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4 record.

5 **IN THE COMPETITION**
6 **APPEAL**
7 **TRIBUNAL**
8
9

Case No: 1615/5/7/23

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

14 Monday 22nd July- Thursday 25th July 2024

15
16 Before:

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**

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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
49

1 **Wednesday, 24th July 2024**

2 **(10.30 am)**

3

4 **CARL HAGGER (cont.)**

5 **MR TIDSWELL:** Good morning. Mr Macfarlane, I think just to check in with you where
6 you are. I think we left things yesterday on the basis that we might give you licence
7 for a few more questions if you felt you needed to. Have you decided whether you
8 want to or not?

9 **MR MACFARLANE:** Yes, sir, I would like to, but the good news is we have managed
10 to condense six pages to one overnight.

11 **MR TIDSWELL:** One page?

12 **MR MACFARLANE:** One page, sir, yes.

13 **MR TIDSWELL:** Shall we get going with that?

14 Mr Hagger, good morning. Mr Macfarlane is going to continue with a few more
15 questions and then we have some questions as well.

16 Yes, Mr Macfarlane.

17

18 **Cross-examination by MR MACFARLANE (cont.)**

19 **MR MACFARLANE:** Morning.

20 **A.** Morning.

21 **Q.** You set out earlier your concerns that were the quality of the offerings on Running
22 Shoes that you are aware. Are you aware of the trust rating on Trust Pilot when you
23 eventually got to see the site?

24 **A.** I am not sure I ever questioned the quality of the content on Running Shoes.

25 **Q.** Well, I don't want to go down an alleyway, but do you know what the Trust Pilot
26 ranking was on Running Shoes?

1 **A.** Only from the evidence that has been submitted.

2 **Q.** Yes. So do you know what that was?

3 **A.** Not off the top of my head.

4 **Q.** If I were to inform you it was 4.7, would you agree with that?

5 **A.** Yes.

6 **Q.** And would you agree that it is the same ranking as Up and Running were as well?

7 **A.** Again not off the top of my head, but if that is what is in evidence, then I would

8 accept that.

9 **Q.** Okay. Thank you. I want to go through these fairly quickly to help the Tribunal as

10 much as we can.

11 If I can refer you to B, 75 of the document. In this paragraph 86(d) on the first line of

12 the paragraph, if you could read that out for me, please?

13 **A.** "In addition to this, the Running Shoes website proposal did not comply with

14 Deckers' criteria that online stores have a domain name that is identical or highly

15 similar to the retailer's bricks and mortar store."

16 **Q.** Thank you. Could you then turn to C, 102, please? It says on the third line there

17 that:

18 "The proposition of the runningshoes.co.uk goes against the fundamental principles of

19 our brand strategy."

20 Do you agree with that?

21 **A.** Yes.

22 **Q.** This wording was I understand the input from four people. Is that true?

23 **A.** Sorry. Say again.

24 **Q.** There were four people who had agreed on the wording for that. Is that true?

25 **A.** Yes, I believe so.

26 **Q.** Thank you. If I could now turn you to C1, 19. Is it 119? It is page 19. Part of the

1 way through paragraph 2 -- this is fairly small, the print on the original one, so it is fairly
2 difficult to read. An old gimmer like me has no chance. If I can read this out and
3 whether you agree with me. This is an e-mail from Mr Henderson to one of the
4 European members of the team. He says:

5 "Please bear in mind, however, we cannot terminate an account or require a distributor
6 to do the same because of the price at which a retailer is selling our products. Such
7 a step would be counter to EU and local competition law. We have, however, informed
8 the distributor that the account is not right for the brand and that they must stop selling
9 to them."

10 Have you seen that?

11 **A.** I am struggling to find where it says that bit.

12 **Q.** It says on the third line down in paragraph 2:

13 "We can, however, inform the distributor that the account is not right for [us] ..."

14 **A.** "We can, however, inform the distributor that the account is not right for ..."

15 Yes.

16 **Q.** Further, on the second to last line:

17 "So after that this problem will hopefully either go away completely or at least be
18 significantly reduced, assuming the new distributor does not sell to the account."

19 **A.** Okay.

20 **Q.** Thank you. Just so I understand the e-mail correctly, someone has taken an issue
21 with one of your retailers discounting and Mr Henderson has offered a get-around for
22 that. Is that how you see it?

23 **A.** My understanding of it is he said "We can't do anything because of the price" but
24 by the looks of it they are buying the product from outside of the EU, which is against
25 our terms and conditions.

26 **Q.** Yes, that is in there. "So after that this problem will hopefully go away if we employ

1 | this method". Do you agree with that?

2 | **A.** "So after that this problem will either hopefully go away completely or at least be
3 | significantly reduced, assuming the new distributor does not sell to the account."

4 | **Q.** Yes.

5 | **A.** So it sounds like it is an account which shouldn't have been within our distribution
6 | in the first place.

7 | **Q.** Okay. We will let the tribunal decide what that means then. Forgive me, but do
8 | you see the similarities between what happens there and the similarities between what
9 | happened to Running Shoes?

10 | **A.** I certainly see the similarities you are trying to make, but I don't agree that they
11 | were the same.

12 | **Q.** We'll let the Tribunal again decide that one, because I really don't want to get into
13 | the tos and fros over it.

14 | I am going to ask a pertinent question. Does this demonstrate a culture from this
15 | e-mail back from 2016 until today, does this demonstrate a culture of HOKA preferring
16 | to see prices being held high?

17 | **A.** I don't think so. I can only attest to the culture that I am used to working in and
18 | that's not what happens.

19 | **Q.** Okay. One final question. Are we the problem you wanted to get rid of?

20 | **A.** No. I think we have made it very clear from the beginning that we wanted to
21 | continue trading with Up and Running and I felt we tried extremely hard to do that.

22 | **Q.** Okay. We will leave it at that and I will see whether the Tribunal agree with us
23 | later.

24 | I want to, however, leave you with two more similar notions from HOKA. Could I ask
25 | you to turn to C, 141, please? It says on here:
26 | "HOKA has fully declined the offer, does not want to be part of the project, as it does

1 not fit their goal to be 'clean' on the internet."
2 Have you seen that? We have discussed it yesterday a bit anyway.
3 **A.** Yes.
4 **Q.** Right. I would then like to refer you to D, 44, please. Mr Hagger, this is headed
5 up:
6 "HOKA's growth accelerates on robust full price selling."
7 **A.** Yes.
8 **Q.** Would you agree that robust full price selling is something that Deckers actually
9 pursues?
10 **A.** I think this is from the media that has been looking I would imagine at the margin
11 that HOKA is fulfilling.
12 **Q.** With respect, Mr Hagger, that was not really what I asked. Would you agree HOKA
13 was pursuing a full price selling strategy?
14 **A.** Where possible, yes, within reason.
15 **Q.** Thank you. Would you, therefore, agree having a discount retailer like Runnerinn,
16 which was the e-mail I first pointed you to in C, 19, would run contrary, therefore, to
17 that pricing strategy such as your CEO has spelt out there?
18 **A.** We have plenty of retailers that sell at a discount. I think what that e-mail was
19 suggesting was that Runnerinn was not getting product from the correct channels.
20 **Q.** I don't want to get into an argument, but do you not agree, therefore, that Runnerinn
21 was a discount retailer?
22 **A.** It was a discount retailer.
23 **Q.** And when you found a work-around -- not you personally -- Deckers found
24 a work-around to be able to advise how we can get rid of this account without actually
25 going into -- you being caught by the competition law, the European on that occasion
26 competition law?

1 **A.** I don't agree with that, no.

2 **Q.** You don't agree with that. Okay. Right. Mr Hagger, can I refer you to your witness
3 statement B, 70, paragraph 70, please?

4 **A.** Which paragraph? Sorry.

5 **Q.** It is paragraph 70.

6 **A.** Yes.

7 **Q.** Could you read that one out for the tribunal, please?

8 **MR TIDSWELL:** I don't think he needs to read it out. We can read it. If you identify
9 the point you want to make and ask him a question about it.

10 **MR MACFARLANE:** It says:
11 "SportPursuit is the only retailer [you] have worked with ..."

12 Quick question. Do you still supply them?

13 **A.** Yes, we do.

14 **MR MACFARLANE:** On the confidential document -- so can I refer to C2, 792 -- you
15 can see there they have not bought anything from you since 2020?

16 **MR TIDSWELL:** Which line are we looking at? How far down the page are we?
17 I have found it. It is in more or less the middle of the page. Is that right?

18 **A.** As a specialist clearance retailer the way they work is they will buy excess stock
19 when we have it and we will do flash sales with them for a period. They reserve bulk
20 product. They sell it on their site. We then ship it to them and they ship directly to
21 consumers. So we do short bursts with them. So when there's clearance product to
22 sell with them, we sell it. If there isn't, then we don't.

23 **MR MACFARLANE:** So that doesn't lead to me to ask why have they not bought
24 anything from you for the last three years?

25 **A.** They have. What years? Can you show us?

26 **MR TIDSWELL:** If you go back to 791.

1 **MR MACFARLANE:** The period of blank is from the year 2020 to 2023.

2 **MR TIDSWELL:** The last sales are in FY '21 and there are none in FY '22 and FY '23,
3 Mr Hagger. Do you know why there were no sales in FY '22 and FY '23?

4 **A.** I believe we last did a sale with them in FY '23, but I can't tell you why that is not
5 showing on here.

6 **MR TIDSWELL:** So as far as you are concerned are you still doing business with
7 them?

8 **A.** The account is still open, yes, and when there's stock available we will have a sale
9 with them, yes.

10 **MR TIDSWELL:** And stock available, is that your choice or their choice?

11 **A.** That's our choice. Excess inventory. So old season product. That's what they
12 specialise in.

13 **MR TIDSWELL:** Yes. I think Mr Macfarlane, when he was giving evidence, told us
14 a bit yesterday about how that market works.

15 **A.** Yes.

16 **MR TIDSWELL:** He said there is an increasing reluctance on the part of
17 manufacturers to manufacture more stock than -- manufacture the extra buffer of stock
18 and therefore to have less to sell in that way. Is that your experience as well?

19 **A.** It goes in fits and starts. Back in 2020 we were actually -- we actually had
20 a strategy to reduce the excess stock that we had and we wanted to sell more of that
21 stock through HOKA.com, because it is a more profitable way of doing business. Then
22 through COVID actually we had a restriction of stock for a period. Then suddenly
23 containers started arriving. All brands had lots of stock and then lots of clearance
24 product was done. Lots of clearance product was sold. We are -- now the stock has
25 kind of normalised over the last nine to 12 months I would say and there is likely to be
26 less clearance of HOKA stock available for the next 12 months or so.

1 **MR TIDSWELL:** Thank you.

2 **MR MACFARLANE:** Thank you, sir. Mr Hagger, does that mean that this document
3 where there are blanks from 2020 to '23, does that mean that it is incorrect, it is wrong?
4 **A.** To the best of my knowledge, yes, because I think that we ran a sale with them in
5 FY '23.
6 **Q.** That could have -- I don't want to make a statement. Do you think that that could
7 have an impact when adding up all the columns together to reach a turnover figure
8 that the business did have? What else, for instance, could be missing off this list?
9 There could be major numbers, for instance, missing off this list?
10 **A.** I'm not sure.
11 **Q.** So we can't really rely on this document?
12 **A.** I don't know. Like I said, to the best of my knowledge we did a sale with them in
13 FY '23. I can't tell you why it's not showing on here. I guess that's something that we
14 can double check.
15 **Q.** I am going to move on.
16 **MR TIDSWELL:** You are now 20 minutes in. I am not saying it is not interesting. It
17 does have to have some limit I think. How much more have you got?
18 **MR MACFARLANE:** Just that page.
19 **MR TIDSWELL:** How many more questions.
20 **MR MACFARLANE:** Two more questions.
21 If you recall, Mr Hagger, I asked you yesterday if you could recall any retailer selling
22 the current season at a discount other than the club discount and you said you couldn't
23 think of anybody off the top of your head?
24 **A.** Sorry. Can you ask the question again?
25 **Q.** Yes. I asked you yesterday if you could recall any retailer selling the current
26 season shoes at a discount and you said you couldn't think of any --

1 **A.** Currencies of shoes?

2 **Q.** Current season?

3 **A.** Current season. Sorry.

4 **Q.** Current season of shoes at a discount, and you said you couldn't think of anybody
5 off the top of your head?

6 **A.** Yes.

7 **Q.** I'm going to put it to you that it seems to me that because many, many retailers
8 are selling the current season shoes at full price, and I agree with you that's the
9 position, that there is a culture from top down here of maintaining the prices as high
10 as you possibly can?

11 **A.** No, I disagree. The new season for autumn/winter started in July. So we are at
12 the beginning of the season. It is where retailers are most likely to be able to make
13 their most profit out of new products. So now typically would be the time that you
14 would see less discounting. As we go through the season, as the product gets older
15 and we get towards a newer season, you would likely see more.

16 **Q.** But we've already ascertained that you're not seeing anybody, not sports shoes,
17 normal retailers selling at a discount such as sports shoes?

18 **A.** No, I didn't say that. I said I don't know of any off the top of my head.

19 **Q.** I think in the interests of expediency I am going to call it a day.

