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4 record.

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

Case No: 1615/5/7/23

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

14 Monday 22nd July- Thursday 25th July 2024

15
16 Before:

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18 Ben Tidswell
19 Professor Pablo Ibáñez Colomo
20 Keith Derbyshire

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

23
24
25 BETWEEN:

26 **Claimant**

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

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30 And

31
32 **Defendant**

33 **Deckers UK Limited**

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

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38
39
40 **Dennis Macfarlane on behalf of Up and Running (UK) Limited**

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

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(10.30 am)

MR TIDSWELL: Good morning, everybody. I should read the live stream warning for some of you joining us over the live stream on our website. I will start with the customary warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual of the proceedings and a breach of that provision is punishable as contempt of court.

Good morning, Mr Macfarlane, Ms Berridge. Mr Macfarlane, starting with you, I think you have with you a litigation friend. Is that right?

MR MACFARLANE: Yes, sir.

MR TIDSWELL: Just in relation to bundles can I ask you not to be adding to the existing bundles, because we are working off them, a set that we have as a working set. So when you add documents, then we don't get them. I am sure I can manage that if you have already done that and we will sort that out, but what I wondered is, there is a bundle D. I don't know whether that's designed specifically as a supplemental bundle or if it is for some other purpose but if we could have a bundle which is a supplemental bundle and if we could put everything in there and make sure it is updated here, then we will be able to manage that. I think we are all working off electronic bundles. As I say, they are frozen in time a little time ago. That includes authorities as well. I am going to ask you to do the same with the authorities and if they could go in the supplemental bundle which is treated as an everything bundle, that would be really helpful. Thank you.

Mr Macfarlane, you will be familiar I think with the way we run the hearings. We normally take a break in the middle of the morning for the transcriber just to have a little time and we do that again in the middle of the afternoon. So around about 11.45 and

1 about 3.15, assuming we start and running on the normal times and they normally last
2 for about ten minutes. If you are in the process of -- if you are on your feet and you
3 are doing something at that stage, I might remind you. You may have it in mind, but it
4 is quite a convenient point for a break for you as well. It will give you ten minutes to
5 think about what you are going to do next and possibly deal with anything we have
6 asked you that you need to have a think about. Just so you know that's how it will
7 unfold during the course of the day. Of course we will take what we call the short
8 adjournment between 1 and 2 o'clock. Timings are flexible. So if we or you feel it is
9 helpful to run a little bit longer at any point in time, you should say so. If I say to you
10 "Shall we have a break?", you might say to me "Can I have another five minutes just
11 to finish the point?" I will not push back on that but we do need to make sure the
12 transcriber gets a break at some stage, because it is quite hard work dealing with all
13 of us.

14 Is there anything else by way of housekeeping that either of you wish to raise?

15 **MS BERRIDGE:** Just to remind your Honour some of the material in the case is
16 confidential and should not be read out on the live stream, and in particular that applies
17 to the video recordings of the meetings between the experts and Deckers' finance
18 team.

19 Second, we are now at trial, so it would not be appropriate if we were to hear any new
20 evidence or allegations today. At this point the defendant hasn't got a proper
21 opportunity to respond. So while you can respond to questions we shouldn't have any
22 new allegations or evidence.

23 Third, advocacy --

24 **MR TIDSWELL:** Sorry to interrupt you. There is a risk that you are starting to do my
25 job here. I understand why you want to make the points but you can be sure I am
26 going to explain to Mr Macfarlane what he should be doing when he makes his opening

1 statement and what he should be doing when he is giving evidence and the distinction
2 between them. Just so you know I am going to do that. It might save you duplication.

3 **MS BERRIDGE:** I will come on to some housekeeping about what we are going to do
4 now then. So on advocacy you may be pleased to hear that Ms Lawrence and I will
5 share the advocacy. We will be taking different topics so we won't be duplicating but
6 I did want to bring to your attention that that means that we would both expect to ask
7 Mr Macfarlane some questions. I wanted to make sure the tribunal was comfortable
8 with that approach.

9 **MR TIDSWELL:** Yes. That's interesting. Can you explain is there a reason for why
10 you are dividing it up like that? Is it because you are dealing with different aspects of
11 the case?

12 **MS BERRIDGE:** Yes. We will divide it up by topic. We felt that was the most sensible
13 way to do it.

14 **MR TIDSWELL:** I don't think, Mr Macfarlane, it should cause you any difficulties.
15 What we want to avoid is you being asked the same question twice in a different
16 context, but I am sure your opposing counsel are going to be thoughtful about that.
17 Do you have any objection to that?

18 **MR MACFARLANE:** Sir, no. I need to say that the confidentiality side I fully
19 understand and (inaudible) I have tried very hard not to be talking any numbers of that
20 description at all.

21 **MR TIDSWELL:** Just on the confidentiality, is it marked in red in the text of documents,
22 where, for example, in the witness statements --

23 **MS BERRIDGE:** At the top of the page.

24 **MR TIDSWELL:** So if we have a number in a witness statement or expert report, how
25 do we know whether it is confidential or not?

26 **MS BERRIDGE:** You will look at the top of the page and that will indicate if there is

1 confidential material on that page.

2 **MR TIDSWELL:** But some of the -- that is only helpful up to a point, isn't it, because
3 some of it may not be confidential and obviously if it is helpful to a witness to be able
4 to talk about it specifically, then they need to be able to do that. What we don't have
5 is a demarcation of particular numbers or particular words being confidential in
6 a colour. That's not what happened.

7 **MS BERRIDGE:** No. I think in this case what we actually find is that there is sort of
8 topics where pretty much everything is confidential. So when we do the market shares,
9 because that all comes out of Deckers' turnover figures, all of that is confidential. Then
10 almost nothing else is. So although I agree you would imagine that ideally you would
11 have individual words or numbers on the page picked out, in fact, in this case it is
12 actually simpler to just have the demarcation on the top of the page.

13 **MR TIDSWELL:** The concern that I am sure is going through your minds and perhaps
14 Mr Macfarlane's, we are just concerned not to make a mistake about this, and clearly
15 it is much easier if it is in red, because you know it is in red and therefore you cannot
16 say it. Here if we have to at least go through a thought process of looking at the top
17 of the page, trying to work out if it is something that might or might not be, it just makes
18 it a bit more difficult. I think that probably means we are all going to have to be a little
19 bit more careful than we might ordinarily. Mr Macfarlane, we are going to have to work
20 hard to make sure we don't make mistakes as well. I think what's important --

21 **MR MACFARLANE:** The vast majority of these are within a database and if I have to
22 refer to them, I will be referring to the cell.

23 **MR TIDSWELL:** Exactly. What we might do is try and work on the basis that anything
24 that's a number that relates to Deckers should be treated with caution and we can
25 always ask you, if we may, for enlightenment if there is any doubt about whether we
26 can or can't and whether it is the right approach.

1 Can I also say to the parties that if someone makes a mistake and it is possible
2 someone makes a mistake, generally I think the better course is not to highlight that
3 with some form of objection but just to ask at the next break for the transcript to be
4 corrected because, of course, the transcript is the only record and we will be very
5 welcoming of any suggestions about things that do need to be corrected. My
6 experience is if you make a big fuss about it, then everybody remembers exactly
7 what's said and therefore confidentiality is less effective, even less effective. Good.
8 So I think we were -- we have gone in a bit of a circle. We started with confidentiality
9 and we went on to cross-examination of Mr Macfarlane. Shall we come back to that
10 then? I think that seems fine. Obviously you understand that you need to be careful
11 not to be asking him the same questions twice.

12 **MS BERRIDGE:** That's understood, sir, yes.

13 Just very quickly to complete on housekeeping, there are some outstanding
14 applications. The defendant has one in relation to the costs of the turnover verification
15 exercise.

16 **MR TIDSWELL:** Yes.

17 **MS BERRIDGE:** Our suggestion is that we don't try to deal with it at this trial and we
18 bundle that into the consideration of costs at the end of the matter when judgment is
19 given.

20 **MR TIDSWELL:** So that's your application for costs in relation to the exercise that has
21 been undertaken. Which bit of the exercise? Is that all of the exercise that relates to
22 numbers or just the bit relating to the video?

23 **MS BERRIDGE:** It is the bit relating to the video.

24 **MR TIDSWELL:** Okay. I am not sure I have seen that. I may have --

25 **MS BERRIDGE:** It is in the bundle.

26 **MR TIDSWELL:** We don't need to turn it up.

1 **MS BERRIDGE:** It is bundle I, tab 56. I am suggesting we don't try to deal with it now.

2 **MR TIDSWELL:** I don't want to make sure I don't lose it. It was I, 56. So we will leave

3 that for now. I am afraid I don't think that was on my radar, but it is now.

4 **MS BERRIDGE:** I am grateful. Just finally, we are going to come on the timetable to

5 Mr Macfarlane's evidence later today. It had been arranged that Stobbs would have

6 someone to sit with him and help to find the places in the bundles. So that's available

7 if that's something you still want.

8 There is a period in the timetable for re-examination, which we discussed briefly at the

9 pre-trial review. At the moment that's not -- no-one on this side is planning to use that

10 time and it may be that the tribunal wants to use that time.

11 **MR TIDSWELL:** You mean for re-examination of your witnesses.

12 **MS BERRIDGE:** No, for Mr Macfarlane.

13 **MR TIDSWELL:** I see. Are you saying Mr Macfarlane is not planning to re-examine

14 himself?

15 **MS BERRIDGE:** I am saying it seems to be an empty piece of time because --

16 **MR TIDSWELL:** It rather depends on -- I don't quite know how this is going to work,

17 if I am honest, but I think we will find a way that's satisfactory to everyone. I will ask

18 that with Mr Macfarlane before he gives evidence as well. So that's part of the suite

19 of things that needs to be covered. You are making a timetabling point we might have

20 a bit of extra time. Is that the point you are making?

21 **MS BERRIDGE:** Yes.

22 **MR TIDSWELL:** I did notice you are intending to cross-examine Mr Macfarlane this

23 afternoon and again tomorrow morning. Is that still your expectation as to timing?

24 **MS BERRIDGE:** Yes, it is. We will see. It is very difficult to anticipate accurately how

25 long cross-examination takes but that's what we are still expecting, yes.

26 **MR TIDSWELL:** We will need to review that, and just the marker to put down with you

1 is if we get to 4.30 and you don't think you have a lot longer, then I wouldn't want Mr
2 Macfarlane to be in purdah overnight. I think that would be unreasonable and unfair.
3 Of course, if you need to continue the next day, you do, but if there is only half an hour
4 or something, we might sit a little bit later, depending on people's availability. It does
5 seem to me like quite a long time to be cross-examining him, but obviously that's your
6 business and if that's what you need, that's what you need.

7 **MS BERRIDGE:** I am very happy to see where we are about 4.30.

8 **MR TIDSWELL:** Maybe we might take a bit of a check in the afternoon and see where
9 we get to.

10 **MS BERRIDGE:** Just one point. I gave you a reference for the costs application and
11 it was incorrect. It is bundle I, page 565. My apologies.

12 **MR TIDSWELL:** That's fine. I have got that. That's very helpful. That is it for
13 housekeeping.

14 **MS BERRIDGE:** Thank you.

15 **MR TIDSWELL:** Good. Thank you.

16 Mr Macfarlane, now we are going to turn, unless there is anything else from you, we
17 are going to invite you to make your opening statement. I just want to remind you -- we
18 are just going to do a little bit of revision. You may have this in mind, so do tell me if
19 I am telling you something you know already, but there is obviously a difference
20 between what you are going to do now in your opening statement and the evidence
21 you are going to give quite shortly when you go into the witness box and become
22 a witness. I am quite keen and Ms Berridge is quite keen that this should be a clear
23 divide in the quality of those things because they are quite different.

24 So what we want from you now is your summary of your case, pulling out for us the
25 high points that you think are important, and you should be doing that by reference to
26 the evidence that's in the case already and of course the law to the extent you want to

1 touch upon that. Of course, the evidence is, as Ms Berridge was indicating, something
2 of a closed item. We have everything in here. What we don't want is new material
3 turning up but we do obviously want your reflections on what has been put before the
4 Tribunal so far and, of course, to some extent you might have some things to say
5 about the witness evidence that is going to be given, but I think you do have to be a bit
6 careful particularly about your own witness evidence. I don't want you to be
7 speculating about things you are going to say that you have not already said. It may
8 be you do say some things that you have already said, because Ms Berridge asks you
9 questions that cause you to say something different, but now is not the time to get into
10 that. There will be a chance at the end of the case for you to wrap everything up and
11 reflect on all the evidence that has come out.

12 In other words, what I am saying is can we please be very disciplined about keeping
13 your submissions now to what's already in the case, the factual material. Obviously
14 the expert evidence and the law. Now if any of that comes as a surprise and is
15 inconsistent with what you have in your notes, then obviously we will just have to
16 manage that. I am not suggesting there is going to be some terrible stroke of doom if
17 you transgress, but I will intervene if you do and let you know that I think you're drifting
18 into the wrong territory.

19 When you get to the next bit, which is you going into the witness box, actually you are
20 going to be asked questions by Ms Berridge. That's going to be the main quality of
21 that exercise. When you are in there, we want your views on what has happened. We
22 want the facts from you. We don't really want your submissions, because we are
23 getting those now. Do you understand the difference between the two exercises?

24 **MR MACFARLANE:** I do, sir, yes.

25 **MR TIDSWELL:** Is there anything else you want to ask before you move into opening
26 submissions about the exercise?

1 **MR MACFARLANE:** No, sir.

2 **MR TIDSWELL:** In that case the floor is yours. I think you are going to have the
3 microphone adjusted.

4 **MR MACFARLANE:** I will try to speak up.

5 **MR TIDSWELL:** The main thing is the transcriber. As you will have appreciated, the
6 transcriber is not in the room. They are dependent on the microphone for picking it
7 up. If you aren't speaking loudly enough, you can expect the microphone to be pushed
8 ever closer to you. Just do the best you can.

9

10 **Opening submissions by CLAIMANT**

11 **MR MACFARLANE:** Thank you, sir. Gentlemen, I would like to say immediately
12 thank you -- can I have a glass of water?

13 **MR TIDSWELL:** Yes, and take your time. I think you have plenty of time actually, Mr
14 Macfarlane. There is no rush. If you want a break at any stage, just say so.

15 **MR MACFARLANE:** I am okay, sir. I would like to start by expressing my thanks to
16 the tribunal, to everybody, for giving small businesses a chance to be heard in this
17 tribunal. It is important that the small man is heard. We are only --

18 **MR TIDSWELL:** Would you like five minutes. Really if you feel at all uncomfortable,
19 I am very anxious that you should have time.

20 **MR MACFARLANE:** I am fine. Just a few minutes.

21 **MR TIDSWELL:** Even if you just want to sit down and collect yourself for two minutes.

22 **MR MACFARLANE:** (Inaudible) when she rang me, I got quite emotional on the
23 telephone. I will be fine. Don't take any notice of my emotional outbursts.

24 **MR TIDSWELL:** We are just listening and we are happy for you to proceed at your
25 own pace.

26 **MR MACFARLANE:** Small businesses being allowed to be heard in this court is very,

1 very important. There are lots of people watching this. To them it is important as well.
2 So I am very grateful to the tribunal for their patience not just before today but now as
3 well in hearing me on this.

4 Can I make an apology now for the transgression I did earlier on in this proceedings
5 when I sent an e-mail to the CMA. I was wrong to do so. I didn't know the rule, but I
6 should have known the rule, should have read on it, so I apologise for that event.

7 Fortunately for me sirs, this is not a complicated case generally and certainly it is not
8 complicated in competition law. The central question that the tribunal needs to grapple
9 with is this: does the defendant's conduct -- does the defendant's conduct amount to
10 a breach of the 1998 Act? I see no point in rehearsing the background in this case.
11 That has already been set out in pleadings by both parties. However, I will just
12 highlight some significant facts in the case.

13 The claimant and defendant are in a vertical relationship, one of a retailer-supplier.
14 The defendant is also a retailer and competes directly with the claimant. The
15 defendant is the only supplier of HOKA running shoes in the UK. The claimant began
16 selling the defendant's product online on a second outlet website. The defendant and
17 the competitor took issue with this and withdrew the supply during the COVID
18 pandemic, a very stressful time for everybody concerned. The reasons for the
19 cessation of supply in this feud, but those are facts and nothing else.

20 This is a claim in tort. The defendant had a duty not to breach the statutory rules,
21 namely CA98. It did breach those statutory rules and the claimant has suffered and
22 continues to suffer loss as a direct and foreseeable result of said breach.

23 Causation and loss are not the subject of these proceedings, so I don't intend to dribble
24 on about them now. There is no dispute the defendant is an undertaking for the
25 purpose of competition law and it is also not in dispute that there exists an agreement
26 between the parties whether in the form of the defendant's terms and conditions or in

1 the form of a selective distribution agreement, which is denied by the claimant that
2 ever existed.

3 It is well rehearsed in competition law and in particular in the case of Metro that there
4 are three requirements of a selective distribution agreement: (a), the nature of the
5 goods or services in question must absolutely necessitate a selective distribution
6 agreement. This means that having regard to the nature of the product concerned
7 such a system must constitute a legitimate requirement to preserve its quality and to
8 ensure its proper use.

9 For instance, the use of a selective diffusion may be legitimate for high priced or high
10 technology product for luxury goods such as a handmade handbag, for instance.
11 Resellers must be chosen on the basis of an objective criteria which are importantly
12 laid down uniformly for all potential resellers and not applied in a discriminatory
13 manner and the criteria laid down must not go beyond what is necessary.

14 I do not need the tribunal to turn to the case at this point, but the Metro case is in the
15 authorities bundle at the joint authorities tab 12, 315.

16 The claimant will show that none of the requirements are satisfied and as such the
17 agreement that fails the Metro test is void and inadmissible in my view.

18 We say that any business such as the defendant and especially the defendant whose
19 director by his own words is an expert in competition law should know of these
20 requirements. His words to that effect can be found in his first witness statement from
21 the previous case. Would you like me to refer you to it?

22 **MR TIDSWELL:** By all means.

23 **MR MACFARLANE:** It is in C2, 139, 1017.

24 **MR TIDSWELL:** 1017, did you say?

25 **MR MACFARLANE:** Yes. 1017. The defendant has not --

26 **MR TIDSWELL:** Mr Macfarlane, do you want to just tell us the point you are driving

1 at there?

2 **MR MACFARLANE:** Yes. The point I am driving at there, sir, is that in Mr
3 Henderson's first witness statement in the previous case, paragraph 1, he made it
4 clear that he is a competition expert.

5 **MR TIDSWELL:** I see. This is the point about his expertise. I am sorry. I thought
6 you were making a further point. You are just establishing his credentials.
7 I understand. That's helpful.

8 **MR MACFARLANE:** Orally gifted.

9 **MR TIDSWELL:** I think he explains in his statement in these proceedings as well,
10 doesn't he? He is obviously from a competition background.

11 **MR MACFARLANE:** Yes, sir. We say that any business such as a defendant, and
12 especially of the defendant -- I have been there already. My apologies.

13 Therefore the claimant says that the notion that such an agreement exists is just retro
14 filling. It is backfilling. It leaves the question open as to why it took from August 2020
15 to December 2023 that the defendant may have had a selective distribution agreed. It
16 leaves the question why? Why was this possible defence not brought forward in
17 August 2020 nor, very importantly, it was not brought forward in the previous case
18 either. It was a surprise to us in the defence served to us on December 14, 2023 for
19 this case.

20 However, we do say that there is an agreement of sorts between the undertaking but
21 it does not take the form of an SDA.

22 The question then is this: does the agreement have as its object or effect the
23 prevention, restriction or distortion of competition? It is worth noting that these, of
24 course, civil proceedings. So the burden of proof that sits with me as representative
25 for the claimant is to establish only on the balance of probability that the agreement
26 had as its object or effect the prevention, restriction or distortion of competition.

1 **MR TIDSWELL:** You may be getting on to this. By all means tell me if you are going
2 to deal with it. I am quite interested just to pin down with you what you mean by the
3 agreement. Just so we are all clear about what you are saying about that. As
4 I understand it, when you say there was an agreement, of course, you are talking
5 about the terms and conditions. Is that right?

