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

Case No: 1615/5/7/23

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

Tuesday 11th June 2024

14
15 Before:

16
17 Ben Tidswell
18 Professor Pablo Ibáñez Colomo
19 Keith Derbyshire

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

22
23
24 BETWEEN:

25 **Claimant**

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27 **Up and Running (UK) Limited**

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29 And

30 **Defendant**

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32 **Deckers UK Limited**

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

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

39
40 **Alison Berridge and Jenn Lawrence (Instructed by Stobbs IP Limited) on behalf of**
41 **Deckers UK Limited**

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(10.30 am)

Pre-Trial Review

THE CHAIRMAN: Yes, good morning everybody. Just before we start, I need to read the usual warning because we are being livestreamed.

An official recording is being made and an authorised transcript will be produced. But it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Good morning, everybody. Mr Macfarlane, I know you have your wife and daughter here with you, I think: welcome to you as well.

I just want to check with you, Mr Macfarlane: are you comfortable with the process today? Do you have any questions you want to start with about what we're going to do and how we're going to do it?

MR MACFARLANE: Okay. So the two people in front of you were very kind and talked me through it earlier so I am very comfortable.

THE CHAIRMAN: Good. Thank you.
Do you mind terribly if, when you're speaking to me and I'm speaking to you, you stand up? Do you mind doing that? That's the convention. So if you're happy to do that when we're at that stage. If you forget, don't worry, I'll remind you. That's more to make sure that you're doing what everybody else is doing, rather than telling you off. So don't feel upset if I remind you about any of those things.

Just so you're clear, the purpose of the hearing today is to satisfy us that the parties are ready for trial and to sort out any issues that may be outstanding in that regard.

Obviously we have an agenda from you: that's very helpful.

Ms Berridge, I think you're new certainly to this case in front of me.

1 MS BERRIDGE: Yes.

2 THE CHAIRMAN: Can I ask: will you be conducting the trial for the defendant?

3 MS BERRIDGE: Yes, along with Ms Lawrence, who is also representing the
4 defendant.

5 THE CHAIRMAN: Yes. Good. Thank you. Well, you're very welcome as well. Thank
6 you very much.

7 Thank you very much for the joint list of issues, that's extremely helpful. Unless there
8 is anything to add to it, I'm going to suggest we just work through it in the order in
9 which they are presented.

10 Is there anything that's not on the agenda that anybody wants to add at the moment?
11 No? Good.

12 I did have one item that I wanted to add, which was, Ms Berridge, it would be quite
13 helpful to have a discussion about the defendant's disclosure, and particularly I'm
14 interested in the document retention policy that we have a witness statement about.

15 I appreciate that may not be something you have chapter and verse about, but I just
16 wanted to explore that we've understood exactly what has happened there and just
17 understand a little bit of the implications for the disclosure that the claimant has had.

18 But maybe we'll come to that later, at a convenient point. I think it probably fits
19 naturally a little bit later into the agenda; just to give you some warning that that might
20 be coming up. And of course if there's anything in there that I ask you that you don't
21 know, then I fully expect that might be a possibility and that you could take instructions
22 if need be.

23 MS BERRIDGE: Thank you, sir.

24 THE CHAIRMAN: Good, thank you.

25 So the first item on the agenda is the trial timetable. I think, if I'm right, we have that
26 in our bundle. Is that right?

1 MS BERRIDGE: Yes, it's tab 3, pages 8 to 9.

2 THE CHAIRMAN: Yes, thank you.

3 Now, there may be a connection between this item and item 7, Ms Berridge. I wasn't
4 entirely sure what you planned to cover in relation to item 7, which I think was put on
5 the agenda by the defendant. Is it sensible to do those -- having said we're going to
6 do them in order, is it sensible to do them together? Is it a trial timetabling point you're
7 concerned about, or are there other issues that we should leave till later, do you think?

8 MS BERRIDGE: Item 7 was an opportunity for the tribunal to help explain to
9 Mr Macfarlane how the trial should work and make sure that that side of things is fully
10 prepared for. Obviously the defendant can provide some guidance but it will always
11 appear, I think, partisan when it comes from the defendant's side and not from
12 a neutral party.

13 THE CHAIRMAN: Yes.

14 MS BERRIDGE: So that is what item 7 was intended to cover.

15 THE CHAIRMAN: No, that's very helpful, because actually that's what I had
16 anticipated.

17 MS BERRIDGE: I understand that the livestream can't hear us.

18 THE CHAIRMAN: Thank you, that's helpful to know that. We will deal with that; we'll
19 keep going in the meantime though. Thank you.

20 Yes, that's precisely what I had hoped and thought you might be getting to. So we
21 can deal with that in due course when we come to it. That's really helpful.

22 As far as the trial timetable goes, Mr Macfarlane, I appreciate this is not your area of
23 expertise, so I'm not sure to what extent you've had thoughts about this timetable. As
24 I understand, it's agreed; is that the position?

25 MR MACFARLANE: Yes, I am comfortable with that as well.

26 THE CHAIRMAN: Yes.

1 MR MACFARLANE: I've had a look at it. I think we'll just be guided by those people
2 that know, like my learned friend and yourself.

3 THE CHAIRMAN: Yes. Well, certainly it looked perfectly sensible to me.
4 I do make the observation that the defendant, I think, is anticipating you being
5 cross-examined for a decent period of time. You will have picked that up. That's
6 obviously a matter for the defendant as to how long they think they're going to take
7 cross-examining you. So I just wanted to make sure you were alert to that.

8 MR MACFARLANE: Yes.

9 THE CHAIRMAN: It obviously takes up a big chunk of time.
10 But otherwise, if one then goes to the defendant's witnesses, where you may or may
11 not be in a position to form a view as to how much time you want to spend asking them
12 questions, I just note that you have, I think, allocated something like an hour -- was it
13 two hours? -- with Mr Hagger; is that right? An hour with Mr Henderson, 15 minutes
14 with Mr Tiller, who I think deals with the document preservation, and then an hour with
15 Mr Yates. Is that right? Yes, an hour with Mr Yates.

16 Are those estimates that you have formulated? Have they been suggested to you?
17 How did you get to those numbers and how comfortable with are you with them?

18 MR MACFARLANE: Mr Tiller and Mr Yates I can foresee being quite brief, because
19 there isn't an awful lot for them to say. I think 5 or 10 minutes would be enough for
20 either of those two. And it may well save them time of having to hang round for days
21 on end if we dispose of those two first. That was my suggestion to the other side
22 earlier.

23 THE CHAIRMAN: Well, I think the defendant will make their decision about the order
24 in which they want to call them. They may have good reasons for wanting to do them
25 in a particular way. By all means, if you want to suggest an alternative, I'm sure they'll
26 take that into consideration.

1 I think what's important, Mr Macfarlane, is you don't worry too much about
2 convenience of anybody else. Your job is to make sure you get across to us your
3 case. So I want you to feel that you're not under time pressure, obviously within
4 reason, and that's the point of this discussion. I don't want you to feel hurried, I don't
5 want you to feel like you haven't had the opportunity to deal with things properly. But
6 obviously we need to know as best we can at the moment what the time timetable
7 should look like.

8 So I'm not going to push you any further on it. I just want to make sure that you've
9 thought a little bit about the time you might need to get the answers to the questions
10 you want to ask.

11 MR MACFARLANE: I did, sir. And I don't think two hours will be sufficient for my
12 cross-examination of Mr Hagger in particular; I think that will be a bit tight. He has
13 about 100 pages of witness statement. So I think two hours would be leaving me quite
14 short for time there.

15 THE CHAIRMAN: So that might be a little bit light, but you think that you might not
16 need quite so much time with Mr Tiller and Mr Yates?

17 MR MACFARLANE: That's my (inaudible), yes.

18 THE CHAIRMAN: I think we don't have to resolve those issues; what I want you to be
19 doing is thinking about them. Obviously we have a little bit of extra time in reserve,
20 and if you need extra time, we'll find it. What I don't want to find is that you're turning
21 up and saying you need a day with Mr Hagger when we only have two hours in the
22 hearing and not enough flexibility to make it manageable. I would be surprised if you
23 said that; in fact, I would push back. But I just want you to be thinking about the
24 mechanics of this.

25 It's obviously up to you how you prepare your cross-examination and so on. I think
26 the experience of everybody in the room who has familiarity with it is that it generally

1 takes longer than you expect, and the tribunal will have some questions as well.

2 I just don't want to be in a position where we end up with a very different-looking
3 timetable on the day compared with what we're doing now. That's only reason for
4 raising it with you at all.

5 MR MACFARLANE: Would that be helpful, sir, if I just liaise with other side in order
6 to get clarification on how long I feel I would need Mr Hagger?

7 THE CHAIRMAN: I don't think you need to have a discussion about it.

8 Let me put it another way: at the moment you're being given all of an afternoon and
9 half of a morning, so three quarters of a day, to deal with -- actually slightly more than
10 that, because you have a bit of time on Day 3 as well. So a little bit more than three
11 quarters of a day. So that's three and a half hours, is that right, we have on here?
12 Yes, almost four hours, I think.

13 The question really is: do you think you're comfortably going to come within that
14 envelope? And as I say, there's a bit of scope for you to fall beyond it.

15 MR MACFARLANE: Yes.

16 THE CHAIRMAN: But obviously it would be helpful, if you think that's likely, to have
17 some sense of that. There's a limitation as to how much we can go beyond that without
18 busting the timetable.

19 I'm just putting that marker down with you. I'm very conscious that this is not what you
20 do every day -- indeed, you might not have done it ever before -- so I'm not expecting
21 you to have any strong views on it. As I say, I just want you to be thinking a little bit
22 about it when you structure the way you go about preparing for the hearing.

23 MR MACFARLANE: Yes, sir, I will give that a lot of thought and planning.

24 THE CHAIRMAN: Good, thank you. That's helpful.

25 Ms Berridge, is there anything else you wanted to raise about it?

26 MS BERRIDGE: That's very helpful, thank you. Only about point 7 which we

1 | discussed.

2 | THE CHAIRMAN: Yes.

3 | MS BERRIDGE: Obviously an opportunity for the tribunal to describe the way that
4 | cross-examination works in the tribunal.

5 | We also had some specific points that we thought would be helpful to cover, the first
6 | of which is that by the time we get to trial, everyone has had a lot of opportunity to
7 | make the points that they want to make and give the evidence that they need to give,
8 | and that the trial is not a place for new accusations or new evidence. We think it would
9 | be helpful to reiterate that at this stage.

10 | THE CHAIRMAN: Yes. You're now drifting into item 7, are you?

11 | MS BERRIDGE: Sorry?

12 | THE CHAIRMAN: You're moving into item 7, are you, now?

13 | MS BERRIDGE: I am, yes.

14 | THE CHAIRMAN: I think we might leave it in order that way, just because I think it
15 | might be more helpful for Mr Macfarlane for me to have that discussion with you and
16 | particularly with Mr Macfarlane at the end, rather than now, because I suspect that as
17 | we go through this, Mr Macfarlane is going to learn a bit more about how things are
18 | going to look and what needs to happen, and that might just help give some context
19 | to that.

20 | So if you don't mind, we might come back to that at the end. I certainly have it in mind
21 | and I do have a bit of a structure I was going to run through, which is obviously largely
22 | framed by the timetable.

23 | MS BERRIDGE: I'm grateful. We'll do that.

24 | THE CHAIRMAN: Good.

25 | So we'll treat the timetable -- obviously it's just a proposal and we are very open to any
26 | adjustment that the parties might consider appropriate. I think it would be helpful,

1 obviously -- and I'm sure you'll do this, Ms Berridge -- to have a conversation much
2 closer to the trial, just to make sure it's all on track and you're all on the same page as
3 to how things are going to go.

4 MS BERRIDGE: Yes, we will do that.

5 THE CHAIRMAN: Just to check in on that. Yes, thank you. That's very helpful.

6 As noted, we do have the day in reserve. But on the basis of what I think you're both
7 saying, we are not likely to need that, at least in a planned way. It's there if we need
8 it for any overspill.

9 MS BERRIDGE: Thank you, yes.

10 THE CHAIRMAN: Good, that's helpful. Thank you.

11 Unless there is anything else, we will move on to item 2. This I think is your
12 application, Ms Berridge.

13 MS BERRIDGE: It is, yes.

14

15 Application by MS BERRIDGE

16 MS BERRIDGE: The defendant's letter which sets out its application is at tab 25 of
17 the bundle on page 365. It's an application in relation to confidential treatment for
18 some of the evidence in the case.

19 THE CHAIRMAN: Yes.

20 MS BERRIDGE: Just for the avoidance of doubt, all of this evidence is available to
21 the claimant and there has been no suggestion that anyone at the claimant's side
22 shouldn't see this evidence. This is about protecting some of that information from
23 public disclosure in the trial process.

24 So perhaps if I can just take a moment to explain. That means that some of the
25 information would be marked in the bundle as "confidential" and if we want to refer to
26 it during the trial, we either say to the tribunal, "Could you perhaps read row 3 on this

1 table", so that it doesn't come across in the livestream, or if that gets too difficult, we
2 can ask the tribunal to go into a private session where the livestream is turned off.

3 We haven't had any objections from the claimant to this application. We obviously
4 have been very mindful, in making this application, of the tribunal's commitment to
5 open justice. So these are tightly defined categories of commercially sensitive
6 information that we propose should be kept confidential. They are described in the
7 letter.

8 Would it be helpful if I take you through them one by one?

9 THE CHAIRMAN: Well, I think certainly it would be quite helpful just to see a couple
10 of examples, just so we know what sort of material we're talking about. Do we have
11 the documents themselves in the bundle?

12 MS BERRIDGE: We have a bundle of them.

13 THE CHAIRMAN: Yes.

14 MS BERRIDGE: We didn't prepare a bundle for everyone.

15 THE CHAIRMAN: No. No, that's fine. I think it's not a contested application. Really
16 all I want you to do is to satisfy us that there is a legitimate business interest that
17 requires protection and that this is genuinely commercially confidential, which
18 I assume is the basis on which it's put.

19 MS BERRIDGE: Shall I go through and deal with it in a descriptive way, and if you
20 want to see any of the specific documents, then we can hand them up?

21 THE CHAIRMAN: Yes, I think that would be helpful. That would be helpful.

22 MS BERRIDGE: So the first category is a breakdown of all the HOKA retail customers
23 and what category of retailer they are. So you will have seen from the evidence that
24 Deckers divides its retailers into different categories and they receive different shoes
25 and different standards are expected from them in the way they display and deal with
26 customers. And we've provided a breakdown of all of those, so all of the customers

1 and what category they are in, as a way of helping to build up that picture.

2 That, we say, is clearly commercially confidential. None of those accounts would want
3 that information to be in the public domain. It's the sort of thing that would be normally
4 kept quite carefully within Deckers.

5 THE CHAIRMAN: Yes.

6 MS BERRIDGE: The second category is a series of retailer invoices, so issued to
7 different retailers by Deckers. These are in evidence because they have on the back,
8 or incorporated within, the terms and conditions. So the reasons those are there is to
9 illustrate how those terms and conditions have been incorporated into the contractual
10 relationship with retailers.

11 But obviously within those invoices are the amounts that are being charged to
12 individual retailers who aren't Up and Running, other retailers. So we would say that
13 information, which is part of that disclosure almost by default, that information is very
14 sensitive and those retailers wouldn't want to see that made public as well.

15 THE CHAIRMAN: Yes.

16 MS BERRIDGE: The third category -- and I can perhaps take you to where this is in
17 the bundle -- is the Deckers sales figures that were disclosed. There was an order of
18 the tribunal and they were broken down.

19 So they are at -- apologies. Do you know where they are in the bundle, Jenn? Sorry.
20 Was it tab 7, page 99?

21 THE CHAIRMAN: Yes. Yes, this is the RFI, yes.

22 MS BERRIDGE: These are a breakdown of the sales figures. Some of these rows
23 are in the statutory accounts, but they are broken down in more detail. So the
24 HOKA-specific sales data is not in the statutory accounts and then the breakdowns
25 between wholesale, retail and physical are not in the statutory accounts. But those
26 are detailed sales breakdowns, some of which are very recent, which we would not

1 normally expect to have in the public domain.

2 THE CHAIRMAN: And the numbered document that you have in your bullet 3, they
3 are the underlying information from which this has been drawn; is that right? Back at
4 tab 25 on 325, you have a number of documents: 88, 88A, 89, 176 and 176A.
5 Presumably they are what this drawn from, are they?

6 MS BERRIDGE: Yes.

7 THE CHAIRMAN: I suspect we're going to be coming back to those, because
8 obviously they're relevant to Mr Macfarlane's application in relation to disclosure,
9 I imagine.

10 But can you tell us anything about those? Are they simply the -- what are they? Are
11 they management reporting information? Give us a sense of the character of them.

12 MS BERRIDGE: Yes. So some of them are -- I might ask for the bundle so I can --

13 THE CHAIRMAN: Yes, of course. Please do. No, please do.

14 MS BERRIDGE: -- give a precise list.

15 THE CHAIRMAN: Yes.

16 MS BERRIDGE: But some of them are earlier forms of that disclosure, before the
17 tribunal's order. So they may be less detailed.

