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4 **IN THE COMPETITION**

Case No. : 1401/5/7/21

5 **APPEAL TRIBUNAL**

6  
7 Salisbury Square House  
8 8 Salisbury Square  
9 London EC4Y 8AP  
10 (Remote Hearing)

11 Tuesday 27 July 2021

12  
13 Before:

14 THE HONOURABLE MRS JUSTICE BACON  
15 (Chairwoman)  
16 SIR IAIN MCMILLAN CBE FRSE DL  
17 ANNA WALKER CB

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

20  
21  
22 BETWEEN:

23  
24 FORREST FRESH FOODS LIMITED

25  
26 Claimant

27 v

28  
29 COCA-COLA EUROPEAN PARTNERS GREAT BRITAIN LIMITED

30  
31 Defendant

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

35  
36 Mr Timothy Becker (instructed by Taz-ul Islam appeared on behalf of the Claimant)  
37 Mr Josh Holmes QC and Mr Nikolaus Grubeck (instructed by CMS Cameron McKenna  
38 Nabarro Olswang LLP appeared on behalf of the Defendant)

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41 Digital Transcription by Epiq Europe Ltd  
42 Lower Ground 20 Furnival Street London EC4A 1JS  
43 Tel No: 020 7404 1400 Fax No: 020 7404 1424  
44 Email: ukclient@epiqglobal.co.uk  
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1 Tuesday, 27th July 2021

2 (10.00 am)

3 **MRS JUSTICE BACON:** Good morning, everyone. Before we start can I check that  
4 everyone can see all members of the Tribunal clearly, and can you hear me?

5 **MS WALKER:** Yes.

6 **MRS JUSTICE BACON:** These proceedings are being live-streamed and of course  
7 many may be joining on the Microsoft Teams platform. I should then start with the  
8 usual warning therefore. They are proceedings in open court as much as if they are  
9 being heard before the Tribunal physically. An official recording is being made and  
10 an authorised transcript will be produced, but it is strictly prohibited for anyone else to  
11 make an unauthorised recording, whether audio or visual, of the proceedings in breach  
12 of that provision is punishable as a contempt of court. So I am sure you will all have  
13 that well in mind.

14 Now in terms of the logistics of today's hearing, we will take a short break around 11.30  
15 for the transcribers and for everybody else.

16 In terms of the running order, in the normal way, Mr Holmes, this is your application.  
17 So you would be going first, but I should say we have considered very carefully the  
18 contents of your skeleton argument. We have all read that and we don't need you to  
19 repeat the submissions that are set out there. So I would suggest that you might keep  
20 your opening quite short.

21 There are two points in particular which I thought it would be useful for us to hear you  
22 further on. One is the limitation issue, which is not developed very extensively in your  
23 skeleton argument and, Mr Becker, as you will have seen, has said something about  
24 that. So you might want to say a little bit more about that.

25 The second is the form of the order. Your draft order has three alternatives, and we  
26 wondered if you were strongly urging on us one or other of those alternatives. So, for

1 example, are you strongly submitting that the Tribunal should strike out or give  
2 summary judgment rather than making an order in the form of the Unless Order which  
3 features in your paragraph 3 of your draft order, and if, so, why. Of course, if there is  
4 anything else that is not in your skeleton argument that you want to address us on,  
5 then you should feel free to do so, but we do think that it is going to be useful for us to  
6 get quite quickly to hear Mr Becker. So we are not encouraging you to repeat anything  
7 that's already in your skeleton argument, Mr Holmes. So then we will hear Mr Becker,  
8 followed by your reply.

9  
10 **Submission by MR HOLMES**

11 **MR HOLMES:** I am grateful, Madam, and I shall try to keep my submissions brief and  
12 to focus on the points on which you have requested assistance.

13 **MRS JUSTICE BACON:** One thing I just wanted to say is that for my part at least you  
14 seem quite far away from the camera, is there any way you could be zoomed in so we  
15 could see you a little bit more clearly?

16 **MR HOLMES:** We will make an attempt to do that. If you give one moment. Is that  
17 better?

18 **MRS JUSTICE BACON:** Yes, that's a lot better.

19 **MR HOLMES:** Can we take it any closer or is that as far as it will go? Very good.  
20 Yes. I hope that's better, Madam.

21 **MRS JUSTICE BACON:** Yes. Can the camera be angled so you are more in the  
22 centre of the frame?

23 **MR HOLMES:** It may be I could angle myself.

24 **MRS JUSTICE BACON:** I don't want you to push your junior off the bench. All right.  
25 Thank you very much.

26 **MR HOLMES:** Thank you, Madam.

1 Before I start on the submissions may I check that you have bundles? I hope that you  
2 have received in electronic form, firstly, the hearing bundles and, secondly, the agreed  
3 authorities bundles. There is also a supplemental bundle of authorities.

4 **MRS JUSTICE BACON:** Yes.

5 **MR HOLMES:** Which was provided by my learned friend's solicitors, containing  
6 authorities from his skeleton argument which was submitted after the agreed  
7 authorities bundle. Do you have that as well?

8 **MRS JUSTICE BACON:** We do have that. We have five authorities bundles labelled  
9 1A to E and then we have the supplemental bundle.

10 **MR HOLMES:** I am grateful.

11 So just by way of overview of the application and to keep matters short could we first  
12 turn to the Particulars of Claim, please, which are in hearing bundle 1 at tab 1? I will  
13 just give you a short summary of our submissions in relation to them. We do say that  
14 the claim as a whole is not properly pleaded. There have been many opportunities for  
15 the deficiencies to be rectified, but as it stands it is not intelligible. It does not provide  
16 the baseline of information and explanation which would enable the defendant to  
17 understand and respond to it, and on that basis we say that each of the particulars of  
18 abuse should be struck out or alternatively summarily dismissed. So that is our case  
19 today; in other words, the first two alternatives in the order.

20 If you look at the particulars, you will see that the parties are introduced in 1 and 2.  
21 The claimant is a wholesaler of food and drinks. Just to note the claimant is by no  
22 means a small business. Its turnover in the trading year to 20th April 2020 was  
23 £47 million, as is explained in my solicitors' statement for today.

24 Paragraph 2 identifies the defendant as a manufacturer and distributor of soft drinks.  
25 As you may have apprehended, Madam, from the evidence, the defendant is a bottling  
26 business, which bottles Coca-Cola and other soft drinks under licence from the Coca-

1 Cola company, which is separate from it.

2 The next three paragraphs are the claimant's case as to the relevant market and  
3 dominance. The defendant doesn't accept that the claimant's market definition is  
4 correct or that there is any merit in the allegation of dominance, nor, we say, are these  
5 matters adequately particularised, but we don't contend that the claim should be struck  
6 out or dismissed for that reason.

7 The focus of the application is upon paragraph 7, which you will find over the page,  
8 page 3. Do you see at paragraph 6 the context?

9 **MRS JUSTICE BACON:** Yes.

10 **MR HOLMES:** That the claimant has been a wholesale customer of the defendant.  
11 In paragraph 7 the allegation that the defendant has abused its alleged dominant  
12 position in breach of UK competition law. Then the four allegations are made in the  
13 subparagraphs which follow. We say that none of these allegations has a realistic  
14 prospect of success. As pleaded, they don't contain the basic information that would  
15 be needed to understand what is being alleged.

16 **MRS JUSTICE BACON:** Yes.

17 **MR HOLMES:** Nor do they explain why the defendant's conduct is said to restrict  
18 competition. They are really little more than headings, and the claimant's case under  
19 each heading remains to be properly explained. There is currently no indication of the  
20 particular facts the claimant relies on in seeking to establish the alleged behaviour  
21 suggested under the headlines.

22 As the Tribunal has seen, the claimant has responded to the application not by  
23 applying to amend its pleading or to explain the allegations. Instead it has served  
24 a large volume of witness evidence. There are eight statements totalling 65 pages in  
25 length and a further 400 pages of exhibits and that evidence contains a myriad of  
26 complaints which stray well beyond the scope of the pleading insofar as it is

1 discernible.

2 We make two points about that. The first is that the submission of the evidence is not  
3 a satisfactory way of correcting the deficiencies in the pleading. If anything, we say  
4 the witness evidence has generated further uncertainty as to which factual allegations  
5 are relied on and in support of which of the four heads of abuse. The problem is with  
6 the claimant's pleading for the purpose of this application, which we say does not  
7 articulate the case with a realistic prospect of success.

8 Secondly, even when the pleaded case is supplemented with information contained in  
9 the evidence, the case does not improve. The evidence tends on the contrary to  
10 confirm that the pleaded allegations have no real prospects of succeeding.

11 Returning to the pleadings, at paragraph 8 on page 3 there is a bare assertion of effect  
12 on trade and competition. We say that general averments of this nature are not  
13 adequate. The claimant should explain its case on these matters by reference to the  
14 individual allegations of abuse. Under loss and damage a claim for £11.6 million at  
15 paragraph 10 and a request for, exemplary damages in paragraph 11, we say that the  
16 figure given is not explained adequately. The basis for it is undiscernible from the  
17 accompanying schedule and as a consequence it is impossible to understand whether  
18 or on what basis loss or damage is alleged in relation to each of the pleaded heads of  
19 abuse.

20 We also say that the claim for exemplary damages should be struck out. So that in  
21 overview is our application for today.

22 On the law I think I can be very brief indeed. I know, Madam, that you are well familiar  
23 with the authorities and we have set them out at length in the skeleton argument. To  
24 pick up three brief points, first of all, the test for a strike-out under Rule 41 is whether  
25 there are no reasonable grounds for making the claim or part of it and the test for  
26 summary judgment under Rule 43 is whether the claimant has -- there is a power to

1 give summary judgment where the claimant has no real prospect of succeeding.  
2 The authorities explain, as set out in the Wolseley case in this Tribunal, that the  
3 claimant must have a realistic prospect of success and that is one which carries some  
4 degree of conviction. It must be more than merely arguable. There is no material  
5 difference, we say, between the test for summary judgment or strike-out in the context  
6 of this case.

7 The second point is the importance of articulating a clear and intelligible case in  
8 competition claims.

9 **MRS JUSTICE BACON:** Yes.

10 **MR HOLMES:** We set out Mr Justice Roth's observations about that in Sel-Imperial.  
11 He stresses two reasons. First of all, these cases involve serious allegations of a  
12 breach of a quasi public law nature with the potential for financial penalties and the  
13 defendant is, therefore, entitled to know what specific conduct or agreement is  
14 complained of and how that is alleged to violate the law.

15 The second reason, which we do say weighs heavily for the purposes of today, is that  
16 these are notoriously burdensome allegations leading to extensive evidence, including  
17 expert reports and lengthy and expensive trials, and that would apply to those parts of  
18 the pleading which are not directly the subject of strike-out today, market definition,  
19 dominance.

20 **MRS JUSTICE BACON:** Yes.

21 **MR HOLMES:** These are quickly and superficially pleaded but it would be very  
22 onerous to consider and address them at trial.

23 The third and final point is simply to note that it is, of course, trite law that for the  
24 purposes of a breach of statutory duty it is necessary to show loss and damage. That's  
25 an ingredient of the tort. It is reflected in Section 47A itself, which applies to a person  
26 who has suffered loss and damage. We say that for each discrete allegation of abuse

1 there should, therefore, be some referable loss to complete the cause of action, and  
2 without this there is no viable claim.

3 So turning to the allegations of abuse, as I develop those I will pick up, if I may, your  
4 point about limitation.

5 The first allegation is at paragraph 7(i). As you have seen, Madam, the paragraph first  
6 refers to three contracts between 2016 and 2017 under which the claimant agreed to  
7 provide information to the defendant relating to the supplies made by the claimant.

8 This is a reference, as we will see in a moment, to so-called sales out data, that's data  
9 provided for audit purposes to check whether the claimant was supplying genuine fast  
10 food outlets and secondary wholesalers so as to be eligible for marketing support in  
11 the form of discounts on such sales. The allegation is then set out in the final two  
12 sentences. It is said that:

13 "Following the provision of the sales-out data the defendant would, to the detriment of  
14 the claimant, supply directly to the customers of the claimant."

15 In the final sentence it is alleged:

16 "By virtue of obtaining such information from the claimant the defendant used its  
17 dominant position to restrict the claimant's access to the marketplace."

18 Now we say this allegation has no realistic prospects of succeeding and we rely on  
19 four points.

20 First, we say the allegation is hopelessly vague. The only primary facts that are  
21 pleaded relate to the contracts. As to the allegations in the final two sentences, the  
22 pleading does not state which customers are said to have been switched from the  
23 claimant to the defendant. It does not state when the switch is alleged to have  
24 occurred and it does not explain how this is said to be linked to the information  
25 provided by the claimant.

26 The implication appears to be that the defendant used the sales-out data to contact

1 and win customers, but even this was not straightforwardly pleaded and none of the  
2 facts underpinning that allegation are set out. So we say the pleading is, therefore,  
3 hopelessly deficient and it does not contain the minimum of explanation it would be  
4 needed for the defendant to understand, investigate and respond to this claim.

5 The second point is that, taken at its highest, the allegation does not identify conduct  
6 that could properly be characterised as abusive. The allegation is that the defendant  
7 competed for and won customers from the claimant. This is described as restricting  
8 the claimant's access to the market, but what is described we say is not anti-  
9 competitive. A dominant firm is entitled to compete on the merits and to win business  
10 at the expense of its competitors.

11 One sees that in action from the evidence of Mr Brimble filed by the claimant. It is at  
12 bundle 3F -- we will go there briefly -- tab 11, page 687.

13 **MRS JUSTICE BACON:** Yes.

14 **MR HOLMES:** The first paragraph explains that Mr Brimble was a wholesaler  
15 supplying fast food shops and a customer of the claimant. He was approached in the  
16 second paragraph you see directly by Coca-Cola European Partners, the defendant,  
17 in 2017 and it was said to him that he would receive products at a lower price than the  
18 prices being paid to Forrest Fresh Foods for the same products.