6 **MR MACFARLANE:** Yes, sir.

7 **MR TIDSWELL:** In order for there to be a chapter 1 infringement you have to have
8 an agreement, as I am sure you appreciate. So you start by saying there was
9 an agreement in the form of terms and conditions and the particular clauses that you
10 have relied on. That's the starting point, isn't it?

11 **MR MACFARLANE:** Yes, sir. The terms and conditions are printed on the back of
12 every invoice but I would say (inaudible) they are implied. They are implied by conduct
13 into our conduct of trading with the other side. As a director of a company where you
14 see 40,000 invoices going through a business every year. It is very unlikely I am going
15 to read every single invoice and look at the back for any points of law at the back, but
16 nonetheless as the law stands by conduct they are implied and we accept that.

17 **MR TIDSWELL:** Exactly. You are accepting that there is an agreement, that the terms
18 and conditions create an agreement between you and the defendant.

19 **MR MACFARLANE:** Yes, sir.

20 **MR TIDSWELL:** Then what do you say -- you were going on. When you say it, are
21 you talking about particular clauses or the agreement as a whole? Are you able to
22 take us down a couple of levels?

23 **MR MACFARLANE:** I am talking about the agreement as a whole. There were
24 paragraphs in there that apply only to bricks and mortar and there are certain
25 paragraphs within those terms and conditions that clearly are aimed at the use of the
26 internet and what restrictions might be in place.

1 **MR TIDSWELL:** Yes. That's clause 15 in particular.

2 **MR MACFARLANE:** Yes.

3 **MR TIDSWELL:** And again forgive me if you are going to go on and talk about this,
4 then I don't want to take you out of course. You should not worry that I am interrupting
5 you. You should view this as being a good sign, because I am interested in what you
6 are saying. So don't please be put off by me interrupting you. I am keen to have a bit
7 of a dialogue with you to understand how you put your case and what we should be
8 focusing on here.

9 **MR MACFARLANE:** Yes.

10 **MR TIDSWELL:** I think you are saying you have the agreement. You have clause 15.
11 You say it has the object or effect -- we are really talking about object here, aren't we?

12 **MR MACFARLANE:** Yes.

13 **MR TIDSWELL:** Is that right?

14 **MR MACFARLANE:** Yes.

15 **MR TIDSWELL:** You are not suggesting you are going to show there is an effect on
16 competition, distortion of competition?

17 **MR MACFARLANE:** Object restrictions.

18 **MR TIDSWELL:** Yes, exactly. Just in terms of that are you saying -- let me put it
19 another way. What are you saying is the object? What are you saying is the objective
20 of the contract or the particular provisions you are relying on?

21 **MR MACFARLANE:** I am saying that the object is one of a restrictive nature, that in
22 itself on its face, especially clause 15, is an object restriction of competition.

23 **MR TIDSWELL:** Yes, and restricted because?

24 **MR MACFARLANE:** Well, because of the fact that it controls -- it has the ability to
25 control and the evidence is that it was controlled, because clause 15 was used to
26 cause the cessation of stock to Up and Running.

1 **MR TIDSWELL:** Before you get to the cessation of stock, as I understand it, you are
2 saying that the ability to control and you are saying the evidence is it was used to
3 control, control what, though?

4 **MR MACFARLANE:** To control our ability to be able to use the internet for the best
5 effective use. Clause 15 sought a requirement for permission. I believe it says in
6 there that you will not use the internet without our permission, using my words. It gives
7 the defendant in this matter complete control over whether we are able to use the
8 internet. We were already using the internet, but the fact that we have one internet,
9 and I will get into explaining why we could not use our existing internet and why we
10 wanted this budget internet. There was a good reason in the middle of lockdown. The
11 clause itself has the object of if they so desire to say "No, you will not use the internet".

12 **MR TIDSWELL:** I think you are saying -- it is probably what you just said about it
13 (inaudible) use the internet for a particular purpose?

14 **MR MACFARLANE:** Yes, this new website talking about running shoes (inaudible)
15 when you have 30 stores closed and we still have masses of overheads to face, we
16 have to do the right thing by law. As a director you have to do everything within your
17 power to maintain the business in the interest of all creditors and all staff as well. So
18 the decision was made in August 2020. It seems we had all the stores closed. We
19 had millions of pounds worth of stock coming through from the suppliers, not just
20 HOKA, but lots of other suppliers. This stock had to be disposed of somewhere. For
21 30 years we had concentrated just on bricks and mortar shops, believing there was
22 a market there always for the try it, feel it, touch it people, who wanted to actually hold
23 something in their hands and physically try it on.

24 For many years that was our concentration. The internet was a very small part of our
25 business, and I think most people know that the internet in the main, the big hitters on
26 the internet are people who will offer a good value for money, which they can do

1 because their overheads are much smaller where you have internet only, but where
2 you have stores, you have to pay those rents and rates and everything. Yes, there
3 was government help, but --

4 **MR TIDSWELL:** I am sorry. I don't want to interrupt you because that's all interesting
5 useful background. We have picked up a lot of that from your witness statement. I just
6 want to narrow in on this point about, if you like, the structure of your argument just so
7 I am clear about exactly what you are saying. So far you have been very helpful. We
8 have an agreement which is the terms and conditions. The question is does it have
9 the object of distorting competition. You say yes, because of the restrictive nature of
10 it and especially clause 15. You say that the agreement and clause 15 in particular
11 has the ability to control and the evidence is that it was used to control the use of the
12 internet to dispose of stock. I think you are saying that stock was going to be
13 discounted. Is that right?

14 **MR MACFARLANE:** Yes, sir. We were in --

15 **MR TIDSWELL:** I am not asking you to explain the factual background. I just want to
16 understand the argument. That's right. You say that you wanted to dispose of the
17 stock at a discount it in a way that you would not have discounted on your normal
18 website. That's your argument.

19 **MR MACFARLANE:** Nor of the fact that we couldn't.

20 **MR TIDSWELL:** Just for you to think about really, not necessarily asking you to
21 respond to this now, but just thing about framing that case, there are potentially three
22 different elements or three different ways one could look at what you have just said to
23 me. One is you could look at it as saying there is a restriction on the use of the internet
24 and there may be arguments about what is and isn't permissible for a supplier to
25 impose on a retailer -- wholesaler to impose on a retailer for the purposes of using of
26 the internet. That is one possibility.

1 There is then another possibility, which you say there is an agreement here which by
2 its terms is restricting your use in a way that's directly linked to pricing. Therefore it
3 falls within the restrictions on resale price maintenance just because of the way it is
4 drafted.

5 Then there is a third possibility, which is that you have an agreement with terms that
6 could be used and you say have been used in these circumstances to create that
7 same environment in relation to pricing. Now I am not probably putting those as
8 technically as I might, and Ms Berridge may have things to say about the definition of
9 them if you like, but I just want to be clear with you that there are different -- I want you
10 to understand that we are saying this and there are three different ways one could look
11 at this and maybe others as well. It would be helpful for you to have a bit of a think
12 about which of those ways, and you are entitled to run all of them if you want but it is
13 helpful for us to have some clarity by the time we get to closing at least, some clarity
14 on where you are focusing your efforts in relation to those three different backups.
15 You may say in closing you are running all of them, and that's absolutely fine. We are
16 not going to stop you. I want you to understand that's how we as a starting point are
17 seeing the analysis of the way the issues could be characterised.

18 **MR MACFARLANE:** Thank you, sir. In the interests of safety I am probably going to
19 run all three at this stage and if there is a change, I will certainly let you know.

20 **MR TIDSWELL:** That is a matter for you. I am not guiding you in any direction at all.
21 I am just giving you a sense of where we are. Do you want to add anything to that?

22 **PROFESSOR IBÁÑEZ COLOMO:** No.

23 **MR TIDSWELL:** I took you out of your way, Mr Macfarlane. That has been very
24 helpful.

25 **MR MACFARLANE:** That's okay, sir. Would you like me to fill you in a little bit more
26 as to the reasons why we have this discount website?

1 **MR TIDSWELL:** You feel free to make the submissions you were going to make. I do
2 not want to dissuade you. I remind you all of that has to be anchored in the factual
3 material that is in the case. I don't want you telling us about it now. I think there is
4 plenty in the bundle. We have seen that. So you are summarising, I think, the factual
5 material we have in front of us.

6 **MR MACFARLANE:** One of the reasons was because we do have franchisees in our
7 business where our model is spun out to people who want to be self-employed. We
8 run a franchise network and there is an understanding, a business understanding that
9 we won't go out of our way to undercut them on the internet which really affects their
10 margins and profits. So we try not to do that. If we do do that, then we come to
11 an understanding where we credit our franchisees to make sure they don't lose their
12 profit, but the fact was that one day in lockdown the stores will reopen and after the
13 first lockdown we were lumbered with millions of pounds worth of stock that obviously
14 couldn't go anywhere. I couldn't send the managers in to empty the stock from the
15 shops and one day the shops will reopen. There is no point reopening a shop when
16 there is no stock in it. We were in a catch-22.

17 Indeed, in July -- the first lockdown stopped in June 2020 and in July all the new
18 season's products were due to come in. So we were looking at double stocks. So
19 I had to find some way of disposing of the old models especially and that's where
20 running shoes was born. We thought we would just create a website, sell them off at
21 cost and maintain the margin in the shops where they carry all the overheads. I think
22 that's sort of it in a nutshell, sir.

23 So I shall carry on. The tribunal must then only be convinced on the balance of
24 evidence that leans in favour of the conduct of the defendant preventing, restricting or
25 distorting competition in the UK.

26 However, during the trial the claimant will show beyond probability and show with

1 certainty that the defendant is in breach of chapter 1 prohibition and that the
2 defendant's attempts to cover up the infringements are plain to see. There are
3 disputed matters.

4 There are in principle just two issues in my view for the tribunal to consider. There
5 may or may not be some fringe matters, but the bulk of the time I hope will be spent
6 on considering the issue of RPM and the internet restrictions. The claimant will walk
7 the tribunal through the evidence throughout this week, which will show that the
8 defendant's conduct and actions constitute an infringement of section 2, CA98.

9 As to retail price maintenance the claimant will show that the relevant -- will show
10 through the relevant burden of proof that the defendant knew that the website of the
11 claimant would be a discount site. This fact to my knowledge is not disputed by the
12 defendant.

13 The information that the defendant had available to them upon cessation of supply
14 was based on that fact and its HOKA shoes were going to be sold and they were going
15 to be sold at a discount, which runs contrary to their stated desire to remain clean on
16 the internet. The decision to cease supply was motivated by a desire to stop its
17 products being sold cheaply and the defendant has used its terms and conditions
18 effectively as a Trojan horse to enforce RPM, to teach not just Up and Running
19 a lesson but also teach the rest of the trade a lesson, of which many people are
20 watching.

21 As to the internet selling restrictions, the claimant will show to the relevant burden of
22 proof that certain of the terms and conditions of the defendant upon which it contracted
23 with the claimant include terms which affected how the claimant could sell the
24 HOKA product online. This again is not as far as I am aware a disputed fact.

25 The defendant's right to deny the claimant's ability to sell HOKA product online was,
26 as the evidence will show, simply a way for the defendant to control and prevent

1 a retailer if they so wish from selling online and worse with the ability to prevent the
2 same retailer from competing with the defendant's own online sales, which I say is
3 a hard-core restriction and in this case it is exactly what happened.

4 Given that the defendant's approval of internet sites was subject also to change at its
5 discretion and that particular right was embedded into the terms and conditions by its
6 ability to communicate the criteria it decided from time to time without giving the
7 opportunity for its members to challenge. They did say at any time in their terms and
8 conditions that they can alter those terms and conditions and not tell anybody unless
9 they are written on the back of an invoice. As I said earlier, many people won't see
10 those invoices.

11 The requirement that the claimant only sell on a website that was approved by the
12 defendant is a restriction of the claimant's ability to make effective use of the internet
13 for sales. I think I have just covered that.

14 **MR TIDSWELL:** That was the first packet. You have given me the third and the
15 second and then the first in that order I think it probably is the way it has come. I think
16 that's all very consistent with the discussion we had. I think that is helpful.

17 **MR MACFARLANE:** I say that it would be commonplace normally under the terms of
18 an SDA, which we deny the existence of, the defendant may well have the ability to
19 put in restrictions on how retailers sell online that otherwise it would not have outside
20 of an SDA, but we deny that an SDA was there in the first place or ever.

21 So in any event the internet sale restrictions that the defendant has in place under its
22 terms and conditions are not consistent with the Metro criteria for SDAs, not least
23 because they do not pursue a legitimate aim, such as RPM restrictions on the effective
24 use of the internet, thereby going further than is necessary such that they are not legal,
25 and I will hopefully take the tribunal through the case law on that shortly.

26 The fact that the defendant's restrictions on internet selling were not an outright ban

1 on internet sales does not mean that those restrictions are still not an infringement. It
2 is that point that's made good in Coty, which is in the authorities bundle. Do you need
3 to go through that, sir?

4 **MR TIDSWELL:** I am sure we will get to Coty at some stage, but if you want to take
5 us to it, you are very welcome to.

6 **MR MACFARLANE:** I don't think it is necessary.

7 **MR TIDSWELL:** We are in your hands. We know it is there and we are familiar with
8 it in general terms, but if you want us to look at any particular point, you should let us
9 know.

10 **MR MACFARLANE:** So in short it would be for the Tribunal to decide, having
11 considered the evidence, which version of events and which motivations are most
12 likely to be the root cause of the defendant's decision to cease supply, its third biggest
13 account in the UK at the time that the fall out occurred.

14 I have lost myself.

15 The inescapable reality for the defendant is that its conduct in refusing to supply the
16 claimant's discount site for closed and entrance to the market -- that was my
17 view -- and left the consumer with less choice and more expensive options than they
18 otherwise would have. That's diametrically opposed to the principle of competition law
19 which is to protect end consumers by promoting competition.

20 It is for the defendant and, if so advised, to plead a case as to why it is otherwise
21 anti-competitive conduct might be saved or justified. However, the very thorny nettle
22 that the defendant needs to grasp is that its conduct is an obvious breach of
23 competition rules and cannot be saved by section 9 of any of the safe harbours.

24 Now further on RPM, we say that RPM is an object infringement of CA98, section 2.

25 That's because RPM represents a sufficient degree of harm to competition to regard
26 it as objective, as anti-competitive and that position is supported in the case of Super

1 Bock, which is, if you need the reference number, sir, I can give you that in our bundle.

2 **MR TIDSWELL:** Give us the reference again. We have it in the bundle.

3 **MR MACFARLANE:** Joint authorities, tab 21, page 589.

4 I feel I could do with a beer right now.

5 The RPM is a by object infringement and means that the tribunal can regard the
6 practice as per se an infringement of competition law without the need to prove the
7 effect upon the market. However, as I mentioned earlier, the conduct had the actual
8 effect of eliminating not just one but two competitors from the market selling
9 HOKA running shoes, that is runningshoes.co.uk and Up and Running from the
10 market.

11 Furthermore, RPM is a hard-core restriction for the purpose of the UK's vertical
12 agreement block exemption, which means that the block exemption not to apply -- it
13 means the block exemption does not apply.

14 The issue is well summarised by this tribunal in the ruling which it gave in favour of the
15 claimant for the fast track and split trial and also features in the defendant's skeleton
16 argument. I can take the tribunal to the quote but I think you will remember this one,
17 sir. These are your words:

18 "The central question is did the executives of the defendant terminate the supply of
19 the claimant because they were genuinely concerned about the qualitative aspects of
20 distribution by the claimant through its alternative website or because they wanted to
21 stop the claimant from selling HOKA shoes at a discount price on the alternative
22 website?"

23 We think that's a very pertinent point.

24 **MR TIDSWELL:** Would you just give us the reference again so we have that?

25 **MR MACFARLANE:** It is in bundle D, tab 1, 11.

26 **MR TIDSWELL:** Yes. Thank you. Can I ask you -- again if you are going to come on

1 to this, just tell me and we can do it in your order, just to make sure we have covered
2 it, though. So we get to -- on your argument just to be absolutely clear, I am not
3 agreeing with you. I am just making sure that I understand your argument, we get to
4 the point where you say it is an object restriction. It is hard-core. Then as a result of
5 that the vertical block exemptions don't apply. So they are just gone. Also I think there
6 is the de minimis notice floating around as well.

7 Now I think -- I may be wrong about this -- Ms Berridge may or may not feel she's able
8 to say anything about it now or indeed I will ask her later. I am not entirely sure the
9 defendants are pursuing reliance on the de minimis notice any longer. It is not entirely
10 clear. At least if they are if one can put it at the top of the list of arguments. I don't
11 know, Ms Berridge, if you are able to help with that.

12 **MS BERRIDGE:** Yes. The de minimis notice won't apply if this is run as an object
13 case, which is what we understand it to be. So assuming that, and again it is helpful
14 that you asked that earlier, assuming that, then no, we don't reply on the de minimis
15 notice and we can leave that aside.

16 **MR TIDSWELL:** To make sure I understand you, of course, you could -- well, I am
17 just trying to think about how this might play out. We could find ourselves having to
18 go down the Metro considerations and then looking at the vertical block exemption.
19 So those are still in play.

20 **MS BERRIDGE:** They are.

21 **MR TIDSWELL:** By time we get into de minimis, you are not anticipating it is going to
22 come into play in this case because the way it is set out. That's really what I am asking
23 you. That's helpful. Thank you.

24 So the vertical block exemption -- Metro is still in play. Vertical block exemption is still
25 in play. I don't think you need to spend too much time on de minimis by the sound of
26 it.

1 **MR MACFARLANE:** That's fair, sir.

2 **MR TIDSWELL:** I think probably we all think that. Just coming back a step, when we
3 get to the vertical block exemption obviously you have your point about Metro and you
4 have explained those, but if you are wrong about those and you are wrong about
5 hard-core, then the vertical block exemption obviously then comes into play. At that
6 stage unless I misunderstood, I don't think you have got anything to say about that,
7 have you, because you are not arguing that the numbers get you outside the safe
8 harbour? Is that right? Are we still going to have an argument about the vertical block
9 exemption from you? I am not saying that's the answer. I am just saying if we get to
10 that point.

11 **MR MACFARLANE:** Yes, sir. When we come on to that at that particular stage,
12 (inaudible) quite late on in the tribunal, but I have some serious inconsistencies to
13 challenge.

14 **MR TIDSWELL:** So you are still saying that even if you get to that point, so you have
15 not managed to satisfy us that it is a hard-core restriction and they have established
16 that the Metro applies, you are still going to be arguing that the numbers might on
17 the -- on the balance of probability you are going to be arguing that the numbers might
18 not allow them the benefit of the safe harbour. Is that where you are going?

19 **MR MACFARLANE:** That's effectively my fall back, because nothing returns
20 a hard-core restriction at the end of the day.

21 **MR TIDSWELL:** I understand that, but if you don't get there on that. The reason I am
22 asking you is we might be able to save ourselves quite a lot of time and bother in this
23 case if that is not in play, but clearly if you want to, then it is a matter for you and I am
24 not going to dissuade you. It sounds to me like you are saying you want to leave us
25 with some uncertainty in our minds at least about the numbers and therefore whether
26 the vertical block exemption applies. Is that putting it in a nutshell?

1 **MR MACFARLANE:** Given it is at the end of the four days, if it was more helpful,
2 (inaudible) if there were sensible answers to some of the questions that I need to pose
3 to the doctor, then at that point I would be happy to say "Yes, I am satisfied".

4 **MR TIDSWELL:** I am not pushing you to agree anything. I just want to make sure
5 I understand what's really in issue and what isn't. I think you have made it plain that
6 you are going to test the numbers.

7 **MR MACFARLANE:** I am going to test the numbers.

8 **MR TIDSWELL:** Is that on the basis you are saying that it is their responsibility to
9 prove that they fall within the safe harbour and therefore if the numbers have any
10 questions about them, you are going to test those. That is the basic premise I think.

11 **MR MACFARLANE:** In effect, sir, yes. The burden falls on the defendant to reap the
12 benefits of the safe harbour.