18 THE CHAIRMAN: Yes, I see.

19 MS BERRIDGE: So there is similar information in a different format.

20 THE CHAIRMAN: Some of the correspondence between the parties and so on. I see.

21 MS BERRIDGE: Then I think ... (Pause) I think these are just different versions of that
22 disclosure at different times.

23 THE CHAIRMAN: Yes, okay. Thank you. That's helpful.

24 Obviously the basis for that is that this is the defendant's confidential information, and
25 you say it's commercially sensitive because it shows the competitive market position?

26 MS BERRIDGE: Yes, very specific breakdowns of specific brands and specific

1 channels over time.

2 THE CHAIRMAN: Yes. Thank you.

3 MS BERRIDGE: Moving on to the next bullet point, we have a category which is
4 "Deckers' strategic account joint business plans".

5 So these are referred to in the evidence of Mr Yates and they are business plans
6 prepared by Deckers for use with each individual retailer. They represent a plan for
7 how that retailer can improve sales and all of these kind of things over time. They are
8 disclosed specifically because they contain some market share estimates, which were
9 very much estimates, and you'll have seen that put in context in Mr Yates's evidence.
10 But that's the reason those are in evidence.

11 Obviously, as strategic business plans on a retailer-by-retailer basis, those are
12 precisely the sort of information that Deckers would not want to see made public and
13 indeed its rivals would take great interest in. So those would be exactly the kind of
14 information we'd want to see kept from the public domain.

15 THE CHAIRMAN: Yes. Thank you.

16 MS BERRIDGE: Then the final category, which is again in a similar vein: in the
17 evidence of Mr Hagger, he describes some retailers who were not able to become
18 a HOKA retailer for various reasons, and that's part of the description of how retailers
19 are assessed and what the criteria are for becoming a HOKA retailer.

20 The evidence has been separated, so in the witness statement they are called
21 retailers A through D, and then the actual identities are disclosed separately. It's those
22 actual identities that we would intend to keep confidential. I don't think any of those
23 retailers would want in the public domain that they had been declined the opportunity
24 to sell HOKA shoes.

25 THE CHAIRMAN: Yes. So we have, just using the bullet points and numbering them,
26 1 and 2 are about third party interests as well as obviously the defendant's, and so is

1 5. 3 and 4 are about how the commercial interests of the defendant.

2 MS BERRIDGE: I think 4 might also be categorised as containing third party
3 information --

4 THE CHAIRMAN: Yes.

5 MS BERRIDGE: -- because those are the business plans that work with the retailers --

6 THE CHAIRMAN: Yes, I see.

7 MS BERRIDGE: -- giving their specific data.

8 THE CHAIRMAN: Yes, I see. Okay, thank you. That's very helpful. Yes.

9 So just a couple of things that occurred to me. One is: your application I think was
10 made under the CPR. It doesn't actually apply here.

11 MS BERRIDGE: Apologies for that.

12 THE CHAIRMAN: No, no, that's fine. Obviously it's a wonderful thing, the CPR;
13 I make no criticism of it, at least not in the generality.

14 But I think the right provision for the purposes of -- you may wish to actually make your
15 application under -- it's rule 101, I'm sure you will have picked up, and then the
16 reference back to paragraph 1(2) of schedule 4 in the Enterprise Act 2002.

17 So that sets the test. And the test is, I think, a little bit different because it talks about
18 confidential information, "disclosure of which could significantly harm the legitimate
19 business interests of the undertaking to which it relates". And there's also a reference
20 to the private affairs of an individual, which probably doesn't apply here,
21 I expect -- might do possibly -- "which could harm his or her interests".

22 So I think that's the target you are aiming for. And really the only reason to ask you to
23 go through this -- I know it's uncontested -- is -- and I absolutely see the point of it. It's
24 just that we need, I think, to have a proper justification for excluding, if you like, that
25 evidence from the usual process.

26 MS BERRIDGE: Yes, that's well understood. Would it be helpful to have a revised

1 application?

2 THE CHAIRMAN: No, I don't think so. I think I'm happy -- if you would like to make
3 that amendment, if you like, orally, which I think you are, then we'll treat it as that
4 application.

5 Can I just ask you a couple of questions about the practicalities. One is: obviously
6 they need to be dealt with separately, identified separately in the bundle. I think I saw
7 somewhere maybe in this letter that the idea would be that you might have a separate
8 bundle.

9 MS BERRIDGE: Yes.

10 THE CHAIRMAN: I wasn't very enthusiastic about that because it's rather unhelpful
11 to us. I think it's much more helpful to have a run of chronological -- I'm assuming the
12 trial bundle is chronological, I hope, in which case I think it's much more helpful to have
13 it in context; otherwise it's at risk of us losing the context of it. That may or may not
14 apply to some of these documents. But that would be more helpful, in which case
15 I suspect the answer is probably some form of colour-coding.

16 MS BERRIDGE: Understood. That indication is very helpful. We will certainly do it in
17 that way and use, as you suggest, colour to just make it easy for everyone to see
18 where that information is and not fall into error.

19 THE CHAIRMAN: Yes, thank you. That's helpful.

20 Then the second question is the difficulty of how to actually deploy the documents in
21 trial. Obviously that's very doable and there's no reason why we shouldn't. If it
22 becomes necessary, we can certainly do a closed session. I just want to put down
23 a marker: I would be very reluctant to do that unless it's absolutely necessary. But
24 clearly if it is necessary, then we will do it.

25 It didn't seem to me from these documents that they were likely to cause enormous
26 problems, subject to one point, which is: at some stage we're obviously going to get

1 into this market share question in some detail, and on the assumption I think we're
2 now going to have two experts giving evidence on it, there's no doubt going to be a lot
3 of numbers put on the table by both of them in cross-examination. I just wondered
4 whether you had any thoughts on managing that.

5 MS BERRIDGE: Yes, I agree. I think most of these categories, the confidential
6 information is, in a way, relatively peripheral to the issues, and it's the sales data and
7 how that is used and converted into market shares that will be the difficult part.

8 It may be that it's possible to do so by reference to the expert reports without having
9 to say the numbers aloud. I certainly would hope that, and that we would be able to
10 avoid going into closed session. But it could be something perhaps that, when we
11 discuss timing a little closer to the day, we could have a discussion about whether we
12 will be anticipating being able to manage without a closed session.

13 THE CHAIRMAN: Yes. Okay, thank you. That's helpful. Maybe we'll just see what
14 Mr Macfarlane has to say about that in particular, unless there is anything else you
15 wanted to add.

16 MS BERRIDGE: Only that later today we may find ourselves discussing the sales
17 data.

18 THE CHAIRMAN: Yes.

19 MS BERRIDGE: So it may be that it would be useful to have from the tribunal at least
20 an indication for today's purposes as to its view on that specific part of this application.

21 THE CHAIRMAN: Yes. Well, no, look, certainly I'm anticipating we'll give you an
22 answer now, rather than waiting. So I don't think we're going to be reserving any
23 decision on that, as I understand it.

24 You're not contesting this, Mr Macfarlane, as I understand?

25

26 Submissions by MR MACFARLANE

1 MR MACFARLANE: No.

2 THE CHAIRMAN: No.

3 I think there are some practical points that we'll all need to be a bit careful about. I can
4 tell you that it does require a degree of concentration when we get into this area -- we'll
5 probably test that a bit this afternoon -- because it becomes quite difficult as a matter
6 of practice, when you're dealing with numbers like this, to have a dialogue, particularly
7 with a witness, unless you actually are able to say what the number is. Because
8 otherwise we all spend lots of time saying, "Do you see the number in paragraph 55?
9 Well, how do you compare that with the number in paragraph 57?" That can actually
10 be quite a cumbersome process.

11 So the alternative to that, assuming that we make the order that has been asked for,
12 is that we would then have to go into a private session, in which case in practice we
13 turn off the livestream, and you would remain here with your team, as I understand it,
14 and the defendant obviously would, and we would deal with anything that they
15 consider to be confidential and we agreed with as being confidential in that
16 environment.

17 Now, I'm not a fan of that because one of the principles of this tribunal is open justice;
18 all tribunals, but particularly this one. So I would rather avoid that if possible. But
19 some of this comes down to your comfort level about dealing with the questioning and
20 the discussion and being able to do so by reference to the numbers.

21 So I don't need you to say anything about that now, other than just to make sure you've
22 understood that the consequence of what's going on here is that we're going to have
23 a bit of fiddling to do at the back end of this to work out how we manage this.

24 MR MACFARLANE: Insofar as, sir, the confidentiality side of it, I fully understand the
25 other side on this. I wouldn't want these things to be going out into the public either.
26 I would, if required, give an undertaking to destroy all the paperwork and wipe it clear

1 in my mind, which won't be difficult, and I will just give an undertaking to them that it
2 will go no further.

3 THE CHAIRMAN: Yes, I think they probably work on the basis that is the position
4 because of the basis on which they've disclosed it to you.

5 Just to be absolutely clear, what we're talking about here is not you knowing about it:
6 you obviously do know about it, you can know about it and you can use it while we're
7 in this trial. I think what we're dealing with is the difficulty that -- let's say you're
8 cross-examining the defendant's expert accountant, expert economist, and you want
9 to refer them to the table we just looked at in the appendix to the RFI, and you want to
10 say to them, "Look at this number here: that number looks bigger than this number
11 over here".

12 MR MACFARLANE: Yes.

13 THE CHAIRMAN: That's obviously a more difficult thing to do if you can't say the
14 number. What we're saying to you is that you might not be able to say the number in
15 open court, and we're all going to have to navigate around with you using a different
16 reference point than actually saying the number.

17 So it's just an entirely practical point I'm just alerting you to.

18 MR MACFARLANE: Yes.

19 THE CHAIRMAN: Again, if I could just leave it with you to have a bit of a think about.
20 If it proves to be too difficult for you to manage that -- in other words, it starts to get in
21 the way of you presenting your case -- then one solution is for us to go into this private
22 session. And if we feel we have to do that, we'll do it; I just would much rather not do
23 that unless I have to.

24 MR MACFARLANE: I'm fine with that, sir.

25 THE CHAIRMAN: Really I think it's important you understand that's the implication of
26 the application as far as you're concerned. I don't think it has any other implications,

1 because you have the information and you can use it. It's just going to make your life
2 more difficult when we come to deal with these questions at trial.

3 MR MACFARLANE: I shall be very careful, sir, not to name any numbers out loud in
4 the court.

5 THE CHAIRMAN: Yes. Well, we will all be being careful and we will all be trying to
6 help each other, and you can rely on us to keep an eye on it and try and make sure
7 you're not getting into difficulty, because we all have to deal with the same problem
8 and we're all familiar with it.

9 MR MACFARLANE: Sure.

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

11

12 (Ruling given but reserved for approval)

13 THE CHAIRMAN: Anything else you need on that?

14 MS BERRIDGE: No, that completes my submissions on that one.

15 THE CHAIRMAN: Good, thank you. That's helpful.

16 The next point I think is reply factual evidence, and again I think, Ms Berridge, your
17 application.

18

19 Application by MS BERRIDGE

20 MS BERRIDGE: Yes, this is our application.

21 We seek permission to adduce a small amount of reply evidence on two limited issues.

22 We are conscious that this a fast-track case and that we should be seeking permission
23 only in relation to genuinely new issues that can cast light on the substantive issues
24 that will come up at trial.

25 Our letter to the tribunal on this is in your bundle at tab 27, which is page 416.

26 I have that wrong, don't I?

1 THE CHAIRMAN: Yes, I think it's not that.

2 MS BERRIDGE: Let me check.

3 THE CHAIRMAN: I think it is -- no, I do have it in 27, that is the right ...

4 MS BERRIDGE: Apologies, I had the wrong bundle.

5 THE CHAIRMAN: Yes, the 6 June 2024 letter.

6 MS BERRIDGE: These are the two issues. They are in relation to new matters raised

7 in Mr Macfarlane's witness evidence served last month. They relate to the defendant's

8 assessment of Up and Running's business, both the stores and the Up and Running

9 website, and also the defendant's assessment of the proposed runningshoes.co.uk.

10 Would it be helpful to the tribunal if I took you to those parts of Mr Macfarlane's

11 statement that we say are new and that we would seek permission to respond to?

12 THE CHAIRMAN: Yes, I think it would be helpful. Thank you.

13 MS BERRIDGE: So Mr Macfarlane's statement is at tab 18 --

14 THE CHAIRMAN: Yes.

15 MS BERRIDGE: -- and it starts at page 154.

16 In relation to the first of those points, can I ask you to turn to page 164 and read

17 paragraph 81. Mr Macfarlane says:

18 "To my knowledge, the defendant has not visited the Up and Running stores in this

19 regard. Our store managers are reporting back and they have not received any such

20 visit from Deckers, as they say in their defence. I have made enquiries and none of

21 our managers are able to confirm any such visits."

22 So this contradicts the evidence of Mr Hagger, which, if you want to have a look at

23 that, that's at tab 20 at page 211.

24 THE CHAIRMAN: Yes.

25 MS BERRIDGE: At paragraphs 37 to 40, he describes generally that Deckers visits

26 all of its retailer stores.

1 So we have, in essence, a conflict of evidence here. And the reason that we are
2 seeking to adduce some further evidence is that we would like to show some records
3 of visits specifically to Up and Running stores, so that the Tribunal is able to form
4 a proper view on that conflict of evidence on that case.

5 THE CHAIRMAN: Yes.

6 Mr Macfarlane refers to the statement in the defence. What did you say in the defence
7 about the visit? Was there a specific reference to a visit to Up and Running stores, do
8 you know? I'm not sure, is the defence in this bundle?

9 MS BERRIDGE: It is. it's at tab 5.

10 THE CHAIRMAN: Yes. I don't know whether -- I'm not sure where it is. It may be that
11 Mr Macfarlane can help us as to where -- do you know where in the defence the
12 defendant says they visited stores? In other words, the source of your statement that
13 we've just looked at --

14 MR MACFARLANE: I don't know.

15 THE CHAIRMAN: You don't know it off the top of your head. That's fine. Don't worry,
16 that's fine.

17 I think paragraph 30 I was --

18 MS BERRIDGE: Yes, on page 32.

19 THE CHAIRMAN: Yes.

20 MS BERRIDGE: "Both retail premises and websites are therefore appraised to ensure
21 they meet the requirements."

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

23 Do you want to deal with the second point?

24 MS BERRIDGE: Yes. If I can ask you to turn back to Mr Macfarlane's statement,
25 which is at tab 18 --

26 THE CHAIRMAN: Yes.

1 MS BERRIDGE: -- and go to page 166.

2 THE CHAIRMAN: Yes.

3 MS BERRIDGE: We are looking at paragraphs 87 to 90 and then 97.

4 This section makes a number of points about the runningshoes.co.uk, the proposed
5 runningshoes.co.uk, and it makes some points about positive features of that website:
6 for example, that it had a dedicated telephone line that customers could call to ask
7 about what shoes would be most suitable for their running style or their feet; features
8 such as delivery, returns, payment options and some of the positive reviews that the
9 site obtained. This is the first time that these features have been specifically raised in
10 these proceedings.

11 Now, Mr Hagger has obviously already given evidence as to the reasons why Deckers
12 didn't want to be involved in the running shoes project, and those are in his statement.

13 At pages 226 to 227 he runs through those reasons. Those reasons don't relate to
14 those sorts of features of the website: they are about creditworthiness, logistical
15 back-up and the fact that the runningshoes.co.uk doesn't make clear its connection
16 with the Up and Running business.

17 So he's already explained his positive reasons. But nevertheless, because that
18 reasoning is so central to the case, and because Mr Macfarlane has specifically raised
19 these features of the runningshoes.co.uk, we would like to provide a very short
20 statement in response explaining how those features did or didn't factor into the
21 decision that Deckers made in relation to running shoes. We envisage that both of
22 these points can be dealt with in a short statement from Mr Hagger.

23 THE CHAIRMAN: So this is a little bit different, isn't it, because as you say, Mr Hagger
24 has set out a positive case. Do we really care what Mr Hagger thinks about something
25 which didn't form part of his view at the time he made the decision that he's talking
26 about in 86? Why is that important?

1 MS BERRIDGE: We felt that it was important for the tribunal to be able to see upfront,
2 to have all of the information about that reasoning, because we felt that the information
3 provided in Mr Macfarlane's witness statement was a sort of implied point that
4 because the website had those features, it should have met the criteria for Deckers.

5 THE CHAIRMAN: So, in a way, this is -- so you're not actually advancing a -- you're
6 actually attacking Mr Macfarlane's justification for or his argument about the quality of
7 the operation, in circumstances where that is not directly the reason why Mr Hagger
8 says the website wasn't approved?

9 MS BERRIDGE: No, the intention would not be to contradict any of the features that
10 have been described. It's to clarify what was the basis of Deckers' reasoning and that
11 those were not part of the basis of Deckers' reasoning.

12 THE CHAIRMAN: Oh, I see. So actually the evidence is going to be to confirm that
13 they weren't things that Mr Hagger took into account?

14 MS BERRIDGE: Yes.

15 THE CHAIRMAN: Yes, I see.

16 Yes, well, I suppose there is a question as to whether you need to do that. I'm not
17 sure that it presents a particular problem if you do. But I'm sure we're going to get to
18 the bottom -- by the time the trial has finished, I hope we're going to get to the bottom
19 of what Mr Hagger says his reasons are and they will have been tested, no doubt, by
20 Mr Macfarlane.