20 **MR TIDSWELL:** Good. Thank you, Mr Macfarlane.

21

22 **Questions from THE TRIBUNAL**

23 **MR TIDSWELL:** Mr Hagger, we have a few questions for you. I am going to ask you
24 a few questions to start off about selective distribution.

25 **A.** Yes.

26 **MR TIDSWELL:** In particular, I wonder if we could have a look at the document at C2,

1 563, which is the document we were looking at yesterday.

2 **A.** Can I ask a question about purdah related to this?

3 **MR TIDSWELL:** Yes?

4 **A.** I was not sure. Am I able to go back and fact check the questions and answers
5 overnight independently by myself, not taking any advice. I know I can't do that, but
6 I wanted to check the answers and if I had any additional evidence I could share based
7 on this.

8 **MR TIDSWELL:** I think the answer to that is yes, if you have done that by access to
9 resource material you would normally have access to. So you have not asked anybody
10 a question about it.

11 **A.** No.

12 **MR TIDSWELL:** You have just gone back to your records?

13 **A.** Yes.

14 **MR TIDSWELL:** I think it does throw up the question as to -- you might need to tell
15 us exactly what you have done and Mr Macfarlane may want to ask you some
16 questions. Is it limited to this document that you have done that exercise?

17 **A.** Yes. There was a question yesterday. Mr Macfarlane asked me when this was
18 produced.

19 **MR TIDSWELL:** I am going to ask you about that too. Why don't we go down that
20 path and if you don't mind telling us what you did last night.

21 **A.** This morning.

22 **MR TIDSWELL:** This morning to verify the position and then if Mr Macfarlane wants
23 to the ask anything, he will get an opportunity later.

24 My first question is exactly when do you think it was? I noted that you weren't sure
25 yesterday but you now think you know the answer to that?

26 **A.** Yes. I recall having a meeting over in Amsterdam where we were brainstorming

1 some of this information. That was myself, Cameron Black and then my counterparts
2 from the other countries within Europe. That was 4th to 6th November 2019 going by
3 my calendar.

4 **MR TIDSWELL:** So that's the genesis of this document was a discussion in 2019?

5 **A.** Yes.

6 **MR TIDSWELL:** You looked at your calendar to identify when you had that
7 discussion?

8 **A.** Yes.

9 **MR TIDSWELL:** Then presumably at some stage -- this is your document? You
10 created it. Is that right?

11 **A.** This was created by Cameron Black.

12 **MR TIDSWELL:** So not by you?

13 **A.** No.

14 **MR TIDSWELL:** So the sequence then is you have the meeting in Amsterdam in
15 November 2019?

16 **A.** He produced the document.

17 **MR TIDSWELL:** Mr Black produces the document.

18 **A.** Yes, and I have saved it. So when I answered 2020, that is based off the saved
19 file on my laptop.

20 **MR TIDSWELL:** So you have checked that as well --

21 **A.** Yes.

22 **MR TIDSWELL:** -- as to when you saved it?

23 **A.** I have not actually gone back to that, but that is what I put in evidence which is
24 where I got it from.

25 **MR TIDSWELL:** Presumably you don't have an e-mail -- would he have sent it to you
26 via e-mail?

1 **A.** (Inaudible).

2 **MR TIDSWELL:** Yes. So you don't have any other records about the transmission
3 from Mr Black to you?

4 **A.** (Inaudible).

5 **MR TIDSWELL:** No, but you do have the date on which it was saved?

6 **A.** Yes.

7 **MR TIDSWELL:** Therefore, I was going to start with FY '21. FY '21 presumably
8 means the 2021 year?

9 **A.** April 2020 through to the end of March '21.

10 **MR TIDSWELL:** Can you tell us the date on which you have identified that it was
11 saved in your system, precise date?

12 **A.** I may have my laptop here but --

13 **MR TIDSWELL:** You don't remember that from looking at it this morning?

14 **A.** I didn't look at that. I was just looking at the meeting where we were brainstorming
15 this idea.

16 **MR TIDSWELL:** Okay. Thank you. So that's helpful. Can you help us with before
17 this document was created am I right in thinking that there was nothing like it? In other
18 words, this is the first attempt to create as far as you are aware any sort of account
19 classification?

20 **A.** There was some work I had done prior to this leading to up to that brainstorming
21 meeting and I thought that was also available in here, which is why I was checking
22 those pages, because I thought it was in here, but this was -- that work was taken from
23 work that we had done at Asics. So it is a very similar way that other brands work is
24 my understanding.

25 **MR TIDSWELL:** Yes. Okay. Thank you. That's helpful, but I suppose the question
26 is, perhaps to put it a slightly different way, if we are thinking about what do we need

1 to consider by way of account classification for the purposes of selective distribution.

2 **A.** Yes.

3 **MR TIDSWELL:** This is the thing to be looking at? There is nothing else we should
4 be thinking of that you are aware of?

5 **A.** No.

6 **MR TIDSWELL:** That's helpful. Thank you. Can we have a bit of a run through this?
7 I wouldn't mind just understanding what you do. If we look at page 564, I think you
8 identify three different -- Mr Black identifies three different headings which the
9 document is going to deal with. In fact, the ecosystem type column.

10 **A.** Yes.

11 **MR TIDSWELL:** Does not really warrant much further discussion. I think it is probably
12 an important classification, isn't it, of --

13 **A.** I think apart from the fact that the reason that's there is we want to make sure that
14 the right product is displayed in the right place. It is basically that.

15 **MR TIDSWELL:** That's basically where the stock should go and who should be
16 supplied with that stock?

17 **A.** Exactly, yes.

18 **MR TIDSWELL:** Then you go on and we see account service come up on 565?

19 **A.** Yes.

20 **MR TIDSWELL:** That seems to be about -- it has some data about sales and growth,
21 but a lot of this is about the service and the level of investment that Deckers would
22 provide. Is that right?

23 **A.** Yes, that's right, aligned to strategic customers would be our biggest account. In
24 lots of cases they would have a European resonance. They would be more complex
25 accounts to manage and therefore they would be managed by more experienced sales
26 reps who have a smaller portfolio.

1 **MR TIDSWELL:** Yes. So this is effectively about the allocation of the Deckers'
2 resource to the client portfolio depending on what you saw as most important?

3 **A.** Yes.

4 **MR TIDSWELL:** That is helpful. When we get on to 566, we then start talking about
5 consumer experience?

6 **A.** Yes.

7 **MR TIDSWELL:** There are these three headings: service, presentation and offer?

8 **A.** Yes.

9 **MR TIDSWELL:** They flow through after assessment into these three categories of
10 pinnacle, premium core. Can you tell us a bit about what's going on there?

11 **A.** So the consumer experience we breakdown into service, presentation and offer.
12 If we feel that the retailer is best in class at each of those areas, we would class them
13 as pinnacle. If we thought they were best at two of those areas, then we would class
14 them as premium and if we didn't think they were best in class at any, then they would
15 be classed as core.

16 **MR TIDSWELL:** Do we see on the next slide, 567, some description about the factors
17 that would go into that assessment? Is that right?

18 **A.** They would be some of the elements that we would factor in, yes.

19 **MR TIDSWELL:** That's repeated I think -- there is then material about various things
20 but it is repeated on the table on 574.

21 **A.** I don't think I have 574.

22 **MR TIDSWELL:** That's odd. It should be -- ah, yes, there it is.

23 **A.** Yes.

24 **MR TIDSWELL:** Can we go back then to 566? Can you tell us what the significance
25 of the classification on the right-hand side would be? What's the significance of being
26 classified pinnacle, premium or core?

1 **A.** That would indicate the level of product that those retailers would have access to.

2 **MR TIDSWELL:** So it helps you with the question in the first column on the first

3 page about ecosystem.

4 **A.** Yes, exactly. If they are the very best run accounts, then we think that they would

5 have the level of service and knowledge available to sell the most technical products.

6 **MR TIDSWELL:** Yes. So if one is thinking about -- you will be aware that selective

7 distribution is about qualitative factors?

8 **A.** Yes.

9 **MR TIDSWELL:** If one is thinking about that here, you are trying to identify that by

10 reference to service presentation and the offering they have got and then categorising

11 them on that basis?

12 **A.** Yes.

13 **MR TIDSWELL:** And deciding therefore what sort of stock you would supply them

14 with and encourage them to sell.

15 **A.** What's most appropriate.

16 **MR TIDSWELL:** Thank you. That is helpful. To what extent were these criteria

17 transparent to existing retail customers?

18 **A.** They are all in place and we have them logged.

19 **MR TIDSWELL:** Maybe that's my fault. I have not asked the question right. To what

20 extent would existing retail customers know about the ...

21 **A.** This is mostly internal.

22 **MR TIDSWELL:** If I was an existing retail customer, I wouldn't know that you were

23 assessing me specifically on these things.

24 **A.** You wouldn't know you were a premium account, no.

25 **MR TIDSWELL:** Or I wouldn't know whether I was pinnacle, premium or core?

26 **A.** No.

1 **MR TIDSWELL:** Thank you. That is very helpful. Can I ask you about what happens
2 if a new retailer turns up?

3 **A.** Yes.

4 **MR TIDSWELL:** And asks to be supplied, it might be helpful to distinguish whether it
5 is purely bricks and mortar, if it is hybrid with bricks and mortar and a website or if it is
6 purely online. Can I ask you how you would use these criteria to make
7 a decision -- would you use these criteria to make a decision about whether you
8 supplied them or would you use something else?

9 **A.** Yes, we would. Preferably we would visit the store. Unless it is a completely brand
10 new customer that's just opened up, typically the team would already know the
11 account. So they would be familiar and have experience of them anyway.

12 **MR TIDSWELL:** Sorry to interrupt. I think we are talking here about someone brand
13 new --

14 **A.** Brand new.

15 **MR TIDSWELL:** -- walking in the door and saying "I have just set up a distribution
16 retail network and I would like you to supply me"?

17 **A.** Then I would put them in touch with -- that would typically come through customer
18 service and then be forwarded to me. We would establish where they are based
19 geographically. I could send the new customer questions, which I believe are in
20 evidence somewhere as well to get, firstly, an overview of the kind of customer they
21 are, whether it is a running store. If it is a lifestyle store it would be a separate team
22 now. They would then get in touch with the customer, arrange a visit to go and see
23 the store, talk to them and find out more.

24 **MR TIDSWELL:** And then when you made a decision about whether you wanted them
25 as a customer or not.

26 **A.** Yes.

1 **MR TIDSWELL:** Do you use this document when you make those sort of decisions?

2 **A.** Yes.

3 **MR TIDSWELL:** Specifically you would get this document out, or at least a version of

4 it and apply the questions of service presentation and offer. Would you do that?

5 **A.** I don't think they would -- again my team have been around for a number of years

6 now. So I don't think they would be referring back to this specifically, but they

7 understand what it is about.

8 **MR TIDSWELL:** And would you actually formally categorise them as pinnacle,

9 premium or core?

10 **A.** Yes.

11 **MR TIDSWELL:** You do actually do that exercise?

12 **A.** Yes, we do.

13 **MR TIDSWELL:** I think you are saying your team would reach a conclusion based on

14 their general knowledge and experience?

15 **A.** We have a database and every customer is tracked, ranked within that ecosystem

16 account classification and consumer experience.

17 **MR TIDSWELL:** Yes. Okay. That's helpful. What would the applicant be told about

18 any of that? Again would they be told anything about those criteria?

19 **A.** They wouldn't be told any of this with these words, no.

20 **MR TIDSWELL:** They would get the questions?

21 **A.** They would know (inaudible) retailer, obviously.

22 **MR TIDSWELL:** They would get the questions and know what the questions might

23 disclose?

24 **A.** Yes.

25 **Q.** Obviously they would presumably know that you would be interested in (inaudible)

26 for example?

1 A. Yes.

2 **MR TIDSWELL:** But they wouldn't know precisely what aspects of service you were
3 interested in?

4 A. No, but like I say, I think this is fairly typical for the industries so I wouldn't be at all
5 surprised that they understood roughly where they were within our distribution,
6 because they would be in a similar distribution for other brands and have a similar
7 level of product available to them.

8 **MR TIDSWELL:** Thank you. That is very helpful I am just going to let Professor
9 Ibáñez Colomo ask you some questions now.

10 **PROFESSOR IBÁÑEZ COLOMO:** Thank you. I have a few questions that relate to
11 your witness statement. If you can perhaps have it close to you and I will try to be as
12 brief as possible when coming up with them.

13 A. I am on B, 48, sir.

14 **PROFESSOR IBÁÑEZ COLOMO:** If you move to 58, paragraph 31.

15 A. Yes.

16 **PROFESSOR IBÁÑEZ COLOMO:** There is some reference to certain criteria that
17 refer to internally. The question I have is just to confirm that some of the criteria to
18 decide whether or not someone becomes a member of the distribution system.

19 A. Yes.

20 **PROFESSOR IBÁÑEZ COLOMO:** Are not communicated to the retailer, some of the
21 things are kept internally or assessed internally?

22 A. That's correct, yes.

23 **PROFESSOR IBÁÑEZ COLOMO:** Thank you. Another question I have. Next page,
24 paragraph 36. In a sense this was the flip side of what we were discussing before.
25 When a retailer is not approved.