13 **MR TIDSWELL:** That has been very helpful. I think that has clarified things neatly.
14 Thank you.

15 **MR MACFARLANE:** After the quote, sir, the central question; it follows therefore that
16 the tribunal must decide on the balance what Deckers true motivations were for
17 refusing to supply the discount website. We say that the refusal was borne out of
18 a desire to maintain prices whilst Deckers say it was because of concerns about
19 financial viability, lack of logistical support and the disguised connection to Up and
20 Running. That can be found on bundle B, tab 4, page 89. This is a second witness
21 statement by Mr Hagger.

22 **MR TIDSWELL:** Yes.

23 **MR MACFARLANE:** But we hesitate, because we have had several explanations
24 over time from the defendant. So we will be challenging that particular point.

25 The evidence that the tribunal has seen to date coupled with the evidence that the
26 claimant will be able to put forward this week will show overwhelmingly that the

1 defendant was not genuinely concerned about supposed qualitative aspect of its
2 purported distribution agreement but about its HOKA product being sold at a lower
3 price.

4 This is the case not at least because its proposed quality criteria do not link to any
5 measurable specific criteria. I am hoping to walk the tribunal through the evidence in
6 favour of that during this week.

7 **MR TIDSWELL:** Yes.

8 **MR MACFARLANE:** The defendant did not apply the supposed quality criteria in
9 anything close to a uniform fashion. For example, it allowed other retailers to have not
10 only a second website but in some cases more than one or two, and sometimes three,
11 all of which had different names and those can be seen at C2, tab 159, page 1180.

12 Further evidence of what can only be described in my view as a sham will be brought
13 to the tribunal's attention during these proceedings when I identify some documents
14 that we were working on over the weekend and discovered to our utter surprise.

15 The alleged requirements of an identical or similar name to the domain name can only
16 be described as ludicrous. It is impossible to have two domain names called
17 www.runningshoes.co.uk or two called www.upandrunning.co.uk. It just can't be done.

18 I don't want to get into the argument now.

19 Meanwhile for one of the requirements they say exists in an e-mail going back to 2019
20 Up and Running and Running Shoes are in our view remarkably similar, sharing 50%
21 of the same name, both of them being "running" but the second one was a discount
22 site.

23 It is noteworthy to mention that in the defendant's own requirements simply require
24 an identical or a similar name to the name under which the bricks and mortar shops
25 and that requirement can be seen in the 2019 e-mail, which is bundle C, tab 10,
26 page 53.

1 With due respect, any reasonable person would see upandraining.co.uk and Running
2 Shoes to be the requisite of similar such that its refusal on this basis is not logical and
3 on balance is more likely to stem from a desire to maintain prices or remain clean on
4 the internet. In the words of the defendant that supposed criteria and that quote can
5 be found on C1, 27, 141.

6 Indeed, sir, the defendant has not put forward any evidence to show that requiring
7 a website to have a similar name or an identical name to the bricks and mortar shop
8 gives rise to any qualitative effect even if it were possible to begin with. If that were
9 the case, then a home improvement store such as B&Q would have all manner of
10 issues with their website, which is called diy.com, but it does not, and indeed it is
11 a multimillion pound a year business. If the URL and the store had different names,
12 so the defendant will have great difficulty in convincing the tribunal that they need the
13 same name for want of quality issues.

14 Indeed, I will be presenting later on to the tribunal evidence that the defendant doesn't
15 police that particular aspect of their criteria at all.

16 **MR TIDSWELL:** Do you want us to look at those? It might be helpful for us to have
17 a quick look at those two e-mails. You gave us I think C, 53. Should we have a quick
18 look at those just so we have them in mind?

19 **MR MACFARLANE:** Do you want the reference again?

20 **MR TIDSWELL:** We have it. We have pulled up the e-mail and were just going to
21 have a look at it. I think it is just ...

22 **MR MACFARLANE:** I think the main one is the first one I gave you.

23 **MR TIDSWELL:** C, 53. I think we have got there. We scroll down, don't we, to the
24 e-mail from Mr Hagger, which looks like it has gone to a whole lot of different -- it is
25 not specific just to one customer, is it, do you think? It looks like a generic e-mail,
26 doesn't it?

1 **MR MACFARLANE:** Yes, it is, sir.

2 **MR TIDSWELL:** And it is the first paragraph we are concerned with, isn't it?

3 **MR MACFARLANE:** Yes, sir.

4 **MR TIDSWELL:** In a way you could say it is not terribly apposite to the situation we
5 have got, at least the second sentence:

6 "All accounts are free to sell HOKA on their own websites which should have a domain
7 name identical or similar to the name under which its brick and mortar shops, if any,
8 exist or operate."

9 I mean, just as a starting proposition if you did have bricks and mortar and you set up
10 a website, I suppose you would expect the website actually to have the domain name
11 to have some relationship to the bricks and mortar you had. Forget about a second
12 website, but if you have one website and one shop, if you think about it logically if you
13 have some bricks and mortar and you set up a website, it would make perfect sense
14 that your website should have some relationship with your -- I mean, would you want
15 that, wouldn't you? You wouldn't have your Up and Running physical shops and then
16 call your website something completely different if that was the only website you had?

17 **MR MACFARLANE:** There are lots of things that could depend on, sir.

18 **MR TIDSWELL:** I am not inviting you to give evidence on this. If you like, this is
19 a point of logic. I am trying to understand how this works. The point I am making, just
20 to be clear with you, Mr Macfarlane -- this is not a point that goes -- I am not trying to
21 make a point that goes in your favour or against you. All I am trying to do here is to
22 understand what on the face of it this e-mail is trying to achieve.

23 **MR MACFARLANE:** Yes.

24 **MR TIDSWELL:** If you look at that second sentence, the most obvious thing it seems
25 to me to say is that if you've got a bricks and mortar operation, then the expectation is
26 the domain names would be similar to that bricks and mortar operation.

1 **MR MACFARLANE:** I would draw your attention, sir to the final line.

2 **MR TIDSWELL:** Quite. Absolutely. The next sentence obviously then departs from
3 that. What I am digging into is whether this actually contemplates the situation that
4 we are talking about, because on one view you could say this is actually just dealing
5 with a situation where you've got your bricks and mortar store. You decide you want
6 to have a website and so you set up your website. All logic would suggest you would
7 want the two to have some connection between them and that's what's reflected here.
8 That is quite different from if you want to have another website for the purpose you
9 have indicated you want to have. Then you absolutely do get into the third sentence,
10 which says if you want to have a website with a different name then, of course, be in
11 touch with us.

12 **MR MACFARLANE:** I would say, sir, we did notify them.

13 **MR TIDSWELL:** That is your case. I understand that.

14 **MR MACFARLANE:** Further on top of that, sir, my argument later on will be I do not
15 see how that adds to the qualitative requirement as well, of the internet. I don't see
16 any logic in that.

17 **MR TIDSWELL:** The notification requirement or the identical or similar point.

18 **MR MACFARLANE:** Yes, sir. I don't see how those can be fairly called equality.
19 (Inaudible) become more was actually ranked as good, if not better, and I find it a little
20 bit insulting that we would do anything other than high quality. So we launched the
21 website. It stood at 4.7 on Trustpilot. It got many, many good reviews, because we
22 set the standards high, just because you are selling cheap doesn't mean you have to
23 be poor on quality.

24 **MR TIDSWELL:** Yes, and we have seen that in your witness statement and the
25 material in the bundle. So we have seen that. Shall we look at the second reference
26 you gave us then, which is I think C/141? Shall we move on to that?

1 **MR MACFARLANE:** I think that number has changed, sir. C, 127, 161.

2 **MR TIDSWELL:** That's fine. Everybody gets the numbers wrong from time to time.

3 So don't hesitate to correct them. As I recall, this is a meeting note. Maybe it is not

4 a meeting note. Go back to 160. Can you remind us what this document is?

5 **MR MACFARLANE:** Yes, sir. I don't know whether yours is highlighted in yellow.

6 **MR TIDSWELL:** Yes, it is.

7 **MR MACFARLANE:** This is a report that came back from our general manager, who

8 was with us at the time. He completely unprompted was giving us feedback on how

9 the development of the website was working. In his words he says:

10 "HOKA fully declined the offer. They do not want to be part of the project, as it does

11 not fit their goal to be clean on the internet."

12 Now that was the first time an alarm bell went off in my head.

13 **MR TIDSWELL:** Can you remind us again the date of this thing?

14 **MR MACFARLANE:** I believe 22nd September in 2020. This was just after the initial

15 refusal on 14th August. 29th September. As a director I charged Mr Midwood with

16 the purpose of giving us feedback, because it was time to spend money.

17 **MR TIDSWELL:** Okay. Thank you. That's helpful.

18 **MR MACFARLANE:** So if I may carry on?

19 **MR TIDSWELL:** Please do.

20 **MR MACFARLANE:** Indeed, the defendant has not put forward any evidence to show

21 that requiring a website to have the same name as a bricks and mortar shop gives rise

22 to any qualitative effect, even if it were possible to begin with, given the fact that they

23 don't have to have the same name. If that were the case -- we have done that. Okay.

24 Sorry.

25 If that were the case -- I have done that. I apologise, sir.

26 The defendant's attempt to obscure its retail RPM initiative into its terms and conditions

1 is quite frankly not fooling me and I don't think it is fooling anybody else. One cannot
2 try to use the apparently legitimate policies to conceal RPM practices. That will not be
3 the news the tribunal -- and it is well documented.

4 As this Tribunal will know, it is not necessary that RPM to be overt, explicit or even
5 written. In fact, my guess is it is common that infringements of section 298 are
6 intentionally under cover and enforced in this case by means of a Trojan horse. The
7 refusal to supply a website which was marketed to be a place where the prices of the
8 shoes was discounted is not right.

9 This Tribunal will no doubt be familiar with such practices whereby a wholesaler
10 removes certain privileges or specific rights in an effort to dissuade a retailer from
11 engaging in price matches and pricing practices which do not please the wholesaler.
12 The pursuit of an RPM agreement by indirect means in this case by draconian
13 measures of cutting supplies unjustly in the middle of a stressful pandemic and
14 lockdown is really quite off the scale.

15 The Tribunal will see that the reasons now given by the defendant for the cessation of
16 supply are not supported by evidence and that the defendant is now somewhat
17 embarrassingly trying to shoehorn its anti-competitive terms into the form of a selective
18 distribution agreement or policy in an attempt to justify the unjustifiable. However,
19 once again the existence of an SDA is in no way supported by the facts.

20 I will take the Tribunal through that evidence on that point in due course, but even if
21 an SDA was found to be in existence, it still fails the Metro criteria test in spectacular
22 fashion.

23 Further, the defendant in chief witness has changed his mind put multiple times during
24 the lead-up to this trial, the fourth change being just a couple of weeks ago. It has
25 taken four years to come up with the latest excuses in the witness statement 2 different
26 given by Mr Hagger.

1 The resulting effect is that the defendant is left with in way of justifying his actions and
2 no way of credibly explaining its refusal to supply the discounted website. The only
3 plausible reason in this conclusion that we invite the Tribunal to draw and that is that
4 of the defendant withdrew the supply on account of the fact that the second website
5 was to sell HOKA shoes at a discount price and to do so goes against the defendant's
6 stated desire to be clean on the internet.

7 As to the restrictions on internet selling, clause 15 terms and conditions provides that
8 the retailer may only sell online on sites approved by Deckers as meeting Deckers'
9 criteria as communicated from time to time. That can be found, if you require it, sir,
10 but I think it has been well rehearsed and I would ask the tribunal if you want to have
11 a look as those -- clause 15 now.

12 **MR TIDSWELL:** Yes, by all means.

13 **MR MACFARLANE:** It is Bundle C2, tab 94, 544.

14 **MR TIDSWELL:** Yes.

15 **MR MACFARLANE:** In fact, the defendant can only provide one instance of the
16 criteria being communicated in an e-mail in July '19, which we have already looked at.
17 It reads like this, sir:

18 "Clause 15. The retailer may only sell products on a website it owns and operates if
19 the retailer has been granted permission to make online sales of products and the
20 website is fully compliant with the company's website requirements as are
21 communicated from time to time and the contents of the website have been approved
22 in writing."

23 Deckers' e-mail of July 2019 took four years to come to fruition in this case and it
24 certainly wasn't seen by me or anybody else, but it does make one wonder why only
25 one communication in four years allegedly setting out a criteria, and we will dispute
26 whether that is a criteria or not. There is no mention as such of the returns policy, the

1 design of the website. There is no mention of many things that a website is
2 constructed of. This is only one part of it and I will argue later, sir, that this particular
3 paragraph was really aimed at preventing third party platform access, because the rest
4 of the e-mail does carry on with that point.

5 So if I can take to you -- sorry. If I may carry on, if I can ask the tribunal to turn to C2
6 bundle, tab 92, 540, I think that's the same terms and conditions.

7 **MR TIDSWELL:** We have different version of this, have we?

8 **MR MACFARLANE:** I think they are very minor. There is the odd full stop and comma
9 here and there that changes it but I don't think there is any significant difference in the
10 terms and conditions from 2016 to today that have any effect upon this trial.

11 **MR TIDSWELL:** Which clause are you going to go to, because I might stick on
12 page 544 if you don't mind, so I only have one, unless you are telling me it is material.

13 **MR MACFARLANE:** I think that's quite separate.

14 **MR TIDSWELL:** Which clause?

15 **MR MACFARLANE:** Clause 15.

16 **MR TIDSWELL:** We are back at clause 15.

17 **MR MACFARLANE:** Clause 15 we say is anti-competitive on its face as it requires
18 permission from Deckers to sell online. It says:

19 "Retailers may only sell products on a website it owns and/or operates if the retailer
20 has been granted permission to make online sales and product."

21 This is a restriction of both active and passive online sales as it says that online sales
22 cannot be made without permission. It is not within the defendant's gift to allow or not
23 to allow passive sales online. That's our view.

24 Now can I ask the tribunal to turn back to the July 2019 e-mail on C, 10, 53?

25 **MR TIDSWELL:** Yes.

26 **MR MACFARLANE:** The July e-mail then adds further terms upon which the reseller

1 contracts with Deckers and are alleged to be anti-competitive. The July 2019 can be
2 broken down into two, the first half as follows. I think you did that, sir, earlier. You
3 broke it down into two:

4 "All accounts are free to sell HOKA on their own website which should have the domain
5 name identical or similar under which its bricks and mortar shops, if any, exist and
6 operate."

7 The use of the word "should" in place of a definitive term such as "must" or "need"
8 leaves the open question on how important or qualitative this is necessary. The
9 requirement is actually, and it is important, as the defendant seeks to suggest that
10 they -- to suggest. Then it begs the question why was it left open in my view? Sorry.
11 I was stuttering over that one a bit.

12 This is compounded by the second half of the communication which reads:

13 "If you wish to sell HOKA from a website with a different name, please notify us."

14 It does not say "It is not allowed". It just says "Please notify us". That for me is one
15 of the most important aspects of this alleged criteria.

16 The statement then goes one step further by setting out why Deckers required the
17 notification. It was nothing to do with quality criteria. Instead it explains that the
18 notification of the other website is needed because it is essential that we have
19 a complete list of authorised websites selling HOKA. They are just looking for a list of
20 websites. They are not saying for one second that you cannot use a website. Just tell
21 us, so that's what we did.

22 As can you seen, it is not a requirement at all. The second website has the same
23 name but only that one notifies Deckers of the name that can be similar. The claimant
24 duly notified the defendant and so a refusal on this basis is illogical and not supported
25 by the facts or Deckers' own terms.

26 It is absolutely clear that Deckers' true motivation for the cessation of supply had

1 nothing to do with supposed quality criteria and in our submission everything to do
2 with the fact that Deckers wanted to maintain the price of their products by refusing to
3 supply the discount site running shoes.

4 **MR TIDSWELL:** Mr Macfarlane, there is an interesting tension here, isn't there,
5 because on the one hand if you were to look at this clause and say, as you have at
6 times, that it actually doesn't really amount to any statement of importance as far as
7 selective distribution is concerned. It is more encouraging the mandatory. It is about
8 notification rather than requirement. So effectively saying: Look, you can't if you're
9 the defendant rely on this as being an important bank of selective distribution, because
10 it just doesn't really contain the goods. It doesn't contain the material. That's one
11 argument you are putting.

12 I think you are also putting to us that on its face this amounts to an agreement, absent
13 any other activity, which is either contrary to a prohibition on restricting internet use
14 generally or amounts to resale price maintenance in its terms because it is effectively
15 preventing discount sites.

16 Now there is a tension between those two arguments I think. The stronger your case
17 turns out to be on it not being very strong selective distribution, the weaker it seems
18 to me to be on the alternative argument. I am not asking you to deal with that now.

19 I think it is probably something for you to have a think about. I rather suspect your
20 position on this at the end of the trial will depend on how the evidence turns out. I just
21 thought I would point it out to you because if I don't, Ms Berridge will. It is worth you
22 having a think about how those arguments sit together. You may say they sit together
23 perfectly comfortably. I am not saying they don't, but it just occurs to me the way you
24 are putting this there is potentially a tension between some of the arguments. That
25 doesn't mean -- it is not necessarily a bad thing. It does mean, though, you may have
26 to make a choice about which way you go at some stage.

1 **MR MACFARLANE:** Yes, sir. I take that on board and I will give it some thought
2 during the process.

3 **MR TIDSWELL:** What we might do now is take our ten minute break. I am not inviting
4 to you come back on that point if you are not ready to do that. How much more have
5 you got on that.

6 **MR MACFARLANE:** Two more pages out of 12.

7 **MR TIDSWELL:** Not too much longer. I think we will take the break. We have gone
8 a bit past 11.45. I have occupied a bit of your time by asking a lot of questions and
9 you shouldn't feel under pressure for time and I am sure we will manage that if it is
10 only ten or fifteen minutes. Don't feel like you are under any pressure to finish. We
11 will take a ten minute break and come back, in fact, just before 12 o'clock. Thank you.

12 **(Short break)**

13 **MR TIDSWELL:** Mr Macfarlane.

14 **MR MACFARLANE:** Is it possible I could ask to have my jacket off? This is the
15 hardest thing I have done.

16 **MR TIDSWELL:** That's absolutely fine. If we turn the air-conditioning down, we might
17 find some people complain. It is probably better we deal with you individually.

18 **MR MACFARLANE:** Can I have some clarification on how we left it? We were relying
19 on clause 15 as being an object.

20 **MR TIDSWELL:** Yes.

21 **MR MACFARLANE:** In the case, and we will be working on that one as well a bit
22 further on.

23 **MR TIDSWELL:** I am anxious that what I said to you before the break doesn't amount
24 to -- I am not giving you a steer as to a change of course or anything like that. I don't
25 want you to think that's what is happening. I am pointing out there is a natural tension
26 I think between some of the arguments we explored earlier and actually the tension is

1 reflected to some extent in the defendant's case as well. It is the reality of the different
2 types of arguments we have here. They relate in different ways. I think it is important
3 that everybody is thinking a little bit about that.

4 At some stage I suspect you may want to make some firm choices about which way
5 you go. I am not asking you to do that now. I am not asking to you curtail your case
6 or go in a particular direction.

7 **MR MACFARLANE:** The terms on their face in clause 15 restrict the claimant's ability
8 to make the effective use of the internet as a means of sale. It is not an answer to the
9 claim for the defendant to say that the claimant was allowed to make the use of one
10 website so the restriction to and on another was not anti-competitive, especially as the
11 second website was price driven.

12 It was, in fact, anti-competitive because the enforcement of the terms removed the
13 competitor from the market, thereby reducing the competition. I covered that a little
14 bit earlier on this and is a bit repetitive, but we will walk the tribunal through the clear
15 link between enforcement of the defendant's terms and the demise of
16 runningshoes.co.uk over the course of this trial.

17 The defendant's own skeleton argument makes this point at paragraph 53. If I could
18 ask the tribunal to turn to the joint authorities JA, tab 37, 1482, page 1482.

19 **MR TIDSWELL:** Not in the authorities bundle.

