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5 **IN THE COMPETITION**  
6 **APPEAL**  
7 **TRIBUNAL**  
8  
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Case No: 1615/5/7/23

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

14 Monday 22<sup>nd</sup> July- Thursday 25<sup>th</sup> July 2024

15  
16 Before:

17  
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**

29  
30 And

31  
32 **Defendant**

33 **Deckers UK Limited**

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

37  
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**

44 Digital Transcription by Epiq Europe Ltd  
45 Lower Ground 46 Chancery Lane WC2A 1JE  
46 Tel No: 020 7404 1400

47 Email:

48 [ukclient@epiqglobal.co.uk](mailto:ukclient@epiqglobal.co.uk)  
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**Tuesday, 23rd July 2024**

**(10.00 am)**

**MR TIDSWELL:** Ms Berridge, good morning.

**MS BERRIDGE:** Good morning.

**MR TIDSWELL:** We were going to start I think with Mr Macfarlane, aren't we? Just before we do that and actually for a thought about Mr Macfarlane as well, we have this point that we talked about at the PTR about re-examination and what we do about that. I wanted to share with you and Mr Macfarlane some thoughts about that and see if you agree with the way forward.

Mr Macfarlane, just to explain this to you. You probably have this, but just in the ordinary course after you are cross-examined by Ms Berridge, we put you in the witness box. You are cross-examined by Ms Berridge. We might then ask you some questions. After that in the ordinary course you would have counsel here who would ask you questions by way of what we call re-examination. The point of that is to clarify the aspect of your evidence that hasn't come across clearly in the answers you have given. I should say it is something which is quite difficult to do well and is therefore exercised very sparingly as a matter of generality by counsel. So this is generally quite a short and focused session on things that require further clarification.

Now obviously that's going to be difficult, indeed impossible, because you are representing the claimant and you can't stand there and ask yourself questions by re-examination sitting over there, so your two hats get combined into one. We have just been trying to work out how as a matter of fairness to you and the defendant we should manage the situation.

What we propose is that after you have been cross-examined and after the tribunal has asked you questions, you should have a short period, not defining it, but I just

1 want you to think of it as a short period in which you can, if you wish, provide any  
2 clarification you think is necessary. So if you think you have been asked some  
3 questions and you have not answered them in the way you think is properly clear  
4 because, for example, there was another document you wanted to look at or you were  
5 taken on to another question before you were able to fully answer the question or  
6 whatever it is, you will be entitled to address that with us.

7 **MR MACFARLANE:** Thank you, sir.

8 **MR TIDSWELL:** Now I want to be absolutely clear with you that that is not  
9 unconstrained because as a matter of fairness to the defendant there needs to be  
10 some limits on that. I am sure Ms Berridge will be very conscious of and very careful  
11 about making sure that you are not straying into things you shouldn't, like, for example,  
12 introducing new topics. If you would introduce things that you had not been asked  
13 about, then that would be unacceptable and Ms Berridge would complain about it and  
14 I would tell you that you could not do it.

15 **MR MACFARLANE:** Yes.

16 **MR TIDSWELL:** To some extent this is a little bit of an experiment because it is not  
17 what we normally do and it is quite a difficult thing to manage. I do appreciate that it is  
18 not ideal for either party but what I have suggested I hope is the best way forward.  
19 Just before I ask Ms Berridge about it, do you have any comments or questions about  
20 that? Does that all make sense?

21 **MR MACFARLANE:** It makes sense, sir.

22 **MR TIDSWELL:** I will give you an opportunity just to ...

23 **MR MACFARLANE:** Yes, sir. Just wondering whether it might be possible that after  
24 the cross-examination that we might rise for five or ten minutes or something like that  
25 to fit the short break in so that I could take a break amongst everything else after the  
26 pressure of being in the witness box.

1 **MR TIDSWELL:** What we might do is we might see how it, in fact, goes. Let's see  
2 how things are at that stage. I think just to be clear with you, so you are absolutely  
3 clear about this, and I will remind you about this when we do come to the normal break,  
4 you would not be entitled to discuss your evidence with anybody else. At that stage  
5 you are on your own and you have to be very careful to be on your own. I wouldn't  
6 want you having a conversation with anybody else about anything.

7 **MR MACFARLANE:** This is purdah.

8 **MR TIDSWELL:** This is purdah and is going to be very serious purdah at that stage.  
9 Just so you are clear, you are going to have to manage that yourself. Certainly I am  
10 open to that as a possibility. I think we ought to see where we get to and you are very  
11 welcome to ask me at that stage and I will try and remember to ask you whether you  
12 think that would be helpful.

13 **MR MACFARLANE:** Thank you, sir.

14 **MR TIDSWELL:** Ms Berridge, what do you think about that? Are you happy to  
15 proceed in that way?

16 **MS BERRIDGE:** Yes. We are content with the proposals for re-examination in  
17 a different form and obviously for appropriate breaks.

18 **MR TIDSWELL:** That is very helpful.

19 **MS BERRIDGE:** I have a very few points of housekeeping. One thing is the transcript  
20 has not reached Up and Running from yesterday.

21 **MR MACFARLANE:** We have it.

22 **MS BERRIDGE:** Just a reminder that we have someone from Stobbs who will be able  
23 to sit with Mr Macfarlane to hand up the bundles so that finding all the pages side of  
24 things is covered and he can focus on the evidence.

25 **MR TIDSWELL:** Thank you. If that is what you would like to do, then that would be  
26 very helpful and I am sure it is much appreciated.

1 So, Mr Macfarlane, would you like to make your way to the witness box? If you just  
2 remain standing for a minute and you will be sworn.

3

4 **DENNIS MACFARLANE (sworn)**

5 **MR TIDSWELL:** Thank you. Make yourself comfortable. I don't know whether it is  
6 easier -- it doesn't matter where you sit but just be mindful the documents are behind  
7 you. I think your helper is going to hand them up to you. You may find it a little bit  
8 easier to sit at that stage and give them a bit more space. If you move to the chair,  
9 feel free. That's helpful. Thank you. You have some water there I think,  
10 Mr Macfarlane. Help yourself to that. So you will be handled the bundles as they  
11 come up and you are asked questions about them and you obviously know how the  
12 numbing system works?

13 **A.** Yes, sir.

14 **MR TIDSWELL:** In the course of that you may feel you want to look at pages either  
15 side of what you have been shown, so feel free to take your time, make sure you have  
16 orientated yourself with the documents and if you need time to look at something either  
17 side of the page, the page before, take time to do that.

18 **A.** Thank you.

19 **MR TIDSWELL:** In some respects unfortunately it is a memory test but it is not  
20 intended to be. What we want is your evidence about what you can recall from  
21 documents you see. So we want you to be able to do that in a fully considered way.  
22 The first thing we need to do is just ask you to confirm your evidence in your witness  
23 statement. Could we please have bundle B. If you look at tab 1, is that your witness  
24 statement in these proceedings?

25 **A.** Yes, sir, it is.

26 **MR TIDSWELL:** I think you were looking at page 24.

1 A. Yes.

2 **MR TIDSWELL:** Is that your signature?

3 A. It is, sir, yes.

4 **MR TIDSWELL:** Are there any matters in the statement you wish to amend or correct?

5 A. No.

6 **MR TIDSWELL:** Are you able to confirm the contents of the statement are true to the  
7 best of your knowledge and belief?

8 A. Yes, sir.

9 **MR TIDSWELL:** Good. Thank you. Just before I hand over to Ms Berridge, I just  
10 want to remind you we are now doing the opposite thing of the opening arguments  
11 where you were acting as an advocate. Now you are acting as a witness. I am afraid  
12 you do have take off your advocate hat and put on your witness hat. We don't want to  
13 hear submissions from you. We want to hear your evidence in response to Ms  
14 Berridge, Ms Lawrence or the tribunal. The only real exception to that is if  
15 Ms Lawrence or Ms Berridge were to ask you about your case and obviously how you  
16 put your case, then obviously you can deal with that. Otherwise we want your  
17 observations about what happened, what you knew, what you saw, your evidence  
18 about the facts rather than arguments about the case. I am sure that if you stray from  
19 that, which you may do as a matter of human nature, Ms Berridge, Ms Lawrence or  
20 I will pick you up on that but if you could try your very best to contain yourself to that.

21 A. Indeed, sir. Should I be standing?

22 **MR TIDSWELL:** No. You should sit to give your evidence. That's fine.

23 Ms Berridge and Ms Lawrence I shall hand you over to them to ask you some  
24 questions.

25

26 **Cross-examination by MS BERRIDGE**

1 **MS BERRIDGE:** Thank you, sir. Good morning, Mr Macfarlane.

2 **A.** Morning.

3 **Q.** Could we start with the events of November 2020 when Mr Hagger called you to  
4 ask you to remove HOKA products from the Running Shoes web site. Can I ask you  
5 would you say you have a good recollection of those events?

6 **A.** Yes.

7 **Q.** Let's look at how you describe them in the claim form. Can I ask you to turn that  
8 up? It is Bundle A, tab 1. I am going to ask you to look at page 10. I would like you  
9 to look at paragraph 26?

10 **A.** Excuse me. What tab was it?

11 **Q.** Tab 1, page 10.

12 **A.** I have it in front of me 1 of 14. Is that the one? Right. Thank you.

13 **Q.** I am going to ask you to look at paragraph 26. There's actually two paragraph 26s  
14 on that page. So the upper one that begins shortly afterwards. So what you write  
15 there:

16 "Shortly afterwards in late November I got a call from a very irate Mr Hagger, senior  
17 sales manager, who told me that he has had complaints from other retailers and  
18 ordered me to take HOKA product down from Running Shoes that was selling HOKA  
19 product at 20% discounts with immediate effect."

20 So I just want to make sure I understand that properly. Did Mr Hagger say to you  
21 "Take the product down because you are selling it at 20% discount" or did he say  
22 "Take the product down" and then you are just providing as background that it was on  
23 the site at 20% discount?

24 **A.** The conversation on the day was quite convoluted and heated at times for want of  
25 a better word. After quite a few -- I tried to explain why we needed the website, but  
26 there didn't seem to be movement on either side. It became heated and I said words

1 to the effect of "Come on. You don't want to see Up and Running go down. What is  
2 the real reason for this" and he said "I have had complaints about the website". I said  
3 "Don't go there. That is not a line that we need to go down. It's a dangerous line to  
4 go down" and there was an immediate backtracking, because he knew where that was  
5 likely to be going, so that conversation from that point did not continue on that theme  
6 anymore thereafter.

7 **Q.** Just so I have this very clear in my mind, he didn't say "I don't like the discounts"  
8 or "I am upset that you are discounting" or "We don't want our shoes discounted on  
9 your site"?

10 **A.** To be fair, no, he didn't.

11 **Q.** That's sufficient. So shall we look at your witness statement around this same  
12 event? So that's bundle B, tab 1, page 18. It is paragraphs 118 and 119. That's  
13 an account of the same conversation. I am just going to ask you to read that to yourself  
14 and obviously everyone else can do the same.

15 **A.** Yes.

16 **Q.** Is that an accurate account of the conversation?

17 **A.** Can I just take it on board again, if you don't mind? Yes. Yes.

18 **Q.** Is that an accurate account of the conversation?

19 **A.** Yes.

20 **Q.** Thank you. If I read that correctly, that corresponds to what you have just told me,  
21 that Mr Hagger did not say to you anything about "We don't like discounts. We would  
22 like you to take them down because you are discounting them". That was not part of  
23 the conversation?

24 **A.** That was not an exact part of the conversation, no.

25 **Q.** Obviously that's just one call and there was a degree of interaction. Can I ask you  
26 if he ever explicitly said to you, "The reason we don't like our shoes on Running Shoes



1 is because of the discounting"?

2 **A.** No, he's not specifically said that.

3 **Q.** Thank you. So let's go back in time a little. Can I ask you to look at the first  
4 evidence bundle? So that's C1, tab 37, page 208.

5 **A.** Yes.

6 **Q.** Could you look at the very bottom of page 208? There is a paragraph there that  
7 begins:

8 "This situation ..."

9 Could you read that aloud?

10 **A.** "The situation has come about for one obvious reason, that you do not want to see  
11 product reduced in price on Running Shoes. You have already said so in a telephone  
12 conversation recorded and confirmed by others in our business."

13 **Q.** Thank you. So in that e-mail you are saying that Mr Hagger has explicitly said to  
14 you that it is the discounting that's the problem?

15 **A.** Is that a statement or a question?

16 **Q.** It is, yes. I mean, you can respond if you wish?

17 **A.** Well, there are two ways to look at that paragraph and that is that I'd already said  
18 to you earlier that Mr Hagger had said that he had had complaints. That leads to one  
19 conclusion in my mind.

20 **Q.** It is a little more explicit than that, isn't it:

21 "You do not want to see product reduced in price. You have already said so in  
22 telephone conversations."

23 If you move on to the second part:

24 "Recorded and confirmed by others within our business."

25 Was that accurate?

26 **A.** Yes, it was.

1 **Q.** So you made a recording of your call with Mr Hagger where he said this?

2 **A.** I am mighty illiterate and my telephone actually fell into water for want of a better

3 word, some time after.

4 **Q.** I think you are getting ahead. You made a recording of the call?

5 **A.** Yes.

6 **Q.** So now you are telling me that you dropped your phone in water and the recording

7 was lost?

8 **A.** Yes.

9 **MR TIDSWELL:** Can we be clear, Ms Berridge? Which call are we talking about

10 here?

11 **MS BERRIDGE:** I am referring -- I don't think it is very clear, because in this e-mail

12 Mr Macfarlane says "There was a call where you said this and I recorded it", so we

13 don't know.

14 **MR TIDSWELL:** Are you going to ask Mr Macfarlane about it?

15 **MS BERRIDGE:** Do you remember what date that call was that you are referring to?

16 The e-mail is dated 14th December. So some time before then I guess.

17 **A.** Yes, and I am just looking at the e-mail. It is difficult to recall exactly:

18 "Refer to your telephone conversation today at 11.20 am when you first rang us to tell

19 me to take the product down with HOKA labels from Running Shoes."

20 So that was obviously midday-ish on 14th December that I wrote that. So I do tend as

21 a person to leap on to doing the latest e-mail immediately afterwards to remember

22 what has been said. So I imagine that it would have been that very same day.

23 **Q.** Thank you. So it is a shame about the recording, but you also say "It was confirmed

24 by others within our business."

25 Can you tell me what you mean by that?

26 **A.** My wife was with me at the time. I do recall we were in the kitchen.

1 Q. And she heard?

2 A. My wife and daughter heard.

3 Q. Are your wife and daughter here with you today?

4 A. My wife is with me today. My daughter is working in the other room.

5 Q. But you haven't called them as witnesses?

6 A. No.

7 Q. So that's May 2020. Let's fast forward to May 2021. That is the same bundle,  
8 tab 54, page 311?

9 A. Tab 54.

10 Q. Page 311?

11 A. Yes.

12 Q. So this is an e-mail from you to the CEO of Deckers, Dave Powers, and it is dated  
13 24th May. Then if you look on the very next page, 312, so the facing page in the  
14 bundle, just after halfway down:

15 "I later asked the reason why HOKA wanted product taken down from our internet and  
16 I ensured that my senior staff were present recording the conversation. Mr Hagger  
17 said that HOKA do not want discounts on any website and that this was their policy  
18 ongoing."

19 Was that accurate?

20 A. Can I just read that again, please?

21 Q. Uh-huh.

22 A. Well, it's certainly true to say the first part of that paragraph was a telephone call.  
23 To be fair, I can't remember whether I rang Mr Hagger or whether Mr Hagger rang me.  
24 There was a shouting match down the telephone and I say here I wouldn't take that  
25 from anybody.

26 Q. The bit I am really getting at is the bit where you say:

1 "Mr Hagger said that HOKA do not want discounts on any website and that this was  
2 their policy ongoing."  
3 Was that bit accurate?  
4 **A.** I am going to take you back to where he said to me that he'd had complaints.  
5 **Q.** He'd had complaints?  
6 **A.** Yes.  
7 **Q.** It doesn't sound exactly the same to me, but if that's your explanation, we can  
8 move on. In that extract you mention a recording and senior staff again. Is that the  
9 same recording and the same senior staff?  
10 **A.** Yes.  
11 **Q.** Thank you. So the recording that has been lost in water and the senior staff --  
12 **A.** Phone was damaged beyond, yes.  
13 **Q.** And the senior staff which is your wife, who is not giving evidence today?  
14 **A.** That's true.  
15 **Q.** Right. Can we move forward again. July 2021. C, 60, 341.  
16 **A.** Yes.  
17 **Q.** So this is an e-mail from you to Mr Ellerker of Deckers. If you go back one page to  
18 page 340, we can see Mr Ellerker's job title. He is the Vice President and  
19 GM -- I assume that is General Manager -- of Deckers EMEA.  
20 So if you come back to 341 and look at the start of the third paragraph:  
21 "I hope that you know that I have unequivocal proof that Carl Hagger gave pricing as  
22 a reason for wanting us to take down HOKA from our website."  
23 So are you referring to the same incident again?  
24 **A.** I am referring back to the same point he was making earlier that he had had  
25 complaints.  
26 **Q.** And the unequivocal proof was?

1 **A.** Well, there was a tape recording at the time.

2 **Q.** So by that time you had not lost your phone or damaged it?

3 **A.** I can't remember the exact date that it was done, but I don't have it now, otherwise  
4 it is would have been in this evidence.

5 **Q.** Thank you. Let's fast forward again to your call with the CMA. Can I ask you to  
6 turn up your witness statement, which is bundle B, page B20, paragraph 133. Right  
7 at the bottom of the page. This is where you were explaining to us how you came  
8 about to be calling CMA:

9 "So I rang the CMA for advice and guidance. I gave the truth of all that had happened  
10 because I wanted accurate information on my options "  
11 So can we take it that everything you said to the CMA was truthful?

12 **A.** Yes.

13 **Q.** Back in the A bundle your reply. A, 4, 73, bottom of the page, very, very bottom.  
14 So this is about the CMA call:

15 "All the conversations were honest."?

16 **A.** Excuse me, madam. Sorry. I am not quite there. Page 73.

17 **Q.** Yes.

18 **A.** The bottom paragraph, 54.

19 **Q.** The last line I am going to read?

20 **A.** Okay.

21 **Q.** "All the conversations were honest, without exaggeration, because I wanted clear,  
22 truthful advice."  
23 So we can take it that everything you said on that call is true.  
24 Do you remember when you made the call to the CMA?

25 **A.** I don't remember exactly, but it's on the transcript, isn't it?

26 **Q.** It is not dated?

1 **A.** Well, in that case I can't give you an accurate date.

2 **Q.** Understood. You have supplied a recording of the call with the CMA. Can you  
3 explain who made that recording?

4 **A.** No. It was a freedom of information request.

5 **Q.** You made a freedom of information request to the CMA?

6 **A.** Yes.

7 **Q.** And they supplied the recording?

8 **A.** Sorry. I didn't hear that.

9 **Q.** And they supplied a recording of the call to you?

10 **A.** Yes.

11 **Q.** Thank you. You have also supplied a transcript. Can you explain who made the  
12 transcript?

13 **A.** Oh, it was one of these downloadable auto things that change, you know. You go  
14 on the internet and it translates audio into text.

15 **Q.** Thank you. Did you check the transcript?

16 **A.** Which one, the audio one or the text, the transcript?

17 **Q.** Yes, the written version?

18 **A.** I speed read it a number of times.

19 **Q.** You speed read it and would you say it is accurate and complete?

20 **A.** To be fair, I took out myself a lot of these "um"s and "ah"s and that sort of thing.  
21 I just wanted to make it cleaner. That was all. I can't swear to it being 100% accurate,  
22 because I didn't do it. It was a machine that did it.

23 **Q.** Understood. So let's look at the transcript. Bundle C1, tab 88, page 496.

24 **A.** Thank you.

25 **Q.** Could you look at page 497, so that's just over the page, at time stamps 02.03 and  
26 02.18:

1 "So we decided we would use a separate website and relatively unconnected but yet  
2 connected to create a budget website to compete with other internet sites. One of our  
3 major suppliers took exception at us doing this and I had, shall we just say for want of  
4 a better word, a stinking row on the end of the phone with their national accounts  
5 manager who demanded we took the product down because we were selling it  
6 cheap."?

7 **A.** Yes.

8 **Q.** So you have told us everything you said to the CMA is accurate and you have said  
9 to the CMA "Mr Hagger told me to take the product down because we were selling it  
10 cheap"?

11 **A.** I refer to what I said earlier -- I have forgotten what I called it earlier now -- but yes,  
12 it was the gist of the conversation, "Take it down because I have had complaints". We  
13 are therefore only talking in my view about pricing at that point. That was my  
14 impression at the time. That's all I can say.

15 **Q.** Just moving on within the call, you told us you obtained as a result of a freedom of  
16 information request. I have had the opportunity to listen to it, and if you are ready to  
17 play some of it, I am going to ask the tribunal to play an extract from it for you now.  
18 So that is at minute 27.09 through to 27.26.

19 **MR TIDSWELL:** Should we be looking at the transcript as it is played, is that the point  
20 of the exercise, or do we not need to do that?

21 **MS BERRIDGE:** Let's listen and take things in.

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

23 **(Audio played)**

24 **MS BERRIDGE:** So, Mr Macfarlane, can I ask you to show me where that appears in  
25 the transcript?

26 **A.** Where what appears in the transcript? Sorry.

1 **Q.** The extract we have just heard?

2 **A.** I was actually looking for that in here just now. Misprint.

3 **Q.** Well, Mr Macfarlane, actually there is quite a long section of the call with the CMA  
4 that doesn't appear in the transcript at all?

5 **A.** Quite honestly I haven't looked at this ever since there, but it could have even been  
6 something as simple as a feeding situation on a photocopier, for instance. It could  
7 have been all sorts of things. I can't think of a reason why I would have an audio  
8 transcript and it not be accurate in here as well, other than a technical issue.

9 **Q.** You did tell me that you checked it and that it was accurate and complete apart  
10 from removing "um"s and err"s?

11 **A.** Well, there are several thousand documents in this hearing altogether and I can't  
12 say I have read every single one of them. There is an obvious missing gap. I can't  
13 give a technical explanation for that at this stage.

14 **Q.** Thank you.

15 **A.** It is not left out for a reason. I am very happy for everything in this transcript to  
16 have been heard and seen.

17 **Q.** So let's turn to what you said in that extract. You said, and I know we are going  
18 over the same ground again, that at the time Mr Hagger voiced his apparent objections  
19 to the discounting on the site your wife and daughter were present in the kitchen with  
20 you. That's accurate, is it?

21 **A.** That's what I said earlier I believe, yes.

22 **Q.** It is. In this extract you said that they would supply witness statements in the  
23 County Court proceedings. Did they?

24 **A.** I wasn't making a promise to the people at the CMA that that would be the position.  
25 Remember, this conversation took place in round about March 2021. What I was  
26 trying to do at that stage was find out whether I am batting a losing wicket at this point.



1 **Q.** I understand. You phoned the CMA and that's very sensible. What I am trying to  
2 understand is you have told the CMA and you have told us here today that you have  
3 available to you witnesses to an absolutely critical admission by the defendant which  
4 is central to this case -- the chair told us in February that this was a central question  
5 in the case -- and you have not called those witnesses?

6 **A.** Yes. Yes.

7 **Q.** Thank you. I put it to you, Mr Macfarlane, that you repeatedly made false claims  
8 that Mr Hagger explicitly told you discounting was a reason for his lack of support for  
9 Running Shoes, and I put it to you that you repeatedly claim to have recordings and  
10 you would have witnesses but we have not had those, and I put it to you that you have  
11 supplied this Tribunal with an incomplete transcript of your call to the CMA, so the  
12 Tribunal should not really have any faith in anything you say, should it?

13 **A.** Well, I wouldn't put it exactly that way. I have already gone to pains to explain that  
14 I have no reason to have not had a print out of the exactness of the transcript and also  
15 to supply the audio version of the transcript.

16 The decision whether my wife, who generally has a nervous kind of disposition and  
17 also has -- I don't want to go into our personal life -- but a 98 year old father to look  
18 after at the same time does not need this in her life. So the decision that she shouldn't  
19 produce a witness statement was borne out of compassion. So no, I do not agree with  
20 you.

21 **Q.** Thank you. I would like to turn to another topic now. Can we turn to your claim  
22 form again, so Bundle A, tab 1, page 11? At paragraph 29, which is near the bottom  
23 of the page, you talk about again the reasons that Mr Hagger has given you for not  
24 wanting HOKA products on runningshoes.co.uk. So paragraph 29 those are the  
25 various reasons you say you have been given. Can we turn over the page and look  
26 at sub point (c)? Can I ask you to read that aloud to us?