21 But anyway, I understand the point. That's helpful. Is there anything else you wanted
22 to add?

23 MS BERRIDGE: No.

24 THE CHAIRMAN: Maybe possibly.

25 MS BERRIDGE: No, nothing more from us.

26 THE CHAIRMAN: Thank you very much.

1 Mr Macfarlane, what's your position on this? Are you opposed to this in any way? Are
2 you happy for them to go ahead and do it?

3 MR MACFARLANE: Sir, I think it's probably in the interests of everybody hearing
4 every part of all the arguments in this tribunal. I don't have a problem. Maybe I could
5 ask for a couple of days after they make that application for a rejoinder?

6 THE CHAIRMAN: Well, this is evidence, and I think there has to be a point in time at
7 which we stop the process. I think so.

8 Remember, of course, you are going to end up sitting in the witness box here and
9 being asked questions about it. And just as I have just said to Ms Berridge, "Do we
10 need to know in advance what Mr Hagger is going to say about this, because I think
11 we'd all rather assumed that if he hasn't put in his reasons, they are not his reasons",
12 I rather assume you're going to have some things to say about the response.

13 Let me put it this way: if there was something that turned up in the response that was
14 absolutely new that you had an answer to, then I suspect we'd all want to know about
15 that before the trial rather than after. I think that's somewhat unlikely from what
16 Ms Berridge has said by way of description.

17 So I'm not going to shut the door on you coming back and saying, "I have something
18 terribly important you need to know about because it addresses what has been said",
19 and if you feel that happens, then of course you should raise that. I think I'm
20 suggesting it's somewhat unlikely, given what Ms Berridge has said about the nature
21 of the evidence.

22 MR MACFARLANE: I agree, sir.

23 THE CHAIRMAN: So, look, if we can leave it on that basis, I'm taking it that you're not
24 going to object to the proposal?

25 MR MACFARLANE: No.

26 THE CHAIRMAN: That's helpful.

1 Do you have any questions?

2

3 Ruling

4 THE CHAIRMAN: Ms Berridge, I think we're happy to give you permission. That is
5 strictly limited to the points in the letter and actually I think, just to be absolutely clear,
6 I don't think we're expecting it to go beyond the discussion as we've discussed it. That
7 applies particularly to point 2, where I think we've had a helpful clarification from you.

8 MS BERRIDGE: That's noted, yes.

9 THE CHAIRMAN: But we're certainly not expecting a great deal of material from
10 Mr Hagger and I think we're not expecting a point-by-point rebuttal of things that
11 Mr Macfarlane says about the website. We're expecting a clarification of his position
12 in relation to paragraph 86 of his statement.

13 MS BERRIDGE: Yes, about his own and Deckers' reasoning.

14 THE CHAIRMAN: Yes, yes.

15 MS BERRIDGE: Thank you.

16 THE CHAIRMAN: That's helpful. Thank you very much. We'll make that order.

17 Just on timing on that, do we specify a timing for it?

18 MS BERRIDGE: Yes, there is a proposed timetable. The timetable has moved slightly
19 because there was an extension.

20 THE CHAIRMAN: Yes.

21 MS BERRIDGE: So on the current timetable, which we are due to come to in our list
22 of issues, but it would be, I think, 21 June.

23 THE CHAIRMAN: And that's agreed, is it? Yes. Subject to anything that happens
24 later, we'll assume it's 21 June.

25 MS BERRIDGE: Thank you.

26 THE CHAIRMAN: Good. Thank you. Good.

1 The next item I think is, Mr Macfarlane, your application in relation to further disclosure
2 and KPMG evidence.

3 MR MACFARLANE: Yes.

4 THE CHAIRMAN: Would you like to just outline for us, just remind us what you're after
5 here, and we can then have a discussion with you about it.

6

7 Application by MR MACFARLANE

8 MR MACFARLANE: Yes, sir. I acknowledge I'm not probably the sharpest pin in the
9 box. I have been trying to adduce some of the numbers that have been presented
10 and I asked our finance director to adduce some of the numbers that have been sent.
11 I am confused because I did have a set of numbers given to us in June last year by
12 Mr Henderson.

13 THE CHAIRMAN: Yes.

14 MR MACFARLANE: Those numbers provided in June last year vary wildly from the
15 numbers that were sent on, I think, the 4 April disclosure date by as much as
16 280 per cent, roughly, below what they were a year earlier. In June last year, there
17 wasn't an incentive for the defendant to be too alert to the de minimis argument.

18 So I believe those numbers to be true and I have other reasons to believe that those
19 numbers were true, such as the business presentations that Mr Yates did when he
20 said that 6 per cent of the whole of HOKA's sales were Up and Running's. I therefore
21 worked out what the other 94 per cent were, roughly, and I came to a considerably
22 higher number which was very near to the numbers from June 2023.

23 THE CHAIRMAN: In Mr Henderson's statement, yes.

24 Would you mind if we had look at Mr Henderson's statement? I would quite like just
25 to make sure that I understand your flow through. I don't know if we have it in the
26 bundle here. Shall we just have a look at that paragraph and start with that?

1 MR MACFARLANE: Yes.

2 THE CHAIRMAN: That's probably logically the first thing, isn't it?

3 MR MACFARLANE: It's the back page.

4 THE CHAIRMAN: In the bundle it's tab 19 and I think it's -- actually, sorry, that's the
5 wrong statement. That's in this proceeding, isn't it?
6 Do we have it in the bundle?

7 MS BERRIDGE: I don't believe it is.

8 THE CHAIRMAN: It's not in the bundle. Okay, fine. That's fine.

9 MR MACFARLANE: I have a copy of it with me, sir. I noticed it wasn't in the bundle,
10 so I brought some copies with me.

11 THE CHAIRMAN: How many copies do you have?

12 MR MACFARLANE: Three, sir.

13 THE CHAIRMAN: Do you have a copy on you?

14 MS BERRIDGE: Yes.

15 THE CHAIRMAN: That would be helpful. Do you have one for yourself as well, or
16 just --

17 MR MACFARLANE: Yes.

18 THE CHAIRMAN: Yes. Thank you.

19 MR MACFARLANE: Sorry.

20 THE CHAIRMAN: No, that's fine. Don't worry. That's absolutely fine.

21 MR MACFARLANE: Sorry, I'm going to have to flick through here.

22 THE CHAIRMAN: Don't rush, Mr Macfarlane. We have plenty of time. So don't rush,
23 it's fine.

24 MR MACFARLANE: Sorry about all the --

25 THE CHAIRMAN: Does that have markings on it?

26 MR MACFARLANE: They are just sticky tabs, sir. I have a clean one here.

1 THE CHAIRMAN: That would be better.

2 MR MACFARLANE: My apologies.

3 THE CHAIRMAN: I expect we can probably access it actually if we need to. Is that
4 a clean copy? Yes.

5 MR MACFARLANE: I have two more copies if the panel would like them.

6 THE CHAIRMAN: This has some highlighting on it, I think, Mr Macfarlane. So I think
7 it might be better if we don't actually ...

8 I tell you what we might do: we might have a break for the transcriber, because we
9 should have a break around about now anyway, just to give the transcriber a rest. And
10 while we do that, we'll get hold of copies of it, and then when we come back in
11 10 minutes' time, we can pick up the discussion then. So don't you worry about it.
12 We'll produce our own copies of it.

13 Just before we do that, can I just ask you to have a bit of a think over the break about
14 focusing this discussion down a little bit, because what I would like to be very clear
15 about is what figures we are talking about, not the number but the nature of them.
16 I am not entirely sure I understand what it is that you actually want to see, and I'd quite
17 like to get real precision around that.

18 So, for example, I think -- and I may be mistaken about this -- but I think the number
19 that you're most interested in is the sales of HOKA running shoes alone -- not HOKA
20 products, but HOKA running shoes alone -- by the defendant on an annual basis. Is
21 that right?

22 MR MACFARLANE: No, sir.

23 THE CHAIRMAN: No, it's not. Okay.

24 MR MACFARLANE: My thought process is that I would be able to get a true figure of
25 what the HOKA numbers are if I knew what their other major brand was, which was
26 UGG. They have a number of brands, Teva, et cetera --

1 THE CHAIRMAN: Yes, I understand.

2 MR MACFARLANE: -- which are small, but UGG is a larger portion of their business.

3 THE CHAIRMAN: Can I just stop you for a minute. What are you trying to get the
4 answer to here? Are you trying to get a specific number of sales for HOKA running
5 shoes in the UK? Is that what you're trying to get to?

6 MR MACFARLANE: That's what I'm trying to get to, yes.

7 THE CHAIRMAN: Yes. And they haven't given you that number because they
8 don't -- I think they say they don't produce it in that form; is that right?

9 MR MACFARLANE: They've given me a number of what the HOKA numbers are --

10 THE CHAIRMAN: Sorry, just to -- I'm sorry to interrupt you again, but I just want to be
11 absolutely precise. When you say "the HOKA numbers", do you mean HOKA running
12 shoes or HOKA products? Because as I understand it, they do have other HOKA
13 products which are not running shoes.

14 MR MACFARLANE: I believe it's HOKA full stop, sir.

15 THE CHAIRMAN: Yes.

16 MR MACFARLANE: I think you saw a HOKA range from walking shoes, hiking shoes
17 and running shoes, which we'll admit that the walking and hiking side is fairly small at
18 the side of running.

19 THE CHAIRMAN: Yes, and I think that the defendant's expert has suggested
20 a number, a proportion of that, somewhere in the expert report. So is the problem that
21 you're identifying here that you don't have that number, they've not given that number
22 to you cleanly, so you don't know what HOKA running shoes is, or are you trying to
23 check the number they've given you against something else?

24 MR MACFARLANE: I am trying to check the number that's been given against
25 something else, sir.

26 THE CHAIRMAN: Okay.

1 MR MACFARLANE: Because I have two conflicting sets of numbers, one from this
2 year and one from last year.

3 THE CHAIRMAN: Yes, I see. Okay.

4 Sorry, just one other question for you to have a think about. When you say you've
5 been given the numbers, is that because you've been given them in the table we
6 looked at a minute ago? Have you seen underlying material that shows you, say, for
7 example, management -- have you had disclosure of management accounts that show
8 you that level of detail?

9 MR MACFARLANE: Sir, we produce management accounts on a monthly basis for
10 our business, but we've not seen any management accounts for Deckers UK at all.
11 We've just been given a fixed number: this is it, this is HOKA.

12 THE CHAIRMAN: So you're getting your information by way of summaries, rather
13 than by disclosed documents you can verify the summaries against; is that what you
14 are saying?

15 MR MACFARLANE: I am going by the numbers that were given last year, in the
16 previous case.

17 THE CHAIRMAN: Yes.

18 MR MACFARLANE: And comparing those with what has been sent this year, there's
19 a huge difference.

20 THE CHAIRMAN: No, I understand that point. I think I am asking a slightly different
21 question. I understand you have two points of reference at the moment: you have
22 Mr Henderson from last year --

23 MR MACFARLANE: Yes.

24 THE CHAIRMAN: -- you have what's now being presented to you in appendix 1 in the
25 RFI --

26 MR MACFARLANE: Yes.

1 THE CHAIRMAN: -- and other places. But I am asking you about something slightly
2 different, which is: have you had documents through disclosure which show you, if you
3 like, the raw material from Deckers' accounting process that show you what those
4 numbers are, so you can verify the table to those numbers?

5 MR MACFARLANE: No, sir, we've purely had the table.

6 THE CHAIRMAN: Okay. That's something I might explore with Ms Berridge a bit later.
7 But so far as you are concerned -- and do you see why I am asking this question?
8 Because in the normal course of things, if you were given by the other party some
9 summary data and you wanted to check it, you would say, "Please show me the
10 underlying documents", and the underlying documents would normally be, in my
11 experience, management accounts or something of that sort, which would show -- or
12 they might be sales presentations or things like that.

13 MR MACFARLANE: Yes.

14 THE CHAIRMAN: You would expect --

15 MR MACFARLANE: The sort of thing a bank would ask for.

16 THE CHAIRMAN: Yes, you would expect to see some sort of material that showed
17 you what the business in real time thought was the position for the thing you wanted
18 to check.

19 MR MACFARLANE: Yes.

20 THE CHAIRMAN: That seems to be the obvious thing for us to be focusing on. If you
21 are not convinced that the table is right, and you have some evidence in the form of
22 Mr Henderson's previous document that suggests there's been some inconsistency,
23 then I think that probably the logical thing to do is to say, "Well, let me see how you
24 record this in your business", which is likely to be the most accurate bit of information
25 you get anywhere.

26 I say that because I think I am just trying to think about where your application might

1 most usefully be focused. I am not sure that the answer is by trying to get a big number
2 and take some other numbers away from it. If we are trying to get to the real answer,
3 I think we ought to be saying: what's the best source of truth on the day-to-day running
4 of the company of the defendant's activities that will show us the answer?

5 MR MACFARLANE: I agree, sir, and I want to emphasise at this point that it may well
6 turn out that numbers that Mr Henderson has given on 4 April this year are the correct
7 numbers. I just have inconsistencies --

8 THE CHAIRMAN: No, I understand why you are asking, I completely understand why
9 you are asking. I have looked at Mr Henderson's previous statement and we've seen
10 the difference between that, as you pointed out in your application.

11 So we understand -- if you like, assume you've got us to the point where you've
12 established there's an inconsistency and that there is a decent reason for you to be
13 saying, "I would like to verify that". The question is what's the most useful and practical
14 source to get verification.

15 Obviously we'll explore with Ms Berridge not only the first point, which she may
16 disagree with, but, secondly, she may be in a position to provide us with some
17 information about other ways in which you could get that verification. I don't know how
18 much of this has been traversed in correspondence between you at that level. I also
19 don't know what has actually been disclosed.

20 I am sure Ms Berridge probably doesn't know the answer to that, but I am sure she
21 can take some instructions on it. Perhaps again that's something, Ms Berridge, at
22 least you could make a start on that over the break and be able to help us with that.

23 Can I leave you with those thoughts and then we'll get hold of Mr Henderson's
24 statement --

25 MR MACFARLANE: Yes.

26 THE CHAIRMAN: -- from the County Court proceedings. Then we'll take a break now

1 and we'll resume at 11.45.

2 MR MACFARLANE: Thank you, sir.

3 THE CHAIRMAN: Thank you.

4 (11.33 am)

5 (A short break)

6 (11.47 am)

7 THE CHAIRMAN: Yes, Mr Macfarlane. We have a copy of Mr Henderson's statement
8 from June 2023, so we've had look at that. It might be quite helpful just to take
9 a moment, if we could just start with that. Shall we start there and perhaps work
10 out -- just on this inconsistency point, if you could just explain that to us, yes.
11 I think the numbers in Mr Henderson's statement are not treated as confidential, but
12 when we get to appendix 1, the comparators are. So it might be best not to refer to
13 any numbers at all.
14 What's the best way to deal with it, do you think?

15 MS BERRIDGE: Yes, from our perspective, we would like those to be treated
16 confidentially, which we do realise makes this conversation a little bit difficult.

17 THE CHAIRMAN: Sorry to interrupt. You mean the ones in paragraph 7 of
18 Mr Henderson?

19 MS BERRIDGE: Yes.

20 THE CHAIRMAN: Yes. Was that in your list?

21 MS BERRIDGE: No.

22 THE CHAIRMAN: No.

23 MS BERRIDGE: It's the same --

24 THE CHAIRMAN: Oh, it's the same -- yes. Although --

25 MS BERRIDGE: It's the same information, but it wasn't in the list. So apologies for
26 not specifically calling it out in that list.

1 THE CHAIRMAN: Yes. I mean, it's ...

2 MR MACFARLANE: If it's helpful, sir, I can just refer to them by year.

3 THE CHAIRMAN: I think we will do that. I'm just going to push back slightly with
4 Ms Berridge on that proposition.

5 I think it is a bit difficult if it's been in a witness statement in other proceedings. I don't
6 know whether Mr Henderson gave evidence. It never went to trial, did it, I don't think?

7 MS BERRIDGE: He didn't give evidence in the County Court?

8 DEFENDANT'S TEAM: Correct. He just provided a witness statement.

9 THE CHAIRMAN: Let's park that point. At the moment I don't think that's within the
10 order we've made. So if you want to apply to vary that order, you'll need to do that.

11 I think that there are two problems with that really. One is it's a historic document in
12 another proceeding and that may give rise to different considerations. The second
13 thing is that Mr Henderson now says they're not the right numbers, and so in a way
14 one wonders what is the point of protecting numbers which we all know they're wrong
15 numbers.

16 But I don't think you need to come back on that. I'll just leave that with you.

17 MS BERRIDGE: Thank you.

18 THE CHAIRMAN: I think Mr Macfarlane is happy we'll just avoid numbers all together
19 and do it that way.

20 MS BERRIDGE: Apologies for taking things out of order, but over the short break we
21 have made a little bit of progress in understanding that apparent discrepancy between
22 the 2023 numbers and the more recently disclosed numbers in the confidential annex.