19 You see from the third paragraph that he subsequently stopped dealing with the  
20 defendant, because he does not like their discount system, but what we say this  
21 evidence shows is competition working as it should with customers choosing between  
22 different suppliers who compete on price and other payment terms, and that is to the  
23 benefit of the customers.

24 The third point is that the identity and location of businesses supplied with Coca-Cola  
25 products is not a secret. It is easily ascertainable by other means and the evidence  
26 before the Tribunal confirms that the defendant knew the locations and identities of

1 customers because it worked closely with the claimant in supplying them.

2 If we could go, please, to bundle 2, tab 4, at page 96, this is in the exhibit to  
3 Mr Henderson, my solicitor's, witness statement.

4 **MRS JUSTICE BACON:** Yes. Tab 4, page 96 did you say?

5 **MR HOLMES:** Yes, 96 of the rolling bundling. You see that this is a letter from  
6 Haymans Solicitors dated 14th January 2020. It is the most detailed of the claimant's  
7 pre-action letters. The current allegation is addressed on page 99 of the bundle, and  
8 in the first full paragraph on the page you will see that Coca-Cola gave additional  
9 support to the claimant to sell products to certain, what are described as Asian cash  
10 and carry outlets.

11 Then in the third and fourth paragraphs you see reference to promoting fast food terms  
12 and conditions. You see that in the penultimate line of the third complete  
13 paragraph and then in the fourth paragraph, mainly carried out in the fast food sector.

14 Then in the fifth paragraph the letter explains that one of the biggest costs that pushed  
15 prices up was transport. Initially the defendant delivered to the claimant and the  
16 claimant delivered to their customers. To enable prices to be lowered you receive that  
17 the defendant set up direct delivery with some of the claimant's larger customers.

18 Then in the following paragraph the claimant would sell stock to their customer. The  
19 claimant had the relationship regarding price, but the defendant would deliver the  
20 goods directly to the claimant's customers, thereby reducing delivery cost, enabling  
21 pricing to be pushed -- to be at a level to push out imported stock.

22 Then in the penultimate paragraph there is reference to sales-out data being required  
23 from around June 2012, and in the final paragraph the list of customers that were  
24 supplied direct from Coca-Cola prior to them requesting the sales-out data consisted  
25 of, and various companies are identified. I would just ask the Tribunal to note  
26 Worldwide Foods, Hutchinson and Yummy. Then this at the end of the paragraph:

1 "These same companies were then contacted directly by Coca-Cola and then started  
2 to trade directly with them."

3 So, as the Tribunal can see from the letter before claim, the customers that Coca-Cola  
4 is alleged to have started supplying were ones to which it was already delivering stock  
5 directly while they were the claimant's customers. At the risk of stating the obvious for  
6 these customers the defendant had no need to consult sales-out data. It knew where  
7 the customers were because it delivered their stock to them under an arrangement  
8 with the claimant.

9 The same picture emerges from the witness evidence of the claimant subsequently  
10 served in these proceedings. If you could turn, please, to the witness statement of  
11 Mr Chris Craven. It is bundle 3A, tab 5, page 230. You see from the first  
12 paragraph that he is managing director of the claimant. Turning on to page 234 if  
13 I could ask the Tribunal just to cast an eye over paragraphs 24 through to 28.

14 **MRS JUSTICE BACON:** That was describing the system of direct deliveries.

15 **MR HOLMES:** It was.

16 **MRS JUSTICE BACON:** Yes.

17 **MR HOLMES:** As Mr Craven explains at paragraph 28, over time the defendant was  
18 delivering to numerous of the claimant's customers directly. Specific reference is  
19 again made to Hutchinson, which we saw in the letter. The defendant therefore had,  
20 Mr Craven says, full visibility on where the stock was going. So again we say the  
21 sales-out data is really a red herring. As well as direct deliveries you see that the  
22 defendant's representatives were called in and worked directly -- this is at  
23 paragraph 27 -- to develop the account, increase the range and so on. Over time  
24 Mr Craven explains in the following paragraph that numerous accounts were set up in  
25 this way.

26 Then turning on to page 245, if you could read paragraph 78. You see that the only

1 customer referred to in relation to the allegation at paragraph 7(i) of the particulars is  
2 Hutchinson, a customer to which on Mr Craven's evidence the defendant was  
3 delivering directly and with whom the defendant's representatives were working  
4 directly.

5 If we could turn on to the finance statement of Mr Zahid Iqbal, which is in bundle 3F at  
6 tab 14 at page 693. You see from paragraph 1 that he is a director of a company  
7 called Worldwide Foods with sales of approximately 75 million a year. The Worldwide  
8 Group, as you may recall, was another company identified in the letter before claim as  
9 a direct delivery customer.

10 If you look at the third paragraph, you see again that the Coca-Cola reps did a lot of  
11 work coordinated with Forrest mainly to increase the range and to encourage the sale  
12 of GB products. So, as with Hutchinson, the defendant's representatives were in direct  
13 contact with the customer. You see in the final sentence on the page the defendants  
14 also provided fridges in Worldwide stores, another direct relationship between the  
15 defendant and Worldwide.

16 Turning over the page, the witness states that over the last three to four years he and  
17 other store managers have been contacted directly by Coca-Cola reps, that's the  
18 defendant's reps, asking if his stores will trade directly with the defendant, a proposal  
19 which the witness rejected. So again we say the sales-out data is a red herring. The  
20 defendant was delivering to this customer. Its reps were involved in the supply  
21 relationship. It supplied fridges to the customer. There was no need for it to use sales-  
22 out data to contact the customer.

23 Then if you look at the statement of Mark Craven at bundle 3E, tab 9, page 678, you  
24 see from the first paragraph that's a director of the claimant. There is then a heading  
25 "Yummy Fast Foods". He explains that Yummy, another of the companies mentioned  
26 in the letter before claim, was set up as a ship to account, that's a direct delivery. So

1 the defendant delivered directly to the customer to save on distribution costs. That  
2 meant the prices were more competitive against other stock.

3 Then in the final paragraph on the page the witness says that the defendant opened  
4 a direct account with Yummy, but this is again a customer in relation to whom the  
5 defendant already assumed the role of direct deliverer and there is no basis for  
6 suggesting that any approach was enabled by the sales-out data from the claimant.

7 One sees the same picture from other examples in this witness statement, that the  
8 defendant's reps were again aware of and involved in dealings with customers  
9 alongside the claimant. That was how these relationships worked.

10 If you look at the penultimate paragraph on page 2, you see a meeting with a customer  
11 in relation to supplying a new cash and carry, a meeting that was attended by the  
12 witness and by a representative of the defendant, and the defendant ended up  
13 supplying the customer directly, but again the contact was not based on any sales-out  
14 data. The defendant's rep attended the meeting and it appears on the evidence that  
15 the defendant won the contract directly.

16 Look at the next two paragraphs.

17 **MRS JUSTICE BACON:** Do we need any more detail on this? You have given us  
18 a lot of examples. I mean, we have your point, that you say that the claimants have  
19 not particularised how their data was causative.

20 **MR HOLMES:** Yes.

21 **MRS JUSTICE BACON:** Of the defendants approaching the customers.

22 **MR HOLMES:** I am grateful. We do go further than that, Madam. My submission is  
23 that looking at the evidence which is before the Tribunal, it shows that the allegation  
24 is not only not properly particularised.

25 **MRS JUSTICE BACON:** Yes.

26 **MR HOLMES:** But it is not supported by the evidence that was subsequently lodged

1 in these proceedings.

2 **MRS JUSTICE BACON:** Yes.

3 **MR HOLMES:** That should weigh heavily in our favour in support, we say, of strike-  
4 out and summary judgment being given. So, in summary, we say that the first  
5 allegation has no realistic prospects of success.

6 Turning to the second allegation, paragraph 7(ii) of the particulars. It may be worth  
7 going --

8 **MRS JUSTICE BACON:** Mr Holmes, when you started your response on this  
9 particular point, you said that you wanted to make four points.

10 **MR HOLMES:** Ah, I may have hurried on too fast. Let me just consult my note. So  
11 the first point was the lack of any particulars.

12 **MRS JUSTICE BACON:** Yes. The second was it was not abusive.

13 The third point is the defendant (inaudible) business anyway, which is the one you just  
14 developed. Was there a fourth point?

15 **MR HOLMES:** No. I think those are all the points in relation to that. Apologies. There  
16 are only three.

17 At paragraph 7(ii), the particulars, is at bundle 1, tab 1, page 2, and the first sentence  
18 supplies the broader factual context:

19 "Between January 2011 and April 2016 the claimant was purchasing Coca-Cola  
20 products from Ireland and Georgia."

21 The second sentence then alleges that:

22 "The defendant approached the claimant and requested their assistance in removing  
23 the said Irish and Georgian stock from the UK market."

24 We say again this allegation is wholly unclear. We don't know when the defendant  
25 approached the claimant. We don't know what assistance it requested. We don't  
26 know by what means it is said that Irish and Georgian stock, the stock imported by the

1 claimant itself, was to be removed from the market, and we don't know whether the  
2 claimant provided the requested assistance, whatever it was, whether the steps were  
3 successful or whether the claimant was harmed by providing the requested assistance  
4 and, if so, how. So the pleading does not articulate anything approaching a coherent  
5 allegation of abuse.

6 One gets some insight into what may be intended from the witness evidence, but again  
7 in our submission that shows that the allegation lacks any realistic prospects of  
8 succeeding.

9 If we could go back to the statement of Mr Chris Craven, that's at bundle 3A, tab 5,  
10 page 233. Look at paragraph 21 at the foot of the page. You see what was proposed  
11 was that the claimant should run a promotion with discounts to net the price down of  
12 the GB stock to enable us to get closer to the Irish Coke price on the market. So the  
13 allegation appears to boil down to a claim that the defendant offered favourable pricing  
14 to enable it to compete with other imported stock.

15 At paragraph 23 FFF would then contact customers and say:

16 "We can provide you with GB stock for the same price / similar price to the Irish stock,  
17 most customers would accept this."

18 The same point appears in paragraph 25, as we have already seen, in the final  
19 sentence:

20 "I knew and so did CC that with the GB stock being such a low price, people would  
21 stop buying the Irish and swap to buying the GB."

22 So two points about this. First, what is being described here is not abusive and it is  
23 not anti-competitive. It is the defendant competing on the merits to win business for  
24 its own product and the assistance that the claimant was asked to provide was  
25 wholesaling at favourable prices.

26 The second point is that there is nothing here to suggest any harm to the claimant as

1 a result of doing this business with the defendant.

2 If you look at paragraph 35 of Mr Craven's evidence on page 236, you see that the  
3 business that the claimant was doing with the defendant did not even result in its  
4 ceasing to import stock.

5 **MRS JUSTICE BACON:** What was that reference?

6 **MR HOLMES:** Apologies. Paragraph 35 on page 236.

7 **MRS JUSTICE BACON:** Yes, the last sentence.

8 **MR HOLMES:** The two final -- or is it the last? No, you are right, Madam, the last  
9 sentence. So:

10 "Coca-Cola was aware that we stocked imported products and Irish, ... I still kept  
11 supplies of other imported and Irish coming in, Coca-Cola were happy with this  
12 business model."

13 Look at paragraph 36. You see that there the claimant continued to trade in this area  
14 and the trading extended to Georgian stock. We say on that basis there is no realistic  
15 prospect of the claimant successfully establishing an infringement in relation to that  
16 allegation. It is not abusive and there is no loss and damage apparent either from the  
17 pleading or from the evidence.

18 **MRS JUSTICE BACON:** Are you saying that on the evidence, especially the evidence  
19 at paragraphs 20, 21 onwards, it looks as if the defendant is actually incentivising the  
20 claimant to make more sales? It was giving the claimant discount in order that the  
21 claimant could sell outlets that would otherwise have bought from imports. Is that  
22 what's being described?

23 **MR HOLMES:** That's it in a nutshell, Madam, yes. You will appreciate that the  
24 imported product is from another bottler. It is effectively a competing product on the  
25 shelves. What is being described is competition on the merits to win business through  
26 discounts to the wholesaler, the claimant, in order to successfully compete with other

1 rival product, and that's simply a normal competitive response. It is not in any sense  
2 abusive.

3 **SIR IAIN McMILLAN:** Madam Chairman, could I come in here, if I may? It is  
4 regarding the way the subsidy was paid.

5 **MR HOLMES:** Yes.

6 **SIR IAIN McMILLAN:** That was not by, from the evidence, a prompt payment, if I can  
7 use that expression, for an invoice submitted by Forrest Fresh Foods to Coca-Cola,  
8 but the subsidy was paid in the form of an off-set to a future order, and the evidence  
9 suggests that sometimes that took up to 11 months for Coca-Cola to pay the claimant.  
10 I just wondered if your client's position was that that didn't damage his business?

11 **MR HOLMES:** The pleaded case makes no reference to any delay in settling invoices.  
12 There is nothing inherently problematic about discounts provided in the form of  
13 rebates. That's a regular feature of business. There is nothing on the pleading that  
14 raises a complaint. This in my submission is an example of another of the myriad of  
15 allegations which are advanced in the evidence but which are not crystallised in the  
16 pleading, and in my submission the Tribunal should approach this based on the  
17 particulars that are set out and the particulars that are set out relate to Irish and  
18 Georgian imports and a request for assistance to remove that from the market. There  
19 is nothing in there about any delay in paying invoices, and so that should not provide  
20 any basis for the claim to succeed. That's my submission.

21 **SIR IAIN McMILLAN:** I see. Thank you.

22 **MR HOLMES:** If we could turn on to paragraph 7(iii), that's in bundle 1 at tab 1,  
23 page 2.

24 **MRS JUSTICE BACON:** I understand Mr Becker says this is not relied on as  
25 an example of abuse causing loss.