20 **MR MACFARLANE:** It is the joint authorities bundle.

21 **MR TIDSWELL:** Sorry. Give us the reference again, please.

22 **MR MACFARLANE:** Tab 37, page 1482.

23 **MR TIDSWELL:** I think we are probably in the wrong bundle because I don't think
24 there's a tab --

25 **MR MACFARLANE:** Maybe if that could be --

26 **MR TIDSWELL:** 1482 is the middle of something.

1 **MR MACFARLANE:** Commissions guidance.

2 **MR TIDSWELL:** You are absolutely right. Forgive me. I thought you were taking us
3 to the defendant's skeleton. We have, yes, Commission guidance. Which
4 paragraph are we looking at?

5 **MR MACFARLANE:** Commission's 2010 guidance which says as follows:
6 "The Commission considers any obligation ..."

7 **MR TIDSWELL:** Sorry to interrupt you. Do you know which paragraph you are in?

8 **MR MACFARLANE:** Paragraph 53, sir.

9 **MR TIDSWELL:** That's helpful. I see in the middle there:
10 "The Commission considers any..."

11 **MR MACFARLANE:** "... considers any obligation which dissuades an appointed
12 dealer from using the internet to reach a greater number and variety of customers by
13 imposing criteria for online sales ..."

14 **MR TIDSWELL:** I am sorry to interrupt you. I am so sorry. I am afraid I can't actually
15 see that in paragraph 53. Have you got it in front of you?

16 **MR MACFARLANE:** We are trying to resolve it.

17 **MR TIDSWELL:** 54, is it? I apologise, because I am sure it is right if front of me
18 somewhere.

19 **MS BERRIDGE:** 56.

20 **MR TIDSWELL:** That's very helpful. Thank you:
21 "Therefore the Commission considers any obligations."
22 That's the foot of page 82. Sorry, Mr Macfarlane. So carry on.

23 **MR MACFARLANE:** It is my fault. The paragraph is:
24 "The Commission considers any obligations which dissuade the appointed dealer from
25 using the internet to reach a greater number and variety of customers by imposing
26 criteria for online sales which are not overall equivalent to the criteria imposed for sales

1 from bricks and mortar shops as a hardcore restriction. This does not mean that the
2 criteria imposed for online sales must be identical to those imposed for offline sales,
3 but rather that they should be pursued in the same objective and achieve comparable
4 results and that the difference between the criteria must be justified by the different
5 nature of these two distribution models."

6 From this statement, sir, it is important to draw out three key points, which point
7 towards the restriction being hardcore. One is the possibility of dissuading retailers
8 and this particular clause we would argue does dissuade retailers.

9 Two, from reaching a greater number and variety of customers, reaching those
10 customers is a different kind of customers I will argue later, and by imposing a criteria
11 for online sales which are not the overall equivalent of the criteria imposed for the sales
12 of the bricks and mortar store is the hardcore restriction.

13 So it is our view that the defendant is in some difficulty trying to draw a distinction
14 between what Commission is trying to prohibit in the 2010 guidelines and its own
15 conduct. The terms of its agreement did, in fact, dissuade us from using the internet
16 as a means of selling to a greater number and a further variety of customers.

17 This is precisely what the second website was designed to do, to reach a different
18 target audience, and this is why it is so important to keep the website separate.

19 The defendant in our view has tried to glaze over these holes in the case by suggesting
20 that the refusal was based on financial viability, lack of logistical support and the
21 disguised connection to Up and Running and the fourth set of explanations/excuses.

22 **MR TIDSWELL:** I mean, Commission guidelines do -- I think you would accept
23 this -- recognise that you can use selective distribution as a basis for restriction of both
24 bricks and mortar and internet sales. So it is possible, but what it says is you have to
25 have a consistency between the two of them. That's what I am taking from this
26 paragraph. You understand that's your position as well.

1 **MR MACFARLANE:** I absolutely agree. Metro is not (inaudible) anyway.

2 **MR TIDSWELL:** In a way if you don't give into selective distribution through Metro,
3 then you don't get into this at all. Having said that, you are taking this leap and actually
4 it is a discussion we have been having about how and what is the order you do this in
5 and whether you start by trying to work out whether it is an object restriction and then
6 you go on and look at whether Metro applies or whether you do it the other way round.
7 I think probably our current thinking, just to sort of give you a sense of that, and
8 Ms Berridge will have a view on this as well, is you start by trying to analyse the nature
9 of the restriction, whether it is an object restriction or not, and then that gives you
10 a sense as to whether you then find your way into the Metro discussion.

11 I mean, I am not saying we have a concluded view on at that and we certainly would
12 be interested on any views that either party has about how one goes about that.

13 **MR MACFARLANE:** Thank you, sir. Can I ask the tribunal to turn to bundle C, tab 58,
14 336.

15 **MR TIDSWELL:** I should say to you and this is for everybody, we are working off
16 page numbers. So if it is in C bundle you don't need to give us the tab or which C
17 bundle it is. We just have one out unitary C bundle.

18 So if you just give us C and the page number, that is as efficient as everything. This
19 is Ping we are in now. I am in the wrong bundle. Forgive me. Just give me the
20 reference again, would you please?

21 **MR MACFARLANE:** C1, tab 58, 336.

22 **MR TIDSWELL:** That's my fault. An e-mail from Mr Hagger to you 9th June 2021.

23 **MR MACFARLANE:** That's the one, sir, yes 9th June. This e-mail sets out the
24 reasons given by the defendant, in that at the time of the cessation of supply, and it
25 can be seen from that document that none of these had anything to do with the reasons
26 now given, which is financial viability, lack of logistical support and the disguised

1 connection to Up and Running. This is all set out in paragraph 1, sir.

2 **MR TIDSWELL:** Just remind me about the timing of this again.

3 **MR MACFARLANE:** Yes, sir. It went quiet between the time of a warning in
4 December that they were going to terminate our account and then more e-mails
5 started to exchange as we neared to the end of that, because product was supplied
6 throughout 2021. It was only the end of 2021 and in effect I was trying to find out the
7 reasons behind. I couldn't understand why they wanted to terminate what is clearly
8 an important account to them.

9 **MR TIDSWELL:** Yes. So this is after they have given you notice to terminate in
10 December 2020. Is that right?

11 **MR MACFARLANE:** Product was still continuing to be supplied throughout 20...

12 **MR TIDSWELL:** Yes.

13 **MR MACFARLANE:** As I say, none of these had anything to do with the reasons
14 given in the later date, that's on 24th May this year, which are the financial viability,
15 the lack of logistical support and the disguised connection to Up and Running.

16 Of course, it is no business of the defendant to dictate how and if we can run our
17 business. The reasons are false and will be proven to be so. The defendant in my
18 submission is grasping at straws when it comes to trying to justify its decision to cease
19 supply of Up and Running and that is because the real reason was it was
20 anti-competitive.

21 It is rather damning that the latest version put forward by the defendants are the fourth
22 set of excuses only drawn out by effectively being boxed-in earlier during the witness
23 statements when I pointed out that they could not have seen the website as they allege
24 that they did. So the story changed.

25 It is not clear how many of these new reasons were investigated in order to be
26 established as a genuine impediment or of any of the other Metro criteria. What's

1 more, the defendant would be required to show that even if they were in issue, why
2 they were justified in none of the -- sorry -- why they were justified refusing supply on
3 that basis. If the impediment could be overcome, the reality is that none of these
4 issues were, in fact, in issue. The claimant's business was of a sound financial
5 standing which we will prove later, had no issues with logistics and the supposed
6 disguised connection to Up and Running was not an issue because the same criteria
7 allowing others to use different names will be shown and proven later, and the quality
8 criteria -- and did not offend the quality criteria required under the Metro test.

9 I am almost done much to the relief of everybody.

10 The claimant's position is that these documents -- that these reasons have been
11 plucked out of thin air in order to defend the indefensible. They are not supported by
12 evidence. We will take the tribunal through that evidence this week. By the end of
13 this trial I feel confident that the tribunal will be left with no choice but to rule in favour
14 of the claimant as on the balance the evidence is with us both on counts and names.

15 The defendant's actions were motivated by the desire to maintain resale prices. The
16 defendant's terms unlawfully restricted the claimant's effective use of the internet as
17 a means of sale and to reach a greater number and variety of customers, contrary to
18 the prohibition set out in chapter 1, section 2 CA98.

19 Sir, those are my submissions. Unless I can assist the tribunal further.

20 **MR TIDSWELL:** That has been extremely helpful, Mr Macfarlane. Thank you. There
21 is just one point, which it is not for you to say anything about, but I raise it now knowing
22 that you won't be able to deal with it now. Just a couple of cases that we identified
23 that we thought -- which are not in the bundle unless they have found their way in
24 somehow that we have not seen, but we thought we would just raise with you and
25 maybe ask if they can be put into the supplementary bundle, please, into bundle D or
26 whatever it was.

1 The first one is, and I am just going to give you the short version of the names, but if
2 you need any more details I can give up the first citation. The first one is
3 AEG-Telefunken, which is C107/82 and the second one is Eturas, which is C74/14.
4 So hopefully they are easy enough to locate. We would find them helpful to have in
5 the bundle.

6 Mr Macfarlane, you have not had any warning about that. If at some stage you wanted
7 to say anything about that, then obviously you will get an opportunity to do that. You
8 certainly will in closing, but I don't want you to feel that if there was anything that came
9 out of those that was important, you hadn't had the chance to alert us it now. It might
10 be over the short adjournment at lunchtime you might be able to have a quick look and
11 just see if you think they are of any particular interest.

12 **MR MACFARLANE:** I find myself getting used to reading until midnight.

13 **MR TIDSWELL:** Whatever happens, I don't want you feel like you haven't had the
14 opportunity to comment on them, you certainly will later, but if anything really jumps
15 out you should let us know.

16 Ms Berridge, I am hoping if you have a chance to have a look at them over the short
17 adjournment, anything you want to say about them as well, you could do so. We are
18 just keen that we think they are quite interesting and therefore they should be in the
19 bundle. We may wish to refer to them at some stage.

20 So that's it. Thank you, Mr Macfarlane. Thank you very much indeed.

21 Ms Berridge.

22

23 **Opening submissions by DEFENDANT**

24 **MS BERRIDGE:** I am going to start with a very short chronology to help us keep track
25 of things. There are four key events to keep in mind. On 23rd July 2020 Up and
26 Running presented a new business proposal to Deckers and that was the

1 establishment of a new website called runningshoes.co.uk. On 14th August Deckers
2 wrote to Up and Running and declined to be involved in that venture. On 25th
3 November Deckers noticed that HOKA products were being displayed for sale on the
4 site, the runningshoes site, and asked Up and Running to remove them. On
5 14th December, after some correspondence, Deckers decided that the relationship
6 had broken down and gave notice that it would cease to supply HOKA products to Up
7 and Running.

8 Up and Running is aggrieved that supply has been terminated and alleges that the
9 termination was unlawful under the chapter 1 prohibition in the Competition Act.

10 There are two alternative versions of this allegation.

11 **MR TIDSWELL:** Just before you move on, there is some peculiarity about the first of
12 those days, 23rd July 2020 meeting. There is just some oddities about some of the
13 dates of the e-mails and some confusion I think generally.

14 **MS BERRIDGE:** Yes.

15 **MR TIDSWELL:** As I understood it, it gets fixed back to 23rd July because
16 Mr Hagger's diary note has got that date in it, but it is quite peculiar that the e-mail
17 chain that appears to be inviting him to the meeting seems to have a date of
18 3rd August on it. I just found that whole -- the whole sort of documentation in that area
19 very odd. It may be I am misreading something. There is apparently no dispute I think
20 about it being 23rd. I don't suppose it matters, but just for the sake of good order are
21 we confident that is the right date?

22 **MS BERRIDGE:** We will hear Mr Hagger's evidence but I agree nothing turns on it.
23 It is some time before Deckers make a decision not to be involved.

24 **MR TIDSWELL:** Which is 14th August.

25 **MS BERRIDGE:** Yes.

26 **MR TIDSWELL:** Mr Macfarlane, there is no significance about that, is there.

1 **MR MACFARLANE:** It was 23rd.

2 **MR TIDSWELL:** It was 23rd. Thank you. Ms Berridge.

3 **MS BERRIDGE:** There are two versions of the allegation. First that Deckers
4 terminated the relationship because Up and Running was refusing to comply with
5 an unlawful agreement regarding resale prices, or alternatively that Deckers
6 terminated the relationship because Up and Running was selling on a site that did not
7 meet its online selling standards and those standards were themselves unlawful.
8 Now I think the chair has earlier today raised a third possibility, a middle possibility,
9 which is that those online selling standards on their face limited the ability of retailers
10 to set their prices and that that could by itself be regarded as an RPM agreement, and
11 I will deal with that as well.

12 **MR TIDSWELL:** Yes. Just to be clear, they are not formulations of mine. I was trying
13 to I think crystallise what I thought the claimant was saying just so you are clear about
14 that. I think certainly the way we have seen the way the case is put and the skeleton
15 and indeed the way I think that Mr Macfarlane has developed it this morning suggests
16 that there probably are three different ways of putting it.

17 I mean, I think -- well, just your two alternative versions, the first one, the unlawful
18 agreement regarding sales prices, so is that -- I am just trying to work out how they
19 map on to the discussion we have just had. That is the agreement.

20 **MS BERRIDGE:** That is the allegation that despite what was said in the e-mails and
21 in the evidence secretly the executives were thinking "We don't want our shoes on that
22 site because it is tainted and that was the secret motivation.

23 **MR TIDSWELL:** I would characterise that as being -- I think I did characterise it as
24 being there was an agreement which may or may not be -- well, actually probably in
25 which it is not anti-competitive but is being used in a way that is. The second of those
26 is on the face it it was anti-competitive and combined with the selling standards.

1 **MS BERRIDGE:** Yes. Is this like Guess? Is it like Coty? That side of the case. So
2 I have divided it into those two but I will deal with the third.

3 **MR TIDSWELL:** The third possibility. Maybe if it helps, I think I was drawing
4 a distinction. Maybe this is not very helpful, but I was drawing a distinction between
5 an analysis of the objective of the agreement in relation to price and then analysis of
6 the objective of the agreement in relation to internet sales, which is the perhaps the
7 broader point we saw in the Commission's paragraph 56. I am just trying to make sure
8 we are mapping the same categories on the same things.

9 **MS BERRIDGE:** I think we are. I suggest I carry on and do it and you can let me
10 know if I haven't.

11 **MR TIDSWELL:** Absolutely. I am sure that will be helpful. Yes.

12 **MS BERRIDGE:** That will be the most efficient way to deal with it.

13 So I am going to start with this allegation that there is a sort of secret motivation which
14 was to prevent discounting. I was going to take the tribunal to the central question
15 that the Chair posed in February, but I think we have done that a few times now.

16 **MR TIDSWELL:** Yes.

17 **MS BERRIDGE:** That highlighted that we have to start by looking at the motivation of
18 the people at Deckers who made these decisions. That is first and foremost a question
19 of evidence. As we know, it is for the claimants to prove its case on the balance of
20 probabilities. The case has raised some special challenges. In particular, sometimes
21 there is not as much direct documentary evidence as we would like.

22 So on that can I ask you to turn up the recent decision of the tribunal in the
23 Prochlorperazine case. That was a late addition to the authorities bundle. It is tab 47,
24 which is page 1758. If that's not working for you, I do have some pages to hand up.

25 **MR TIDSWELL:** If these have been updated, I assume it will be in here.

26 **MS BERRIDGE:** It will be the third volume right at the end.

1 **MR TIDSWELL:** We do have them in here. Yes.

2 **MS BERRIDGE:** Can I ask you to turn to page 1770 and look at paragraph 24?

3 **MR TIDSWELL:** Yes.

4 **MS BERRIDGE:** So in that paragraph the tribunal starts by articulating the problem
5 in these kinds of cases. It says:

6 "Chapter 1 cases often concern matters which are in some way hidden or secret.

7 There may be little or no documentary evidence. What evidence there may be may
8 be quite fragmentary. The evidence may be wholly circumstantial."

9 Then it explains that it will be sympathetic to that problem:

10 "We acknowledge the difficulties in proving a case in such circumstances.

11 Circumstantial evidence and inferences can play an important role in proving such
12 a case."

13 It then goes on to strike a note of caution about cases where there is an absence of
14 evidence and it says:

15 "Where there is no evidence about a matter, any inferences about it are required to be
16 based on and properly deduced from evidence which does exist."

17 Then, finally, on cases where there is some exculpatory evidence it says this:

18 "Further, if there is evidence which contradicts the existence of an anti-competitive
19 agreement, that does not necessarily mean that the evidence has been falsely
20 concocted to deflect from the agreement. It may simply mean that the evidence is true
21 and there is no anti-competitive agreement at all."

22 So that's quite an involved paragraph, but it is basically saying don't go searching for
23 conspiracy behind every corner and sometimes the simplest explanation is the right
24 one.

25 Can I then ask you to look a little further down the page where the tribunal comes on
26 to talk about witness evidence? So paragraph 26 and it is talking here about the CMA,

1 because that was a CMA case, but the same applies:

2 "Where the CMA has advanced a view or finding in respect of an event, matter or
3 document but has chosen not to lead oral evidence at the hearing from a witness who
4 can speak to that, we have taken account of the lack of oral evidence from that witness
5 in assessing whether to accept the CMA's view and whether the CMA has proved its
6 case."

7 So we will come back to that point later.

8 So having looked at it in the abstract, let's turn to the actual evidence itself. What
9 evidence is there of the executives' reasoning when they declined to be involved in
10 the Running Shoes' project and then terminated the relationship?

11 So first and foremost there is the direct evidence from those executives themselves.
12 They are Carl Hagger, Steve Yates and to a lesser extent Alex Henderson. All of
13 those have provided witness statements in these proceedings and they are in
14 bundle B.

15 Mr Hagger provides a clear account of the reasons for those decisions. What I am
16 going to do is summarise them quickly and then I am going to take you to his witness
17 statement so you can see them in his own words.

18 So there were four reasons. First, there were concerns about credit. The Running
19 Shoes project would involve a higher volume of orders and it would increase Deckers'
20 financial exposure to Up and Running.

21 Second, there were concerns about Up and Running's ability to manage the logistics
22 required by a much larger online operation with consequential impact on the HOKA
23 brand.

24 Third, there were concerns about the covert nature of the proposed business. So as
25 we have heard, it was due to have a different domain name from its owner, Up and
26 Running, and it was also due not to signpost the connection clearly on the site.

1 Deckers had already notified its retailers in writing, and you have seen that e-mail, that
2 it expected such connections to be made clear and that websites that did not do this
3 would not be supplied.

4 Fourth -- and this reason applies only to the decision to terminate -- the fact that the
5 relationship had broken down.

6 So can I ask you to look at these in Mr Hagger's first witness statement? So that's
7 bundle B, page 74.

8 **MR TIDSWELL:** Yes.

9 **MS BERRIDGE:** Rather than reading them out to you I am going to invite you to read
10 paragraphs 85 and 86. So that is the whole of that page and half of the next.

11 **(Pause.)**

12 **MR TIDSWELL:** Yes.

13 **MS BERRIDGE:** If terms of the reasons for terminating the relationship can I ask you
14 to turn to page 79 and have a look at paragraph 102?

15 **(Pause.)**

16 **MR TIDSWELL:** Yes.

17 **MS BERRIDGE:** I will only take you to Mr Hagger's first statement in the interests of
18 time. The references for the statements of Mr Yates, Mr Henderson and Mr Hagger's
19 second statement are all in the skeleton and obviously you will have an opportunity to
20 ask questions of all of the witnesses in the following days.

