, final paragraph:

24 "Due to the timing of the receipt of the order in Christmas week, subsequent cyber

25 crime issues, the club's operational policies [and so on] the club was still in the process

26 of considering FG's order request when your letter was received. This of course now



1 | sadly appears to have been superseded by your letter threatening legal action,  
2 | therefore the club's consideration of FG's order request has been placed on hold whilst  
3 | the club considers the issues raised therein." [As read]

4 | I mean, frankly, we submit that is actually a disingenuous thing to have written now  
5 | that we now know that in October they had signed the exclusivity Heads of Terms with  
6 | JD.

7 | Then, on 12 February, page 508 of the bundle -- it is a longer letter --

8 | **THE PRESIDENT:** Yes.

9 | **MR SINGLA:** -- but you will see at paragraph 5 reference to the fact that they have  
10 | been reviewing their licensing arrangements and so on. Then they say for the first  
11 | time they are determined to appoint Adidas and to work with JD Sports.

12 | At 8, even if it is possible from a manufacturing perspective it is unlikely the club will  
13 | be able to meet the JD order request due to contractual obligations.

14 | Then, at the end of the letter, paragraph 18, they accuse us of not having sufficiently  
15 | explained why the matter was urgent, because we had threatened to seek injunctive  
16 | relief.

17 | What we say about all of that is it turns out that we were absolutely right to be pressing  
18 | for clarity, and we placed the order in December because Sports Direct has a general  
19 | buying window with Adidas in October to December. At that point there was still not  
20 | clarity. The Fenwick arrangement was the thing that actually prompted the letter  
21 | before action of 19 January and what really the club was doing was stringing us along  
22 | saying we are still considering your order as of 25 January when they had no intention  
23 | whatsoever to perform.

24 | Then they switched to a different mode which is "well, now it's too late". So we say  
25 | actually the delay point is one which, frankly, should not have been raised at all and  
26 | we have acted promptly throughout, consistent with our desire, as you have heard me

1 say, the desire to get hold of the product.

2 Just finally on delay -- I will deal with everything else in reply -- the Pfizer case is cited  
3 by Mr De La Mare. Again, a very selective quotation from that authority, because they  
4 include in their skeleton paragraph 25, which is the conclusory paragraph, but they  
5 say nothing whatsoever about the facts of that case. I won't take you to it. If I need to  
6 in reply I will, but it was a very different case of delay on the facts. There had been  
7 public announcements in that case of the new arrangements.

8 In April 2005, Pfizer had announced its intention to exclude wholesalers. In September  
9 2006, they had announced their new arrangements with Unichem in particular. But  
10 then what the claimants did was they waited until the very last minute, I think the  
11 working day before the new arrangements were going to come in to place, they went  
12 to court on Friday, 2 March saying:

13 "We are going to be cut off with effect from Monday 5 March 2007". [As read]

14 One can see in those circumstances why the judge held there had been undue delay  
15 in that case. Very different here.

16 Sir, that's all at this stage I am going to say on delay.

17 **THE PRESIDENT:** Thank you very much.

18 Mr De La Mare.

19 **MR DE LA MARE:** Sir, balance of convenience. We think the leading case on this  
20 front is probably now Olint. I do ask you to turn up Lord Hoffmann's famous speech  
21 in Olint. It is authorities tab 11, starting at page 403, the passage he cites starts at 16,  
22 page 407. This is the famous cases that says formulaic boxes as between mandatory  
23 and prohibitory are not helpful. What is helpful is to understand what the purpose of  
24 the injunction is about and what has happened in substance. In particular, at 16,  
25 effectively Lord Hoffmann, in his characteristically brilliant reductive fashion, says that  
26 the interlocutory stage what the court is really assessing is whether the granting or

1 withholding of an injunction is more likely to produce a just result. All of the limbs that  
2 we have been going through are really tools assisting that inquiry. If you can  
3 adequately be compensated in damages or by a cross-undertaking in general, that is  
4 then going to be the just result, the grant of the injunctive relief, et cetera.

5 Then, he approaches the considerations that arise in relation to mandatory injunctions,  
6 in particular at 18 and 19. Because once you get into balance of convenience, the  
7 real relevance of a mandatory injunction lies in the fact that it has a much wider  
8 capacity to cause harm or irremediable prejudice.

9 What Lord Hoffmann explains at 18 and 19 is that the thinking that underpins the  
10 distinction between mandatory and prohibitory is a generalisation to the effect that  
11 mandatory relief is more likely, if awarded incorrectly, to give rise to irremediable  
12 prejudice.

13 You see that in particular at the foot of 19. It is in that context that the test that had  
14 previously been trotted out somewhat axiomatically of a high degree of assurance in  
15 a mandatory injunction case, which was the test, in fact, applied in the AAH case itself,  
16 is thus explained.

17 It remains the test. You need to show a high degree of assurance, once there is a risk  
18 of irredeemable prejudice shown. That was Mr Justice Mann's reading of Olint in the  
19 Barclays Bank case at tab 16 of this bundle that you were referred to earlier.

20 That's the test. Over the page you can see rigid classifications is barren. What matters  
21 is the practical consequences of the actual injunction and it seems to me that James  
22 J in the Court of Appeal proceeded first by box classification and then inflexibly  
23 applying the high degree of assurance test, which is not the correct approach.

24 We say that is the proper approach. It follows from that also that you must apply the  
25 same sort of approach in relation to the status quo issue which has always been at  
26 very best something of a tiebreaker. If all else is equal then you have a look at the

1 status quo as the path of least resistance. Of course, arguments about what is the  
2 status quo are kind of chicken and egg arguments, as some of the submissions we  
3 heard earlier today demonstrate. So that is, we think, the proper approach.  
4 Insofar as status quo is relevant, the test is Garden Cottage as set out at page 399 of  
5 Adidas, the passage my learned friend referred you to. It is the position immediately  
6 before the application for relief. Of course in this case, the position immediately before  
7 the application for relief is that the Castore agreement has come to an end. Castore  
8 has been replaced by Adidas as the relevant manufacturer. The periods of one month  
9 exclusivity that went with the Castore agreement have fallen away, the kit has changed  
10 and effectively, ever since October 2023 -- and I will show you that when we get to the  
11 topic of delay -- Sports Direct has known it is receiving no supply at all. There has  
12 been no doubt in its mind that it is not receiving supply since October 2023. That, you  
13 will see when we get to the topic of delay, is the relevant period, the period between  
14 October and December and the placing of the order. That's the pivotal period.  
15 Now, insofar as one is looking at status quo, it's not without significance given the  
16 overall justice test to pay some attention to the fact that the Castore agreements in  
17 place were put in place effectively by the common ownership of the club, Sports Direct,  
18 Mr Ashley, et cetera, in 2021 and following, and there is evidence from Mr Silverstone  
19 as to just how unusual and unfavourable those Castore arrangements are. That's  
20 paragraph 12 of his first witness statement, page 175. It is a remarkably one-sided  
21 agreement even before one gets to the exclusivities seemingly unpaid for that Sports  
22 Direct enjoyed under the arrangements.

23 **DR BISHOP:** Can you direct me to that?

24 **MR DE LA MARE:** Yes, of course. Page 175 of the bundle.

25 **DR BISHOP:** Sorry, this is the first volume?

26 **MR DE LA MARE:** Yes, first volume.