26 A. Yes.

1 **PROFESSOR IBÁÑEZ COLOMO:** I would have two questions on that front. Are
2 there any mechanisms for the retailer that has not been approved to challenge or to
3 appeal to HOKA internally or question the decision that has been made?

4 **A.** Yes, that can happen. Like I have said on here, we try and give more of a general
5 response because there's improvements that can be made. That doesn't mean a no
6 now is a no forever.

7 **PROFESSOR IBÁÑEZ COLOMO:** Okay. That's the other question I had in relation
8 to this paragraph. When it is no now, maybe some time in the future?

9 **A.** Yes.

10 **PROFESSOR IBÁÑEZ COLOMO:** Do they have sufficient elements or personalised
11 elements about what they need to improve, or is the same feedback sent to everybody
12 in the same way?

13 **A.** No, we don't generally give them specific feedback where they need to improve.

14 **MR TIDSWELL:** Can I check in relation to the question prior to that? I think the
15 answer is there is no appeal mechanism. Is that right?

16 **A.** No formal appeal mechanism, no.

17 **PROFESSOR IBÁÑEZ COLOMO:** If we turn to page 65.

18 **A.** Sorry. Page 65 did you say?

19 **PROFESSOR IBÁÑEZ COLOMO:** 65, paragraph 50. So then you are discussing the
20 evolution of the distribution strategy of HOKA, etc. There has been a decline in the
21 number of acceptances as far as I understand. There have been more rejections over
22 time, etc. So now I think there's a reference to the distribution being fuller than it used
23 to be?

24 **A.** Yes.

25 **PROFESSOR IBÁÑEZ COLOMO:** So then the question that I have, and I think it
26 builds on something that the chairman brought up, it has to be when considering

1 whether to accept someone into the system whether there is a consideration about the
2 number of retailers will be anticipated, whether there is a sense that there is an upper
3 limit as to how many retailers are accepted.

4 **A.** No, I don't think so. It is more about if they are appropriate. If the service
5 presentation and offer is particularly strong, then we wouldn't reject it.

6 **PROFESSOR IBÁÑEZ COLOMO:** The geographic consideration that was brought
7 up, when someone applies or when someone expresses an interest in joining the
8 system, geography plays a role?

9 **A.** Geography does play a role as well.

10 **PROFESSOR IBÁÑEZ COLOMO:** What's the role that geography plays?

11 **A.** That's more of a commercial decision. We wouldn't necessarily want to open
12 a partner offering exactly the same thing if we already have a partner within a couple
13 of streets away, yes, but if it was an outdoor retailer looking to open down the road
14 from a run retailer and service presentation offer was appropriate, then that wouldn't
15 be an issue.

16 **PROFESSOR IBÁÑEZ COLOMO:** Okay. So --

17 **A.** It is more just offering the same thing.

18 **PROFESSOR IBÁÑEZ COLOMO:** Let's consider you have a town with a single high
19 street and there is already a retailer, an accepted retailer. So then you would be
20 reluctant to accept a second one in this town in the same high street?

21 **A.** Unless the service presentation and offer was better than the partner we already
22 had.

23 **PROFESSOR IBÁÑEZ COLOMO:** Thank you. Then if we turn to page 68, I just
24 want -- I think there were -- I just wanted to make sure that I understand well the
25 strategy that has been vis-a-vis Outdoor and Cycle Concepts and ShoeFit. I want to
26 make sure as far as I understand Outdoor and Cycle, I think there are two separate

1 business units effectively within the group.

2 **A.** Yes. There are three different facias. Actually this is something else that I went
3 back and was checking this morning. Please go ahead and ask your question. If that's
4 relevant, then I will answer.

5 **PROFESSOR IBÁÑEZ COLOMO:** Of these three units, there are two business units
6 that have accounts with HOKA?

7 **A.** That we deal with, yes.

8 **PROFESSOR IBÁÑEZ COLOMO:** Any business would have a bricks and mortar
9 presence and an online presence?

10 **A.** Historically they would have been three separate stores but over the last two or
11 three years they have been consolidating the facias into single -- like single stock one
12 stop shops. So you would have a Cotswold outdoor with a Runners Need and
13 Snow+Rock concession or a variation of that. That is typically how they are set up
14 now within bricks and mortar. So we felt the online proposal that they made to us was
15 consistent with that strategy.

16 **PROFESSOR IBÁÑEZ COLOMO:** Okay. The original strategy where there would
17 not be such integration at the brick and mortar level.

18 **A.** Not originally, no.

19 **PROFESSOR IBÁÑEZ COLOMO:** Originally you could keep separate accounts
20 corresponding to each of the presences?

21 **A.** Yes, yes.

22 **PROFESSOR IBÁÑEZ COLOMO:** And each of them would have an online and brick
23 and mortar presence?

24 **A.** Yes.

25 **PROFESSOR IBÁÑEZ COLOMO:** Thank you. I just had a final question on this
26 particular point. So then when it comes to ShoeFit and Precious Soles, etc, how the

1 issue was resolved effectively. There would be now be an account that would be
2 a Precious Soles account?

3 **A.** Yes.

4 **PROFESSOR IBÁÑEZ COLOMO:** A separate one would be an online one,
5 exclusively an online one?

6 **A.** For ShoeFit.

7 **PROFESSOR IBÁÑEZ COLOMO:** Each of them would be run separately?

8 **A.** It is managed by the same rep but run separately and they take separate orders.

9 **PROFESSOR IBÁÑEZ COLOMO:** Which means that signposting to Precious Souls
10 is no longer a consideration or a factor?

11 **A.** No.

12 **PROFESSOR IBÁÑEZ COLOMO:** I just have a final question -- sorry -- on page 74.
13 Paragraph 86(a) this is warehousing and facilities factor.

14 **A.** Yes.

15 **PROFESSOR IBÁÑEZ COLOMO:** I just wanted to understand whether the
16 warehousing issues are a consideration that is systematically taken into account by
17 HOKA when deciding whom to supply?

18 **A.** Typically when we are opening a new account it would do depending on the size
19 of the order, yes.

20 **PROFESSOR IBÁÑEZ COLOMO:** Is this factor considered systematically in each of
21 the new sort of applications?

22 **A.** I mean, if a rep was going to a new bricks and mortar customer and you could see
23 it was a small shop with a very limited stockroom, and then they started placing orders
24 for a thousand of units, then something would clearly be wrong.

25 **PROFESSOR IBÁÑEZ COLOMO:** Is this communicated to the applicant or to the
26 potential member of the system?

1 **A.** It doesn't tend to happen.

2 **PROFESSOR IBÁÑEZ COLOMO:** Thank you.

3 **MR TIDSWELL:** Mr Hagger, we are going to change subject. I have a few more.
4 Sorry. We are going to keep you a bit longer. Actually that's quite a useful way just
5 to make that connection, because I wanted to ask you about the reasons in 86 and
6 particularly about logistics and credit. I just wanted to clarify, firstly, the point about
7 logistics in relation to -- I am now talking about in relation to Up and Running.

8 **A.** Yes.

9 **MR TIDSWELL:** And the decision that was made. I think you were saying yesterday
10 this was a commercial reason when Mr Macfarlane asked you about it?

11 **A.** Yes.

12 **MR TIDSWELL:** I don't think you were suggesting it is part of an analysis that comes
13 from the selective distribution account classification?

14 **A.** No.

15 **MR TIDSWELL:** Thank you. Similarly about credit. Again I think you were saying it
16 was a commercial reason?

17 **A.** Yes.

18 **MR TIDSWELL:** And not one that falls into account classification and selective
19 distribution?

20 **A.** These were completely reflective thoughts when we first had that meeting with
21 Jonathan, yes. My mind went immediately to these areas and I didn't feel that what
22 they were proposing was at all possible.

23 **MR TIDSWELL:** Yes. Thank you. Just coming back to this question of discounting
24 and you know that Mr Macfarlane has told us and there is evidence that it wasn't
25 commercial -- I will use it as a broad term -- to discount for the extent he wanted to or
26 needed to for liquidity purposes on the Up and Running website and that was the

1 reason for wanting to set up Running Shoes.

2 **A.** Yes, but I never agreed with that because they had always discounted on
3 upandraining.co.uk and still do. I know he said it was a breach of contract, but I never
4 believed that that was truly the case.

5 **MR TIDSWELL:** Well, I think you are -- what I would like to be clear about is whether
6 you understood that to be the position in July 2020?

7 **A.** I understood that was the position, but I didn't ...

8 **MR TIDSWELL:** You didn't agree with it?

9 **A.** Yes.

10 **MR TIDSWELL:** Yes. Also it was clear there would be no -- I think it is clear from
11 your witness statement at 86(d) that there would be no association. It is an arm's
12 length proposal.

13 **A.** That was very clear from the beginning.

14 **MR TIDSWELL:** Were you aware -- Mr Macfarlane yesterday told us that he had
15 liquidity concerns, which were one of the reasons -- maybe a significant reason why
16 he wanted to dispose of a large amount of stock and therefore to discount that to get
17 rid of it?

18 **A.** Yes.

19 **MR TIDSWELL:** That's putting it somewhat crudely, but that was the gist of his
20 evidence.

21 Were you aware of that at the time in July 2020 do you think?

22 **A.** Yes, and that would have been fine for us if he had done that through the existing
23 business.

24 **MR TIDSWELL:** Yes. In your paragraph 86, which I think you probably have in front
25 of you, you say:

26 "I didn't see any merits in the proposal."

1 You had in front of you I think the business case proposal, didn't you? You were
2 provided with that?

3 **A.** I don't think it's the business proposal that was shown yesterday. There was
4 another document that was sent through that mentioned things like RTV agreements
5 and SMUs, like we discussed yesterday.

6 **MR TIDSWELL:** Can we perhaps have a look at that then?

7 **A.** I am not sure where that is.

8 **MR TIDSWELL:** I am not sure where it is either, but we will find it. I think there was
9 a September version and there was a --

10 **A.** I seem to remember him sending that to us shortly after the meeting that we had.

11 **MR TIDSWELL:** Yes. I see. So you got it after the meeting, the August version of
12 the --

13 **A.** It is a Word document.

14 **MR TIDSWELL:** If we look at C, 107, so it is tab 22, is that the document that you
15 think you saw?

16 **A.** That may have been it, yes.

17 **MR TIDSWELL:** If you look at the front of C, 107, you can see there is
18 a 17th August 2020 date.

19 **A.** Yes. I remember it being shorter than this, but yes.

20 **MR TIDSWELL:** I think this is the earliest one we have unless someone corrects me.
21 I think it is the earliest one we have. Did you read this document?

22 **A.** Yes, we did, yes.

23 **MR TIDSWELL:** Can I ask you whether you saw the next version then, which is the
24 one I think we were looking at yesterday, which I think is at C, 132?

25 **A.** I can't be sure if I saw a second version of this.

26 **MR TIDSWELL:** Actually it is not 132. I have gone too far. It is C, 126. Would you

1 mind turning that up? So this is the 23rd September version and it is marked as "V2
2 draft". Did you see that?

3 **A.** I don't believe I saw that, no. I am not sure but I don't think I did.

4 **MR TIDSWELL:** I am just going to show you a couple of extracts in there to ask you
5 whether, if you had seen it, would it have helped you make any assessment. Can you
6 look at page 136, please? Here we see quite detailed financial assumptions, which
7 certainly give the impression that a lot of thought had been given to the financials of it.
8 Do you agree with that?

9 **A.** Sorry, sir. I am not sure if I have seen this.

10 **MR TIDSWELL:** No, I appreciate you might not have before. I am just asking you.
11 I think I am asking you -- so --

12 **A.** Some financial forecasts have helped our decision.

13 **MR TIDSWELL:** Precisely and also in a way really to illustrate that it seems that Up
14 and Running had actually given thought to some of the things you were concerned
15 about and actually whether it would have helped you if you had seen this, whether it
16 might have led to you taking a different view as to the merits of the proposal?

17 **A.** Potentially, but our key assumption on the affordability was based on the credit
18 limit that we could give them versus the recommended limit.

19 **MR TIDSWELL:** Yes. We do see on 138 there is a heading at the top of 138?

20 **A.** Yes.

21 **MR TIDSWELL:** "Sources and uses of funding". Again, you know, obviously thought
22 has been given to it, and I am not saying it answers the questions you have raised,
23 but obviously thought has been given to it. Would you agree?

24 **A.** Yes, it looks like it, yes.

25 **MR TIDSWELL:** And then 144, if you look at the bottom of the page under the heading
26 "Challenges/comments to the above outlined issues", and there's a second bullet point

1 | there:

2 | "Warehousing will be big enough for now but for the forecasted level of stock to be
3 | brought across to the New Co, we need to be prepared to look for additional space."

4 | There is a recognition there that there might well be an issue about warehousing but
5 | they had plan to deal with it. Do you mind answering? The transcript will not pick up
6 | a nod?

7 | **A.** Yes. That is what it would suggest, yes. Whether they could do that would be in
8 | question, but yes, it says that yes.

9 | **MR TIDSWELL:** Yes, of course. I understand. That's very helpful. Thank you. Can
10 | I now just jump on -- sorry, we have to go back to your witness statement. Would you
11 | mind going back to 87?

12 | **A.** B, 87.