23 THE CHAIRMAN: Yes.

24 MS BERRIDGE: That's not an explanation that we've provided to Mr Macfarlane. So
25 I'll be able to give that to you now. I just don't want to be ambushing with an
26 explanation that's not been provided. I wanted to let you know we've come to a better

1 understanding over the short break.

2 THE CHAIRMAN: Well, that's helpful. Why don't we just make sure we've crystallised
3 the point with Mr Macfarlane and then we'll come back to you, because the way I'm
4 seeing this is there are two questions here. One is: is there any basis to ask you to
5 go further in the provision of information, however that is? And the second is: what is
6 the right information to ask you for?

7 You'll appreciate that my starting position with Mr Macfarlane is: well, let's see what
8 Mr Henderson said and let's see what's now said, which provides, if you like, the
9 inconsistency and, in his argument, the answer to 1. It sounds like you're going to
10 have a go at convincing us there's not a inconsistency we need to investigate, so that's
11 fine. I think we would be interested actually, just for sake of clarity, in whether there
12 might be an easy answer, whether answer 2 might be the easiest way through all this.
13 I also just put down a marker on this that Mr Macfarlane has now instructed an expert,
14 we're expecting an expert report, and at some stage certainly we would expect, by the
15 time we come to trial, the experts would have resolved this issue. This is not an issue
16 I would have thought we ought to be having people fighting on at trial. We ought to be
17 working off a common set of numbers that the experts all agree are right.

18 So I put that marker down and we'll come back to it. But why don't we see where
19 Mr Macfarlane gets to with this, and then we can have that discussion.

20 MS BERRIDGE: Yes, I'm grateful.

21 THE CHAIRMAN: Thank you.

22 So, Mr Macfarlane, I have in front of me Mr Henderson's paragraph 7 and I have the
23 confidential annex 1, which you may -- I think you probably have a summary. Do you
24 want to take us somewhere else? Do you want to do it off your application? Is that
25 easier? If you could --

26 MR MACFARLANE: Yes, I'm just -- the letter I had --

1 THE CHAIRMAN: Yes, your table in there. Do you want to do it off that? Let's do it
2 off that. Does that correspond to the numbers in the confidential annex?

3 MR MACFARLANE: Yes, sir.

4 THE CHAIRMAN: It does. Just remind me: do you know where that is in the bundle?

5 MR MACFARLANE: No, I don't.

6 THE CHAIRMAN: Don't worry, we'll find it. I think it is tab 24. Yes. So we're looking
7 at page 310. Yes.

8 If we just orient ourselves with this. So the first number -- so you have your table,
9 Mr Macfarlane. The first number in 2019 is given there, and that comes directly out
10 of -- we can see that coming directly out of Mr Henderson's statement. That's right,
11 isn't it?

12 MR MACFARLANE: No, sir, I think it's the other way round. The first number is the
13 numbers from June 2023 --

14 THE CHAIRMAN: Yes, that's right, yes.

15 MR MACFARLANE: -- and the second ones are from 5 April.

16 THE CHAIRMAN: 5 April being --

17 MR MACFARLANE: This year.

18 THE CHAIRMAN: The annex?

19 MR MACFARLANE: 2024, yes.

20 THE CHAIRMAN: This thing here, yes.

21 Where do we find it in the table? Second-to-bottom line, 2019, okay. So that's the
22 wholesale figure. So we're talking about the wholesale figure in the table.

23 MR MACFARLANE: Yes.

24 THE CHAIRMAN: Yes, fine. Okay, that's good. Okay. So that is you summarising
25 the difference between what Mr Henderson says in paragraph 7 and what's in this line
26 across here in annex 1; is that right?

1 MR MACFARLANE: That's how I see it, sir, yes.

2 THE CHAIRMAN: Yes. Good, thank you. That's helpful.

3 MR MACFARLANE: I think the point I'm trying to make here is that the difference in
4 the numbers -- although I'm fearful that we may be taken down a pointless rabbit hole
5 and this is not the right time to be arguing the case. But what I'm fearful is that if it
6 were the first numbers, then we would be looking at a figure which exceeds the
7 10 per cent threshold for de minimis, especially -- and I have yet to get clarity on
8 this -- for the date of the cause of action, the damage being caused. My view is that
9 it's the end of 2021, when we were deprived of product. Everything before that was
10 negotiation, effectively.

11 So the damage caused to the business was in 2021, so the relevant year for
12 calculating the de minimis threshold would be 2020, in my view. And therefore the
13 numbers are so vastly different that it would take us over the 10 per cent threshold
14 and that particular rabbit hole would not need to be gone down.

15 THE CHAIRMAN: So just pausing there for a minute. You're talking about the
16 de minimis notice --

17 MR MACFARLANE: Yes, sir.

18 THE CHAIRMAN: -- and we obviously have the vertical block exemptions as well.

19 MR MACFARLANE: Yes.

20 THE CHAIRMAN: And they have a different number: they have 15 per cent in them,
21 don't they?

22 MR MACFARLANE: Yes, sir, except for horizontal competitors --

23 THE CHAIRMAN: Yes.

24 MR MACFARLANE: -- which we are.

25 THE CHAIRMAN: Yes.

26 MR MACFARLANE: It therefore sticks at 10 per cent --

1 THE CHAIRMAN: Yes, okay. Yes, yes.
2 I'm just looking at your table on the letter in front of you. So you're saying that -- and
3 I appreciate -- I'm not asking you to commit to a position. These are really matters for
4 trial, as to whether or not you're right about what year is the right year or whatever it
5 is, and I don't want to put you in a position where I'm pinning you down at the moment.
6 But just exploring that for a minute. If you look at the 2020 line, obviously there is
7 a substantial difference between the two figures.
8 MR MACFARLANE: Yes.
9 THE CHAIRMAN: Are you saying that using the larger figure on the left --
10 MR MACFARLANE: Yes.
11 THE CHAIRMAN: -- you get above 10 per cent? That's what you're saying. Where's
12 your calculation for that? Do we see that anywhere?
13 MR MACFARLANE: I don't have those workings with me.
14 THE CHAIRMAN: That's a different question. What number are you putting on the
15 bottom for that? Where do you get the number you put on the bottom for that?
16 MR MACFARLANE: You mean the actual market size?
17 THE CHAIRMAN: Yes.
18 MR MACFARLANE: Yes. Well, I'm going by the expert's report of 220 million in total.
19 THE CHAIRMAN: Yes, he gives these different bands, doesn't he?
20 MR MACFARLANE: Yes. And when we combine Up and Running's turnover with
21 Deckers' turnover of HOKA product, then my calculations show that we go above the
22 10 per cent margin.
23 THE CHAIRMAN: Okay. Is that the right calculation for the vertical block exemption
24 as well?
25 MR MACFARLANE: Yes, sir.
26 THE CHAIRMAN: Can we just have a look at --

1 MR MACFARLANE: Chapter 3.

2 THE CHAIRMAN: Yes, 269, I think, or -- sorry, tab 23. Let's just have a look at the
3 expert report, Dr Majumdar. Do you have that in the bundle? That's tab 23.

4 MR MACFARLANE: Page what, sorry, sir?

5 THE CHAIRMAN: Tab 23, page 271. Or actually I think, yes, 272, in fact, at the
6 bottom of paragraph 84, isn't it?

7 I think he concludes that the total relevant market is somewhere between 410 million
8 and 142 million.

9 MR MACFARLANE: Yes, sir.

10 THE CHAIRMAN: Obviously you're going to put in your own expert evidence on this,
11 so this is all to play for. I'm not suggesting that you're accepting any of this or anything
12 like that.

13 But what you are doing is you're then putting your -- so treating that as the market,
14 which you're comparing not just the sales that we see in Mr Henderson's statement
15 for 2020 but you're adding to that your sales for 2020 as well.

16 MR MACFARLANE: Yes, sir.

17 THE CHAIRMAN: Okay. That's the methodology. Right. Okay.

18 You say it matters, therefore, whether you're adding the left-hand column or the
19 right-hand column for 2020: it makes a difference.

20 MR MACFARLANE: Yes, sir, it does. So there will be further challenges, which I know
21 we're not going to hear here, on the numbers that the expert has done.

22 THE CHAIRMAN: Yes.

23 MR MACFARLANE: That would be icing on the cake, so to speak, if I persuaded you
24 so; but if not, I am working on worst case scenario. Therefore the numbers that I am
25 looking for clarification on are crucial in this case to me being able to calculate exactly
26 what the market share of both parties is.

1 THE CHAIRMAN: Yes. So just moving on, assume that you have persuaded us that
2 there is an inconsistency that needs to be investigated further. Back to the discussion
3 we had before the break: what's the best way to do that? I think we don't see that it's
4 obviously the way you've necessarily set out here, because it does seem us to it would
5 be much better to go back to the source material in the company than just try and build
6 it from another number which we don't know the provenance of.

7 MR MACFARLANE: I think to be fair, in order to get clarification, sir, I would be quite
8 comfortable in whichever way that comes. And maybe just a statement of truth from
9 KPMG, rather than a subpoena to have them appear or do a statement, although if
10 there is a cost involved in that, we of course will stand that cost. It just enables us to
11 all be clear and know the direction of travel from here onwards if we get much more
12 clarification for that.

13 I have some concerns about the value of a statement in truth that's already been
14 declared because of the variation of numbers.

15 THE CHAIRMAN: Yes.

16 MR MACFARLANE: So therefore maybe just a statement of truth from KPMG; and
17 any costs involved, we will of course stand.

18 THE CHAIRMAN: Just putting aside the costs for a minute. So the point of going to
19 KPMG is you're effectively asking them to provide an independent third party --

20 MR MACFARLANE: Yes, sir.

21 THE CHAIRMAN: Do you anticipate that they will have that information already from
22 the work they've done or are you suggesting they need to do some more work? Or
23 maybe you don't know the answer to that question.

24 MR MACFARLANE: I would have thought it's a button-pressing exercise, sir, by any
25 auditor. It is for ours. All the information must be there with them. They can't draw
26 up accurate year-end accounts without knowing the finer detail from management

1 accounts.

2 The reason I'm not standing here particularly asking for management accounts,
3 although I think that would clear the matter up, is because I totally appreciate that
4 management accounts, like ours, drill into the business with highly confidential
5 information and I don't want to put the defendant through that particular course. I think
6 the simplest course would be quite simple: to ask KPMG to do a statement of truth.

7 They will have those numbers.

8 THE CHAIRMAN: Well, I'm not sure it is the simplest course, and I will explore this in
9 a minute. It seems to me that KPMG are going to go back to the source material
10 anyway -- they have done or will do -- and actually it seems to me that what is most
11 useful for us is to go to the source material.

12 So I'm really putting that to you as perhaps a better suggestion than getting KPMG
13 involved. I can see from your point of view why there might be something to be said
14 for having KPMG come in and effectively verify the position; I understand that. But
15 actually from our point of view, I think we're most usefully served by having the best
16 evidence we can get, which in this case would actually be the underlying reporting
17 material that has been made available to the auditors, management and indeed
18 anybody else.

19 MR MACFARLANE: I am quite comfortable to go along with your wisdom, sir.

20 THE CHAIRMAN: So if we were to end up -- and obviously we'll have to hear
21 argument about it and no doubt be told that there are lots of reasons why no order is
22 necessary. But if we were to end up in that place, you wouldn't object?

23 MR MACFARLANE: No.

24 THE CHAIRMAN: You just want to make sure you have a mechanism to go to some
25 material that gives you some proper verification of this numbers.

26 MR MACFARLANE: And, indeed, sir, there may be from the lady here another

1 explanation, but I would say it's probably hearsay (several inaudible words).

2 THE CHAIRMAN: Well, no, I think obviously we're very interested in hearing what has
3 been said about this. But I understand the point you're making: that you want that on
4 a proper evidential basis. I understand that.

5 Good. Is there anything else you want to say about that at the moment? I'm going to
6 ask Ms Berridge to comment and then I'll come back to you for any further
7 observations if that's necessary.

8 MR MACFARLANE: Yes.

9 THE CHAIRMAN: Good. Okay, thank you.

10 Ms Berridge.

11

12 Submissions by MS BERRIDGE

13 MS BERRIDGE: Thank you.

14 So first in relation to this discrepancy between the numbers in Mr Henderson's
15 statement in 2023 and the numbers in this confidential annex that you have in front of
16 you. You do have our apologies that this explanation wasn't provided earlier, and so
17 does Mr Macfarlane, and we'll be very happy to put those in in evidence properly. But
18 I would like to take a moment to explain our understanding as it is now.

19 So if I could ask you to look at Mr Henderson's statement from 2023, paragraph 7. He
20 says:

21 "Deckers' sales of HOKA in the UK were approximately ..."

22 And then he gives a series of numbers with years.

23 So just to make sure we're referring to the correct line, the line that Mr Macfarlane has
24 put in his letter from this confidential annex is the fourth line of numbers, marked
25 "Wholesale", but in fact what Mr Henderson was referring to was "Total HOKA UK
26 sales". So that would be the fourth line of numbers in the confidential annex.

1 THE CHAIRMAN: Just give us a minute to have a look at that.
2 So 2019 -- well ... I'm looking at the confidential annex. "Request 2", the line
3 "Request 2", is that where I should be looking? Total --
4 MS BERRIDGE: Yes, that's the total comparable number. That's the discrepancy that
5 we're dealing with, in fact, between that line and the numbers in the witness statement.
6 I just want to get that correct.
7 THE CHAIRMAN: Yes. And there's a discrepancy still, isn't there?
8 MS BERRIDGE: Yes.
9 THE CHAIRMAN: Because the number for "FY18" is not the same as the number
10 given for 2018. Now, there may be reasons for that as well, but ...
11 MS BERRIDGE: Yes, I wanted to start from the right place before we give our
12 explanation.
13 THE CHAIRMAN: Yes.
14 MS BERRIDGE: So what has happened is that the financial year for Deckers ends in
15 March. So in this confidential annex, when it says "FY18", it's referring to the year that
16 ends in March 2018. And what Mr Henderson was doing in his witness statement from
17 2023 was referring more loosely to the years. So the financial year that ends in
18 March 2018 is actually much more in 2017. So he is referring to that as "2017".
19 So it is an unfortunate way of referring to the years --
20 THE CHAIRMAN: I'm sorry to interrupt you. Would you just say that again? So when
21 he says the number for 2018, doesn't that mean for the calendar year 2018? Is that
22 what you're saying? Sorry, I think I misunderstood.
23 MS BERRIDGE: No, I apologise. It's a bit tricky.
24 So in this confidential annex, we have the numbers for the financial year 2018, and
25 that would be the year ending March 2018.
26 THE CHAIRMAN: Yes.

1 MS BERRIDGE: And obviously most of that period is actually in 2017.

2 THE CHAIRMAN: Yes.

3 MS BERRIDGE: What's happening in this witness statement -- and I agree it's not
4 ideal -- is that Mr Henderson is still using the financial year numbers, but as a shortcut
5 for talking about what year it is, he doesn't call that year "2018", he calls it "2017",
6 because most of it is in 2017.

7 THE CHAIRMAN: Well, he doesn't say "2017" at all.

8 MS BERRIDGE: Yes, I apologise, I've given a wrong example.

9 THE CHAIRMAN: No, fine. No, don't worry, I'm not criticising; I'm just trying to get to
10 the bottom of it.

11 So when he says "2018", what is the period that he's talking about in paragraph 7?

12 MS BERRIDGE: He is there talking -- he says -- sorry, can you repeat the question?

13 THE CHAIRMAN: When he gives a 2018 figure --

14 MS BERRIDGE: Yes.

15 THE CHAIRMAN: -- what is the period that he now says he was referring to in
16 paragraph 7?

17 MS BERRIDGE: He now says that he is referring to -- when he says "2018", what he
18 means is the financial year that is mostly in 2018, but is in fact March 2018 to
19 March 2019, which then appears in the confidential annex as "FY 2019".

20 THE CHAIRMAN: Yes. So the "2018" number is from March 2018 to March 2019?
21 Mr Henderson is shaking his head behind you: I don't know whether that ...

22 MR HENDERSON: Am I allowed to ...?

23 THE CHAIRMAN: No, you're not. Well, talk, yes, but not to us. Thank you.

24 MR MACFARLANE: Sir, if I can be helpful, I believe it's the other way round: counsel
25 is saying that the numbers for 2018 are actually 2017 numbers.

26 THE CHAIRMAN: That would be more consistent, wouldn't it?

1 | Look -- yes, Ms Berridge.

2 | MS BERRIDGE: I'm so sorry, I have misspoken. In the witness statement, the
3 | numbers obtained were estimates for calendar years.

4 | THE CHAIRMAN: For calendar years.

5 | MS BERRIDGE: But it does --

6 | THE CHAIRMAN: So, sorry, just to be clear then. So we're talking the "2018" number
7 | is a January to December 2018 number. Yes, okay.

8 | MS BERRIDGE: So the best comparator when you're looking at the financial year
9 | numbers for 2018 is in fact the one that appears in the confidential annex's financial
10 | year 2019, because most of that is in 2018.

11 | THE CHAIRMAN: Yes.

12 | MS BERRIDGE: And when you move the numbers along by one year, the discrepancy
13 | almost disappears.

14 | THE CHAIRMAN: Yes. Okay, I can see that.