1 You see the particularly unfavourable terms. There is no right for the club to receive  
2 any sales royalty or overage. No right for the club to receive sales data. The complete  
3 outsourcing of all the club's licensing activities beyond Castore's area of sports apparel  
4 capability, including, for instance, bed linen, Christmas jumpers, a rights assignment  
5 that really a third party had no expertise to deal with. A significant penalty break fee  
6 and no requirement for Castore to pay interest on late payments. All of that led to,  
7 effectively, paragraph 14, Castore's founders accepting in a meeting that the  
8 agreement was very one-sided. That's even before one gets to the exclusivity which  
9 has become apparent since.

10 So it is pretty unattractive for Sports Direct to be setting up those arrangements of the  
11 club, implemented by, effectively, Sports Direct, Mr Ashley, when in situ, as part and  
12 parcel of the status quo.

13 That's the first point. The second point is of course that everything that I said in relation  
14 to the topic of compensatability comes back into the balance of convenience.

15 **THE PRESIDENT:** Yes.

16 **MR DE LA MARE:** So that topic of debate we had, for instance, about whether or not  
17 there is a potential for loss flowing from JD's termination of the agreement and what  
18 might flow from it, that comes back into the equation at this stage and you have to look  
19 at the magnitude of potential losses were there to be a termination.

20 It is hard to see why at the end of the day JD would not at least seek to terminate or  
21 threaten to terminate in order to renegotiate to cover the loss of exclusivity in question.

22 Any such termination from our perspective brings with it not just the problem of liability  
23 to JD Sports, but the operation of the minimum commitment to Adidas in terms of the  
24 units we have to shift and the WSP under that. Because if JD Sports is not doing it,  
25 then we have to do it. We might then have to arrange with someone else and  
26 renegotiate with JD Sports to do so, et cetera. You can see immediately that all that

1 snowballs into potentially very significant sums, all of which feed into the FFP item  
2 I identified.

3 One of the difficulties of balance of convenience, if you get there, is then you have to  
4 make some kind of assessment of the relative risk posed to each side of  
5 uncompensatable loss and its magnitude. It is quite apparent that the losses for the  
6 club have a much longer tail and a much larger kick to them.

7 So that's that topic.

8 Of course, also, as I flagged this morning, you then have to factor in the serious issue  
9 to be tried issues, because this is a case where we say, applying the test approved by  
10 Lord Hoffmann, because of the real risk of irremediable prejudice to the defendant, as  
11 I have just described, you have to have a high degree of assurance.

12 In that respect, there is not really much difference between applying the high degree  
13 of assurance test, which you must, and *NWL Ltd v Woods* looks at the merits in  
14 circumstances where the effect of the junction is most of what you are looking for at  
15 trial. That line of *Castore* is obviously classically deployed in restrictive covenants  
16 when you may have three or six months on your covenants by the time you can get to  
17 an expedited trial, the benefit has been had already and the parties at the interlocutory  
18 stage never get at trial.

19 **THE PRESIDENT:** Yes.

20 **MR DE LA MARE:** I totally accept my learned friend's point that there is a difference  
21 between that sort of scenario and a scenario where this litigation is going to affect two  
22 out of five years of the *Adidas/JD* type arrangements.

23 But nevertheless, the point remains what you still have to apply is the high degree of  
24 assurance test which does set a high bar for a claimant seeking mandatory relief, and  
25 particularly the more intrusive it becomes, the higher that hurdle is.

26 The relief is intrusive. My learned friend did a very good job of trying to explain away

1 all the inconveniences and all the problems caused. I invite you to read paragraph 68  
2 and 69 of Mr Silverstone's statement, page 188 of the same bundle we have just been  
3 looking at.

4 You will see that there is not just the problem of the non-existent wholesale operation  
5 which has to be catered for by the logistics implications, there is the problem that the  
6 retail business is in itself in its infancy. It doesn't have -- didn't have -- employees at  
7 this time last year. It has since recruited various people. It doesn't yet have the final  
8 processes as to how the stock will be organised once it gets to the warehouse. So it  
9 is still in the process of organising its retail business. If it has to organise a wholesale  
10 business or a supply on top of that, you can see the potential for that to disrupt the  
11 nascent logistics of the retail business. So that is a problem.

12 With respect, that's a problem that is created, whether it is the percentages Mr Singla  
13 seeks on behalf of his clients or the sorts of percentages the tribunal was mooting with  
14 me earlier, the sort of 10 per cent. They will still produce the same effects on the retail  
15 operation and the wholesale operation and the same sort of disruption.

16 So that has to be fed into the analysis of status quo along with the risks from the  
17 agreements and the risks in relation to FFP. We say when you look at that in the  
18 round, when you look at the change in product and the change in arrangements, this  
19 is manifestly a case where the balance of convenience doesn't favour the imposition  
20 of any form of interlocutory relief, even before you get to the discrete topics that the  
21 tribunal has identified, and they are clean hands, delay and workability.

22 Let me just address workability. There are profound problems with workability of the  
23 order and it is an order which, if imposed, is obviously going to impose a very high  
24 consequential policing or supervisory burden on the tribunal, because every time there  
25 is a shortage of stock that may arrive, there will have to be relief sought unless one  
26 goes down the rubric of saying it is 10 per cent of stock that you get when you get it

1 made available within a certain period of time.

2 Even that is going to have a mechanic for handover: Does it require delivery, does it  
3 require the materials to be made available? It is going to raise questions about pricing.  
4 It is going to raise questions about payment. When is payment going to be required?  
5 What additional sums can be sought on top? For instance, if we have been financing  
6 the relevant stock, why should we have effectively paid the financing costs for stock  
7 that we then hand over? There are a myriad of questions like that even before one  
8 gets to the absence of terms and conditions.

9 So this is an order, even in the sort of final form we are heading towards in terms of  
10 the applicant's ambitions that brings with it a great supervisory burden, and for that  
11 reason the balance of convenience is set strongly against it.

12 Then we have the clean hands issue. My learned friend really has not addressed this  
13 issue at all. They almost want to pretend the Castore exclusivity doesn't exist, and it  
14 plainly does. There has been no attempt to suggest that other than that it was the  
15 practice to give one month's exclusivity to Sports Direct.

16 There is a number of consequences from that. It affects the order numbers, the  
17 volumes being sought, because they are based on historical numbers. That may be  
18 addressed by the tribunal's proposal to produce that threshold.

19 It raises the question as to when Sports Direct should ever be free to sell. Why, for  
20 instance, would equity -- or status quo which they are fond of -- why would that  
21 authorise them to sell before, let's say, 7 July, which is a month after the launch date.  
22 Very difficult to see why they should have an improved position relative to the status  
23 quo.

24 So it comes in in that fact. One feature of the order that, if it is made, will need to be  
25 addressed is that there is nothing at the moment to prevent them getting stock and  
26 jumping the launch date. So they are asking for delivery of stock before it is officially



1 launched. There is nothing in situ to stop them, in fact, themselves launching the kit,  
2 let's say, in May, the day after they receive it, in advance of the 7 June or later launch  
3 dates for the away and third kits. I am sure that's not their intention to do so, I am sure  
4 Mr Singla will confirm on his client's behalf that there will be no such gun jumping.