13 | **MR TIDSWELL:** This is paragraph 87. It is on page 75?

14 | **A.** Oh, yes.

15 | **MR TIDSWELL:** This is where you record a meeting at which the decision was made
16 | to reject the proposal. What we have from you in 86 is the reasons that you -- the
17 | concerns, if you like, that you aired after the meeting with Mr Yates?

18 | **A.** Yes.

19 | **MR TIDSWELL:** Then you say in 87 that you for the reasons explained above at the
20 | meeting decided that you didn't want to be part of the venture. We don't really have
21 | any detail about that meeting at all. Do you remember it?

22 | **A.** I think that was a Teams meeting.

23 | **MR TIDSWELL:** Can you recall it?

24 | **A.** Not specifically, no.

25 | **MR TIDSWELL:** Nobody took a note of it as far as you are aware?

26 | **A.** No.

1 **MR TIDSWELL:** Are you able to say anything more than you've said here about that
2 meeting? Can you say anything more about what was discussed?

3 **A.** I think it was if we were to reject, how we can use our terms and conditions to
4 actually reinforce the rejection. Is it legally possible for us to decline it.

5 **MR TIDSWELL:** So the view was that you wanted to decline it and then the discussion
6 was about what the basis for that should properly be?

7 **A.** Yes.

8 **MR TIDSWELL:** Is it your position that there was no discussion in that meeting about
9 the prospect of Up and Running discounting on the Running Shoes website?

10 **A.** No.

11 **MR TIDSWELL:** So you are absolutely -- even though your recollection --

12 **A.** We knew there was a discount site, but there was no reason to not authorise it
13 because it was a discount site.

14 **MR TIDSWELL:** So how would Mr Black have known it was a discount site? Would
15 you have told him in the meeting?

16 **A.** Yes, I believe so.

17 **MR TIDSWELL:** Really that's my question. So you think there would have been
18 a reference to the nature of the site and the possibility of discounting in the meeting?

19 **A.** Yes. It was always very clear that it was to be a site for clearance product.

20 **MR TIDSWELL:** Yes.

21 **A.** Yes.

22 **MR TIDSWELL:** And was there any discussion about the significance of that in the
23 decision you were taking?

24 **A.** No.

25 **MR TIDSWELL:** Did nobody say anything about that at all?

26 **A.** It was never a consideration that it was a discount site, no, because we have other

1 sites that specialise in discount.

2 **MR TIDSWELL:** Well, of course, you had Mr Henderson on the call and you might
3 expect him to say that's not a consideration that should be taken into account, but you
4 don't recall him saying that?

5 **A.** Not specifically, no.

6 **MR TIDSWELL:** Thank you. The decision which has been taken here was effectively
7 to impose on Up and Running a requirement about how it dealt with its stock, because
8 you were saying you didn't want that stock sold on Running Shoes?

9 **A.** On Running Shoes. We wanted it to remain within the Up and Running business,
10 yes.

11 **MR TIDSWELL:** And it was also effectively to decline what would have been a new
12 business model application.

13 **A.** A new covert site, yes.

14 **MR TIDSWELL:** Do you, or did you think once that was communicated that Up and
15 Running had accepted that position prior to discovering that they were selling the stock
16 on Running Shoes?

17 **A.** We had an e-mail back from Mr Macfarlane saying that that was unfortunate and
18 then I don't remember anything else. I'm trying to think back to the evidence. We
19 have perhaps an e-mail or phone call from Mr Macfarlane in September. So yes, there
20 was period that we thought that was accepted.

21 **MR TIDSWELL:** Was it, therefore, a surprise when you found that he was selling
22 shoes on the site?

23 **A.** Yes.

24 **MR TIDSWELL:** Which you found out I think in November or thereabouts.

25 **A.** Yes.

26 **MR TIDSWELL:** Can I ask you to have a look at C1, 90, please? This is just to clear

1 something up for us. I hope I have the right reference. I think you might have been
2 sitting and watching this discussion. We are just wondering about this red box.

3 **A.** Yes. That was something else that I checked this morning.

4 **MR TIDSWELL:** Good. Thank you. Are we waiting for it? Maybe you don't need.

5 **A.** I don't need it.

6 **MR TIDSWELL:** Are you able to tell us -- there are two things we are interested in in
7 relation to this. The first one is as far as you know when did it appear and secondly,
8 who actually put the red box on it? Was it Up and Running or was it somebody --

9 **A.** It was definitely me put the red box on.

10 **MR TIDSWELL:** You put the red box on?

11 **A.** Yes, and I checked that this morning. It is a PowerPoint document I have, saved
12 screenshots, when I believe I first saw HOKA showing on Running Shoes.

13 **MR TIDSWELL:** So this dates back to November?

14 **A.** I believe that would be November, yes.

15 **MR TIDSWELL:** So there is a separation between the adding -- what we were not
16 sure about was whether this was added before or at the same time that "Powered by
17 Running Shoes" was added. It looks like this was added earlier.

18 **A.** Yes. That was the first time that I had seen HOKA on Running Shoes, I think the
19 first time I had seen the Running Shoes website at all. I took screenshots of each of
20 the different pages and sent them over to Alex Henderson to show how obscure the
21 signposting to Up and Running was and I added a red box, which I checked this
22 morning. It is my box. I can remove it, move it around, because it is on a PowerPoint
23 document.

24 **MR TIDSWELL:** Thank you. That is very helpful. Can we just move on? Back to
25 your witness statement. I hope you have not lost that. It is page 79, which is your
26 paragraph 100. This is where you are talking about terminating the account. There is

1 another meeting here, isn't there, with you, Mr Yates, Mr Henderson and Mr Black. Is
2 that right?

3 **A.** Yes. So I believe the sequence of events was that Steve and I met with Jonathan
4 when he made the initial proposal. Then typically after a meeting like this me and the
5 rep would have a wash-up directly afterwards. We both immediately said that we didn't
6 think this was a good idea.

7 **MR TIDSWELL:** Sorry to interrupt you, Mr Hagger. I think we might be at cross
8 purposes. I think this was about the decision to terminate. I think this is in December
9 now. I think you were going back to the earlier discussion.

10 **A.** Sorry.

11 **MR TIDSWELL:** It is probably my fault for not being plainer. We are now talking about
12 the discussion to terminate the account. I wanted to ask you similar questions to
13 before. Do you remember the meeting?

14 **A.** Not specifically, no.

15 **MR TIDSWELL:** Is it likely to have a Teams meeting again do you think?

16 **A.** Yes, it would have been. It would have to have been, yes.

17 **MR TIDSWELL:** Where is Mr Black situated?

18 **A.** The Netherlands.

19 **MR TIDSWELL:** Yes.

20 **A.** This was during lockdown as well, was it, still?

21 **MR TIDSWELL:** Probably.

22 **A.** My family were shielding because my son was very ill at this time.

23 **MR TIDSWELL:** Okay. Are you aware of anybody having made a note of this
24 meeting?

25 **A.** No. If it is not shown in the evidence, then no.

26 **MR TIDSWELL:** And you can't say anything more than you have said here about the

1 discussion?

2 **A.** No?

3 **MR TIDSWELL:** So you don't recall what was said by whom?

4 **A.** No. I remember that we wanted to continue trading with Up and Running but they
5 had put HOKA product on an unauthorised site, a site they had come to us for
6 authorisation and we declined. They put it on there and we asked them to remove it,
7 they refused. It didn't look like we had any other option than to terminate the Up and
8 Running account, which is unfortunate because, as I say, we wanted to continue
9 trading with Up and Running.

10 **MR TIDSWELL:** I think in the next paragraph you do recall that your hope was:

11 "... Up and Running would remove HOKA from sale on the Running Shoes website so
12 that we could return to our original trading agreement."

13 **A.** Yes.

14 **MR TIDSWELL:** Is that why you gave them 12 months' notice because I don't think
15 you were obliged to?

16 **A.** We were not obliged to. We wanted to give them longer. We thought we could
17 resolve the issue.

18 **MR TIDSWELL:** And so he might realise the consequences of not complying with the
19 requirements about the use of the stock?

20 **A.** Yes.

21 **MR TIDSWELL:** He would change his view on that and would conform with those
22 requirements?

23 **A.** That was our hope, yes, and it would give us further time to discuss, yes.

24 **MR TIDSWELL:** Okay. Thank you. That is very helpful. Have you got anything?

25 **MR DERBYSHIRE:** No.

26 **MR TIDSWELL:** Mr Macfarlane, is there anything you want to ask as a result of

1 anything we have asked Mr Hagger?

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

3

4 **Further cross-examination by MR MACFARLANE**

5 **MR MACFARLANE:** Just very briefly, Mr Hagger, do you remember yesterday we
6 talked about the quote from Mr Midwood where he said -- because we held
7 a discussion about it, where he said that HOKA want to keep their internet clean?

8 **A.** Yes.

9 **Q.** You said at that time that you knew of that document, keeping the internet clean.
10 Isn't that the same document that was being referred to earlier?

11 **MR TIDSWELL:** I think it is the document Mr Hagger says he doesn't think he saw.
12 I think it is the September version of the business plan. I think Mr Hagger said he
13 didn't see that.

14 **A.** Where Mr Midwood says he wants to keep the internet clean was an Up and
15 Running internal meeting. I had not seen that until --

16 **MR TIDSWELL:** Let's pull it up. I think if we look at C, 132. I am sorry. That's again
17 a wrong reference. It is C, 126. I think, Mr Macfarlane, C, 126 is the second version
18 of the business plan. I think that's right.

19 **MR MACFARLANE:** Yes.

20 **MR TIDSWELL:** Have you got that, Mr Hagger?

21 **A.** Yes.

22 **MR TIDSWELL:** Then I think if you scroll down to the bit where it does a SWOT
23 analysis, which as I understand it is part of this document.

24 **A.** C, 140.

25 **MR TIDSWELL:** Starts on C 140. Then you see on 141 in the middle of the page the
26 reference to being clean on the internet.

1 As I understand it, Mr Macfarlane I think told us it was part of a composite document,
2 but in any event I think you say, Mr Hagger, that you don't think you saw this document.

3 That's what you told me earlier?

4 **A.** No, but this document would have been an internal Up and Running document.
5 They wouldn't have sent to their partner brands what all of the decisions were for all
6 of the other brands. This was certainly an internal Up and Running document.

7 **MR MACFARLANE:** I am not doubting that, Mr Hagger. We will check on the
8 transcript from yesterday, but I have it certain in my own mind that you and I discussed
9 that particular document, because you had indicated that you already knew about the
10 quote from Jonathan from the evidence documents that you already knew that
11 Jonathan had said that internet -- that HOKA want to keep their internet clean, but you
12 said to Mr Tidswell that you hadn't seen the document before, but yesterday --

13 **MR TIDSWELL:** I don't think he was saying he hadn't seen it ever. I think he was
14 saying he didn't see it at the time. That's what I understood you to be saying.

15 **A.** Yes. I didn't see it at the time. I have seen it since it was submitted to evidence,
16 yes.

17 **MR MACFARLANE:** I understand. I took it the wrong way.

18 **MR TIDSWELL:** I think it is helpful to clarify. So we are clear about that. I think that
19 is the position. Is that all?

20 **MR MACFARLANE:** Thank you very much.

21 **MR TIDSWELL:** Ms Berridge.

22 **MS BERRIDGE:** Can I make one small observation? You take bundle C, there are
23 these two documents that look very similar and it is confusing. So C, 107 and then C,
24 126. C, 107 is entitled "business proposal".

25 **MR TIDSWELL:** I am sorry. Give me the references again, would you? 107 I am
26 looking at. So this is business proposal and it is dated 17th August.

1 **MS BERRIDGE:** So that's the one that has been sent to the brands as part of
2 Mr Hagger's outreach programme.

3 **MR TIDSWELL:** It is the document Mr Hagger thinks he did see after the meeting.
4 What is the second one?

5 **MS BERRIDGE:** The second one is C, 126.

6 **MR TIDSWELL:** Which is the document that Mr --

7 **MS BERRIDGE:** Because it is set out in a similar way I have certainly found them
8 confusing. This one I understand to be a business plan and it is an internal document.

9 **MR TIDSWELL:** Yes. That is helpful. Actually that's the point we got to in that
10 dialogue, isn't it? It is helpful to have that crystallised like that.

11 Ms Berridge, do you wish to re-examine?
12

13 **Re-examination by MS BERRIDGE**

14 **MS BERRIDGE:** A very small point.

15 Mr Hagger, could I ask you to turn up C2, tab 104, page 663? Do you recognise this
16 document?

17 **A.** Yes.

18 **Q.** Can you describe what it is?

19 **A.** It shows how we designate or classify each of our accounts within our system.

20 **Q.** Do you remember the chair asked you just now if those classifications were
21 contained within a database?

22 **A.** Yes. This shows that, yes.

23 **Q.** Moving on, yesterday the Chair asked you a question about the brand and the
24 requirement that you have that ownership should be signposted?

25 **A.** Yes.

26 **Q.** I might just read it:

1 "If you are thinking about the brand, what would be the concern -- what would the
2 concern be in relation to Up and Running from Deckers' point of view? How might it
3 impact the brand to have a separate website?"