26 **MR HOLMES:** No, indeed. We can move very quickly here I think. We don't

1 understand how the allegation is said to have harmed competition. There is no loss  
2 or damage alleged in relation to it. If it be said that this is part of a course of conduct,  
3 we say there is no basis for that allegation. This is clearly a discrete and  
4 disparate claim.

5 The third point is that the conduct dates from April 2012. So on that basis -- this is  
6 where the limitation point comes in, Madam. The applicable limitation period is the  
7 two-year period we say specified in Rule 31 of the Tribunal's 2003 rules, the effect of  
8 which is preserved by Rule 119 of the current rules.

9 **MRS JUSTICE BACON:** Should we look at those?

10 **MR HOLMES:** Yes, by all means. This is in authorities bundle 1E.

11 **MRS JUSTICE BACON:** So I have Rule 119.

12 **MR HOLMES:** Yes. Yes, Madam. You are ahead of me. One moment.

13 **MRS JUSTICE BACON:** If you want to start with Rule 31, then please go there.

14 **MR HOLMES:** Yes. Well, perhaps start at Rule 119, as you suggested, Madam.  
15 Page 618. You see that this is in the savings provisions of the rules -- of the 2015  
16 rules. Paragraph 1 relates to proceedings commenced before the Tribunal before 1st  
17 October 2015. That's not the operative provision for our purposes, but paragraph (2)  
18 provides that:

19 "Rule 31(1) to (3) of the 2003 rules continues to apply in respect of a claim which falls  
20 within paragraph (3) for the purposes of determining the limitation period which would  
21 apply in respect of the claim if it were to be made on or after 1st October 2015 in  
22 proceedings under Section 47A."

23 We say this is such a claim. If you look at paragraph (3):

24 "A claim falls within this paragraph if it is a claim to which Section 47A of the 1998 Act  
25 applies and the claim arose before 1st October 2015."

26 We say that "arose before" is effectively when the cause of action accrued. So on that

1 basis we say that the applicable rule is Rule 31, which you find at tab 14 at 613. That  
2 states:

3 "A claim for damages must be made within a period of two years beginning with the  
4 relevant date."

5 "The relevant date is the later of the end of the period in relation to the decision on the  
6 basis of which the claim is made or the date on which the cause of action accrued."

7 We say that therefore the relevant date is two years following -- the limitation period  
8 expires two years following the date of the conduct here which is alleged to have  
9 concluded in April 2012, which takes us to April 2014, a long time before the  
10 commencement of these proceedings.

11 **MRS JUSTICE BACON:** Just for completeness, Section 47A, which is one of the  
12 other threshold conditions for the application of Rule 119 or the saving provision in it,  
13 that applies to a claim in respect of an infringement decision or an alleged  
14 infringement. So Section 47A on its face applies to both stand alone and follow-on  
15 proceedings.

16 **MR HOLMES:** I am grateful, Madam. That's correct.

17 **MRS JUSTICE BACON:** Of course, there is an oddity here, is there not, because if  
18 a stand alone claim is brought, it could be brought in the High Court.

19 **MR HOLMES:** Yes, that's correct and it could then be transferred, but these are  
20 obviously rules affecting the jurisdiction of the Tribunal to hear the claim.

21 **MRS JUSTICE BACON:** Yes.

22 **MR HOLMES:** This claim originated from the Tribunal. We say that the rules of  
23 limitation are clear and we have seen how these proceedings have been commenced.

24 **MRS JUSTICE BACON:** Yes.

25 **MR HOLMES:** But in any event we say that this is one argument amongst several  
26 why this claim really doesn't get out of the ground -- this aspect of the claim does not

1 get off the ground. We just don't understand in what sense this is said to be abusive,  
2 and equally we say it is a discrete allegation in relation to which no harm is pleaded,  
3 which is also, of course, a constituent requirement for a claim under Section 47A.

4 **MRS JUSTICE BACON:** Yes. To what extent do you say the same about  
5 paragraph 7(ii), the Particulars of Claim, because that refers to conduct between  
6 January 2011 and April 2016, but I think you said that the evidence suggests that that  
7 relates to conduct before October 2015.

8 **MR HOLMES:** It is very odd. If we could go perhaps to paragraph 7(ii) of the pleading,  
9 you will see that the date range which is given relates not to the conduct but to the  
10 claimant's purchases of Coca-Cola products.

11 **MRS JUSTICE BACON:** So what do we get from the evidence about when the  
12 conduct occurred?

13 **MR HOLMES:** It is extremely unclear, but from what we can see it appears to date  
14 from April -- sorry -- from 2011 to 2012. One sees that in various places. One place  
15 one can get it from is the evidence of Mr Chris Craven. If you go to paragraph --

16 **MRS JUSTICE BACON:** 21 is the one we were looking at.

17 **MR HOLMES:** Yes. It appears to be describing a sequence of events with offers  
18 being introduced that were competitive with Irish and other imports.

19 **MRS JUSTICE BACON:** Yes.

20 **MR HOLMES:** It appears all to be prior to --

21 **MRS JUSTICE BACON:** It appears to be before the Vietnam incident. If he is relating  
22 this as a chronological narrative, that appears to be before Vietnam, which appears to  
23 be in early 2013.

24 **MR HOLMES:** Yes, indeed. So that would situate us in 2011 to 2012. That's  
25 supported by a later reference in the evidence. If you turn to page 251, you see the  
26 heading above paragraph 104.

1 **MRS JUSTICE BACON:** Yes.

2 **MR HOLMES:** "2010 to 2011". There is a further point which arises from the schedule  
3 of loss which was provided as an attachment to a letter from claimant's accountant.

4 **MRS JUSTICE BACON:** Yes. That's in bundle 4, tab 20 I think.

5 **MR HOLMES:** Yes.

6 **MRS JUSTICE BACON:** The schedule to the letter is attached to that.

7 **MR HOLMES:** Apologies. We are just getting the document. Thank you.

8 **MRS JUSTICE BACON:** The letter is at page 708/709. There are a couple of  
9 schedules. Which one did you want us to look at?

10 **MR HOLMES:** The relevant one is the schedule relating to imports.

11 **MRS JUSTICE BACON:** Is that page 710?

12 **MR HOLMES:** I think this is 712. 710 I think is a summary which pulls together the  
13 strands.

14 **MRS JUSTICE BACON:** I see.

15 **MR HOLMES:** At page 712 you see "Trade on imports". You see that the allegation  
16 of losses in relation to Georgian Coca-Cola imports is explained at note 5.  
17 "Georgian imports ceased in 2011 to 2012; whilst these accounted for less than 1% of  
18 turnover the margin generated was 12% and it is not unreasonable to assume the  
19 trade would have continued."  
20 So whatever is being alleged, and we say it is entirely unclear from the evidence and  
21 from the particulars, this again appears to situate the incident chronologically in 2011  
22 to 2012, which is therefore well out of time.  
23 I should note while we are here that there is no reference at all to Irish imports in this  
24 table. So we simply don't know what loss is alleged in relation to that or what time-  
25 frame is alleged, but we do have the evidence of Mr Chris Craven that we saw earlier,  
26 Madam.

1 The other point to note while we are here is that there is also a reference to Vietnam  
2 imports.

3 **MRS JUSTICE BACON:** Yes, which were settled.

4 **MR HOLMES:** Which were settled, Madam. You have my point. That is not part of  
5 the claim and for good and sensible reasons, because it was the subject of  
6 a settlement, and yet if you look at the losses which are alleged.

7 **MRS JUSTICE BACON:** Yes. That's the point you made. They include some of the  
8 Vietnam losses.

9 **MR HOLMES:** More than that. They account I think for 6 million, £7 million of losses,  
10 1.385 million in relation to the imports that it is said would have continued from  
11 Vietnam, but also in relation to non-Coca-Cola imports which are alleged to have been  
12 chilled from the same date in some way, that is imports from other producers, there is  
13 a claim for £5 million.

14 **MRS JUSTICE BACON:** Yes.

15 **MR HOLMES:** So a very large proportion of the pleaded value of the claim relates to  
16 something which is entirely extraneous -- an episode which is entirely extraneous to it  
17 and which has been the subject of separate settlement.

18 I am grateful to Mr Grubeck. He points out as well of course the settlement related to  
19 events involving the seizure of products at the instigation and request of a different  
20 company, Coca-Cola GB, which is the local trading entity of the Coca-Cola Company,  
21 which is not the bottler, but the company which produces the concentrate and owns  
22 the trademarks and which is separately listed, separately managed, separately run  
23 business.

24 **MRS JUSTICE BACON:** Yes.

25 **MR HOLMES:** Although the settlement does extend to my client.

26 So those are my submissions on the limitation point, unless I can be of any further

1 assistance to you.

2 **MRS JUSTICE BACON:** No. I apologise. I took you off course. Given you were  
3 dealing with 7(iii) of the particulars it would be useful to just bottom out what you were  
4 saying about 7(ii) as well.

5 **MR HOLMES:** It was very helpful.

6 **MRS JUSTICE BACON:** In 7(iii) you make a limitation point but you say it is only one  
7 argument amongst several. Anyway Mr Becker says that he does not rely on 7(iii) as  
8 giving rise to loss and damage. So that leaves 7(iv).

9 **MR HOLMES:** Yes. This is the final allegation on page 3 of the particulars, very briefly  
10 described there. What is said is that:

11 "Since October 2017 to date the defendant has refused to reimburse the claimant for  
12 sugar tax levies on Coca-Cola products exported by the defendant to Europe and  
13 beyond."

14 Now the short point about this is that no specifics are given in the pleading as to any  
15 specific request for reimbursement in respect of products exported by the defendant,  
16 and despite the very large volume of evidence and documentation lodged by the  
17 claimant, there is no such request identified or exhibited there.

18 This is important because of the way in which the credit system works. If you could  
19 turn, please, to authorities Bundle E, tab 16, please, you will see that this is a guidance  
20 note in relation to the soft drinks industry levied credit for exported drinks. It is the  
21 government's guidance on applying for a credit in respect of the levy.

22 Turning on to page 2, internal page 2, page 620 of the bundle, you see that detailed  
23 evidence is required to substantiate a claim for a credit. The evidence you need for  
24 exported drinks is described at the foot of the page:

25 "To claim a levy credit for exported drinks, you must get and keep evidence that shows  
26 that the drinks have been exported from the UK, and that shows the supplier,

1 consignor if different from the supplier, customer, brand of drinks that have been  
2 exported, method of transporting the drinks, route of movement of the drinks,  
3 destination."

4 So very detailed information. Examples are then given of the types of evidence that  
5 will suffice:

6 "A goods departed message, generated by the National Export System, a screenprint  
7 of the DEVD, the Display Entry Version Details in the customs handling of import,  
8 export, single administrative document" and so on.

9 The reason why such evidence is required is obviously to avoid refunds being claimed  
10 in respect of stock which is then sold levy free in the UK. So for that reason there  
11 really needs to be chapter and verse showing that the stock has gone elsewhere. In  
12 the absence of any such information or evidence of a proper request having been  
13 made with supporting evidence we say the defendant cannot be expected to obtain  
14 reimbursements. There is no way it could do so, and that in consequence the claim  
15 lacks any realistic prospects of success.

16 So these are my --

17 **MRS JUSTICE BACON:** Is there any issue about whether Coca-Cola was supposed  
18 to be reimbursing the claimant anyway, because I seem to recall reading somewhere  
19 in the correspondence that -- yes, I am looking at page 169 of the exhibit to  
20 Henderson. So that's at page 209 of bundle 2.

21 **MR HOLMES:** Yes.

22 **MRS JUSTICE BACON:** Where it said:

23 "As FFF is aware, it is CCEP's general policy not to engage in such claim processing."

24 I mean, even leaving aside -- you have kind of short circuited this by referring to the  
25 HMRC guidance, but the claim is that the claimant requested this from the defendant.

26 Isn't the primary question whether there was a contractual or other obligation on the

1 defendant to pay that and, if so, what obligation was there?

2 **MR HOLMES:** Well, indeed, Madam. I will hear what my learned friend Mr Becker  
3 has to say about that, but we have seen no suggestion that that is the case. We say  
4 in any event the claim appears to relate to specific exports that were made from the  
5 way that it is pleaded, and just on the terms of the pleading to get off the ground there  
6 would have to have been a request made in relation to those exports with supporting  
7 documentation. There is nothing to suggest that that in fact occurred. So we say this  
8 is also a non-starter. It has no realistic prospects of succeeding.

9 **MRS JUSTICE BACON:** You are saying the request would need to be made from  
10 FFF to Coca-Cola?

11 **MR HOLMES:** Yes.

12 **MRS JUSTICE BACON:** I mean, what is the idea, that Coca-Cola would then claim  
13 from HMRC?

14 **MR HOLMES:** Yes, I think so. I think that's what is suggested. It is not entirely clear  
15 I agree.

16 **MRS JUSTICE BACON:** I see. All right.

17 **MR HOLMES:** Thank you. So those are the submissions on the headings of abuse.  
18 That leaves loss and damage. The Tribunal saw a pleaded value of the claim of  
19 £11.6 million. The Tribunal's rules require an explanation of the amount claimed. The  
20 schedule to the particulars I have to say I found impossible to understand. We don't  
21 seek to strike out or dismiss the claim on that basis alone, but we do say that it is  
22 relevant in assessing the prospects of the heads of abuse, because for each head it  
23 is necessary to show some associated loss or damage.

24 I have already taken you to the more recent schedule and I have made the point that  
25 a very large portion of the claim relates to an allegation which is unpleaded,  
26 an allegation relating to Vietnam, which was the subject of a separate settlement and

1 was sensibly kept off the face of the pleading.

2 In relation to the Irish imports there is no allegation of loss. In relation to the  
3 Georgian imports we have a date of 2011 to 2012, which, as you have pointed out,  
4 Madam, would take it out of time.