5 It was said that the T Mobile and Soft Cell case was an instance of the court having  
6 made yet more intrusive orders and them being workable. I really struggle to  
7 understand that submission. When you read the case, what it is about, it is about the  
8 provision of a mobile call termination service of a fairly standard nature which T Mobile  
9 had refused to supply to a VOIP service. There was not any great complexity in the  
10 charge. I think I am right in saying that the charges in question would have been  
11 regulated in the event, and four out of the then five, I think it was, MNOs were already  
12 providing this service to the relevant operator. So the parameters of the service in  
13 question were very clear and there was no problem of feasibility. It is a long way from  
14 the facts of this case which entail, as you like, us having to give them to an extent the  
15 keys to our warehouse and letting them fill their vehicles with our stock.

16 So no answer to clean hands. Soft Cell overstated and real problems of workability.  
17 Then you have the consumer harm arguments. These arguments are, with respect,  
18 entirely circular in a case such as the present. They are entirely circular unless the  
19 court gets a long way down a decision on the merits, and as we say therefore they  
20 only can have favoured us.

21 Because we are not dealing with a cartel, or an alleged cartel, we are dealing with  
22 arrangements that might in fact be -- I think everyone has accepted that that is  
23 germane to the debate -- very competitive, because they are vertical agreement, they  
24 reinforce or trigger or engender more effective competition from JD Sports, the number  
25 2, against the big number one, Sports Direct.

26 There may be entirely pro-competitive benefits of the agreement, so to seek to

1 leverage a view of the merits of the case based entirely on these excerpts from the  
2 Two Circles reports and the alleged conversations taken out of context is, in our  
3 submission, an extremely unsafe path.

4 Consumer benefit is, in fact, in a case like this, a two-way street and it is a pretty  
5 uncertain and unsafe basis on which to approach the least irremediable justice  
6 ring-holding exercise.

7 That then leaves the topic of delay. Our case in relation to delay is that the problems  
8 in relation to delay stem from the inactivity of Sports Direct between October and  
9 December. The full chronology is this: they attended a meeting in October with Adidas  
10 at which it was made entirely plain to them that they would not be receiving supply  
11 from Adidas. In consequence of that, a letter was immediately -- an email was  
12 immediately sent. It is worth having a look at this. It is page 132 of the bundle.

13 In is the email from Mr Dickinson to his bosses including Mr Nevitt.

14 **THE PRESIDENT:** Yes.

15 **MR DE LA MARE:** "Just wanted to make you aware that Adidas currently plan for  
16 Newcastle to be a club shop only for 24/25." [As read]

17 So, it was plain at that stage that they knew that they, Sports Direct, a previous  
18 customer, would not be getting any supply. It is true that the existence of the JD  
19 arrangements is not evident, but that's not, on my learned friend's case, in fact relevant  
20 to his case because his case turns upon the fact, as you exposed from your careful  
21 questioning this morning, sir, his case turns on the fact that they are an existing  
22 customer and rearrangement of your arrangements in those circumstances is  
23 potentially an abuse.

24 Then please note this. Immediately, just after the meeting, Mr Dickinson is able to  
25 say:

26 "Rolling 52-week cost of sales from Newcastle as a franchise is 1.7 million with poor

1 supply and availability from Castore." [As read]

2 Which rather confirms a lot of what Mr Silverstone has said about the quality of them  
3 as a manufacturer.

4 "So, this presents a massive loss of business for the group. Adidas have ambitious  
5 growth targets in football in 2024, so denying us access to this product doesn't make  
6 sense at all. Catherine Swarbrick is taking us away to try and change on the Adidas  
7 side, but I think you should you put some pressure on from our end as well." [As read]

8 **THE PRESIDENT:** Just remind me of the date on which the Castore arrangements  
9 came to an end.

10 **MR DE LA MARE:** It is running to the end of this season, but I think it had terminated  
11 already by this date. In any event, it is before the date of this email.

12 **THE PRESIDENT:** I am grateful.

13 **MR DE LA MARE:** So how was this addressed in Mr Nevitt's initial statement? The  
14 relevant treatment is at page 120 and following, paragraph 31.

15 The email is contextualised and it is explained that apparently it was just  
16 a conversation at the bar and he wasn't sufficiently serious to have any substantive  
17 conversation around the supply of club kit.

18 That's a little difficult to reconcile with the pretty pointed content of the email, but then  
19 Mr Nevitt says:

20 "This did not cause us much concern at the time as Adidas is a major relationship for  
21 Sports Direct so we thought it would be able to obtain supply. That said, given that  
22 SD have always been a supplier of the club's replica kit, this indication was surprising.  
23 Therefore, together with my colleagues, I engaged in commercial discussions with  
24 representatives of the club between October and December in order to try to  
25 understand and resolve these positions." [As read]

26 Then that narrative culminates in the much cited by my learned friend alleged

1 conversation or conversational content with Ms Staveley at paragraph 32. She then,  
2 at the end of that, suggests there should be a further conversation with Mr Silverstone.  
3 There is no meeting arranged so they then place the order on 18th December.  
4 What then happens is that Mr Silverstone replies and points out in the material you  
5 have already seen that the delivery windows are set out by Adidas -- that was the  
6 paragraph 39, page 182 -- and he, as a former employee of Arsenal, says that in his  
7 experience:  
8 "The same or very similar lead times are given by Adidas for the kit of all Premier  
9 League clubs, and I assume that SD must have been aware of such windows in  
10 general given its business model and aware of the deadlines operated by Adidas in  
11 particular because it deals with them for instance in relation to Arsenal and Man U."  
12 [As read]  
13 And you get the kit launch date the order was placed.  
14 What then happens is that effectively Mr Nevitt recants and say, well, yes, in fact there  
15 were no conversations between us and the club between October and December, but  
16 he suggests in his second witness statement instead that the October deadlines apply  
17 effectively only to clubs because they are commercially disorganised, but that there is  
18 nothing out of the ordinary in placing an order at the end of December for a substantial  
19 retail customer like Sports Direct, and that's perfectly ordinary, albeit later in the  
20 window.  
21 We say, well, that's just not true. That narrative that the orders could be placed until  
22 December is not true. It is belied by all of the evidence. The evidence is not just the  
23 windows and Mr Silverstone applies to the club and logic which suggests why would  
24 you ever apply windows for large orders and a differential like that you if you are trying  
25 to plan your manufacturing run.  
26 It is also belied by the fact that, in fact, we now know from correspondence -- I think it

1 is page 659 of the second bundle, paragraph 8 of Travers' letter. It is a Friday letter,  
2 4 April 2024, page 659.

3 "We note that the Manchester unit and Arsenal kit orders were placed on 24 October  
4 and 27 October." [As read]

5 That's entirely consistent with the windows, given a couple of days slippage, that we  
6 say are applied to the clubs and retailers alike. Why on earth did Adidas add another  
7 two months for Newcastle?

8 Of course, it was the Arsenal and Man U orders that were used to supply the wholesale  
9 prices with which the order on 18 December was populated. So although Mr Nevitt  
10 doesn't explain this, the process must be he looked back at the orders he'd made for  
11 Manchester United and Arsenal about two months earlier, took the prices from those  
12 and carried them across to the order that they are making those two months later. So  
13 that is the first point on the idea that the club could order later and that this was  
14 a regular order is untrue.

15 The second clearest possible pointer is the evidence supplied under cover of  
16 Mr Silverstone's second witness statement, bundle 2. The witness statement is at  
17 tab 23 and starts at 772.19. The relevant passage of the evidence is at .20,  
18 paragraphs 8 to 12.