15 | So, Ms Berridge, is there any -- if we can just jump -- forget about the inconsistency
16 | for a moment. It seems absolutely vital that we're not having this dispute at trial, and
17 | there seems to be no reason why we should be. And clearly we are going to have two
18 | experts engaged. I don't know whether Mr Macfarlane's expert is yet identified by
19 | name, but hopefully somebody who is familiar with this process and can deal with your
20 | expert.

21 | So this needs to be sorted out somehow, doesn't it? And I do think that it would be
22 | surprising, given what's happened and given the importance which Mr Macfarlane has
23 | attached to this, if we're not dealing with some source material.

24 | MS BERRIDGE: Yes.

25 | THE CHAIRMAN: Of course, as I understand it, your expert hasn't sent us source
26 | material, as far as I understand it from the report. I may be wrong. But on the face of

1 | it, it looks like his instructions have been to assume annex 1 is the right material. Now,
2 | I may be wrong about that, but that's certainly my reading of it, our reading of it.

3 | Is there any reason why we or the experts are not being given access to source
4 | material? Like, for example, management accounts, which is telling you the answer.

5 | MS BERRIDGE: Perhaps I could come on to that.

6 | THE CHAIRMAN: Yes.

7 | MS BERRIDGE: So in this confidential annex, in the final column, the "Comment",
8 | there are references to disclosure documents, the documents marked "STBS".

9 | THE CHAIRMAN: Yes.

10 | MS BERRIDGE: Those disclosure documents are the raw output from the financial
11 | system at Deckers that was used to create this summary here. So they are the Excels
12 | that, as we understand it, pop out when you ask the Deckers financial system: what
13 | was this number? It pops out as an Excel. And those Excels are disclosed, those
14 | reference numbers, and then from those Excels this summary table has been
15 | produced.

16 | THE CHAIRMAN: That's helpful.

17 | I note that the document that's said to tell us the answer to all this is actually one of
18 | the documents in your list in tab 25 and one of the documents which we agree should
19 | be made confidential. Maybe I misunderstood you, but I thought that I asked you
20 | whether it was a source material and actually I think I had the impression it wasn't.
21 | But is that because it's a spreadsheet produced from system for the purpose of this
22 | exercise? Is that the reason for that?

23 | MS BERRIDGE: Yes, I think some of these were produced earlier, before we had the
24 | very specific list of things that the tribunal asked to be disclosed.

25 | THE CHAIRMAN: Yes.

26 | MS BERRIDGE: So that's why there are different ones, because they came at

1 different times.

2 THE CHAIRMAN: Yes.

3 MS BERRIDGE: But they are the source. And as we understand it, they are the
4 documents that pop out from the Deckers system.

5 THE CHAIRMAN: Yes. So that's helpful.

6 I don't know if you know the answer to this question, but I would anticipate that there
7 would be some management accounts which would tell us the answer to this pretty
8 quickly and would not involve the need to interrogate the system. Is that an easy way
9 through this?

10 MS BERRIDGE: It may be. What we have not been able to do over the very short
11 break is ascertain whether these numbers in this form are reported regularly and as
12 a matter of course in the management accounts.

13 THE CHAIRMAN: Yes.

14 MS BERRIDGE: So I'm not able to give you that answer today.

15 THE CHAIRMAN: Well, I'll tell you what where I think we are.

16 We're going to have an expert appointed by Mr Macfarlane to come and do some work
17 on this.

18 So far, your expert hasn't carried out an exercise of verification of the numbers, as
19 I understand it. I have to say that's not actually entirely consistent with what we would
20 expect. I would have thought as an expert he ought to be carrying out some degree
21 of verification.

22 What I think we would like to see happen is the experts satisfy themselves as to the
23 source material and agree that, so there's no dispute on this matter when we get to
24 trial. Of course, it may be they can't do that, but that would seem to be a slightly
25 surprising proposition.

26 Now, I'm not completely sure -- I mean, there are different ways of doing that. We can

1 make an order that effectively gave access to the system in some way, or we could do
2 it on the basis of the production of some documents. I would much rather do it on the
3 basis of production of documents because I would have thought that there would be
4 some sensitivity and some practical issues about giving a third party access to the
5 system. One way of dealing with that might be for your expert to have gone through
6 that exercise and be able to be questioned about it and indeed to discuss it with
7 Mr Macfarlane's expert.

8 So there are a number of different possibilities here. But the one possibility I think
9 that's not open at the moment, certainly I think as we're inclined, is that we would like
10 this exercise of verification to take place in some way.

11 MS BERRIDGE: Thank you. Yes, I'm grateful.

12 Perhaps the easiest way through this is for us to obtain instructions as to what would
13 appear in the management accounts and whether disclosure of those would offer
14 a way to verify and interrogate these numbers here. And if not, we will, I suggest,
15 consult with Dr Majumdar and see if we can find a way -- perhaps when
16 Mr Macfarlane's expert is identified -- a way that they can, as you suggest, interrogate
17 the numbers and come to an agreed position, so that we're not having this
18 conversation at trial.

19 THE CHAIRMAN: Thank you. Just give us a minute. (Pause)

20 Ms Berridge, just before I go back to Mr Macfarlane, just to put to you where I think
21 we're likely to end up on this, or where I think we are on this.

22 Rather than make an order for any specific disclosure at this stage, I think we're
23 minded to say this is a matter which we expect the experts to progress and resolve,
24 and therefore we will, when we get to that point in the next point on the agenda, make
25 a direction that the experts need to address this point, they need to identify and satisfy
26 themselves as to the source material; in other words, leave it to them to fulfil their

1 responsibilities to us in order to get that right.

2 Now, that might be any of the courses you've suggested. And I think in doing that, we
3 are going to rely on -- just to be absolutely clear, this needs to be an agreed position
4 as between the two of them. So they're going to have to get together and work out
5 what's the best way to satisfy themselves so that they can come here and tell us that
6 they're satisfied, and they need to agree on that. Of course, if they can't agree it, then
7 we'll have to deal with their disagreement. What I don't want to do is find that we've
8 come to trial where they have that disagreement and it hasn't been resolved.

9 That observation applies to clarity about what the top line of the calculation is. Now,
10 there may be some differences of principle as to what goes into that top line, but we
11 do not want any differences of data, if I can put it that way, as to which numbers go in,
12 depending on the principles.

13 MS BERRIDGE: That's understood, yes. Thank you.

14 THE CHAIRMAN: It also applies to the bottom line. And if we could just look
15 quickly -- I'm slightly off the subject, but just to make sure we're clear about it, so I don't
16 forget the point.

17 If you look at page 272, back to 272, and paragraph 84 of the expert report. That
18 range of numbers, I think it would be very helpful if the experts were to direct their
19 discussions to that as well, and to seek to agree whatever they can.

20 Again, it may be that they have different views on the right answer. It may be that
21 Mr Macfarlane's expert takes a different approach. But one way or another, we don't
22 want to get to a trial without there at least having been a proper airing between the
23 experts of what the bottom of the equation should look like, or the market, the
24 reference point there. The more they can narrow that down, obviously the more helpful
25 it is to us.

26 I'm going to suggest that to Mr Macfarlane. If we were to leave it on that basis, I'm not

1 sensing you're pushing back on that?

2 MS BERRIDGE: No, I think it would be sensible for the experts to discuss the issues,
3 but in particular those issues, so that, as you suggest, there may be differences of
4 principle but there isn't an argument about data at trial.

5 THE CHAIRMAN: Yes, thank you. That's very helpful.

6 Mr Macfarlane, I don't know, did you follow that? Would you like me to do it again?

7 MR MACFARLANE: No, I followed that.

8 THE CHAIRMAN: How does that leave you? I appreciate it's not what you asked for,
9 but I think it does give you the essence of what you've asked for, which is we're going
10 to make sure that we get rid of these issues as to what the right numbers are because
11 we're going to go back to the source data in a way that your expert can be satisfied
12 that it's appropriate. In a sense we're using your expert, if you like, instead of KPMG
13 to do the validation.

14 That may require a little bit of management because I don't think you can just walk into
15 Deckers' office and go on the table and have a look at things; or at least not
16 necessarily. It may have to come to that. But between the two experts, they ought to
17 be able to responsibly, given their duties to the tribunal, be able to resolve this issue.
18 If they can't, then there needs to be a very good reason for that, which no doubt will
19 emerge before the trial.

20 Would you be comfortable if we were to not grant your application today, but instead
21 make a direction for the experts to proceed in that way when we get to expert agenda?
22

23 Reply submissions by MR MACFARLANE

24 MR MACFARLANE: Yes, sir.

25 One other thing that does puzzle me slightly is that I have actually been asking since
26 February of this year, in at least ten emails to the solicitors representing the defendant,

1 for information, for a simple answer to the question of "How big are your other major
2 brand?", so I can compare the two and come up with a market share.

3 THE CHAIRMAN: Sorry to interrupt. Just pause there.

4 Why is that going to help us though? We've been round this a little bit. I know if you
5 have a bigger number for total sales, you can take that out and you get to this number
6 as a cross-check. But actually, if we do what we've just discussed, you're not going
7 to need a cross-check because you're starting from the bottom up and you get the
8 right number.

9 Is there another reason why you want to see these other brand sales?

10 MR MACFARLANE: Yes, sir, and that's because I believe the numbers were plucked
11 out of the air, and I believe that any numbers are manoeuvrable if you really wanted
12 them to be manoeuvred.

13 All I need to know at the end of the day is how big the UGG brand is, and compare
14 that as a percentage of sales of the HOKA sales, and I will therefore -- because all the
15 brands together will amount to 100 per cent of their sales. So once I've seen what
16 those are, then I should be able to have an accurate calculation of exactly what the
17 HOKA sales are, which is what this tribunal is focused on.

18 THE CHAIRMAN: So is this because you want to use the cross-check that goes back
19 to the 6 per cent; is that the point?

20 MR MACFARLANE: More or less sir, yes.

21 There has been, in various communications backwards and forwards -- and witness
22 statements from Mr Yates, who was at pains to say that these numbers that he
23 produced for this presentation were "Approximate", with a big A for "Approximate".
24 But I would say that that isn't quite true, sir, because in those days we were feeding
25 HOKA, Deckers, with our sales numbers every single day, so they know exactly what
26 our sale numbers were, and I think the figure of 6 per cent is absolutely accurate.

1 THE CHAIRMAN: Mr Macfarlane, I understand why a cross-check is interesting and
2 helpful to you. I'm not sure how interesting and helpful it is to us, because at the end
3 of the day we have to decide what the actual sales figures are, the two parts of the
4 equation we've been talking about.

5 It seems to me that what Mr Yates thought the position was and might have told you
6 in your calculation is not as interesting to us as what the real position is that the actual
7 systems show. Because it's just a question of fact as to what the sales are; it doesn't
8 matter what Mr Yates thought, or indeed what Mr Henderson thought, other than it
9 gives rise to a question of consistency.

10 So once we've been through an exercise where the experts have verified from the
11 source what the actual sales numbers are, I don't think we are very interested in
12 anything else.

13 MR MACFARLANE: I agree with you, sir, to a certain extent. But I would say that the
14 history so far with the experts, the joint expert that both parties are paying for, I would
15 have expected at least a phone call from the expert to have at least checked our
16 numbers as well for the market share, but I didn't get one.

17 THE CHAIRMAN: Sorry, but I think we're slightly at cross-purposes. There is no joint
18 expert.

19 MR MACFARLANE: No, it's not a joint expert, no. I agree, sir. But there is an order
20 for us to share the costs of that expert.

21 THE CHAIRMAN: Well, I don't think there is actually. I think there was some
22 discussion about that, but I don't think --

23 MR MACFARLANE: Senility kicks in on my part.

24 THE CHAIRMAN: No, don't worry. No, it's fine. There are awful lot of things that have
25 happened that we all forget about.

26 But just so I'm clear about that, have you instructed an expert, a separate expert?

1 MR MACFARLANE: I can't instruct an expert until I have some more accurate
2 numbers to work from.

3 THE CHAIRMAN: Well, I think you can, because I think the first job of that expert is
4 to have a discussion with Dr Majumdar and work out what the right source material is.
5 So I wouldn't worry about that.
6 Do you have somebody in mind?

7 MR MACFARLANE: I do have somebody in mind, sir, yes.

8 THE CHAIRMAN: Yes.

9 MR MACFARLANE: I'm going to be working purely with an economical expert; I'm not
10 going to go down the avenue of the veracity of the shoes and the quality of the shoes.

11 THE CHAIRMAN: So you're just looking at the numbers, that's all you're going to ask
12 the expert to do.

13 MR MACFARLANE: Yes.

14 THE CHAIRMAN: I would have thought that you could do that quite quickly and I think
15 you should be getting on with that. I can't remember, what date did we give you to
16 serve that?

17 MR MACFARLANE: 21 June.

18 THE CHAIRMAN: Well, you're getting quite short on time and I think you need to get
19 on with that.

20 MR MACFARLANE: Yes, I agree.

21 THE CHAIRMAN: That's right. And I think what I'd like you to do is I'd like you to give
22 them this report from Dr Majumdar and ask them to start their exercise by agreeing
23 with Dr Majumdar what the source material shows in relation to the total sales that
24 we're talking about here.

25 MR MACFARLANE: Yes.

26 THE CHAIRMAN: So that would be the very first step for you to do.

1 MR MACFARLANE: Yes.

2 THE CHAIRMAN: Once that expert has that, then the second bit of the job for them
3 is to look at what's said in paragraph 84 and the material that underlies
4 that -- Dr Majumdar's statement -- and then to see whether they can agree that as
5 well.

6 At that stage we'll have a pretty good indication as to how far apart the experts are.
7 And that should be on basis of some analysis of principle rather than some argument
8 on data, because they should be able to work out what the data is.

9 MR MACFARLANE: I will do that, sir. The reason I haven't progressed that was
10 because I didn't know to what extent it was our position to be questioning the experts
11 before we get to the trial.

12 THE CHAIRMAN: No, that's fine. Don't worry. I'm conscious that this is all new stuff,
13 so don't worry about that. Hopefully you'll get the transcript of this and you'll be able
14 to look back.

15 Just so I am absolutely clear with you, I think the first step is: retain your expert. Do
16 you know, is it someone who has given expert evidence before?

17 MR MACFARLANE: An accountancy firm, yes.

18 THE CHAIRMAN: Yes. Good, okay. Well, they hopefully will be familiar with their
19 responsibilities to the tribunal.

20 MR MACFARLANE: Totally unconnected.

21 THE CHAIRMAN: Yes.

22 So if you give them this report and ask them to focus on two things. One is working
23 out what the total sales figure they should start with is, and they should approach
24 Dr Majumdar and have that conversation with him as soon as possible, and have
25 a discussion about how they are going to satisfy themselves about what the right
26 number is to use for that. Then secondly, they should be looking at paragraph 84 of

1 Dr Majumdar's report and working out how they're going to satisfy themselves they
2 can reach agreement or not agree on what's in that paragraph about the size of the
3 total market.

4 MR MACFARLANE: Yes.

5 THE CHAIRMAN: Once they've done that, we'll know, hopefully, that there is
6 agreement on the numbers and any difference of opinion as to what should go into the
7 numbers.

8 MR MACFARLANE: Yes, sir.

9 THE CHAIRMAN: Is that clear?

10 MR MACFARLANE: Yes.

11 THE CHAIRMAN: Do you have any questions?

12 MR MACFARLANE: No. It will be done this week, sir.

13 THE CHAIRMAN: Very good. Okay. That's very helpful.

14 On that basis, I would suggest that I think we might just stay your application.

15 MR MACFARLANE: Okay.

16 THE CHAIRMAN: Because if there turns out to be a problem in this process and your
17 expert can't make the progress I've just discussed, then obviously we'll revisit it.

18 MR MACFARLANE: Yes.

19 THE CHAIRMAN: But for present purposes, I don't propose to decide it today. We'll
20 just make a direction to the experts, which is basically what I've just said to you.

21 MR MACFARLANE: Will I be able to apply should we not make any progress on it?

22 THE CHAIRMAN: Yes, so if your expert finds that, for whatever reason, it's not
23 possible to do what I've just said, whether that's because Dr Majumdar won't
24 participate or because your expert is not satisfied that the defendant is producing the
25 right material or whatever it is, then you should come back to us. But I would expect
26 you to do that with very specific reference to what the expert says.

1 MR MACFARLANE: Yes.

2 THE CHAIRMAN: So I would expect you to come back and say, "I have been told by
3 my expert they are not getting any traction because of these things". I don't want
4 a letter from them or anything like that, but I want you to be telling us what they say,
5 rather than you coming along and just giving us a view.

6 MR MACFARLANE: Yes.

7 THE CHAIRMAN: So I want the expert to decide whether this is working or not, not
8 you. Does that make sense?

9 MR MACFARLANE: Yes, it does, sir. Should I expect some sort of communication
10 from the expert on the other side?

11 THE CHAIRMAN: No, other than the report. You mean --

12 MR MACFARLANE: Our turnover was wildly out because nobody asked me about
13 our franchisees --

14 THE CHAIRMAN: Yes.

15 MR MACFARLANE: -- where we have probably another 30 per cent in our turnover
16 that isn't in the -- it looks to me like they've just gone to company accounts, but we
17 have group accounts for the franchisees, which adds considerably more to our
18 turnover, which has that effect on the de minimis argument.