4 You said you were not sure how you could answer that question.

5 So can I just ask you to turn up your witness statement? So that would be B3, page 67.

6 Look at the third paragraph. Perhaps you would like just to take a minute to just remind
7 yourself what it says and then if there is anything you want to elaborate for the Tribunal
8 in answer to that question from yesterday.

9 **A.** Yes. We want to make sure that a consumer can be completely sure who they are
10 buying from and we wouldn't want them -- we wouldn't want them to have any, or to
11 not be clear who they were buying from. We wouldn't want that to be hidden at all,
12 because I don't think that would look very good on the brand at all.

13 **Q.** Thank you. My third and final question is about the volume of product that you
14 understood that Up and Running would be purchasing specifically for the Running
15 Shoes project. So going back to these famous confusing documents, let's look at the
16 business proposal one, which is the one that was sent to you, which I believe is C1,
17 tab 22, page 107. If I can take to you page 112. Literally the heading at the very top
18 of the page there. I am going to take you to three little bits of this document. So that
19 heading there. Then that's number 1 of six points. Then under the sixth point there is
20 another. Maybe I will read them out because it is getting confusing.

21 "All of this will ensure the supplier will attain and maintain increased year on year sales
22 and turnover."

23 Then on the facing page, so the next page, if you are electronic:

24 "Recap."

25 Bullet points. First bullet:

26 "We will increase orders."

1 So, Mr Hagger, when you reviewed this document what was your understanding about
2 the kinds of increased volumes that Running Shoes would be requiring?

3 **A.** The discussions that we had with Jonathan were significant increased orders.
4 I believe it was in one of my notes where I was talking about -- where he talked about
5 three to five times. So the increases were large and we never felt that that was at all
6 affordable.

7 **Q.** Thank you. No more questions.

8 **MR TIDSWELL:** Thank you, Ms Berridge.

9 Mr Hagger, thank you very much. You have been very patient with us. I am sorry we
10 had to keep you overnight and for a decent time this morning. Thank you very much
11 for your evidence. You are now released from the witness box.

12 I think we are now overdue for a short break. Mr Henderson presumably will
13 follow -- he has disappeared momentarily, but hopefully not fleeing the building. So
14 we will resume again at 11.55. Thank you.

15 **(Short break)**

16 **MR TIDSWELL:** Ms Berridge.

17 **MS BERRIDGE:** Mr Henderson.

18

19 **MR ALEX HENDERSON (sworn)**

20 **MR TIDSWELL:** Mr Henderson, please take a seat. Welcome. Thank you for coming
21 along. You have water there I hope?

22 **A.** I do.

23 **MR TIDSWELL:** Good. You know how the bundles work I am sure from observation.

24 **A.** Yes, although I will probably rely on some assistance from Sarah.

25 **MR TIDSWELL:** That's entirely fair and you should do. I probably don't need to say
26 this to you but I will say it to you anyway. If you need to look at the context of the

1 document, you should do so. Don't feel constrained from taking your time to look at
2 the pages either side to familiarise yourself with the document. As I said to others,
3 this is not a memory test. We are trying to get your best recollection by reference to
4 the documents well.

5 **A.** Understood. Thank you.

6 **MR TIDSWELL:** Ms Berridge, do you have any evidence-in-chief?

7 **MS BERRIDGE:** Only to show Mr Henderson his statement and ask him if it is true.

8 **MR TIDSWELL:** Please go ahead.

9

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

11 **MS BERRIDGE:** Good morning, Mr Henderson. Can I ask you to give the tribunal
12 your job title?

13 **A.** I am the European legal counsel for Deckers Europe.

14 **Q.** Thank you. Could I ask you to turn to B, tab 2, page 26?

15 **A.** Yes.

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

17 **A.** It is.

18 **Q.** Can I ask you to turn to page 42?

19 **A.** Yes.

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

21 **A.** It is.

22 **Q.** And is this statement true to the best of your knowledge and a belief?

23 **A.** It is.

24 **Q.** Thank you. I have no questions for you today. I will hand you over to
25 Mr Macfarlane.

26

1 **Cross-examination by MR MACFARLANE**

2 **MR MACFARLANE:** Thank you. Mr Henderson, good morning just.

3 **A.** Good morning.

4 **Q.** Can I ask you some questions just to start with and I will try to get through these
5 as quickly as possible because I am acutely aware of the time constraints.

6 Mr Henderson, do you think that you can refuse to supply someone because they are
7 selling products at a discount?

8 **A.** Not for that reason alone, no.

9 **Q.** Do you think that you are able to implement that by indirect means or by way of
10 a work-around?

11 **A.** No.

12 **Q.** Can I ask you, sir, to turn to C1, 19, please?

13 **A.** Okay. I have it.

14 **Q.** The quote there is:

15 "Please bear in mind, however, we cannot terminate an account or require a distributor
16 to do the same because of the price at which a retailer is selling our products. Such
17 a step would be counter to European local competition."

18 Do you agree with that?

19 **A.** Yes.

20 **Q.** It goes on then to say:

21 "We can, however, inform the distributor that the account was not right for the brand
22 and that they must stop selling to them."?

23 **A.** You missed a part of the sentence.

24 **Q.** Could you read the sentence out for me then, please? It is on my iPad?

25 **A.** "Such a step would be counter to EU and local competition law. We can, however,
26 inform the distributor that the account is not right for the brand (and if they are obtaining

1 HOKA from outside the EU, then that would support that position and they must stop
2 selling to them)."

3 As in the distributor must stop selling to the account who is breaching one of our criteria
4 because they are obtaining product from outside of the EU.

5 **Q.** Thank you. I think that covers a lot of clarity to that. I still say, though, that when
6 you -- I am putting this as a question. Right? When an account becomes an issue to
7 you, to use your words a nuisance, or it has been used in --

8 **A.** I don't think I used the word "nuisance".

9 **Q.** I think the word "nuisance" was in there. Let's imagine it is a nuisance to you then.
10 Is this a way of you particularly going for a firm that's discounting and we want to find
11 a way that doesn't breach the European law to make sure it will not be such
12 a nuisance?

13 **A.** Not in this instance, no. It is clear from the e-mail exchange that the reason for
14 this account no longer being approved is that they are obtaining product from outside
15 the EU and then offering it for resale on their website.

16 **Q.** Although it goes on to say a little later, and I think we can all agree that it does say
17 this, later on:

18 "This is the last season we will be supplying this particular wholesaler so hopefully that
19 problem will go away."

20 **A.** The account had been obtaining product from outside the EU.

21 **Q.** Yes. You said you are changing your wholesaler distributor in Spain?

22 **A.** Correct. At that point we had inherited the previous distributor, who had been
23 selling HOKA before Deckers acquired the HOKA brand. So in 2016 we had been
24 evaluating our distributors and had taken the decision, entirely separately of this
25 e-mail -- the decision had already been taken at that point that we were going to be
26 supplying a new distributor in Spain. We would make clear to the new distributor, "Oh,

1 by the way" -- INSPORT I think was their name -- "if you are considering to sell to
2 INSPORT, we would like to point out to you it appears from our research INSPORT
3 has been obtaining product from outside of the EU. Were they to continue to do that,
4 then we would not authorise them as a customer for you to sell to".

5 **Q.** Thank you. Runnerinn I think it was?

6 **A.** Runnerinn, yes.

7 **Q.** The point I am trying to emphasise here, Mr Henderson, is that hopefully the
8 problem will go away with the change of wholesaler?

9 **A.** The problem of them obtaining product from outside the EU. If you read the e-mail
10 from Fabien Dubois, who was involved in the HOKA distribution business, he says:

11 "Alex,

12 What could we do if the goods is coming from elsewhere, as we do not want to work
13 with them?",

14 which I interpret to mean as coming from outside the EU. So that was the problem
15 that we were looking to resolve and stopping selling to the customer would be part of
16 achieving that objective.

17 **Q.** Thank you, Mr Henderson. There is just a few words more in that paragraph that
18 I wanted to explore. You used the words:

19 "The account is not right for the brand."?

20 **A.** Yes, I see that.

21 **Q.** What did you mean by that?

22 **A.** The account was selling product which it had obtained from outside the EU.

23 **Q.** So if it was able to obtain product from within the EU, that wouldn't be the problem,
24 with this change of wholesaler?

25 **A.** Correct. I think you are referring to the grey market. Is that what you mean?

26 **Q.** Yes.

1 **A.** So if it would be a help for the chair, I could talk for a moment or two about the grey
2 market. By that we mean product that probably originally has been sold to one of our
3 authorised accounts and at the end of the season, as we have talked about a lot over
4 the past couple of days, often times retailers are looking to find somebody to buy the
5 product. They have not been able to sell it in their stores. There are companies out
6 there who go around and sort of buy 20 pairs here and 10 pairs there, put together as
7 good a collection as they can and offer -- usually they would offer to sell the product
8 to accounts we don't sell to. If I am honest we prefer that practice does not happen
9 but we are aware that grey marketing is something that does happen and legally there
10 is very little we can do about it. So we accept people obtaining product from
11 unauthorised sources, particularly within the EU is not something we can do anything
12 about, but, as my advice note says, if they are obtaining product from outside the EU,
13 then we are able to do something about it.

14 **Q.** You are able to do something about it but why would you want to? Surely they are
15 sales of HOKA?

16 **A.** So if they are obtaining the product outside the EU why would we want to do
17 something about it? There are any number of reasons. First of all when we sell
18 product, there might be product that is in the US range which for whatever reason is
19 not in the European range. So we would not want a retailer in Europe, just one single
20 retailer to be selling HOKA product to European consumers which no other retailer in
21 the region has the ability to sell, and that's a fairly common practice in ours and other
22 industries.

23 **Q.** It is, but surely isn't that the choice of the consumer, what they want to buy?

24 **A.** We have the ability to say "If you want to sell product from Deckers, it needs to be
25 product which was originally put on to the EU market". This is product that was not
26 originally put onto the EU market, so we were within our rights to say you can sell

1 product that was originally European product but if we want to say we don't want you
2 selling US product, then we are within our rights to do so, and again that is common
3 in our and other industries.

4 **Q.** Just one more little point on that and then I will move on, Mr Henderson. It says in
5 one of the -- the e-mail from 6th October in that same e-mail chain?

6 **A.** There are two e-mails from 6th October. The one from Fabien or Elling.

7 **Q.** 6th October from Heidi?

8 **A.** There is no e-mail from Heidi. There's an e-mail from Fabien and an e-mail from
9 Elling.

10 **Q.** From Fabien. Sorry.

11 **A.** From Fabien to Heidi.

12 **Q.** There is an e-mail that says:

13 "We need to stop supplying Runnerinn."

14 **A.** Correct.

15 **Q.** What does that mean?

16 **A.** One thing to bear in mind is because we didn't have the direct relationship with the
17 Spanish retailer -- in the UK Deckers sells at one point to Up and Running and all the
18 other authorised retailers. In Spain we don't deal directly with the retailers. We sell to
19 one Spanish company who we call the distributor and they in turn would sell to the
20 various retailers. So our ability to interact with a customer -- a retailer is different if it
21 is a retailer who is sold to by our Spanish or other distributors as opposed to the
22 retailers we have a direct relationship with.

23 So we don't have the direct relationship, so we cannot ourselves stop the sale of HOKA
24 to this offending retailer. We have to say to our Spanish distributor "Because of what
25 they're doing, because they are obtaining product from outside of the EU and then
26 selling it, we now no longer would designate them as an authorised retailer" and we

1 would then ask the Spanish distributor, the old one or the new one, to no longer supply
2 that customer.

3 **Q.** Thank you. This e-mail originated from an initial complaint from part of the HOKA
4 team?

5 **A.** No. It is a little bit confusing. It originally came from our HOKA distributor in
6 Norway.

7 **Q.** My apologies.

8 **A.** No. It is perfectly reasonable given the footer does say "HOKA". They were and
9 still are our authorised distributor in Scandinavia.

10 **Q.** The point being made in there was "Is there anything we can do" -- I am trying to
11 get the correct absolute wording:

12 "Is there anything we can do to avoid our shoes that are sold to them and consequently
13 sold below RRP.?"

14 **A.** The answer to that is there is nothing we can do because of the price at which they
15 are selling the product, but in the subsequent e-mail from Fabien it indicates that they
16 are obtaining the product from elsewhere, from outside the EU. For that reason we
17 can say this is no longer an authorised account. It wasn't because of the price.

18 **Q.** I think we have covered that one well and truly and I think we should move on.
19 Can I ask you to look at your witness statement, B2/27?

20 **A.** Yes.

21 **Q.** Paragraph 7 says you place a litigation hold of your e-mails on 1st
22 December 2023?

23 **A.** Correct.

24 **Q.** According to the e-mail retention policy, which is C1, 115 -- do you need to see
25 that? It will save time.

26 **A.** I am generally familiar with it. If you ask about specific provisions, I might need to

1 | consult.

2 | **MR MACFARLANE:** Does the panel wish to see that.

3 | **MR TIDSLEY:** Only if you want us to. We are quite familiar with it.

4 | **MR MACFARLANE:** That's fine. It says that you must place a litigation hold on
5 | e-mails when it is pending or threatened. So the obvious question is you placed
6 | a litigation hold in December 2023?

7 | **A.** Correct.