21 **MR TIDSWELL:** Thank you. Just in relation to Mr Hagger's paragraph 85 and 86,
22 I think what he is recording here is his reaction to the proposal that's put on 23rd July.
23 Then I think what happens -- what we see in 87 is that Mr Hagger and Mr Yates,
24 Mr Henderson and Mr Black have a discussion. We are not actually told anything
25 about that discussion. I don't think there is any direct evidence anywhere, no
26 documentary record of it, as I understand it. So am I right in thinking you are inviting

1 us to take the reasons set out in 86 as being the reasons -- I mean, he says:
2 "For the reasons above we were immediately against HOKA being involved in the
3 Running Shoes website. We subsequently discussed this and for the reasons
4 explained above ..."
5 We are taking that as being reasons for the decision. They were not just the reasons
6 coming out of the meeting. They were the reasons for the decision.
7 **MS BERRIDGE:** (Inaudible).
8 **MR TIDSWELL:** I think there was some criticism about a moving set of reasons.
9 These are the reasons that you say were the reasons at the time.
10 **MS BERRIDGE:** Yes.
11 **MR TIDSWELL:** For the declining of the proposal.
12 **MS BERRIDGE:** Yes. So I am trying to take you through the evidence in a structured
13 way.
14 **MR TIDSWELL:** Yes.
15 **MS BERRIDGE:** First of all, those are the personal accounts of the people who had
16 the thought process that we are interested in.
17 **MR TIDSWELL:** Yes.
18 **MS BERRIDGE:** The second, there are some contemporaneous documents that
19 support those reasons and I want to take you to those.
20 Can I start by asking you to go to -- I think I might give you the whole reference, for
21 the benefit of others. So C1, 17, 96.
22 **MR TIDSWELL:** Say that again.
23 **MS BERRIDGE:** C1, 17, page 96. This is Mr Hagger's note of the July meeting, so
24 that meeting where Running Shoes was presented. It is a manuscript note and you
25 will see it is dated 23rd July, which we say is the same day as the meeting took place.
26 If you turn over the page and read the final sentence, it says:

1 "Where are you going to hold all this stock and how are you going to ship it?"

2 So that's direct contemporaneous evidence of what Mr Hagger was thinking at the
3 time. He was thinking "I am worried about the logistics. Are they going to be able to
4 handle this?"

5 The second, can I ask you to turn in the same bundle to page 101, which is at tab 19.

6 This was an internal e-mail from Mr Hagger. He has had a call from Mr Macfarlane
7 and he is reporting back to colleagues internally. It is 15th September. So it is about
8 a month after they decided not to be involved in Running Shoes. What he says is in
9 the second paragraph there:

10 "We told them that what they have presented goes against our brand strategy, and as
11 per our T&Cs, we wouldn't open a store fascia with an existing customer that does not
12 clearly state to the consumer who they are buying from."

13 So that's a nearly contemporaneous account. In that one Mr Hagger is emphasising
14 his concern about the consumer not understanding who is really selling on that site.

15 **MR TIDSWELL:** That's the covert nature and not the signposting point. Yes.

16 **MS BERRIDGE:** Then finally, C1, page 116, page 123. This is an Up and Running
17 meeting note from 19th August. So that's very shortly after Deckers declined to be
18 involved in Running Shoes. It is a sort of general management meeting not confined
19 I think to the Running Shoes project. If I can ask you to turn to page 116 and read the
20 second paragraph, and it says there:

21 "There is a potential problem with credit limits from suppliers if larger orders are being
22 placed. All retailers are having their credit limits reduced and suppliers are asking for
23 payments quicker to keep within limit."

24 So that's not evidence from the executives who are involved. That's evidence from
25 Up and Running that there was a widespread concern in the industry about credit and
26 that when the volume of orders goes up, which is what's proposed in the Running

1 Shoes proposal, there's broadly a concern about credit and that helps support that that
2 was likely to have been a concern in the minds of the people at Deckers at the time.

3 Now there is one more contemporaneous document I would like to take you to. This
4 one is a bit more difficult to construe. Can I ask you to stay in the same bundle but go
5 to page 161, which is at tab 27. Mr Macfarlane has shown you this document but
6 I want to go back to it.

7 **MR TIDSWELL:** Sorry. Could you give me that page reference again?

8 **MS BERRIDGE:** 161. This is part of the Running Shoes business plan dated
9 23rd September 2020. It is prepared by Jonathan Midwood, who was the Up and
10 Running person who attended the meeting with Carl Hagger and Steve Yates. What
11 he does is he reports back to Up and Running what various brands have said to him
12 about the Running Shoes proposal. That's on page (inaudible). You can see various
13 brands there: Asics, ON running.

14 In relation to HOKA he says:

15 "HOKA -- have fully declined the offer. They do not want to be part of the project as it
16 doesn't fit their goal to be 'clean' on the internet."

17 What should we make of that? I have got two points.

18 First, the person who attended the meeting with HOKA and who prepared this
19 document is not here today to give evidence and I remind you of what the tribunal in
20 Prochlorperazine said about that. You can, however, ask the Deckers executives if
21 they remember saying any such thing and, if so, what it means.

22 Second, Up and Running invites you to interpret this as a thinly veiled reference to
23 maintaining prices and that's in the skeleton at paragraph 40. That seems to us to be
24 quite a stretch. Clean on the internet means highly priced on the internet. Deckers
25 had a clear policy that its retailers should make the ownership of their websites clear
26 and not indulge in confusing or deceiving customers. It is much more likely that clean

1 on the internet refers to that policy, but again you can ask the people who supposedly
2 said it.

3 So that's what you might call the direct evidence, what the relevant people actually
4 say and what they wrote down at the time.

5 What about indirect evidence? You will remember that the Prochlorperazine judgment
6 talks about that as well. I am going to start with a thought experiment. I am going to
7 ask us to think what if Deckers did have secret arrangements with retailers to maintain
8 resale prices? What if this is what they are doing all the time, trying to stop people
9 discounting HOKA shoes? What sort of evidence would we expect to see if was that
10 the case, and I would submit you would expect to see three things.

11 First of all, we would expect to see them objecting when retailers try to discount and
12 we would expect to see them reacting positively when other retailers say "Oh, my rival
13 is trying to discount. Can you do something about it".

14 Then, finally, we would expect them not to want to supply retailers who specialise in
15 discounting, because the business model is discounting. Yet those are the
16 things -- precisely the things we don't see. So we know that retailers discount
17 regularly -- discounted regularly and do discount regularly and there is no evidence
18 that Deckers tried to stop them.

19 I will take you to Mr Hagger's evidence on this. That's bundle B, page 70 and tab 3.
20 So paragraph 70 there:

21 "Sport Pursuit is the only retailer we have worked with in the UK that specialises in
22 discounted products but I cannot think of a retailer that doesn't discount on their
23 website ... at some point in the season.

24 ... I have been shown a document which gives examples of discounted goods being
25 sold by Up and Running which aligns with my recollection that this did take place as a
26 normal part of business."

1 Then over the page, 71, he again talks about being shown another document and
2 examples of discounts. He says:
3 "We have never discussed pricing policy or discounting with these retailers and they
4 are free to set their own prices."
5 The discounting happens and we have no evidence that Deckers ever tries to stop it.
6 Second, we know that retailers did complain when their rivals discounted. That's quite
7 common I think in retail industries, but in this case they were rebuffed, and I am going
8 to do this again from Mr Haggars' first statement. So that's the same page where we
9 just were, page 71 at paragraph 72. Then he talks about Up and Running and says
10 "One of our rivals is discounting. Can we do something about it". They said very
11 properly "No". There are more examples.
12 Finally, we know that Deckers supplies HOKA products to a website called Sport
13 Pursuit. As we have just heard, that's a specialist discounter.
14 So all of the indirect evidence that we would expect to see if Deckers was pursuing
15 a price maintenance policy, none of it is there.
16 What does the claimant say about all of this? Now there is quite a lot of material and
17 we have organised it. We say that the claimant has five main lines of attack. You
18 have heard some of them already, some of them are in the skeletons and some of
19 them are in the pleadings.
20 I am not going to make submissions on those now, because you are going to want to
21 hear the evidence on them first. I am going to give you a list so that you have some
22 structure in mind when you are listening to the evidence and obviously I will come back
23 to all of them in closing. I am just going to list the five lines of attack.
24 So, first, the claimant says that Mr Hagger explicitly told him that they did not want
25 HOKA shoes on the Running Shoes site because it was discounting them.
26 Secondly, the claimant says that Deckers gave inconsistent reasons over time, which

1 undermines its credibility.

2 Third, it says that Deckers made a timing error that proved that its reasons were made
3 up. Specifically it said that when Mr Hagger said there would be no signposting, so
4 that signposting concern we went back to earlier, at the time he says that the Running
5 Shoes site had not yet been built. So that is presented to us as a gotcha because it
6 is said that he must have made that up because he hadn't been able to see it.

7 Fourth, the claimant says that lack of signposting cannot have been the real reason
8 because about six months after the relationship was terminated the claimant actually
9 added some signposting to the Running Shoes site and nothing changed.

10 Fifth, the last one, it says that it was a valuable customer of Deckers. If terminating
11 the relationship wasn't part of a resale price maintenance strategy, then it was
12 an inexplicable act of self-harm.

13 So those are the five lines of attack and they are what I would request that you look
14 out for when we listen to the evidence in the coming days and I will come back and
15 make submissions on all five of them on Thursday.

16 That is the evidence relevant to the chair's central question that you posed in February.
17 We say that it shows overwhelmingly that the decisions were not motivated by the fact
18 that Running Shoes planned to sell at a discount. There are positive, rational and well
19 supported reasons for those decisions.

20 If the tribunal agrees on that, then that's enough to dispose of this first issue, the resale
21 price maintenance issue, with the caveat I am going to come on to the middle way that
22 we pointed out, but before I do that I just wanted to remind the tribunal that even if it
23 believes that Mr Hagger had a secret thought in his head "I don't like discounting.
24 I don't want this", there would be a few further steps that the tribunal would have to
25 take before it could make an infringement finding.

26 They are described in the skeleton. I am going to briefly take you back to them. First,

1 the Tribunal would have to identify an agreement or concerted practice on that price.
2 Chapter 1 doesn't apply to unilateral conduct. Tacit acquiescence is enough, but the
3 claimant denies that even that was present.

4 Second, the Tribunal would have to come to some view on what the terms of that
5 agreement were, in other words, what actual limits on discounting were agreed
6 between Deckers and Up and Running. We can see no answer to this. I have shown
7 you that people discount regularly and there are no -- there were no clear limits based
8 on that. There are no limits based on that.

9 Then, finally, even if we get past those two hurdles then the tribunal would have to
10 think about how this sort of, at best very loose agreement that's even denied, about
11 some very unspecified limits on discounting, whether that has such an obvious
12 anti-competitive effect that it is correct to think of it as an object infringement without
13 the need to examine any actual effect.

14 **MR TIDSWELL:** On your second point I think the way -- I won't say the way the case
15 is being put but the way it is being framed -- this is all assuming your
16 hypothetical -- I am not making any judgment about this -- but if you come back to this
17 clause 15 which gives a right of refusal, effectively allows a prohibition on the use of a
18 website and if the obvious use of that website was to operate in a discounting manner
19 that was not going to happen on the main website, and obviously that's
20 Mr Macfarlane's evidence, then do you need to get into what the terms were? Wouldn't
21 it be sufficient for there to be an understanding that there was an agreement,
22 an understanding that there was not to be a website -- an unconstrained ability to go
23 on to websites that would allow that kind of discounting?

24 **MS BERRIDGE:** Just to be clear, there is not a general discretion reserved for
25 Deckers to say yes or no to websites. We have seen an e-mail from July 2019 where
26 Deckers sets out its criteria. Shall we go to that now?

1 **MR TIDSWELL:** Yes.

2 **MS BERRIDGE:** It is C1, tab 10, page 53. So although clause 15 is in quite general
3 terms it then says we may communicate what our criteria are and these are the criteria
4 it communicated:

5 "All accounts are free to sell HOKA on their own websites which should have a domain
6 name identical or similar to the name under which its bricks or mortar shops exist or
7 operate."

8 So that's a complete pass for anything that meets those criteria:

9 "If you wish to sell HOKA from your website with a different name, please notify us."

10 We say that means that the obvious interpretation of that is yes, sometimes you can't
11 use the same domain name. Maybe someone has taken it. Come and talk to us and
12 we will come up with a work around and we will maybe say as long as you signpost,
13 that will be fine. We have evidence that that's actually what happened when people
14 notified these different domain names.

15 **MR TIDSWELL:** But you are not suggesting -- you are not saying -- you are not
16 contesting that there was effectively a veto here, are you, or are you saying there isn't?
17 Are you saying Mr Macfarlane could have done what he wanted?

18 **MS BERRIDGE:** The website Mr Macfarlane proposed did not meet these criteria. It
19 is not a completely discretionary palm tree justice kind of veto at a whim. It is a veto
20 based on criteria.

21 **MR TIDSWELL:** Yes. I understand that but I am not quite sure why that helps with
22 the scenario I gave you, because we were talking about the degree of -- if you like, the
23 detail that needs to be fleshed out for what the terms were. You were suggesting there
24 might need to be some agreement on the level of discount that was or was not
25 permitted, but if the fault line here is -- I mean, the premise of Mr Macfarlane's case
26 I think is everybody knows you are not going to discount significantly on your own

1 website if you have a bricks and mortar operation, because it damages your customer
2 relations within your own distribution.

3 So the point of having a separate website which doesn't have an identical name or
4 similar name is that it allows you to discount more heavily without impacting your own
5 distribution.

6 Now just assume for argument's sake he is right about that. He may or may not be
7 right, but if that were the case, then it could be said, couldn't it, that the agreement is
8 clause 15 combined with the guidance, which effectively prevents using
9 an unconnected website which everybody knows is really to allow a much greater
10 degree of discounting that would otherwise take place. I am putting to you why would
11 you need to have anything more in that scenario in order to get to the point that you
12 have an infringement.

13 **MS BERRIDGE:** Let's take that scenario and I understand what you are saying there
14 is you have these criteria set out and it is said that the effect of those criteria is that we
15 don't get as much competition as we otherwise would have had because people don't
16 make websites like Running Shoes.

17 **MR TIDSWELL:** And people are constrained from pricing to the extent they would do
18 if they had that kind of website.

19 **MS BERRIDGE:** If they can disguise the fact that it is connected to their bricks and
20 mortar stores, they can have more freedom.

21 **MR TIDSWELL:** Yes.

22 **MS BERRIDGE:** So let's have a look that. Can I ask you to turn to my skeleton?

23 **MR TIDSWELL:** Yes, of course.

24 **MS BERRIDGE:** Paragraph 21, which is where I tried to deal with this issue perhaps
25 a little quickly.

26 Up and Running argues that nevertheless the effect of the termination, of the

1 agreement we can say, was to limit discounting because it is more difficult to discount
2 on your own branded website or in-store even though it actually does. Then what I say
3 is that we should look --

4 **MR TIDSWELL:** Sorry to interrupt you. Obviously this is dealing with termination as
5 well, which brings us on to another -- takes us on to another step, but just so we are
6 clear, I am not talking about termination just yet, just to be clear.

7 **MS BERRIDGE:** Perhaps that was not the perfect word to use. It tells us to go and
8 look at Ping.

9 **MR TIDSWELL:** Yes.

10 **MS BERRIDGE:** Which is at the joint authorities bundle, volume 1, tab 11, page 329.

11 **MR TIDSWELL:** Yes. Paragraph 24. Yes.

12 **MS BERRIDGE:** I see you are ahead.

13 **MR TIDSWELL:** Not necessarily that far.

14 **MS BERRIDGE:** I don't want to read out the whole paragraph to you. I'm going to
15 read out a sentence about two-thirds of the way down:

16 "The CJEU held that where a selective distribution network is appropriate because of
17 the nature of the goods, then even though restricting sales to certain outlets might
18 reduce price competition to some extent, it was justified because it enhances
19 competition by other means."

20 **MR TIDSWELL:** Yes. I certainly have got that point. I absolutely understand the point
21 about the potential impact of selective distribution agreements on price and the
22 observation about -- I think I am putting a slight -- unless I misunderstood the point
23 you were putting about a slightly different point. So if one comes back and if one is
24 doing the object analysis before you get into Metro and the consequences of Metro,
25 but just looking at what is the content of the agreement, what's subjective and what is
26 the legal and economic context before we get anywhere near selective distribution.

1 Maybe selective distribution is one of those things, but I thought you were saying
2 that -- maybe I misunderstood you -- I thought you were saying that it would be very
3 difficult for Mr Macfarlane to establish on the assumption that Mr Hagger did have in
4 his mind a motive to prevent discounting, that Mr Macfarlane had to jump through
5 some hoops that involved some degree of detailed specificity about what the
6 agreement would be. I think I was challenging that and saying actually if the argument
7 is that the agreement is clause 15 combined with the guidance, isn't that enough to
8 create the conditions that it is anti-competitive by object, because the whole point of
9 the construct and then the disciplining of it, if one comes on to termination, then the
10 disciplining in relation to that is to prevent access to a website that would allow for
11 a degree of discounting that was quite different from the normal website. You might
12 then say all of that may be under the umbrella of a distribution arrangement,
13 I understand that, but before that point really.

14 The reason for raising it, I have spent quite a lot of time on it and it is my fault. The
15 reason for raising it is I don't want there to be any doubt about what you are saying
16 Mr Macfarlane has to do if we are in this territory, which we may not be, but if we are
17 then it seems to me you are putting the bar quite high for him.

18 **MS BERRIDGE:** I am grateful for the question. It does help to clarify things I think.
19 You have two separate questions really. One is if we look at clause 15 and we look
20 at the July e-mail and the criteria set out and how it was applied and all that on its face,
21 it does mean that not everyone can sell on every internet website that they want. So
22 we completely acknowledge that, and maybe that means some people are not able to
23 discount as much as they want and Mr Macfarlane has described the reasons why.
24 We say that whole on its face argument is captured within the analysis that we do
25 underpin. So when we say does it meet the Metro criteria, is it an object infringement,
26 does the block exemption apply?

1 **MR TIDSWELL:** I understand that.

2 **MS BERRIDGE:** Because all of those are taking into account that sometimes when
3 you impose quality criteria on your retailers, they can't do everything they want and it
4 may mean that prices are a little bit higher than they otherwise would be, but on the
5 other side of that you have a legitimate ability to decide where your brand should be
6 sold and how it is presented.

7 So that whole case law balances those two things. So it deals with the sort of de facto
8 effect of the way that those clauses are written and applied.

9 What I am doing now as sort of my first half is a slightly different point, though it does
10 get quite abstract, which is; was there another layer here, which was a bit of a secret
11 agreement or secret understanding of some sort, where everyone knew that if you
12 discounted Deckers would find a way to stop you and maybe it would say "Oh, look, it
13 turns out your website doesn't meet our criteria because it is not signposted properly"
14 or something else. So is there a sort of secret agreement as to RPM? That's what
15 I understood and sometimes it is a little bit difficult to understand what the case against
16 us is, but that's what I understood was part of the case against us and in particular
17 was being floated by your question on 6th February.

18 **MR TIDSWELL:** And I think it is definitely part of the case. I am not sure how it fits,
19 but --

20 **MS BERRIDGE:** It is helpful to separate the two. Is there a kind of secret
21 understanding?

22 **MR TIDSWELL:** Exactly.

23 **MS BERRIDGE:** Or are we just looking at this is what the clause said and what are
24 the effects that flow from that, the good ones, the bad ones, and how do they balance
25 in the case law.

26 **MR TIDSWELL:** Yes. I think -- maybe this is going too far and I am not expressing

1 any conclusions beyond this, but I am not sure it is just limited to a secret
2 understanding in relation to clause 15 and the guidance. It may be that one could take
3 the view that they may or may not be infringements or capable of being infringements,
4 but then when you layer into it the way in which they are exercised and so you get into
5 this area of nuance about -- I think that's where some of the cases -- the cases
6 I referred to earlier might be helpful and indeed some of the other cases in the bundle.
7 So you have the sort of world where you have a clause which on the face of it might
8 be perfectly acceptable, but it is being used in a way -- so it amounts to an agreement,
9 but it is being used in a way and potentially abused in a way that gives rise to
10 an argument that it is an abuse.

11 Now --

12 **MS BERRIDGE:** What I have been trying to get at in my extra hurdles point is that
13 when we are talking about, you know, these criteria perhaps being used in a way that's
14 not apparent from their face we have to remember that chapter 1 does not deal with
15 unilateral content.