19 THE CHAIRMAN: Yes. Obviously your expert will be able to deal with that. That's
20 a point of principle. We're now talking about a point of principle. That's a question as
21 to what properly goes into that top line.

22 MR MACFARLANE: Yes.

23 THE CHAIRMAN: That may turn out to be a point of law actually, rather than a point
24 of accounting, but we'll see. And if you say that Dr Majumdar has that wrong, then
25 obviously you'll be able to cross-examine him at trial about that and put to him what
26 the numbers are that you say should be in there. So I wouldn't worry too much about

1 that at the moment. Obviously your expert should explore that if you want to.
2 I think the most important thing at the moment is that there is the interaction between
3 your expert and Dr Majumdar, so that we can make sure this is being taken forward
4 and so your expert can produce something in writing to be served within 10 days' time.
5 It's pretty critical that's done, because if not, it's getting far too close to the trial.

6 MR MACFARLANE: Yes.

7 THE CHAIRMAN: And either we'll say it's too late to put it in or we might have to
8 adjourn the trial, and I don't want to do either of those things. So I'm afraid it's definitely
9 skates on time for --

10 MR MACFARLANE: Yes.

11 THE CHAIRMAN: But it's a pretty narrow scope, isn't it, I think --

12 MR MACFARLANE: Yes.

13 THE CHAIRMAN: -- if you're just focusing on the numbers. And we have the very
14 helpful report from Dr Majumdar which has set out lots of data and information which
15 I would have thought would be very helpful for an expert coming in.

16 MR MACFARLANE: Yes, okay.

17 THE CHAIRMAN: Okay? Thank you. You can sit down.

18

19 (Ruling given but reserved for approval)

20 THE CHAIRMAN: I think that deals with that point, Mr Macfarlane. Let's see how we
21 get on with the experts and hopefully we'll get some clarity through that.

22 Next item on the agenda: directions through to trial. I have a few things that I wanted
23 to pick up. I don't know whether -- Mr Macfarlane, did you have anything particular
24 you wanted to say about this, or shall we ask Ms Berridge to deal with it?

25 MR MACFARLANE: Apologies, sir --

26 THE CHAIRMAN: No, don't worry. We're just moving on to the next item,

1 Mr Macfarlane, which is the directions through to trial.

2 MR MACFARLANE: Yes.

3 THE CHAIRMAN: I don't know whether you have anything particular you want to say
4 about that before we get on to the subject? Is there anything you on your mind about
5 the directions?

6 I wonder if it might be more efficient to ask Ms Berridge just to deal with any points
7 she has, and I have a few points, and then I'll come back to you and just make sure
8 you're happy with that.

9 MR MACFARLANE: Yes.

10 THE CHAIRMAN: Thank you.

11 MS BERRIDGE: Thank you.

12 If you would like to turn to page 405 in the bundle, we have in correspondence
13 canvassed an amended set of directions through to trial which take account of
14 a seven-day extension that Mr Macfarlane asked for in relation to reply evidence.

15 THE CHAIRMAN: Yes.

16 MS BERRIDGE: So that's the proposal between the parties. We've had no objections
17 to that. So it might be a useful place to start. That's on our understanding at this point
18 of how we will get from here to trial.

19 THE CHAIRMAN: Yes. It gets quite tight, doesn't it, at the back end?

20 MS BERRIDGE: Yes.

21 THE CHAIRMAN: I suppose the thing that jumped out for me when I saw this -- and
22 I did see this when your solicitors sent it in and didn't object, so it seemed to me to be
23 sensible. But I suppose the thing that jumped out is the question of the bundle and
24 where we are with that.

25 What's the current state of it? Well, maybe first question: normally the claimant would
26 be doing that, but I got the impression that the defendant was taking carriage of it; is

1 that right?

2 MS BERRIDGE: Yes, that's our understanding, that it will be more straightforward for
3 the defendant to deal with that and to share the costs.

4 THE CHAIRMAN: I think that's very helpful. Thank you for that.

5 Do you have a sense of where that is at the moment? Or rather perhaps a more open
6 question: are we confident that these dates are going to work?

7 MS BERRIDGE: Yes, we have confidence that we can produce a bundle in this
8 time frame.

9 THE CHAIRMAN: Presumably it's not huge. I'm not asking you to give me an
10 estimate, but I would be surprised if it was a very large bundle. Good. Okay.

11 So now we do need to fit into here the experts, don't we?

12 Sorry, just before we move off the bundle -- and I think probably I don't need to get
13 into this -- but obviously we would expect the witness statements to be
14 cross-referenced to the bundle and so on. I just want to make sure that's the
15 expectation. I see nods behind you as well. Really more a question -- I wasn't
16 completely sure who was going to be doing it, but I wanted to make sure that it's done
17 in the usual way. I'm sure you have a vested interest in that as well.

18 MS BERRIDGE: The witness statements?

19 THE CHAIRMAN: Yes.

20 MS BERRIDGE: Yes.

21 THE CHAIRMAN: And indeed the expert reports if necessary, but particularly the
22 witness statements. Good.

23 The expert process, where do we fit that into here? Obviously you're not going to get
24 that from Mr Macfarlane until the 21st.

25 What I would like to do -- there's clearly a discussion to be had between them. I think
26 I've made it plain in the order I've just given what we're expecting of them, and in

1 discussion with Mr Macfarlane, and hopefully we don't need to record any of that.
2 There's no need to record initial discussions and so on, but what I would like to do is
3 to put in here a formal meeting and some output from that. I'm hoping that can be
4 done very efficiently because I don't think the scope is going to be huge, particularly
5 when they've sorted out the data. But I think it would be quite helpful to have from
6 them a succinct statement of the key points that they think are in issue and of course
7 what they agree.

8 Can we put some dates in for that? I think from our point of view we are not too
9 bothered if it turns out reasonably close to the trial because we're not expecting it to
10 be a very big document. I think the bigger problem is really for you in terms of
11 skeletons and whether you feel the need to know the output of that before you draft
12 your skeleton. That's probably the tight bit of it, isn't it?

13 MS BERRIDGE: Yes. There is about a month between receiving the claimant's expert
14 report and the start of trial, so we need to fit in there a meeting between the experts
15 and then production of a joint issues statement in good time.

16 We don't have Mr Majumdar's diary in front of us today, so I don't think we can put
17 those dates in, but I think we can take that away and try and deal with that in
18 correspondence. We'll obviously have to take account of the availability of the
19 claimant's expert as well. If there is any scope to receive that report earlier, then it will
20 be easier to fit in.

21 THE CHAIRMAN: I think given where we are and the discussion we've just had, that
22 may be wishful thinking. But obviously that's a fair point.

23 I think we're happy to leave it with you, on the basis that there are about three weeks,
24 aren't there, between the expert evidence arriving and the date on which
25 Mr Macfarlane needs to put his skeleton in? So it really probably needs to happen
26 pretty smartly at the end of June, doesn't it, dependent on diaries?

1 MS BERRIDGE: Agreed.

2 THE CHAIRMAN: The meeting and then obviously something very quickly thereafter.

3 So I think you're right. Rather than binding people whose diaries aren't here -- well,

4 I think we can give an indication, can't we, that the meeting needs to happen before

5 the end of June, doesn't it, if at all possible? So the 28th is last working day in June.

6 That only gives Dr Majumdar a week from receiving the report to digest it, but I don't

7 think, from the sound of it, it's going to be a big document.

8 I appreciate you have no sense of that, but does that sound unreasonable as

9 an expectation?

10 MS BERRIDGE: It is tight, but I think it is not unreasonable. We would need to consult

11 his diary. But assuming he's not away in that period, that should be achievable. The

12 issues are relatively defined.

13 THE CHAIRMAN: Yes. Let's leave it as expectation rather than a direction.

14 MS BERRIDGE: Understood.

15 THE CHAIRMAN: And obviously the consequential report would follow pretty shortly

16 after that.

17 Good. Okay. Is there anything else we need to talk about in relation to the directions

18 to trial?

19 MS BERRIDGE: Not from me.

20 THE CHAIRMAN: Can I ask you one other thing: transcript, live transcript.

21 MS BERRIDGE: Yes.

22 THE CHAIRMAN: Obviously we have the transcript provision here, but that comes

23 overnight.

24 MS BERRIDGE: Yes.

25 THE CHAIRMAN: I rather suspect you would quite like to have it available live if it was

26 available, and we certainly would like that too, and I'm sure Mr Macfarlane would

1 benefit. The difficulty, of course, is no doubt the money.
2 But I wondered if somebody could investigate that. Really I think it's a question of
3 proportionality. So if it turns out to be very expensive, and therefore not proportionate,
4 then we would accept that. I think we have a preference to have it if it's available and
5 not too expensive.
6 MS BERRIDGE: Yes.
7 THE CHAIRMAN: I imagine you would probably have a preference for it if you can
8 have it.
9 MS BERRIDGE: Yes.
10 THE CHAIRMAN: We're happy to leave it with the parties to discuss that and whether
11 it is proportionate or not, but I just wanted to get your reaction to that.
12 MS BERRIDGE: Thank you. I think we'll take that away and investigate the cost and
13 speak with Mr Macfarlane and perhaps write with our joint proposals, if possible.
14 THE CHAIRMAN: Yes, good. Thank you.
15 MS BERRIDGE: But the indication is helpful, thank you.
16 THE CHAIRMAN: Good. Okay. Thank you very much.
17 Mr Macfarlane, just on this timetable. Obviously it's been agreed, I think you're happy
18 with it. We've talked a bit about squeezing the expert process into it. Are you happy
19 with that? It means it is quite tight. What I'm concerned is that you have to put
20 a skeleton in -- we'll talk about that in a minute -- you have to put a skeleton argument
21 in on 8 July.
22 MR MACFARLANE: Yes, I'm about halfway through that now.
23 THE CHAIRMAN: Good.
24 I want to make sure the expert process doesn't come so close to that that you don't
25 have time to properly reflect what you want to say in your skeleton. But I think that it
26 probably should be manageable if the experts meet by around about 28 June and then

1 they produce a document for us, which will be a joint statement from them about the
2 things they agree on and the things they don't agree on.

3 Again, I'm hoping that's going to be a very short document, and hopefully with lots of
4 agreement in it. But that's quite a helpful output for us. So that's the critical document
5 that I think you want to finalise your skeleton.

6 So that probably is going to come a few days before your skeleton. You might have
7 to have a bit in your skeleton you do at the last moment. Are you happy with that?

8 MR MACFARLANE: I'm perfectly comfortable with that, sir, yes.

9 THE CHAIRMAN: I think it does underline the need to get your experts going as soon
10 as possible and as vigorously as possible.

11 MR MACFARLANE: Understood.

12 THE CHAIRMAN: Good, thank you.

13 Then just on this question of the trial bundle. Are you familiar with how this process
14 works? Do you want me to tell you a bit about it?

15 MR MACFARLANE: I think at the last CMC it was discussed and we -- this I'm certain
16 about -- we did agree to pay a contribution towards the defendant to produce the
17 bundle --

18 THE CHAIRMAN: Yes.

19 MR MACFARLANE: -- and see what's here. I can't do that.

20 THE CHAIRMAN: Yes. And look, I think it's very helpful of the defendant to be willing
21 to do that: it makes life easy for all of us. Normally we would expect you to do it, and
22 therefore clearly I think it is entirely fair that the defendant asks you to pay half the
23 costs of it, which I think is the proposal.

24 MR MACFARLANE: On that point, I would like some approximation --

25 THE CHAIRMAN: Absolutely. I'm sure they can give you a sense of what the costs
26 are of the preparation of it.

1 MR MACFARLANE: Yes.

2 THE CHAIRMAN: Of course, in a way, all these costs go into the wash as well, as
3 you'll be aware, and you know what the cost position is generally in relation to whether
4 you win or whether you lose. So it's probably more of a cash flow point than a --

5 MR MACFARLANE: Absolutely, sir. And I was aware that at one of the CMCs,
6 Ms Patel mentioned something about £25,000 for that CMC, and I nearly fell through
7 the floor at that prospect; and yourself, sir, you said, "I'd like to see a breakdown of
8 that". So I would hope that we're not going to be clobbered with something like
9 40 grand's worth of costs for our share of the bundle.

10 THE CHAIRMAN: That would be a surprising number for what is going to be quite
11 a small bundle, I think. But the reality, Mr Macfarlane, is we have to have a trial
12 bundle, and unless you're going to do it, which I think probably you're not, you need to
13 pay your way on it.

14 MR MACFARLANE: Yes.

15 THE CHAIRMAN: Of course, if you think it's an unreasonable cost, then you're entitled
16 to challenge that, as you would any lawyer's charges. There is a mechanism for that.
17 And I'm sure that the defendant's solicitors are going to be very mindful of that and
18 they will want to be as efficient as they can, for their own client's sake as well as for
19 yours.

20 I suppose the point I'm making to you is that you're not committing to an open-ended
21 and unchallengeable commitment, because you do have recourse if you think it's
22 unreasonable. But you are in a process which you've initiated where we have to have
23 one and someone has to pay for it.

24 MR MACFARLANE: Yes, sir, understood.

25 THE CHAIRMAN: So hopefully that will --

26 MR MACFARLANE: I'm not threatening, I just want to make it clear --

1 THE CHAIRMAN: No, no, I understand. No, I completely understand. No, that's
2 understood.

3 Just to be clear with you, you need to make sure that in your exchanges with them
4 about that, all the documents you want in that bundle are notified to them and are in
5 the bundle.

6 MR MACFARLANE: Yes.

7 THE CHAIRMAN: That's not sort of a completely absolute rule. So if you turn up and
8 say on the second day of trial, "I've found a document I really must deal with", there
9 might be a bit of an argument about that, Ms Berridge might not like it very much, but
10 in the circumstances, you're unlikely to be shut out if it's important, but we're not going
11 to be very pleased with you. So you need to make sure you've used every endeavour
12 you can to get every document you think you might want at the trial into the bundle.

13 That's not invitation to kitchen-sink it. I want you to be realistic and sensible about it.
14 But please do apply your mind as to: what are the things I need to ask questions of
15 the witnesses about, what are the things I want to show the tribunal, and therefore
16 they need to be in the bundle so that everybody knows they're coming and everybody
17 has access to them at the right time and the right place.

18 Does that make sense?

19 MR MACFARLANE: Yes, it does. I'm just looking for the date of the bundle.

20 THE CHAIRMAN: They're going to give you a draft on 21 June and you have a week
21 to turn that around.

22 MR MACFARLANE: Okay.

23 THE CHAIRMAN: So we need you to use your very, very best efforts to make sure
24 that you've given them, in the draft index, reference to anything you think sensibly
25 needs to go in there.

26 MR MACFARLANE: I have everything electronically filed, sir; it just needs --

1 THE CHAIRMAN: The way it will come to you, it will be a list of documents, most likely
2 just by reference to date and description of the document. I imagine that's how it's
3 going to turn up.

4 So you're going to have to do a bit of work. You need to put aside some time to make
5 sure that you've been able to check against your electronic documents what's in that
6 index, because they're not going to take kindly to you sending them a whole lot of
7 references that they have to do a lot of work on. That will add to the cost that they
8 charge you for.

9 So if you want an efficient process you don't need to spend a lot of money on, you
10 need to do the work and give them a really clean list of the documents in the same
11 format as they've given to you, so there's no doubt about what you want in the bundle.

12 MR MACFARLANE: Fully understood, sir, and we will be working on that (inaudible).

13 THE CHAIRMAN: Yes, good. Thank you. I'm afraid it's not the most exciting task,
14 but it is terribly important to the conduct of the trial and making it work within the days
15 we've specified.

16 MR MACFARLANE: Okay, thank you.

17 THE CHAIRMAN: Good. Okay, thank you.

18 Then just the last point: you will have picked up what I said about a transcript. I don't
19 know whether you're familiar with this, but in a trial, quite often what you'll find is that
20 instead of getting a transcript at the end of the day, which you've seen before -- we
21 get a transcript from our transcript provider -- what we quite often have is someone
22 who produces it in real time, so you can see it on the screen in front of you.

23 That can be really helpful if you're asking questions, as you will be doing and
24 Ms Berridge is doing, and really helpful us to sometimes, because we can look back
25 up and see what --

26 MR MACFARLANE: What was said.

1 THE CHAIRMAN: -- was said. And if there's argument about what was said, then we
2 can all look at that and we don't have to rely on anybody's note or recollection.

3 Now, that is all well and good, except that it's not necessarily cheap, and there's
4 a question as to whether it's worth spending the money. And that's a decision, I think,
5 that you and the defendant need to reach some conclusion on, and if you're not
6 comfortable with it, then we probably aren't going to end up having one. But I think
7 the expectation would be that you would share the cost, if you were going to have one.
8 So I'm afraid it's another cost that goes into the pot.

9 MR MACFARLANE: If it gets us to the end of the trial in an efficient manner, I'll be
10 more than happy with that, sir.

11 THE CHAIRMAN: Well, have a look and see what the -- I think probably the easiest
12 thing, the defendant is more likely to know where to go and how to get the options, so
13 they will give you some options. If you're uncomfortable with the cost, you're entitled
14 to say no. It's not a must-have, it's a nice-to-have. But it's quite nice to have from our
15 point of view and I think you might find it quite helpful.