19 **THE PRESIDENT:** 772?

20 **MR DE LA MARE:** 772.20. Under the heading:

21 "Adidas order cut-off dates and delivery (inaudible)." [As read]

22 He sets out the relevant propositions from Mr Nevitt's witness statement which had  
23 landed, I think, Wednesday evening last week, that being addressed.

24 And exhibits, answers from Mr Pinder, who as you can see is General Counsel, Global  
25 Sales Digital Market EU and EM. And that's at 772.26.

26 The answers provided by Mr Pinder, at 772.61, first of all it wouldn't be normal or

1 feasible for replica kit ordered in December to be delivered in May, although air freight,  
2 as I mentioned earlier, could be used, but this comes with a premium cost ordinarily  
3 borne by the customer.

4 Over the page:

5 "Do larger retailers have separate buying windows for club replica kit in general?" [As  
6 read]

7 That's the thrust of Mr Nevitt's second statement. For each club, the answer is:

8 "There is a timetable for order cut-offs and associated delivery windows for respective  
9 replica kit. This is applied equally to all retailers regardless of size." [As read]

10 3:

11 "Please confirm whether you are aware of larger retailers placing the orders of club  
12 replica kit in December. We are not aware of any retailers being able to place regular  
13 orders for replica kit in December and with the associated delivery window being  
14 shortened back to the May window." [As read]

15 For completeness, there are no spare stocks which would have been one of the other  
16 issues floating around.

17 So what this establishes, this totality of evidence, is that Sports Direct knew full well,  
18 as of October, it was not going to get supply. It also knew full well that unless an order  
19 was placed in October, the relevant additional stock would not be available for supply  
20 for launch. What follows inexorably from that is it is inevitable that in consequence of  
21 the decision not to place or force an order at that time, that any attempt to secure stock  
22 would effectively have been sought from the existing stock, in this case from any client,  
23 ordered by one party for their own purposes. In other words, there was no potential,  
24 as Mr Singla referred to at various stages this morning, for ordering additional stock or  
25 matters of that kind.

26 That, in my submission, is a wholly material consideration when one comes to balance

1 of convenience. Because it explains why my learned friend is necessarily in the place  
2 of effectively haggling about how much of our inventory should be allocated to him for  
3 his client to use.

4 It is the delay between October and December that has locked in this issue. He makes  
5 much of the correspondence in January of this year when in response to an in-house  
6 legal letter effectively making some fairly serious allegations of competition law breach  
7 out of the blue, the club effectively says it is considering all of its options. I mean, it  
8 doesn't have to, at that stage, explain all the particular agreements in place particularly  
9 if it is taking legal advice about the enforceability of those agreements as may be  
10 threatened by the allegations being advanced.

11 But by the time that the second letter is being written, the die is already cast because  
12 the window for the delivery of the stock has already been missed. It was missed long  
13 before the correspondence even started. It was missed even before the purported  
14 order was placed on 18 December. That's the critical period of delay. Not the  
15 argy-bargy between lawyers and parties thereafter.

16 So that's why we say delay is relevant. Once you combine that with the problems of  
17 clean hands, enforceability of orders, irremediable prejudice and the lack of anything  
18 that will give you a high degree of assurance that they are going to prevail in this case,  
19 the balance of convenience plainly favours the refusal of an injunction in this case.

20 Let me turn my back momentarily.

21 Nothing further from me, sir.

22 **THE PRESIDENT:** Very grateful, Mr De La Mare, thank you very much.

23 Mr Singla.

24 **MR SINGLA:** Sir, I am conscious of time. May I just respond briefly?

25 First of all, in relation to the merits, what is actually quite striking about the way in  
26 which the club has dealt with this injunction application is that we have not seen

1 a substantive answer to the points we make about discounting being the motivating  
2 factor. That's been at the forefront of our case and we have the Two Circles reference  
3 to wanting wider distribution through JD, but not with SD because of the way they  
4 discount and eat into our margin.

5 We have Amanda Staveley, a director of the club -- Mr De La Mare might want to refer  
6 to those as "alleged conversations", but that submission is not open to him in  
7 circumstances where the club has not put in any evidence from her or anyone else  
8 refuting what our evidence says about those calls. So on the face of it, on the material  
9 before the tribunal, the sole reason that Sports Direct will not have these kits is  
10 because they discount in favour of customers.

11 Now, they have not addressed either of those points, slide 20 of Two Circles or  
12 Amanda Staveley's statements in December, in either Mr Silverstone's witness  
13 statement, in the skeleton argument, or in any of the very lengthy submissions from  
14 Mr De La Mare today.

15 Therefore, in my submission, all we have heard, as against that clear explanation, the  
16 rationale that's in the documents and in the evidence, as against that, all the tribunal  
17 is being asked to accept is that they are pro-competitive arrangements because they  
18 allow JD to -- as the underdog.

19 Now, the underdog with 400 stores is a bizarre way to describe JD in any event, but  
20 what the tribunal has met with is the material suggesting the concern is the discounting  
21 versus the idea that these are pro-competitive arrangements. We say, in fact, this is  
22 overwhelmingly a case with which the tribunal can be satisfied has a serious issue to  
23 be tried or high degree of assurance because the club simply has not put forward any  
24 sensible justification for these proposed new arrangements.

25 Now, so far as clean hands is concerned, that is a hotly contested issue. So the  
26 tribunal can see for itself the reference is core 1/469. The Castore written agreement



1 only concerns Rangers, the 30-day exclusivity. That is all explained by Mr Nevitt. If it  
2 was treated by Castore as 30 days of exclusivity in practice, that's a matter that needs  
3 to be investigated at trial. But in my submission, where there is a hotly contested  
4 issue, the tribunal cannot proceed on the basis today that there was an exclusive  
5 arrangement and therefore we don't have clean hands. That's just something the  
6 tribunal cannot possibly resolve.

7 Then, thirdly, in relation to delay, that's all been explained by Mr Nevitt as to why the  
8 order was placed in December. They have that general buying window --

9 **THE PRESIDENT:** But as a matter of fact, looking only at the Newcastle United replica  
10 kit that was provided by Castore to Sports Direct, did Sports Direct have a period in  
11 which they were the exclusive supplier of kit?

12 **MR SINGLA:** That is the issue of fact that's in dispute.

13 **THE PRESIDENT:** Right.

14 **MR SINGLA:** There is certainly no legal written agreement between Sports Direct and  
15 Castore that they should have a 30-day period of exclusivity.

16 **THE PRESIDENT:** I am not asking about what the agreement said, I am asking about  
17 whether there is -- and presumably Sports Direct must know who else is selling replica  
18 kit in the market.

19 **MR SINGLA:** I don't have the answer to that on my feet. But what we cannot be  
20 expected to have an answer to is communications that are being exhibited to  
21 Mr Silverstone statement between third parties.

22 **THE PRESIDENT:** That's was not my question.

23 **MR SINGLA:** I know, but that's the submission that is being advanced on the only  
24 material before you. So, sir, there may or may not be anything in that point. It can't  
25 be said that we don't have clean hands on the material before you, they are seeking  
26 to place --

1 **MR DE LA MARE:** My learned friend has mischaracterised the position. It is not  
2 communications between third parties, it is a communication from Castore saying that  
3 such exclusivity existed. It is the party to the arrangements.