1 **A.** Yes:  
2 "HOKA are not taking any further URLs."  
3 **Q.** And can you continue?  
4 **A.** Oh, sorry:  
5 "Up and Running maintain that this is a further dishonest statement, as many new  
6 URLs were approved shortly after Up and Running were discontinued. I present to the  
7 Tribunal Mr Hagger's e-mail dated where he confirms as a reason", not good  
8 grammar, "followed by denial in a e-mail dated", blah, blah, blah. "Here is undeniable  
9 evidence of dishonesty of Mr Hagger."  
10 **Q.** Thank you. What you are saying here is that you had an e-mail from Mr Hagger  
11 telling you that one of the reasons that he didn't want to see HOKA product on Running  
12 Shoes was that Deckers was not taking on any new URLs?  
13 **A.** That's what's said there, yes.  
14 **Q.** Yes. You have said that you will supply that e-mail to the Tribunal as evidence?  
15 **A.** Yes, I said that there.  
16 **Q.** Have you been able to do that?  
17 **A.** No, I haven't.  
18 **Q.** For the Tribunal's note Mr Hagger gives evidence on this point and that's at B, 3,  
19 68. He says he does not believe he ever said that.  
20 I put it to you, Mr Macfarlane, that he never said that to you. He never sent you that  
21 e-mail?  
22 **A.** I was about to say it wasn't communicated verbally that he said that. On that  
23 particular point over the last month I was aware of that. I have 7,000 documents in  
24 this and an awful long journey that we have been going down and I can say that I have  
25 seen it somewhere, and I have searched all of these documents and I haven't been  
26 able to find it. Look, one person doing the job that I have been doing as well as running

1 a business and you have a team of people and they have all been allocated jobs.  
2 Sometimes the odd piece of information which I knew in my mind I had seen and I felt  
3 confident when I was writing this that I could pull that back up again, but my wife and  
4 I have been searching madly to try to find this but I can't find it, but I do know it was  
5 said at the time.

6 **Q.** Thank you. So, Mr Macfarlane, you understand I have to put my case to you. I put  
7 it to you that you never received such an e-mail and that you falsely claimed to have  
8 written evidence that Mr Hagger said that to you, when you did not.

9 I would invite you in light of what we just said to withdraw the statement that this is  
10 undeniable evidence of the dishonesty of Mr Hagger?

11 **A.** Can I say I have not finished looking yet.

12 **Q.** It is day two of the trial, Mr Macfarlane. The time has passed.

13 Right. Let's move on to something else. Can I ask you to turn to your claim form  
14 again, Bundle A, tab 1, page 8?

15 **A.** Yes.

16 **Q.** Paragraph 23. It starts:

17 "I refer the tribunal ..."

18 Can you read us that paragraph from:

19 "I refer the tribunal ..."

20 Right down to the bottom of the page?

21 **A.** "On 15th September 2020 I received a telephone call from ..."

22 **Q.** Can I stop you? Just to be very clear, in the claim form here you are quoting, the  
23 first line is "I refer the tribunal to the witness statement of Mr Hagger, as follows below."

24 So then you are quoting Mr Hagger?

25 **A.** Yes.

26 **Q.** "On 15th September 2020 I received a telephone call from Dennis Macfarlane,

1 MD of Up and Running, in respect of Deckers' decision to not authorise sales of HOKA  
2 and Running Shoes website. I explained the reasons for our decision, including the  
3 fact that it would not be clear to consumers that www.runningshoes website was  
4 owned and operated by Up and Running. Deckers' view was that the goodwill and  
5 brand recognition which Up and Running had generated with dedicated running  
6 consumers through the operation of its bricks and mortar stores would not be present  
7 in the Running Shoes website as it was in the Up and Running website."

8 **Q.** Would you carry on to the end of the page?

9 **A.** Oh, sorry.

10 "It is a fact that Up and Running had not developed the new website by  
11 15th September. In fact, not even a logo had been agreed. Nothing said here can be  
12 true. This statement was created some 15 months after the dispute commenced. It  
13 is a total untruth."

14 **Q.** Thank you. So what you are saying here is the signposting concerns, the concerns  
15 Mr Hagger said he had about the content of the website, must have been made up  
16 because he could not have seen the website at the time that he said that. That's  
17 a summary of the point you are making there?

18 **A.** Where has signposting come from? I don't see that in here.

19 **Q.** "It would not be clear to consumers that the Running Shoes website was owned  
20 and operated by Up and Running."

21 I am using signposting as a shorthand for that. His worry about the lack of clarity in  
22 the Running Shoes website about its ownership, you say he must have made that up  
23 later because he couldn't have assessed that, because he could never have seen the  
24 site and looked to see if it was clear or not?

25 **A.** Well, he couldn't see the website because it wasn't generated. It didn't exist.

26 **Q.** I am trying to make sure we understand the point you are making?

1 **A.** The website didn't exist.

2 **Q.** Therefore you accuse Mr Hagger of telling a total untruth. That's the last words  
3 down there?

4 **A.** Well, I don't see how you can say such as -- just read that again. I am just trying  
5 to catch the wording. It says here:

6 "It would not be clear to consumers that the Running Shoes website which Up and  
7 Running", etc.

8 "It would not be clear to consumers."

9 Nothing will be clear to anybody unless there is a website to be clear about.

10 **Q.** Understood. I am just getting everyone up to speed with where you already are.

11 **A.** Okay.

12 **Q.** Which is your argument that you are making in the claim form here. You repeat it  
13 in the skeleton if we want to go there. That's 41 to 3, but I don't think we need to.  
14 Can I ask you to turn in the first evidence bundle, which is C1, to page 99? Sorry.  
15 I didn't write down the tab, but page 99.

16 **A.** Yes.

17 **Q.** So at the bottom of the page we see an e-mail from Jonathan Midwood of Up and  
18 Running?

19 **A.** Yes.

20 **Q.** What he is trying to do in that e-mail is to arrange a meeting with Mr Hagger and  
21 Mr Yates to present a new project.  
22 Then further up the page, so more recently in time, Mr Midwood thanks Mr Hagger  
23 and Mr Yates for attending the meeting and attaches a written proposal.  
24 Do you know what that new project was?

25 **A.** Sorry, madam. I am just reading this, if I may.

26 **Q.** Yes.

1 A. Something doesn't fit with this. I don't know why.

2 Q. I have a lot of sympathy. The dates are in a mess?

3 A. Yes, that's ...

4 Q. It is something very confusing. I am not too concerned about the dates. We spoke

5 about this with the chair. There was a meeting 23rd July or at some point presumably

6 before Deckers declined to be involved. All I am trying to establish --

7 A. After, not before.

8 Q. Thank you. All I am trying to establish here is that your colleague, Jonathan

9 Midwood, was arranging and then thanking Mr Hagger and Mr Yates for a meeting?

10 A. Yes.

11 Q. Thank you. It was about a new project. Do you know what that new project what

12 was?

13 A. Yes. Jonathan was following instructions from me.

14 Q. Yes. Can you tell us what the new project was that he was presenting?

15 A. Running Shoes project.

16 Q. Thank you. So it seems -- and we have covered the dates. It seems it took place

17 on 23rd July or at least close to that, and the attendees at that meeting were Jonathan

18 Midwood, Carl Hagger and Steve Yates?

19 A. I believe it was on Zoom. I'm not sure it was face-to-face. I believe at that point

20 we had just come out through lockdown and it wasn't a wise thing to be -- we were still

21 in a very panic stricken state over face-to-face in a room.

22 Q. Yes. I am certainly not trying to trick anyone into saying they were in a room when

23 they were on Zoom. I am just using meeting in the general sense of interacting.

24 A. Yes.

25 **MR TIDSWELL:** Not that it matters terribly, but I think at the bottom of the e-mail chain

26 the invitation, the one that's dated 3rd August, but we think probably isn't, it says:

1 "Location: TBC -- it will either be above the Harrogate shop or in the new  
2 buying/marketing offices above the U&R Warehouse."  
3 Maybe it was a face-to-face meeting. Maybe Mr Hagger might be able to help later.  
4 **A.** Jonathan Midwood was the General Manager. He ran the business. All major  
5 decisions were sitting with him.  
6 **MS BERRIDGE:** I am certainly not trying to unleash some sort of Party Gate scenario  
7 here. However you met is fine by me. I am trying to establish the attendees. That  
8 was Midwood, Hagger, Yates?  
9 **A.** As far as I know.  
10 **Q.** Because you weren't there?  
11 **A.** I wasn't there.  
12 **Q.** Thank you. So you were not at that meeting at which the Running Shoes proposal  
13 was made to Deckers. Is it possible that Mr Midwood explained to Mr Hagger and  
14 Mr Yates what the website would look like?  
15 **A.** Like I said, I wasn't at that meeting, so I don't know.  
16 **Q.** Let's speculate. Did you think if he was presenting to them a proposal for a new  
17 website he might have explained to them what the new website looked like?  
18 **A.** No, I don't think he would have done, because he didn't know what it would look  
19 like.  
20 **Q.** Can we turn to the evidence bundle? I think it is the first volume, C, 26, 126.  
21 **A.** Yes.  
22 **Q.** So this is a business plan for runningshoes.co.uk. It is dated 23rd September. So  
23 it's a couple of months after that meeting, but it is in the planning phases of the  
24 Running Shoes project?  
25 **A.** Sorry. Did you say a couple of months after that meeting?  
26 **Q.** Yes. 23rd July, 23rd August, 23rd September. Two months.

1 **A.** Yes. This is V2. That's where I'm at. This is Version 2.

2 **Q.** Right. Have you not had Version 1 then?

3 **A.** I don't know. I don't know that.

4 **Q.** Well, I don't want to go into this version. Let's look at V2, because this is the  
5 version in September, so it is around the right time. Can I ask you to turn to page 140?  
6 You have here a SWOT analysis for the Running Shoes model. So "SWOT analysis.  
7 Strengths, weaknesses, opportunities and threats". About three-quarters of the way  
8 down the page "threats". There are a few there. Six. The number 6 threat that was  
9 identified in relation to Running Shoes is this:  
10 "Up and Running being exposed as the brand behind runningshoes.co.uk if we decide  
11 to go covert."  
12 **A.** Yes.

13 **Q.** Now could we turn to 143? Right at the bottom of that page, business status, there  
14 are two bullets points. Could you please read the second one aloud for us.

15 **A.** "Do we need to get a New co incorporated like we did with online Runner Limited?  
16 How much anonymity would this afford us?"

17 **Q.** Thank you. Now the facing page, 144, we have a heading at the bottom of the  
18 page:  
19 "Challenges/comments to the above outlined issues."  
20 We have five bullet points. Could you read aloud the fourth bullet point?

21 **A.** "In the case of mitigating negative PR once the Up and Running association gets  
22 out there needs to be a standardised and clear message as well as a response  
23 prepared. There needs to be a response which is based on the reason for the  
24 separate business and the positive spin on the two business strategies."

25 **Q.** Thank you. So it was clear internally that you intended to disguise the connection  
26 between Running Shoes and Up and Running?



1 **A.** Is that a statement?

2 **Q.** It's a question.

3 **A.** It's a question. Well, there are two ways of looking at this. It is thought process.

4 You need to look at every -- when you are planning a business like this you need to

5 look at every possible scenario. Jonathan is or was a person of great thought himself

6 and we needed to look at the positives, the negatives, the threats and everything. This

7 is, I wouldn't say so much of a business plan but more of a thought process of how we

8 would conduct that process.

9 **Q.** It is clear from that that it was certainly on the table that the Running Shoes website

10 would be, to use the words in this business plan, covert.

11 **A.** Look, it is Jonathan's wording, not mine, nor a kick-off. Jonathan put together this

12 as a plan as best he could. Jonathan was a very hardworking person and uses his

13 own wording on that. I wouldn't necessarily agree that the wording "covert" is the best

14 choice of wording on there. I would have said, if we are honest about it -- look, I have

15 been told not to ramble, so rambling isn't a good idea, but there is a very important

16 point to make in this and that is we did have bricks and mortar stores. Customers do

17 come into our stores.

18 **Q.** Yes?

19 **A.** Well, you asked me a question. I would like to finish the answer.

20 **Q.** I just said "Yes".

21 **A.** Oh, sorry. If a customer bought a pair of shoes from us, albeit a different colour

22 way but it is the same shoe and found they could go to Running Shoes and bought it

23 much cheaper, then that customer would bring the product quite rightly back for

24 a refund. So the linkage -- that would cause all sorts of problems for the shop. It is

25 not pleasant having to sit with your customer and say "Sorry. We didn't mean to rip

26 you off. It is a different colour way". Customers just see a running shoe as a running

1 shoe. We wanted to keep it not as a secret but at arm's length. That's a better way in  
2 my view of describing it, so we didn't end up with a lot of hassle from customers in the  
3 store or minimise as well.

4 Then on top of that we had franchisees. They are all self-employed, hardworking  
5 people. They themselves didn't want -- it made things very complicated, franchisees  
6 doing a refund because of the Running Shoes, but that did not mean that we couldn't  
7 run the Running Shoes project. So, therefore, it was designed to be operated at arm's  
8 length rather than covert.

9 **Q.** Thank you. So all I am trying to establish here is that in the planning stages of  
10 Running Shoes you have always planned it to be at arm's length, as you put it. It has  
11 a different domain name. The business plan talks about anonymity, having a PR  
12 strategy if the brand association gets out. It was always in the plan?

13 **A.** It's always in the thought process.

14 **Q.** Yes. So if it was always in the thought process, did it not stand to reason that  
15 Mr Midwood would have explained that to Deckers when he presented the proposal  
16 to them?

17 **A.** As I said earlier, I wasn't at that meeting.

18 **Q.** Understood.

19 **A.** So I can't say what he did or didn't or even guess what he did or didn't talk about.

20 **Q.** That's fair enough. We also know that Deckers had a clear policy on that. So we  
21 have seen the e-mail from July 2019 where they say "You may use a website with the  
22 same domain name but otherwise you need to come and talk to us". Doesn't that  
23 make it even more likely that Mr Midwood would have taken care to ensure that  
24 Deckers had a good understanding of this part of the proposal when he spoke to them?

25 **A.** I don't remember -- if you are referring to the e-mail of 2019, I don't remember it  
26 saying "You should come and talk to us".

1 **Q.** I have summarised. "Notify" is the word?

2 **A.** Yes. I believe we did.

3 **Q.** You did notify?

4 **A.** Yes.

5 **Q.** I am just suggesting that Mr Midwood would have known Deckers were concerned  
6 about this part of online selling and so when he presented the website to them, he  
7 would, it stands to reason, have been clear about what was planned, but he was there  
8 and you weren't there, so if you have no answer, that's fine.

9 **A.** No, I do have an answer to that, and that is one e-mail in 2019, quite some distance  
10 from 2020, and just like your own e-mail retention policy, you may not be able to recall  
11 or it doesn't really come into a conversation, "Listen what about that e-mail in 2019.  
12 Oh, we had better cancel the website". It doesn't work like that. If he is sitting round  
13 a table, he is discussing it. If there was an issue on that time, then surely  
14 your -- Mr Hagger and Mr Yates, who were party to that conversation, would have said  
15 "You can't do that" at this stage and then he would have reported to me saying "There  
16 is an issue. HOKA say you can't do that at this stage". That's how I would have  
17 imagined I would find out.

18 **Q.** Even at its most basic level it is very apparent that you proposed the website would  
19 have a different domain name. It is literally written on the proposal that you sent out  
20 to the parties?

21 **A.** Yes. That was in the early stages. Well, it wasn't -- to give a full explanation, we  
22 had had -- we have sat on Running Shoes as a domain name for maybe five or six  
23 years without use of it and in re-examining our position on the internet one of the  
24 professionals we brought in to advise us said "Wow. That's a great name for a running  
25 site. Why don't you use that?" "Oh, yes. Why don't we?"

26 **Q.** It is a great name. I agree. So just turning back to where we are here, we have

1 a problem that Mr Midwood is not here and he can't tell us. Obviously we can ask the  
2 Deckers' people later, but I put it to you that there was every reason to believe that  
3 disguising the connection between Running Shoes and Up and Running was part of  
4 the plan, and that it would have been communicated by Mr Midwood to Deckers in  
5 July 2023.

6 Can I now ask you to go back to the claim form, so Bundle A, tab 1, at page 7? This  
7 is the bottom of the page. This is paragraph 21, sometimes the numbering is a bit  
8 awry:

9 "I refer the tribunal to extracts in the witness statements of Mr Henderson and Mr  
10 Hagger used in the above mentioned previous court case."

11 So that's the county court case:

12 "Mr Henderson is a director. Mr Hagger is a national sales manager. In these witness  
13 statements Mr Henderson and Mr Hagger say that they have seen Running Shoes  
14 website in September 2020. That is completely dishonest. The website had not even  
15 had a logo developed at that time, never mind the features referred to. The  
16 complainant asks what can be believed when the key players just invent stories to fit  
17 their arguments that are clearly dishonest."

18 That's quite a serious allegation, isn't it, Mr Macfarlane?

19 **A.** Yes, it is.

20 **Q.** Just to be very clear about what it is, you say that Mr Henderson and Mr Hagger  
21 both say that they have seen the Running Shoes website in September 2020. You  
22 say you get that from their witness statements in the County Court proceedings?

23 **A.** Can we bring those witness statements up?

24 **Q.** Yes, we are about to?

25 **A.** Oh, okay.

26 **Q.** I just want to just clarify that before we were talking about you saying "Well, he

1 must have made that reason up, because he couldn't have seen the website". Now  
2 you have doubled down. You said "He said he did see the website and he lied" or  
3 "They said they did see the website and they lied".

4 So let's go to the witness statements. Mr Henderson's is in the second evidence  
5 bundle. That's C2, 139 --

6 **A.** Can I ask for clarification of something? When you say I have doubled up ...

7 **Q.** I used the phrase "doubled down". I was just referring to the fact -- there are two  
8 allegations. One is that they have made up the reason because they couldn't have  
9 seen the website, and then the second allegation is that they actually claim to have  
10 seen the website. So there is just a slight difference there?

11 **A.** That's the same thing really, isn't it?

12 **Q.** I see them slightly differently, but let's go to the witness statements. Sorry. I can't  
13 remember now if I have given you the reference. Mr Henderson's, C2, tab 139,  
14 page 1018, paragraph 4. Sorry. It is a long paragraph and I have not highlighted the  
15 bits. I just need to find it:

16 "In July or August 2020 ..."

17 I maybe have the wrong reference. No. Sorry. I am misreading from my notes.

18 "Mr Hagger gave me the background to the matter ..."

19 That's near the top. That's the second sentence:

20 "Mr Hagger gave me the background to the matter, i.e. that Up and Running wanted  
21 to sell HOKA products on a new website that it planned to operate."

22 **A.** Tell me what line. We are in paragraph 4.

23 **Q.** I apologise. I managed to get myself in a muddle. So paragraph 4, right at the  
24 end of line 2 starting:

25 "Mr Hagger gave me the background to the matter, i.e. that Up and Running wanted  
26 to sell HOKA products on a new website that it planned to operate."?

1 **A.** Yes.

2 **Q.** So it is very clear there that Mr Henderson was talking about a prospective  
3 website?

4 **A.** The bottom of the paragraph says something different.

5 **Q.** Yes. Do you have the reference to the claim form?

6 **A.** It says:

7 "To the best of our knowledge Running Shoes only offers for sale goods from previous  
8 selling season."

9 Well, you wouldn't know that unless you have seen the website.

10 **Q.** He is using the present tense at the end of the paragraph but at the beginning of  
11 the paragraph he says:

12 "A new website that it planned to operate."

13 If you read the paragraph as a whole, it is clear he is not claiming to have seen it. He  
14 is referring to a proposed website?

15 **A.** Can I respond to that?

16 **Q.** If you wish.

17 **A.** I don't see it that way. I see it as:

18 "To the best of our knowledge Running Shoes only offers for sale goods from previous  
19 selling season."

20 This was a statement in the previous case. If it only offers goods for sale in the  
21 previous selling season, then you can only draw that conclusion from seeing the  
22 website.

23 **Q.** You could have been told what was planned. Anyway let's move on to Mr Hagger's  
24 website, which is the next tab. Mr Hagger's witness statement. Apparently I shouldn't  
25 use abbreviations. So that is page 1020 and paragraph 4 again:

26 "In July or August 2020 Up and Running informed Deckers of its intention to operate

1 a new website."

2 Then over the page on paragraph 6:

3 "I explained the reasons for our decision, including the fact that it would not be clear  
4 to customers that the Running Shoes website was owned and operated by Up and  
5 Running."

6 So again it is very clear from his witness statement that he is talking about a site that  
7 was only in planning at the time that he made the decision. So the allegation that you  
8 have made that Mr Henderson and Mr Hagger claimed to have seen the website in  
9 September 2020 is just untrue, isn't it, Mr Macfarlane?

10 **A.** Well, I disagree.

11 **Q.** They don't claim anything of the sort. Mr Hen...?

12 **A.** You have just said there from paragraph 5 that they explained the reasons,  
13 including the fact that it would not be clear to customers that Up and Running website  
14 was owned by Up and Running. That to me is saying "I have seen the website". Am  
15 I seeing something different?

16 **Q.** It is clearly a statement about a future website. I invite the tribunal to construe the  
17 witness statement for themselves.

18 **A.** You said it, not me. It is in writing. I can't agree with you, no. That clearly indicates  
19 that he is saying he has seen a website.

20 **Q.** Thank you. So let's move on. I want to ask you when after this process of planning  
21 and working with your website designers you do get to have a website and I think you  
22 say it is launched in November?

23 **A.** Yes.

24 **Q.** 2020. So can you turn to the first evidence bundle, tab 35, page 200? So this is  
25 an e-mail from Mr Hagger to Mr Henderson dated 27th November 2020. What he is  
26 doing there is attaching some screenshots of the Running Shoes' website as it stood

1 at the time.

2 So let's go and look at those screenshots. They are at tab 32.

3 **A.** Can we come back to this e-mail a bit later on as well?

4 **Q.** Yes.

5 **A.** You don't want me to comment on that now?

6 **Q.** No. I was just contextualising these screenshots for us.

7 **A.** Okay.

8 **Q.** You can obviously come back to anything in your re-examination time, as explained

9 to you. So these screenshots -- I don't know about anyone using the E bundle?

10 **MR TIDSWELL:** Can you give us the tab -- have you got the page number? I am

11 sorry. I missed that.

12 **MS BERRIDGE:** Oh, I am sorry. 185.

13 **MR TIDSWELL:** 185. Thank you.

14 **MS BERRIDGE:** They are a little difficult to read I think for all of us, but the first

15 page here is the "Contact us" page. Then if you turn over, the next one is the "About

16 us" page.

17 **A.** Yes.

18 **Q.** Then Mr Hagger has screenshotted the pages with HOKA products, the next two?

19 **A.** Yes.

20 **Q.** Now is there any mention of Up and Running on any of those pages?

21 **A.** No.

22 **Q.** Then the very final screenshot is a two-pager. It is the terms and conditions?

23 **A.** Yes.

24 **Q.** And right at the bottom of the terms and conditions someone has added a red box

25 here, but I don't think that's from the website itself. If you can read that, it says:

26 "Running Shoes is a wholly owned subsidiary of Up and Running Limited"?



1 **A.** Yes.

2 **Q.** Can we turn to your skeleton --

3 **MR TIDSWELL:** Can you clarify that? The red box, was that on the website or has  
4 somebody added that later?

5 **A.** To be honest with you I think that was on the website from the beginning. I am not  
6 certain.

7 **MR TIDSWELL:** The red box that surrounds those words?

8 **A.** Well, actually it must have been, because Mr Hagger sent this e-mail referring to  
9 these on 27th September I believe.

10 **MR TIDSWELL:** Well, I am not asking you to speculate, Mr Macfarlane. If you don't  
11 know the answer, you should say so. I am just asking you whether you know whether  
12 as it appeared on the website those words:  
13 "Running Shoes is a wholly owned subsidiary of Up and Running (UK) Limited."  
14 were in a red box. Do you know that or not? If you don't know, just say so.

15 **A.** I can't say for certain. I do recall having a conversation with the web designer  
16 saying we should have Up and Running on there somewhere, but not on the front  
17 page.

18 **MS BERRIDGE:** There will be obviously an opportunity to ask Mr Hagger if he knows  
19 how the red box got there.

20 **MR TIDSWELL:** Thank you.

21 **MS BERRIDGE:** Can I just ask you to turn to your skeleton, paragraph 58? I will read  
22 this out to you. It is in the penultimate sentence of paragraph 58:  
23 "In any case when the runningshoes.co.uk website was eventually developed months  
24 later, it said in 'About us' that the site was a wholly-owned subsidiary of Up and  
25 Running."  
26 Just to be clear, we have seen it. It wasn't in the "About us" section, was it?

1 **A.** Wasn't it? Well, maybe. It was on the website somewhere, but I can't remember  
2 whether it was "About us" or "terms and conditions".

3 **Q.** Sarah, could you give it back to him so he can check?

4 **A.** Yes, it looks like it is in the terms and conditions.

5 **Q.** So not in the "About us" section?

6 **A.** But it is in there.

7 **Q.** Would you like to correct your skeleton?

8 **A.** Well, what did I say in my skeleton?

9 **Q.** That it was in the "About us" section?

10 **A.** Yes. Maybe I will correct it for what that's worth, yes, I don't see where that has  
11 any impact.

12 **Q.** Can we turn to your witness statement, which is bundle B, tab 1, and I would like  
13 us to go to page 19 and look at paragraph 120.

14 **A.** Yes.

15 **Q.** I am just going to read the first bit there:  
16 "I did not see it necessary to make more mention of the fact that the new site was  
17 owned by Up and Running."  
18 Then you explain all the reasons you have given multiple times.

19 **A.** Yes.

20 **Q.** So what you're saying there is that it was not actually intended that customers  
21 should understand the connection between the two businesses?

22 **A.** I think I've already explained that a little earlier, yes.

23 **Q.** Thank you. Apologies. There is a lot of bundle action here. Could we go to the  
24 defence, which is A3, page 31 and look at paragraph 42? So that's Deckers' defence  
25 and it describes the way that the Running Shoes website looked in November. It talks  
26 about the reference being on the bottom of the "Terms and conditions" page and then

1 it says:

2 "It was, therefore, extremely difficult to tell whether the site was ultimately owned and  
3 operated by the claimant."