8 | **Q.** Yet the threats of litigation in this case started as early as September 2022?

9 | **A.** I didn't consider various statements made in e-mails to be actual threat of litigation.

10 | **Q.** We will come to that because it crops up a little bit later. We can go to evidence
11 | where Mr Hagger has said "You have had a text from Dennis Macfarlane in
12 | December 2020 threatening to sue us"?

13 | **A.** Yes, I am familiar with that and when I said I didn't consider those e-mails to be
14 | actual threats of litigation, and given that it was only several years after that the
15 | litigation was actually brought, I believe my assessment was correct.

16 | **Q.** Okay. Thank you. In fact, that was my next paragraph. You have heard from
17 | Ms Berridge during my cross-examination of the various times that I've threatened
18 | action since 2020?

19 | **A.** Correct.

20 | **Q.** A number of times?

21 | **A.** Correct.

22 | **Q.** Would it not have been appropriate for you to mark it up at that time as being --

23 | **A.** As I said, I do not consider them credible actual threats of litigation given they were
24 | used frequently in e-mails. I didn't take them as -- and, as I said, I was proved correct.

25 | **MR TIDSWELL:** Well, I am not sure that's right. You were proved incorrect because,
26 | in fact, there has been litigation and indeed there have been two bits of litigation one

1 of which has manifested itself in a counterclaim. So I don't think you have been proved
2 correct. It is unfortunate to say the least that because the litigation hold was only
3 placed in December 2023 -- is that right -- we have lost everything prior to December
4 2022.

5 **A.** I would disagree with the assertion that we have lost everything. In fact, because
6 I would have been copied on all relevant e-mails and I have provided copies of all of
7 those, I don't think it is right to say that we have lost all of this evidence. I would say
8 to the contrary.

9 **MR TIDSWELL:** That's not really the point. You may be right in correcting me but
10 you understand what I am saying. If you had taken Mr Macfarlane's threats of litigation
11 more seriously, then you might have placed a litigation hold at an earlier stage. We
12 can look at some documents if it is helpful. If you don't mind, Mr Macfarlane, we may
13 as well deal with that now. If we look at 278, C, 278, this is a document which you
14 may have heard Ms Berridge put to Mr Macfarlane yesterday. I don't know if you
15 remember seeing this. The e-mail itself starts on 277. So this is 8th April 2021. Then
16 if you -- there is quite a lot in there about this, but on page 278 at the top it says:

17 "I'm putting you on notice I shall pursue Deckers through all legal channels in this
18 case", under the Unfair Contracts Term Act as it happens.

19 Then you will see at the bottom of the e-mail on the text page:

20 "Please respond to this e-mail within seven days failing which I shall instigate
21 proceedings without further notice."

22 Now there are a number of e-mails like that and we can look at others?

23 **A.** Yes.

24 **MR TIDSWELL:** But they are of the same character. I do understand the point you
25 are making that Mr Macfarlane does seem to be quite liberal with his threats, but it
26 also does seem to me that you have a litigation -- a document destruction policy and

1 I would have thought that in your mind you might be concerned, knowing that, be more
2 sensitive perhaps to threats of litigation than you might otherwise be if you didn't have
3 a document destruction policy when you came to put a litigation hold on, would that
4 make sense?

5 **A.** It would make sense. I have to confess that I was not entirely clear on how the
6 e-mail retention policy operated in practice in the sense that my understanding had
7 always been that even if an e-mail was deleted, it existed on some server somewhere
8 so that we could obtain it and it was only when I had detailed discussions with Dean
9 Tiller and others that I found out, in fact, no, gone means gone.

10 Also I personally am an exception to the e-mail retention policies. My e-mails are all
11 there. I didn't get into the level of detail in terms of is Carl or Steve or everybody
12 keeping copies of every piece of correspondence. So a combination of (a) I didn't
13 think the threats were credible and also I was under the understanding that if we did
14 ever require the documents, they could be obtained from some server somewhere.
15 That understanding was incorrect.

16 **MR TIDSWELL:** Then just -- so that clearly is the position. That is in April 2021.
17 Obviously if a litigation hold had been put in place at that stage, then we would have
18 all documents relevant to this, because it would take us back to May 2020.

19 **A.** Correct.

20 **MR TIDSWELL:** I understand what you are saying about that, but when you get to
21 the County Court proceedings and the counterclaim that's raised in May 2023, why
22 didn't you put a litigation hold on then?

23 **A.** I didn't think that the counterclaim had any merits, because the counterclaim was
24 not -- this was a debt collection case. At that point more what I thought were not
25 relevant claims led me to concluded I don't think I need to all of a sudden put
26 a litigation hold on, and even if I had, it wouldn't have captured the e-mails from 2021.

1 **MR TIDSWELL:** That is true, but is it correct to say the test for whether you put
2 a litigation hold on is whether you think the case has merits or not? Surely once it has
3 been issued, even if you discount the threat, once it has been issued surely that's the
4 point at which you should have done that?

5 **A.** With the benefit of hindsight I would agree with that, yes. I should say I do not
6 have a significant amount of experience in litigation. Fortunately over my ten plus
7 years at Deckers it is not something that has come up. So having a clear
8 understanding of, first of all, the need to put a litigation hold in place, the first time
9 there's any mention of a potential lawsuit, with the benefit of time I would have put it
10 in place, but again I didn't think the threats were credible. I had copies of what I felt
11 were all of the relevant e-mails, because Carl and Steve would have sent them to me.
12 I was under the understanding that even if they had been deleted from Carl, Steve's
13 and anyone else's e-mail box, we could still go back and get them from some server
14 somewhere.

15 **MR TIDSWELL:** Mr Macfarlane.

16 **MR MACFARLANE:** Thank you, sir. I have only one more small question on this
17 subject. I note that you have managed to find quite a few e-mails, because this is the
18 crux of my reason for answering -- quite a few e-mails that go back much further than
19 a year or much further than 23rd December such as in C1, 17. Would that be helpful?

20 **MR TIDSWELL:** Sorry, Mr Macfarlane, I am not sure I understand that question. Do
21 you want to just rephrase that?

22 **MR MACFARLANE:** This is an example of an e-mail that goes back some
23 considerable time, sir.

24 **MR TIDSWELL:** I see. You are saying why does this e-mail exist if there is
25 a document destruction policy?

26 **MR MACFARLANE:** Yes.

1 **MR TIDSWELL:** That's the question. I am sure Mr Henderson can answer that.

2 **MR MACFARLANE:** There is a policy to delete these and I am just wondering why
3 such documents as this have never been deleted?

4 **A.** There was not an active policy of destroying documents. If a document had not
5 been placed in a special folder to keep it, then after 12 months it would be
6 automatically deleted. I am an exception to that, I and certain other colleagues within
7 the business. So my e-mails do not automatically delete after 12 months. They stay
8 there forever unless I choose to delete them. So when I was asked as part of the
9 discovery to give all relevant e-mails, I took that responsibility seriously and went
10 through all of my e-mails. I did various searches of competition law, a number of
11 different means of searching so that I could provide all relevant e-mails to the
12 proceedings. So this was one of those.

13 **Q.** Sorry. So you deleted your own e-mails that were pertaining to the previous County
14 Court case?

15 **A.** No, no. I never said that.

16 **Q.** Have I misunderstood that?

17 **A.** You have misunderstood. I would do completely the opposite. Anything that I had
18 related to Up and Running I would absolutely have kept a copy of, I did keep a copy
19 of and I presented all those documents.

20 **Q.** I thought you said that you delete them yourselves but you are not in this
21 automatically deleted?

22 **A.** Correct. So my e-mails would not automatically be deleted. So from time to time
23 I will get a reminder that basically says "Your mailbox is full". Amongst the reasons
24 we have the deletion policy is to stop that issue. Because my e-mails are not
25 automatically deleted I would periodically go through -- I don't go through all my
26 e-mails. I will organise them by the largest e-mails. If I have just sent a copy of

1 a contract to someone that happens to be a 10mg e-mail, I will have a look they e-mail
2 and think; is there some reason this e-mail might be important in the future and if I
3 conclude it is not then I will delete it.

4 Everything that I have ever received relating to Up and Running to the best of my
5 ability I would have kept, or if I deleted anything it would have been a document that
6 I had determined to be irrelevant to the proceedings, but there would have been very
7 few, if any, Up and Running related documents that I would have deleted. I don't recall
8 any Up and Running documents.

9 **Q.** I am going to conclude on this particular subject and then move on. I am going to
10 put it to you, Mr Henderson, that it is very convenient and there are gaping gaps in the
11 submissions and the evidence that had has been disclosed. There has been clear
12 indication that when there is a flurry of e-mails -- where there is an issue, there is
13 a flurry of e-mails going backwards and forwards, especially around about August,
14 September time when the stroppy Dennis Macfarlane was kicking off, but we don't
15 seem to have seen any emails from that period.

16 **A.** I disagree with that completely. There are e-mails from that period. There is the
17 e-mail from Carl on 15th September 2020, which also includes previous e-mails
18 between Steve and Jonathan and then there were gaps because Carl would only come
19 to me as and when there was a communication which had a particular legal aspect to
20 it, but essentially to the best of my knowledge -- I don't know whether Carl addressed
21 it yesterday -- he would have sent me -- I cannot say he sent me every e-mail that
22 came from you or others in the Up and Running business, but there was
23 a regular -- sometimes there might be two or three months in between, but when an Up
24 and Running e-mail -- when an issue resurfaced, he would forward it to me and we
25 have provided copies of all of those e-mails as part of the submission.

26 **Q.** Final point, Mr Henderson, that it just seems that there is an awful lot of e-mails in

1 the evidence that paint a very saintly picture, which I have no doubt is the case, of
2 Deckers, but there seems to be none that seem to have talked about this nasty
3 person?

4 **A.** No, there are e-mails in there which -- Carl doesn't write "Dennis is a nasty person".
5 I think in an e-mail of 15th December he said something like "This is typical for this
6 customer" but for one to conclude that Dennis is a nasty person, I would make
7 whatever judgment, as might others, based on what was written by you in your e-mails
8 which Carl shared with me.

9 **Q.** We can move on from that subject I think.

10 Can I refer you, Mr Henderson, to the document C, 1074 in the bundle?

11 **A.** Do you mean C1, 74?

12 **MR TIDSWELL:** Which one is the page number, Mr Macfarlane? Which one is the
13 page number? Do you know?

14 **MR MACFARLANE:** Page number 74.

15 **MR TIDSWELL:** So it is an e-mail of 10th January 2024.

16 **MR MACFARLANE:** 1074 is the page.

17 **MR TIDSWELL:** The e-mail of 10th January 2024?

18 **MR MACFARLANE:** Yes. Apologies.

19 **A.** I have it.

20 **Q.** Is it fair to describe the e-mail of you threatening to report Up and Running to the
21 authorities, that you are obviously aggrieved at HOKA still appearing on Running
22 Shoes. Do you agree?

23 **A.** What are you referring to?

24 **MR TIDSWELL:** I am afraid I am not sure what you are referring to either,
25 Mr Macfarlane. This is an e-mail from -- I think from your daughter to you and your
26 wife I think about Shopify. Are we on the right one?

1 **MR MACFARLANE:** I will leave this question and move on to the next question
2 because I have the references wrong.

3 **MR TIDSWELL:** People do that all the time, Mr Macfarlane. It is a common feature
4 of advocacy. Carry on.

5 **MR MACFARLANE:** Can I refer you, Mr Henderson, to your witness statement from
6 the previous case, C2, 139, 1018. You say there --

7 **MR TIDSWELL:** Just give me a minute.

8 **MR MACFARLANE:** It says in there that Deckers was within its rights to withhold
9 approval of sales on multiple websites by that customer "as long as we had a valid
10 reason for doing so".

11 **A.** Correct.

12 **Q.** Do you agree with that? Good. That saves me finding the exact sentence.
13 Can I refer you to document A3, 27?

14 **MR TIDSWELL:** Did you say A?

15 **MR MACFARLANE:** A3, page 27. Yorkshire accent.

16 **MR TIDSWELL:** This is the defence, isn't it?

17 **MR MACFARLANE:** I believe paragraph 27 we are looking at.

18 **A.** Yes.

19 **Q.** It says:
20 "Although clause 15 does not specifically limit retailers to a single website ..."
21 Do you agree that impacted on what we could do for selling online?

22 **A.** I would agree if we chose to decline the Running Shoes website for the reasons
23 we have given, that would be one less outlet for Up and Running to sell our and other
24 products online, yes.

25 **Q.** Thank you. Please can I take you to C, 282? I am at a disadvantage here,
26 because it doesn't say on here what that says. If you could help me by reading that

1 out?

2 **A.** Reading what out?

3 **Q.** Line 2, please?

4 **A.** Of my e-mail -- sorry. The e-mail from Carl to you?

5 **Q.** Yes.?

6 **A.** It says.

7 **Q.** "One of the criteria ..."?

8 **A.** "One of the criteria is that we only allow sales via a single website and typically
9 require the domain to have the same name or a name as close as possible to the
10 retailer's bricks and mortar stores."

11 **Q.** Having said what you just said, that you can understand the impact upon Up and
12 Running, how do you see that -- why would Mr Hagger say that "We only allow a single
13 website" was the exact wording?