4 **MR SINGLA:** Sir, my Lord, I am conscious of time. Castore is a third party so that's  
5 a false point. Sports Direct did not have a legally enforceable right to 30 days of  
6 exclusivity. There may be an issue as to how Castore proceeded in practice.

7 **THE PRESIDENT:** Do we have an agreement between Sports Direct and Castore?

8 **MR SINGLA:** I will need to take instructions on that. In relation to the club's kit, I don't  
9 believe we do. I can just double-check.

10 **THE PRESIDENT:** On what basis was Sports Direct --

11 **MR SINGLA:** Sir, if I can perhaps show you. The agreement that -- the only written  
12 agreement between Sports Direct and Castore, according to the evidence, is at 469.  
13 What there is, in relation to other clubs, at 471 -- the background to this agreement is  
14 discussed by Mr Nevitt, but you will see from the recitals that the issue arose because  
15 of matching rights in respect of the Castore offer to Rangers. That's on 469.  
16 The 30-day exclusivity provision is at paragraph 5, clause 5, which you will see  
17 concerns Rangers kit.

18 **THE PRESIDENT:** Right. SDI is what entity?

19 **MR SINGLA:** That's not -- that's not the same entity as the claimant in these  
20 proceedings, but it is obviously part of the group.

21 **THE PRESIDENT:** What is it?

22 **MR SINGLA:** It was a joint venture partner with Rangers, as I understand it.

23 **THE PRESIDENT:** It's not related in any way, shape or form to Sports Direct now.

24 **MR SINGLA:** It is part of the same group, yes.

25 **THE PRESIDENT:** Right, okay.

26 **MR SINGLA:** I think Frasers Group is the ultimate parent company.

1 **THE PRESIDENT:** Right.

2 **MR SINGLA:** I apologise, if I have --

3 **THE PRESIDENT:** No, no.

4 **MR SINGLA:** They are definitely related companies, but they do different things.

5 **THE PRESIDENT:** You are saying that there was no --

6 **MR SINGLA:** Can I show you paragraph 9 on 471?

7 **THE PRESIDENT:** Of course.

8 **MR SINGLA:** "Castore is keen to develop its retail relationship with the Frasers Group  
9 as Castore's preferred football retail partner, Castore shall, without limitation, consult  
10 and discuss with SDIR opportunities to develop retail arrangements in respect of other  
11 arrangements Castore agrees with any other UK football club which Castore have the  
12 right to sell product to third parties." [As read]

13 What Mr Nevitt explained in his --

14 **THE PRESIDENT:** What is the date of this letter? It must be around 2019 or 2020,  
15 mustn't it?

16 **MR SINGLA:** Can I take instructions, sir?

17 **THE PRESIDENT:** Yes.

18 **MR SINGLA:** I am not sure I have an immediate answer. Could I perhaps show you --

19 **THE PRESIDENT:** No. It has to be around 2019 or 2020 because they are discussing  
20 the football season's 2021, 21/22 and 2022/23.

21 **MR SINGLA:** My instructions are it is 2020.

22 **THE PRESIDENT:** 2020, right.

23 **MR SINGLA:** Sir, just to help you, in Mr Nevitt's second statement, footnote 32, he  
24 notes a copy of the agreement has been signed only by himself on behalf of SD:  
25 "It has not at this stage been possible to identify a copy signed also by Castore. No  
26 reason to believe that any final copy executed by Castore would have had different

1 terms." [As read]

2 But what he says is -- and this must be right on the face of the agreement -- in terms  
3 of other clubs, the agreement with Castore provides that SD is a preferred retail  
4 partner. This is Nevitt 2, paragraph 34, and that's the relevance to Newcastle.

5 "The preferred retail partner does not guarantee Sports Direct has the same 30-day  
6 sole retail rights with the club, but which endeavours to ensure that Sports Direct gets  
7 the product that it is ordering and in the timelines Sports Direct requires it." [As read]

8 And then -- so I do understand that Mr Silverstone exhibits correspondence in which  
9 Castore seems to have said to the retailer in Dubai that we can't --

10 **THE PRESIDENT:** I take your point about your being unable to speak to Castore's  
11 communications with third parties that are not part of the Sports Direct or Frasers  
12 Group. That's fine. I understand that. What I am asking is a much more prosaic  
13 question, which is you are telling me that over the years post-dating 2020, there was  
14 no formal agreement that you can produce -- you being Sports Direct, the  
15 group -- regarding the provision of replica kit widely defined in regards to Newcastle  
16 United Football Club to Sports Direct. It is just within the air?

17 **MR SINGLA:** Can I just take instructions?

18 **THE PRESIDENT:** Yes, of course.

19 **MR SINGLA:** My instructions are there is not.

20 **THE PRESIDENT:** Okay.

21 **MR SINGLA:** Sir, on clean hands, first of all we say there is obviously a hotly  
22 contested factual issue around this, which you could not possibly determine at this  
23 stage.

24 Secondly, and in any event, at most it would be a 30-day period of exclusivity. So the  
25 submission that essentially we are complaining now about that which we had with  
26 Castore doesn't work in any event, because they are not like-for-like arrangements.

1 So if they are intending to say by way of defence to these proceedings, well, you had  
2 exactly the same arrangement with Castore, that doesn't work. It's not apples with  
3 apples, with respect.

4 **THE PRESIDENT:** The trouble is you don't actually know what the arrangement was,  
5 which is why I asked a few moments ago whether there was anything that could be  
6 said about in practice Sports Direct having the ability to sell Newcastle United kit  
7 exclusively in prior seasons. Not as a matter of contractual right, but whether it knew  
8 simply because it was selling kit at a faster rate than otherwise might be the case?

9 **MR SINGLA:** That is a completely reasonable question, sir, but I just don't  
10 have -- obviously the evidence has all been prepared on --

11 **THE PRESIDENT:** No, no, could you remind me where the sales figures for Sports  
12 Direct Newcastle United kit are? I think we have seen it.

13 **MR SINGLA:** You may have in mind the reference in Nevitt 2, paragraph 20, footnote  
14 11.

15 Please tell me if that is not the reference you had in mind. It is page 441 of the bundle.

16 **THE PRESIDENT:** I think that is what triggered my recollection. There is nothing  
17 more granular than that, is there?

18 **MR DE LA MARE:** My Lord, forgive me for rising. My learned friend said this is  
19 a problem which only cropped up at the end. We asked for details on this on 12  
20 February 2024. The letter starts at page 508. The relevant requests in relation to  
21 Castore occupy a good part of that letter.

22 So the idea that this is something that hasn't been live from pretty much the outset of  
23 contested discussions between us is hopeless. Their response, until Mr Nevitt's  
24 second witness statement, throughout has been that this is irrelevant.

25 **MR SINGLA:** And that remains my primary position. Because, as I say, at best it is  
26 a 30-day period of exclusivity. So what they have always said consistently is how can

1 | you complain on -- before we get to clean hands, they have always said by way of  
2 | defence, as it were, to the main competition allegations, well you had this arrangement  
3 | with Castore, and in that context it is actually irrelevant in my submission because it  
4 | doesn't amount to the same type of foreclosure that we are concerned with now.

5 | **THE PRESIDENT:** The danger with labels is that they are tendentious. I will be very  
6 | clear that I am not particularly attracted by the clean hands label.