4 **A.** Well, that's opinion. Some people look at terms and conditions fairly quickly. Some  
5 people go on a website and check terms and conditions.

6 **Q.** Some people read all the terms and conditions right to the end?

7 **A.** Absolutely.

8 **Q.** So in your reply you actually admit paragraph 42 of the defence. Do you want to  
9 see that or do you remember doing that?

10 **A.** Could you say that question again, please?

11 **Q.** In that part of the defence it says:

12 "It was extremely difficult to tell whether the site was ultimately owned and operated  
13 by the claimant."

14 Then when you reply to the defence you say "This paragraph is agreed. This  
15 paragraph is denied", this, that and the other. That paragraph is one you admit?

16 **A.** I will go with you on that. No point wasting time.

17 **Q.** I can give up the reference for your notes. It is A4, 72.

18 So there was no clear signposting letting users know that the site was owned by Up  
19 and Running, was there?

20 **A.** Where did signposting come from? I didn't know we had to signpost the website.

21 **Q.** That is my term. There was nothing on the Running Shoes website in  
22 November 2020 that clearly explained or would have clearly shown to customers that  
23 it was owned by Up and Running?

24 **A.** But I already explained the reasons why I didn't want that to happen.

25 **Q.** We understand why. I am just asking for the fact. It was not clear?

26 **A.** It wasn't clear, no. That achieved exactly what we wanted it to.

1 **Q.** Understood. Then at some point that changed, didn't it? You talk about that  
2 change in the reply. So I will now go to the reply. A, 4, 73. There is a heading on that  
3 page, para 51?

4 **A.** Yes.

5 **Q.** So could you start by just letting us know what date in this paragraph it says that  
6 you changed the website?

7 **A.** First of all, I didn't change the website. I instructed other people to change the  
8 website.

9 **Q.** I am paraphrasing a little bit.

10 **A.** That's okay.

11 **Q.** It is your decision?

12 **A.** Yes. I don't know the answer to that question.

13 **Q.** All I am asking you to do is pick it out from the paragraph. It is in the second line?

14 **A.** The seventh line?

15 **Q.** The second line?

16 **A.** Yes. If I said that, that could ring true that it was in January, but I can't remember  
17 exactly. To be fair, there was very little correspondence between the parties after  
18 December, because we went into, if you recall, the third lockdown and there wasn't  
19 really much to talk about that particular point and correspondence didn't really kick-off  
20 again until round about May. So there was a lot happened in that period where we  
21 ourselves were up against a brick wall, up against some serious issues.

22 **Q.** I am just doing some basics here really?

23 **A.** Yes.

24 **Q.** The website was changed to add the words:  
25 "Powered by Up and Running."  
26 So the opening page?

1 A. Yes.

2 Q. That happened in January 2021?

3 A. Ish.

4 Q. Ish. Shall I write that in, "ish"?

5 A. If you like, yes.

6 Q. Then you say:

7 "We will produce evidence from our website designer of the exact date that powered

8 was posted."

9 Were you able to supply that evidence?

10 A. No, because our website designer left.

11 Q. We'll take January as the date. That's fine. Do you remember when you drew that

12 change to the attention of anyone at Deckers?

13 A. Was there any need for me to draw it to anybody's attention?

14 Q. It is a factual question.

15 A. I don't recall bringing it to their attention. I do recall the reasons why I put it there.

16 Q. We will just go with dates for now?

17 A. Okay.

18 Q. Can you keep Bundle A open to keep us from going back and forth? I appreciate

19 that will not work for everyone. Open the evidence bundle, so C1, 53, 308.

20 A. Yes.

21 Q. If you look at the bottom of the page, we have the header of an e-mail from you to

22 Mr Hagger on 24th May 2021?

23 A. Yes.

24 Q. And then if you sort of mentally scroll down that e-mail on to the next page, you

25 can see where it says "Your stance". I will just read that for you:

26 "Your stance, therefore, with regard to Running Shoes is unsustainable, especially if

1 you look at the site, which clearly states that Running Shoes is Up and Running owned  
2 (front page)."?

3 **A.** Can you just -- I can't find it. Am I on C, 309 now?

4 **Q.** Yes. Sorry. I don't want to rush you through the bundles. As you say, there is a  
5 lot of material?

6 **A.** Got it:

7 "Your stance, therefore, with regard to Running Shoes is unsustainable, especially if  
8 you look at the site, which clearly states that Running Shoes is Up and Running owned  
9 ..."

10 Yes.

11 **Q.** "... (front page)."

12 That's the first evidence we can find of you informing Deckers of the change?

13 **A.** Yes. As I said earlier, and I was guessing off the top of my head about the lack of  
14 correspondence between Christmas 2020 and May 2024, that that sort of corresponds  
15 with what I said earlier, so yes.

16 **Q.** So we are happy that that's the date?

17 **A.** Well, I am not saying that's the date that powered by Up and Running went up  
18 there.

19 **Q.** The date you told Deckers?

20 **A.** That's when I effectively -- I will tell you why I said that as well, because that's part  
21 of the explanation why I did it. I was hoping that we could reopen the door for sensible  
22 negotiations.

23 **Q.** Great. Well, let's carry on.

24 **MR TIDSWELL:** Ms Berridge, at a convenient moment we ought to take a break, but  
25 I don't want to stop you if you are in the middle of a subject. So make a decision about  
26 when works best.

1 **MS BERRIDGE:** I will go to the end of this page. Thank you for reminding me.  
2 So the very next sentence:  
3 "There is no court in this land that will rule that we have or are reaching an out of date  
4 and inappropriate term of condition."  
5 So you have just told me that when you changed the website and told Deckers about  
6 it, what you hoped was that you would be able to repair the relationship and persuade  
7 them to supply you with HOKA shoes?  
8 **A.** Yes.  
9 **Q.** And yet you say:  
10 "There is no court in this land that will rule that we have or are breaching an out of date  
11 terms and conditions."  
12 Does that sound like someone who is trying to repair a relationship?  
13 **A.** Well, we all have different ways of negotiating. Sometimes you do that by backing  
14 people into a corner and saying "Here, this is not logical. This is not a proper way to  
15 go forward. If you want to go down the line of court action, then we will go down that  
16 line, but if you don't want to go down that course of action, let's sit round a table and  
17 talk like adults".  
18 **Q.** Let's go back to the reply, which I hope you have open. Anyone in the E bundle  
19 will have to do the work. So the reply, A4, 73?  
20 **A.** Yes.  
21 **Q.** That same paragraph we were at before?  
22 **A.** Paragraph 51.  
23 **Q.** Yes. The heading it is "para 51". About halfway down:  
24 "The claimant attempted to appease the defendant. However, this changed absolutely  
25 nothing. The defendant in reality were conceded their main objection."  
26 So you are saying your method of appeasing someone is to threaten to take them to

1 court?

2 **A.** You can interpret it that way, if you so wish, but I would say that sensible parties  
3 should avoid court action where necessary.

4 **Q.** 100%, but it is your word "appease"? I am just showing you -- I am showing the  
5 Tribunal what your version of appease sounds like. That's all I am doing?

6 **A.** I would also say this, that you must appreciate that changing my mind and putting  
7 "Powered by Up and Running" on the front page in itself is an action designed to find  
8 some middle ground between the parties. So the wording may be Yorkshire style  
9 wording, but the actions were certainly aimed at appeasing I would say.

10 **Q.** Well, I'll put my case to you, Mr Macfarlane, and that's when you changed the  
11 website and informed Deckers of it, it wasn't an attempt to repair the relationship. It  
12 was actually an attempt to enhance your threats of court action. That's echoed --

13 **MR TIDSWELL:** I am sorry, Ms Berridge. If you are putting -- you ought to get  
14 an answer I think. Mr Macfarlane, you can say what you want to say about that, but  
15 you need to answer the proposition that Ms Berridge is putting to you.

16 **A.** I disagree, madam.

17 **MR TIDSWELL:** Is that now a convenient moment?

18 **MS BERRIDGE:** Yes.

19 **MR TIDSWELL:** We will resume again at -- how are you doing for time?

20 **MS BERRIDGE:** Just over halfway. That is my section. Ms Lawrence will have  
21 some --

22 **MR TIDSWELL:** How much more do you think? We are trying to get a rough sense  
23 of how the day is looking. We are just over halfway. You think you have another hour  
24 and of a half, which will take us at least through to lunchtime. What is the best guess  
25 for Ms Lawrence?

26 **MS BERRIDGE:** I think -- Ms Lawrence is doing an estimate from my notes. I think



1 the other bit of the notes will go a bit quicker.

2 **MR TIDSWELL:** I am not putting pressure on you I just want to get a sense of how  
3 it's working. It sounds as if you might finish before lunch but if you don't, it will be  
4 a short spell after. Good. So we will resume again at 11.45. Thank you.

5 **(Short break)**

6 **MR TIDSWELL:** Ms Berridge.

7 **MS BERRIDGE:** Thank you and thank you, Mr Macfarlane.

8 We were just discussing about the fact that you arranged for a change to the Running  
9 Shoes website to add "Powered by Up and Running". That was in January of '21-ish.

10 Your case is that was an attempt to appease. We disagreed about that.

11 We now come on to the fact that Deckers did not respond to that change by reinstating  
12 Up and Running as a retailer. So Deckers' own case on that is in the defence. Could  
13 we have a look at that? A, 3, 83 -- sorry. A, 3, 33.

14 **MR TIDSWELL:** That's page 33?

15 **MS BERRIDGE:** Yes.

16 **MR TIDSWELL:** Thank you.

17 **A.** Thank you.

18 **MS BERRIDGE:** So this is Deckers' case on this point:

19 "Some time in the first half of 2021 the wording 'Powered by Up and Running' was  
20 added to the home page of runningshoes.co.uk. By this point the defendants'  
21 relationship with the claimant had broken down."

22 Now in your reply you disagree. So can we go back to that? A, 4, 73. So that same  
23 paragraph -- sorry. This is your reply, that same reply we have been looking at under  
24 the heading "paragraph 51":

25 "It is denied that the relationship had broken down and when the 'Powered by Up and  
26 Running' was applied to the opening page."

1 **A.** Yes.

2 **Q.** We have decided that the critical date for that is the date that you told Deckers that  
3 you had done this. So that was 24th May 2021. So let's look at some of the  
4 correspondence leading up to that date. Can I ask you to open up the evidence  
5 bundle, C1, 33, 192?

6 **A.** Do you want to know why I don't think the relationship had broken down?

7 **Q.** No. You can tell us in re-examination.

8 **MR TIDSWELL:** Could you give us that page reference again?

9 **MS BERRIDGE:** 192. I am just going to do some highlights from the correspondence.

10 So this is an e-mail from you, Mr Macfarlane, to Carl Hagger on 25th November. I will  
11 not trouble us to read all of it, just the very bottom:

12 "You fancy a legal battle. Bring it on."

13 **A.** Yes.

14 **Q.** Now can we go to tab 37, page 209? Again towards the end -- this is an e-mail  
15 from you to Carl Hagger and it is 14th December 2020:

16 "You have until 19th December to confirm your position, failing which I will report your  
17 company for investigation thereafter and also submit to the Competition Authority that  
18 we should be exempt from prosecution for whistle blowing. You can deny all you want  
19 but you and I know just what this is about however you dress it up. I put you on  
20 warning that any attempt to restrict supply as a result of my insistence that we as  
21 business follow the law will be seen as a further attempt to assassinate our business  
22 for which you can expect an application for a restriction order. I do not bluff."

23 Now can you turn to the next tab, page 201. That can't be right. 210. This is  
24 an internal e-mail by Carl Hagger and he is sending it to Mr Henderson, Mr Yates and  
25 Mr Black. He is reporting on a conversation that you have had. Just pointing you to  
26 the second paragraph there. He is talking about you there, Mr Macfarlane:

1 "Predictably he got very angry."

2 Now let's go to tab 44, page 227.

3 **A.** Yes.

4 **Q.** Over the page on 228 can you see the paragraph that starts:

5 "I suggest ..."?

6 **A.** Yes.

7 **Q.** So could you read that and then the next four?

8 **A.** "I suggest that before this deteriorates to a position where I had been before with  
9 another manufacturer that you should change your stance. To be clear, we are  
10 attempting to avoid a breach of competition law before we ourselves are implicated.  
11 I suggest that you should come round the table to discuss this matter. Alex, you must  
12 know that I had to report Asics a few years ago to the Competition Authorities. That  
13 resulted in a serious cost -- a cost to Asics in the hundreds of thousands of pounds.  
14 I am therefore well versed in competition law and consequential cause actions. I have  
15 no desire to see the fall of HOKA in the UK, but you must know that I will not put my  
16 business at risk either. Come around the table and talk. This can and will get very  
17 messy otherwise. If I do not hear from you within seven days, you will force me in  
18 a direction that is irreversible and will only recover when the authorities rule. Is it a risk  
19 you are prepared to take?"

20 **Q.** Thank you?

21 **A.** "In the meantime please supply the SDA ..."

22 Sorry. You didn't want that bit.

23 **Q.** That was the bit I have highlighted. Now could you turn to tab 47, page 268?

24 **A.** I will get used to this.

25 **Q.** It is a bit of an art to the bundles. Actually could you look at 269? On 269 we see  
26 the e-mail we have just been at, the one where you talk about Asics and so on:

1 "Is it a risk you are prepared to take?"

2 Then mentally scrolling up, so on to page 268, this is Mr Hagger on 2nd March  
3 forwarding that e-mail to Mr Henderson and copying Mr Yates and Mr Black and  
4 obviously commenting on it, but the crucial part is the last line of that e-mail:

5 "I see no way back with this customer."

6 So Mr Hagger obviously believes that the relationship had broken down by this point.

7 So that was March. Let's do April, tab 48, page 278.

8 **A.** Did you say 278?

9 **Q.** Yes. This is an e-mail from you to Mr Hagger, 8th April 2021. I am just going to  
10 read a few bits from it:

11 "I am putting you on notice that I shall pursue Deckers through all legal channels under  
12 Unfair Contract Terms Act 1977."

13 So that's quite near the top. Then about two-thirds of the way down:

14 "Your unreasonable behaviour during an unprecedented pandemic is just appalling  
15 and will receive no sympathy from any court."

16 At the bottom:

17 "Carl, you must know that I have a level of determination that has before today cost  
18 other suppliers hundreds of thousands of pounds in legal costs for them to lose the  
19 legal battle."

20 So that was 8th April. Let's fast forward two more days to 10th. Tab 50, page 294.

21 Sorry. Tab 51, page 294?

22 **A.** Yes.

23 **Q.** This is you to Carl Hagger again, a short e-mail this time:

24 "I will defend vigorously my business and HOKA's attempt to assassinate it. You will  
25 not win."

26 That was 10th April. 4th May. So tab 52, page 304. So in this e-mail you have written

1 to the CEO of Deckers, Dave Powers. Then that is forwarded internally within  
2 Deckers. The e-mail I want us to look at on page 302 is the last one shown on that  
3 page. It is from Mr Ellerker to Dave Powers and someone else called Stefano and is  
4 talking about your e-mail and the situation. So the third paragraph of that e-mail:  
5 "Previous correspondence from Dennis Macfarlane to Carl Hagger, who leads our UK  
6 HOKA sales team, is very aggressive, accuses us of price fixing and threatens legal  
7 action throughout and naturally he is in complete disagreement with our decision to  
8 stop supplying. He is a very difficult character to work with. We believe he is doing  
9 similar things with other brands. His note to you", so this is to the CEO "is much more  
10 conciliatory, of course, but does not reflect anywhere near the tone he is using with  
11 our UK team."  
12 So I put it to you, Mr Macfarlane, that your correspondence with Deckers throughout  
13 this period was so vitriolic that even if you had tried to appease Deckers, that could  
14 not have worked. The relationship was indeed broken down.  
15 **A.** Well, the problem is that quite often in sort of legal places it becomes very  
16 protracted. You become entrenched in your positions and your attitudes and your  
17 views. The positions running deep through arguments do run deep but do you know  
18 what? I can get over it. I can get over it. I have in the past got over it. There was  
19 a battle with Asics many, many years ago. They were left wanting. We have now got  
20 a fantastic relationship with Asics. Same person at the top of this business. I don't  
21 believe that all bridges have ever been burnt. They might be offended by my  
22 characterisations of the way I see things. I am what I am. I'm part German. I can't  
23 help it, but the other point is that there is always a way back if grown-ups and adults  
24 can find a way if you want to find a way. So actually I disagree with you.  
25 **Q.** Thank you. So you disagree with the defence which says that the relationship had  
26 broken down at that point?

1 **A.** Yes.

2 **Q.** Let's look at a bit more correspondence. This is on the day that you informed  
3 Deckers about the website change, 24th May. This is C1, 53. I don't think we need  
4 to go to that. We have seen it before. This is the one with "no court in the land". This  
5 is where you tell Mr Hagger about the change?

6 **A.** That's just me expressing opinion.

7 **Q.** So the very same day that you are telling Mr Hagger "I've changed the website",  
8 and you are expressing your opinion about "No court in the land will side with you"?

9 **A.** Can I just say this, you don't have to be madly in love with the people you are doing  
10 business with.

11 **Q.** No. Let's just look at some more correspondence from that same day. So C1, 54,  
12 page 311. This is another e-mail from you to the CEO of Deckers. So this is the day  
13 you are appealing in the manner that we disagreed about. This e-mail is very long  
14 and reiterates the threats and claims to have recordings and witnesses. Then it does  
15 get quite personal. So on page 313 right at the top:

16 "I think that your Mr Hagger is inexperienced and less than honest about events."

17 Then near the bottom, so the penultimate paragraph:

18 "Finally, I cannot deny that I have no liking for Mr Hagger, as I have no doubt he feels  
19 the same about me."

20 So if the relationship wasn't broken down at the start of the day on 24th May, it surely  
21 was by the end of it.

22 In the reply which we looked at before you ask the tribunal to conclude that the only  
23 possible explanation for Deckers' actions was price fixing. So you say:

24 "But nonetheless this did not change their minds."

25 This is the change in the website:

26 "Why? Because it was all about price. There is therefore nothing else that is offered

1 by way of explanation by the defendant other than price fixing. This is another  
2 undeniable indication of hardcore restriction in a covert manner, despite the spin from  
3 the defendants."

4 So I am putting it to you that this whole incident about changing the website  
5 demonstrates nothing in your case. A full six months after the relationship ended you  
6 got in touch with Deckers and told them you had changed the website but you didn't  
7 ask to be reinstated as a retailer and you continued even on that very same day to  
8 make threats and contact the CEO with personal attacks about Mr Hagger. Well  
9 before that date your conduct had caused the defendant to conclude that the  
10 relationship was broken?

11 **A.** I repeat that you don't have to be madly in love with the people that you do business  
12 with, but equally so I think you might see that by contacting the CEO of Deckers that  
13 there is a hope in there that somebody in a senior position will say "Enough. Draw  
14 a line underneath this. It needs to have a draw". My view is we really don't need to  
15 be here today in truth if grown-ups would just talk together. There's a situation here  
16 of self-harm and harm to both businesses. Where do you go with that? What is the  
17 point in that? The fact is that personalities were coming into this, into play on this and  
18 they shouldn't be allowed to be personalities. You should look at this as business.  
19 Talk business and then go for a pint afterwards and then don't talk business. That's  
20 the way business is done.

21 **Q.** Thank you. That is very helpful. So you will recall that when we did that  
22 correspondence I was trying to be quite precise about dates, because what we were  
23 trying to deal with was the proposition that the relationship had broken down by the  
24 time you told Deckers that you had changed your website. So I was showing you  
25 correspondence leading up to that date and that date was 24th May.

26 What I am just going to do now is one more correspondence, one more e-mail, and

1 that's after that date, and the reason that I want to show you one more e-mail after that  
2 date is that it shows how the relationship develops after that, and it is relevant to your  
3 request that this Tribunal orders Deckers to do business with you in future indefinitely.  
4 So can we go to evidence Bundle C1, tab 60, page 342? Sorry. Page 341. So the  
5 third paragraph there. Line 4. I am going to read it out:  
6 "I have no desire to cause you or Deckers grief. However, I feel that we are being  
7 crapped upon by a liar. The parents cannot see the petulant child."  
8 Who are you talking about there, Mr Macfarlane?  
9 **A.** Obviously Mr Hagger.  
10 **Q.** Thank you. Then if we go to the next paragraph what you should know about me",  
11 can you read that out loud?  
12 **A.** Yes.  
13 "What you should know about me, if anybody wants something, ask me. Very likely  
14 I will give it to you free, but if anyone decides they are just going to take it from me,  
15 I turn into a dog with rabies."  
16 **Q.** Thank you.  
17 **A.** As I say, that's the German in me.  
18 **Q.** Let's make sure we have this right. Mr Hagger is a petulant child and you are  
19 a dog with rabies, and you are asking this Tribunal to order Deckers to do business  
20 with you indefinitely?  
21 **A.** If I got upset every time somebody called me a name, I wouldn't be sitting here  
22 now. Water, duck's back.  
23 **Q.** Thank you. That is very helpful.  
24 Right, I have one last topic and then I am going to hand over to Ms Lawrence. So we  
25 are doing well for time. I want to go back. You have talked to us about the reasons  
26 for keeping Up and Running and Running Shoes, as you say, at arm's length, so not



1 making clear on the website that there is a connection between them.

2 I am trying to boil it down to sort of two core points. The first one let's do from your  
3 witness statement. So B, 1, 11, paragraph 69:

4 "By way of further explanation one cannot keep older cheaper models in store on  
5 shelves, because in most cases the new models are no more than a cut-off date. For  
6 the sake of a different colour but the same shoe customers would obviously buy the  
7 old colour at a discount, meaning profits fall off a cliff."

8 So can I just check I have understood that. What you are saying there is "We can't  
9 put the full price current season's stock in the same selling environment as the  
10 discounted last season's stock because there is not much difference between them  
11 and any customer in their right mind will buy the cheaper one. They will say 'I don't  
12 really care if this season's colour is burgundy. I am happy with lilac. It saves me £25".  
13 That's what you are saying there?

14 **A.** Yes.

15 **Q.** The other proposition can we do from the claim form? So A, 1, 15. Apologies.  
16 I am going to have to get the reference from somewhere else, because I have written  
17 it down wrong.

18 The second proposition, and I think it is one that you have articulated even today, so  
19 perhaps we don't need a reference, which is if you put full price currencies and stock  
20 in a store and then you put discounted old season stock in a website that has the same  
21 name as the store, what will happen is customers will either buy the shoe in store after  
22 having their gait analysed and all the useful advice. Then they will spot that they could  
23 have had a very similar shoe with just a different colour on the website and they will  
24 go back to the store and say "I want a refund". That is one of the reasons that you say  
25 you need to keep these businesses separate?

26 **A.** Yes. Runners -- I have been doing this for 30 years, not always on the shop floor,

1 but the first eight years on the shop floor, and runners know their shoe. They know  
2 what they want. For instance, they will come in and order the Adrenaline and the  
3 Adrenaline is still the Adrenaline no matter what colour it is in, and they know that. In  
4 fact, when you have been running in a shoe for about two weeks, they all go the same  
5 colour, a dirty grey. So to a runner it doesn't make any difference, but the store still  
6 carry all the overheads, the staff, the rent, the rates and that sort of thing. So we have  
7 to maximise the margin to cover those overheads. The internet doesn't carry  
8 anywhere near the same amount of overheads pro rata the amount of sales that it  
9 makes.

10 It doesn't really make sense, but there is another very important aspect in this. We  
11 were in a COVID year.

12 **Q.** Yes?

13 **A.** In COVID we were locked down shockingly. It was a shock to the system. Nothing  
14 could go out of the stores at all and stocks that were accumulating between April 2020  
15 and June 2020 soon became out of date. So there was a great glut of last year's  
16 shoes, but at the same time we have to work with people like HOKA, who do not want  
17 us to cancel the orders, which were substantial to them in those days. So, therefore,  
18 we would end up in a position of being double stocked. So there has to be a solution  
19 and that's the solution that I adopted.

20 **Q.** I am just trying to drill down and I am just trying to boil down two propositions, but  
21 it is very understood your position on this.

22 Can I ask you to turn to --

23 **A.** Can I just say it is a pity HOKA didn't understand my position at the time on that.

24 **Q.** Thank you. So evidence bundle 3, tab 154, page 1120. This is more screenshots,  
25 which I admit are very trying if you do not have exceptional eyesight. These are  
26 screenshots from different years from the Up and Running website, so the Up and

1 Running branded website. Basically they show discounted shoes?

2 **A.** Yes.

3 **Q.** So you were able to discount on the Up and Running website?

4 **A.** Well, a statement like that shows no understanding of how the matters work. As  
5 I said earlier, we had an exceptional situation because of lockdown between April and  
6 June.

7 **Q.** Can I stop you, because --

8 **A.** If I may just finish, we had an exceptional situation to face and we had in the  
9 millions of pounds worth of stock to go. If I don't take action we're bankrupt.

10 **Q.** That is all understood, but these screenshots, some of them are from 2017, 2018.  
11 Some are from 2020, so maybe lockdown was involved. 2021. So there's a variety of  
12 them.

13 All I am trying to establish is you do sometimes discount Running Shoes and HOKA  
14 shoes on the Up and Running branded website?

15 **A.** It's misleading, because --

16 **Q.** Well, they are screenshots. Are you saying we have manufactured them?