16 MR MACFARLANE: Absolutely.

17 THE CHAIRMAN: So, for example, you would be able to -- if we have a lunch break
18 and you've been asking questions, you're going to be able to go back and have a look
19 and see what has just been said to you. That sort of thing can be quite helpful.

20 But it all boils down to how much it's going to cost. I have no idea. It may be an
21 enormous amount of money, in which case you're quite entitled to say, "No, thank
22 you".

23 MR MACFARLANE: Thank you, sir.

24 THE CHAIRMAN: Okay?

25 MR MACFARLANE: Yes.

26 THE CHAIRMAN: Good. Is there anything else about the timetable from here to trial

1 that you want to ask about?

2 MR MACFARLANE: No, sir. I stand for that and I knew it was tight, but that's my fault,
3 falling ill for a week, shoving it back. But I'm quite comfortable that it's --

4 THE CHAIRMAN: Good. No, these things happen. I think it's quite manageable, as
5 long as everybody gets on and does what they need to do.

6 MR MACFARLANE: Thank you.

7 THE CHAIRMAN: Good, thank you.

8 Ms Berridge, I think that's it, isn't it, in terms of the agenda, apart from item 7?

9 MS BERRIDGE: Yes.

10 THE CHAIRMAN: Just before we get on to that, I just want to ask you just a few
11 questions about the disclosure, and I am conscious that these may not be things that
12 you have very much in mind.

13 There's one question, which is aside from the documentation. I wasn't sure -- there's
14 a reference to another witness statement from Mr Henderson in the County Court.
15 I hadn't appreciated there were two. I had slightly an impression from something
16 I read somewhere that there was some uncertainty about its provenance, about
17 whether it should or shouldn't be in these proceedings. I don't know whether it has
18 any relevance.

19 So maybe I've misread that somewhere. I just want to --

20 MS BERRIDGE: It doesn't ring a bell and I don't see anyone behind me suggesting --

21 THE CHAIRMAN: Mr Henderson is shaking his head, which suggests that he doesn't
22 know about it either.

23 Anyway, I just wanted to make the point that if there is a -- I suppose I was coming
24 back to this point about the use of the documents in the proceedings --

25 MS BERRIDGE: Yes.

26 THE CHAIRMAN: -- which obviously there was a bit of a fight about earlier. It seemed

1 to me that it's actually not something that should apply to a document which is in your
2 possession which might be relevant.

3 So if there is another witness statement, it ought to be disclosed; and then of course
4 if it is in these proceedings, it can be used. I just didn't want there to be any
5 misunderstanding about it that.

6 So can I leave that with you just to check that there's nothing else like that. I suppose
7 it may apply more generally to the County Court proceedings. I'm conscious that these
8 are things that Mr Macfarlane may not have picked up and I just want to make sure
9 we have proper disclosure, which I'm sure the solicitors sitting behind you have done
10 lots of hard work on. I just want to make sure that point has been addressed.

11 MS BERRIDGE: Thank you. We'll take that away and go back to the County Court
12 proceedings and see if there is anything we want to have a second look at.

13 THE CHAIRMAN: Yes, good. Thank you.

14 Then just dealing with document retention. I think we were all quite struck by the
15 witness statement from -- is it Mr Tiller?

16 MR MACFARLANE: Yes.

17 THE CHAIRMAN: Yes, Mr Tiller's witness statement.

18 I suppose I'm really putting down a bit of a marker rather than anything else. It did
19 seem to us to be, firstly, shall we say, quite an aggressive document management
20 policy and that's because that's what it is, but I wasn't entirely sure I understood the
21 ambit of this because I think that Mr Tiller is talking about emails. He may be talking
22 about more than that. But it wasn't clear us to what the consequence of that was for
23 the records that the defendant has in relation to dealings with the claimant.

24 Obviously it may well be that there are a whole lot of emails that say everything -- we
25 know that Mr Yates says, "Well, I might have some emails, but they might have gone".

26 Is that as far as this goes, or does it apply to other things? Like, for example, is there

1 a document repository that deals with -- I think you've told us about some information
2 that records dealings with retailers. Is that all recorded in emails and have they all
3 gone? Or are there other document repositories that Mr Macfarlane has had access
4 to about dealings between the two entities?

5 Now, I don't expect you know the answer to any of that. I suppose I was left with some
6 uncertainty as to what the extent of the document management policy was and
7 therefore what the consequence of that was for the disclosure and therefore what the
8 consequence was for the pool of documents we are going to see at trial.

9 I certainly haven't looked at the exhibits to the witness statements. But I am a little bit
10 nervous that we may not have access to a lot of documents we would expect to have,
11 quite aside from the emails where we understand the position.

12 MS BERRIDGE: Yes, so it would be useful if we could provide some clarification about
13 the specific -- I noticed that it's described as the email retention policy, so whether
14 that's a retention policy that is confined to emails or goes wider. But I think your
15 question goes a bit beyond that and it says: have we looked in all of the relevant places
16 for documents that could be relevant to the issues in this case?

17 THE CHAIRMAN: Well, I think I am assuming -- unless somebody tells me otherwise,
18 I am assuming that it has happened.

19 MS BERRIDGE: Yes.

20 THE CHAIRMAN: And that is the exercise you've carried out. I suppose what I am
21 concerned about is that we may find there are some large empty spaces in that
22 because this is more than just an email retention policy, and it would be helpful I think
23 just to have a better understanding -- maybe put this a slightly different way, given the
24 email retention policy, and we have no visibility of the disclosure, what has the impact
25 been on that in terms of other documents, if any impact at all? I suppose when you
26 think about this, you know, in the ordinary course you might expect somebody like

1 Mr Yates to keep a lot of the documents that matter in his email account.

2 MS BERRIDGE: Yes.

3 THE CHAIRMAN: So, for example, if someone emails him a note about
4 a conversation with Mr Macfarlane or he has a conversation with Mr Macfarlane and
5 emails a note, that might be the place that most people keep that note as an
6 attachment to an email, but then that begs the question as to whether there's anywhere
7 else this material gets stored? Are there retailer specific share point sites or whatever
8 it happens to be?

9 I am not asking for chapter and verse about the disclosure and whether it's been done
10 properly. I am assuming it has been done properly. What I would like to have is just
11 a little bit of a preview as to what the implications of this document disclosure policy
12 are for the population of documents we like to have in front of us. Because, at the end
13 of the day, quite a lot of this case is going to be about things that happened and what
14 people did and the decisions they made, and the documents are obviously pretty
15 important over the passage of time as being an anchor point for those recollections. I
16 am not sure -- I would quite like to know a little bit more about that before we actually
17 lurch into the trial on that.

18 MS BERRIDGE: Thank you. So perhaps some form of descriptive note that talks
19 about, as you say, the impact of this retention policy. Because if it is the case, as you
20 have suggested, that most of the records that would have been relevant to these
21 issues are in emails or attached to emails and have gone as a result of the policy, then
22 it would be useful to have that described and to understand whether there were
23 alternative places and therefore what you can expect to see when you look in more
24 detail at the disclosed documents.

25 THE CHAIRMAN: Yes, I think that's exactly it. It may be that we can't do anything
26 about it, but at least I would quite like to know that before it turns out -- I don't want to

1 | be having this discussion in the middle of some -- when Mr Macfarlane is asking -- it
2 | probably won't be Mr Henderson because I think he's in a different position, but when
3 | Mr Hagger is being asked questions and we just don't know why he hasn't got the
4 | documents that Mr Macfarlane is asking about. All of that I think is better aired
5 | beforehand than in the middle of cross-examination.

6 | MR DERBYSHIRE: Can I ask a specific question about the email retention policy.
7 | Mr Tiller's statement does say that you can make a business case to actually have
8 | a folder to store important emails, so it would be interesting to know if Mr Henderson
9 | or Mr Hagger or Mr Yates had that facility.

10 | MS BERRIDGE: Yes, of course. We will -- I think that might be covered in
11 | Mr Henderson's statement, but I don't want deal with these things on the hoof and get
12 | them wrong.

13 | THE CHAIRMAN: I think Mr Henderson did indicate that there were different rules for
14 | the lawyers and so I think he indicated that he might have had a different position.
15 | I am not sure we know the answer in relation to Mr Yates and Mr Hagger, but it's
16 | precisely that sort of -- I think that's precisely the sort of thing that it would be quite
17 | helpful to know how -- really with the impact on this case and the way in which the
18 | evidence is likely to come out. I think you've got the ...

19 | MS BERRIDGE: I have. Thank you. That's very helpful.

20 | THE CHAIRMAN: Thank you very much. Mr Macfarlane, do you want to say anything
21 | about that?

22 | MR MACFARLANE: Very briefly, sir. It was a point I was going to question Mr Tiller
23 | about, the question. The trial date may be too late to get the clarification. So I much
24 | appreciate you bringing that to the fore because it was on my mind during --

25 | THE CHAIRMAN: Good. You will certainly have the opportunity to ask Mr Tiller about
26 | it, if you haven't had those issues clarified.

1 MR MACFARLANE: Yes.

2 THE CHAIRMAN: I am anticipating we are going to get a letter from the defendant's
3 solicitors. If you have any observations on that or have any questions or anything
4 arises out of that, of course you should raise that because the time to trial is quite tight.
5 I think what I am trying to avoid is all of this blowing up at trial because what is very
6 unhelpful in trials is somebody realising that either there are documents that should
7 be in front of people but aren't, or just a very unsatisfactory discussion about there not
8 being documents without anybody understanding the context. So I am trying to cut
9 through that a bit earlier on.

10 MR MACFARLANE: I was concerned, sir, about selecting points in the (inaudible),
11 but I am quite happy with your (audio distortion) position.

12 THE CHAIRMAN: Good. Thank you. Excellent. Thank you.

13 I am just conscious that we have reached 1 o'clock. We are at the last item on the
14 agenda, unless anybody else has anything that pops out. It might be most efficient, if
15 the parties are happy, just to keep going for 10 minutes. Would anybody object to
16 that?

17 MS BERRIDGE: I would be happy with that.

18 MR MACFARLANE: Yes, sir.

19 THE CHAIRMAN: Can I just check that the transcriber -- let's see whether I receive
20 any objection from the transcription service to that, if they wouldn't mind doing another
21 10 minutes. Apparently not. I think we would have heard if there was. We are grateful
22 to everybody for that. Thank you.

23 Mr Macfarlane, I just wanted to explore with you this item 7. I think Ms Berridge has
24 invited me just to say a few things to you about how this is going to work and make
25 sure that we are all on the same page.

26 What I would like you to do is if I am telling you things you know the answer to, then

1 | just tell me. But I just want to try and give you a little bit of a roadmap as to how this
2 | is going to work. It might be quite helpful if we go back to the timetable which I think
3 | is back at tab 3. If you want to have a look at that at tab 3. I am just going to talk
4 | through with you just how this -- you may know all this and indeed actually we
5 | might -- you should tell me if you know it, but I just want to make sure you have a clear
6 | understanding of how these different pieces fit together and what we are expecting of
7 | you in that.

8 | This may again be something you want to go back and have a look at the transcript
9 | because it's probably quite a lot of information that you won't absorb straight away, but
10 | it's really just to make sure that you have a sense of your role in relation to each of
11 | these bits and also just some of the areas where it might go wrong if we are not careful
12 | about it.

13 | Is that okay? Do you mind if I just do that?

14 | MR MACFARLANE: Yes.

15 | THE CHAIRMAN: I think actually we start before the timetable which is the skeletons.
16 | We haven't actually -- that reminds me, Ms Berridge, we haven't said anything about
17 | the length of skeletons, have we?

18 | MS BERRIDGE: No, we haven't. I know there's a practice direction.

19 | THE CHAIRMAN: Yes.

20 | MS BERRIDGE: I think we assumed that if we need a few more pages we'll write to
21 | you nearer the time.

22 | THE CHAIRMAN: Yes.

23 | MS BERRIDGE: But it may be useful to explain about the page limits.

24 | THE CHAIRMAN: Yes. So normally we impose page limits. I am actually going to
25 | have to remind myself, could you remind me of the practice? So normally it's 20 pages,
26 | but for a trial it might be longer, might it not? Does it say anything about that? We

1 maybe both have to remind ourselves.

2 MS BERRIDGE: I believe it's 20 pages, unless there are multiple claimants or
3 defendants.

4 THE CHAIRMAN: Yes.

5 MS BERRIDGE: So it would be 20, I think.

6 THE CHAIRMAN: Yes, exactly in this case. So we would normally restrict you to 20
7 pages for your skeleton.

8 MR MACFARLANE: Okay, sir.

9 THE CHAIRMAN: Also, when I say 20 pages it's in the format of the skeletons that
10 you've seen previously --

11 MR MACFARLANE: Yes.

12 THE CHAIRMAN: -- from the defendant's counsel. Your type I think is quite a lot
13 smaller and quite a lot tighter, and we don't want 20 pages of that, we want 20 pages
14 of whatever -- there is a practice direction which explains all this, so if you wouldn't
15 mind having a close look at that.

16 MR MACFARLANE: Which practice direction?

17 THE CHAIRMAN: It's on the website. If you look, there is a practice direction about
18 the length-- I will make sure that the referendaires just direct you towards that, but we
19 specify the size of the font, right down to that.

20 MR MACFARLANE: Yes.

21 THE CHAIRMAN: Because what we don't want you doing is packing 20 pages with
22 lots of stuff you can't read.

23 MR MACFARLANE: No.

24 THE CHAIRMAN: What that means is you really have to cut to the chase in the
25 skeleton, and we are expecting you to deal with that -- typically that would involve
26 something of an overview of the case, a summary of your position, if you like, and then

1 | you would explain to us what the legal principles are, and clearly you may feel you can
2 | do that to some extent but obviously you may also expect us to help you with that and
3 | indeed Ms Berridge.

4 | MR MACFARLANE: I will be fine with that, sir.

5 | THE CHAIRMAN: But then we will also want you to deal with the real issues in the
6 | case and what you say the answers to them are.

7 | MR MACFARLANE: Yes.

8 | THE CHAIRMAN: And clearly you are not going to be able to deal with every point in
9 | 20 pages, so we want you to focus on the big picture points that make a difference.
10 | I think obviously that involves the question of what's the basis on which supply ceased
11 | to you, what's that all about, it doesn't amount to what you say it does and what do
12 | you say about their arguments about and, equally, this question of the application of
13 | the vertical block exemption and the de minimis notice and so on.

14 | A good way to do this is to go back to the defendant's defence and have a look at the
15 | issues that they've popped up and just make sure you've covered -- you are dealing
16 | with the main arguments that you think they are putting up in your skeleton.

17 | MR MACFARLANE: Yes, sir. So a question really is in the skeleton therefore I won't
18 | be dealing with arguments of the witness statement, for instance, which I think is 100
19 | pages long in the case of Mr Hagger and therefore it's going to be fairly tight for me to
20 | get 20 pages --

21 | THE CHAIRMAN: I think we'd like to know what your high level position is, but we are
22 | not asking you to deal with all the points of Mr Hagger. That's not what this is about.
23 | The point of the skeleton is to give us a really good roadmap to what you say are the
24 | key issues in the case and what the answers are. This is not your detailed argument.
25 | You will get a chance at the end -- you will see this in a minute, we are going to have
26 | some closing submissions -- you will get a chance at the end to explain to us what the

1 answer is by detailed reference to the evidence. There's not much point in doing that
2 beforehand because you are going to ask Mr Hagger a whole bunch of questions and
3 you are going to want to reflect the totality of his evidence to us when we get to the
4 end.

5 So the skeleton is just setting the scene for us, what's this case about. Of course we
6 know that, but we want you to give us a pithy summary of what the case is about and
7 what are the key issues we need to focus on and what do you want, what are the
8 things you are asking us to give you at the end of it.

9 MR MACFARLANE: Okay.

10 THE CHAIRMAN: Okay?

11 MR MACFARLANE: Yes, sir.

12 THE CHAIRMAN: I think you will find the 20 page discipline will help you focus on
13 those things. We are not asking you to rehearse all of the arguments and particularly
14 not the detailed arguments in the skeleton. That's not going to help us. We want the
15 signposts to the big points and then that will help us when we get to the next bit, you'll
16 be able to explain how it all fits together.

17 MR MACFARLANE: And I can keep case law out of this as well.

18 THE CHAIRMAN: Yes, I think it would be helpful if you have cases -- if you want to
19 put the legal propositions, then you should do so. It's a document that we are then
20 going to expect you -- if you then go on to this timetable in front of you, you see that
21 first thing that happens is your opening submissions. So you have an hour where we
22 are expecting you to stand up and take us through that skeleton, and at that stage you
23 might well want to expand on it. You might want to give us some examples from
24 Mr Hagger's witness statement. We don't want you, again, to do a forensic exercise
25 of going through all of it, but you are setting the scene for us and you are trying to
26 persuade us -- get us into the mindset as to why you should succeed in this case.

1 Ms Berridge is going to stand up and do the opposite and say: no, all the things you
2 said are wrong and actually this is the answer.