7 | What I am pushing back a little is the point about irrelevance because the way you are  
8 | putting your case on abuse is that there is an importance in the preservation of  
9 | incumbency. I understand that. But if that is the way the case is being run, the basis  
10 | for that incumbency that is being lost is quite important. It does seem to me to be  
11 | significant that you can't actually tell me what the basis was. Because there is no  
12 | agreement to show. The most you can say is well, at best, it is a 30-day period of  
13 | exclusivity, which may or may not be right, but -- I don't want to put you in an awkward  
14 | position, Mr Singla, if that is as far as you can go, then so be it. But it just does seem  
15 | to me, given the importance of the supply to SD that it isn't documented.

16 | **MR SINGLA:** Well, sir, it is not documented, those are my instructions.

17 | **THE PRESIDENT:** I completely accept that.

18 | **MR SINGLA:** You will understand it follows from that, that in order to explain the  
19 | arrangements, that would require a level of granularity and an amount of evidence.

20 | **THE PRESIDENT:** That you don't have.

21 | **MR SINGLA:** -- that we do not have on the serious issue to be tried threshold.

22 | **THE PRESIDENT:** Actually that you can't produce period.

23 | **MR SINGLA:** Well, there will obviously need to be a trial. If this point is won against  
24 | us, the Castore arrangements are prayed in aid by the club, then of course we will  
25 | have to look into that in terms of witness evidence for the --

26 | **THE PRESIDENT:** My point is a little bit more fundamental than that, which is

1 whatever they say -- and accepting exactly what you say about this being an  
2 interlocutory process -- we do need to reach some sort of landing point as to what the  
3 arrangements were in order to understand what it is that you are being deprived of.  
4 Suppose the Castore arrangements were that they could provide you what they  
5 fancied, without any obligation to provide you anything at all? I know that's what you  
6 say isn't the case.

7 **MR SINGLA:** No, sir, I think the crucial point, we respectfully submit, is that there is  
8 no doubt that JD were getting these Newcastle kits under the previous arrangements.  
9 So what we are complaining about is being excluded -- the new arrangements will  
10 have the effect that Sports Direct does not have access to any Newcastle kits at any  
11 time at all.

12 The Castore arrangement, whilst I accept there is no written agreement, the only  
13 agreement there is the Rangers one which has the preferred retail partner point.

14 **THE PRESIDENT:** You are not relying on that.

15 **MR SINGLA:** No, sir, but the reason we say this is actually a red herring so far as the  
16 current case is concerned is because JD and Sports Direct were both ultimately  
17 receiving Newcastle kits.

18 **THE JUDGE:** Under the old regime?

19 **MR SINGLA:** Exactly.

20 **THE PRESIDENT:** But you can't say anything about the relative times at which they  
21 received it.

22 **MR SINGLA:** That's the point. At best, it is a timing issue.

23 **THE PRESIDENT:** No, but are you saying that it is a timing issue or it isn't a timing or  
24 you don't know?

25 **MR SINGLA:** I don't know, unless --

26 **THE PRESIDENT:** Mr De La Mare, is it doing the best we can do on this?

1 **MR DE LA MARE:** No, it isn't with respect. We know that paragraph 5 of the Rangers  
2 agreement contains an express 30-day exclusivity period. Page 418 of the  
3 non-confidential bundle. 30 days is locked in. Exactly the type of arrangements we  
4 allege is locked into the Rangers agreement, and then we know from the  
5 evidence -- we know from the internal email from Castore at 263 that supply to Noon,  
6 a Dubai retailer, was refused on the basis of exclusivity. We know from page 348 of  
7 the non-confidential bundle from the JD Sports' letter, paragraphs 5.1 and 5.2, that in  
8 the last season JD Sports could not obtain supply in the months following the launch  
9 of the then last Castore kit because it fell within the exclusivity period. There is a welter  
10 of evidence showing the existence of this agreement and all that Sports Direct can do  
11 is say, whatever the practice in question, it wasn't reduced to a formal written  
12 agreement.

13 That doesn't answer the point, because competition law is concerned with practices,  
14 what was in fact the practice between you and Castore and did they, in practice, give  
15 you that exclusivity. The evidence is unanswered, and very, very clear.

16 **MR SINGLA:** Sir, there are some answers from JD which have been conveyed  
17 through a witness statement from Northridge.

18 **THE PRESIDENT:** Yes, that is Mr Eighteen's statement.

19 **MR SINGLA:** Exactly. There is a limit to how far we can assist on this. We do submit  
20 that the arrangement -- whatever the arrangement was and that would be a matter  
21 which will need to be explained, I accept, in greater detail at trial -- is not equivalent to  
22 what we are currently dealing with. Because a Newcastle fan could have bought  
23 a shirt from JD or Sports Direct and that will not be the case.

24 **THE PRESIDENT:** Well --

25 **MR SINGLA:** Subject to the timing point.

26 **THE PRESIDENT:** Yes.



1 **MR SINGLA:** Sir, with respect, there is a material --

2 **THE PRESIDENT:** Subject to the timing point on which you are not taking -- and this  
3 is not a criticism -- you are not taking a position, the answer is you don't know what  
4 the position was?

5 **MR SINGLA:** Yes, I am not in a position to give you a categorical answer as regards  
6 the timing point. With respect, when we are talking about a season's worth of kit, let's  
7 assume for present purposes there was a 30-day exclusivity period.

8 **THE PRESIDENT:** Yes.

9 **MR SINGLA:** Even assuming that, my submission is what one is looking at here is an  
10 arrangement whereby SD will be excluded for the whole season.

11 **THE PRESIDENT:** Are you saying, though, that the way in which the incumbency  
12 works is it should be replicated point for point, or that it should be replicated in  
13 a broader brush way? This is really going to the point that you majored on, the status  
14 quo ante.

15 We will come to this a little later, I fully accept, but the reason I am pressing you on  
16 this is because when one is asserting that the status quo ante matters, one normally  
17 has that fairly clear idea about what the status quo ante was. It seems as if that is  
18 something which is uncertain until we get to trial --

19 **MR SINGLA:** On any view. I understand the point, sir, but on any view the status quo  
20 was not that Sports Direct or JD was excluded entirely for the whole season.

21 **THE PRESIDENT:** No, but the status quo may have been that Sports Direct had  
22 a month's head start which I think, it is common ground, is an important month when  
23 one has fans who are keen to get the latest kit.

24 **MR SINGLA:** The other point being made is that on any view the Castore relationship  
25 was only two years. I think, according to JD, it started in 2021/2022. So when one is  
26 looking at the status quo, we do say one needs to look -- because, as I say, what has

1 happened over decades is that Sports Direct has supplied Newcastle kit and what is  
2 going to happen is they will not have a single kit.

3 Sir, in my submission, it could not possibly be the case that the status quo was Sports  
4 Direct excluded entirely, that is really where we were coming from. Simply to say we  
5 have changed arrangements, as it were, so the status quo now has to take into  
6 account the new arrangements because Castore has been terminated with effect from  
7 next month and as Adidas is now on the scene, that in my submission is totally circular.  
8 That is not, to adopt the phrase from the authorities, it is not the status quo ante bellum.  
9 The status quo ante bellum is that JD and Sports Direct both had access to these kits.

10 **THE PRESIDENT:** Sure, but I am not sure that one can, when one is looking at the  
11 status quo ante bellum, go back decades. It does seem to me that the appropriate  
12 starting point will be the arrangement from 2022/2023, which is the Castore period. It  
13 is that which is, for reasons I understand, unclear.