17 **A.** No. I was trying to finish. It is misleading because we did not have that massive  
18 inventory in previous years that we were facing in 2020 because of COVID lockdown  
19 and therefore of course we had that website running. Of course we have to dispose  
20 of them somewhere. We can't burn them. So of course when you come to the end of  
21 a season -- can I just explain to you that when you take a size run of shoes, we can  
22 sell 120 pairs of size 9s to every one pair of six 6. You inevitably get left with size 6s,  
23 7s, 8s, 11, 12s and 13s, but the prime sizes have gone. Wherever you go on the  
24 website and you click on people's internet, you will always notice that you can rarely  
25 buy a size 9, because all the manufacturers have sold out and that is why they get  
26 reduced.

1 **Q.** It is understood things get reduced. All I am saying is that we can see that you  
2 sometimes put discount shoes on the Up and Running website. That's all I am saying.

3 It's not confined to 2020?

4 **A.** Yes. I didn't hear that.

5 **Q.** All I am trying to establish from these screenshots is that you are able to put  
6 Running Shoes, including HOKA shoes, at a discount on the Up and Running branded  
7 website?

8 **A.** And sometimes you even buy shoes yourselves on a clearance price and those  
9 shoes -- because manufacturers end up with surplus stock as well. So therefore those  
10 shoes go on the one and only website you have left and it does create the same issues.  
11 It always creates the same issues with people coming into the store and saying "You  
12 didn't tell me I could have bought this in a different colour way but much cheaper. You  
13 are not being honest with me".

14 **Q.** Let's hold that thought about people coming into the store to complain. Very quickly  
15 one tab back, 153, page 1098. It is another lot of screenshots which are quite horrible  
16 to try to look at. If you go to 1116, that's Runners Need.

17 **A.** Yes.

18 **Q.** And they are showing some discount shoes. They are in the sort of same situation  
19 that you are?

20 **A.** Yes.

21 **Q.** They have stores called Runners Need and a website called Runners Need. So  
22 that's just to say it is not just you. We see other people putting discount shoes on their  
23 own branded website. So we have done that. I probably just have --

24 **A.** That's probably the end of season as well.

25 **Q.** I asked you to hold a thought about complaints from customers. Do you have  
26 records of the frequency of that kind of complaint from your customers?

1 **A.** We have thirty managers. It is just not possible for me to hold that sort of thing  
2 inside my head. They handle it very well and we try to appease our customers by,  
3 say, giving them a free pair of socks or something like that to make up for the fact.

4 **Q.** Sometimes even refunds or price matches?

5 **A.** Sometimes quite honestly you do, yes.

6 **Q.** Do you have any records of how frequently you are giving away socks or price  
7 matches or refunds?

8 **A.** Well, we do have an EPOS system that runs on the system. That tells us there  
9 has been various refunds but it doesn't give us the reasons for the refund. So we do  
10 keep records of that. Actually that all comes out in our annual staff get together where  
11 if the managers are uncomfortable about something, they will tell us, the management,  
12 senior management, about the grief they are getting if they are getting. So, therefore,  
13 we react to that, as it were.

14 **Q.** You will be pleased to hear this is my very last question and it is about this  
15 discounting on the Up and Running site. Do you have any records of how often you  
16 list shoes at a discount on that site and how often you sell shoes at a discount on that  
17 site?

18 **A.** Those records could be got, but I don't have them here.

19 **Q.** Right, because this is quite central to your case. So it's a little surprising that you  
20 have not come here with those records?

21 **A.** If you want me to get that information, I can get that information but, as I've  
22 explained earlier, it's all seasonal. It is a difficult balance between selling on your own  
23 website that carries the same name as your shops because it is surprising how many  
24 people come and buy the shoes and then go to our website. Very surprising.

25 **Q.** You say quite often but you don't know how often?

26 **A.** I know it happens often enough. I don't know because I don't speak to every

1 manager all day. I run a business and I have to handle this.

2 **Q.** I think that is perfectly adequate. That's what I wanted to cover today. Thank you  
3 very much for your patience with me, Mr Macfarlane. I will hand over to Ms Lawrence.

4 **MR TIDSWELL:** Ms Lawrence.

5 **MS LAWRENCE:** Sorry. Before I get in trouble with the transcriber. Only a few  
6 questions from me on two topics.

7 First, Mr Macfarlane, I would like to ask you some questions about your stores.

8 It is right, isn't it, that some are in-house and some are franchisees?

9 **A.** Yes.

10 **Q.** Can I ask you to please turn to paragraph 12 of your claim form? That's at Bundle  
11 A, tab 1, page 5.

12 **A.** Yes.

13 **Q.** So here the claim form explains why you don't want to discount supplies on  
14 upandrunning.com -- sorry -- .co.uk. You will see that the second sentence of that  
15 paragraph states:

16 "Lowering U&R online prices means huge amounts of refunds for those who bought  
17 in-store, customers complaining of rip offs. Up and Running in any case would breach  
18 a contract with its franchisees."

19 Do you see that?

20 **A.** Yes.

21 **Q.** I don't think we have copies of those contracts in disclosure, do we?

22 **A.** Yes.

23 **Q.** We do?

24 **A.** Yes.

25 **Q.** Can you direct me to where those contracts are?

26 **A.** No. You have caught me flat footed. I don't know.

1 Q. Apologies?

2 A. You have caught me flat footed, but I know I sent a copy of the franchise  
3 agreements.

4 Q. Well, okay. I think we have one for runningshoes.co.uk. Is that a standard  
5 template?

6 A. Identical.

7 Q. It is identical. Great. So that contract is at C, 3, tab 143, page 1032?

8 **MR TIDSWELL:** Sorry. Could you give us the page reference again?

9 **MS LAWRENCE:** 1032.

10 A. Page what?

11 Q. This is the beginning of the franchisees contract with Running Shoes, but I think  
12 you have just told the Tribunal that it is absolutely identical?

13 A. Yes, it is.

14 Q. To all the other franchisee contracts. Could you please direct us to what provision  
15 in that contract you say would be breached by you discounting on your website?

16 A. Moral.

17 Q. A moral contract?

18 A. Not everything, as we well know, is in writing, because there are certain terms and  
19 conditions on the back of an invoice that we receive and they are implied by  
20 action -- by conduct. Right? If I give somebody my word, I mean it.

21 Q. So when you say in your claim form that it would breach a contract, what you are  
22 referring to is a moral contract?

23 A. And an implied contract.

24 Q. An implied contract, but there is no express term that you could point me to that  
25 would be breached, is there?

26 A. Look, the franchisees and I work very closely together. They are all wannabe

1 businessmen, but they want their hand holding as well. I think they would all admit  
2 that. No matter how well you write a contract there is always somebody who is not  
3 happy with a clause somewhere or other, and although some people might disagree  
4 I think I am a reasonable person, and if they have an issue with a contract I will show  
5 flexibility in that contract.

6 Taking the point that you are going to where I am in a contracted position with the  
7 franchisees, if I give them my word that I will not undercut them, then I will not undercut  
8 them. They have got the same costs and the overheads and the staff and everything  
9 else that we've got to run as well. They have to be profitable. If they are not profitable,  
10 our business isn't profitable. So we are working together in partnership. So the  
11 partnership means --

12 **Q.** Hold that there, Mr Macfarlane. We will get there. What I am asking you is; is  
13 there an express term in this contract, the written contract, that would be breached?

14 **A.** 2015 it was written and if you are asking me to pull up every paragraph out of 7,000  
15 documents, it is fairly difficult.

16 **Q.** That's what you do say in your claim form?

17 **A.** Yes.

18 **Q.** I am just cross-checking to make sure?

19 **A.** What I have said in there is because I know where we stand with our franchisees.

20 **Q.** Okay. Thank you. In that case can we please turn to paragraph 5 of your skeleton  
21 argument? So here I think in the last sentence you will see -- well, the  
22 paragraph effectively states:

23 "U&R could not dispose of its excess stock via its existing sites for a number of  
24 reasons."

25 Then in the last sentence:

26 "Also because it is against the spirit of the franchise agreement to undercut ..."?



1 **A.** That's confirms all I have just said to you.

2 **Q.** So here we are talking about the spirit of the franchise agreements. Is that right?

3 **A.** I forgot I had said that in there but it just confirms where I stand.

4 **Q.** Indeed, and is that the same thing as the understanding I think you referred to  
5 yesterday to open your case, and understanding with the franchisees that you wouldn't  
6 undercut them?

7 **A.** Well, yes, I mean, we do have to have that position where we can't undercut each  
8 other, because it simply wouldn't work in a franchise agreement where franchisees  
9 themselves were competing with each other that you would buy from one shop and  
10 then go to another shop and you could have bought it cheaper. We are all one  
11 company at the same time. I know that may well come across as an anti-competitive  
12 edge on what I am saying, but within a franchise agreement that is pretty much the  
13 normal I would expect.

14 **Q.** Understood, Mr Macfarlane. So although it is not an express term, what you just  
15 described is something that you obviously as a businessman would take into account  
16 in your relationships with the franchisees?

17 **A.** Yes.

18 **Q.** Thank you. The final topic. Just a few questions from me. Could I please ask you  
19 to turn to paragraph 144 of your witness statement? That's at B, tab 1, page 22. I am  
20 looking at the heading entitled "Impact of the cessation of supply", if you are with me.  
21 Just H there on the page?

22 **A.** You are on page what?

23 **Q.** Page 22?

24 **A.** Yes.

25 **Q.** So under that heading at paragraph 146 you say:  
26 "Losing supply of the HOKA brand has meant that runningshoes.co.uk has become

1 | unsustainable."?

2 | **A.** Yes.

3 | **Q.** "Runningshoes.co.uk is no longer trading."

4 | In other words, you are saying that Deckers' termination of HOKA supplies is the

5 | reason that the Running Shoes website is no longer trading. Do you see that?

6 | **A.** Yes.

7 | **Q.** What brand is the biggest supplier of running shoes to Up and Running?

8 | **A.** Of running shoes? Is that right.

9 | **Q.** Up and Running, to your company?

10 | **A.** Brooks is the largest.

11 | **Q.** Can I please ask you to turn to bundle C1, tab 26, page 126?

12 | **A.** Yes.

13 | **Q.** You are there before I am. This is the business plan for the Running Shoes website

14 | that Ms Berridge discussed with you a little bit earlier?

15 | **A.** Yes.

16 | **Q.** You will see it is prepared by Jonathan Midwood and it is dated 23rd September?

17 | **A.** Yes.

18 | **Q.** Could I please ask you to turn to page 141?

19 | **A.** Yes.

20 | **Q.** So about halfway down the page you will see in bold:

21 | "Brands that have been approached and their responses as of 15/09/20."

22 | This is referring to approached about Running Shoes?

23 | **A.** Yes.

24 | **Q.** Do you see Brooks, second bottom from the page?

25 | **A.** Yes.

26 | **Q.** The plan states here, doesn't it, they have decided that it isn't something they

1 would support at this time?

2 **A.** Yes.

3 **Q.** And then --

4 **A.** They changed their mind.

5 **Q.** They changed their mind?

6 **A.** Yes.

7 **Q.** When was that, Mr Macfarlane?

8 **A.** Very shortly afterwards.

9 **Q.** So they ended up fully supporting the Running Shoes website?

10 **A.** Yes.

11 **Q.** Understood. Then three brands above: ON, I take it that's ON Running?

12 **A.** Yes.

13 **Q.** The plan states here they have decided this time not to support the project as well?

14 **A.** Yes.

15 **Q.** Did they change their mind as well?

16 **A.** No.

17 **Q.** They did not change their mind?

18 **A.** No.

19 **Q.** So that was the position going forward?

20 **A.** Yes. Do you want to know why?

21 **Q.** In a second, Mr Macfarlane, you can come to that in re-examination. So in that

22 case, looking at this page, if Brooks ended up supporting Running Shoes, you would

23 agree, wouldn't you, that most of the brands that you approached actually ended up

24 supporting the Running Shoes website?

25 **A.** Yes, they did.

26 **Q.** If that's the case, then I put it to you that it is highly unlikely the entire site failed

1 because HOKA refused to supply?

2 **A.** Well, somebody who didn't have an understanding of the running business would  
3 say that, but in actual fact not at any point have I ever said that HOKA is a poor brand.  
4 It is a brilliant brand. Marketing is brilliant. The sustainability and every part of it is  
5 brilliant, and although you can bring any expert in you want, there is nobody knows  
6 more about the specialist running industry than I do, and HOKA are a big player, a big  
7 player. Without HOKA your website is useless.

8 **Q.** There's nothing further from me. Thank you very much, Mr Macfarlane.

9 **A.** Thank you.

10 **MR TIDSWELL:** Thank you, Ms Lawrence.

11

## 12 **Questions from THE TRIBUNAL**

13 **MR TIDSWELL:** Mr Macfarlane, we have a few questions for you. I am just  
14 conscious -- you have about another 20 minutes and we will take a break. Are you all  
15 right?

16 **A.** Yes.

17 **MR TIDSWELL:** Good. I want to start just by actually picking up that business plan  
18 that we were looking at. You remember that you were asked to look at, I think it is in  
19 the business plan we are in right now and it starts on page 140. Actually. That's the  
20 bit about SWOT but the document itself starts at 126.

21 **A.** Yes.

22 **MR TIDSWELL:** I think you said when you were asked about it that there was  
23 an earlier business plan. This is the September version and you had said there is  
24 an earlier plan.

25 **A.** Yes. It's substantially the same. This one was generated by Jonathan Midwood  
26 as a report stage, which is why the previous one, for instance, didn't cover, as can be

1 seen in one of the paragraphs -- it says HOKA were not interested in the plan. That  
2 is him updating this business plan and giving a report to the board.

3 **MR TIDSWELL:** Yes. Can I ask you just to look at page 107?

4 **A.** Sorry, sir. Did you say 107?

5 **MR TIDSWELL:** 107, yes. Is that the document you are referring to, the earlier one?

6 **A.** Yes, it is, yes.

7 **MR TIDSWELL:** I want to ask you some questions. You were asked questions about  
8 effectively the economics and commercial aspects of both discounting in your own -- in  
9 the Up and Running branded structure and discounting on Running Shoes. We would  
10 just like to explore that with you a little bit more and understand some of the factors  
11 that go into that.

12 So what we would like to understand is -- you were talking a little bit about discounting  
13 both in the shops and on your own Up and Running site. We would like to explore  
14 with you why you were doing that. There is some evidence you were doing it  
15 prior -- Ms Berridge showed you some websites prior to COVID. So you were doing it  
16 prior to COVID?

17 **A.** Yes.

18 **MR TIDSWELL:** We would like to understand a bit more about why you were doing it  
19 and the economics of it from your point of view and then the constraints that might  
20 apply to the extent that you were doing it which we know were partly because of  
21 customer complaints, partly because of franchise considerations and also interested  
22 in the economics of them as well. Would you be able to say just a little bit about that?  
23 Can we just start with why you would discount either on in-store or on the Up and  
24 Running website?

25 **A.** Yes, sir. Seasons change twice a year in the running industry, rather than four  
26 times a year is quite commonplace in the fashion shoe industry, and the fashion shoe

1 industry is the biggest part of the trainer market. It only changes twice, that will be  
2 autumn/winter each year and spring/summer each year. There is a very good reason  
3 for that, and that's because runners are not interested in colours.

4 When the new season comes in, a complete new supply is millions of pounds. Not  
5 big to some people. Big to us.

6 **MR TIDSWELL:** Can I just stop you? Can you tell us what would your order book be  
7 for a season?

8 **A.** If he would be spending between 4 to 5 million on trainers, maybe even more than  
9 that. The trainers are about 70% of our sales, so it would be about 4 to £5 million a  
10 year spread between quite a lot of suppliers, and we reject an awful lot more trainers  
11 than we actually buy. The reps will come along with a bag full of trainers. No, we don't  
12 want them. We never select them on colour. We select them on their functionality  
13 every time.

14 So at the end of every season manufacturers compete with each other and they bring  
15 forward their -- we order six months in advance, but they bring forward their seasons  
16 and autumn/winter can sometimes start coming in in July, shoes, which is just  
17 nonsense. That's because the early bird catches the worm. They go in with their bag  
18 and get the orders from the big guys and therefore there is nothing left in the budget  
19 for the next people who are coming afterwards.

20 So the season arrives at us rather unfortunately at a peak selling time. We find  
21 ourselves running down the stocks because the new stocks are about to come in. You  
22 are always left with sizes left over and those sizes, if they are left on your shelves in  
23 the shops, they will sell. It has a massive impact on cashflow, because you've got the  
24 new stock that's coming in due to be paid in 30 days or 60 days if you are in favour,  
25 and they are still on the shelves at the side of the brand new shoes.

26 Well, obviously customers are going to buy the cheapest shoe, as I said earlier.

1 Nobody or very few people buy on colour. So they are -- we then take them out of  
2 store as much as we can.

3 **MR TIDSWELL:** Sorry to interrupt you again. So the consequence -- just to be clear,  
4 the consequence of leaving them on the shelf is what that you end up selling the  
5 cheapest shoe -- the older, cheaper shoe.

6 **A.** Yes.

7 **MR TIDSWELL:** And therefore you get a lower margin because you have to discount  
8 it and you have another shoe which you have not sold, which remains on your stock.  
9 Is that right?

10 **A.** Yes. So you haven't sold many of the brand new shoes that are in stock and you  
11 are selling lots of the cheaper ones. Your costs are still running and your overheads  
12 are still running. So you must find a way of saying "Look" -- when people come  
13 through the door, many people don't actually know what they want. A lot do but many  
14 don't know what they want and they are relying on advice. We will give honest advice.  
15 If the right shoe for that customer is 29.99 then that's what they will go out with. If the  
16 right shoe is the £200 shoe, if they can't afford it then let them go somewhere else.  
17 We would rather they went somewhere else than buy the wrong shoe. That is where  
18 we get our reputation from of being honest.

19 So we take out of the store the old models, of which there aren't really that many left  
20 in the store and that makes room in the stockroom. For every shoe you see on the  
21 shelf there are another 25 to 30 shoes sitting in the stockroom. We take those out.  
22 When the customers come in we will do our best to sell them what's on the shelf.  
23 Believe it or not, 90% of people will buy what's on the shelf. Therefore, we are able to  
24 sell on the Up and Running site the older models cheaply, but even at that it does  
25 uniquely in bricks and mortar where they have both the bricks and mortar shops and  
26 internet, it does cause that clash with customers, especially if they have come in and

1 bought a size 8 of the brand new model and paid £150 and then they look on our own  
2 website and the same shoe in a different colour, the Adrenaline for argument's sake,  
3 is reduced to £75 to clear out.

4 **MR TIDSWELL:** Presumably you also have the same problem on the website as do  
5 you in the store, don't you, which is that if a customer goes on the website and decides  
6 they are going to buy the older discounted stock, you have a reduced margin from that  
7 which you would make if they bought the newer model on the website?

8 **A.** The internet doesn't make the same margin as the shops do. The margin is much  
9 lower. We don't have the bulk on the internet. We are not like (inaudible) shoes, who  
10 buy millions of pounds worth of last year's model. In fact, this is unique to our trade  
11 that some manufacturers make last year's models specifically for them. That's  
12 an anomaly.

13 **MR TIDSWELL:** We will come back to the other discounting sites, but just to stick for  
14 the moment with what you're doing, so when you're making a decision about selling  
15 on the Up and Running website.

16 **A.** Yes.

17 **MR TIDSWELL:** You don't want to discount in the store. Is that right? Am  
18 I understanding?

19 **A.** We prefer not to discount it in the store.

20 **MR TIDSWELL:** So if you are going to discount the older stock, you will do that on  
21 the website.

22 **A.** Yes.

23 **MR TIDSWELL:** Are you saying that you don't discount -- are there constraints on  
24 what you do there? In other words, are you saying that you are not just discounting  
25 as freely as you might do because of the considerations you have indicated?

26 **A.** Yes.



1 **MR TIDSWELL:** Can you please explain a bit more about how you make that  
2 judgment about what you do and don't do on the website by way of discounting?

3 **A.** To be honest with you, it all depends on what stock is available and how popular  
4 they are at the time. We won't take every shoe out of the store that's old model,  
5 because we buy -- although we order in advance, we can't have all of the stock arriving  
6 in one month because the bill at 60 days later is unsustainable. So we buy over a three  
7 month period and we have deliveries over a three month period. It saves on  
8 warehousing. It saves on all those sorts of things. So not every shoe is taken off the  
9 shelf and goes on the internet. So it is only a dribble that is going to the internet at  
10 any one time, because we must keep the models in until the new models arrive.

11 **MR TIDSWELL:** So actually -- am I right in understanding that the main driver of  
12 volume of the discounting on the website is actually just the availability of the shoes  
13 coming off the floor?

14 **A.** Yes.

15 **MR TIDSWELL:** Yes, I see. I think that's helpful.

16 **MR DERBYSHIRE:** I would like to build on that and ask you some questions about  
17 when you emerged from lockdown, what kind of constraints and what kind of  
18 opportunities did you think you had? You characterise the situation you are in now as  
19 a kind of self-harm. So I just want to go back to when you emerged from lockdown,  
20 my understanding would be that you had a lot of unsold stock of the old season?

21 **A.** Yes.

22 **MR DERBYSHIRE:** And you chose to take on some new season stock from HOKA.

23 **A.** Yes.

24 **MR DERBYSHIRE:** Then you had the problem that could you sell two seasons in one  
25 calendar period, because you had the old stock and new stock.

26 **A.** In copious quantities --

1 **MR DERBYSHIRE:** Yes, and the runningshoes.co.uk was a kind of vehicle to sell the  
2 old stock at a significant discount.

3 **A.** Yes. If COVID could have been timed differently, I would have been very pleased,  
4 but at the end of the first lockdown in COVID, it is probably the best selling time of the  
5 year during COVID, because such as the London Marathon is on. The lighter nights  
6 are arriving and everything like that. So we were well stocked going into March,  
7 heavily stocked as we have ever been, but then there's the position that I don't want  
8 to disappoint for want of a better word.

9 We want to work closely with our suppliers. They also have the same issues of  
10 a stock. A lot of people have their stock on the water when COVID struck. We felt  
11 morally obliged to honour our orders that we had placed.

12 **MR DERBYSHIRE:** Did you have orders that you actually contracted for or did you  
13 have an opportunity to say "No, we don't want the next season's stock."

14 **A.** There is a moral issue here as well, but yes, if we had to cancel as a need for  
15 self-survival, then we would cancel, but a lot of suppliers offered flexibility to us  
16 because they knew as well that we were facing a different scenario we had never  
17 faced before. So I wanted to honour our working relationship, that's the way I can put  
18 it, to keep that good working relationship going, try not to cancel. They have the same  
19 problems to face as we have to face post COVID and I see those. We all should be  
20 working together.

21 I would say, however, that HOKA sent a circular around to all of their retailers, which  
22 was making a promise of cooperation, flexibility.

23 **MR DERBYSHIRE:** I think we have all seen that. That's in the evidence. The key  
24 thing I would like to get from you is that the rationale for runningshoes.co.uk was that  
25 the discounting on that site of all the stock would be much more than you could sustain  
26 selling that stock in the shop and on your own website.

1 **A.** Absolutely, sir, yes.

2 **MR DERBYSHIRE:** Okay.

3 **MR TIDSWELL:** Actually I am going to dig into that a bit more, if we may. Can you  
4 explain that to us a bit more? I don't know whether you do want to draw a distinction  
5 between the response to COVID, which you have just explored with Mr Derbyshire, to  
6 be contrasted with the ordinary operation of the website? I don't know  
7 whether -- because I think once you decided you were going to set it up, obviously you  
8 were setting it up for all time. At least that was the plan as I understand.

9 **A.** Yes.

10 **MR TIDSWELL:** What we would like to understand a bit more is how you saw the  
11 economics of that new operation working, because obviously you are now without the  
12 overheads that you have in bricks and mortar as far as runningshoes.com is  
13 concerned and you are able to price at a different level.

14 **A.** Yes.

15 **MR TIDSWELL:** Can you explain to us how both you saw and indeed you experienced  
16 the economics of that arrangement?

17 **A.** Running Shoes, it is a terrible position sometimes in retail, especially as a SME  
18 that the impact of COVID was just horrendous, but to be able sometimes to pay bills  
19 you actually physically overtrade. I am sure you know what over trading is.  
20 Sometimes you can't pay your bills until you sell the product. That overtrading  
21 exposed a huge number of retailers who hit that brick wall when you suddenly  
22 don't -- you can't overtrade any longer because you haven't got your shops open. So  
23 it was more a matter of we found ourselves massively overstocked, morally obliged to  
24 take the new stocks. We wanted the new stocks anyway, because that's our DNA is  
25 we are offering the best and the most up-to-date product and the most available  
26 product. So it left us with a cash issue and Running Shoes was designed to be able

1 to dispose of the stock quickly and turn that into cash, turning that into cash so that we  
2 could have the money available to pay for more of the full price, the full season, the  
3 new season product coming in.

4 **MR TIDSWELL:** So the primary economic driver for setting it up was actually liquidity?

5 **A.** Yes.

6 **MR TIDSWELL:** Then just in terms of the operation of it, the overheads obviously with  
7 the existing structure were low.

8 **A.** Low, yes, sir. When we do a business plan, such as the business plan we have  
9 seen, you try to pitch what your costs are going to be, your rent, overheads and staff,  
10 and then work out a margin that you can go to be able to stay in profit, because every  
11 venture has to have a profit. So, therefore, you look where you have got to meet and  
12 then work out what you can sell it for at that point.

13 **MR TIDSWELL:** I want you to be really careful here, because we are in danger of  
14 straying into confidential information in relation to the wholesale price and retail price.  
15 I don't want you to talk about either the numbers or the relationship in proportionate  
16 terms, but just so I understand it, once you are on [runningshoes.com](http://runningshoes.com), subject to  
17 obviously covering your overheads, is the primary driver of your ability to discount  
18 actually the wholesale price?