3 Now, again, you have an hour and 15 minutes to do that. We will hold you strictly to
4 that time because that's quite enough for the exercise. You will probably find that's
5 quite enough for you too. But, again, we want you to be looking at key issues, key
6 points, not getting down into the detail too much.

7 MR MACFARLANE: I am planning on using flashcards, that sort of thing, to prompt
8 myself.

9 THE CHAIRMAN: Exactly. Precisely. Indeed, most people operating in this way will
10 have a typed script, or at least something approaching that, that they will use for their
11 opening submission. I would very much encourage you to -- in a way, you could have
12 your skeleton, the long version of your skeleton in which you will undoubtedly get it
13 right, and then you can contract that down to 20 pages and you can use the long
14 version as your script when you come and talk to us for an hour. That's not a bad way
15 of doing it. You do it however you like, but I think that's probably not a bad way to
16 think about that.

17 What we don't want you to be doing is giving evidence, and there is a really important
18 point here that is quite difficult for everybody in this case which is that you don't have
19 an advocate for you. When you stand up we need to be really clear up about when
20 you are an advocate and when you are actually giving evidence about what happened.
21 To be fair to everybody in the room, including us, because we have to write
22 a judgment, but also to Ms Berridge and her client, you have to draw the distinction
23 that when you are standing up and talking about things you are not giving us evidence
24 about what happened. That's a bit odd, I know, because you've given a witness
25 statement and you are a witness. But in order to make that work you have to put
26 yourself a bit in the third person. Does that make sense?

1 So when you do your skeleton and opening submissions, we don't want you turning
2 up and saying this happened because I was there and these people did this, they did
3 that. We want you to say, evidence based: you will see that on such and such a date
4 Mr Yates rang Mr Macfarlane -- by all means, do it in the third person if you want to,
5 to make it easier -- and you'll see that document at page 555 of the bundle.

6 So that's the exercise of separation we want you to do. I appreciate it's a bit difficult
7 and there will be times when you get it wrong, and when you do we'll remind you that
8 you are not giving evidence here, you are acting as an advocate.

9 MR MACFARLANE: Sir, I am old enough and ugly enough to be able to be put back
10 in my place if I overstep the margin and don't become offended.

11 THE CHAIRMAN: Thank you. It's not an easy thing to do and I won't be doing it
12 unless I feel I have to, but I do want you to understand the context of it.

13 MR MACFARLANE: Yes.

14 THE CHAIRMAN: And that's just because when you go and give evidence we need
15 to have a compartment around your evidence, so we all know this is the evidence that
16 Mr Macfarlane gave when he was a witness and therefore that's what you can rely on
17 in an argument, that's what Ms Berridge can rely on in an argument, that's what we
18 can put in the judgment. We don't want any confusion about whether something in
19 your skeleton or something you said when you turned up to do your opening
20 submissions is somehow part of your evidence.

21 So you are going to have to stick very much in the opening submissions to the
22 documents, what's in the bundle, so the witness statements, the expert reports, the
23 documents, and in a way you are telling us, you are giving us the roadmap as to what's
24 there, warning about what's coming, you are going to hear this evidence, this is what
25 Mr Macfarlane, I, am going to say. You can see that in my witness statement. But
26 make sure you are very disciplined about keeping to the documentary record, including

1 the witness statements, when you are giving us submissions as an advocate.
2 Obviously when you go and sit in the witness box as a witness actually you are going
3 to be asked questions rather than you speaking freely and then you have to answer
4 the questions and that becomes your evidence. They are two quite different things.
5 It's a quite difficult concept and you need to think a bit about it. As I say, you are bound
6 to get it wrong, so don't worry too much.

7 MR MACFARLANE: These two will help me through on that.

8 THE CHAIRMAN: Have a look at the transcript again, just to rehearse this. If you are
9 uncertain about it, you should ask, either before or at the trial, and we can talk about
10 it again or we can get you some assistance with that.

11 MR MACFARLANE: Yes.

12 THE CHAIRMAN: But I think just as a guiding path, to distinguish the two different
13 jobs you are doing, when you are the advocate you are relying on the record in front
14 of the tribunal, you are pointing stuff out, you are cross-referencing everything, this is
15 the evidence in the case because it's in Mr Hagger's witness statement or wherever it
16 is.

17 MR MACFARLANE: Yes.

18 THE CHAIRMAN: When you are giving evidence, you are being asked to tell your
19 story and we want you to tell your story as you saw it and remember it.

20 MR MACFARLANE: Okay, thank you.

21 THE CHAIRMAN: So that's the tricky bit. I think we can move on quite quickly after
22 that. Once you've given us your explanation in the opening submissions, Ms Berridge
23 will then stand up and she'll do the same thing from the defendant's point of view.
24 Then the first thing that happens after that is you'll go and sit in the witness box and
25 you'll give evidence, so that's when you are going to flip across to give evidence.

26 Now I just want to be really clear with you, and this applies to the defendants as well,

1 we don't want all sorts of new evidence coming in late at the last moment. You've put
2 your witness statements in and actually we expect that to be what we call the
3 evidence-in-chief.

4 Now obviously if you are asked questions by Ms Berridge and the proper answer is
5 something that's not in your witness statement, that's fine, tell us what the answer is.
6 But what I don't want you doing is turning up and making speeches in the witness box
7 about either why you are right, because at that stage we are only interested in what
8 you saw, heard, did. You stop being an advocate when you go in there and you start
9 being a witness, and we want to know what your recollection is and people will ask
10 you questions about the documents and so on.

11 So what I am very keen is that there should be no what we call extended
12 evidence-in-chief. You'll be shown your witness. If there is anything you want to
13 correct, you should say so. Normally your counsel will do that, but I will ask you those
14 questions. Then I will hand you over to Ms Berridge and she'll start asking you
15 questions. You have to answer as best you can, as truthfully as you can. I am sure
16 we'll have questions to ask you.

17 At the end of that, there is a bit of a complicated bit where normally you'd be expected
18 to have your lawyer tidy up anything, ask you questions about things you've missed
19 out. Frankly, I am not sure how we're going to do that because that's not an easy thing
20 for you to do in any circumstances. I think maybe we might just see how that goes.

21 There's in principle an opportunity for you to be what's called re-examined, but
22 obviously you can't re-examine yourself, it's a bit of an odd thing to do. So that's
23 probably the hardest thing, and I must confess I am not sure what the answer to that
24 is at the moment, Ms Berridge may have some views on it, but we'll deal with that and
25 we'll manage that at time.

26 Just so you know, that's sort of the process. Does that make sense?

1 MR MACFARLANE: Yes.

2 THE CHAIRMAN: It's an odd process, but it sort of requires you to wear two different
3 hats and take one off and put another one on for different purposes.

4 MR MACFARLANE: Yes, I have seen that -- I am sure I have seen a Monty Python
5 sketch that covered that.

6 THE CHAIRMAN: There's bound to be some laughter as it happens, I am sure.

7 When you've given evidence, I think you are the only witness from your side, then
8 Ms Berridge will call her witnesses. Again, they are not going to say very much other
9 than what is in their witness statements, unless there are corrections or vital new
10 information that's come out, and then you are entitled to ask questions.

11 MR MACFARLANE: Yes.

12 THE CHAIRMAN: I am not going to tell you how to cross-examine. It's not an easy
13 thing to do, but I am sure you will be taking advice from people, trying to learn a bit
14 about how it works and so on. What you need to do I think is just remember that you
15 are trying to get evidence out of a witness. So you are not about -- and you do have
16 an obligation to put your case to them so they understand what you are saying and
17 therefore they have the chance to respond to it. So I want you to feel that you have
18 had a chance to ask them about the issues, but this is not about an argument about
19 whether you are right or not.

20 MR MACFARLANE: I agree, sir, yes.

21 THE CHAIRMAN: Particularly when you are no longer part of this as a witness, you
22 have your advocate hat back on, and what you should be trying to do is to get
23 admissions or bits of evidence that are important to you in order to make submissions
24 to us at the end. That's the key point.

25 Again, I won't hesitate to help you with that and direct you if I think you are going in
26 the wrong way and you shouldn't take it the wrong way. You might feel a bit frustrated

1 | if I say that you shouldn't be asking that question, but if I do there will be a reason for
2 | it and I will explain it to you and I will try and direct you into a way in which you can
3 | address the subject without getting into difficulty, but sometimes that might just be
4 | a little bit tricky, but we'll manage it though I am sure.

5 | MR MACFARLANE: Yes, I'm sure we'll manage it, sir, and, as I say, if I need
6 | correcting I need correcting.

7 | THE CHAIRMAN: Then, after we've done that, we do the same again with the experts.
8 | So your expert will go into the witness box and Ms Berridge will be entitled to
9 | cross-examine. You will be entitled to ask some supplementary questions; that's a lot
10 | easier because you are no longer the witness. And then the reverse will happen: the
11 | defendant's expert will go into the witness box and you'll be able to ask your questions
12 | about their report, again trying to extract the concessions and the bits of information
13 | that you need in order to make your case work.

14 | MR MACFARLANE: Yes, sir.

15 | THE CHAIRMAN: Then, finally, we get -- if you have a look on this, you see we've got
16 | closing submissions. The way this works is that you go first, and that's where you
17 | draw it all together. Sometimes we would have a written document from you to explain
18 | all this, but I don't think there is a need for that here because I think the issues are
19 | probably reasonably contained. But it's possible, if we felt we need it, we might ask
20 | you to produce something in writing afterwards. But what we want you to do here is
21 | just to draw together everything that's happened over the previous few days and just
22 | give us a short summary of what conclusions you think we should draw from the
23 | evidence we've heard and the arguments we've heard.

24 | I think by that stage -- that probably sounds a bit daunting now, you think how I
25 | am going to do that. By the time you've spent three days in here, I think we all know
26 | what you are going to say probably and you will know what you're going to say. If you

1 need a bit more time for that, to prepare it, then I am sure we can manage to find that
2 within the timetable. That's another reason why it's good to have a bit of extra --

3 MR MACFARLANE: I am sure.

4 THE CHAIRMAN: I don't want you to worry too much about the back end because as
5 the trial develops we'll have time to talk about this a bit more and if you have any
6 questions or difficulties we can talk about it. What I really want you to be focused on
7 at the moment is the stuff at the front end, which is the skeleton and the opening
8 submissions, and about making sure that you are doing it the right way and in the way
9 that's going to be most helpful to us.

10 MR MACFARLANE: Thank you for your help, sir.

11 THE CHAIRMAN: I have given you a lot of information, I am conscious of that, and
12 you have been very patient and taken it very well.

13 MR MACFARLANE: It's very helpful.

14 THE CHAIRMAN: If you find any of it uncertain when you look at the transcript or you
15 have any questions, you should get in touch and we'll find a way of dealing with those,
16 otherwise of course we can discuss any of it at any stage in the trial. We will all be
17 trying to -- it's in all our interests for this to work because everybody wants the trial to
18 work to get to the right answer. So you will certainly find us, and I am sure
19 Ms Berridge, being as helpful as we can to make the process work. So don't feel that
20 anyone is here to trip you up or make it difficult or embarrass you, but we are all
21 conscious that this is not straightforward for you and so we know it's quite a big
22 challenge.

23 MR MACFARLANE: It is, and I appreciate being a litigant-in-person it's not easy for
24 you or the defendant either, I will (inaudible) with it and I will do my best, as much as
25 anybody can do.

26 THE CHAIRMAN: Good. Thank you. We really appreciate it. Thank you.

1 MR MACFARLANE: Thank you.

2 THE CHAIRMAN: Ms Berridge, is there anything I have missed that you think I should
3 highlight to Mr Macfarlane or anything arising out of that that you have any concerns
4 about?

5 MS BERRIDGE: No, just very briefly on this timetable, I just noticed as you were
6 speaking that in the timetable we have our expert going first and the claimant second.

7 THE CHAIRMAN: Oh, that's the wrong way round, isn't it?

8 MS BERRIDGE: Yes, the opposite of what you had. So we'll correct that and send
9 that through.

10 THE CHAIRMAN: Well, I assume it's the wrong way round. Unless you're suggesting
11 it's a sensible thing to do, but I can't --

12 MS BERRIDGE: I think that just arises because the original version only had one
13 expert.

14 THE CHAIRMAN: The sequencing, yes.
15 Look, I think if anybody has different view on that -- it might turn out to be a good idea,
16 but I doubt it. But if you felt it was a good idea or Mr Macfarlane made a strong pitch
17 for it, we could look at it again. But I think it probably isn't going to be terribly helpful.

18 MS BERRIDGE: Understood.
19 Then just a question really about re-examination. There isn't specific time in this
20 timetable for re-examination. Whether it would be helpful for us to split that out and
21 just have 5 or 10 minutes per witness, so it was --

22 THE CHAIRMAN: Well, look, it probably would be a good idea. For all the reasons
23 we've discussed, I rather suspect there's not going to be an awful lot of it in relation to
24 certainly Mr Macfarlane's evidence, because it's going to be a difficult thing, I think, for
25 him to do. And I don't know what your approach to this is, but I never anticipate an
26 awful lot of it.

1 But if you think it's a helpful thing to do to add in a buffer, then I agree with that. That's
2 a good idea.

3 MS BERRIDGE: I think it operates more as a guide to what's coming next if we split
4 out in that way.

5 THE CHAIRMAN: Yes, and helpful to Mr Macfarlane because he sees the running
6 order. No, I agree with that. That is helpful.

7 MS BERRIDGE: We'll do that and recirculate.

8 THE CHAIRMAN: Good, thank you.

9 MS BERRIDGE: Then just very briefly in terms of this last point, on the expert.

10 THE CHAIRMAN: Yes.

11 MS BERRIDGE: Obviously we don't have the identity of the expert; we understand
12 it's an accounting firm.

13 So it is quite important that the expert, if they are not familiar with the process of giving
14 expert evidence in a court, that that side of things is very clear. So they have specific
15 duties to the court and as you'll see in Dr Majumdar's report, they should disclose all
16 of the information that they've been provided with and all of the instructions that they've
17 received.

18 THE CHAIRMAN: Yes.

19 Mr Macfarlane, this is definitely quite a technical area and it rather depends who
20 you've instructed and what familiarity they have with it. But they do have some quite
21 serious obligations to the tribunal and they're going to need to read into those and
22 understand them. So if they haven't ever done this before, it's a bit of a learning curve
23 for them as well. For a professional, it's not by any means insuperable, but it is
24 a different mindset and we take it very seriously.

25 MR MACFARLANE: In your order agreeing to the expert, you made it very clear at
26 the front of that note that the experts mustn't stray into various avenues of leading the

1 tribunal. And I will be showing him that order as well and he has to comply with --

2 THE CHAIRMAN: Well, it's a bit more than that actually as well, because -- and
3 actually a good place to start with this is Dr Majumdar's report, because you will see
4 that he sets out -- if you have a look at page 37 so where is that going to be in his
5 report. If you have a look at page 290 of his report you see he has something there
6 called an expert declaration.

7 MR MACFARLANE: Yes.

8 THE CHAIRMAN: He summarises his duty to the court, and do you see he refers
9 there to a number of different documents which are sort of guidelines for experts in
10 how they give evidence in front of courts and the expectations of the courts as to them?
11 So it's really important that your expert is aware of those guidelines, has read them,
12 acknowledges that they need to comply with them and that that's probably recorded
13 in their report. Otherwise it will be defective. And I think probably the easiest way to
14 do that is to say, "Have a look at page 290 in the bundle, paragraph 160 of
15 Dr Majumdar's report". That's as good a place as any start with the references.

16 MR MACFARLANE: I will make sure that that's in the report, sir.

17 THE CHAIRMAN: Good, thank you. That's really helpful. Thank you.

18 I think we're done then.

19 MS BERRIDGE: Yes, sir. That was my final point, that there is a specific scope of the
20 expert reports, that Mr Macfarlane is reminded of that as well.

21 So yes, unless you have any further questions, that's my submissions on the final
22 point.

23 THE CHAIRMAN: No, thank you very much.

24 Mr Macfarlane, do you have anything else? Good. Okay.

25 Well, thank you. I'm grateful to everybody. We've made really good progress actually.

26 I'm encouraged by -- I wasn't sure whether this was going to be a morning or a day.

1 We've made some very good progress and that's, I think, partly because everybody is
2 now focusing on the right things and getting to the right place.

3 It is tight. I think if there are going to be any issues, we would like to know about them
4 sooner rather than later. Just to be very clear, Mr Macfarlane, this is the time when
5 we all have to make this work. So this not the time for sparring and tactical steps and
6 so on. Indeed, I make that observation to both parties. But I want you to understand
7 that what we're really focused on now is making this work so the trial works. There
8 may be all sorts of things that you'd like to have a bit of a go at, a bit of a poke at, but
9 that probably isn't going to help us get to trial.

10 So if we can focus on just getting the expert reports done, the bundle done and getting
11 your skeleton ready, those are the things that ought to be top of mind. I think if we can
12 do that, then we should arrive on the first day of the trial in good shape. But if anybody
13 has any real problems or can foresee problems coming, we'd rather know about them
14 sooner rather than later, so we can try and deal with them so they don't disrupt the
15 trial.

16 Good. Thank you very much for your help. We will now rise.

17 **(1.25 pm)**

18 **(The hearing adjourned)**

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