14 **A.** So with all of the retailers, and I believe this is true for all of the HOKA retailers -- it
15 is also true for our retailers of other brands -- the starting point is they all have one
16 website and they sell from that one website. If at some point they want to propose
17 a secondary website, we will consider it. It's not a blanket one only, but the default
18 position is that everybody will have one website and that's the website they will sell
19 from. It is very important for us to be aware of all the places our products are being
20 sold, and us being aware of the websites that are bricks and mortar or our internet
21 only retailers are using to sell our products is extremely important to us.

22 **Q.** Thank you, Mr Henderson, but the actual wording on the e-mail says:
23 "We only allow sales via a single website."?

24 **A.** As I say, that would be the starting point. There could potentially be exceptions
25 and we think we made that clear in the e-mail of 2019 where we said if you want to
26 sell from another website, you have to come and -- you have to tell us about it and

1 then in practice we'll have a conversation, and it's possible that we might allow
2 a second website, but that would be exceptional and, as I say, I can't think of a single
3 instance -- there may be some, but I am not aware of any instances where we have
4 retailers selling from multiple websites, but if they are and we are aware of it and we
5 are happy with them selling on multiple websites, that's a possibility that we might
6 make an exception.

7 **Q.** Thank you. I want to put it to you on that point that if you were happy with it, I think
8 we all agree that after you were informed about the new website at that multiple
9 meeting -- you were part of that meeting --

10 **A.** I wasn't part of the meeting.

11 **Q.** You were part of the agreed wording for the refusal?

12 **A.** When Mr Hagger explained to me in his e-mail of 15th September 2020 about his
13 concerns for the website in which he specifically said "It's because there is no link back
14 to Up and Running" or whatever the exact wording was, to me that was a legitimate
15 reason to say "Unfortunately we are not willing to approve this second website". So
16 I was -- if the conversation included "Alex, are we okay to decline to sell this website
17 for legal reasons", I would have consulted to say "What are the reasons". Carl had
18 explained what the reason was. Personally I think it is a very valid and entirely
19 sensible reason. So I would have said "Yes, we are within our rights to refuse based
20 on the fact that they are selling from a website which has no link back to Up and
21 Running".

22 **Q.** I think we are talking about two different things, Mr Henderson. I really didn't want
23 to interrupt you. What I was talking about was that meeting between the four people
24 that has been referred to. I don't want to waste everybody's time by referring back to
25 it, but there were four people who had agreed the wording, of which you were one,
26 on --

1 **A.** I would have been involved in agreeing the wording for the e-mail, yes.

2 **Q.** That's the point I was getting to. The answer was "No". I think we can all agree

3 on that?

4 **A.** The answer was that we did not give the permission that Up and Running requested

5 to sell on the other website. Correct. We did decline that.

6 **Q.** No negotiations?

7 **A.** I wouldn't have been part of the negotiations with Up and Running. We said that

8 we weren't going to authorise the second website. The e-mail from Steve Yates from

9 14th August does -- it doesn't specifically say "We didn't approve this website because

10 there is no link back to Up and Running". He did say "You are free to continue to sell

11 any excess inventory on Up and Running and the Up and Running bricks and mortar

12 store" but it didn't give a reason. I didn't think we were required at that point to give

13 a reason. It just said that it didn't match our brand criteria, or whatever the exact

14 wording Mr Yates used.

15 **Q.** Might it have helped and maybe resulted in the fact that we wouldn't be here if

16 you had explained?

17 **A.** I think we did subsequently explain. There is correspondence between you and

18 Mr Hagger in which he does explain the reasons why.

19 **Q.** I think I have done enough about that, so I will move on to the next subject, which

20 I have lost. If I can go back to the one where I lost my way a little earlier. Can I refer

21 you to document C -- no, it is not C. D, 38.

22 **A.** Okay. I have it.

23 **Q.** Are the panel with me? Here is an e-mail where, if I read correctly, you were

24 threatening to report Up and Running to the authorities where you were obviously

25 aggrieved. Do you agree?

26 **A.** I was aggrieved. I was aggrieved by the fact that on the Running Shoes -- I am

1 just looking at the time -- on the Running Shoes website Running Shoes, Up and
2 Running, whoever was running the Running Shoes website, was listing among the
3 brands of goods that were available for sale HOKA. As I pointed out, that was
4 incorrect. You or the website was falsely claiming that it had HOKA product available
5 for sale when, in fact, there was no HOKA available for sale anywhere on the website.
6 I did that by doing a search for the product. When I typed in HOKA, it came up with
7 no matches. I pointed out to you that you were advertising -- you were listing all the
8 brands which it certainly appeared to me, and I think most sensible people would
9 agree, the website was claiming it had HOKA products for sale when it didn't.

10 **Q.** Do you recall the exchange of e-mails between ourselves where I --

11 **A.** I do generally. You said -- well, I don't remember exactly what you said, but I think
12 you said "Okay. Fine. We still have some HOKA product in stock. We will put it on
13 the Running Shoes website" which you did. You put it at a ridiculous £256. I don't
14 know whether that was because you didn't actually have any product and so you just
15 didn't want to get any sales, or you didn't, in fact, want to sell the product. You just
16 wanted to satisfy my pointing out that there was no HOKA available for sale. So I will
17 accept that you probably did have some -- if somebody had wanted to buy a pair of
18 who HOKA shoes from whatever season at £256, Up and Running or Running Shoes
19 would have fulfilled that order and they probably would have been psyched about the
20 amount of margin they would have made.

21 **Q.** If it helps you some people did buy them but we don't need to go down that line.
22 The question I want to ask you is were you aware that Running Shoes was taken down
23 as a result of Shopify requiring confirmation from suppliers?

24 **A.** I was aware that the website went down. I was not aware of any reason for that.
25 I was aware at the time that Up and Running accused Deckers of taking steps to
26 facilitate the website coming down as a result of actions by Shopify. We looked into

1 that. We 100% did not. At no time did I or anyone else at Deckers contact Shopify to
2 ask that the website be taken down.

3 **Q.** Do you know how many websites Shopify host in the UK?

4 **A.** I do not.

5 **Q.** Would you agree that it is in the millions?

6 **A.** I honestly wouldn't know, but if there is proof to that effect -- millions seems high,
7 but if there is evidence that it is millions, I would accept that.

8 **Q.** Thank you. So for them to select Running Shoes for investigation from a large
9 number -- let's call it a large number -- of websites is quite remote chance-wise. Would
10 you agree?

11 **A.** I don't know that I am in a position to comment. I don't know Shopify's process
12 about how they do -- I don't really know any of that. I am familiar with Shopify and we
13 will engage with Shopify if there are issues between Deckers and Shopify. We had
14 absolutely nothing to do with the fact that Shopify sent the e-mail that they did and the
15 website went down.

16 **Q.** Were you aware of how many brands were on the website at that time?

17 **A.** On the Running Shoes website? Not exactly. If I was pressed to guess, I would
18 say probably about ten, but that would be a guess.

19 **Q.** Would it help you if I informed you two?

20 **A.** Yes, it actually would.

21 **Q.** Thank you. There were only two. The chances of Shopify hitting the one brand
22 after a threat from you to report us to the authorities doesn't look good in reality, does
23 it?

24 **A.** Are you accusing me of lying?

25 **Q.** No, not at all. I am asking for an explanation?

26 **A.** I have given you an explanation.

1 **Q.** There may be a good explanation?

2 **A.** I cannot comment on why Shopify contacted you and whatever steps Shopify may
3 or may not have taken which resulted in the website being taken down. That had
4 nothing to do with Deckers. We checked internally. We have evidence to that effect.
5 We had a witness who we were willing to make available. That had nothing to do with
6 Deckers.

7 **Q.** Right. I accept what you say, because I have seen the copy e-mails in the
8 evidence where you have said there, but that doesn't mean to say that somebody other
9 than yourself might have taken exception?

10 **MR TIDSWELL:** Mr Macfarlane, I don't think there is any point in pursuing this any
11 further. I think you need to move on.

12 **MR MACFARLANE:** I agree, sir. If I can move on to the next paragraph, sir. Can
13 I refer you back to your witness statement of 30th June? C2, 139, 1018? It said on
14 there --

15 **A.** Sorry. Which paragraph?

16 **Q.** You say in September 2020 and you ask Mr Hagger why Deckers did not wish to
17 allow Up and Running to sell on Running Shoes?

18 **MR TIDSWELL:** This is paragraph 4, is it?

19 **MR MACFARLANE:** Yes, paragraph 4. My apologies.

20 **A.** I don't think I asked why. He gave me the reason why.

21 **Q.** I think that's academic. So he gave you the reason --

22 **A.** No, it is not academic. You said did I ask him the reason why. He, in fact, came
23 to me originally upfront explaining the reason why.

24 **Q.** Fine. So he said it was in large part due to the URL, which bore no relationship to
25 Up and Running, nor was there any information on the website linking Running Shoes
26 to Up and Running.

1 How could he know that there was no information on the website linking Running
2 Shoes to Up and Running?

3 **A.** That's a good question. It's a question we have talked about since. I don't know if
4 this came up in Mr Hagger's evidence. I think when he and I talked about it, he said
5 he didn't recall, but he said it was possible either in one of the meetings he and Steve
6 would have been shown either a mock-up of how the website was going to look or the
7 actual website but it hadn't gone live yet. If the website was live in November of 2020,
8 it would be -- it would make sense that there had been some degree of development,
9 even if it hadn't been fully created in terms of a website, in terms of how the website
10 was going to look. So I assumed he had seen something which led him to conclude
11 that there was not going to be any link between the website and Up and Running,
12 which by September -- by November of that year it is proven that that observation was
13 accurate. So my guess is he saw either a mock-up or the website before it actually
14 went live. I don't think we know when the website went live.

15 **Q.** I can help you?

16 **A.** I interpreted it to mean he had seen something to lead him to conclude that there
17 would not be a link back to Up and Running on the website, which was subsequently
18 proven to be the case.

19 **Q.** I am just asking that question. You know what my view is, so I don't need to dwell
20 on that point.

21 Would you agree in large part -- is it simply not possible to have a URL of the same
22 name?

23 **A.** The same name as what?

24 **Q.** Same name as Up and Running?

25 **A.** In the case of Up and Running when we talk about a domain name which is
26 identical or as close as the bricks and mortar store -- actually Up and Running is a very

1 good example -- because you cannot have an -- so Up and Running writes its name
2 on its facias, Up & Running. Is that correct?

3 **Q.** Yes.?

4 **A.** So when you go to a domain name you can't register Up & Running because you
5 can't have an ampersand as part of your domain name. So instead the word AND was
6 used. That is the example of we were 100% fine with that. That's as close to the
7 actual bricks and mortar domain name you could use as opposed to
8 runningshoes.co.uk, which could not be a more generic name if it tried.

9 **MR TIDSWELL:** I think he is asking a different question, which is if you already have
10 a website called Up and Running, then you can't have another URL which is Up and
11 Running as well.

12 **A.** Correct, but you might have one that says Up and Running.co.uk and you would
13 just sell your apparel on that website or you might choose to have Up and Running
14 outlet and that would be a place where you would sell just product that is outlet
15 product, which I think would be fair to describe what the Running Shoes business
16 model had been.

17 **MR MACFARLANE:** Can you see the illogicalness of why no other retailer has run
18 another website with the same name? You said earlier, and Carl has said earlier he
19 is not aware of other people that had run. What was the point?

20 **A.** When we say the same name we mean the same name as the bricks and mortar
21 site. We don't mean the same name as the existing URL. That wouldn't make any
22 sense. When we say you have to have a website that has the same name, we are
23 referring to the same name as the bricks and mortar retailer. We are not saying Up
24 and Running needs to have the same domain name. We are not saying that Up and
25 Running needs to have the same domain name upandrunning.co.uk, because they
26 already have that. So when they say the same name, we are referring to the same

1 name as the bricks and mortar retailer, not the same name as the website.

2 **Q.** I'm putting to you, Mr Henderson, that it is illogical for any retailer to spend a penny

3 on two websites that has the same name on it?

4 **A.** Agreed, but that is not what we are asking.

5 **Q.** You are asking for the same name but a variation of it then?

6 **A.** We are asking for the same name as the bricks and mortar store.

7 **Q.** Yes, but with a variation on it. The first Up and Running is already called Up and

8 Running.

9 **A.** Correct.

10 **Q.** So the second one would be called?

11 **A.** Upandrunningapparel.co.uk. Upandrunning outlet.co.uk.

12 **Q.** I put it to you it is still the same name?

13 **A.** Not if you add apparel or outlet to it, it is not.

14 **Q.** I will move on from that. I will just allow the panel to consider that, where they sit

15 with that one.

16 Can I take you to -- I think it is the same bundle, C2, 139, 1018.

17 **MR TIDSWELL:** That's the statement again. Same document, isn't it?

18 **MR MACFARLANE:** Is that the same document? Sorry. You say in paragraph 4

19 again, because it was a long paragraph, paragraph 4:

20 "To the best of our knowledge Running Shoes offers only past season product

21 whereas Up and Running sell mainly current season product."?

22 **A.** Correct.

23 **Q.** Is that a clear understanding that you recognise that Up and Running sell shoes

24 generally, the current season shoes at full price whereas Running Shoes will sell

25 shoes at a discount price?