5 The only other point to note is that on the last allegation we have just been considering  
6 there's no reference there either to any specific exports or any claim in relation to  
7 exports or any suggestion that exports have been made in relation to which sugar tax  
8 has not been refunded by Coca-Cola. So again very hard to understand what loss  
9 and damage is alleged under that head.

10 The final point concerns exemplary damages. You will have seen that that is pleaded  
11 in paragraph --

12 **MRS JUSTICE BACON:** The prayer for relief and paragraph 11?

13 **MR HOLMES:** Yes. What's said is that:

14 "The conduct was calculated to make a profit and the loss and damage thereby caused  
15 was caused with a view to profit and the claimant on that basis seeks exemplary  
16 damages."

17 We make two points about that, as foreshadowed in our skeleton. The first is that  
18 since 2017 the applicable legislation provides that no claim may be brought under  
19 Section 47A in respect of exemplary damages. That is in authorities bundle 1E,  
20 tab 13, page 611. You will see this is a Schedule 8A, which contains further provision  
21 about claims in respect of loss or damage before the court or the Tribunal.

22 "Part 8 exemplary damages.

23 A court or Tribunal may not award exemplary damages in competition proceedings."

24 You will see that was inserted you will see from the textual amendments by the 2017  
25 Regulations.

26 Now on its face the prohibition appears to be absolute. It appears simply to prohibit

1 claims for exemplary damages in the Tribunal, but even if it were interpreted as  
2 applying only from 2017, when the paragraph was inserted, we say that the current  
3 pleading cannot stand in relation to the period subsequent to that. This, of course, is  
4 another reason why the lack of any specificity as to the timing of the various allegations  
5 in the claim form is important and unsatisfactory, but it is clear that at least one of the  
6 heads of alleged abuse postdates 2017, and that's the allegation in paragraph 7(iv)  
7 relating to the levy, which was only introduced in April 2018. So the pleading should  
8 carve out allegations of that nature.

9 The second point is that the pleading is in any event inadequate. It asserts in general  
10 terms that the conduct was calculated to make a profit and the loss and damage  
11 thereby caused was caused with a view to profit, but, with respect, that is not  
12 an adequate foundation for a claim for exemplary damages.

13 One sees that from a judgment of the Tribunal in 2012, the 2 Travel Group v Cardiff  
14 City Transport, which is at authorities bundle 1B at tab 7.

15 **MRS JUSTICE BACON:** Oh, this is Cardiff Bus.

16 **MR HOLMES:** Yes. The relevant discussion starts at page 275 of the bundle. You  
17 see at paragraph 448 that exemplary damages:

18 "The purpose of an award of damages is to compensate a claimant's loss, the object  
19 of exemplary damages is to punish and deter. ... they have been described as  
20 an undesirable anomaly. Exemplary damages are awarded in addition to  
21 compensatory damages for the purposes of vindicating the strength of the law and to  
22 teach the wrongdoer that tort does not pay, thus justifying the admission into civil law  
23 of a principle which ought logically to belong to the criminal. The courts have  
24 emphasised that exemplary damages are a remedy of last resort, which are not to be  
25 encouraged, and that the court's inherent discretion to award exemplary damages  
26 must be cautiously exercised."

1 Over the page at 451 there are the three categories in *Rookes v Barnard*. The  
2 category of present relevance is the second:

3 "Conduct calculated to make a profit which may well exceed the compensation  
4 payable to the claimant."

5 So that is the calculation which is described in *Rookes v Barnard*.

6 Turning on to page 280, you see at paragraph 461 that this was explained by Lord  
7 Devlin in *Rookes v Barnard* in the following way:

8 "Where a defendant with a cynical disregard for the plaintiff's rights has calculated that  
9 the money to be made out of his wrongdoing will probably exceed the damages at  
10 risk."

11 So that's the calculation described.

12 A more modern formulation can be seen from the *Kuddus* authority of the Supreme  
13 Court, which begins at paragraph 473 -- which is described at paragraph 473. You  
14 see there the dicta of Lord Nicholls:

15 "On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of  
16 the plaintiff's rights so contumelious, that something more than compensatory  
17 damages is needed to show that the law will not tolerate such behaviour."

18 Then for Lord Nicholls:

19 "A remedy of last resort. The essence of the conduct constituting the court's  
20 discretionary jurisdiction to award exemplary damages is conduct which was  
21 an outrageous disregard of the plaintiff's rights."

22 Then turning on to page 485 to 487 you see a consideration of these principles in the  
23 context of competition law damages claim and you see there at 485:

24 "Exemplary damages can in theory be awarded where there is an intentional breach  
25 of the law i.e. the defendant acts knowing that what he does constitutes  
26 an infringement of competition law and intending that infringement. It is equally clear

1 that the jurisdiction to award exemplary damages extends beyond this core case, and  
2 that cases which may be termed cases of recklessness can be sufficiently  
3 outrageous."

4 Then at 486:

5 "Lord Bingham defined recklessness in the context of the criminal law as the knowing  
6 disregard of an appreciated and unacceptable risk of causing an injurious result or  
7 a deliberate closing of the mind to such risk. The key word for present purposes is  
8 unacceptable. It is only when a risk is unacceptable, but is nevertheless consciously  
9 disregarded, that conduct becomes reckless."

10 Then at 487:

11 "What, then, is an unacceptable risk? We consider that an unacceptable risk is one  
12 capable of being characterised as involving conduct that entails a cynical disregard for  
13 a claimant's rights or behaving outrageously or outrageous disregard of the claimant's  
14 rights."

15 At paragraph 490:

16 "We consider that this will only be in those cases where an undertaking is aware that  
17 its proposed conduct is either probably unlawful or clearly unlawful that a risk can be  
18 classed as unacceptable."

19 **MRS JUSTICE BACON:** Yes, I see.

20 **MR HOLMES:** We don't come anywhere near to that we say. At paragraph 598 there  
21 is a specific indication as to the pleading that will be required. You see this is the  
22 passage we set out in our skeleton argument in a footnote:

23 "We are under no illusions but that this judgment is likely to incentivise the bringing of  
24 claims for exemplary damages and competition cases."

25 **MRS JUSTICE BACON:** I am sorry. Where are you reading from?

26 **MR HOLMES:** Page 329, paragraph 598. Do you have that?

1 **MRS JUSTICE BACON:** Yes.

2 **MR HOLMES:** "We are under no illusions but that this judgment is likely to incentivise  
3 the bringing of claims for exemplary damages in competition cases. That is a matter  
4 for future Tribunals. We would only emphasise that the mere fact that an infringement  
5 of the competition rules has been found is insufficient to justify the pleading of such  
6 a claim. In any case where exemplary damages are sought, it will be necessary to  
7 plead, and to plead with specificity, facts and matters alleging that the competition law  
8 infringement in question was executed either intentionally in breach of the law or  
9 recklessly so as to be regarded as sufficiently outrageous as to fall within Lord Devlin's  
10 second category. Otherwise, we consider, the claim will fall to be struck out."

11 We say that this pleading ignores that clear indication in the Tribunal's case law. The  
12 pleading -- the claim for exemplary damages is simply a general averment. It is  
13 unsupported by any particular facts and we say that that should be struck out.

14 So, Madam, unless I can be of further assistance, those are my submissions.

15 **MRS JUSTICE BACON:** Thank you very much. Yes. So, Mr Becker we could either  
16 break for five minutes now or you can start your submissions and we will break in  
17 fifteen minutes time. Which would you prefer?

18 **MR BECKER:** My Lady, I would prefer if I could take it now. Certain issues have been  
19 raised by my learned friend which I would need to take instructions on, because there  
20 are points I would like to hear from my clients first.

21 **MRS JUSTICE BACON:** All right.

22 **MR BECKER:** Can I just check one thing? The point about the Vietnamese loss and  
23 damage according to the schedule, my learned friend has put it on substantial  
24 amounts. I want to make sure I am reading from the right column myself. The Coca-  
25 Cola Vietnam imports comes out at -- where is my magnifying glass -- at 1,692,867.  
26 That's the 710. That's the figure that my learned friend is considering, is it, because

1 there is the third party imports as well?

2 **MRS JUSTICE BACON:** I think we were looking at the schedules on page 712, which  
3 included here forecasted Vietnam Coca-Cola imports of total purchases of 4 million,  
4 calculated losses at 1.385 million. Then forecasted non-Coca-Cola imports, which  
5 also appears to relate to the Vietnamese issue, losses calculated as 4.9 million. Those  
6 are the figures that Mr Holmes was referring to.

7 **MR HOLMES:** Madam, if it assists, it was point 1 below the table which makes good  
8 the link between the non-Coca-Cola imports and the other imported goods.

9 **MRS JUSTICE BACON:** Yes. Exactly.

10 **MR BECKER:** Point 1. Thank you. I will follow that up.

11 **MRS JUSTICE BACON:** All right. We will have five minutes now and then we will  
12 resume with Mr Becker's submissions.

13 **(Short break)**

14

15 **Submissions by MR BECKER**

16 **MRS JUSTICE BACON:** Thank you very much. Mr Becker.

17 **MR BECKER:** Yes, my Lady. Thank you very much. I have had an opportunity of  
18 just confirming a few matters with my client. Thank you to my learned friend for setting  
19 out the issues.

20 The tests in this Tribunal are in relation to strike-out. I think there is at least common  
21 ground in relation to the rules and obviously there would be, but more importantly to  
22 what in effect this hearing has to be, that is not a mini trial, a sort of standard  
23 arguments one would run to defend Part 24 or Part 3 strike-out. I think that's fairly trite  
24 law. I don't think I need to insult the Tribunal by going over the test, but I will do it if --

25 **MRS JUSTICE BACON:** No. Unless you disagree with something Mr Holmes said in  
26 his skeleton argument, I don't think you need to repeat that.

1 **MR BECKER:** No. As I say the judgment of Mr Justice Roth who in effect imports the  
2 Part 24 type of case law into the Tribunal rules I think we are on the same page in  
3 relation to that. Moving to that which we are most certainly not.

4 The position in relation to the three allegations which we are concerned with. My Lady,  
5 I am afraid my bundle which was sent to me on Friday after the skeletons does not  
6 have the page numbers. It has a few but doesn't elsewhere. It tails off in the second  
7 bundle. As I say the allegations are set out at page 2 and my learned friend has  
8 already taken you through those.

9 In relation to the evidence of in effect our customers, my client's customers being  
10 stolen, if I can use that term, by the defendant the evidence in relation to that is that  
11 pressure was brought to bear by my client -- brought to bear by the defendant to share  
12 these details and there is plenty of evidence set out by Mr Craven both in his original  
13 witness statement and more specifically in the smaller statement that my learned  
14 friend took you to.

15 Though it is I think right that there was follow-up by Coca-Cola both subsequently and  
16 ultimately through deliveries, the main point I am asked to advance on this is they were  
17 our clients and no matter what subsequently happened in relation to the association  
18 that the defendant formed, whether it was by deliveries or by contact by executives,  
19 and the sort of follow-up that -- and can I say the provision of fridges, which was also  
20 of an incentive, the point that my client would like me to advance is the fact that these  
21 were originally our customers. That alone we say is the beginning of the end. Once  
22 they are our customers, once we were forced to disgorge their dealings, anything that  
23 happened subsequently does not change the fact that it is said that the defendant in  
24 effect pressured us to give over the information and that was then used. So that is the  
25 point in relation --

26 **MRS JUSTICE BACON:** Mr Becker, first of all, where is the pleading, which clients'

1 information was given and also how it was used. You have heard what Mr Holmes  
2 has said, that the pleading does not identify the former, and the evidence doesn't  
3 identify the latter.

4 **MR BECKER:** My Lady, that is right. Obviously the witness statement does go into  
5 what subsequently happened once the details were divulged in relation to the  
6 deliveries and the like, and obviously my learned friend has taken you to that. It is  
7 right to say and I am not going to insult the Tribunal by saying the details in  
8 paragraph 1 along which your Ladyship has just spotted for comment, that is lacking  
9 it is right to say, but that is not necessarily terminal to the claim itself. That would be,  
10 if necessary, as I say, orders can be made for further particularity, as one might have  
11 in the normal course.

12 **MRS JUSTICE BACON:** All right. So if you were to particularise who you said was  
13 involved, which customers' details were given, how those were subsequently  
14 contacted by, you say, the defendant, that gets you so far. Where are the particulars  
15 of how that constitutes an abuse of dominance as opposed to, as Mr Holmes says,  
16 simply competition on the merits?

17 **MR BECKER:** I am -- well, yes, of course competition is -- competition itself, I can see  
18 how the argument is put that it is an open market and people can trade with who they  
19 want. I think it is the fact that the position is this might be not quite so offensive if it  
20 was just another person in the same position as my client. The fact is the competition  
21 here is emanating directly from the very bottling company that --

22 **MRS JUSTICE BACON:** Yes, but how is it an abuse of dominance for the defendant  
23 to compete by offering favourable prices? What is abusive about that in terms of the  
24 competition law principles?

25 **MR BECKER:** It only assists insofar as it is not something that obviously we can avail  
26 of ourselves as part of a weaponry. We can't compete. It is something we say which

1 is purely vested in the defendant, because --

2 **MRS JUSTICE BACON:** Are you saying that the defendant was pricing at  
3 an unprofitable level?

4 **MR BECKER:** Well, there were various -- I mean, that's, as is in Mr Craven's  
5 statement, is in a different context said. However, in this particular -- we have put our  
6 colours to the mast in relation to the particulars in relation to the abuse and in this  
7 context it is, we say, by them using their position to in effect steal our clients.

8 **MRS JUSTICE BACON:** How is that an abuse of a dominant position rather than  
9 simply offering a more favourable price, which anyone could do?

10 **MR BECKER:** It is because the contacts they bring -- they are the bottlers. My Lady,  
11 I hear what you say and I can't -- my case has been put as it has been put and I can't  
12 really advocate it much more than it is.