14 I think the most you can say is that there was a duality present in the market in that it  
15 was JD Sports and Sports Direct, but that it may well be the case -- you certainly can't  
16 push against it -- that Sports Direct had a head start as against JD Sports during that  
17 period.

18 **MR SINGLA:** Could you just give me a moment to take instructions?

19 **THE PRESIDENT:** Yes, of course.

20 **MR SINGLA:** Sir, I am grateful for that opportunity.

21 **MR SINGLA:** The position is -- I am on instructions -- we have not fully investigated  
22 when other retailers were receiving Newcastle kit. I am not able to assist in terms of  
23 what the position was. Obviously, Sports Direct knows when it was receiving  
24 Newcastle kit but, with respect, there is obviously a contested issue around the way in  
25 which the agreements were working, but on any view I do keep coming back to the  
26 point that the status quo cannot possibly be no supply at all.

1 **THE PRESIDENT:** No, I understand your point there, but I don't think you are in  
2 a position to push back at all on the evidence that Mr De La Mare and Newcastle  
3 United have produced about the advantage to Sports Direct under this two or  
4 three-year period because we have some evidence from Newcastle United and we  
5 have an absence from you. You are not saying it's not true, you are saying you don't  
6 know. That's the position, isn't it?

7 **MR SINGLA:** That is the position. Save that I would add that there is no legal  
8 provision entitled --

9 **THE PRESIDENT:** No written agreement.

10 **MR SINGLA:** No. I am just repeating --

11 **THE PRESIDENT:** No, no, that is very helpful. I am sorry to put you on the spot.

12 **MR SINGLA:** You will see why I say it is just not analogous for a couple of reasons.  
13 One, it is 30 days, and, two, there doesn't appear to have been a written agreement  
14 in any event.

15 **THE PRESIDENT:** Yes.

16 **MR SINGLA:** So we do maintain it is simply not right to frame this as a clean hands  
17 argument.

18 **THE PRESIDENT:** No, I don't think we will be using the term "clean hands", but I do  
19 think we may be using the term "status quo ante" and we will, therefore, have to be  
20 working out what the status quo ante was, and that seems to me something that both  
21 sides are requiring us to look at, accepting, of course, that this is an interlocutory and  
22 not a trial.

23 **MR SINGLA:** Yes. Also in the balance, sir, you have raised the idea of perhaps  
24 a percentage, for example, to make sure we get the irreducible minimum and so on.  
25 Of course, that would all need to be looked at in the round. If one was thinking about  
26 an interim order, I understand the point you are making about what exactly the status

1 quo looked like, but conversely, if you are already considering whittling down the order  
2 on a percentage sense, then on any view we would not be put in exactly a like-for-like  
3 position anyway.

4 So if one is looking at all of these points in the round, because they are all linked and  
5 ultimately they go to what any interim order would look like, if you are minded to whittle  
6 down the Sports Direct order on a percentage basis then that, to some extent, cuts in  
7 a different direction to the 30-day exclusivity.

8 I was going to respond on delay simply because we do submit that this is really not  
9 a delay case. What is quite striking is that the correspondence on 20 January, when  
10 they tell us they are still considering the order, how could they possibly have said that,  
11 on 25 January, in circumstances where they have signed an exclusive deal on  
12 19 October?

13 Mr De La Mare says there is inactivity between October and December, but the one  
14 thing that I think is clear is Sports Direct wanted to get this kit. It placed its orders with  
15 the other clubs, Arsenal and Manchester United in October. Therefore, it is absolutely  
16 obvious that the only reason they didn't place the order is because of the confusion.  
17 They only actually told us about the agreement with JD in February.

18 So to say that we have somehow delayed, we say, is completely inappropriate,  
19 because why weren't they more forthcoming in October to say, look, we know you  
20 have stocked Newcastle kits for decades, by the way we have signed an exclusive  
21 agreement with JD.

22 Also, ultimately, as I said earlier, what difference would any of this have made,  
23 because are they saying they would have ordered extra stock or somehow agreed to  
24 supply us in October last year if we had acted on what they say would have been  
25 a more prompt basis? So we say really the delay points goes nowhere. We have  
26 acted tenaciously, if I can use that word, to try to get to the bottom of what was going

1 on. It is quite striking that the January letter before action refers to the Fenwick  
2 arrangements. That actually shows the level of confusion when a director of the club  
3 is saying in mid-December that no decision has been taken, let's set up a meeting with  
4 Mr Silverstone and so on.

5 Then, finally, if I can just say in relation to the in terrorem submissions that are being  
6 made about the mechanics and mandatory nature of injunctions and so on, we do  
7 respectfully submit that the sorts of points that are being taken are ones that are  
8 theoretical problems rather than real world problems. There is no suggestion that we  
9 are going to jump the launch date, for example.

10 What one is really seeing, when they complain about logistical issues, this is on their  
11 evidence an organisation that is gearing up to sell 359,000 replica kits. The idea that  
12 they couldn't, from an administrative perspective, divert a small fraction of those  
13 orders to service Sports Direct between now and trial, we say really that is all fanciful  
14 and is designed to put up as many roadblocks as possible when actually the order that  
15 we have put forward cuts through many of those difficulties.

16 Unless I can assist any further.

17 **THE PRESIDENT:** No. Thank you very much, Mr Singla, I am very grateful to you.

18 **MR DE LA MARE:** There are a couple of questions on logistics. I am not going to try  
19 to address you on anything else on the order. I suspect you have heard everything  
20 you want to at the moment. If we need to come back to discuss the terms of the  
21 order -- it being 5.30 not 4.30 --

22 **THE PRESIDENT:** Yes, I am afraid that clock --

23 **MR DE LA MARE:** It is an hour out. I suspect we are going to have to come back  
24 and talk about the terms of the order for which there is not time now, if that is what you  
25 decide to do.

26 The immediate pressing issue is that our defence is due on Monday. You will not be

1 surprised to hear that we want a generous extension of time, because all of our  
2 resource has been directed at dealing with this matter over the holiday, and many  
3 holidays have already been disrupted, weekends worked through, et cetera. There  
4 just has not been time.

5 Ms Berridge, my junior, is on a plane to America at the moment, off to the ABA, lucky  
6 her. You probably have some idea about the constraints of the competition bar more  
7 generally. So we need more time to file a defence, whether the four weeks we have  
8 asked for or not --

9 **THE PRESIDENT:** Mr Singla, what is opposed? I mean, you are not going to oppose  
10 an extension?

11 **MR SINGLA:** Not any extension, but one needs to look at the timetable in the round.  
12 That's the difficulty.

13 **MR DE LA MARE:** I think probably all we need to do is say that Mr Singla will not  
14 jump up and down if it doesn't arrive on Monday, because we are going to need to  
15 have a conversation about expedition and timing in any event.

16 **THE PRESIDENT:** Yes. Look, unless, Mr Singla, you are going to violently object,  
17 I am going to give you a two-week extension now.

18 **MR DE LA MARE:** I am grateful, my Lord.

19 **THE PRESIDENT:** On the basis -- is that a problem, Mr Singla?

20 **MR SINGLA:** No, sir. But can I put down a marker about any further extension?  
21 Obviously we have acted very quickly to produce all these documents as well.

22 **THE PRESIDENT:** I understand that. But there is always an advantage in an  
23 injunction case in the party that moves first because you, as it were, front-load the  
24 pain. Having done the front-loading, you can then watch the other side try to catch  
25 up. So two weeks.