19 **A.** No, sir. It has to make a profit.

20 **MR TIDSWELL:** Yes. So you have to cover your overheads and make a margin?

21 **A.** Yes. We have to cover our overheads and make a margin, albeit a smaller margin.  
22 That was incumbent in my thought process, because if I had held Running Shoes  
23 within the same company, I have financial people to satisfy in the business and they  
24 hate seeing your overall margin to drop.

25 In fact, manufacturers like HOKA, Asics, Deckers and everybody hold you to account  
26 to be profitable in your main business. If I just run Running Shoes within Up and

1 Running as the same thing, I run it as a franchise, because it therefore has a separate  
2 set of accounts, etc, and it doesn't affect the mother company, the margin. Therefore,  
3 those people who assess whether you are credit worthy say you have a margin here.  
4 We are perfectly all right. We will not lend you any money for Running Shoes because  
5 it has a terrible margin. I can live with that.

6 **MR TIDSWELL:** That is interesting and what I am asking you. So actually I think what  
7 you are saying is that the way in which you looked at the economics of  
8 upandrunning.com would have taken into account the overheads of the entire Up and  
9 Running operation and the margin -- target margin for that, whereas you were not  
10 operating on that margin for the runningshoes.com.

11 **A.** We still had to have --

12 **MR TIDSWELL:** You had a target margin.

13 **A.** Yes. If it is in trouble, it fails.

14 **MR TIDSWELL:** But it was going to be different because of the overheads which  
15 largely drove you back to the cost of sales?

16 **A.** Yes, and were reasonable.

17 **MR TIDSWELL:** Yes. That is helpful. I am just going before I move on -- can I ask  
18 you also just about the new website and the conditions of selling that you were putting  
19 in place?

20 **A.** Yes.

21 **MR TIDSWELL:** So the way in which you anticipated and indeed eventuated that it  
22 should appear to customers. You said a little bit about this in your witness statement.  
23 There is some material on the proposals. Can you just say a bit about what the  
24 proposition was for customers on the new website?

25 **A.** My wife set standards. Those standards are we will not fall below those standards.  
26 Just because you are selling them cheaply does not mean that we will have a lower

1 quality of service in any way whatsoever.

2 **MR TIDSWELL:** Compared with the existing website.

3 **A.** Compared with the existing website. Therefore, we took out of a couple of our  
4 shops, we took those managers who volunteered and they worked within Running  
5 Shoes and they were always available. We had a telephone call where people could  
6 ring in and discuss with real runners, people who enjoy running, experience running  
7 and they can talk them through the shoes and even it gets into conversations over why  
8 they are becoming injured and things like that. So we set I think a standard that other  
9 people will only follow. That's my view, of course.

10 **MR TIDSWELL:** Thank you. You mentioned a little bit earlier sports shoes, the  
11 discounter.

12 **A.** Yes.

13 **MR TIDSWELL:** I had noted that Mr Hagger had referred to something called Sports  
14 Pursuit. Is that different?

15 **A.** It is different.

16 **MR TIDSWELL:** Are they both discounting websites, or have I misunderstood?

17 **A.** There has been a seismic change in the UK market on running shoes. This tribunal  
18 has heard there is a big difference between the current seasons and the old seasons.  
19 Quite honestly old season shoes, it is open season. Nobody has a problem with that.  
20 Everybody understands, but in the case of sports shoes, they have been going for  
21 a long, long time, but indeed recently clearance shoes have not been as readily  
22 available in the recent years from manufacturers. They run a much tighter ship as  
23 well. It doesn't pay them to have product being discounted around the country and it  
24 can be reputationally damaging. So they run a much tighter ship.

25 Manufacturers to my knowledge used to bring in all the forward orders. We call that  
26 ordering six months in advance plus 10%, but I am led to believe now that they are

1 tightening that down even to 5%. That means there is not so much sitting in old  
2 warehouses after they have finished so therefore clearance isn't as available. You will  
3 find people like sports shoes who reputationally offer cheaper shoes find themselves  
4 running out of stock. So they themselves are also offering in season shoes, but they  
5 do offer a discount. I don't have a problem with that.

6 **MR TIDSWELL:** Just so -- I think what I am understanding you are saying is  
7 historically and generally those discounting websites have sold clearance, older shoes  
8 or other shoes which are not current season. They are now moving into in season  
9 more.

10 **A.** Yes.

11 **MR TIDSWELL:** Can you -- is there a timing -- can you give us a timing on that?  
12 When has that shift happened?

13 **A.** I would say in the last three years especially, it has been noticeable in the last three  
14 years that such as sports shoes are not getting the quantity of clearance shoes they  
15 have previously relied upon because people are running a tighter ship at  
16 manufacturing level.

17 **MR TIDSWELL:** Thank you. I am going to turn to a different topic and just to ask you  
18 a couple of questions about what you thought the position was at various points in time  
19 after these discussions that happened in August 2020. So what I want to understand  
20 is what did you think the position was contractually between you and the defendant  
21 after the defendant had refused to approve runningshoes.co.uk. Did you think that -- in  
22 particular did you think that the defendant had the ability to refuse permission for their  
23 products to be sold on that website?

24 **A.** I didn't know contractually where we stood if the truth were known. I said earlier  
25 that it came as a surprise to me to find that the terms and conditions were on the back  
26 of invoices. I don't see invoices, never see invoices. You don't look at the back of

1 an invoice to find out whether there's a term of law there that's in there. It just doesn't  
2 happen. All too often -- you don't look at an insurance policy until you need to make  
3 a claim.

4 **MR TIDSWELL:** I understand that, but either you thought that there was  
5 an entitlement from the defendant to say "No, we are not going to provide you with  
6 stock for your website" or you didn't, and I am asking you really which of those it was.  
7 Once you heard the news -- I am not quite sure exactly when you did hear the news,  
8 but once you heard the news from Mr Midwood that the answer was no, HOKA did not  
9 want to participate in the proposal, did you view that as being something which they  
10 were entitled under the contract -- the contractual arrangements to do?

11 **A.** I started getting contractually into the argument in November and December --

12 **MR TIDSWELL:** I do understand that. I am going to come to that. Before you get to  
13 that I want to understand what was in your mind in August and September?

14 **A.** It was negotiable. I didn't go to the contract. We had a good working relationship  
15 in those days. I wasn't the most popular person on the planet but, you know, working  
16 under stress of COVID, etc, but I didn't investigate -- I always thought right up until the  
17 end of 2021, when the cessation of deliveries occurred, I always thought that it's  
18 rescue-able. The only time I felt that there was something going pear shaped was  
19 when Jonathan Midwood did his business plan and reported back to me and said  
20 "HOKA want to keep their internet clean".

21 **MR TIDSWELL:** That's the September business, the SWOT analysis?

22 **A.** That's when the alarm bell went off in my head. Having gone through similar  
23 circumstances and the alarm bell went off inside my head thinking "That's not right"  
24 but I wasn't looking to challenge them on that at that time. I wasn't looking for conflict.  
25 I was looking to keep our business alive. So I didn't go looking for contracts. So I don't  
26 know the answer to that, sir.



1 **MR TIDSWELL:** That's fine. Later -- I think you referred to this a little bit  
2 earlier -- things changed because you have the 20th October telephone conversation  
3 about taking the stock and then you have the confirmation or the advice that you  
4 shouldn't be selling HOKA products on the website.

5 **A.** That was November, sir.

6 **MR TIDSWELL:** That was November. That's right. Just before we get to that at what  
7 stage did you decide that you were going to put HOKA products on the website  
8 whether or not the defendant agreed to it?

9 **A.** When the second lockdown occurred.

10 **MR TIDSWELL:** So was that --

11 **A.** No. 5th November. Boys didn't want to meet for bonfire night.

12 **MR TIDSWELL:** So the sequence is that you had the telephone call on 20th October  
13 with Mr Hagger where he asked you -- you talk about taking the new season stock. Is  
14 that right?

15 **A.** Yes. I do have evidence to this via a disabled guy called Harry (inaudible), a lovely  
16 guy. We got notice that lockdown, second lockdown was going to happen, horror of  
17 all horrors in the biggest selling season of the year and you have to look and say can  
18 we afford to pay these bills in a month or two month's time. No, we can't, not if we are  
19 not able to sell them. There is a big difference between what you order from the  
20 internet and orders for 30 stores.

21 So we were scrambling around on 2nd November. Carl and I held a conversation  
22 where Harry was looking to cancel the orders and Carl and I held this conversation  
23 and I was persuaded to keep them with words used such as "Look, everybody else is  
24 doing well on the internet". It hurt to hear that. That was 5% of our normal sales. We  
25 have always concentrated on the bricks and mortar stores right or wrong. So I said  
26 "Okay. I will take the stock. I don't want to let you down on this". So we took the

1 stock. Did I say to him "I am going to stick it on Running Shoes"? Probably not.

2 **MR TIDSWELL:** I think you have acknowledged it. I think I am asking you a different  
3 question, which is when did you decide you were going to do it, which I think you have  
4 told me, and then did you know when you did it, that they did not approve of that?  
5 They had not agreed to it?

6 **A.** I felt that circumstances had changed. Who in August, when we thought this plan  
7 up, thought there was going to be a second or even a third --

8 **MR TIDSWELL:** It may be the circumstances had changed, but I just wanted to be  
9 clear with you about whether you thought at any stage you were doing something they  
10 had not approved.

11 **A.** No, I never thought that honestly. I thought the working relationship was always  
12 good enough for us to say, "This is temporary. Let's carry on and get this job sorted  
13 and we will talk about it when COVID is over". That's just my thought on that.

14 **MR TIDSWELL:** Thank you. I have finished.

15 Ms Berridge, is there anything that arises out of that that you want to ask any more  
16 questions about?

17 **MS BERRIDGE:** No. Thank you.

18 **MR TIDSWELL:** So we are finished asking you questions, Mr Macfarlane. There is  
19 the opportunity for you to have your re-examination in the way we discussed earlier.  
20 We have just run up against lunchtime and the short adjournment. I think you did  
21 suggest you might like some time to consider what you were going to say.

22 **A.** Yes.

23 **MR TIDSWELL:** I think that probably would be helpful, because it is more likely to be  
24 useful if it is considered. What I suggest is we take the short adjournment and resume  
25 again at 2 o'clock. At that stage if you want to say anything else, and I do emphasise  
26 in short re-examination, then you should do that.

1 Can I just stress with you that you are not to discuss your evidence with anybody over  
2 this break. I think in the circumstances, although it may be a little bit uncomfortable,  
3 I think would be better not to speak to anybody at all about anything. Ordinarily you  
4 could go and have a conversation about the weather or whatever it is, but I think, given  
5 the sensitivity of this exercise of you re-examining yourself, it would be better if you  
6 didn't have any conversations with anybody at all.

7 **A.** So I will go to purdah?

8 **MR TIDSWELL:** Well, you are in purdah, but this is super strict purdah, if I can put it  
9 that way. Just to be clear, if you know already you are not going to have anything  
10 further to say, you should say so and we can save the problem, but I don't think you  
11 are going to get any help from anybody else on this. I am afraid it is your thought  
12 process.

13 **AMICUS CURIAE:** Sir, can I just say something?

14 **MR TIDSWELL:** I am afraid you can't. I am sorry.

15 **A.** I am tempted to say I don't have anything further. The reason for that is I have  
16 some work which I yet have to do for this afternoon's cross-examination and some  
17 reading up on that.

18 **MR TIDSWELL:** You would rather spend the time doing that?

19 **A.** I would rather spend time on that and get myself out of the personal lockdown to  
20 be able to prepare better for this afternoon's session. So I am saying I don't have any.

21 **MR TIDSWELL:** What I want to be clear with you is if you think there is something,  
22 and I am afraid you are not going to get any help from anybody on this, so there is no  
23 point asking anyone else for advice, because that's not permitted, or looking to anyone  
24 else for advice, and I am happy for you to reflect on how you might put it or what you  
25 might say, but what I don't want you to feel is you have something you want to say and  
26 don't have the opportunity. If that means we have to find some extra time for you to

1 | prepare, or we could start a little bit earlier or whatever it is to get it done, but I am  
2 | anxious you are not losing an opportunity here. It is an awkward situation for  
3 | everybody.

4 | **A.** Yes.

5 | **MR TIDSWELL:** What I don't want to do is encourage you to spend time on that which  
6 | is not going to be of any benefit to you.

7 | **A.** I fully understand that, sir, and I appreciate you considering us. I would say that  
8 | I don't have anything. In fact, I am saying I don't have any further points that I wish to  
9 | make on this. I would rather -- much rather spend the time being able to catch up and  
10 | prepare for this afternoon.

11 | **MR TIDSWELL:** Just to be clear, once we finish, that's the end of your evidence. You  
12 | can't come back and supplement it, and if you stand up in closing arguments and start  
13 | making submissions which are really evidence, then we will stop you.

14 | **A.** Yes.

15 | **MR TIDSWELL:** So this is your evidence and it is in a locked box once we finish here.

16 | **A.** Yes.

17 | **MR TIDSWELL:** Okay. Well, on that basis I think we are finished with you as  
18 | a witness, Mr Macfarlane. Thank you very much for your help with that. You are  
19 | released from the witness box and therefore released from purdah, and you can go  
20 | about discussions with your team, as is normally the case. Thank you very much for  
21 | your help this morning.

22 | **A.** Thank you.

23 | **(Witness withdrew)**

24 | **MR TIDSWELL:** We will take the short adjournment and start again at 2.00 pm.

25 | **(1.09 pm)**

26 | **(Lunch break)**

1 (2.00 pm)

2 **MR TIDSWELL:** Mr Macfarlane.

3 **MR MACFARLANE:** First of all, sir, I apologise for the slight delay getting through  
4 printing. It was a bit of a panic.

5 **MR TIDSWELL:** That's absolutely fine. I think Ms Berridge will call her witnesses.

6

7 **CARL ANTHONY HAGGER (sworn)**

8

9 **Examination-in-chief by MS BERRIDGE**

10 **MS BERRIDGE:** Good afternoon. Can I ask you to give your job title?

11 **A.** Head of sales for HOKA UK and Ireland.

12 **Q.** Thank you. Can I ask you to turn to your witness statement, your first witness  
13 statement, which is at B, 348?

14 **A.** Yes.

15 **Q.** Is that the first page of your first witness statement?

16 **A.** Yes.

17 **Q.** Can I ask you to turn to page 81?

18 **A.** Yes.

19 **Q.** Is that your signature?

20 **A.** Yes.

21 **Q.** Now your second statement, that's at B4, 87?

22 **A.** Yes.

23 **Q.** Is that the front page of your second witness statement?

24 **A.** Yes.

25 **Q.** And if I can ask you to turn to page 91, is that your signature?

26 **A.** Yes.

1 **Q.** And are both of these statements true to the best of your knowledge and belief?

2 **A.** They are.

3 **Q.** Thank you. I have no questions for you now, Mr Hagger, so I will hand you over

4 to Mr Macfarlane?

5 **MR TIDSWELL:** I think while Mr Macfarlane is getting up. Mr Hagger welcome. I think

6 you have water there I hope?

7 **A.** Yes, sir.

8 **MR TIDSWELL:** And you know about how the bundles work?

9 **A.** Yes, I am going to have some help.

10 **MR TIDSWELL:** If you feel the need to take some time or look at either side of

11 a page and familiarise yourself with a document, please do that, we don't want you to

12 just rely on your memory.

13 **A.** Thank you.

14 **MR TIDSWELL:** Now I think Mr Macfarlane will ask you some questions.

15

16 **Cross-examination by MR MACFARLANE**

17 **MR MACFARLANE:** Can I ask you a question, Mr Hagger? Were you involved in the

18 decision to refuse Running Shoes through an e-mail sent on 14th August? I can give

19 you a reference number, if you like.

20 **A.** The e-mail sent by Steve Yates?

21 **Q.** Steve Yates, yes?

22 **A.** Yes.

23 **Q.** So you are quite comfortable with that e-mail. How many other people were

24 involved in that decision-making?

25 **A.** I believe it was myself, Steve, Alex and Cameron.

26 **Q.** Right. Can I refer you to B/3/75.

1 **MR TIDSWELL:** Is that page 75? Yes.

2 **MR MACFARLANE:** It says there:

3 "After the meeting Mr Yates and I subsequently discussed the proposal with Alex  
4 Henderson in his role as legal adviser, Cameron Black, who is a sales director, and  
5 for reasons explained above, decided that we did not want to be part of the venture."  
6 Further if I refer you to paragraph 88:  
7 "We had all agreed on the wording."  
8 Have you got that?

9 **A.** I can't see where it says we have all agreed.

10 **Q.** Paragraph 88, the third line?

11 **A.** Yes.

12 **Q.** "We had all agreed on the wording."  
13 Can I refer you to an e-mail from Jonathan Midwood, which is C1/102? This is the  
14 e-mail from Mr Midwood asking that he would need for his records your current terms  
15 and conditions for Up and Running and any SDA that is in place.  
16 Did you send that SDA?

17 **A.** No, I don't think so.

18 **Q.** Do you know why?

19 **A.** You have the terms and conditions though.

20 **Q.** Say again?

21 **A.** You have the terms and conditions, though.

22 **Q.** I didn't ask whether we had it. Did you send it to him?

23 **A.** The SDA?

24 **Q.** Yes.

25 **A.** No.

26 **Q.** Is there a reason why?

1 **A.** We don't have a selective distribution policy. Our policy is informal.

2 **Q.** I am certain I read somewhere that you said you had a selective distribution policy  
3 in place since you inherited the product in 2014?

4 **A.** Where does it say that?

5 **Q.** It is in the witness statement. It is A3/25. It is in the defence document.

6 **A.** Yes. The standard operates a selective distribution policy.

7 **Q.** So you have had this selective distribution policy since 2014, yet as a senior person  
8 within HOKA you didn't know about it?

9 **A.** I knew the policy that we have. I think we are talking about slightly different things,  
10 though.

11 **Q.** What slightly different things are we talking about?

12 **A.** I think you are referring to a formal selective distribution policy with the likes of  
13 Asics and Brooks. We run an informal selective distribution policy.

14 **Q.** Informal did you say?

15 **A.** Yes.

16 **Q.** How informal? Does anybody else know about it?

17 **A.** Yes. It is enforced by our terms and conditions and the various criteria that we  
18 have in place.

19 **Q.** That's very interesting. So you say your selective distribution policy is in your terms  
20 and conditions?

21 **A.** Terms and conditions form part of our selective distribution policy, yes.

22 **Q.** So I don't quite understand. Maybe it is just me. It is part of your terms and  
23 conditions and the other part is part of what?

24 **A.** I don't understand the question.

25 **Q.** Well, you said it is part -- your terms and conditions are part of your selective  
26 distribution policy?



1 **A.** Yes.

2 **Q.** What is the other part?

3 **A.** There are various criteria that we have in place to ensure the consumer experience  
4 of the brand.

5 **Q.** So that's a criteria?

6 **A.** (Nods).

7 **Q.** Have you told anybody about this?

8 **A.** Most of those criteria that I am referring to are internal.

9 **Q.** Internal?

10 **A.** Internal to ensure that the brand is presented in the correct way.

11 **Q.** Is that a really good idea for you to have a policy and a criteria and not tell anybody  
12 about it?

13 **A.** That was never my decision.

14 **Q.** Right, but it doesn't seem logical to me. Can I ask you about the e-mail, the famous  
15 e-mail that came from Mr Yates? It is C1, 104.

16 "Hi, Jonathan,  
17 Can I just clarify SDA?"

18 You are with Mr Yates I am presuming when you are discussing these things?

19 **A.** When was this e-mail sent?

20 **Q.** It was sent on 10th August just two days before the fateful decision not to support  
21 Running Shoes?

22 **A.** I don't believe I was with Steve when he sent that, no.

23 **Q.** Can I ask you why Steve Yates would ask that question and not you or  
24 Mr Henderson or Mr Black? Why would he ask us what an SDA is? I know he has  
25 already said in his witness statement that he didn't know what an SDA was and I can  
26 probably understand that if he had never been involved in one, but you are a very

1 | experienced person. You have been with Asics for many years?

2 | **A.** I was with Asics, yes.

3 | **Q.** Why did he not ask you?

4 | **A.** I don't know.

5 | **Q.** You don't know. I am going to move on. It does seem strange is all I am saying.

6 | Right. Whilst through many witness statements you can recall many phone call

7 | conversations in great detail, I am going to refer you to B/71. Are you there. Sorry?

8 | **A.** Yes.

9 | **Q.** You say there in paragraph 72:

10 | "I have received a phone call from Mr Macfarlane in relation to this e-mail ..."

11 | As it stands you were in the middle of a department store with wife and children.

12 | I apologise. I didn't know:

13 | "... and received a verbal barrage centring around a complaint that one of our retailers

14 | was selling HOKA at a discount price and Mr Macfarlane was making various claims."

15 | So you can recall that?

16 | **A.** Yes, I can recall some of that, yes. What I put in my statement I recall.

17 | **Q.** Well, we can go into rhetoric as to why you received an alleged barrage. I would

18 | say something different.

19 | What I am trying to get at here is, if you can just give here a second to read

20 | that -- where am I? Yes. I am wondering during that conversation if you remember in

21 | the middle of November telling me that you had had complaints from other retailers

22 | about the prices of Running Shoes when we had that heated conversation, you and I?

23 | **A.** No, I don't ever recall you saying that or I don't ever recall seeing complaints.

24 | **Q.** But you don't recall seeing complaints, but do you recall saying to me that you had

25 | had complaints from other people and I said to you "Let's level on this. You don't want

26 | to see Up and Running going bust, which I am sure you don't want to see Up and

1 Running going bust. So can you level with me what this is all about. We are in  
2 a survival battle". Do you recall saying to me "I have had complaints"?

3 **A.** No.

4 **Q.** That's a pity. I didn't expect you to. Can I refer you to B3, 54, paragraph 21 of  
5 your witness statement? This is paragraph 216 in your witness statement where you  
6 reveal the supposed back story of the customer experience, a complete version of  
7 which can be found at C2, 563, but I think we have all seen that one, haven't we?  
8 That's the -- we will bring it up if it helps, please.

9 **A.** Is this a confidential document?

10 **Q.** It is confidential. We are not going to go into any numbers or anything like that, so  
11 don't be concerned?

12 **A.** So we are free to discuss?

13 **MR TIDSWELL:** I am not sure -- this is one of the difficulties with the way this has  
14 been done is we know the document is confidential but we don't know what exactly in  
15 it is confidential. If you have any concerns about an answer you think contains thinking  
16 that's sensitive, you should say so. Equally I am sure Ms Berridge will be alive to any  
17 questions which might lead in that regard. You will have to do your best,  
18 Mr Macfarlane. I am assuming the numbers are the more confidential aspects but  
19 I am not sure we can exclude other aspects.

20 **MR MACFARLANE:** My line of questioning is not going to be about anything that it  
21 controversially says in that document. My line of questioning is going to be based  
22 around when it was created.

23 **MR TIDSWELL:** Good. Why don't you get started with that? That's helpful.

24 **MR MACFARLANE:** In this document you have suddenly come up with a wording we  
25 have never seen before. It was created when?

26 **A.** It says in my statement it was created in 2020.

1 **Q.** It says it was created in 2020 and this is an internal document again?

2 **A.** Yes.

3 **Q.** Would you agree with me that this document sets out criteria, strategy, the ways  
4 forward, your business plan, things you would consider?

5 **A.** It sets out how we would classify accounts.

6 **Q.** Is it a criteria or is it strategy you are employing?

7 **A.** It is a criteria.

8 **Q.** Did you develop that document or was it somebody else?

9 **A.** I had drafted an initial version but actually this version was created by Cameron  
10 Black.

11 **Q.** So you say it was created in 2020?

12 **A.** To the best of my knowledge, yes.

13 **Q.** When in 2020?

14 **A.** I don't know.

15 **Q.** You don't know. It is quite important, because it was in August 2020 when you  
16 declined the website and it is important to know, but if you don't know, then you don't  
17 know. Right.

18 Can I refer to the documents that you created in 2020, which is C1/99/563? Would it  
19 have been a good idea if you had criteria built into there, as you said, wouldn't it have  
20 been a good idea to share that criteria with somebody?

21 **A.** It was shared with everybody at HOKA.

22 **Q.** But I am talking about 2020 when COVID is on and you have developed a criteria  
23 as you said, wouldn't it have been a good idea to share that criteria with your retailers,  
24 for instance? This is a criteria that you have set. You want people to adhere to. You  
25 want your dealers to adhere to it. You want us to adhere to it. So wouldn't it have  
26 been a good idea to give it to us, share it with us or tell us?

1 **A.** That was never discussed.

2 **Q.** You don't have an opinion as to whether it should have been shared?

3 **A.** We would have talked about some of the information within there specifically  
4 around levels of service, presentation and offer, but the other information probably  
5 isn't relevant.

6 **Q.** I just think it is a great shame that had we known that there was a criteria, then we  
7 might have been able to discuss that criteria with you in the middle of what was  
8 a stressful period for everybody else? But you decided to keep that criteria to yourself.

9 **A.** (Inaudible).

10 **Q.** That is a good point. In that document you are talking, using words I have never  
11 heard for some time about an ecosystem?

12 **A.** Yes.

13 **Q.** Ecosystem, is this something you have always had running in the business or is  
14 this just since 2020?

15 **A.** The wording was developed but it is a pretty common way of working. That's how  
16 I remember Asics working initially when I started working there.

17 **Q.** I am just wondering why in all the correspondence we have been having that the  
18 word "ecosystem" didn't ever crop up in correspondence until May 2024?