13 **MRS JUSTICE BACON:** Are you saying that cannot be particularised because you  
14 have seen the case law saying that not only do the facts have to be set out, but also  
15 the defendant needs to know how it is said that that is an abuse of dominance. That's  
16 one of the key complaints made by Mr Holmes. It is not said how this is an abuse of  
17 dominance. At the moment I am struggling to understand from your response as to  
18 what you say the answer to that question is.

19 **MR BECKER:** Well, my Lady, evidentially I would see here legally what, but  
20 evidentially my client has set out the basis upon which they say is the anti-competitive  
21 nature of the defendant knowing.

22 **MRS JUSTICE BACON:** This is not a question of fact, Mr Becker. I am asking you  
23 to explain how as a matter of law the facts that you rely on translate to an infringement  
24 of the competition rules.

25 **MR BECKER:** Yes, my Lady. I get that. It is on the basis -- my clients put it on the  
26 basis that the dominant position, which I don't think is in doubt, in relation to --

1 **MRS JUSTICE BACON:** No, that has not been accepted. Mr Holmes is simply saying  
2 he is not asking for your claim to be struck out on that basis. He doesn't accept for  
3 one minute that his clients are in a dominant position, nor does he accept that the  
4 pleading is sufficient in that regard. He is merely not applying on the basis of the  
5 deficiencies in the pleading in that regard for a strike-out or summary judgment, it is  
6 not accepted and the Tribunal cannot conclude that it is not in doubt, because  
7 Mr Holmes has not pleaded to it. He said in order to establish a dominant position  
8 a vast amount of evidence, including expert evidence, would be required.  
9 So leaving that aside, assuming for present purposes that there is a dominant position,  
10 the question is how this conduct abuses that dominant position as a matter of law and  
11 what do you say about that?

12 **MR BECKER:** My Lady, insofar as -- I am just bringing up my skeleton on this point.  
13 Sorry. I am just reminding myself of Section 18 in relation to that, 18(2), looking at  
14 that:

15 "Conduct may, in particular, constitute such an abuse if it consists in directly, or  
16 indirectly imposing unfair purchase or selling prices or other unfair trading conditions.  
17 ..."

18 We are obviously not doing that:

19 "Applying dissimilar conditions to equivalent transactions with other trading parties ..."

20 My Lady, obviously that is what the law says in relation to that.

21 **MRS JUSTICE BACON:** Do you say that this conduct falls into any of those categories  
22 and if so which?

23 **MR BECKER:** My Lady, I would say probably (2)(a) and imposing unfair trading  
24 conditions in the sense that that would be -- I think it is the only one it slots into in  
25 relation to that because they are -- well, they are doing what they are doing. That  
26 would be the answer to your question.

1 **MRS JUSTICE BACON:** What trading condition is being imposed, because as far as  
2 I understand it you are not saying that any trading condition is imposed on you? What  
3 you are complaining about is the defendant supplying to somebody else and supplying  
4 to somebody else at a favourable price. In what way does that amount to an unfair  
5 trading condition and, if so, imposed on whom?

6 **MR BECKER:** My Lady, I think the way it has been taken is the condition in the more  
7 general sense than trading conditions, in the way the defendant has got possession  
8 of the names of the various of our customers. That's how it has been construed I think  
9 certainly by my clients.

10 **MRS JUSTICE BACON:** Hang on. The abuse is said to consist -- the way that the  
11 abuse is said to have given rise to loss is that the defendant supplied the customers.  
12 It is not said that simply getting possession of the names was in itself abusive so as to  
13 cause loss.

14 **MR BECKER:** Yes.

15 **MRS JUSTICE BACON:** That's not a trading condition as far as I can see. It is simply  
16 gaining possession of the names.

17 **MR BECKER:** It may be (inaudible) subject to amendment to reflect your Ladyship's  
18 observations.

19 **MRS JUSTICE BACON:** What is the amendment that you would seek to make?

20 **MR BECKER:** Well, my Lady, the particularity to which my learned friend has  
21 obviously (inaudible) but more to the point is to answer your Ladyship's question posed  
22 in relation to -- in effect what as a matter of law are the -- what the conduct is abusive.

23 **MRS JUSTICE BACON:** Yes. I can see if you had told me that you wanted to plead  
24 a particular way in which this conduct causes abuse, you might be saying "This is the  
25 way we want to plead it. Can we please have permission to amend". At the moment  
26 I have not understood how it is that you do want to plead it. You have said unfair

1 trading conditions. I can't understand what you mean by unfair trading conditions.  
2 What trading condition is said to have been unfair?

3 **MR BECKER:** My Lady, the conditions is that in effect Coca-Cola -- I think that's  
4 plain -- in order for us to continue to be in effect -- get the necessary benefits for my  
5 clients that they had to in effect -- and this is something of a blanket position that one  
6 sees throughout this case or through the complaints, is that Coca-Cola are saying we  
7 are -- and my client trades obviously very heavily in the Coca-Cola product, not just  
8 the famous one but various other ones under the Coca-Cola banner and therefore  
9 what we are saying is that they in effect on matters of pricing and who we can trade  
10 with, as you have seen from the evidence, my clients used to trade in certain markets,  
11 on the discounted markets geographic areas, there is very specific on what Coca-Cola  
12 when they are contracting with my clients to give the necessary benefits to it which are  
13 set out. We say that this is part of the controlling aspect of Coca-Cola that we had to  
14 give them the details they sought, otherwise they would either just cut us off or make  
15 this impossible for us to trade competitively. That is really I think to pull the strings  
16 together.

17 **MRS JUSTICE BACON:** Yes. So you are saying the unfair trading condition is that  
18 they would not give you an advantageous price unless you would provide the customer  
19 list?

20 **MR BECKER:** I think probably, yes. That's right.

21 **MRS JUSTICE BACON:** That is the unfair trading condition. How does that in itself  
22 lead to loss because what you are saying is they gave you an advantageous price?  
23 I don't see how that translates to the loss and damage claimed.

24 **MR BECKER:** I think the fact is once we lose control of our customers and in effect  
25 Coca-Cola strike up their own deals with our former customers, that is where the loss  
26 starts to accrue. It is right to say, I have to say as we speak, the schedule of loss

1 | which my learned friend has already taken you to is focused predominantly on the  
2 | Georgian losses in relation to -- and third party losses in relation to that, to which I will  
3 | turn in a moment, but it is right, my Lady, yes, there would need to be particularity in  
4 | relation to what loss there is. It is right and I am not going to waste the Tribunal's time  
5 | at the moment by saying there is no evidence as to what loss has been sustained as  
6 | a result of the conduct pleaded to at 7(i), but it doesn't necessarily make it a hopeless  
7 | case to raise.

8 | **SIR IAIN McMILLAN:** Madam Chairman, can I ask Mr Becker a question, if I may,  
9 | please? When Coca-Cola asked your clients for the details of their customers, did  
10 | they give a reason as to why they wanted these details and was the reason that they  
11 | gave, if they did ask, accurate?

12 | **MR BECKER:** That's a very good question, to which I have to say unless it is covered  
13 | by Mr Craven in relation to it, why it was -- why the request was made my clients only  
14 | suppose that was part of the pressure that was being brought to bear upon them.  
15 | I can't answer that any further than that which is actually set out in Mr Craven's first  
16 | witness statement when he starts to raise it. There were obviously -- I mean, it is not  
17 | pleaded it is right to say, but touched upon on the retro system, but I am not going to  
18 | go down that way because it is not pleaded as part of the loss. So I can only -- I have  
19 | to say I am looking around to see whether it was one of the paragraphs in Mr Craven's  
20 | witness statement that covers this particular enquiry, your enquiry, as to why they were  
21 | doing it, save for the fact that they saw the marketplace and they just get -- I think the  
22 | general gist of my client's position on this is that it was just the defendants seeing  
23 | an opportunity and going for it I suppose. I think that is the only -- in the general  
24 | scheme of things that is why they did it.

25 | I can probably use this moment to raise as to why it was my client instructs me to plead  
26 | in relation to the Bestway aspect. As a matter of law I certainly was not going to run

1 that as an abuse but the point that was put in was an element to show that Coca-Cola  
2 will ask -- sorry, the defendant will ask my client to in effect manipulate statistics of  
3 that particular -- one of their best cash and carry customers in order to do things, and  
4 that's the way they operated. So it was a sort of gun to the head type of scenario, but  
5 as far as why, save for the fact that they wanted to be able to control, the answer is  
6 probably the market, and you will have seen there was particular concern about  
7 imports from various places and I think there was a general -- from Mr Craven's  
8 statement that there was a concern at being able to police what product was in the  
9 marketplace in relation to that.

10 That will no doubt be the official reason probably put by the defendant, that they were  
11 put to their election. We see something rather more darker obviously on the lines of  
12 what we have said, but I think that's only as far as I could, pulling the strings together  
13 from Mr Craven's witness statement, that's probably all I could say on the response to  
14 that.

15 **SIR IAIN McMILLAN:** Thank you.

16 **MR BECKER:** Just maybe going on, my Lady, to the second one, which is something  
17 slightly more tangible, I take on board obviously the observations made by my learned  
18 friend in relation to the Vietnamese aspect and that's quite right, but, of course, that  
19 element was settled. I am trying to find a bit of space.

20 Now in relation to the loss and damage on that I have taken some instructions in  
21 relation to that. As you see the loss in relation to that we say is by -- we have the  
22 Georgian imports. Obviously you have the Vietnam imports. Of course that must be  
23 right, the loss of that. That has already been settled and I don't seek to disagree with  
24 my learned friend in relation to that. The large amount was the -- we obviously have  
25 the Georgian amounts, which are only £260,000.

26 The third party imports, you can see from Mr Craven's witness statement that in effect

1 because of the conduct of the defendant in relation to the Vietnam debacle, but also  
2 in relation to the Irish and the Georgian. It is right to say that there is no information  
3 in relation to the Irish.

4 My client's case on that, as I understand it to be, is as a result of the conduct of the  
5 defendant, putting the various pressures on in relation to stopping of the Georgian and  
6 the Irish that my client starts to import other imports for fear of loss corporately  
7 speaking, commercially speaking and that's how the loss for that was -- in effect, that's  
8 what they mean by third party imports, which is to say the 4 million odd.

9 So, my Lady, that's in relation to that. That impact where it says on that last page, to  
10 which my learned friend helpfully took me to, the forecasted non-Coca-Cola imports.  
11 To say that, the 4 million odd, that's what's that is to do. Actually although I understand  
12 why they may think that, it is nothing to do with the Vietnamese aspect. It is to do with  
13 the losses as a result of concern, loss of sort of corporate nerve as a result of the  
14 conduct of the defendant that we have not felt able to import other non-Coca-Cola  
15 items as a result.

16 My Lady, even if the Tribunal is not with us on that, there is still some loss and damage  
17 in relation to the Georgian --

18 **MRS JUSTICE BACON:** Yes. Can you address the prior question, which is exactly  
19 what your case is on this, because Mr Holmes, as you will have heard, says the  
20 pleading is hopelessly unclear. What is the alleged abuse? Before we even get on to  
21 loss. When did it occur and what was the assistance that is said to be and how is that  
22 abusive?

23 **MR BECKER:** My Lady was saying again as far as abusive is concerned -- the dates  
24 I can't add anything to what -- the observations made by my learned friend. It says  
25 what it says. I haven't got any specific instructions.

26 **MRS JUSTICE BACON:** All right. Do you have any instructions that this conduct took

1 place after 2013, because Mr Holmes said on the evidence every indication is that this  
2 took place prior to 2013?

3 **MR BECKER:** Looking at Mr Craven's witness statement, it is right to say he does not  
4 give detail in relation to that. If I go to where it was in his witness statement -- there is  
5 a subheading in relation to that particular in relation to that, and I am looking at towards  
6 the end of the witness -- half way through the witness statement. We have the  
7 contracts.

8 **MRS JUSTICE BACON:** Perhaps you could give me the relevant paragraphs of the  
9 witness statement that sets out the date that you say this conduct took place?

10 **MR BECKER:** My Lady, it is scattered quite -- we obviously -- we had the -- looking  
11 at paragraph 40. That was the 2013 and '14 which was the Vietnamese stock. That  
12 starts at paragraph 40.

13 **MRS JUSTICE BACON:** We are not talking about the Vietnamese. We are talking  
14 about the Irish and the Georgians.

15 **MR BECKER:** Then we have -- I am looking -- 19 was when the VAT was. There was  
16 a meeting with the parties.

17 **MRS JUSTICE BACON:** We know all that. Could you just tell me what are your  
18 instructions on this.

19 **MR BECKER:** My Lady, there is not -- in relation to -- there is salesman information  
20 which is at page 8, paragraph 80, but that is not exactly on point in relation to what  
21 your Ladyship is asking. Banning of exports is 88 and ongoing.

22 **MRS JUSTICE BACON:** That's sugar tax issue.

23 **MR BECKER:** Banning of exports --

24 **MRS JUSTICE BACON:** I think it is a very short question.

25 **MR BECKER:** Yes. My Lady, it is. Georgian stock, my Lady, is at 22 but I can see  
26 what my learned friend has alighted upon saying it does say 2010 to 2011 in relation

1 to that. I am just looking to see if there is any other dates. At 108 since 2018 they  
2 have been exporting all over the world. That doesn't take matters any further. I am  
3 just looking at -- it says at 112:

4 "Since the Vietnam episode in 2016 they have not imported any branded stock from  
5 outside the EU for fear of having the container seized."

6 My Lady, that is our case in relation to that.

7 **MRS JUSTICE BACON:** No. That is the Vietnamese episode. The pleaded case  
8 relates to you being asked to give assistance to take Irish and Georgian stock off the  
9 market. As far as I can see from the evidence there is no evidence that this took place  
10 after 2013 and the evidence seems to suggest that it took place some time between  
11 2010 and 2012. Is it your case that anything occurred in terms of abusive conduct  
12 which is pleaded in paragraph 7(ii), your Particulars of Claim, is it your case anything  
13 occurred after 2012?