16 **MR TIDSWELL:** I understand that unilateral is part of the answer to that. I absolutely
17 understand that. If that's all you are saying, I think we are all on the same page.

18 **MS BERRIDGE:** I am not saying this was the case, but if Deckers neutrally applies
19 its criteria fairly over years and one day wakes up and says "We are changing our
20 policy. We are going to punish people who discount." Then that is not a chapter 1
21 infringement. It might be all kinds of other things, but it is not a chapter 1 infringement,
22 because there was no agreement about that sort of way of applying things.

23 So if you want to argue that the way of applying things is itself a different option for
24 a chapter 1 infringement, you do have to work out what was the agreement. It doesn't
25 have to be a happy agreement. It can be tacit acquiescence. Okay. We saw you
26 punished someone else for discounting so we kind of know we can't. That would be

1 enough, but Mr Macfarlane says he didn't even have that.

2 I think for the tribunal to find an agreement or a concerted practice, it would have to
3 have some notion what the terms of that were. You know, is it don't discount very
4 much, or don't set up non-discounting sites or what are the terms of that agreement.

5 **MR TIDSWELL:** I think this is very helpful. I think that is the point I am putting to you.
6 It might be as simple as we don't want you unconstrained in your ability to set up
7 websites that discount where that would have no other impact on your business.

8 **MS BERRIDGE:** The problem with that, what that (inaudible). If Deckers is supplying
9 a discounting website --

10 **MR TIDSWELL:** You are now getting into the facts whereas I am just at the point of
11 principle. I understand that's very helpful. Is that a convenient time, Ms Berridge?
12 I have taken you off course. Just in terms of -- I don't think we should be too worried
13 about timetable at this stage, because I think we may well find we have a bit of time
14 here and there on the way. Just roughly speaking what's your sense of -- I don't think
15 I have let you get very far by interrupting you. When do you think you are likely to be
16 getting on to Mr Macfarlane?

17 **MS BERRIDGE:** In about 30 more minutes, subject to anticipating questions.

18 **MR TIDSWELL:** Yes. Good. Sorry.

19 **MS BERRIDGE:** Our proposal was that I would spend about an hour on these points,
20 which are the two allegations and then I think you may recall that we discussed the
21 possibility of taking you through the amended joint expert statement and the tribunal
22 indicated that it would find that helpful.

23 **MR TIDSWELL:** Yes. I am not sure we would find it helpful now, if I am completely
24 honest, but, I mean, let me put it this way. At some stage it might be helpful, but it is
25 not entirely clear to us how much of that is contested. I suspect we were not going to
26 know the answer to that until we know what the points are that Mr Macfarlane wants

1 to take with Dr Majumdar. So I am a little bit reluctant to spend a lot of time on it now.

2 **MS BERRIDGE:** Our proposal was not to spend a lot of time going into the numbers
3 but just to show you the threshold in the block exemption and then the bit in the AJES
4 that fits with it because they are quite fiddly.

5 **MR TIDSWELL:** How long do you think it will take?

6 **MS BERRIDGE:** Ms Lawrence was going to do that.

7 **MR TIDSWELL:** How long?

8 **MS BERRIDGE:** Ten minutes.

9 **MR TIDSWELL:** That's absolutely fine. Let's do that then.

10 **MS BERRIDGE:** We are ready to do the same with the de minimis notice. As we
11 said, if this is an object case, we are not relying on that. We are in your hands.

12 **MR TIDSWELL:** I don't think that would be helpful at this stage. Let's proceed on that
13 basis. You are going to be another half an hour, and Ms Lawrence ten minutes.
14 Perfect. We will break now and resume again at 2.00 pm. Thank you.

15 (1.04 pm)

16 **(Lunch break)**

17 (1.50 pm)

18 **MR TIDSWELL:** It has occurred to us that there is a bit of a problem with the
19 timetable, because it seems to us to be unsatisfactory for Mr Macfarlane to be in
20 purdah tonight in circumstances where he is expected to cross-examine tomorrow
21 morning and it does seem to us that that's putting an unfair burden on Mr Macfarlane,
22 because obviously he can't in the course of that discuss -- he can't in the course of the
23 evening discuss his preparation for that cross-examination with his team. I am afraid
24 I had not spotted that. I had spotted it wasn't ideal but I had not really spotted the
25 implications, which perhaps I should have. What it does I think is force a choice.
26 That's a reason for starting a little bit earlier, so to give every chance of giving you the

1 best of either option. We either need to finish Mr Macfarlane today and we are happy
2 to sit until 5 pm if others can do that in order to get that done and then he will be free
3 to go and prepare for tomorrow, or we will have to adjourn and start Mr Macfarlane in
4 the morning and we will have to make the timetable work around that. If you think you
5 are going to be more than -- assuming you are going to go through to 2.15, 2.20, if you
6 think you are going to be more than two hours 40 something minutes, I think we are
7 going to need to do that in the morning. I know that's probably not the easiest thing
8 for you to be sure about, because it all rather depends on how Mr Macfarlane reacts,
9 but if you have any uncertainty, I don't think we can find ourselves in the position at
10 5 o'clock you are not finished. If you think that's going to be the position I am afraid
11 we are going to have to have the afternoon off and start in the morning.

12 I appreciate you now have to do some work and finish your opening. It is perhaps
13 unfair to say do you want to have a think about it. If it is helpful, why don't we get your
14 opening done and then if you need some time to consider with Ms Lawrence and to
15 think about that, we can give you time. I was keen to make sure we got through your
16 opening with some sense of giving you a clear run of two and three quarters hours if
17 you thought that was feasible. If you don't, then we will go into tomorrow morning.

18 **MS BERRIDGE:** Thank you. I am grateful. I would appreciate. We will finish
19 openings and then discuss if we believe we can safely get it done before 5 o'clock.
20 Perhaps if we have to have the afternoon off, we could start early tomorrow and try to
21 get some time back that way.

22 May I perhaps float a third option, which I think is what we perhaps had in our minds
23 perhaps and had not articulated? Maybe it is too complicated. If we think of
24 Mr Macfarlane as witness and Mr Macfarlane as advocate, we would expect
25 Mr Macfarlane as advocate to be able to talk to his team about things that happen in
26 the future. So when he will cross-examine the defendant's witnesses and when he

1 will do closing. Then we would expect Mr Macfarlane the witness not to be able to talk
2 to his team about the evidence that he has given or will give. If we felt we could give
3 a direction that distinguished those, we could perhaps make purdah work, but I am
4 just --

5 **MR TIDSWELL:** Look, I think it is helpful to have this suggestion. There are two
6 reasons why it won't work. I think one of them is that Mr Macfarlane's team is
7 obviously not like your team. He does have a litigation friend but he is not resourced
8 in the same way. Managing that as a matter of practicality is quite difficult. I mean, if
9 it was Mr Macfarlane dealing with leading junior counsel and a team of solicitors, then
10 you would expect that there would be very careful management of that. I am not sure
11 it is fair to put Mr Macfarlane and his litigation friend in that position.

12 The second reason is there may well be things that come out of your
13 cross-examination of Mr Macfarlane that he wants to work into his cross-examination
14 of Mr Hagger, for example. Again it would be unfair I think and unreasonable to try to
15 separate those. So thank you for the suggestion and we are where we are. The
16 suggestion we might deal with the joint expert statement I think we will have to put off
17 as well, albeit if you decide that you can't do the cross-examination this afternoon then,
18 of course, we could deal with that. If you decide you can, we could do that just before
19 Dr Majumdar gives evidence. So there are ways of managing it I think.

20 **MS BERRIDGE:** Thank you. I am grateful.

21 **MR TIDSWELL:** Why don't you come back and we will try and bother you as little as
22 possible and then we will give you some time just to think about how you want to
23 proceed.

24 **MS BERRIDGE:** Thank you. In the short break I looked at the cases that you
25 mentioned to us and in particular AEG. I think what you may be reading from that
26 case and what I read from that case is that when a supplier imposes selection criteria

1 on its retailers, not just the way those criteria are written (inaudible) with the Metro
2 criteria, it is also the way they are applied. So the reason that that case came before
3 the court was Commission -- this is the olden days when you notified your proposed
4 anti-competitive agreements to Commission and Commission said this doesn't look as
5 if this is being applied in the way we expected when you notified it to us. So they
6 (inaudible) and there was a decision and it came before the court.

7 So that seems to be talking about where the application is a bit different from what's
8 written down or is a particular use of what's written down. So if we think about that in
9 this case maybe if Deckers are being very selective about websites that didn't have
10 the same domain name or signposting. Say there are five of them out there, they don't
11 have the same name as the bricks and mortar stores and they don't signpost, but they
12 have been authorised and it turns out that they are all pricing at RRP, then I think we
13 would say; Yes, that's an AEG case.

14 **MR TIDSWELL:** I don't think you need to -- in a sense we don't need to have
15 a discussion about it. It may be better to leave it for people to consider for closing.
16 What I think we were anxious to do was to make sure that we were not taking anybody
17 by surprise by suggesting the parties look at them. Shall we perhaps leave it on that
18 basis?

19 **MS BERRIDGE:** One of the reasons I wanted to mention it was I now want to come
20 on to the part of my openings that deals with the criteria as we see them on the
21 page and as they were applied in real life.

22 **MR TIDSWELL:** Yes.

23 **MS BERRIDGE:** If you think back to the reasons that Mr Hagger gives for not wanting
24 to be involved in Running Shoes there were four of them. One of them was this lack
25 of signposting, the fact that consumers would be on a website and would not
26 understand who they were buying from.

1 I want to start by getting very clear in our minds what this criterion requirement policy
2 actually was. I am not going to ask you to turn up the terms and conditions again,
3 because we have been there a lot of times, but I am going to ask you to go back to
4 that July 29th e-mail -- sorry -- 2019 e-mail. So that's C1, 10, 53:
5 "All accounts are free to sell HOKA on their own websites which should have a domain
6 name identical or similar to the name under which its bricks and mortar shops, if any,
7 exist and operate. If you wish sell HOKA from a website with a different name, please
8 notify us. It is essential we have a complete list of all authorised websites selling
9 HOKA."
10 Now we have seen in among the papers the claimant tries to suggest various different
11 readings of this and we have heard some of that in openings and it might be said that
12 it would be even better if the e-mail had set out the criteria in more detail, but we say
13 that doesn't matter because there is not any real ambiguity here.
14 If you are a retailer and you are reading this e-mail you do know exactly what it means.
15 It means that your website should have the same domain name at your physical stores
16 and if you can't do that for some reason, so maybe someone has bought it and is
17 holding you to ransom then you can ask Deckers, and if you ask what it is likely they
18 will do is try to find a way to achieve the same result. So, for example, they will say
19 "Okay. You can't use the same domain name but make it clear in the content of the
20 site", so signposting.
21 We say that's clearly what it means and there is no ambiguity about that. That is
22 supported by the way that the criterion or the policy has been applied. So if we go
23 back to Mr Hagger's first statement, bundle B, page 68 he talks about how it is applied.
24 Then he gives some examples on the following page, 68, which I will not ask you to
25 read now, but they show that it is pretty clear how this works. You have to signpost
26 who your ownership is.

1 Now was this policy agreed with retailers? You will remember chapter 1 does not
2 apply to unilateral conduct. There has been quite a lot of debate about this, but I think
3 from what we have heard this morning and what's in the skeleton there is no longer
4 a dispute about this. The claimant accepts that there was some kind of agreement
5 implied by conduct based on the terms and conditions and based on the e-mail. So
6 I think that part of the debate has gone away. So we have our agreement and we
7 know what it means and we can turn to the law.

8 I just want to say a little word about the framework for the legal analysis. There are
9 quite a lot of stages to that and they can be quite confusing. So what I'd like to do is
10 follow the way that the Court of Appeal suggested doing it in Ping.

11 Now I did notice that earlier, sir, you talked about the order of these stages and you
12 have suggested a different order. I think just so that I can work through my
13 submissions in the way I have written them I am going to stick with my own order.
14 I don't think anything turns on the order.

15 **MR TIDSWELL:** No. I don't think we think anything turns on the order either.

16 **MS BERRIDGE:** Apologies if you felt it was more intuitive. This is the order that we
17 have.

18 **MR TIDSWELL:** I am sure it will be just as helpful. Thank you.

19 **MS BERRIDGE:** Can I ask you to turn up Ping, which is in the joint authorities bundle,
20 tab 11, page 235?

21 **MR TIDSWELL:** Yes.

22 **MS BERRIDGE:** Look at page 336. Right at the bottom of the page the Court of
23 Appeal quotes the tribunal's judgment and the legal framework that it uses there. So
24 three stages.

25 First, does the ISP -- that was the internet selling prohibition in that case -- satisfy the
26 criteria in the Metro case -- so stage one, Metro case -- and, if so, fall outside article

1 101(1)? If not, does the restriction reveal a sufficient degree of harm to competition to
2 be considered a restriction by object within article 101(1)? Stage 3 or limb 3: if it is
3 restrictive of competition by object, can it nevertheless be exempted under article
4 101(3)?

5 So I am going to take us through it in those three stages. I am going to start with (i),
6 the Metro criteria. I think we are all very familiar with those. In Metro the European
7 Court looked at requirements imposed on retailers by their suppliers and it held that in
8 some cases those requirements were so obviously not anti-competitive that they
9 simply fell outside the scope of article 101(1) or chapter 1. If you like, it is almost
10 a safe harbour. If you can fit within the Metro criteria you don't even go there. We
11 don't have to worry about block exemptions or the object of it. It is outside the scope.
12 That's why it is convenient to consider it first. The way it defined that safe harbour was
13 using these Metro criteria, and I know Mr Macfarlane has taken you to them. So I am
14 going to remind you only very briefly.

15 The supplier must have requirements that are objective and qualitative and applied
16 uniformly. They must be necessary and the exact words are:

17 "The characteristics of the product necessitate such a network."

18 So that's the network of distributors who comply with the requirement:

19 "In order to preserve its quality and ensure its proper use."

20 Then, finally:

21 "They must be proportionate."

22 So we are in the first limb of the Ping structure. We have three Metro criteria to look
23 at.

24 The first one, is the requirement in this case, so the signposting requirement we have
25 been talking about, is it objective, qualitative and applied uniformly? Yes. We can
26 objectively determine whether a website signposts its ownership clearly. We know if

1 the consumer is going to be able to see who owns that website or not in the real world
2 that's something that we can determine in a relatively objective way.

3 We also know that that is a qualitative matter. It is not quantitative. Any website that
4 complies with that should be able to meet the criteria. In terms of application, uniform
5 application, I have just shown you Mr Hagger's evidence on that. He says yes, it was
6 applied uniformly and he has given examples and from those we can see that all of
7 the decisions under this policy were made on the underlying principle that the
8 ownership of the site should be made clear to customers.

9 I just want to pause to note this is therefore very different from the situation in Guess,
10 because Guess is a case or a decision that the claimant relies on quite heavily in its
11 skeleton.

12 So can I ask you to have a look at Guess? That's in the second joint authorities
13 bundle, tab 24, page 1162. Just a reminder. Guess is a decision of the European
14 Commission. It is not a court judgment. So it is a matter that the tribunal can have
15 regard to but it does not have the same binding authority.

16 If you have Guess, could you look at 1176, at the bottom of the page, paragraphs 53
17 and 54. This talks about the criteria that Guess was applying to its retailers. You will
18 see from that that retailers needed permission to sell on any website. There was no
19 generalised "Yes, you can sell if it is the same domain name as you" or any other
20 generalised permission. It was every website had to apply for permission from Guess.
21 The permission was kept fully discretionary with no criteria at all and the discretion
22 was applied with the explicit purpose demonstrated from internal documents of saying
23 no to most retailers and to protect the supplier's own internet sales. So we say that's
24 a very different kind of case. That's a case where you needed permission and in
25 essence you never got permission because Guess was trying to protect its own sales.
26 In this case we do have criteria. They were written down and they were sent to

1 distributors. There was some scope to make individual decisions on particular cases,
2 but those were made in a way that was fully consistent with the criteria spelled out in
3 the e-mail.

4 We say our case is the exact opposite of Guess.

5 Now if we turn to the second of the Metro criteria -- at least it is the second one in the
6 order I have given them -- perhaps we should have had some kind of conspiracy about
7 the order of things to keep things simple. In my order, the second one, was the
8 requirement necessary to preserve the quality or ensure the proper use of the product.
9 Obviously when we think about that kind of restriction on distributors there are some
10 examples that are obvious. Medicines come to mind. Medicines should only be
11 dispensed by professionals. Maybe we could think about wine. It should be kept
12 within a certain temperature range. So if you produce fine wines, you probably want
13 to make sure your distributors are doing that correctly.

14 Can we please go back and we are going to spend a lot of time here to Coty, which is
15 in the joint authorities bundle at tab 20, page 579? The importance of Coty, especially
16 in this case, is that there the court recognised it is not just about keeping your wine
17 sort of tasting good and it is not just about keeping people safe. It also recognised the
18 importance of brand in the investment that firms make in building and preserving the
19 goodwill in their brand assets.

20 In that case the brands were luxury brands and Coty applied its retailer selection
21 criteria, which were to maintain an aura of luxury around the goods. So there were
22 things like the lighting must be good, that sort of stuff. The court looked at that and it
23 said yes, an aura of luxury was an aspect of preserving the quality of the goods in that
24 case, because they were branded as luxury goods.

25 Now I know the case is very familiar to you, but can I suggest that you re-read
26 paragraphs 25 to 29 where that happens?

1 (Pause.)

2 **MR TIDSWELL:** Yes.

3 **MS BERRIDGE:** So that was about luxury. Luxury is quite an abstract idea but we
4 do know what it means and we can recognise when we see it, and we can all see that
5 selling on Amazon does not fit with a luxury brand. In the present case we are not
6 talking about luxury as such. There is not a natural term that comes to mind when we
7 talk about running shoes, but we do know that Deckers invests significantly in the
8 HOKA brand.

9 Can I ask you to turn to our additional bundle D, tab 10, page 42 and go to page 46.

10 And look at the second paragraph there. This is just an article. I think it is one of the
11 claimant's pieces of evidence. This is an article reporting on some of the investor
12 communications. It talks about the investment in the brand.

13 "Powers said that the increased brand awareness reflects the payback from branding
14 investments, including the expansion of its fly human fly campaign and sponsorships
15 of local running events, as well as major ones, including signing on as the title sponsor
16 of the UTMB (Ultra-Trail de Mont-Blanc) mountain ultramarathon race. The brand's
17 expanded owned-store footprint is also allowing it to support community building
18 activities like its HOKA Run Club."

19 So just like Coty, HOKA invests in the brand.

20 Now Mr Hagger's evidence also tells us some things about what Deckers wants that
21 brand to be like. So if we can go back to that. That's bundle B, page 50, paragraph 12:

22 "HOKA is a brand that specialises in performance footwear."

23 Then page 54, paragraph 19:

24 "The brand primarily targets runners."

25 So HOKA is a performance shoe and it targets those people who actually run in them
26 rather than the fashion wearer.

1 Mr Hagger also explains why the signposting issue was important in the context of
2 their brand. So if we stay in his statement, can I show you page 58, paragraph 29.
3 "Deckers guards its distribution very carefully so that end customers are happy with
4 their purchase and the purchasing experience."
5 Then page 67, the third paragraph down:
6 "We expect our retailers' websites to be clearly signposted as being connected to the
7 bricks and mortar store. For example, the domain name, home page, contact
8 information and returns information would all be signposted and clearly connected to
9 the retailers' bricks and mortar name so customers were in no doubt as to who they
10 were making a purchase contract with."
11 Finally, page 78, paragraph 97, and near the end of that paragraph:
12 "It also meant that the consumer wasn't being misled as to who they were buying
13 HOKA products from."
14 So we can see from all that the prospect of customers not knowing who they were
15 dealing with runs contrary to the way Deckers wants to present the HOKA brand,
16 a specialist shoe that runners can trust with their feet. We say that is very closely
17 analogous to Coty. In Deckers' case the requirement pursues trustworthiness rather
18 than luxury, but both of those are legitimate and desirable brand attributes.
19 Now would it be more convenient for all of us if there was a brand strategy document
20 and the claimant makes quite a lot of weight out of the lack of such a document and,
21 of course, it would be much easier in this case if we had one but, of course, this is the
22 real world and sometimes things develop over time as businesses grow and
23 sometimes they are understood and not necessarily written down, but we say that
24 doesn't matter, because what matters according to Metro and Coty is that the criteria
25 are articulated and that you can work them back to a brand strategy that you can
26 identify. I have just shown you how we can do that.