19 **A.** I am not sure I understand the relevance.

20 **Q.** I think it is fairly relevant if you have ecosystem that you want somebody to adhere  
21 to or you have ecosystem, a selling system, etc, that you want to use, why was it never  
22 presented in the defence, for instance, in the County Court proceedings?

23 **A.** I wasn't present in the County Court proceedings.

24 **Q.** Well, you did a statement for the County Court proceedings. You did a witness  
25 statement?

26 **A.** Yes.

1 **Q.** So in that witness statement there was never any mention about the fact that you  
2 are protecting your brand using your ecosystem. You just said -- well, you just said  
3 what you say in your statement. It is never been mentioned before, the word  
4 "ecosystem", before?

5 **A.** I am not sure.

6 **Q.** You are not sure why it hasn't been brought up. It just suddenly occurred in 2024  
7 in your witness statement and evidence that we will present this document we have  
8 had since 2020, never been seen before, never been shown in evidence. I am going  
9 to put it to you, Mr Hagger, in my own words. It didn't exist in 2020, did it?

10 **A.** Yes, it did.

11 **Q.** It did. Can I refer you to the famous e-mail. It is C1/438. You will see in  
12 paragraph 7 in blue writing?

13 **A.** Yes.

14 **Q.** "We do not have the strategy in writing."

15 **A.** Yes.

16 **Q.** Well, the question is why did you not therefore refer to this criteria strategy you  
17 have then? Why did you say "We don't have anything in writing" surely that's  
18 an opportunity for you to bring that document forward and say "We do have it in writing.  
19 Here it is"?

20 **A.** I think we clarified that wasn't a strategy. We said it was a criteria.

21 **Q.** Is there a difference between strategy and criteria? You can't have a criteria  
22 without a strategy. You can't have a strategy without a criteria, but surely whether you  
23 call it strategy or whether you call it criteria, it is the same thing. Ideal opportunity for  
24 you in the middle of 2021 to turn round and say "Here we have this document and this  
25 is what we are following", and then maybe we can all understand what game we are  
26 playing or where we are on. Why did you say you don't have that in writing? It is not

1 a strategy, but we do have this criteria in writing"?

2 **A.** There is no suggestion that the Running Shoes website was refused because of  
3 this criteria.

4 **Q.** You say one of the reasons the Running Shoes was refused was because we  
5 didn't conform with your criteria?

6 **A.** Signposting and terms and conditions.

7 **Q.** I will come to signposting in a second. I am just wondering, Mr Hagger, why with  
8 that golden opportunity you didn't say, and it must have been fresh in your mind  
9 because this was only created less than a year ahead, why did you not at that point  
10 say "Here is our criteria. We shouldn't be sharing this with you, Dennis. It is an internal  
11 documents but let's stop this argument at the beginning. Here is our criteria"?

12 **A.** I think we had established previously that Running Shoes hadn't been created so  
13 there was no criteria to judge it against.

14 **Q.** With due respect, Carl, we are talking 2021. The website had been created and  
15 was operating by then. This e-mail is dated in 2021.

16 **A.** But we never had any issues with the content of the website.

17 **Q.** Well, maybe I am getting confused, because I am not the sharpest pin in the box,  
18 but I thought your problem with the website was that we didn't conform with your  
19 criteria?

20 **A.** No. It didn't conform with our signposting request.

21 **Q.** Okay. We will go to signposting. Can you show me anywhere in any  
22 correspondence where the word "signposting" has been used, where you say we have  
23 to point our website as Up and Running or we have to do this and that. Can you point  
24 out anywhere in our correspondence where it says that?

25 **A.** I believe it is in our witness statements and evidence as well.

26 **Q.** Witness statements are 2024. We had our dispute in 2020. Can you point me

1 anywhere where it says -- we are designing a website. We are trying to survive the  
2 COVID thing. If you had said to me in 2020 "Where is your signposts?", in fact, I have  
3 noticed in an e-mail in September you have actually said that to Alex Henderson that  
4 we shouldn't go along with the website that doesn't state where it is listed from, but  
5 that was an internal e-mail. Right? Has there been any occasion where you have  
6 said between 2020 and 2024 that there's a requirement for us to point at Up and  
7 Running before your witness statement?

8 **A.** I don't know.

9 **Q.** I can tell you there hasn't, just to enlighten you. I am going to put it to you,  
10 Mr Hagger, that that is just made up for the sake of this hearing, this case, that you  
11 said "We are running out of reasons here for refusing the Up and Running website, so  
12 we are going to create a requirement for pointing" -- you call it signposting, but pointing  
13 "powered by Up and Running". We covered all that off earlier. I don't think I need to  
14 go into all the relevant documents. Where has it been said that that is a requirement  
15 in your criteria? I don't mean just verbally saying so. I mean if there are rules that you  
16 are setting, then help us to adhere to those rules if you can show me where we should  
17 have adhered to those rules?

18 **A.** I am not sure what's the question there.

19 **MR TIDSWELL:** I think what he is asking you, Mr Hagger, is he wants to know  
20 whether Deckers have articulated to Up and Running at any stage.

21 **A.** Yes.

22 **MR TIDSWELL:** Requirements that will go to what's been referred to now as  
23 signposting, but which I think perhaps more accurately --

24 **A.** I believe we referenced our terms and conditions clause 15 and then there's a link  
25 to the e-mail sent in 2019 talking to -- about notifying us of additional websites. So  
26 I believe we did.



1 **MR TIDSWELL:** Yes, and just so we are clear, that is the totality of the -- before  
2 consent is requested by Up and Running, that is the totality of the communications  
3 about that that you are aware of?

4 **A.** Yes, with regards to signposting, yes.

5 **MR TIDSWELL:** I think, Mr Macfarlane, that's what you are asking, isn't it? You want  
6 to know what it is that they have said to you about the requirements and I think the  
7 answer is it is in the terms and conditions and it is in the 2019 e-mail. That I think is  
8 as far as Mr Hagger knows it I think.

9 **MR MACFARLANE:** I am very grateful. Can I ask you were you happy or did Running  
10 Shoes comply with your criteria?

11 **A.** Once we had seen it in terms of service presentation and offer I never got the  
12 chance to test their service criteria but the presentation certainly did. The  
13 offer -- I don't know. I can't recall what brands and what products were available on  
14 there.

15 **Q.** Just as a matter of interest had we not fallen out, do you think you might have  
16 approved the website?

17 **A.** That's hard to speculate.

18 **Q.** It is not my question here. Well, you are the person in charge. You are the person  
19 who makes the decisions. It is not speculation. It is just well worth asking the  
20 question?

21 **A.** Potentially based on purely on the website yes, but we still had commercial  
22 concerns.

23 **Q.** Oh, yes. Can I ask you to go to B/75, please? Paragraph D right at the top of the  
24 page:

25 "In addition to this the Running Shoes website proposal did not comply with Deckers'  
26 criteria."

1 Did I hear you say earlier you were happy that it did comply with Deckers' criteria?

2 **A.** I think you need to take the sentence as a whole:

3 "... did not with Deckers' criteria that online stores have a domain name that's identical

4 or highly similar to the retailer's bricks and mortar store."

5 **Q.** We will try to deal with that. An identical website. How many identical websites

6 have Intersport got? Intersport have 207 retailers in the UK and we can agree that as

7 we both know the trade?

8 **A.** Intersport no longer exist in the UK.

9 **Q.** That's not quite right, because I have got an image which I will be able to pull up

10 for you. I think you will have seen it in Donald's -- George Donald's. We will pull it up

11 in a second?

12 **A.** George Donald I believe are a member of the AIS Group.

13 **Q.** But it says Intersport on then?

14 **A.** On the store facia.

15 **Q.** On the store facia?

16 **A.** But they are not a member of Intersport.

17 **Q.** But it says Intersport on them. The website does not say Intersport. It says

18 excell-sports.com. You are selling HOKA. That's no different to Running Shoes.

19 I should ask that as a question rather than a statement. How different is it from George

20 Donald's warehouseman, a well-known specialist retailer, how is that different with the

21 Excell Sports, which has no relationship to the account, which is George Donald's

22 Warehouseman Limited, how is that different to their stores, which say Intersport over

23 them, and how do you square that one with the way that you refused Running Shoes?

24 **A.** I am not familiar with that particular account, but I believe -- I recognise George

25 Donald from within our system. I believe that is their -- that is their business name but

26 the account -- the trading name is Excell Sports.

1 **Q.** No, the internet name is Excell Sports, not their trading name. Their trading name,  
2 and we have it in here in evidence, and we have the pictures on the exhibit. I will give  
3 you the reference number. Sorry. I will need my glasses. It is D, 167, please, to D,  
4 171 inclusive. Have you got that? Sorry?

5 **A.** Yes.

6 **Q.** We started off with a Companies House image showing George Donald as the  
7 trading name, Warehouseman, that well-known running brand. They retail all sorts of  
8 things, washing machines, tumble dryers and knitting amongst other things. What  
9 happened to your criteria about only going into specialist running stores?

10 **A.** It is not an account I am familiar with.

11 **Q.** It still breaches your account whether you are familiar with it or not. It still breaches  
12 that, doesn't it?

13 **A.** Without understanding the context from one of my reps who opened this store,  
14 I wouldn't know. He may have an explanation.

15 **Q.** But you said earlier in your witness statement that approval of retailers is  
16 a combination of the representative and yourself. They must have known about this  
17 appointment?

18 **A.** They will request approval and I will give it. I didn't -- I wasn't aware that they have  
19 a separate website to the -- to the bricks and mortar store.

20 **Q.** Wouldn't the rep have been aware of it who covers the area?

21 **A.** I would have hoped so, yes.

22 **Q.** He didn't report this back to you?

23 **A.** No.

24 **Q.** This criteria that you were so protective about?

25 **A.** No, this is the first I have seen that.

26 **Q.** Is it the first, because you actually knew about it when we were talking about it just

1 now, but the main point here is that this doesn't sit too squarely with Running Shoes  
2 not pointing at Up and Running and neither does Excell Sports. In fact, it is doing  
3 exactly the same. It is trading in a different name. So how can you justify the position  
4 with Running Shoes when you seem to want to justify the position with George Donald.  
5 Isn't there inconsistencies here?

6 **A.** It looks like our criteria hasn't been correctly applied in this case, but that doesn't  
7 mean the criteria is not there. I was aware that Up and Running was  
8 opening -- proposed to open the website [runningshoes.co.uk](http://runningshoes.co.uk) with no connection to the  
9 initial store, so we refused it on that ground. I wasn't aware of this. So I wasn't able  
10 to refuse it.

11 **Q.** Isn't it the case, though, that you have given this as a reason, that you want it to  
12 be in the name of the bricks and mortar store and the images in front of you, despite  
13 what you say about Intersport, all the shops are displaying Intersport. One or two of  
14 them have another name other than Intersport, but they are in small type. They have  
15 been highlighted with arrows in the red. Something fit. 169, which is part of the same.

16 **A.** Yes. Where it says "Just right".

17 **Q.** Just right, yes. It really does sit at odds. Are you a familiar with the Metro criteria  
18 that we have been discussing earlier?

19 **A.** I am not.

20 **Q.** The Metro criteria says that it has to be applied in a uniform manner, your criteria  
21 has to be applied in a uniform manner. Would you say that this is an example of it  
22 being applied in a uniform manner?

23 **A.** This looks like an oversight on our part.

24 **Q.** That is a great shame. That is a great shame. It still is a fact that you must agree  
25 with me that it hasn't been applied, therefore, in a uniform manner?

26 **A.** We try to apply the criteria -- I certainly would try to apply the criteria wherever

1 I can. I wasn't part of this, this one here, but I was a part of the Running Shoes and  
2 I was applying our criteria consistently.

3 **Q.** Consistently with George Donald's?

4 **A.** With the criteria.

5 **Q.** Can I just ask you a question here? When did you open the account with George  
6 Donald?

7 **A.** I'm not sure.

8 **Q.** You're not sure?

9 **A.** (Shakes head).

10 **Q.** You weren't aware of George Donald then at all?

11 **A.** I am aware of George Donald because I have seen the name within our system,  
12 but I am not aware of when it was opened.

13 **Q.** I can tell you according to the data that you sent us the account was opened in  
14 2023, only a year ago, and you are involved in the accounts. Can I put it to you that  
15 you maybe have a selective memory?

16 **A.** No.

17 **Q.** It appears so?

18 **A.** Right.

19 **Q.** It appears to me, and I am going to put this to you as a question, isn't this all about  
20 really finding a criteria thereafter, backfilling where you were, because the whole  
21 problem with Running Shoes was only about price?

22 **A.** Price was never in issue.

23 **Q.** You have had lots of competition law training I believe in March 2020  
24 Mr Henderson ran a programme with you. Is that correct?

25 **A.** I don't know the dates.

26 **Q.** It is in the -- we don't need to quibble over when it was. You will be fully aware,

1 because one of the firms that were absolutely terrified about price fixing allegations  
2 was Asics, your previous employer. You will also be aware the dispute that I had with  
3 somebody else over the price fixing allegations was Asics. Were you aware of that?

4 **A.** Posthumously, yes.

5 **Q.** Yes, and you were aware that Asics very sadly in those days, and it is nothing to  
6 do with the people who are there now, were fined rather heavily for price fixing football  
7 shirts and those sorts of things and it didn't help them going into a problem with me at  
8 that time, or with Up and Running should I say really. So you will be acutely aware  
9 that you don't talk pricing fixing -- price fixing. There are other ways to deal with it, but  
10 not openly saying so.

11 I am putting it to you, Mr Hagger, or if you prefer me to call you Hagger?

12 **A.** Yes, please.

13 **Q.** That indeed you couldn't just come along and say "Dennis, this is all about prices".  
14 Right?

15 **A.** I repeat again that it was never about price.

16 **Q.** We have differing opinions on that. Can I ask you about ShoeFit Limited?

17 **A.** Yes.

18 **Q.** I don't know whether we need to pull these up, because we both agree on the  
19 content of what has been said. ShoeFit had a very similar scenario by Precious Soles?

20 **A.** This was one that we have identified within the statements that was inconsistently  
21 applied.

22 **Q.** Yes. In other words, it was another Running Shoes/Up and Running situation?

23 **A.** No. The credit application form said ShoeFit/Precious Soles. We were of the  
24 understanding that both the store and the website would be signposted as Precious  
25 Soles. We later found out that it wasn't and had corrected that within how we had set  
26 the account up.

1 **Q.** I think what you said -- we can pull it up -- is that you negotiated and you were  
2 happy with the website once you saw it. Is that true?

3 **A.** I would have to look at the evidence to see.

4 **Q.** Have we got that one, Clare? Whilst we are pulling that one up and I will give you  
5 the reference number on it. What I am getting at here, Mr Hagger, is that you  
6 negotiated with Precious Soles/ShoeFit?

7 **MR TIDSWELL:** Why don't we just wait to have a look at the witness statement, then  
8 you can ask him the question. Do you have a paragraph reference? B/69.

9 **MR MACFARLANE:** Yes, B/69.

10 **A.** Thank you. Could you please point me to the place where it says "negotiated".

11 **Q.** I haven't got it in front of me yet but it says that you took a look at their website.  
12 It fitted your criteria and I believe it says you opened an account then in the proper  
13 name.

14 "We assessed the website and formed the view that it did meet the criteria. So we  
15 have now set up a separate account with ShoeFit."?

16 **A.** Yes.

17 **Q.** Can you maybe explain to the tribunal why you could not have done that with  
18 Running Shoes?

19 **A.** We felt that Running Shoes was misleading the consumer, but we also had  
20 commercial concerns as well.

21 **Q.** Mr Hagger, we have already established that you didn't give those as initial reasons  
22 for it. We have already established that ShoeFit and Precious Soles were operating  
23 contrary to your criteria. It is obvious for anybody to see that you have gone in there  
24 and negotiated with the guys and said "Listen, it is not fitting. Can we simply open  
25 an account". Is there any reason why -- I don't recall any negotiations from you?

26 **MR TIDSWELL:** Mr Macfarlane, I think you are going to have to formulate questions.

1 I am afraid you are making a bit of a speech. If you could keep it slightly shorter  
2 sentences and distinct questions, that would be helpful.

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

4 **MR TIDSWELL:** No, it is not easy for you to pick this all up. You are doing fine.

5 **MR MACFARLANE:** Mr Hagger, can you refer to any level of negotiation that  
6 happened during or before you sent us an e-mail saying "We do not want to be part of  
7 this project".

8 **A.** I believe there is an e-mail from Steve Yates putting to you various options and  
9 during discussions that we had we discussed ways that we could continue trading with  
10 Up and Running, but we were very clear that we didn't want to be part of the Running  
11 Shoes website.

12 **Q.** Yes, but I am talking here, if we can, about negotiations with Running Shoes, not  
13 Up and Running. You negotiated with ShoeFit.

14 **A.** (Overtalking).

15 **Q.** Were there any negotiations other than "No"?

16 **A.** There was never any negotiations with ShoeFit. It was purely an administrative  
17 change.

18 **Q.** But you must have gone to ShoeFit and said "We want to change this and we now  
19 want to open an account". You said "We want to open an account with ShoeFit". Is  
20 there any reason --

21 **MR TIDSWELL:** If that's the question, let him answer it.

22 **A.** What was the question?

23 **MR TIDSWELL:** The question is do you know what happened in relation to ShoeFit?  
24 The suggestion is you must have gone and had a discussion with him. I think you said  
25 it was an administrative change. Does that mean there was no discussion with  
26 ShoeFit?



1 **A.** There was no discussion with ShoeFit. It was purely an administrative change  
2 when we realised that error.

3 **MR MACFARLANE:** This is a question. You just changed the account without  
4 speaking to them about it?

5 **A.** We added a new account. So there is one account for Precious Souls and one for  
6 ShoeFit.

7 **Q.** So it is fair to say you opened a new account for ShoeFit?

8 **A.** Yes.

9 **Q.** Is there any reason why you couldn't open an account for Running Shoes?

10 **A.** Because of the commercial concerns that we had.

11 **Q.** Have you -- let's deal with these commercial concerns. Have you looked at Up  
12 and Running's accounts?

13 **A.** No.

14 **Q.** Did you ask for any commercial information prior to this refusal for want of a better  
15 word?

16 **A.** We made our own assessment.

17 **Q.** Did you look at Companies House?

18 **A.** We take our credit information from a third party credit profiler.

19 **Q.** But did you look at Companies House?

20 **A.** No.

21 **Q.** Did you ask for any bank references?

22 **A.** No.

23 **Q.** Did you ask for any financial information?

24 **A.** I believe I raised my financial concerns with you at one point but was quickly shut  
25 down.

26 **MR TIDSWELL:** Mr Hagger, is there any record of the credit information you had

1 about Up and Running prior to August 2020?

2 **A.** Sorry. Was there any ...?

3 **MR TIDSWELL:** Do we have any material before us, any record of you seeing  
4 information from the third party credit provider, the credit information provider, about  
5 Up and Running's position; in other words can we see it documented anywhere what  
6 you have received and learned?

7 **A.** I think only -- it is definitely within my witness statement. Whether it is referenced  
8 in the e-mails back and forth between myself and Mr Henderson I'm not sure.

9 **MR TIDSWELL:** I think I am asking a slightly different question, which is not so much  
10 how it has been characterised by you, but do we have the source material? In other  
11 words, can we see what you received?

12 **A.** Not that I am aware of.

13 **MR TIDSWELL:** Can you tell us what sort of information would that have typically  
14 contained? What would you get in a credit report about Up and Running?

15 **A.** So all I'd get is the figure that the third party profiler has recommended. That was  
16 6,500, but we have a credit analyst who does all the background work on that.

17 **MR TIDSWELL:** And the figure represents what? What does 6,500 represent?

18 **A.** What credit we could extend to them.

19 **MR TIDSWELL:** You are saying that the recommended credit limited was £6,500.

20 **A.** £6,500.

21 **MR TIDSWELL:** Yes. Okay.

22 **A.** At the time we already extended £90,000 worth of credit, because £6,500 is not  
23 a lot to go across 30 stores.

24 **MR TIDSWELL:** Thank you.

25 **MR MACFARLANE:** I was about to come to that, Mr Hagger. Do you recall in 2019,  
26 because you will have been part of this, where you wanted to take further orders from

1 us, larger orders? We were really on good terms in those days. Do you recall the  
2 negotiations for want of a better word, us increasing our orders and at the same time  
3 you were going to increase the credit allowance from in those days 69,000. Can we  
4 just bear in mind that the credit reference agencies are insurance companies. If you  
5 recall, we did increase the credit limit. I think it was 90 or 100,000.

6 **A.** The number I have in my memory is 90,000.

7 **Q.** I think we can both agree with that?

8 **MR TIDSWELL:** When did that happen, Mr Hagger?

9 **A.** I don't know, I am afraid.

10 **MR MACFARLANE:** I can tell you, sir.

11 **MR TIDSWELL:** I don't want you to tell me, Mr Macfarlane. It is Mr Hagger giving  
12 evidence, not you. I think Mr Macfarlane is suggesting it was in the context of  
13 discussions about supply during COVID, which would suggest it would be October.  
14 Does that sound the right time? Is that the sort of ball-park we are talking about?

15 **A.** Honestly I have no idea when the credit limit was extended and it would have gone  
16 up. I think the recommended limit was 6,500. That may have been the credit limit at  
17 the time when we started trading with them back in 2016 but it would have been put  
18 up. Each time we do that that's not in my gift, authority to put it up. We will put a formal  
19 request in to our credit control team, who will do the assessments based on the order  
20 book that we have, and they are the ones that will increase it, but they were the ones  
21 that manage our exposure to risk.

22 **MR TIDSWELL:** And again I think this is a slightly different question from the one  
23 I asked you before. We don't have here a history of the credit limits that were applied  
24 from time to time, do we?

25 **A.** No.

26 **MR TIDSWELL:** Is that information still available at Deckers? Is that material that's

1 kept?

2 **A.** Potentially, but I would have to -- we would have to check internally with our credit  
3 control team.

4 **MR TIDSWELL:** Would you typically know from time to time -- would you have easy  
5 access to a source that told you what the credit limit was from time to time?

6 **A.** Not me personally, no.

7 **MR TIDSWELL:** So, for example, if you were dealing with Mr Macfarlane or dealing  
8 with the account, talking to Mr Yates, it wouldn't be straightforward to find out what  
9 that was?

10 **A.** We would be informed if the credit limit had been increased. So we would then be  
11 able to tell the customer, but we are never given a record of when those increases  
12 happen. Potentially at some time it could have been recorded through e-mails but  
13 because of our e-mail retention policy, we no longer have that.

14 **MR TIDSWELL:** And you can't carry it around in your head. You don't remember the  
15 credit limit for different customers?

16 **A.** No.

17 **MR TIDSWELL:** Sorry Mr Macfarlane. I am trying to be helpful and move things along  
18 a bit.

19 **MR MACFARLANE:** Were you aware at any time that you were unable to make any  
20 deliveries because the account was on stop.

21 **A.** Not off the top of my head, no.

22 **Q.** Within your first statement, if I can go to your first witness statement, paragraph 87,  
23 B/375. You list the reasons and summarise that you were immediately against HOKA  
24 being sold on Running Shoes?

25 **A.** Sorry. Where are we?

26 **Q.** Paragraph 87?

1 **A.** Yes.

2 **Q.** You list those reasons and summarise that you were immediately against HOKA  
3 being sold on Running Shoes. Those reasons are set out in paragraph 86(a) to (e) of  
4 B3, 74-75. Your first reason, that you were sceptical about the warehousing?

5 **A.** Yes.

6 **Q.** Given that we had a warehouse, what gave you concerns about our warehousing?

7 **A.** I have not seen your warehouse first-hand, but I have been told that it was  
8 a lock-up on a residential street in Harrogate.

9 **Q.** Yes, but what gave you concern? You are concerned that it was a lock-up on  
10 a residential street in Harrogate?

11 **A.** Concerned at the proposal to take on the volumes of stock that you were talking  
12 about and how that could possibly be serviced by a lock-up on a residential street in  
13 Harrogate.

14 **Q.** A little bit more than a lock-up?

15 **A.** Like I say, I have not seen it. That's just what I was told.

16 **MR TIDSWELL:** I am afraid you don't have -- it is not the right thing to do to tell us  
17 about it, Mr Macfarlane.

18 **MR MACFARLANE:** Our logistics capabilities and experience was another reason?

19 **A.** Yes.

20 **Q.** Can I ask you whether you knew that we already had a website running?

21 **A.** I did know, yes. Our interpretation was that it was comparatively -- it performed  
22 comparatively poorly against your competitors. Our analysis was that it was roughly  
23 between 3 and 5% of your total business.

24 **Q.** Which is absolutely right, but we already had experience how to run a website.  
25 Another question is who said that we were going to go for the volume -- you mentioned  
26 volumes that we handle?

1 **A.** Yes.

2 **Q.** I have already mentioned that we had £1 million of stock, not just of yours but many  
3 others. Would you imagine --

4 **A.** In your stores.

5 **Q.** Say again?

6 **A.** In your stores.

7 **Q.** In our warehouse. If we --

8 **A.** I think you referred in the evidence where you say your stock was stuck in your  
9 stores.

10 **Q.** I also think you will find we had new stock coming in and we took it out of the stores  
11 and put it into the warehouse?

12 **MR TIDSWELL:** Again I think, Mr Macfarlane, just try to crystallise the question. That  
13 would be helpful.

14 **MR MACFARLANE:** So I am asking you what made you think we were asking for  
15 volumes of that nature? I noticed that you --

16 **MR TIDSWELL:** Pause there.