14 **MR BECKER:** My Lady, I am just --

15 **MRS JUSTICE BACON:** Could you just answer that question before you move on?  
16 Is it your case that anything occurred after 2012?

17 **MR BECKER:** My Lady, I understand there is, otherwise it would be pointless. That's  
18 why it says at 112 since the Vietnamese episode in 2016 FFF have not imported and  
19 because of the continued obviously policing in relation to what we said at 7(ii).

20 I have just had a text from those instructing me asking if I could take some instructions  
21 from them. It may cover this particular point. I wonder if I could have your indulgence  
22 for a few moments.

23 **MRS JUSTICE BACON:** A couple of minutes and then we will resume at 12 o'clock.

24 **MR BECKER:** Thank you very much.

25 **(Short break)**

26 **MR BECKER:** My Lady, thank you very much for that. I was just able to field a phone

1 call from Mr Craven.

2 **MRS JUSTICE BACON:** Can you just wait a minute, Mr Becker. I want to wait until  
3 we are told the live-stream is up. Thank you. Thank you, Mr Becker.

4 **MR BECKER:** My Lady, thank you very much. As I say, I have just taken a call from  
5 Mr Craven, who asked to field the question you posed. As I left things, 112 of his  
6 witness statement talks about obviously since the debt episode. His instructions on  
7 this and I quote are that he didn't put it any particular date because it continues and it  
8 did continue until relations with the defendant came to an end. So it was an ongoing  
9 situation in relation to the Georgian and the Irish conduct by the defendant in relation  
10 to those.

11 **MRS JUSTICE BACON:** What do you mean by "It continued"? What continued?

12 **MR BECKER:** In relation to the -- as part of the ongoing trading conditions between  
13 my client and the defendant that they were in effect to ensure that the Irish and  
14 Georgian products were pushed out of the English market and, as I say, that had  
15 an impact on my client's profits, which I have seen in the accountant's --

16 **MRS JUSTICE BACON:** All right. How is it said that your client was to ensure that  
17 Irish and Georgian product was pushed out of the market, because the only details  
18 even in the witness statement are those given at paragraph 21:

19 "I remember having conversations with Coca-Cola reps. They wanted to push the Irish  
20 out of the market. ... They told me they would run a promotion whereas Coca-Cola  
21 would give FFF additional retros."

22 So the conduct was described at paragraphs 21 to 22 and that's all that is said about  
23 the specific conduct which is then pleaded at paragraph 7, sub-paragraph (ii). So what  
24 is it that you say was continuing and where is the evidence of that?

25 **MR BECKER:** My Lady, I am just going through where I have highlighted things  
26 myself in relation to that. Well, at 104, of course, it is talking about the Georgian stock:

1 "I have spoken with a former ..."

2 **MRS JUSTICE BACON:** Yes. That's specifically described as being something that  
3 happened between 2010 and 2011. What is the conduct that is said to have occurred  
4 after 2012?

5 **MR BECKER:** My Lady, it is just in effect -- my instructions are that it has continued  
6 as it has done throughout. That's what my client informed me. So the conduct which  
7 in effect, by the defendant seeking the cooperation of my client to remove those other  
8 marketplaces from the UK market, that has continued until relations between the  
9 parties ended.

10 **MRS JUSTICE BACON:** So what you are saying is this promotion which is described  
11 at paragraph 21 occurred after 2012. If so, when?

12 **MR BECKER:** Well, my Lady, I obviously can't give evidence in relation to it. It is right  
13 to say it is not expressly set out in the witness statement.

14 **MRS JUSTICE BACON:** It is not either implicitly set out in the witness statement.  
15 This is describing a past event. It is not describing a continuing event that continued  
16 to happen at any later date. It is describing a promotion which worked in a particular  
17 way.

18 **MR BECKER:** My Lady, I see that. My instructions on the point are that the conduct  
19 as set out, even on its perhaps not more detailed as one might like it, has continued,  
20 as I say, until matters concluded between the parties. I can't put it any higher than  
21 that. I am not going to waste the Tribunal's time by trying to sort of -- that is my  
22 instructions on the point.

23 My Lady, if the -- again this may all be matters that can be, dare I say it, and it would  
24 be difficult for me to push back on, if the Tribunal was going to order on terms that  
25 further particularity is given.

26 **MRS JUSTICE BACON:** That is what you say about the facts. Do you dispute

1 Mr Holmes' analysis that insofar as conduct did occur prior to 2015 that is time-barred?

2 **MR BECKER:** I see what in relation to -- I obviously see in relation to that. I don't  
3 think the argument of concealment particularly works because we obviously knew  
4 what was going on at the time. So I don't think that is in relation -- there was  
5 an argument I was asked to advance that there was concealment in relation to aspects  
6 and that's why you have the authority that was sent in yesterday.

7 **MRS JUSTICE BACON:** Not whether you were asked to advance the argument, but  
8 you have heard what Mr Holmes has to say. You have seen the provisions that he  
9 has taken you to.

10 **MR BECKER:** Yes. It would be difficult to push back on that in relation to those early  
11 years. I think that is probably right.

12 **MRS JUSTICE BACON:** Right. So that deals with limitation. Now can you explain to  
13 the Tribunal, please, how the conduct that is referred to at paragraphs 21 and 22 of  
14 the witness statement of Mr Craven amounts to an abuse of dominance, because at  
15 the moment what is described there is conduct which gives your client additional  
16 discounts to enable them to sell more by selling at lower prices in the UK market. How  
17 is that an abuse of dominance?

18 **MR BECKER:** As I understand the imports from, whether it is Vietnam or in our case  
19 Georgian and Irish, that there were even greater discounts to be had by being to import  
20 from that. So notwithstanding what we were getting from Coca-Cola there was still  
21 an enduring loss. If that were not so, the accountant's report would be based on a  
22 very false premise, but it is put even on the £200,000 odd is there was a loss through  
23 the years in relation to that.

24 **MRS JUSTICE BACON:** I don't understand how that relates to what is said in  
25 paragraphs 21 and 22. What's being said there is that the conduct which is  
26 complained of, which is your client offering Coca-Cola assistance, is that your client

1 would be asked to share data with Coca-Cola for outlets where the Irish stock was  
2 being sold. Coca-Cola would then sign off additional stock with funding to allow your  
3 client to sell cheaper in the UK market. Now how is that abusive? Can you explain  
4 how that amounts to an abuse of dominance? On its face that looks like Coca-Cola  
5 incentivising you to sell more and at a lower price.

6 **MR BECKER:** My Lady, yes, I see that, but the position, as my client put it, I can't  
7 really add any more to it. I am just making sure that I just go back to a paragraph or  
8 two. My Lady, I can't say anything more than has already been said in relation to that.  
9 My client has -- the accountants have formulated losses in relation to that. I will  
10 perhaps maybe pull that up. That might assist in --

11 **MRS JUSTICE BACON:** No. I am not asking about loss and damage. I am asking  
12 about the legal formulation of abuse.

13 **MR BECKER:** My Lady, it is just telling in effect, directing us, telling us where we can  
14 buy our product from and that's again, like the addresses, is another example of -- is  
15 another example of the defendant telling us in effect "If you know what's good for you,  
16 you will do what we say", and in effect using the fact that they were a major provider  
17 of product in order to tell us what to do, by in effect having to comply with what they  
18 want do, which is the loss and damage.

19 **MRS JUSTICE BACON:** So that's 7(ii). If you can't add anything more, then there is  
20 no point in dwelling on that I don't think. Before we move on do either of the other  
21 Tribunal members have any questions about that?

22 **SIR IAIN McMILLAN:** I have a question, if I may, Madam Chairman? There are  
23 a number of paragraphs there, 20, 21, 27, 29 and 30, where Mr Craven refers to CC  
24 reps. Now the CC reps and the date and time of the conversations are not in the  
25 witness statement either. At paragraph 30 in the witness statement it reads:

26 "A senior CC rep contacted me and requested that I help them out. CC realised their

1 pushing out of the Irish stock was unlawful."

2 Then if continues to read the rest of that paragraph it concludes:

3 "The invoices were to be used, if ever CC were questioned about pushing out the Irish  
4 stock, so they knew exactly what they were doing and even collated evidence to cover  
5 their actions up."

6 I just wonder, were this case to go to trial, if it were to go to trial, would Mr Craven be  
7 in a position to say who that representative was and be in a position to introduce  
8 evidence to support this statement?

9 **MR BECKER:** Well, Mr Craven is obviously hearing these proceedings. I will happily  
10 ask him to text me on the line -- I would normally at this stage be just turning around  
11 and answering your question very quickly. It is all a little bit more challenging in these  
12 times. I will see whether, if I may -- I will just get him to -- he has just texted me and  
13 said yes, he can.

14 **SIR IAIN McMILLAN:** Thank you. Indeed, he would have to, I am afraid, because  
15 otherwise it would make very thin evidence. Thank you.

16 **MR BECKER:** Yes, indeed. Thank you very much. Then just dealing with the last  
17 point, which is to do with the sugar -- the replacement of the sugar levy. The point  
18 taken by my learned friend in relation to that is no requests were exhibited in relation  
19 to that. The short point in response to that is there was just a blanket refusal by the  
20 defendant to allow us to have in effect put in play -- to claim back -- Coca-Cola -- the  
21 defendant would claim it back, but it is right to say they have not exhibited the requests,  
22 but my instructions on this was that the requests were just blankly refused.

23 **MRS JUSTICE BACON:** Right. So what obligation do you say the defendant was  
24 under to pay this?

25 **MR BECKER:** It is a case I think as it is put, and I will just happily bring this up,  
26 because this is covered obviously in the witness statement in relation to that, and then

1 we have got -- so there is at 88:

2 "Paul Banton of the defendant denied that CC supported exports, so we could not  
3 have the sugar levy tax back for stock we exported."

4 It's a blanket point in relation to this. I mean, there is obviously -- my client goes on to  
5 surmise as to why this has been happening.

6 **MRS JUSTICE BACON:** Well, first of all, can you just answer the question? What is  
7 the defendant's obligation to do this? Do you say that there was a contractual  
8 obligation which meant that they should have reimbursed you or some other obligation,  
9 because in the correspondence it is said they have no general policy and, in fact, it  
10 says in the correspondence on the page to which I referred Mr Holmes it said:

11 "It is CCP's general policy not to engage in such claim processing and there is no  
12 statutory obligation on suppliers to undertake such steps."

13 So what is the defendant doing wrong by not providing you with a reimbursement of  
14 that?

15 **MR BECKER:** In relation to that my client has -- it is just more examples of the  
16 controlling aspects conducted by the defendant. As you see, he sets out at  
17 paragraphs 89 and 90 other companies that are allowed to in effect have that privilege.

18 **MRS JUSTICE BACON:** Have you set out any evidence of the defendant reimbursing  
19 other companies? If so, where?

20 **MR BECKER:** He says at 88:

21 "I can prove that CC continually allowed export of stock and have allowed other  
22 companies discounts ... These documents detail that."

23 Then you have a Mr Thakrar of ...

24 **MRS JUSTICE BACON:** All right. Are those the companies that are said to have  
25 benefitted from this levy being reimbursed?

26 **MR BECKER:** As I understand it, yes.

1 **MRS JUSTICE BACON:** Where is the evidence of that?

2 **MR BECKER:** The evidence of them benefitting it, well, my client states that, my Lady,  
3 does he not, at 89? Then, incidentally, going on in answer to your question at 92 --  
4 this is going back a step -- I am sorry to take things out of -- there is the CC actively  
5 pushed Irish products and other products out of the UK market. That's an answer to  
6 your earlier question. It doesn't give a date it has to be said. Then we obviously have  
7 this meeting which is at 95.

8 **MRS JUSTICE BACON:** Are you saying that there is any evidence before the Tribunal  
9 of particular companies getting the sugar levy back from Coca-Cola, apart from the  
10 assertion by your client in this witness statement?

11 **MR BECKER:** Well, my Lady, as I say, my client has stated the companies that have  
12 been. I am sorry. I am just texting on this. I mean, he has provided, as I say, the  
13 export documentation, which he obviously sets out at 89. I haven't got the exhibits  
14 cross-referenced, I am afraid. My client says it's in the exhibits. I am afraid he does  
15 not cross-reference the page number. It's slightly difficult for me to find it off the -- wait  
16 a minute. They are page 115 to 116. Just if I can pull that up. I am afraid I don't  
17 have -- the second bundle is not paginated in the same way. Perhaps I can just see  
18 those documents.

19 **SIR IAIN McMILLAN:** Madam Chairman, could I pose a question to Mr Becker, if  
20 I may? It is about paragraph 92:

21 "CC actively push Irish product and other legally imported goods out of the UK market.  
22 They also actively push GB stock into European and other markets outside the EU.  
23 They dictate who can sell what product where, and even control who can get  
24 government sugar levy tax back."

25 My question, if I may, Mr Becker, is would your client be able to expand on that  
26 sentence to give the Tribunal more information, more evidence to support that -- the

1 statement in that sentence?

2 **MR BECKER:** Again I imagine the answer is it's possible. I am just waiting for him  
3 again to confirm it on a text message that he probably would. I have just got yes, he  
4 can. I have just received a text to that effect.

5 **SIR IAIN McMILLAN:** Right. So he would be able to evidence the assertion?

6 **MR BECKER:** Yes, he would. I am just looking for -- my client has told me it is in the  
7 exhibits. Unfortunately the exhibit that I am looking for which he says is at 90:  
8 "Stock was then delivered to the Netherlands."

9 That's not --

10 **MRS JUSTICE BACON:** The exhibit might show stock being sent from one place to  
11 another. The question I was asking is do you have actual hard evidence of other  
12 companies being reimbursed the sugar levy by Coca-Cola?