26 You can take it, Mr De La Mare, that I am very conscious of the importance that

1 expedition may play and I am certainly not saying it is a final order, I don't think it is,  
2 but it is one that is made very conscious of the fact that we may have to move very  
3 quickly indeed.

4 **MR DE LA MARE:** I totally understand. We will crack on. If we need to come back  
5 for time, we will come back early and come back with a reasonable request, but we  
6 are dealing with the art of the possible.

7 The only other thing I wanted to mention is a marker on the sort of expedition that is  
8 sought. My learned friend is seeking a trial in September in the vacation in this case.  
9 We think that is completely impossible in this case given the complexities it will raise.  
10 We are almost certainly going to go into a lot of issues of disclosure, very complicated  
11 expert issues -- much more complicated than Mr Stannard anticipated in his witness  
12 statement starting all this off. There are some thorny economic issues in there as you  
13 have touched upon and there are going to be some real issues about either third party  
14 disclosure or who the parties to the litigation are, not least because much of the  
15 relevant documentation is held by Castore and JD Sports.

16 **THE PRESIDENT:** Mr De La Mare, those points are all well understood. I think it is  
17 no secret that there is a concern on this side of the room about the amount of volume  
18 of work that cases such as this generate.

19 **MR DE LA MARE:** Yes.

20 **THE PRESIDENT:** It may be that you are both going to be the unfortunate guinea  
21 pigs of something that tries to slim these things down.

22 Suffice it to say that for the moment I would like the parties to think very hard about  
23 just what is needed, rather than what is desirable, to have a fair trial in this matter and  
24 to consider the timetable to trial with that in mind, because that is what we will have in  
25 mind when ordering a trial. It is going to move quickly, whatever.

26 **MR DE LA MARE:** Understood. But, nevertheless, I think we are all agreed

1 a full-blown effects analysis is required, and that is a substantial exercise. If you are  
2 going to do that, there doesn't seem to be any sense at all in separating liability from  
3 damages, because it is exactly the same question.

4 **THE PRESIDENT:** I am grateful you raised that. Because one of the points I did  
5 have, before I get on to my final point which is on the interlocutory application before  
6 us now, is that we will take some persuading to split the trial.

7 I think Mr De La Mare is right. I have a general disinclination to split off quantum from  
8 liability. It almost always ends in tears, usually mine, and we, I don't think, want to go  
9 down that route unless it is compellingly presented. I would rather have a one shot.  
10 But that does not change the sense that we all have that this is something that needs  
11 to be dealt with rather quickly. I am not going to say anything more than that. I just  
12 want that to inform --

13 **MR DE LA MARE:** Understood.

14 **MR SINGLA:** May I make two brief observations? The first is we were not at all  
15 wedded to September, as I hope I made clear earlier. It is driven by the concern about  
16 the season that follows and the lead times. Actually, to a certain extent, that is a matter  
17 that the club could help us with, because they could tell us what is the absolute  
18 backstop by which the orders would need to be placed for the following season.

19 **THE PRESIDENT:** Let me give you this assurance. I don't think this tribunal has  
20 a reputation for moving slowly. We will look very hard, when we are considering our  
21 ruling, at what sort of timetable to trial we think is doable and then we will suggest it,  
22 perhaps a little bit more than tentatively, to the parties and just see how unhappy it  
23 both makes you and we will move on from that.

24 **MR SINGLA:** I am grateful. My second point was simply on the split trial. Obviously  
25 one understands the concerns that arise in other cases. I think here one point to  
26 perhaps emphasise is that insofar as damages are concerned this is a somewhat



1 moving feast. Obviously it is a live case, as it were, so the thought that in addition to  
2 the fact that a split trial bring things on faster, which I do maintain is the case, the other  
3 advantage or key advantage of a split trial is that any assessment of damages would  
4 be much more meaningful and perhaps easier for the tribunal if one is looking at  
5 an historic set of data.

6 This damage that we say is going to accrue is obviously going to accrue between now  
7 and trial. Therefore for experts to prepare evidence on quantum as the sales are  
8 happening, we see actually that being fraught with danger. So that's actually quite  
9 a key reason driving the split trial proposal.

10 **THE PRESIDENT:** The problem with splitting it that way -- quantum in the second  
11 trial -- is that you just don't get to grips with what drives both the abuse and the manner  
12 of quantification.

13 So it may be that you draw a line in the sand and say: please assess quantum up to  
14 a certain point in time. Then one can leave, as it were, mechanistic phase 2, where  
15 you assess the rest but in accordance with the principles and the practice for the  
16 quantum loss up to the line in the sand. That's something I am less opposed to than  
17 a liability/quantum split.

18 But all we are doing here is articulating matters for further consideration. We are not  
19 doing any more than that.

20 **MR SINGLA:** Yes, I am grateful. I was going to say could I perhaps have an  
21 opportunity to come back to you, because it may depend on what you decide on the  
22 injunction and so on. I am very conscious of how late it is, but I would just like --

23 **THE PRESIDENT:** That is understood. You have simply given me food for thought  
24 and indications. I would not want it to be read in any other way.

25 Moving on then to the final order of business, which is resolution of this application.  
26 I am clearly going to have to take away some thoughts as to how one deals with urgent

1 interlocutory matters in a context where they are unusually heavy in this tribunal. They  
2 are also rarer than in Chancery. But even in this case, I would, but for the fact we are  
3 sitting in a panel of three, be wanting to have this indicated as a resolution today.  
4 That's not going to be possible. But we will take away the general process for these  
5 things to see whether one can resolve matters more swiftly, but we will endeavour to  
6 get a ruling to you as soon as possible. I would hope, although I am not promising,  
7 this week rather than next.

8 We are very conscious that if an interlocutory injunction is ordered, there will be a great  
9 deal to discuss about the terms. It is simpler of course if one is not ordered, but we  
10 will have to factor in on the basis of the most work. So we need something fast so that  
11 one can debate the underlying shape of the order.

12 **MR DE LA MARE:** I wonder in that connection, sir, whether it would be sensible for  
13 the clerks to liaise and to liaise with the tribunal to look to get a date in the tribunal next  
14 week. One way or the other there is going to be business to wash up, as it were.

15 **THE PRESIDENT:** I think that will be sensible. It is not going to be completely  
16 straightforward. I am sitting in the Applications Court in Chancery next week. But that  
17 may mean that one can get a couple of hours either --

18 **MR DE LA MARE:** I know the Doug Taylor window has opened up, if nothing else.

19 **THE PRESIDENT:** I'm sorry?

20 **MR DE LA MARE:** The Doug Taylor window has opened up. I think there is a hearing  
21 that has been vacated.

22 **THE PRESIDENT:** In that case I had not even heard about the hearing, let alone its  
23 vacation.

24 **MR DE LA MARE:** Maybe it had not been allocated to you.

25 **THE PRESIDENT:** That will be helpful. But I agree, I think we should try and find a  
26 date --

1 **MR DE LA MARE:** Brick Court and Blackstone et cetera will liaise with Monckton.

2 **THE PRESIDENT:** I am grateful.

3 It remains then for me to thank you both and your teams for the assistance you have  
4 given us. We are very grateful. We will reserve our judgment for the shortest time  
5 possible, but thank you very much.

6 **(5.44 pm)**

7 **(The hearing concluded. Judgment reserved)**

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