17 **A.** One of the items on the proposal was to do SMUs. Minimum quantity for an SMU  
18 for HOKA is 2,500 units.

19 **MR TIDSWELL:** SMU is?

20 **A.** Special make up, shoes specially designed for Running Shoes.

21 **MR MACFARLANE:** Are SMUs a good enough reason to refuse Running Shoes'  
22 website given that we already had stock for our website?

23 **A.** The question was around my concerns for your warehouse being able to take the  
24 stock and I am saying that the minimum quantity for an SMU is 2,500 units. That  
25 formed our analysis that the warehouse wasn't sufficient.

26 **Q.** But you said earlier that you had not been to our warehouse, Mr Hagger?

1 **A.** No. I am going on what I had been told.

2 **Q.** You don't think it was worth even visiting before you turned us down?

3 **A.** I couldn't even if I tried during COVID.

4 **Q.** What made you think that 2,500 pairs of shoes is too much?

5 **A.** Because what I had been told was that it was a lock-up on a commercial street in  
6 Harrogate.

7 **Q.** But you have never seen it yourself?

8 **A.** That is true.

9 **Q.** Nor seen how big it was?

10 **A.** I had been told there was one person working in it, so that helped form my opinion  
11 of the size.

12 **Q.** Would it come as a surprise if I told there were 15 people --

13 **MR TIDSWELL:** Unless that's in the evidence somewhere, we can't have you giving  
14 evidence while you are cross-examining.

15 **MR MACFARLANE:** Right. I need to put my glasses back on.

16 **MR TIDSWELL:** Just so you know, Mr Macfarlane, we are going to have a break in  
17 ten minutes. You might have a look at where that naturally falls and you can say so.  
18 If you don't, I will. Have a look and see what you can sensibly do in the next five to  
19 ten minutes and then we can have the break then.

20 **MR MACFARLANE:** Tell me when I will.

21 So you have taken word from what other people have told you about our logistics, our  
22 experience and our warehouse that you have never seen but you have made  
23 a decision, and on our credit ability, but you have never looked at our accounts. Is  
24 that true?

25 **A.** On Companies House.

26 **Q.** Well, yes, on Companies House or even looked at how the account was running?

1 **A.** We had only gone by our own internal information.

2 **Q.** But other people had told you and you went on their word?

3 **A.** Yes.

4 **Q.** Did you think about asking us?

5 **A.** Like I say, as I think I mention in my statement I tried to broach the subject with  
6 you but was quickly shut down.

7 **Q.** I am talking about did you tell us before 14th August when you refused the  
8 website?

9 **A.** I don't know.

10 **Q.** It is very strange?

11 **MR TIDSWELL:** Mr Hagger, can I ask you about those things we have been talking  
12 about and the information you have accumulated in order to have the discussion and  
13 make the decision. Can I ask you how that was recorded? Now I appreciate there  
14 has been the deletion of documents pursuant to the policy.

15 **A.** Yes.

16 **MR TIDSWELL:** I am interested to know whether you went and gathered information  
17 in order to have -- to make the consideration and have the discussions. If so, whether  
18 that was provided to you in written form, which now obviously doesn't exist because  
19 we don't have it, and if not, how otherwise you would have gained the information that  
20 you have just discussed with Mr Macfarlane. I appreciate it is a while ago and you  
21 may not be able to answer precisely, but just as a matter of ordinary course as well,  
22 what is the nature of the information you would have had available to you and how  
23 would that have been recorded?

24 **A.** I think it is information that had been accumulated over the period from 2016 when  
25 the account was opened up until this point and that information was -- it was a fairly  
26 reflective decision based on the information that we have. The credit limit already



1 being massively stretched during a period of financial crisis, it made no sense to us to  
2 expose ourselves further with a customer in an online business where they were  
3 already --

4 **MR TIDSWELL:** Forgive me for interrupting you. What you are saying is interesting  
5 but it is not actually an answer to my question.

6 **A.** Okay.

7 **MR TIDSWELL:** What I am really asking you about at the moment. I don't want to  
8 trample all over Mr Macfarlane's cross-examination. I just want to understand how the  
9 information would have been put together. I think so far you have told me you had a  
10 lot of things in your head as a matter of --

11 **A.** That's correct, yes.

12 **MR TIDSWELL:** It sounds to me as if some of that came from third parties, like what  
13 you have been told about the warehouse because you had not been there.

14 **A.** Yes.

15 **MR TIDSWELL:** I don't know if you are able to identify whether you had been told  
16 sometime before or do you think you made enquiries and learnt that at the time that  
17 you were considering the warehouse issue?

18 **A.** I think that was by the rep who managed the account before Steve.

19 **MR TIDSWELL:** Yes, and then do you think that any of this is documented or was  
20 documented, because it may no longer exist. For example, we don't see any of the  
21 data that you have talked about?

22 **A.** Yes.

23 **MR TIDSWELL:** In any of the e-mail exchanges that have survived.

24 **A.** Uh-huh.

25 **MR TIDSWELL:** I am just wondering whether you think there would have been a body  
26 of e-mails or documents or something else that recorded all of this or was it all done

1 because it was in your head and you were able to communication it in the discussions  
2 you would have?

3 **A.** I think that was probably a communicated conversation.

4 **MR TIDSWELL:** Rather than documented?

5 **A.** Yes.

6 **MR MACFARLANE:** Thank you, sir.

7 **MR TIDSWELL:** Thank you, Mr Macfarlane.

8 **MR MACFARLANE:** Mr Hagger, can you explain how in your words the premium  
9 nature of Up and Running and our experience of 32 years in retail, an award winning  
10 business, that Running Shoes would be run differently and how would that affect the  
11 premium nature of HOKA?

12 **A.** I think it was in relation to the signposting, the fact that we thought it would be  
13 misleading to consumers who they were buying from.

14 **Q.** How would that affect the premium nature of HOKA?

15 **A.** We would be concerned by consumers not being able to identify Running Shoes  
16 as an authorised partner of HOKA.

17 **Q.** Does that mean that in effect there could never be any new entrants in terms of  
18 internet sites on to the market?

19 **A.** No, there's plenty of examples of new entrants.

20 **Q.** So how would -- the difference between other new entrants on to the market and  
21 Running Shoes entrants into the market which is supported by an already existing  
22 premium retailer?

23 **A.** Because a new customer entering the market would not be trying to hide their true  
24 identity.

25 **Q.** Do you understand why it is necessary -- in my cross-examination it was made  
26 clear -- do you understand why it is necessary that products that are being sold to

1 customers could cause issues for the existing retailer?

2 **A.** Sorry. I don't understand the question.

3 **Q.** Do you understand why Up and Running prefers to be at arm's length from Running  
4 Shoes?

5 **A.** I understand why, yes.

6 **Q.** You do understand that?

7 **A.** Yes.

8 **Q.** So what is the problem then with a customer buying from Running Shoes? Is it  
9 not the case that a customer would prefer to buy it cheap?

10 **A.** I understand the benefits to Up and Running. I don't understand the benefits to  
11 HOKA and my concerns are about the benefits to HOKA.

12 **MR TIDSWELL:** Mr Hagger, what I think Mr Macfarlane is asking you to is to explain  
13 I think why it matters either to the brand or indeed to customers to know that there's  
14 a linkage between Running Shoes and Up and Running. I just wonder if you can  
15 explain that a bit more fully?

16 **A.** I think it is important that the consumer fully understands who they are buying from,  
17 that it is a legitimate website, that if there were any issues with the product, with  
18 service, that they can be properly serviced.

19 **MR TIDSWELL:** But why -- it is not clear to me why that would be not the case if they  
20 thought they were buying from runningshoes.com unless there was a proper provision  
21 of support. In other words, if runningshoes.com were set up with adequate standards  
22 of service, presentation and so on.

23 **A.** We didn't know that at the time.

24 **MR TIDSWELL:** You did not, but as you fairly said earlier, those were not the reasons  
25 why you declined to approve it. So we are really at the so-called signposting point.

26 **A.** Yes.

1 **MR TIDSWELL:** It seems to me that -- well, what I am trying to understand is why  
2 a customer should care at all that they are told about a connection between Running  
3 Shoes and Up and Running? Why does it make any difference to them?

4 **A.** I mean -- sorry. Can you ask the question again?

5 **MR TIDSWELL:** Why would it make any difference to a customer to know there is  
6 a connection between Running Shoes and Up and Running? If I go on to a website  
7 of Up and Running and I buy shoes at a price that I am happy with and the returns and  
8 the service and everything about it are satisfactory, why do I care who owns it?

9 **A.** We were concerned that there were nefarious reasons to have a website that is  
10 not connected with your own name. So perhaps it is the concerns for the brand as  
11 opposed to the consumer. I completely understand your point.

12 **MR TIDSWELL:** Just stick with the consumer for the moment and then we will come  
13 back to the brand. Just as far as the consumer is concerned, tell me if I am wrong,  
14 but I am not hearing from you anything that says the consumer really should care that  
15 much?

16 **A.** As long as they are serviced correctly I guess they don't care.

17 **MR TIDSWELL:** So let's turn to the brand.

18 **A.** Yes.

19 **MR TIDSWELL:** Can you explain what you mean by "nefarious". I don't understand  
20 what you mean by that. Can you give an example what concerns you might have?

21 **A.** Counterfeiting or any -- I don't understand a legitimate reason for them not to  
22 disclose who they are doing business with.

23 **MR TIDSWELL:** Well, I think Mr Macfarlane has just asked you that question and  
24 I think you just said you did understand that.

25 **A.** I understand for them. I understand for Up and Running, because they are trying  
26 to maintain prices in their Up and Running business. I don't see that as a benefit to

1 the consumer or to HOKA.

2 **MR TIDSWELL:** I think we are approaching this as a consideration of the discussion  
3 with Up and Running rather than a general point. So can we proceed on that basis?  
4 We are just talking about the discussion you are having. There may be more general  
5 points. I understand that you may have a policy to deal with more general points, but  
6 there was not really a suggestion that Up and Running was going to put counterfeit  
7 material on their site, was there?

8 **A.** No.

9 **MR TIDSWELL:** You have dealt with them for a long time and that would be a very  
10 odd thing to do, wouldn't it?

11 **A.** Yes.

12 **MR TIDSWELL:** If you are thinking about the brand what would the concern be in  
13 relation to Up and Running from Deckers' point of view? How might it impact the brand  
14 to have a separate website?

15 **A.** I am not sure how I can answer that question.

16 **MR TIDSWELL:** Thank you. I think maybe, Mr Macfarlane, we might take the break.

17 **MR MACFARLANE:** That's exactly what I was going to say, sir.

18 **MR TIDSWELL:** Good. Thank you. We will rise for ten minutes and come back at  
19 3.25.

20 I am so sorry. Before we do that, Mr Hagger, you know, don't you, that you are not  
21 supposed to discuss your evidence with anybody. So if you can avoid conversations,  
22 that's better. If you do have to have conversations, then, of course, they should be  
23 about anything other than the evidence you are giving. Thank you very much.

24 **(Short break)**

25 **MR TIDSWELL:** Mr Macfarlane.

26 **MR MACFARLANE:** Thank you, sir. I am very conscious of the time we are running

1 to, sir.

2 **MR TIDSWELL:** Just in terms of where you are roughly how far through are you?

3 **MR MACFARLANE:** I could go on forever. I am conscious of the time. I am going to  
4 try to skip through these as quickly as possible.

5 **MR TIDSWELL:** You have the luxury of whatever you feel you need to do. On the  
6 other hand, if you are able to focus on the most important things, that would be helpful.  
7 I certainly don't want you to rush over anything you think is important. I appreciate this  
8 is not straightforward for you and I think we all understand that. You know, I don't want  
9 you to feel at the end of the day you regret not having asked questions, because once  
10 Mr Hagger is gone, he is gone. I think it would be helpful -- I don't think -- I wasn't  
11 planning to sit beyond 4.30 unless there is any sort of firm request for that and I do  
12 have a bit of a time constraint anyway. So I think we will want to wrap up by 4.30.  
13 Now that doesn't mean you have to be finished but it would be quite helpful if you were,  
14 if I can put it that way.

15 **MR MACFARLANE:** I will target that.

16 Mr Hagger, I will whip through these as quickly as possible. So just to summarise,  
17 one of your concerns was the financial means that we had and you have already said  
18 that you hadn't asked us for any -- is it agreed that you haven't asked us for any  
19 financial information?

20 **A.** I think I recall, and it is in the evidence that at one point I raised financial concerns  
21 but they were shut down. I agree I didn't ask you for any.

22 **Q.** Is it fair -- do you recognise is it fair to say that you recognise that we had a million  
23 pounds worth of stock ready to go?

24 **A.** I don't know.

25 **Q.** Okay. If you don't know, that's fine. Right. I want to take you -- that's two of the  
26 reasons we have covered off in your reasons paragraph. I want to take you to the

1 third reason, the credit limit concerns and to ask for what you meant by "Bluster" in  
2 paragraph 86(c) of the document. Clare, do you have that?

3 **A.** Yes. What was the question? Sorry.

4 **Q.** Yes. I am just coming to that. So we provided you with no evidence to show how  
5 it was funded. Is that correct?

6 **A.** Yes.

7 **Q.** And you didn't ask us for any?

8 **A.** No.

9 **Q.** So how could you draw that inference then that we were not able to fund?

10 **A.** Based on the recommended credit limit that we had.

11 **Q.** But the recommended credit limit was £6,000. You know we -- I am making a  
12 statement. Take that back.

13 Where in the terms and conditions does it say that HOKA have judgment on anybody's  
14 ability to fund a project? Where is this a criteria? Where is it said that "you have to  
15 prove to us the funding requirement"?

16 **A.** That's down to our own judgment as to whether we see fit that we would extend  
17 additional credit limit.

18 **Q.** So it is not a criteria?

19 **A.** No.

20 **Q.** Okay. Where in that document that Jonathan did, the business plan -- we will pull  
21 a reference up for it. It is missing off my sheet -- does it say that we are requiring  
22 further credit?

23 **A.** That was our understanding, that the expectation was that you were going to be  
24 buying additional stock. Now we didn't feel that we wanted to take any further risk  
25 selling additional stock to a customer that we were already massively over-extending  
26 to, and to what we deemed as a weaker part of their business.

1 **Q.** Do you recall -- if I can take you to Steve Yates's e-mail. I think it is C1, 102. Is  
2 that right? C1, 102, when Steve Yates sent the e-mail declining the proposal. It is  
3 page 102. It says in that e-mail that he wants to be clear that none of the stock is  
4 going -- Mr Yates was offering to increase the stock. "We are going to turn Running  
5 Shoes down but we want to sell you more stock"?

6 **A.** Can I read it?

7 **Q.** Yes, sure.

8 **A.** "Should you wish to discuss further the prospect of increasing forward orders for  
9 Up and Running and associated support, we can provide for this."  
10 So what he's saying is that if it's for Up and Running, then that's potentially something  
11 that we would look at, but Steve wouldn't have the authority to increase the credit limit.  
12 So he is just trying to find some common ground I think.

13 **Q.** But he says you can provide for it. If we want to increase our orders, "We can  
14 provide for it"?

15 **A.** Steve could not do that.

16 **Q.** I know he said it but that is what he offered.

17 **A.** That he is what it says in the e-mail.

18 **Q.** Yes.

19 **A.** But that's not within his authority to do.

20 **MR TIDSWELL:** Can I just understand what you are saying here? Are you saying  
21 that he is making an unauthorised offer of granting more stock; in other words, are you  
22 saying that that's not something that actually Deckers would have been prepared to  
23 do?

24 **A.** I don't think that's something Deckers would have been prepared to do, no.

25 **MR TIDSWELL:** So why has he done that then? Did you see the draft of this before  
26 it went?



1 **A.** I didn't see a draft before it went, no.

2 **MR TIDSWELL:** It is odd. Mr Macfarlane is right, it is a bit odd. On the one hand you  
3 are saying you didn't want to supply them with more stock and on the other hand  
4 Mr Yates is saying "We can give you more stock".

5 **A.** We had discussion about the prospect, yes. He is offering a discussion to be had.  
6 He is not promising that we are going to be able to offer more stock and I would  
7 suggest that Deckers wouldn't have extended any further the credit limit that we had  
8 with them.

9 **MR MACFARLANE:** Mr Hagger, can I draw your attention to the draft of that e-mail  
10 on 14th August?

11 **A.** Same e-mail.

12 **Q.** You say you had not seen it before, a draft of it?

13 **A.** I hadn't seen a draft of it before it was sent.

14 **Q.** Your e-mail is listed there at the top. You are copied in on an e-mail?

15 **A.** I was copied in but I wasn't -- it wasn't drafted to me before -- I didn't get to check  
16 it before it was sent.

17 **Q.** Earlier on you said that four people were involved in formulating the response.  
18 This is the response?

19 **A.** Yes.

20 **Q.** You were involved in the response. You were part of the response, but now you  
21 are saying you were not drafted in it. Is that not contrary to what you have just said  
22 earlier and what you are saying now?

23 **A.** No. I was part of the reasons why we wouldn't be able to supply Running Shoes.  
24 We had not discussed that area of further prospect of increasing forward orders.

25 **Q.** You are going off track a little bit, Mr Hagger. You just said that you weren't copied  
26 in. You were copied in, because it is on the e-mail. You said earlier that you were

1 part of the team who agreed the wording, part of four people who agreed the wording  
2 and this wording is offering an increased credit to Up and Running?

3 **A.** Four people were agreed on the reasons why we wouldn't authorise Running  
4 Shoes. I wasn't privy to the sentences there that Steve had sent prior to them being  
5 sent.

6 **Q.** One simple question, Mr Hagger. Why did you not correct it then -- you are copied  
7 in on it -- if it is wrong? If Steve overstepped the boundary, you are his supervisor.  
8 You all had discussions about this "Whoa, hang on, Steve. Don't offer them more  
9 money. Don't offer them more stock"?

10 **A.** I didn't think anything of it at the time.

11 **Q.** I am going to put it to you, Mr Hagger, credit was never the problem for turning  
12 down Running Shoes?

13 **A.** I respectfully disagree.

14 **Q.** Do you know what the account stood at in August, how much money we owed?

15 **MR TIDSWELL:** I don't know if that's in evidence, Mr Macfarlane. If it is, you need to  
16 give us a document evidence.

17 **MR MACFARLANE:** I shall bring it up.

18 **MR TIDSWELL:** If you have it in evidence, then that's fine.

19 **MR MACFARLANE:** I think the credit limit -- the credit of the account is in document  
20 D and it is in the documents.

21 **MR TIDSWELL:** Let's have a look at it. Let's have a look at it then.

22 **MR MACFARLANE:** D/24, sir. The actual amount of the facility being used in that  
23 month is on one of those pages highlighted in black -- in bold.

24 **MR TIDSWELL:** Whose document is it?

25 **MR MACFARLANE:** It is our document off our EPOS system.

26 **A.** I don't have anything highlighted in bold on mine.

1 **Q.** The amount I am not allowed to say but it is in bold at the bottom of the last page,  
2 sir.

3 **MR TIDSWELL:** What page number?

4 **MR MACFARLANE:** 26. It is on 26 I think.

5 **MR TIDSWELL:** D, 26. What is that number? Can you explain it by reference to the  
6 document? What is that number? What does that mean?

7 **MR MACFARLANE:** That was the amount that was outstanding at that moment in  
8 time in August.

9 **A.** I don't understand either.

10 **MR TIDSWELL:** I think Mr Macfarlane is saying to you that the number at the bottom  
11 of page 26 is the amount of the credit that was outstanding to Deckers at the end of  
12 August.

13 **A.** Okay.

14 **MR TIDSWELL:** So it is obviously greater than the limit you were talking about but  
15 less than the exposure you were talking about.

16 **A.** The limit was 90,000.

17 **MR TIDSWELL:** By this time it was 90,000, end of August?

18 **A.** Yes.

19 **MR TIDSWELL:** I see. I am sorry. Okay.

20 **A.** The recommended limit was 6,500 but the credit limit we extended was 90,000.

21 **MR TIDSWELL:** I see. Okay. It obviously is less than that number is the point  
22 Mr Macfarlane is making.

23 **MR MACFARLANE:** It is considerably less than the 90,000 that we are talking about.  
24 So I repeat my question. What gave up the concern on the credit limit?

25 **A.** This is a snapshot in time. August wouldn't have necessarily been a big month.  
26 It's third or fourth month of a six month season. So there would be bigger months

1 within a season.

2 **Q.** I don't suppose it would really help to go much further on that particular point.

3 I think I have made my point. Can I take you to the fourth reason?

4 You said we did not comply with Deckers' online criteria of your witness statement,  
5 86(c), which is B3, 74.

6 **A.** Sorry. Can you repeat where we are?

7 **Q.** Paragraph 86(c), B3, 74. This is where I believe you set out your criteria. Can you  
8 maybe explain to me how anybody can have a domain name which is identical? It is  
9 paragraph (d) if that helps. I have just been told it is B, 75. It just clips the page a bit.

10 **A.** So it says:

11 "... the Running Shoes Website proposal did not comply with Deckers' criteria that  
12 online stores have a domain name that is identical or highly similar to the retailer's  
13 bricks and mortar store."

14 **Q.** Can you explain how it is possible to have [www.runningshoes.co.uk](http://www.runningshoes.co.uk) twice?

15 **A.** I am not sure it is arguing that. I am saying that your online store could be the  
16 same as your bricks and mortar store. Your bricks and mortar store is called Up and  
17 Running. The authorised website is called Up and Running.

18 **Q.** But you want us to call, if we had another website, then that also has to be called  
19 Up and Running?

20 **A.** I don't see the need -- I didn't see the need for another website.

21 **Q.** With respect, we make that decision, but if we decided to have a second website,  
22 you are saying it has to be also called Up and Running?

23 **A.** No. I think there's provision also if you were setting up a second website that we  
24 could give approval.

25 **Q.** Then why didn't you?

26 **A.** Because the reason for setting up the second website was purely to mislead

1 consumers about who they were buying from.

2 **Q.** Well, I could ask --

3 **A.** We didn't want our brand to be associated with a retailer --

4 **Q.** I will not go down that rabbit hole of whether we intentionally mislead customers  
5 or not.

6 You talk about -- you sent a message to me and I think it is in C -- sorry. Can we go  
7 to B, 3, 61, please? This is the Snow+Rock. It will be in paragraph (b) I believe. You  
8 say in your witness statement, and I don't think we need to drag it up, we don't have  
9 an account with Snow+Rock. Do you agree with that?

10 **A.** Directly with Snow+Rock, yes.

11 **Q.** Can you explain why Snow+Rock are selling HOKA?

12 **A.** So we have an account with O&CC.

13 **Q.** Yes.

14 **A.** They have three businesses that trade in the UK: Runners Need, Cotswold Outdoor  
15 and Snow+Rock. They came to us with a proposal of how they would have  
16 concessions on each of their stores. Runners Need concessions on their other  
17 businesses and they were fully signposted. If you went on to a Cotswold website you  
18 would see clear signposting to Runners Need. You click on there and that would take  
19 you through to the Runners Need website. Very clearly signposted and consistent  
20 with how they ran their stores.

21 **Q.** Is it fair to say, though, that Snow+Rock don't have an account?

22 **A.** Snow+Rock don't have an account.

23 **Q.** Running Shoes didn't have an account. Snow+Rock are being supplied products  
24 by O&CC?

25 **A.** Snow+Rock never had HOKA product, no.

26 **Q.** Snow+Rock are advertising product of HOKA?

1 **A.** Snow+Rock were advertising a Runners Need concession and then the consumer  
2 went through to the Runners Need website.

3 **Q.** Is it not the other way round, Mr Hagger, that Runners Need is a concession of  
4 Outdoor & Cycle Concepts?

5 **A.** Outdoor & Cycle Concepts is the overall owner of the three businesses.

6 **Q.** Yes, it is. So Snow+Rock -- is it fair to say that Snow+Rock is not the concession  
7 giver -- sorry -- Runners Need is not the concession giver to Snow+Rock. You supply  
8 Outdoor & Cycle Concepts with HOKA?

9 **A.** We supply Outdoor & Cycle Concepts for Runners Need, yes.

10 **Q.** That product is therefore sold on the Snow+Rock website?

11 **A.** No, not exactly, no.

12 **Q.** Well, it is, because you go to the website and it says HOKA?

13 **A.** I believe you go to the website. You can see Running Shoes -- a Runners Need  
14 heading. Then you click through to the Runners Need website.

15 **Q.** Can I take you, Mr Hagger, to C3, 1181? It is not a very clear picture but sadly  
16 I took that one with an iPhone on the kitchen table, but can you point on that image  
17 where it points at Runners Need?

18 **A.** I can't see anything that says -- oh, I can see Runners Need where it says "Home  
19 >Runners Need".

20 **Q.** Does it point at Runners Need?

21 **A.** Sorry.

22 **Q.** Does it point at Runners Need?

23 **A.** It suggests there's a link to Runners Need there. Obviously the image is cropped,  
24 so I can't see it in its entirety.

25 **Q.** I am not aware that it does. I am looking for it. Can you help me on that?

26 **A.** There is Runners Need where it says "Previous > Home > Runners Need >

1 Clearance > Hoka".

2 **Q.** Isn't that on the heading?

3 **A.** Yes.

4 **Q.** But this is not pointing at Runners Need, is it? This is Snow+Rock's own website  
5 advertising HOKA. It says "snowandrock.com" at the very top. That's the website?

6 **A.** Yes.

7 **Q.** Snowandrock.com?

8 **A.** Yes.