13 **MR BECKER:** My Lady, I understand that there is because that's what my client says  
14 in his witness statement in relation to this point. I am just having a look exactly where  
15 it actually says, because it talks about the HMRC aspect and I will just pull that up. At  
16 101, for instance --

17 **MRS JUSTICE BACON:** What document in which bundle are you referring us to?

18 **MR BECKER:** This is in my client's witness statement. He doesn't, I am afraid, make  
19 any cross-reference to the --

20 **MRS JUSTICE BACON:** Which bundle do you want, 3A, B or C?

21 **MR BECKER:** This is in Mr Craven's witness statement, his original one.

22 **MRS JUSTICE BACON:** All right. Which bundle do you want me to look at? We  
23 have electronic bundles.

24 **MR BECKER:** My Lady, I haven't got -- there is no cross-reference at all. So this is  
25 impossible unless my client can actually give me. I don't have the reference -- my  
26 bundle only has exhibit pages.

1 **MRS JUSTICE BACON:** Do you not have the electronic bundle?

2 **MR BECKER:** I have, but there is no cross-reference between the points made in my  
3 client's witness statement and to answer the question you are posing.

4 **MRS JUSTICE BACON:** All right.

5 **MR BECKER:** Obviously there are the documents in the exhibits but at the moment  
6 I am struggling somewhat to find out where it is. He is hearing what I have to say. If  
7 he would like to text me -- sorry to talk over -- his exhibit page numbers, then that  
8 would very helpful, but at the moment it is not -- it's no more -- doesn't seem expressly  
9 referenced.

10 **SIR IAIN McMILLAN:** Is it the witness statement without paragraph numbers by Chris  
11 Craven?

12 **MR BECKER:** No. Well, it's the one -- there's Chris Craven's first witness statement  
13 and it is on this point at which he starts talking in relation to the banning of exports,  
14 which is from paragraph 88 onwards.

15 **SIR IAIN McMILLAN:** Oh, yes. Right.

16 **MR BECKER:** He says:  
17 "I can prove that CC continually allowed export of stock and have allowed other  
18 companies discounts."  
19 He has just texted me to say -- her Ladyship has quite rightly asked me to take the  
20 Tribunal to --

21 **MRS JUSTICE BACON:** If you want the pages of exhibit CC, page 115 to 126, I am  
22 finding those in bundle 3B, page numbers 370. These are simply invoices.

23 **MR BECKER:** Yes, my Lady. I have seen that.

24 **MRS JUSTICE BACON:** Does any of this answer my question about where the  
25 evidence is that other companies have been reimbursed by Coca-Cola?

26 **MR BECKER:** My Lady, I am just asking him to take me to the evidence on that,

1 because, as I say, it is not.

2 My client makes one point, while he is considering helping me with that, the price he  
3 paid for stock would not be possible to sell without the levy reimbursed. The levy is  
4 obviously factored in. In answer to the question of abuse, the point my client has  
5 asked me to raise with you is that it wouldn't be possible to sell, because the levy in  
6 effect reduces the price, as I understand it, and to make it competitive, otherwise he  
7 wouldn't be. It is all part and parcel of his ability to trade profitably when factoring in  
8 the levy reimbursement.

9 I have just sent him a text in relation to can he take me to the evidence in relation to  
10 the other companies' discounts, because I am just looking at the remaining --

11 **MRS JUSTICE BACON:** So how do you say that that constitutes an abuse of  
12 dominance?

13 **MR BECKER:** My Lady, it impacts on my -- my client has just sent me -- my Lady, in  
14 relation to that from those instructing me the information you seek in relation to that  
15 would be provided during the disclosure process. So it's not in the bundle, as  
16 I understand it for me to take you to now. So that deals with that.

17 Coming to your point as to what is the abuse on this, well, it's again we say a controlling  
18 element of the -- sorry. I seem to be sent another text from my client. Yes. My client  
19 puts it on in answer to your question -- this is an example of the defendants picking  
20 and choosing who can benefit from the levy. Therefore its impact on my client's ability  
21 to trade profitably and more importantly competitively, because, as I say, it is one rule  
22 for others and one rule for my clients. My Lady, that's my instructions on that point.

23 **MRS JUSTICE BACON:** Right. You already said earlier that the loss and damage on  
24 this point is not particularised.

25 **MR BECKER:** It is not, no.

26 **MRS JUSTICE BACON:** Is there anything in the material before me that shows your

1 client asking Coca-Cola for reimbursement of the levy?

2 **MR BECKER:** I suppose it is implicit by what's said at paragraph 88:

3 "Mr Banton denied that CC supported exports, so we could not have the sugar levy  
4 tax back ..."

5 That's implicit in that line. He was asked and refused. That confirms what I was saying  
6 earlier. It was just a blanket ban. That's why there's no ongoing correspondence. As  
7 to whether there's an exhibit -- an e-mail from Mr Banton saying "You can't have it",  
8 I don't know at the moment. There's no reference to how that was communicated to  
9 those. I have just actually got a text from my client again.

10 The point is -- my client puts it this way. If they hadn't said "No", my clients would be  
11 exporting, as he does with other brands. So it's self proving, the fact that we are not.  
12 It is not -- there's no commercial reason why we wouldn't. It is just the fact --

13 **MRS JUSTICE BACON:** You are just asking me to assume that a request was made  
14 and that it was denied without any evidence as to when the request was made, when  
15 the denial was made, how it was made, whether it was in a conversation, whether it  
16 was in a text message or an e-mail.

17 **MR BECKER:** My Lady, I have just received a text. Mr Craven, my client, I will read  
18 out the text. He has an e-mail from Paul Branton saying that Coca-Cola will do nothing  
19 to support the exports. I have not seen that e-mail, it has to be said, and I don't think  
20 it is exhibited, but those are my instructions on it and that's to say my client makes  
21 reference to Mr Banton denying it. It is right to say that I can't take matters any further  
22 as to the evidential basis to that denial.

23 **MRS JUSTICE BACON:** Yes, and we have not seen the e-mail or the context of the  
24 e-mail, whether it was in the context of a discussion about the sugar levy or something  
25 else.

26 **MR BECKER:** My client said apparently it was sent to those instructing me and those

1 are obviously online and it may well be that they might be able to take me to the  
2 exhibits, whether it is in his exhibits as well in relation to that point. If I may, my Lady,  
3 with your indulgence just have a quick look at the other witness statements of those  
4 instructing me just to say --

5 **MRS JUSTICE BACON:** Well, I would rather we didn't spend time altogether looking  
6 at the witness statements. Perhaps you should just continue.

7 **MR BECKER:** That deals with the points in paragraph 7. That is the last of the  
8 allegations.

9 **MRS JUSTICE BACON:** All right. If you want to give us a reference to a particular  
10 document that you would like us to look at, then we will do that.

11 **MR BECKER:** My Lady, I will just need to have -- I am just seeing whether those  
12 instructing me have been able to send me a text in relation to that, where that could  
13 be found. All I have is a text from Mr Craven saying it was sent to those --

14 **MRS JUSTICE BACON:** If during the course of your submissions they give you  
15 a bundle reference that you would like us to look at, then you can break off and give  
16 that to us.

17 **MR BECKER:** My Lady, thank you. The other aspects covered -- I think that covers  
18 the rest of it. I will just have a look, if I may, in my skeleton to make sure I have covered  
19 everything I needed to do so. I have dealt with the loss in relation to that.

20 **MRS JUSTICE BACON:** You have dealt with it in the sense that you have said it's  
21 not particularised. As I understand it, it is not in the schedule of loss at all.

22 **MR BECKER:** Right. They said the link for the bundle expired. The solicitors have  
23 deleted it. That's the bundles expired. They have deleted it. I don't quite know what  
24 those instructing me are meaning by that.

25 **MRS JUSTICE BACON:** I don't think you need to give us details of what your solicitors  
26 are telling you unless that is just a reference to which page of which bundle you would

1 like us to look at.

2 **MR BECKER:** That's the difficulty in relation to being -- as to where the document in  
3 relation to Mr Banton's e-mail that seems to have been sent to those instructing me,  
4 but it does not appear -- it is certainly not in Mr Craven's witness statement -- sorry --  
5 exhibits. It may well be in those instructing me's exhibits. I want to make sure that  
6 that reference is given, so I hope I might be able to be given a reference.

7 My Lady, the position relating -- I think really in conclusion is that whether the case  
8 itself, taken in the round, has a realistic as opposed to fanciful prospect of success.  
9 Obviously realistic means a claim that is more than merely arguable.

10 Now the biggest criticism from the defendant is, as I see it, the lack of particularity in  
11 the evidence. Now for reasons that it seems to me that those instructing me and from  
12 what I have just received instructions is that a lot of the detail that has been sought will  
13 come out in disclosure.

14 **MRS JUSTICE BACON:** Well, that's not an answer. As I see it from correspondence,  
15 your clients have been put on notice for a very considerable period of time that their  
16 claim is not properly particularised. Why has an amended pleading not been produced  
17 for this hearing?

18 **MR BECKER:** My Lady, in relation to that -- I mean, my client felt that at this particular  
19 time that there has been sufficiency at this stage to -- notwithstanding what the other  
20 side have said, this application is yet another example of, to use the vernacular, bully  
21 boy tactics by the defendant.

22 **MRS JUSTICE BACON:** I am sorry. Mr Becker, you have said to me repeatedly  
23 during the course of your submissions that the particulars are not there and will need  
24 to be provided.

25 **MR BECKER:** Yes, that's right.

26 **MRS JUSTICE BACON:** You have accepted the point being put to you. Why was

1 an amended pleading not produced before now?

2 **MR BECKER:** My Lady, without -- it is a slightly difficult professional question to  
3 answer without divulging privilege, but they felt in relation to the answer of loss  
4 and damage that the accountant's report filled that hole. In relation to specifics as far  
5 as dealing with the clients that were lost as a result of the antics of the defendants,  
6 that was dealt with in some more detail by Mr Craven's supplementary witness  
7 statement speaking to certain companies to which my learned friend took you to.

8 There are other aspects of -- in relation to dates, times and evidence which your  
9 Ladyship has been testing while I have been on my proverbial feet. It is right there are  
10 bits, but it is right my client felt that those are aspects that could be dealt with in  
11 response to any orders made by this court if it was felt things were lacking, or be dealt  
12 with in disclosure further down the line, but it is not worthy of the whole claim being  
13 thrown out.

14 We have not breached an Unless Order yet and therefore if the court is not entirely  
15 satisfied or the Tribunal is not satisfied with matters as they are, and I can see that  
16 there are aspects which would be very foolish for me to sort of skirt over them, but  
17 may need further particularity, that's something that can necessarily be dealt with by  
18 subsequent orders later on in the process. In a sense it is not worthy of the whole  
19 claim being thrown out at this stage.

20 **MS WALKER:** Madam Chairman, may I ask a question? Talking about particularities  
21 of the case and particular aspects of paragraph 7 which have been raised, an issue  
22 which has come up earlier, but I would like to ask Mr Becker further about, is what  
23 thought and definition you and your clients have given to Section 18 of the Competition  
24 Act 1998 and the definition of abuse of a dominant position? So what thought has  
25 been given by you and the client to what is the market that we are talking about and  
26 its definition, because that hasn't been clear to me in the discussions that we have

1 | been having. There have been several markets. There's been a GB market. There's  
2 | been a broader market if you look at exports and imports. There's the market for soft  
3 | drinks and the markets for bottling, which could be separate, and wholesalers and  
4 | direct outlets and it does seem to me that a greater definition in relation to some of  
5 | that complexity would be needed to meet Section 18 drivers.

6 | **MR BECKER:** In relation to how -- my clients had leading counsel before me in  
7 | relation to obviously -- that matter was addressed historically before I became involved  
8 | in the case. As far as what marketplace is, well, the export market has been somewhat  
9 | curtailed in relation to that and it seems to me -- I mean, I am answering this question  
10 | without again taking instructions on it, so please forgive me if I am -- or my client  
11 | should have sight of me. Forgive me.

12 | It is obviously the domestic market that seems to have suffered the most, but it is  
13 | obviously an observation that has been rather taken for granted perhaps in the  
14 | pleading process, but if that is something that -- it clearly does -- concerns the  
15 | Tribunal, that's something that can be dealt with on the basis of any further  
16 | amendment, or indeed part of the particularity process.

17 | I have just actually been texted probably by my client. I just want to check to see if  
18 | they have anything to add on this. So -- yes, I am sorry. It's a comment which  
19 | actually -- it doesn't actually answer your question. I suppose one of the points I think  
20 | my client would like me to raise is the conduct of the defendant is clearing out -- in  
21 | relation to the foreign product is obviously an attempt by the defendant to in effect  
22 | clear out the English market, which seems to answer your question. That's where it is  
23 | focused I would venture to suggest, but, as I say, it's an observation, without wishing  
24 | to sound too sycophantic, to be well made and something which may need to be  
25 | incorporated in any future amendment should the opportunity arise.

26 | My Lady, I think that that deals with our response to the application. As I say, there

1 | may be -- there are aspects of this current pleadings which could be said to be lacking.  
2 | I can't respond as to why it is that the correspondence aspect has not been taken any  
3 | further by those instructing me or by my client, and it wouldn't be right for me to  
4 | speculate.

5 | We are where we are with this but, as I say, even allowing for the lack of particularity,  
6 | that is something that is not uncommon in the normal courts or in any litigation for that  
7 | matter. It is something that could be rectified if the court or the Tribunal obviously feels  
8 | that there is room for improvement, but it does not need to have -- for the case to be  
9 | struck out. As I say, it is obviously an option that those instructing on behalf of the  
10 | defendant think is an option that the Tribunal could follow if -- but, as I say, I can't take  
11 | matters any further, save for the fact that the lack of particularity in itself should not kill  
12 | this claim.