1 So we say that both of those requirements are clearly met here.

2 **MR TIDSWELL:** That question is quite undeveloped, isn't it, the question as to what
3 type of product is going to justify the sort of protection, because some of the points
4 you have made about the investment in brands, lots and lots of makers of product
5 would say that about their brands, that they are important and they want to invest in
6 them? I suppose the interesting question is at what point do you cross a line where
7 you become entitled to that sort of protection under Metro?

8 As I understand it, you are sort of building that up a little bit by sort of creating the
9 sense of the things that are important to the consumers and that can be delivered by
10 the manufacturer and you say as a sort of cumulative point, at a certain point it feels
11 like it is a sufficient brand to justify. Is that the way you would look at it?

12 **MS BERRIDGE:** Yes, I think so, if I have understood you correctly. It would be
13 a mistake to say Coty can only apply exceptionally, so an exceptional small category
14 of products. It should apply any time where you have invested in some attribute of
15 your product and the way you want it presented is necessitated by that investment and
16 that strategy. So there is a sufficient link between the two of them.

17 **MR TIDSWELL:** Here the investment and the attribute, what is the attribute?

18 **MS BERRIDGE:** It is not written down and I wish it was. I need to be a little bit careful
19 about speaking for Deckers and putting words around something that they haven't.
20 I tried to show you from the evidence that it is something about trustworthiness. It is
21 a performance shoe. It arose out of a technical innovation from runners who run in
22 Chamonix. It is all about -- I don't know if you are familiar but it is very much got
23 a sense of "We are for real runners. We are not your sort of Nike or Adidas kind of
24 shoe".

25 That's what they are building by sponsoring ultra marathons and run clubs and all this
26 sort of thing.

1 **MR TIDSWELL:** So would you -- do I take it from that that you would distinguish other
2 running shoes? They wouldn't be -- is there a line among running shoes that some
3 get into Coty and some don't? This is the difficulty with this. I am not criticising you at
4 all. I think we are in this difficult world where there is no obvious analogy that we know
5 fits within the criteria for this sort of product, is there?

6 **MS BERRIDGE:** The way I think about it is not that some products can be in Coty
7 and some can't. It is that Coty says you can apply retailer criteria as long as they are
8 connected to your product. So you might say there are some running shoes that can't
9 be as fussy because they haven't invested in their brand in the same way.

10 So, for example, Adidas has -- I will never work again, will I? Adidas has sort of
11 positioned itself as a fashion shoe or some of its models as a fashion shoe. So it
12 would be very difficult Adidas to turn round and say "We don't want to be in Top Shop"
13 to name a store that doesn't exist anymore, because that's not the brand that they
14 have spent time and money creating.

15 **MR TIDSWELL:** That's interesting, isn't it, because I would have thought that was
16 much closer to Coty where it is all about the -- I am not saying Adidas shoes are about
17 luxury but it is much more about the creation of an impression of fashion luxury.
18 Fashion I would have thought was probably easier to fit in. I mean, I know you say it
19 is not about finding which products fit in, but the problem is one way or another you
20 have to decide where the edge is, don't you, because otherwise everything is in Coty?
21 So at some stage you have to have some set of guardian principles, which I don't think
22 we have from Coty itself, as to what gets included.

23 **MS BERRIDGE:** One case today.

24 **MR TIDSWELL:** No, but in doing that we have to have some rationale for it, and I am
25 not criticising the way you have gone about it. I am just musing as to whether actually
26 there was any particular touchstone other than what you have done, which is explain

1 to us the investment and the importance.

2 **MS BERRIDGE:** I think Coty was always a very interesting case because, as
3 I understand it, the cases before that were really of the kind of medicines and wines
4 type where could you really say the product just doesn't work unless you do it this way
5 or it is not safe.

6 Coty came up with this very much more of an abstract idea and it talked about brand
7 and I think that the case we have here is analogous to Coty, but Coty did take us into
8 a world of things that are a little bit hard to put our fingers on but perhaps the safest
9 thing rather than trying to develop the whole of the law for everyone is to say this one
10 is pretty close to Coty and that's good enough for us today.

11 **MR TIDSWELL:** Yes. That's helpful. Thank you.

12 **MS BERRIDGE:** So if we go back to our Ping framework, which was three things, we
13 have done the first limb. So we say -- sorry. I did not do proportionality, but I think
14 that's easy enough. If your aim is to ensure that websites make their ownership clear,
15 then requiring some kind of signposting on them is probably the only way you can do
16 that. So I don't think there is any problem with proportionality. So those are the Metro
17 criteria.

18 We say they are clearly met and therefore this signposting requirement, the July 2019
19 e-mail combined with the terms and conditions, falls outside the scope of the chapter 1
20 prohibition. It is lawful and it can't be the subject of an action in damages.

21 So if you agree with me on that, this second part of the case falls away. However, if
22 you don't agree with me on that we will move on to Ping limb 2, which is; is it an object
23 restriction? The claimant has repeatedly told us this is an object infringement.

24 I just want to pause there and consider what that really means. What the claimant is
25 asking the tribunal to do here is to decide first, that distributors must, must be allowed
26 to establish websites which deliberately deceive their customers with the aim of being

1 able to maintain higher prices in the bricks and mortar stores and, second, the tribunal
2 is being asked to say that any limitation on that right is so unambiguously
3 anti-competitive that it is an object restriction of the worst kind, the ones where we
4 don't need to think about effects because they are so bad, like hardcore cartels or
5 absolute bans on internet selling. Those are object restrictions.

6 To me those seem stretch claims from the claimant but I am going to take you through
7 it in a more structured way.

8 It is useful to start with the precedents. I know that Professor Whish talks about the
9 object box, so the box of things that are already found to be object restrictions. We
10 talked about hardcore cartels and so on. Are we already in there? No, we are not.
11 There is no case law that suggests a restriction of this kind, which is the qualitative
12 limit on online selling, is in the object box. Ping says if you absolutely ban use of the
13 internet, yes, that's object box but we haven't got anything of this kind in there at the
14 moment.

15 **MR TIDSWELL:** You are assuming a certain outcome from the analysis of objective
16 there. I mean, if we reach the conclusion, say, that the objective was actually to avoid
17 discounting in the way we discussed before the break, then obviously it would be quite
18 different, wouldn't it?

19 So I think you are dealing here with the sort of highest level of the claimant's case,
20 which is if you just look at the bare words of the thing and the way it is set up, then it
21 is unobjectionable for reasons you advance. That's how I --

22 **MS BERRIDGE:** The claimant either has to convince you that the words of the
23 requirement and the way it was applied in the evidence, they have got to convince you
24 that that is unlawful and this is what we are doing now, all sort of Guess and Coty and
25 Ping and so on, or he has to convince you something else was going on so, so maybe
26 the criteria were being applied in a way that's not at all apparent from their face or

1 | there was a sort of secret understanding about how people should price, and that's
2 | what I did before the break.

3 | **MR TIDSWELL:** Or actually that you could read that the objective of the clause and
4 | the guidance when it was given was to avoid discounting, pure and simple. I am not
5 | saying that's the answer, but I think that is part of the case that's being advanced.

6 | **MS BERRIDGE:** I am not sure what "objective" means in this context.

7 | **MR TIDSWELL:** It is in the framework of the analysis of objects. In other words, what
8 | they really --

9 | **MS BERRIDGE:** The question here is yes, you won't get as much
10 | competition -- whenever you apply selection criteria to your retailers, you are just going
11 | to have less competition than if you throw your goods out and say "Anyone sell them
12 | on a market, eBay", everything.

13 | **MR TIDSWELL:** So it will impact?

14 | **MS BERRIDGE:** Yes.

15 | **MR TIDSWELL:** We are assuming here I think on your analysis we have not got into
16 | Metro, have we? You have not succeeded on the way we are doing this. Aren't we
17 | doing this on the basis of --

18 | **MS BERRIDGE:** Oh, yes. I say we do succeed on Metro, but I am only falling back
19 | on to this.

20 | **MR TIDSWELL:** Yes. We are only looking at object in the order you are doing it
21 | because you have not succeeded on Metro. So you haven't got a selective distribution
22 | process to do this. So you are now looking at this thing and saying "What is it there
23 | for?" It is not there for selective distribution reasons. It may be there for other, as you
24 | say, perfectly sensible reasons, which is that the defendant doesn't want customers
25 | (inaudible) even if that doesn't amount to selective distribution criteria and --

26 | **MS BERRIDGE:** The way I read the cases -- sorry.

1 **MR TIDSWELL:** Go on, please.

2 **MS BERRIDGE:** It is more about looking at what the effect is rather than what was in
3 the minds of the people who were writing it.

4 **MR TIDSWELL:** Well, as I understand it, the sequence is you look at the content of
5 the provision, you try and work out what the objective was and you look at the legal
6 consequences and you come up with what the effect was. I think I am focusing on the
7 middle bit of that.

8 **MS BERRIDGE:** Yes.

9 **MR TIDSWELL:** I am not sure -- in a way I don't think it needs to detain us very much.
10 It is part of -- it is one of the ways that the claimant puts its case. I don't think you
11 can -- I am not expecting you to explore every sub point that they have made. I mean,
12 there is time to do that later. I just want to be clear that there are different ways of
13 looking at this. It is not just -- I mean, the way you have put it is a perfectly fair way to
14 put it. He puts it that way. There is nothing wrong with you doing that but it doesn't
15 wholly answer the question that has been put forward.

16 **MS BERRIDGE:** Yes. Thank you. I am grateful. So I was going to carry on from
17 where I left off.

18 **MR TIDSWELL:** Yes.

19 **MS BERRIDGE:** It is not already in the object box. We know from *Cartes Bancaires* --

20 **PROFESSOR IBANEZ COLOMO:** If I may follow on that, that's an important question
21 because you cited Professor Whish. Professor Whish believes that if one or several
22 of the Metro criteria are met then the selective distribution agreement is a restriction
23 by object.

24 **MS BERRIDGE:** Yes? This was a great question, isn't it. That comes from a very
25 odd paragraph in Pierre Fabre, which we could go to if you like, which seems
26 potentially to muddle the idea of effect on trade between Member States and being

1 an object infringement, but I think the answer to that sort of muddle which is talked
2 about in some of the textbooks is in Ping.

3 So let's go to Ping and try to answer that question. So that's in joint authorities bundle,
4 tab 11. It is quite long. I think I am going to spend too long trying to find the bit I am
5 thinking of.

6 **MR TIDSWELL:** In a way and this is just opening. I think the most important thing is
7 the marker is put down. Depending on how things pan out in the next couple of days,
8 I think it would be helpful to wrap up when we come to closing. I think that's the best
9 way to deal with it.

10 **MS BERRIDGE:** The short answer is the answer is in Ping and the long answer is
11 I will find that for you.

12 **MR TIDSWELL:** We can pick that up later.

13 **MS BERRIDGE:** So we should be cautious about identifying new categories of object
14 infringement, and that's Cartes Bancaires. I don't know if you want to see that. That's
15 probably very familiar ground.

16 **MR TIDSWELL:** We are familiar with that, yes.

17 **MS BERRIDGE:** The question when you are looking at an arrangement and deciding
18 if it is an object infringement is whether it prevents a sufficient degree of harm to
19 competition that there is no need to examine its effects. That is articulated in lots of
20 cases but one of them is Allianz Hungária which is in the bundle, but again I am
21 assuming you don't want to go and see that because that's familiar ground.

22 But perhaps more practical guidance that I do suggest we look at is Ping because Ping
23 addressed this question. It is our very own Court of Appeal and it is quite recent. So
24 I am in Ping. I don't know if you are. Joint authorities bundle, volume 1, tab 11,
25 page 340. You will see under the content of the ISP it does this sort of two stage
26 process, the court.

1 First of all, in paragraph 81 it asks itself what is the mechanism by which the relevant
2 provision was to restrict competition. The question here:
3 "In what way does a prohibition on retailers selling over the internet restrict
4 competition?"
5 It articulates that out. In the next paragraph, having done that, it considered whether
6 there was a reliable and robust wealth of experience regarding agreements such as
7 the one at issue.
8 So it is saying there do we have lots of Competition Authority decisions where they
9 have looked at this. They have looked at the effects. They have taken witness
10 statements. They have maybe done some analysis on pricing to look on. Obviously
11 in that case that was a little different, because there were loads of Competition
12 Authority decisions that dealt with outright bans on internet selling.
13 So the Court of Appeal in Ping was able to say yes, the mischief is no-one can sell on
14 the internet. So they are basically only selling to a few people around their store or
15 concession or whatever it is and (b) yes, we have lots of competition authorities have
16 looked at this and they were satisfied that this is a very serious restriction. So that is
17 how Ping got itself into the object box.
18 Now if we try and apply a similar analysis here, we have to say what is the mechanism
19 by which this restriction, this selection criteria would limit competition? The claimant
20 explains this and has done multiple times in the papers. So they say that the
21 signposting requirement makes it difficult to pursue a dual pricing strategy. They say
22 we can't have stuff at full price in our shops and then obviously cheaper on our very
23 own website, because people get upset. So it is the dual pricing that's the problem
24 here.
25 That obviously is intuitively true, but it doesn't tell us anything about the scale of that
26 problem. How important is it to be able to dual price? We know, because I have taken

1 you to that evidence, that all of these retailers who have bricks and mortar stores and
2 a website with the same name, they are discounting on the website. There is loads of
3 screenshots in the bundle. You can see it. So they are doing it. So they are doing it,
4 we just say maybe a bit less than then would have done otherwise. That's really all
5 that's said against this restriction. That's really the essence of why it can't be an object
6 restriction because it is just a matter of degree and we don't have any --

7 **PROFESSOR IBÁÑEZ COLOMO:** If I may ask are we not conflating here the object
8 of the agreement and effect of the agreement. The moment we start talking about the
9 scale of the problem, etc, we are talking about the effect of the agreement, which is
10 a separate issue and the court has always insisted that one should not be conflated
11 with the other. So I just want to make sure how the effects of the agreement are
12 relevant when we are ascertaining the object of the agreement.

13 **MS BERRIDGE:** So what the court says about that is that they are both ultimately
14 about effects. An object infringement -- it is such an inapposite term. An object
15 infringement is one where the effects are just obvious. So if you get into a smoke filled
16 room with your competitors and fix the prices, we really don't need to be bothering
17 about checking whether the prices have gone up higher than they would otherwise
18 have been, because it is just obvious.

19 So an object case is one where the effects are obvious and we just don't need to go
20 into them. An effects case is where it is more nuanced. It is more difficult. Maybe
21 there will be big effects in some cases and not big effects in other cases. So in those
22 cases in order to prove your case that there is an infringement, you need to look at
23 those effects. So that is the difference. That is why --

24 **MR TIDSWELL:** But if the logic here is that you accept that if there was freedom to
25 discount on an alternative website the prices would be lower, then you are in the same
26 position, aren't you? It never matters in a cartel case how much higher the prices are

1 going to be. Actually in a lot of cartels, as we know, sometimes the price isn't higher.

2 **MS BERRIDGE:** They are not very good at cartels.

3 **MR TIDSWELL:** Assuming that Mr Macfarlane is reasonably good at discounting, we
4 are treating it as a fair assumption that if you are discounting -- you do have more
5 freedom to discount more. At that point why do you need to get into how much more.
6 It is the same as a cartel case, isn't it?

7 **PROFESSOR IBÁÑEZ COLOMO:** If I may just follow up on that point, because it is
8 quite important. We think of some cases where the defence in a cartel case, in a
9 (inaudible) cartel case where there is a single meeting where information has
10 changed. So some undertakings have come up with a defence saying "This is unlikely
11 to have any effects" and the court said "It doesn't really matter that you met only once.
12 It doesn't really matter how far you are from defining prices so long as this is an object
13 infringement, this is not going to change the qualification of the agreement". It doesn't
14 really matter ultimately how much the effects or how serious the effects are going to
15 be. Right?

16 **MS BERRIDGE:** Yes. There are cases like Team Aval(?) and Galvanised Steel
17 Tanks. I think maybe we should not worry about them, because they are different
18 ones. Maybe it is something that's happening when we say look; Everyone knows you
19 can't fix prices and you can't exchange information and you shouldn't be doing it. We
20 are not prepared to indulge in an effects discussion.

21 Perhaps the simplest of way of dealing with those is those are in the object box so
22 they are safely there. You can't put things into the object box unless you are sure that
23 they have real and significant effects every time. That he what Cartes Bancaires says.
24 Maybe we should go to 162.

25 **MR TIDSWELL:** I think what has happened here is the difficulty is we have strayed
26 from one scenario into another, because we are now very much talking about an object

1 of the exercise being -- the object of the agreement impacting on price in
2 circumstances where that is not justified in price selective distributions. I suspect that's
3 where we're -- I don't think we are disagreeing. I think we have slightly crossed wires
4 on this.

5 It seems if we are now talking about an agreement where on the face of it -- let's just
6 deal with the construction before you get into any of the behaviour and the application
7 of it -- if we are just talking about an agreement where it can be inferred that the
8 purpose of it is to prevent discounting, it seems to me none of the points you make
9 really matter, because we are in a world in which there has been a very deliberate
10 attempt to fix prices to stop prices discounting in circumstances where there is no
11 justification for that. It is hard to see why that wouldn't be an object effect. I don't think
12 you started this analysis there. As I understand it, you started it on the basis that on
13 the face of the agreement it doesn't get you there. Is that helpful to look at it that way?

14 **MS BERRIDGE:** Yes. I hope -- I have a lot of questions all at once.

15 **MR TIDSWELL:** Yes. You are getting -- yes.

16 **MS BERRIDGE:** It is really important to remember, and lots of the cases say this, that
17 not every time that someone can't do what they want, even in terms of discounting, is
18 that an infringement of chapter 1. That's too simplistic, because, for example, we have
19 the Metro criteria, and it is acknowledged, and I think I showed you that in Ping, that if
20 you apply selection criteria to your retailers, you are probably going to have a slightly
21 higher price, but it is justified. It is an overall assessment.

22 **MR TIDSWELL:** Yes, but I think we are past Metro now. We are in the point where
23 you have failed on Metro --

24 **MS BERRIDGE:** Yes.

25 **MR TIDSWELL:** -- in this analysis, and really the question is -- this is why I think you
26 do have to go back and ask yourself about the objective of the agreement. You have

1 to go through that analysis, don't you? You start with the content, the objective and
2 then the legal and economic context. All of that gets you to the point where you decide
3 what you think this is doing. If your conclusion from that is that it is actually -- what it's
4 actually doing is preventing a degree of discounting that would otherwise take place
5 with no other justification -- you've no selective distribution, because you've lost that
6 argument -- then in those circumstances you are messing around with the price, and
7 once you start messing around with the price, then that is a hardcore object restriction.
8 Now clearly in that analysis along that way you might not reach that conclusion,
9 because you might say, "Actually I look at this arrangement and all it is doing is
10 requiring the claimant to let the defendant know that there is a website with a different
11 name" and the defendant may have all sorts of good reasons to say "Well, actually
12 I don't really like that", and indeed some of them may have -- I mean, I think, you know,
13 there's a -- one of your points about the reason why we are where we are is because
14 of the breakdown in the relationship between the parties. That could be a reason why
15 they say, "We don't want to the (inaudible) and have decided to stop doing business
16 with you altogether", and that may be perfectly legitimate. So it might have nothing to
17 do with price.

18 So we don't have to get to that point. I don't think either of us are pushing you to say
19 that's the inevitable consequence, but once you get into an analysis where you have
20 reached the conclusion that the point of the exercise is to prevent the operation of
21 websites where discounting is inevitable, with no other valid reason to permit that sort
22 of restriction, then I think you are into object, aren't you? It is hard to argue that you
23 are not.