9 **Q.** And it does not point at Runners Need. There is no pointing on there like you did  
10 with Sport Edit or with anybody else. This photograph was taken in 2021.

11 I am going to put it to you, Mr Hagger, that you've gone and had a word with these  
12 guys and said "We need this changing. I know it does today. I am going to put it to  
13 you this needs changing, but it was changed after and it is a case of retrofitting?"

14 **A.** No.

15 **Q.** It is a case of stepping back and saying "Get this out of my sight. I want this all to  
16 be cleaned up because it really does cut across our problem with Up and Running"?

17 **A.** No, that's definitely not the case.

18 **Q.** It looks that way, doesn't it? It could be interpreted that way, couldn't it?

19 **A.** That is not how I recognise how that website is set up.

20 **Q.** But you say you don't deal with Snow+Rock. They get their product from the  
21 mother company just like Running Shoes got its product from its mother company, but  
22 you had a problem with Running Shoes doing it. You didn't seem to have a problem  
23 with Snow+Rock doing it?

24 **A.** We did have a problem with anybody doing that. That isn't how that should work.

25 **Q.** But you didn't have a problem with the one we were talking about earlier, which  
26 you said wasn't your account that you were dealing with. You didn't have a problem

1 with them having a different website, different name shops and this is George  
2 Warehouseman. You didn't have a problem with Snow+Rock?

3 **A.** I didn't say I never had a problem with those. I have said that's not how it should  
4 have been displayed.

5 **Q.** That is how it has turned out, that George Warehouseman is using a different  
6 website to the name of their shops. All I am trying to point to here, Mr Hagger, is  
7 inconsistency, inconsistency in how you apply it and whether you were particularly  
8 picking on Running Shoes?

9 **A.** We weren't picking on Running Shoes. If there are inconsistencies, then they are  
10 honest mistakes.

11 **Q.** I am going to put another point to you, Mr Hagger. If you look at all of these  
12 websites, they are all selling at full price. They are. We know the trade. You know  
13 the trade?

14 **MR TIDSWELL:** Just let him answer the question, Mr Macfarlane.

15 **MR MACFARLANE:** Sorry.

16 **A.** -- I think you could go on to numerous websites now and also back at this time you  
17 could find HOKA at all sorts of prices.

18 **Q.** I am going to put it to you, Mr Hagger, that in season product, if one were to go on  
19 the internet and look at in season product you would struggle to find anybody  
20 discounting HOKA shoes at in season full price. Is that true or not?

21 **A.** I would disagree.

22 **Q.** Do you have any examples of that?

23 **A.** Off the top of my head?

24 **Q.** Off the top of the head will do actually as we are both in the trade?

25 **A.** No.

26 **Q.** You don't?



1 **A.** No.

2 **Q.** Neither do I, Mr Hagger. That's the fact. We will hopefully do some research  
3 before the end of this trial and see if I can find anybody selling HOKA at a discount  
4 price.

5 I am going to move on from that point conscious of the clock on this occasion.

6 Signposting, just to return very briefly to signposting. Right? A term that has never  
7 appeared in the previous case such as a big reason. Why was it not written into your  
8 notes of the meeting of the date of 23rd July that you required signposting?

9 **A.** I think it was part of the discussion that Steve and I had immediately after the call,  
10 but I can't tell you why it wasn't written into the notes.

11 **Q.** Did you fill those notes in actually at the meeting of 23rd?

12 **A.** With Jonathan, yes.

13 **Q.** With Jonathan and Steve Yates present?

14 **A.** Yes.

15 **Q.** Why were those notes not brought up in the previous case?

16 **A.** That was requested during disclosure, was it not, for this case?

17 **Q.** I will answer your question. Right. I can't ask for something I didn't know existed.  
18 If you are defending your position which was the arguments were all about competition  
19 law, I would have expected that if you had those notes, you would have brought them  
20 to that hearing, because it could have just brought the hearing to a stop like that?

21 **MR TIDSWELL:** I think we are drifting slightly off the point here, Mr Macfarlane.

22 **MR MACFARLANE:** Yes.

23 **MR TIDSWELL:** I think you have asked the question and got the answer about the  
24 notes and not including the reference to signposting. I think you should probably move  
25 on.

26 **MR MACFARLANE:** Okay. Mr Hagger, I am going to go on to the fifth and final

1 reason, and that is that you had a problem with our credibility. You used the word in  
2 there. Right? Were you aware of the ongoing COVID crisis at the time? Of course  
3 you were.

4 **A.** Do I need to refer back to something?

5 **Q.** B, 74. I do apologise. B, 75, paragraph (e). Here you were concerned about our  
6 credibility. We should focus on bricks and mortar?

7 **A.** Yes.

8 **Q.** Can you explain how we could do that in lockdown?

9 **A.** You had your own Up and Running website as well, which we saw as an obvious  
10 extension of the stores and where you should be focusing surely during COVID  
11 lockdown.

12 **Q.** With due respect, Mr Hagger, I ask you how we can concentrate on bricks and  
13 mortar, not the website?

14 **A.** I wasn't specifically referring to COVID when I mentioned that.

15 **Q.** No, I did. You said that we should concentrate on our bricks and mortar?

16 **A.** I said:

17 "Our assessment of the business was that Up and Running's expertise was in bricks  
18 and mortar and not in their website. We are very aware of the difficulties retailers were  
19 facing during the COVID pandemic, but our view is that Up and Running should focus  
20 on the development of their online offering via their existing website which held all  
21 brand integrity and reputation."

22 **Q.** That's where you said you recognise that our website sales were just 3 to 5%?

23 **A.** Yes.

24 **Q.** Can you explain how you think we could survive on 3 to 5% of our income?

25 **A.** That wasn't necessarily my concern. My concern was for the risk that HOKA was  
26 taking on this business.

1 **Q.** I think we have already established that we were within our credit limit. So do you  
2 think --

3 **A.** In August.

4 **Q.** In August, yes. If it helps, later on I will bring you a few more, but I don't want to  
5 deal with that at this stage, because we are short of time.

6 Would you agree that since COVID e-commerce has seen a huge increase in sales?

7 **A.** During COVID. I think it's normalised again now.

8 **Q.** Your own internet sales have gone from something near on 375,000 to 12 million  
9 in a relatively short period?

10 **MR TIDSWELL:** I just think we need to be a little bit careful, Mr Macfarlane, with some  
11 of the -- I am not quite sure where we are with the numbers on this. If you could just  
12 be careful with numbers. I don't know what is and what is not confidential.

13 **MR MACFARLANE:** Oh, yes. My apologies.

14 You have seen a massive increase in your own internet sales. Is that fair to say?

15 **A.** Our brand has grown across all channels.

16 **Q.** But you have seen a massive increase. So there has been a flow towards the  
17 internet sales within the UK during and after COVID?

18 **A.** There was a huge increase during COVID, because people were advised to  
19 exercise and they could only buy their running shoes online. That has since  
20 normalised.

21 **Q.** I don't necessarily agree on that point, but do you think it was reasonable at that  
22 time to restrict Up and Running's internet sales or the company or the team, the group  
23 to the existing website or do you think it is only fair that you restrict us to what we had  
24 rather than looking at a new avenue?

25 **A.** We never felt it was a restriction.

26 **Q.** You didn't? Right. You should have been in my shoes. My apologies. I have just

1 | been told off, sir.

2 | Can I take you back, Mr Hagger, to C, 14, 84? This is the document that is well  
3 | rehearsed where promises were made of help and cooperation. Can I take you to  
4 | where it starts with "Our commitment"?

5 | **A.** Yes.

6 | **Q.** Could you read that out, please, for ...?

7 | **A.** "Our commitment to operate thoughtfully for our retail partners remains as strong  
8 | as ever. At HOKA we appreciate the need to face these trying times and challenges  
9 | together in solidarity and we thank you for your partnership."

10 | **Q.** Continue?

11 | **A.** "To help regain and accelerate your HOKA business we have prepared the  
12 | following additional initiatives."

13 | **Q.** Which are?

14 | **A.** "Drop shipping, expedited reorders, shop local and F20 product introductions."

15 | **Q.** And I do believe there were words in there like "flexibility". The last paragraph,  
16 | please?

17 | **A.** "We are continuing to proactively develop other ways to operate thoughtfully  
18 | throughout this period including risk sharing, flexibility, payment incentives and other  
19 | terms. As an important partner of HOKA, we ask that you support us by maintaining  
20 | your open order book and working closely with our sales and customer service  
21 | representatives."

22 | **Q.** So do you agree we did maintain our order book?

23 | **A.** I have no evidence to suggest otherwise.

24 | **Q.** So we did maintain our order book. Do you recall where we found ourselves in  
25 | August? Do you find that operating thoughtfully?

26 | **A.** Are you able to tell me when this letter was sent?

1 Q. It was sent during the first lockdown. I think it was undated, to be fair. It was  
2 certainly at the beginning. I believe it was March 2020?

3 A. I mean it, starts saying:

4 "These last months ..."

5 So I think it was at the beginning of lockdown.

6 Q. Yes.?

7 A. And these were the initiatives that we put in place at the beginning to support our  
8 wholesale network.

9 Q. Which was very thoughtful of you but where is it operating thoughtfully that you  
10 decided to not support Up and Running in their endeavours to survive?

11 A. I am afraid this doesn't have anything on here to suggest that this kind of support  
12 was going to happen indefinitely.

13 Q. But we are still in COVID. Indefinitely was never said. We are still in the middle  
14 of COVID. Do you think that in the middle of COVID that this is operating thoughtfully?

15 A. I believe this is the first lockdown.

16 Q. It is the first lockdown, yes.

17 A. So we didn't send another letter like this for the second lockdown.

18 Q. So it was a temporary thing until we came out of the first lockdown?

19 A. I think at the beginning here we didn't know what was going to happen out of  
20 COVID. Actually we realised through the second lockdowns that on the whole our  
21 business was doing very well.

22 Q. So it doesn't say in that letter "This is just temporary"?

23 **MR TIDSWELL:** Mr Macfarlane, I think you made your point. I don't think you need  
24 to dwell on it.

25 **MR MACFARLANE:** I would like to just ask you how working closely -- what it means  
26 in this document when you say you are going to work closely with us?

1 **A.** I believe Up and Running availed of some of these offers at the time, but those  
2 initiatives were never meant to be indefinite.

3 **Q.** Yes. Okay. Can I -- I think we need to move on from that one now. I think the  
4 point is well and truly made, sir. Can I say regardless of the breakdown of our business  
5 relationship how did you get on with Jonathan Midwood?

6 **A.** We always got on fine with Jonathan.

7 **Q.** You always got on fine with him?

8 **A.** Yes.

9 **Q.** Right. Can I take you to your document B, 3, 72? Paragraph 78 of your first  
10 witness statement. It really confirms that.

11 **A.** Yes.

12 **Q.** We are just looking at the document. We had it a little bit earlier. In the business  
13 project document that you were shown -- I will take you to it as soon as I get it?

14 **A.** Sorry. Repeat that. In the business?

15 **Q.** In the business project that was put to you?

16 **A.** Project.

17 **Q.** Jonathan Midwood says that HOKA wanted to keep the internet clean?

18 **A.** They were Mr Midwood's words, not ours.

19 **Q.** Do you mistrust Jonathan or something? Do you think he's made that up?

20 **A.** I think he has misinterpreted that entirely, yes.

21 **Q.** What do you mean -- well, I can't ask you what he thinks because you are not  
22 inside his head. Why would he say that unless he's had a conversation with somebody  
23 at HOKA? You have already said he is fairly credible?

24 **A.** I don't know what he meant by "clean" and he is not here to answer that question.

25 **Q.** Sorry, sir. The reference is C1, 126. Clare, I need to know where I'm going from  
26 here.

1 I am going to put it to you, Mr Hagger, that Mr Midwood doesn't make these things up.  
2 I am going to put it to you that that had been said to him. He has said it in such a way  
3 that somebody at HOKA has said to him, "Here, we are not going with this. We want  
4 to keep the internet clean". I am going to put to you that this was all about pricing?  
5 **A.** I was in that meeting and there was no mention of price or being clean on the  
6 internet. If he's had that interpretation, that's incorrect.  
7 **Q.** What meeting? I was not referring to a meeting. I was referring to his e-mail --  
8 **A.** His proposal -- the proposal meeting with me, Steve and Jonathan.  
9 **Q.** There's been no discussion after the refusal --  
10 **A.** With Jonathan?  
11 **Q.** With Jonathan.  
12 **A.** No, I don't believe so.  
13 **Q.** I am going to leave it at that, because we could go round in ever-decreasing circles  
14 on that point.  
15 Right. Clare, where am I going on this? We have covered that ground. We have  
16 covered ground and I don't want to cover that.  
17 Can I take you to paragraph 58 of B3, 67? That's the defence document. This defence  
18 document is addressing something that we all agree was said by you in an e-mail,  
19 that, "We only allow one website".  
20 **A.** Referring to the second paragraph on B, 67?  
21 **Q.** Yes. It says:  
22 "There is strictly no policy that this must be limited to one website ..." (sic)  
23 **A.** "... no strict policy ..."  
24 **Q.** I can take you to the previous e-mail where you have said it, if it helps. Can we  
25 agree for the saving of time that you did say, "We only allow one website"? I will take  
26 you to it if you wish.

1 **A.** Yes, please take me to it.

2 **Q.** It is in your previous witness statement, the witness statement from the previous  
3 case in 2023. It is C2, 140, 1021. Sorry. I have just been told off again. It is page 282.  
4 Sorry. My apologies. This is an e-mail from yourself to me. Second line down it says:  
5 "One of the criteria is that we only allow sales via a single website and typically we  
6 require [it] to have the same [domain] name ..."

7 So you have said that.

8 **A.** This was an e-mail drafted I believe by Alex Henderson and then sent by myself to  
9 you.

10 **Q.** So you were advised by your competition law expert that it is perfectly legal to  
11 restrict as to one website. Is that what you are saying?

12 **A.** That is what it says.

13 **Q.** Do you agree that it is perfectly okay to restrict us to one website or do you disagree  
14 with your own e-mail or do you disagree with Mr Henderson?

15 **A.** This was -- maybe it is best to ask Alex.

16 **MR TIDSWELL:** Well, I think Mr Macfarlane is asking you what your view is of what  
17 the position is.

18 **A.** This would have been our understanding at the time.

19 **MR TIDSWELL:** So in your witness statement you say there's no strict policy. I think  
20 Mr Macfarlane is putting to you that this suggests at least a policy of sorts. So the  
21 question is which one is right?

22 **A.** I think there's that 2019 e-mail which came from me, which says that if you want to  
23 open a second website, then you'd need authorisation for that. My assumption is that  
24 that came out in disclosure after this e-mail was sent.

25 **MR TIDSWELL:** So you're saying that the -- your witness statement is right and this  
26 e-mail is wrong?



1 **A.** Yes. I think the understanding was correct at the time, but it's been corrected in  
2 my witness statement.

3 **MR MACFARLANE:** We are just going to pull up your witness statement indeed,  
4 because it says in your witness statement that you were advised -- I am going to pull  
5 the reference up on the witness statement, but it does infer in your witness statement  
6 that you were within your rights to restrict this particular customer from having multiple  
7 websites. This was in your witness statement on 30th July in the previous case.

8 **MR TIDSWELL:** Mr Macfarlane, why don't we do it this way? Why don't you find the  
9 reference and then ask him the question?

10 **MR MACFARLANE:** Yes. Okay. It is C2/140/1021.

11 **MR TIDSWELL:** So that's the witness statement from the previous -- we were looking  
12 at that before, weren't we? Which paragraph?

13 **MR MACFARLANE:** I am just looking now.

14 **MR TIDSWELL:** It is paragraph 5 I think, isn't it?

15 **MR MACFARLANE:** Yes.

16 **MR TIDSWELL:** Bottom of page 1020:

17 "Mr Henderson also advised me that while a complete prohibition of online sales of  
18 HOKA products by a UK wholesale customer might be deemed to be in breach of  
19 competition law, Deckers was within its rights to withhold approval of such sales on  
20 multiple websites operated by that customer."

21 **A.** Sorry, sir. Which --

22 **MR TIDSWELL:** At the bottom of page 1020 you see the last two words:

23 "Mr Henderson ..."

24 Then over the page. It is the two sentences over the page. That is the point, is it,  
25 Mr Macfarlane?

26 **MR MACFARLANE:** That's it, sir, yes. So the question is that it says there although

1 you are within your rights to make sure -- as long as you are not putting a complete  
2 ban on internet sales, you are perfectly okay to restrict us to one website?

3 **A.** Yes.

4 **Q.** And is that your belief now? Do you want to change your mind on that?

5 **A.** I think we had the authorisation to restrict to a single website, but we also had the  
6 authorisation to authorise a second website as well.

7 **MR TIDSWELL:** I think we are talking about two different things, aren't we? The  
8 previous set of questions I think was about the policy, wasn't it, and this is now about  
9 the advice that Mr Henderson has given about the legal position.

10 **MS BERRIDGE:** Yes. The witness is being asked about a legal position.

11 **MR TIDSWELL:** Well, I am not sure what he is being asked at the moment. We'll just  
12 explore that. Just to be clear, I think you are on to a different sort of question here.  
13 So it is one thing -- and I am not saying you can't ask him questions about it, but I think  
14 you are now moving away from asking him about what the policy was, and you're -- this  
15 is about what he has been told by Mr Henderson is the legal position, which may not  
16 be the same as the policy, just so we are clear about that.

17 So on that basis do you want to ask a question about this? You can tell that  
18 Ms Berridge is concerned that you might be asking Mr Hagger to give legal advice,  
19 which he is not qualified to give. So that's not a path you want to go down.

20 **MR MACFARLANE:** I understand that. I should not question you about legal advice,  
21 but in general terms that you did say both in an e-mail and at other times that you were  
22 okay to restrict us to one website?

23 **MR TIDSWELL:** Sorry, Mr Macfarlane. Look, I think you have absolutely made the  
24 point earlier that there is a discrepancy between what Mr Hagger said in his witness  
25 statement about the policy and what appeared in the May e-mail, which appears to  
26 suggest there was a policy that was contrary to what Mr Hagger said.

1 Mr Hagger has now clarified that he thinks that his statement was right and the e-mail  
2 was wrong. I don't think you can ask him about whether this sheds -- this may shed  
3 some light on that, because obviously Mr Henderson has given the advice that as  
4 a matter of law if there was a policy to have one website, it would be legal, but I don't  
5 think that tells us anything about the question as to whether Mr Hagger's witness  
6 statement is right.

7 I think if you are asking him -- if you are challenging him again on what he says in his  
8 witness statement, I am not sure that this gets you very far with that, because on the  
9 face of it all it records is that Mr Henderson has given him some legal advice.

10 Now you may say he is suggesting in here that on that basis you might say that is  
11 suggesting there could at least be a policy that they were legitimate. That's all really  
12 for submission if you want to make that submission, but I am not sure Mr Hagger can  
13 help very much with that.

14 **MR MACFARLANE:** I am perfectly okay. I think I will move on from that subject, sir,  
15 if the truth be known.

16 **MR TIDSWELL:** Right.

17 **MR MACFARLANE:** Can I ask you to refer to C2, 140, 1021?

18 **MR TIDSWELL:** That's the same document we are in, isn't it?

19 **MR MACFARLANE:** Paragraph 6.

20 **MR TIDSWELL:** Yes.

21 **MR MACFARLANE:** It says here:

22 "[It was] Deckers' view ... that the goodwill and brand recognition which Up and  
23 Running had generated with dedicated running consumers through the operation of  
24 its bricks and mortar stores would not be present on the runningshoes website as it  
25 was on upandrunning website."

26 **A.** Yes.

1 **Q.** Do you agree it says that? Then how can anybody as a new entrant into the market  
2 generate that sort of goodwill?

3 **A.** I think the point was that you had a perfectly -- a perfectly good website in  
4 upandrunning.co.uk that had plenty of goodwill. Why would there be a need for  
5 runningshoes? That was my decision, my interpretation.

6 **Q.** I don't think that quite answers my question. Does -- why does that -- wouldn't that  
7 policy there prevent any new entrant coming on to the --

8 **A.** That was never the intention of the policy, no, and we have opened plenty of  
9 businesses with websites. So it was never the intention of the policy and it has never  
10 been carried out like that either.

11 **Q.** Can I ask you one very important point? The point you make in there that:  
12 "... the goodwill and brand recognition which U&R had generated ... through the  
13 operation of its bricks and mortar stores would not be present ..."  
14 How could you know that?

15 **A.** Because it was always clearly implied that this was to be completely disconnected  
16 from Up and Running.

17 **Q.** But you haven't seen the website?

18 **A.** No, but it was always implied from the very first conversations we had had.

19 **Q.** So I still don't understand how -- maybe you can help me on this -- that the goodwill  
20 and the brand recognition from Running Shoes wouldn't be present it says here. It  
21 says:  
22 "... would not be present ..."  
23 How do you know it wouldn't be present?

24 **A.** It was always very clear that Running Shoes was to be completely distanced from  
25 Up and Running.

26 **Q.** So I am going to put it to you that you couldn't have actually known that the goodwill

1 and the brand recognition of Up and Running was not on the website?

2 **A.** It was always implied that it was never anything to do with Up and Running.

3 **Q.** But you said that it wouldn't be present on the Up and Running website. I'm asking  
4 you how would you know that it wouldn't be present on the website?

5 **MR TIDSWELL:** I think he has answered that, because he has been told it was always  
6 going to be separate, Mr Macfarlane. I think you have made your point. He's  
7 answered the question.

8 **MR MACFARLANE:** I am putting it to you that, because you hadn't seen the website,  
9 you couldn't know that, and therefore there were other untoward reasons why you  
10 turned down that website on the day.

11 **A.** No.

12 **Q.** No. I think, sir -- I am looking at the clock.

13 **MR TIDSWELL:** Just so you know, I am afraid, Mr Hagger, we are probably not going  
14 to finish today, because I have a few questions for you and the rest of the panel might.  
15 Then Ms Berridge may well have some re-examination. I don't want anybody to feel  
16 under pressure to do that.

17 That's not an invitation to you, Mr Macfarlane, to open up all sorts of other questions,  
18 but I think the inevitability is we are going to have to start again in the morning. So  
19 you might have a think, but why don't we take a pause now? You might have a think  
20 about whether there is anything you must ask. I would like you to be very disciplined  
21 about that. I don't want to have another great lot of questions tomorrow morning. If  
22 that were necessary, then it would be acceptable, but really less would be better than  
23 more, because we are at the stage where we have been two hours now -- a bit more  
24 than two hours I think with Mr Hagger, and we are going to be under a bit of pressure  
25 with the timetable tomorrow if we don't move on from him. Of course, all that does is  
26 eat into your preparation time for closings and that's not helpful for anybody.

1 So what we will do is we will take a break. You can have some licence for a few  
2 questions in the morning if you feel you have to ask them. If you decide there aren't  
3 any you have to ask, then, of course, you are welcome not to do that.  
4 We will have some questions. There will be re-examination, and then we will be able  
5 to finish with Mr Hagger.  
6 You know again the rules. You are not to discuss your evidence with anybody at all.  
7 I appreciate overnight that is more difficult for you. No doubt you have people you will  
8 see and conversations you want to have and that's fine, but you should be very careful  
9 to stay away from any discussion of what's happened today.  
10 **A.** Understood.  
11 **MR TIDSWELL:** It is possible you may be asked whether you have had any  
12 conversations with anybody, so it is important you take that very seriously and don't  
13 transgress.  
14 **A.** Yes.  
15 **MR TIDSWELL:** Unless anybody suggests otherwise, I think we can probably start at  
16 10.30. We still I think have enough time to get comfortably through the remaining  
17 witnesses around about the short adjournment. So we will start at --  
18 **MS BERRIDGE:** (Inaudible).  
19 **MR TIDSWELL:** Well, Mr Macfarlane, that's a fair point. What we don't want to find  
20 is we get to 1 o'clock tomorrow, having in mind the timetable contemplates we finish  
21 at midday tomorrow -- I don't think that's going to happen, but the timetable  
22 contemplates we are going to get -- if we get to 1 o'clock and we have not finished,  
23 then we start to get into difficulty in giving you some proper time to prepare for closing  
24 submissions, which we are going to start at 2 o'clock on Thursday. Now I am keen  
25 not to start eating into that time. I think both parties would value the time to prepare  
26 those.

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

2 **MR TIDSWELL:** What that means is we need you to move fairly swiftly through  
3 Mr Henderson, Mr Tiller and Mr Yates. Just by way of foreshadowing it, do you need  
4 to ask Mr Tiller any questions? Do you have any questions for him?

5 **MR MACFARLANE:** No more than five minutes, sir.

6 **MR TIDSWELL:** Do you have a sense of how much you have got for Mr Henderson?  
7 You may not be in a position to say.

8 **MR MACFARLANE:** Certainly less than an hour with Mr Henderson and Mr Yates no  
9 more than fifteen minutes.

10 **MR TIDSWELL:** Well, that is helpful, because that rather suggests we will be  
11 comfortably in time.

12 **MR MACFARLANE:** Those are my thoughts.

13 **MR TIDSWELL:** What you might do is give some thought to that. I appreciate you  
14 have not done this before and so you are learning as you go along. If, having reflected  
15 on it, you think you might be longer tomorrow, then you should tell us first thing and  
16 we will try to manage the timetable.

17 **MR MACFARLANE:** I shall.

18 **MR TIDSWELL:** That is very helpful. Good. So we will rise and we will resume at  
19 10.30 am. Thank you.

20 **(4.30 pm)**

21 **(Hearing adjourned until 10.30 am**

22 **on Wednesday, 24th July 2024)**

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