13 | My Lady, unless I can assist you further, those are really my submissions on the point.

14 | **MRS JUSTICE BACON:** Thank you, Mr Becker. Mr Holmes, how long do you need  
15 | for your reply?

16 | **MR HOLMES:** Madam, I think I should comfortably be able to conclude before the  
17 | short adjournment.

18 | **MRS JUSTICE BACON:** In which case I think that would be sensible. Thank you.

19 |

20 | **Reply by MR HOLMES**

21 | **MR HOLMES:** To begin with on the strike-out test my learned friend emphasised that  
22 | this was not supposed to be a mini trial, but we would rely upon the observations of  
23 | Mrs Justice Cockerill based and her review of the case law in the King v Stiefel case,  
24 | which is in the authorities bundle D, tab 12.

25 | **MRS JUSTICE BACON:** You set that out in your skeleton argument. Do you need  
26 | anything more than the extract in your skeleton argument? Oh, no. I am sorry. Yes.

1 You are referring to paragraphs 27 and 28 of your skeleton argument. Do you need  
2 more than that?

3 **MR HOLMES:** It is just points at paragraph 21 and 22. They are pretty much trite, but  
4 they simply -- if we could turn them up briefly.

5 **MRS JUSTICE BACON:** Yes.

6 **MR HOLMES:** It is at tab 12 of the authorities bundle, I think that's bundle D,  
7 paragraph 21. It is just for the point that in the context of summary judgment:

8 "The court is by no means barred from evaluating the evidence, and concluding that  
9 on the evidence there is no real (as opposed to fanciful) prospect of success. It will of  
10 course be cautious in doing so. It will bear in mind the clarity of the evidence available  
11 and the potential for other evidence to be available ... It will avoid conducting a mini  
12 trial. But there will be cases where the court will be entitled to draw a line and say that  
13 - even bearing well in mind all those points - it would be contrary to principle for a case  
14 to proceed to trial."

15 We say here where there is a great volume of evidence provided by the claimant, that  
16 should be considered and can legitimately be taken into account in evaluating  
17 prospects. In paragraph 22 we also rely on the first sentence:

18 "When faced with a summary judgment application it is not enough to say, with  
19 Mr Micawber, that something may turn up."

20 It was canvassed in discussion with Mr Becker whether particular evidence could be  
21 amended or developed at the hearing. We have had very full evidence. This is not  
22 a case where the claimant has held back and really where we are now the Tribunal is  
23 entitled to consider that evidence and to take a view about the merits of the case.

24 I am grateful to my learned friend for the indication that retro payments are not part of  
25 his case, one of the points that was canvassed this morning. That is not a pleaded  
26 allegation. It's covered in the witness evidence. Of course, if the claimant wishes to

1 bring a claim in respect of that it can do so, but that's not what is the current claim and  
2 it is not what we came prepared today to meet.

3 There's no claim also in relation to alleged losses relating to the Vietnam episode. My  
4 learned friend quite rightly made that clear.

5 Thirdly, there is no dispute, as we understand it, regarding the legal position on  
6 limitation periods and no concealment point is being taken.

7 In relation to allegation 7(i), my learned friend said that the complaint was that  
8 customers that were originally his clients had been -- were now being supplied by the  
9 defendant, but as identified by the Tribunal, there is no detail in the pleadings spelling  
10 out the actual allegations. Moreover, competition on the merits is permitted and it is  
11 not abusive to offer more favourable prices. The claimant was unable to explain why  
12 it was said that this was an issue from a competition law perspective.

13 Nor in my submission is this a case of unfair trading conditions. The only condition  
14 pleaded in relation to customers is a lower price and it is not apparent why that would  
15 be abusive.

16 As to the conditions on the claimant, the only condition is the provision of sales-out  
17 data in exchange for discounts and that is to verify that the basis for the discount is  
18 made out.

19 In response to Sir Iain's question, the reason for the request for sales-out data is  
20 explained in paragraph 42(b) of our skeleton argument, and the evidence cited there.

21 If we could go to the contracts attached to the Particulars of Claim. They are in  
22 bundle 1 at pages 10 and 14.

23 **MRS JUSTICE BACON:** Yes. They're somewhat difficult to read.

24 **MR HOLMES:** This is actually I think a better copy of this exhibited to Mr Henderson's  
25 evidence in volume 2. Perhaps we should take it from there. Yes. If you could go to  
26 bundle 2, tab 4, page 165 of the rolling numbering. This is one of the three contracts.

1 **MRS JUSTICE BACON:** Yes, more legible.

2 **MR HOLMES:** You see from the first page that the investment description:  
3 "Independent Fast Food Environment Distribution". So that is what these discounts  
4 are being aimed at, assisting and promoting sales in that particular channel.

5 Over the page you see that:

6 "The discounts will be paid retrospectively on CCEP Products sold to Fast Food  
7 independent outlets via a secondary route to market:

8 (i) provision of sales-out data detailing Fast Food secondary route to market outlet  
9 address line, full post code, CCEP Product delivered ...

10 (ii) completion of audit as set out below to the satisfaction of CCEP."

11 So the purpose of the data was to ensure that the sales were being made to the  
12 relevant class of retailer in order to trigger eligibility for the discounts. We say that's  
13 legitimate and it is an acceptable purpose. It is confirmed, in fact, by the evidence  
14 before the Tribunal. If we could, please, go to bundle 3F, tab 13, you will see that's  
15 a witness statement of Mr Neil Turton. He is the managing director of Sugro, a buying  
16 group, of which the claimant is the largest member. He is describing a meeting which  
17 took place in 2019 to try to promote good relations between the claimant and the  
18 defendant. On page 692 you see that in the fourth line from the bottom:

19 "CCEP also requested customer data to make sure that the claimant were supplying  
20 legitimate shops and fast food outlets and not simply secondary wholesaling."

21 That was why the promotional discounts were being offered and why sales-out data  
22 was provided for in the contract. So there is nothing unfair about that per se and it  
23 was not suggested prior to this hearing that there was any specific difficulty with it. It  
24 is nowhere in the pleadings or in the evidence. That's in all I have on the first  
25 allegation.

26 As to the second, my learned friend was unable to point to any pleading or evidence

1 showing relevant conduct after 2012. Mr Craven's instructions to my learned friend  
2 was that there was continuing conduct regarding pushing Irish and Georgian stock out  
3 of the market. However, it was unclear what was said to be continuing and there was  
4 no evidential basis as respects that. Again no explanation of how or why the alleged  
5 conduct is said to be abusive.

6 There was reference to anonymous Coca-Cola reps in Mr Craven's evidence in the  
7 paragraphs identified by Sir Iain. Now these advance serious allegations and if these  
8 representatives can indeed be named, it is wholly unclear why that has not yet been  
9 done. In any event this is not a pleaded allegation. It is not part of the claim, nor is it  
10 relevant whether such reps thought the conduct was unlawful. The question is  
11 whether what is alleged is, in fact, an infringement of the Chapter II prohibition. On  
12 that the claimant has been unable to explain why the conduct is said to be unlawful.

13 On the third allegation I don't think there is anything I need to add.

14 On the fourth allegation my learned friend was unable to point to any evidence of  
15 requests and there is no pleaded detail about this. As the policy of the HMRC makes  
16 clear, there is detailed information which has to be provided in support of a request.

17 There need to be specifics and there is nothing of that kind before you.

18 **MRS JUSTICE BACON:** What seems to be said, paraphrasing somewhat, is that  
19 other customers were permitted to export and were supported with their exports by  
20 a reimbursement of the levy and that the claimant was not but was met with a blanket  
21 refusal and the defendant saying it simply didn't support those.

22 **MR HOLMES:** I think, Madam, that's very helpful and I agree that's how it was put.  
23 There is no pleaded allegation of discrimination. We are straying very far here from  
24 the pleadings. In any event we see the evidence that the claimant is able to offer. It  
25 has been brought forward in copious amounts after repeated requests and there's  
26 simply no evidence before the Tribunal to suggest that the claimant could not obtain

1 similar reimbursements in response to a proper request, nor is there any evidence of  
2 others having received reimbursements.

3 **MRS JUSTICE BACON:** What's said is that in paragraph 88 that the defendant denied  
4 that Coca-Cola supported exports. Now we have not seen the relevant e-mail, but  
5 that's what's said in the witness statement. What's said in relation to other exporters  
6 is that other companies were able to export and there is some evidence of that  
7 attached to the witness statement, and what is said is that they couldn't have done  
8 that unless they had the sugar tax refunded.

9 **MR HOLMES:** Well, Madam, that's a perfect example of the extent to which this is  
10 just an endlessly moving feast. That's the first time to my knowledge that such  
11 an allegation has been made. The invoices by reference to which it was made do not  
12 contain any information about the levy and the prices have been blacked out. They  
13 have been redacted from it. So the Tribunal simply doesn't have any evidence in  
14 support of that submission which was made upon instruction, and in any event you  
15 have my point, Madam, that the loss and damage has not been at all particularised.  
16 So one final point. The question arose whether this is an appropriate case for  
17 a repleading as opposed to a strike-out or a summary judgment.

18 **MRS JUSTICE BACON:** Yes.

19 **MR HOLMES:** We say, Madam, that there have been many opportunities to produce -  
20 - to bring forward a focused case, properly particularised. We have asked for that in  
21 correspondence on multiple occasions and we did so in our evidence for today. I can  
22 take the Tribunal through all of that if it would be helpful.

23 **MRS JUSTICE BACON:** That's set out in Mr Henderson's evidence and I have looked  
24 at the correspondence. I have read all of it.

25 **MR HOLMES:** I am grateful, Madam. It is really much too late now to suggest that  
26 these allegations could be changed or embroidered by a repleading. This is not

1 an iterative process. We have come here today to advance a strike-out and  
2 a summary judgment application based on the case that was ultimately brought  
3 forward. We have considered the evidence and the evidence we say does not help.  
4 Moreover it remains unclear how the claimant could replead its case. You repeatedly  
5 asked, Madam, what would the replead look like? In my submission no coherent  
6 answer was given to that question. In those circumstances we say that the Tribunal  
7 is entitled to grasp the nettle and to avoid what will be very onerous proceedings going  
8 forward on a basis that has, even when supplemented with the substantial evidence  
9 which is before you, no realistic prospects of success.

10 Unless I can assist further, those are my submissions.

11 **MRS JUSTICE BACON:** Thank you. Does any -- does anyone else have any  
12 questions? Do the other members of the Tribunal have questions for Mr Holmes  
13 before we rise?

14 **MS WALKER:** No.

15 **SIR IAIN McMILLAN:** No. Thank you.

16 **MRS JUSTICE BACON:** Okay. We will rise and we will return at 2.05 and we may  
17 then be able to give you some indication of how we propose to deal with the case.

18 **MR HOLMES:** I am grateful.

19 **(1.01 pm)**

20 **(Luncheon adjournment)**

21 **(2.05 pm)**

22

23

### **RULING**

24 **MRS JUSTICE BACON:** Good afternoon, everybody. Can I just check that you can  
25 see us clearly and that you can hear me?

26 **SIR IAIN McMILLAN:** Yes.

1 **MR HOLMES:** Yes, Madam, loud and clear.

2 **MRS JUSTICE BACON:** We have carefully considered the parties' submissions. We  
3 are not going to give an ex tempore judgment but will give our ruling now with full  
4 written reasons to follow. The conclusion that we have reached is that the claim will  
5 be struck out and/or summarily dismissed.

6 I am going to give some very brief reasons for that, which will be expanded in due  
7 course in a judgment that we will hand down. The starting point is that this is  
8 a specialist area of law in which a claim needs proper and careful pleading. As is quite  
9 clear from the cases which have been referred to in the defendant's skeleton  
10 argument, a contention that a party has breached competition law is a very serious  
11 allegation. It has serious consequences, which can include financial penalties, and  
12 the investigation of the claim is likely to involve a substantial amount of evidence,  
13 including expert evidence, which will inevitably put the parties to very considerable  
14 time and expense.

15 A defendant faced with such a claim is, therefore, entitled to know what specific  
16 conduct is complained of, how that is said to have infringed competition law, and the  
17 loss and damage that is said to flow from that. We consider in the present case the  
18 Particulars of Claim fail on all three counts and the evidence does not serve to remedy  
19 that deficit.

20 Moreover, this is a case in which the claimant has been fully on notice throughout the  
21 course of extensive pre-action correspondence that the defendant considers the  
22 claimant's allegations to be unclear and unparticularised. Despite that correspondence  
23 there is before the Tribunal no draft amended Particulars of Claim, nor a coherent  
24 explanation of the matters that are said to give rise to the claims.

25 We do not think it is for the Tribunal to tell the claimant how to plead its claim. That is  
26 for the claimant to consider, but it is not an iterative process. A claimant that fails to

1 provide adequate particulars cannot expect to come to the Tribunal and be given  
2 another bite of the cherry without explaining how it proposes to replead its case.

3 For those brief reasons, and for the more extensive reasons that we will set out in our  
4 written judgment to follow, the claim will be struck out and/or summarily dismissed.

5 I can't give you a date as to when the judgment will be handed down, particularly as  
6 the long vacation is approaching, but we will get that to you as soon as possible. There  
7 will then be a question of costs and consequential issues. We would propose that  
8 those are dealt with in writing once we have handed down judgment.

9 Does anybody want to say anything else at this point for us to deal with? Mr Holmes?

10 No?

11 **MR HOLMES:** No, Madam. We are very happy to proceed in the manner that was  
12 suggested.

13 **MRS JUSTICE BACON:** Mr Becker?

14 **MR BECKER:** No, Madam. I have nothing.

15 **MRS JUSTICE BACON:** All right. Thank you very much and thank you for your  
16 submissions today and in writing.

17 **MR HOLMES:** Thank you, Madam, and to the Tribunal.

18 **(2.13 pm)**

19 **(Hearing concluded)**

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