24 **MS BERRIDGE:** Yes. I think if you have a restriction that doesn't appear to have any
25 other justification apart from maintaining price, yes, but when I did the brand stuff, I did
26 show you all the times -- all the evidence that suggests that Deckers was

1 worried -- didn't want its shoes on websites that were hiding who they were actually
2 owned by.

3 **MR TIDSWELL:** That's interesting. So are you saying that -- I think that's just another
4 way of saying that even if you have lost on Metro, you are still allowed to bring into the
5 discussion about the objective of this clause things like brand and other things that
6 might not tick the Metro box, but they do provide a reasonable understanding what the
7 objective is, and if an effect on price is a consequence of that, maybe that's an area
8 we are going to have to think about, and it may be quite difficult, because it may be
9 that the subject of the intention is very much not to affect price, but actually the object
10 of the intention is that it does.

11 Now I don't think we need to go down that rabbit hole at the moment, but I think we're
12 opening up -- I think it is helpful, because we are opening up quite a lot of different
13 ways of looking at this, but at the end of the day I think the point we were pushing back
14 on was that if we reached the conclusion that the objective of the agreement is to stop
15 discounting, then it is hard to say it is not an object infringement. I don't think we were
16 pushing back any more than that.

17 **MS BERRIDGE:** I think I have shown you what the objective of the provision was and
18 you can ask Deckers --

19 **MR TIDSWELL:** Quite, yes.

20 **MS BERRIDGE:** -- and please do. I think it is clear that they feel strongly that people
21 should know who they are buying from. So if you go into an Up and Running store
22 and you have a bad experience, you don't want to be, "Oh, well, I will buy it online"
23 and there is a different website, Running Shoes, and then realise it was the same
24 people.

25 **MR TIDSWELL:** Yes. I understand that point.

26 **MS BERRIDGE:** Right. So shall we go back to our structure?

1 **MR TIDSWELL:** Yes.

2 **MS BERRIDGE:** So just thinking about the way Ping -- the court in Ping approached
3 the object question, it also asked about a decisional practice. We have looked for
4 decisional practice. So we have looked for cases and we didn't find any that put this
5 in the object box. We have looked for decisional practice and we can't find any. So
6 we have lots of cases that talk about outright bans on online sales, so Ping. You just
7 can't sell on the internet. We have cases about bans on supporting price comparison
8 engines, so they say "Don't feed your prices into one of these shopping websites";
9 bans on the use of search advertising, so "You can't bid on our brand name in Google";
10 and bans on the use of third party online marketplaces, such as eBay. So those are
11 all canvassed sort of across Europe. I think we have given you some examples in the
12 skeleton, but nothing that deals with the situation we have here, which is the quality of
13 the website and how it discloses to customers who it is owned by.

14 **PROFESSOR IBÁÑEZ COLOMO:** May I ask a question on the personal experience?
15 So then have you looked only for cases related to the internet? I can imagine and in
16 particular in this arena, vertical agreement, etc, I don't think when it comes to
17 experience we need to consider cases only from the internet, but perhaps there is
18 a reason why the only cases you were considering related to sales via the internet,
19 because I can imagine in the sort of analogue world, if you put to want to put it that
20 way, you may also find cases that relate to similar issues.

21 **MS BERRIDGE:** Yes. Obviously there are cases about the physical environment that
22 you can sell things in. I think AEG is one of them. I can't think -- there are examples.
23 Most of the more recent cases are about the internet, because that's what is happening
24 now. So we are happy to widen our search and come back to you, if that would be
25 helpful.

26 So we say that this is simply not credibly an object case. It is unclear how far this

1 qualitative criterion actually limits the actions of retailers who can and do discount, and
2 there is no relevant decisional practice by competition authorities. It is difficult to see
3 any conceivable basis for concluding that Deckers' online sales criterion constituted
4 an infringement by object.

5 Now if the tribunal agrees that it isn't, then again that disposes of the allegation and
6 we can go home. So again we are now going to move into our third fall-back position,
7 if you like, in a waterfall, which was the limbs of the -- the Ping limbs, as it were. That's
8 the block exemption.

9 **MR TIDSWELL:** Just before you do that, I don't think -- I just want to check with you,
10 but I don't think there is any question of 101(3) applying here, is there?

11 **MS BERRIDGE:** We have not pleaded it.

12 **MR TIDSWELL:** No, that's what I thought. I mean, actually the third limb of Ping is
13 actually 101(3), isn't it, and obviously you are entitled to rely on the block exemption.

14 **MS BERRIDGE:** Well, 101(3) includes the block exemption actually.

15 **MR TIDSWELL:** Right. Fine. Yes. It's in Genrock, yes. (Inaudible). That's an entirely
16 fair point to make that way, but you're not -- there is no attempt by you to justify with
17 evidence in relation to the 101(3) --

18 **MS BERRIDGE:** We did not plead it, no.

19 **MR TIDSWELL:** Yes.

20 **MS BERRIDGE:** So the block exemption. I mentioned earlier that Ms Lawrence is
21 going to talk to you about that, some aspects of that. So she is going to talk about the
22 market share threshold and also some of the requirements for a vertical agreement
23 and what it looks like when it is between competitors. So I am putting that aside for
24 now for Ms Lawrence to deal with and I understand that's now no longer going to be
25 today.

26 **MR TIDSWELL:** I think it looks like it, doesn't it? I mean, I think we sort of have almost

1 by default moved into plan B, haven't we, unless you are telling me you're --

2 **MS BERRIDGE:** Mr Macfarlane starts in the morning.

3 **MR TIDSWELL:** Yes.

4 **MS BERRIDGE:** If that is the case, maybe we should do it today.

5 **MR TIDSWELL:** Well, I think if that's where we are, we should. Where are you in
6 terms of how much time you've got?

7 **MS BERRIDGE:** Very near the end.

8 **MR TIDSWELL:** I still leave open for you -- you may well -- I will let you reach your
9 conclusion about whatever you want to reach. I will not force that now, but clearly if
10 we are not going to have Mr Macfarlane this afternoon, then we may as well hear what
11 you have to say about it.

12 **MS BERRIDGE:** Yes. The only part of block exemption that I was going to do was
13 talk about hardcore restrictions. So lets go to the block exemption. I think there is no
14 dispute here or no misunderstanding about which block exemption we should look at.
15 They are all actually quite similar, but the right one is the 2010 block exemption.

16 That is at joint authorities bundle 3, tab 29, page 1254. It lists hardcore restrictions.
17 The one we are interested in is right at the bottom of the page in the left column, 4(c):
18 "The restriction of active or passive sales to end users by members of a selective
19 distribution system operating at the retail level of trade ..."

20 It doesn't tell us that much of itself. So let's go and look at the guidelines. I am going
21 to start with the 2010 guidelines, because those are obviously the ones that were
22 current at the time of the events that we are talking about.

23 So that's in that same volume, tab 37, page 1469. I can ask you to look at page 1482.

24 I think we have been here before. (Inaudible). So this talks about that particular
25 hardcore restriction and in particular how it applies to internet selling. (54):

26 "... the supplier may require quality standards for the use of the internet site to resell

1 its goods, just as the supplier may require quality standards for a shop or for selling
2 by catalogue or for advertising and promotion in general."

3 . Then if we go to (56), the bit Mr Macfarlane took you to:

4 "... the Commission considers any obligations which dissuade appointed dealers from
5 using the internet to reach a greater number and variety of customers by imposing
6 criteria for online sales which are not overall equivalent to the criteria imposed for the
7 sales from the brick and mortar shop as a hardcore restriction."

8 So it is saying there, yes, it is not hardcore to have requirements for your internet
9 distributors. That is normal, but if you are making it harder for them than you do the
10 bricks and mortar people and your requirements aren't equivalent, then that's
11 hardcore.

12 So if we go back to our case and say, "Is this something that is making it harder to
13 internet selling?", we say no, because actually what it is actually doing is trying to
14 harmonise the way that the retailers operate between the bricks and mortar stores and
15 online. It is actually saying you need to make that connection clear. So we say not
16 a hardcore restriction as it is described in those 2010 guidelines.

17 I am going to take to you the latest guidelines as well, because they may be able to
18 shed some light, even though they weren't in existence at the time of the relevant
19 events.

20 So that same volume, tab 43, page 1602. I am going to look at paragraph 8.41. It is
21 on the last page there, page 1609. I will not read it all. It is about halfway down the
22 big block of text at the top:

23 "Online sales restrictions generally do not have such an object where the buyer
24 remains free to operate his own online store and to advertise online. In such cases,
25 the buyer is not prevented from making effective use of the internet to sell the contract
26 goods or services."

1 We say the retailers were able to operate their own online store and advertise online.
2 They were absolutely free to do that. If they had the same domain name or they made
3 the connection clear, they could sell online as much as they wanted and at any price
4 they wanted.

5 So based on these guidelines we say this is not a hardcore restriction. So the block
6 exemption is available provided Ms Lawrence can convince you that the market share
7 threshold is not surpassed and the other aspects of the block exemption apply.

8 **MR TIDSWELL:** And provided we are convinced that this is not a price -- the objective
9 was not a price objective. I am using shorthand, but going back to the conversation
10 we had before.

11 **MS BERRIDGE:** Yes, those three limbs. So if you believe it is within the Metro criteria,
12 we are not in chapter 1 at all. If you believe it is not an object infringement, then we
13 are not in chapter 1 at all, because there is no (inaudible). If you do believe it is an
14 object infringement, then we can still benefit from the block exemption.

15 **MR TIDSWELL:** Not if it is an object restriction in relation to price, which would be
16 hardcore, wouldn't it?

17 **MS BERRIDGE:** Yes. So an object infringement and hardcore are not exactly the
18 same thing. It is similar.

19 **MR TIDSWELL:** No, I appreciate that, but it is quite unlikely -- again it's quite unlikely
20 if we -- if we were to reach -- this is all hypothetical, but I just want to be absolutely
21 clear that if we reach the conclusion that the clause either in the way it's drafted or the
22 way it's operated, using that as shorthand for the various ways it is put, is about
23 preventing discounting, then that is likely to be object and likely to be hardcore, is it
24 not? You are not really seriously suggesting the opposite I think, are you? Well, if you
25 are, you had better say so, but, I mean, it seems to me that is quite a difficult place for
26 you to be, if we -- I appreciate that maybe -- I don't want to tie you down to the

1 formulation I have given. You know, maybe a better way of asking you the question
2 is to say if we reach the conclusion that the objective is to prevent discounting and that
3 is really what this is all about --

4 **MS BERRIDGE:** Yes.

5 **MR TIDSWELL:** -- one way or another then we are probably going to end up in the
6 hardcore, object and hardcore, because something which has as its objective the
7 prevention of proper pricing, discounted pricing, is likely to take you there.

8 Now I am not saying for a moment that's an indication of where we are going. I just
9 want to be absolutely clear at that stage that block exemptions fall away, don't they?

10 **MS BERRIDGE:** Yes. I think fall away in the sense they are helping you decide if
11 that's the proper way of looking at the agreement.

12 **MR TIDSWELL:** I am not sure that's right, is it? That is really starting to become quite
13 a circular exercise if we have to -- there I think it does start to matter which order you
14 do things in. I don't see -- I can understand the guidance is obviously helpful, but the
15 guidance is not anticipating any analysis of something which we -- the premise of my
16 question is we've reached the conclusion that this is all about price.

17 **MS BERRIDGE:** If you think it is all about price, then there is nothing else. There is
18 no other justification for this.

19 **MR TIDSWELL:** Yes.

20 **MS BERRIDGE:** Yes. I don't really want to be there I think.

21 **MR TIDSWELL:** No, no, I know you don't want to be there, but I --

22 **MS BERRIDGE:** I mean, I think that would be difficult for us. I think then we have to
23 not fall into the trap of thinking just everything that might affect price is necessarily
24 that. So we have seen the evidence --

25 **MR TIDSWELL:** Sorry to interrupt you. I completely understand everything you say
26 about all of that. I am not suggesting that's where we are. I'm just trying to get -- you

1 know, you are giving us the structure.

2 **MS BERRIDGE:** Yes.

3 **MR TIDSWELL:** You know, your approach to the block exemption is premised I think
4 on us not finding that you've got a problem about price, about the objective in relation
5 to price. Now however one -- let's not define what that is, because you know what
6 I mean. I am talking about a bad problem, not an arguable problem. If you end up in
7 the bad place in relation to price, then we don't have to do this. I don't think any of this
8 helps you with that, does it? It doesn't make any difference, because the one thing
9 that's plain about all of these things is that if you end up with price -- in a bad place on
10 price, then that's it. Once it is hardcore, it is hardcore and everything else falls away.
11 Now you have all your arguments about why it is not hardcore. I am not suggesting
12 for a moment that I'm shortening any of that. That will all depend firstly on the
13 examination of the object infringement and then what the conclusion is after that and
14 whether one can genuinely say that does then fall into hardcore. There is obviously
15 a whole bunch of things that happen in there, but once you have got to that point we
16 are very clear, aren't we, this all disappears?

17 **MS BERRIDGE:** Yes, if you say there is no other reason for them.

18 **MR TIDSWELL:** Well, I am not sure it is even there is no other reason. Again maybe
19 there is a discussion to be had about what the right test is, but clearly it is never going
20 to be the only reason, but, I mean, I think, you know, we would reach the
21 conclusion -- in order to get to that point we would have to reach the conclusion that it
22 was -- I don't know how you would characterise it -- certainly a very important objective
23 of the provision or the way it was implemented in conjunction with the provision. That
24 would have to get us into the objects of -- in a sense you are tilting at the windmill we
25 know we need to build here. We have not done all that.

26 **MS BERRIDGE:** I don't want to sort of get myself too deeply involved in this sort of

1 precise -- I tried to give you the correct legal framework so you can sort of do things
2 there and I think you are right, that we have to have a sort of sense of, some common
3 sense around it and price. Maybe I will take you to Carte Bancaires, because I think
4 maybe that helps us to articulate it.

5 **MR TIDSWELL:** Yes. I suspect you may as well, because I rather suspect we have
6 got time on our hands.

7 **MS BERRIDGE:** You don't particularly want to go there.

8 **MR TIDSWELL:** I am very happy for you to go there. That is fine. I think we probably
9 felt it wasn't going to add to the sum of human knowledge but it sounds like it might
10 do, so let's do it.

11 **MS BERRIDGE:** The joint authorities bundle, volume 1, tab 19, page 573,
12 paragraph 58. I think the second sentence:

13 "The concept of restriction of competition by object can be applied only to certain types
14 of coordination between undertakings which will be of a sufficient degree of harm to
15 competition. It may be found there is no need to examine their effects."

16 So we have to find a sufficient degree of harm to competition.

17 **MR TIDSWELL:** But fixing the price would almost always be a sufficient degree of
18 harm to competition, wouldn't it?

19 **MS BERRIDGE:** That's different from applying a criteria. It means that it may be that
20 prices go up a bit. We have seen that from Ping.

21 **MR TIDSWELL:** In the context of a selective distribution agreement recognised by
22 Metro or outside that context.

23 **MS BERRIDGE:** (Inaudible). I think we have now reached the end of my submissions,
24 though Ms Lawrence will -- I think we have agreed that Mr Macfarlane will happen
25 tomorrow and so --

26 **MR TIDSWELL:** You don't want some time to have -- obviously it is now very difficult,

1 isn't it? You have two hours maximum. You are confident you are going to need
2 longer.

3 **MS BERRIDGE:** Yes.

4 **JUDGE WORSTER:** In which case let's do that. Why don't we ask Ms Lawrence to
5 get into the joint expert statement.

6 **MS BERRIDGE:** She has reminded me to say that because this involved confidential
7 material, could we go into a closed session for this short piece?

8 **MR TIDSWELL:** Well, I have to say I am not very enthusiastic about it unless it is
9 absolutely necessary. Just tell me again what it is -- maybe, Ms Lawrence, you could
10 describe to us what you are going to do in general terms so we can decide whether
11 you can do that or not.

12 **MS LAWRENCE:** (Inaudible) it would be helpful to the tribunal to point out (inaudible).
13 That was the exercise. If the tribunal wouldn't find that helpful, then there is no need
14 to.

15 **PROFESSOR IBÁÑEZ COLOMO:** So the joint expert statement actually has
16 relatively few numbers in it, doesn't it?

17 **MS LAWRENCE:** Annex 3 contains calculations that get you to the market (inaudible)
18 for the purposes of the block exemption.

19 **MR TIDSWELL:** Yes, I see. That is where you are going to focus your --

20 **MS LAWRENCE:** (Inaudible).

21 **MR TIDSWELL:** Yes, I see. So there are two sides to this, aren't there? There is the
22 top and the bottom. So there is the size of the market and size itself and then there is
23 the market shares of the parties, but even the market share size itself relies quite a lot
24 on Deckers market share, doesn't it, and the way it is calculated? So you are going to
25 need -- I am trying to think if we need to do all of this in confidential session.

26 **MS LAWRENCE:** That's right. There is one point about the manner in which we get

1 from retail market share to wholesale market share which involves an assumption that
2 might perhaps be best done in closed, but other than that certainly for the purposes of
3 going through -- well, touching briefly on the relevant provisions of the block
4 exemption, which should only take three minutes, and then the manner in which the
5 sales figures were verified, that doesn't necessarily need to be done in closed. It is
6 only really say the last five minutes out of ten that would be more involved with the
7 numbers.

8 **MR TIDSWELL:** I think what we might do. I am just thinking of the time. You are not
9 anticipating anybody in court wouldn't be allowed to be in court. So it is really just the
10 live stream we are talking about turning off.

11 **MS LAWRENCE:** I think that's the position.

12 **MR TIDSWELL:** Because Mr Macfarlane's team have obviously seen the numbers.
13 Somebody is shaking their head at the back. I don't know what the position is. I mean,
14 are you comfortable -- obviously there is a one or two points here about the use of the
15 document and Mr Macfarlane and his team are bound by that and understand that.
16 I am not entirely sure who else is in court. Maybe what we might do is we might take
17 our break now and just give you ten minutes just to sort out exactly who is in the room
18 and who isn't. If we can do that just to make sure -- I don't want there to be any
19 mistakes about that. Then we will commence again at 3.15 and commence in closed
20 session. So we will not turn the live stream back on again after we finish.

21 Just to be clear, there's nothing else we can do today, is there? Mr Macfarlane, is
22 there anything else you wanted to deal with today? Your evidence is now going to
23 start tomorrow morning and we will come back to the timing for that.

24 **MR MACFARLANE:** Not in terms of the timetable.

25 **MR TIDSWELL:** We will manage the timetable one way or the other. That's my job
26 to try and make it work, so we will see how we go. I think that's inevitable now. I don't

1 know why it is driven, I think for making sure that you have a proper run and are able
2 to prepare this evening for the cross-examination you are going to conduct tomorrow.

3 **MR MACFARLANE:** The one person shaking his head is a fellow director and I have
4 not shared any of the document. He is more than happy to stay in the room.

5 **MR TIDSWELL:** I will let you sort that out in the next ten minutes. Just while we are
6 still live and so everybody watching can work out what we are doing tomorrow, I mean,
7 I think probably the best thing is -- what I suggest is we start at 10 o'clock tomorrow
8 morning. I don't really like starting very much earlier because people have
9 commitments and other things they need to do. If we were to start at 10 and,
10 Mr Macfarlane, would you start giving your evidence then, and then we might just work
11 out what we need to do to make the timetable work. Some of that may depend a little
12 bit on what you are going to tell us about actually turns out to be something that
13 Mr Macfarlane wants to spend time on or not because you are not cross-examining
14 his expert. So it may well be that there is some space in the timetable anyway, but we
15 will have a look at that and have a think about it. For present purposes we will get
16 ahead by starting at 10 o'clock tomorrow morning, if that's convenient for everybody.
17 Good. Thank you. We will rise for ten minutes and then we will resume in closed
18 session.

19 **(Short break)**

20
21 **[Hearing resumed in closed session - see separate transcript]**

22
23 **[Hearing adjourned at 3.35 pm until 10.00 am on Tuesday, 23rd July 2024]**