26 **A.** Sorry. I didn't understand the question.

1 **MR TIDSWELL:** I think what he's asking you is in your -- in the end of that statement
2 you make a distinction between the type of goods that are being sold by Running
3 Shoes and the type of goods that are being sold by Up and Running on the website
4 Up and Running. He is saying isn't it clear to you -- aren't you saying here and making
5 it plain that Up and Running sells current selling season therefore at full price and
6 Running Shoes --

7 **A.** It's --

8 **MR TIDSWELL:** Just let me finish the question.

9 **A.** Sorry.

10 **MR TIDSWELL:** And Running Shoes sells goods from previous selling seasons and
11 is therefore likely to discount. I think that's the point he is making.

12 **A.** I understand the point he is making. I referred to current and previous seasons.
13 I didn't say anything about the price at which it was being sold.

14 **MR TIDSWELL:** But he is putting to you I think that's the implication of the distinction,
15 isn't it? Why would you make a distinction other than to sell at a different price?

16 **A.** Because we would prefer our consumers to be principally offered the current range.
17 If that same retailer has product from previous seasons and they want to sell it on the
18 same website, that's fine, but we want consumers to be given the opportunity to buy
19 our current range as the sort of principal part of the business.

20 **MR TIDSWELL:** I don't think that's really the point, is it? What you say there is:
21 "These and other differences between the two websites were the primary reasons why
22 it determined it was not willing to authorise sales."

23 I think what he's putting to you is that the difference between the website is actually
24 the difference between the pricing of the stock. That is what I think he is putting to you
25 and that is not only implicit from what you are saying but really the only sensible
26 interpretation of it. Now I am not expressing a view on that, but he is asking to you

1 comment on that point?

2 **A.** I would characterise it differently, that it is important for us to have the primary
3 focus to be on our current season's product. We have new product introductions.
4 Frankly we would prefer consumers to be buying brand new product as opposed to
5 product which is already 12 to 18 months old, because older product might not perform
6 as well. We absolutely accept that retailers are going to sell previous season's
7 product. We do not expect anybody at the end of the season to throw product away
8 or donate it or anything. We assume they are going to keep on trying to sell it however
9 they can until they find a buyer for it. We would just prefer that that happened in
10 an environment where the bulk of the product is current season product as opposed
11 to a website where the primary -- well, all of the product is from previous seasons.

12 **MR TIDSWELL:** Well, I suppose -- so are you saying that that is the reason for making
13 the distinction, that you didn't like the idea of there being a website which only offered
14 previous seasons?

15 **A.** When one is comparing two websites and why one was okay and one was not,
16 there were a number of factors. The most important one is the one we have spent
17 much of the past two and a half days talking about, the lack of signposting. Another
18 reason would be that all of the product that was going to be sold on Running Shoes
19 was going to be previous seasons. It wouldn't include any current stock. That was
20 not because of pricing. It was because it was not an accurate reflection of the current
21 HOKA product offering.

22 **MR TIDSWELL:** So just so I am clear about this, you are saying that it is not
23 an observation about differential on pricing but it is an observation about the
24 desirability of what are effectively outlet type websites which only sell outlet stock?

25 **A.** Correct.

26 **MR TIDSWELL:** Yes. Thank you. I hope I have not taken you too far from -- how are

1 | you doing for -- how are you doing? How much have you left?

2 | **MR MACFARLANE:** This is taking quite some time.

3 | **MR TIDSWELL:** I don't want to hurry you. I appreciate this is important to you and
4 | indeed to us so I am not going to hurry you but I want a sense of where you are about
5 | to go.

6 | **MR MACFARLANE:** I have -- I am about two-thirds of the way through my questions
7 | and I am proposing that if we do a couple more questions we go for a break.

8 | **MR TIDSWELL:** I think that's where we are going to end up, having a short
9 | adjournment and starting again this afternoon. I think we would be happy to start
10 | a little bit earlier if that -- I mean, the price that's being paid here is your preparation
11 | time for tomorrow and obviously that is on both sides, but on the other hand I am not
12 | going to hurry you if you think you have questions you need to ask.

13 | **MR MACFARLANE:** There are some questions.

14 | **MR TIDSWELL:** Why don't you go through to 1 o'clock and subject to anybody else's
15 | observations, we could try to resume at 1.30 and then we will see how much we can
16 | get done as quick we as we can, but making sure you have proper time to put the
17 | questions you want to put.

18 | **MR MACFARLANE:** Thank you, sir. Much appreciated.

19 | Mr Henderson, if I may just continue finally on that particular theme, do you
20 | understand, therefore, that a bricks and mortar retailer such as ours cannot just burn
21 | the stock? We have to dispose of it somewhere?

22 | **A.** Correct.

23 | **Q.** And do you understand the conflict of the Up and Running website with regard to
24 | the new -- the bricks and mortar stores if we were selling just a different colour way on
25 | that website -- on the Up and Running website? Do you understand the conflicts that
26 | can occur?

1 **A.** I understand how it's been explained. I would point out every other retailer seems
2 to be able to operate with just a single website selling HOKA and if they want to sell at
3 a discount on that website, they are free to do so. We regularly put that in writing. It
4 has been introduced into evidence. We didn't see why one retailer out of the 100 plus
5 that we supply needed to do things differently than all of the others.

6 **Q.** Can I ask you how many other retailers have 30 bricks and mortar stores in
7 lockdown?

8 **A.** I don't know the customer base, but we sold to retailers with multiple stores and
9 they all seem to be able to operate with just a single website.

10 **Q.** Can I help you on that? There are two. The Cotswold Group and Up and Running
11 are the two key players in the specialist running industry. We are going to put it to you
12 that there was an excess inventory that we had to deal with. Can you understand that
13 we had to deal with that?

14 **A.** Yes.

15 **Q.** Thank you. I am going to move on from that point. Can I refer you to the terms
16 and conditions, C2, 94, 544, which is the terms and conditions? I am going to read
17 that myself:

18 "The retailer may only sell product on the website it owns and/or operates if the retailer
19 has been granted permission to make online sales of products and the website is fully
20 compliant with company's website requirements as are communicated from time to
21 time."

22 We have been through that one 100 times, both of us. Do you agree, therefore, that
23 you have the ability to withhold permission for the use of the internet and you hold that
24 at your complete discretion?

25 **A.** You could interpret the wording that way, but in practice we allow all of our
26 customers to use the internet to sell our products.

1 **Q.** There is a difference between in practice and what the clause 15 says. Do you
2 agree, that you hold -- that doesn't answer my question. You hold the discretion?

3 **A.** You could interpret it to mean that we wouldn't give permission to sell on the
4 internet, but it would really depend on the circumstances. We don't want to give just
5 a carte blanche "Yes, you can sell on the internet". You can sell on the internet, but
6 you have to comply with our criteria when you sell on the internet.

7 **Q.** I understand that, but the question was; do you yourselves as a company hold
8 complete discretion whether you are able to say you may have the internet or not.

9 **A.** No, I don't think we do have complete discretion.

10 **Q.** I will draw a line under that one, sir. I think it might be a good time for a break.

11 **MR TIDSWELL:** Yes. That sounds sensible. So we will rise and we will resume at
12 1.30. Thank you.

13 **(12.57 pm)**

14 **(Lunch break)**

15 **(1.30 pm)**

16 **MR TIDSWELL:** Mr Macfarlane.

17 **MR MACFARLANE:** If I may say so first, sir, we have reviewed the time constraints
18 that are in front of us. We also are facing the same time constraints with the
19 summing-up for the next day or so. So we have come to the conclusion that we don't
20 have a requirement to cross-examine Mr Tiller and also we don't see the point in any
21 cross-examination for Mr Yates. You gentlemen may have some to do, but to save
22 a bit of time, it would only result in some repetition of questions. We don't see the
23 point in that, sir. I only have about three more questions to put to Mr Henderson, two
24 or three. So I should be able to conclude this fairly rapidly I hope.

25 **MR TIDSWELL:** Good. You are still planning to cross-examine Dr Majumdar?

26 **MR MACFARLANE:** Very briefly, sir. Five minutes.

1 **MR TIDSWELL:** That's very helpful. I am sure it is very helpful to Ms Berridge and
2 her clients. For your assistance, Ms Berridge, there is nothing that we would want to
3 ask Mr Tiller or Mr Yates and I am not sure that you would thank us for forcing them
4 to give evidence if Mr Macfarlane wasn't. So I think the position will be, therefore, that
5 their witness statements will be taken as being their evidence in the proceedings and
6 they can be --

7 **MS BERRIDGE:** Unchallenged.

8 **MR TIDSWELL:** Unchallenged. I think they can be released. Just on the
9 unchallenged point, I think what Mr Macfarlane is saying is that to the extent there are
10 points in them that he has put to other witnesses, particularly Mr Hagger and
11 Mr Henderson and has challenged the points -- if you like, the points that Mr Yates
12 repeats, then he doesn't feel the obligation to put them to him again. I think that's
13 probably right, isn't it? Maybe we ought to be clear about that before Mr Macfarlane
14 gives up entirely.

15 I don't think it is going to be open to you to say that Mr Macfarlane hasn't challenged
16 Mr Yates on a point which Mr Macfarlane has challenged Mr Hagger on. Now
17 obviously if Mr Yates says different things, then that's a different thing, but if it is the
18 same thing, then Mr Macfarlane has put his case and he has challenged it and I don't
19 think that Mr Yates' evidence being unchallenged is going to make a difference to the
20 way the tribunal looks at that. Is that a fair way of putting it?

21 **MS BERRIDGE:** (Inaudible) hypotheticals, if that's correct. Obviously to not put
22 something to a witness (inaudible).

23 **MR TIDSWELL:** Yes, of course, particularly if it was something that hadn't been put
24 to any other witness. Yes. Thank you. Is that clear, Mr Macfarlane?

25 **MR MACFARLANE:** Yes.

26 **MR TIDSWELL:** So obviously if Mr Yates says something which you have not dealt

1 with anywhere else, what you are accepting is that is evidence on that that is effectively
2 unchallenged. If that has been put and you have put your case fairly comprehensively,
3 then clearly everybody knows that's the position and no-one is going to be suggesting
4 the fact that you have not put it to Mr Yates means that you accept it. That's the sort
5 of fault line, I think.

6 **MR MACFARLANE:** Whilst I don't want to give away something that might work
7 against us, the reason why I am trying to do this is really expediency. I think that we
8 have covered already in questions to other witnesses most of the questions that
9 I would have otherwise asked of Mr Yates. So I don't see anything in there that I could
10 want to cross question him on. I don't see any point in repeating anything.

11 **MR TIDSWELL:** Yes, and just to be clear, if I thought there were things that we
12 needed Mr Yates desperately to be here to talk about, I would be encouraging you not
13 to take that position. So I don't think -- I think we are talking more hypothetically than
14 really. So that's the position then. Mr Tiller and Mr Yates are released.

15 Ms Berridge.

16 **MS BERRIDGE:** I should have said when I was speaking before I have one question
17 for Mr Yates.

18 **MR TIDSWELL:** I see. Right. I should have asked you that question first.

19 **MS BERRIDGE:** I should have mentioned it. I have one question for him, but only
20 one.

21 **MR TIDSWELL:** We will call him. Mr Macfarlane is entitled to ask him a question and
22 indeed we might as well as he is here. I am not sure if we will or not. If that's the
23 course you have decided on, that's absolutely fine, of course.

24 I am sorry, Mr Henderson. In the middle of your evidence we have got into some
25 complicated procedure. What we will do is resume -- if you resume your
26 cross-examination of Mr Henderson, Mr Macfarlane, then we will deal with what

1 happens with Mr Yates next.

2 **MR MACFARLANE:** Thank you.

3 Mr Henderson, I have finished now with the clause 15 question. I am going to briefly
4 set out here a few of the reasons that Carl Hagger has given for the refusal of supply
5 and then I'll ask a question at the end of it. There will be a question at the end of it,
6 because I don't want it to be a statement.

7 Basically, as I understand it, the reason one was against the fundamental strategy,
8 which I can take to you the documents if you require, but I don't think we need to.

9 **MR TIDSWELL:** That's a matter for you.

10 **MR MACFARLANE:** In the e-mail for refusing to supply on 14th August, it finished off
11 by basically saying "It is against our fundamental strategy".

12 **A.** I don't recall the precise wording but if that's what you are summarising from the
13 e-mail --

14 **Q.** It is better that I take you there.

15 **MR TIDSWELL:** Let's have a look at it. I don't think you quite captured it. I think it
16 might have been "brand strategy". So let's have a look at it.

17 **MR MACFARLANE:** It is at C, 102. Are we there with at that one, C, 102:

18 "The proposition of Running Shoes goes against the fundamental principles of our
19 strategy?

20 **A.** "Of our brand strategy" but I agree.

21 **Q.** Number 2, you can't have more than one website, which is at C, 282. This is me
22 abbreviating what was said, but I think we all know that that was said?

23 **A.** Correct. That is what it says in Carl's e-mail.

24 **Q.** The selective distribution, SDA, allowed the restrictions. It doesn't say that in here.
25 I think that's the general theme of where Mr Hagger was going, that the selective
26 distribution agreement allowed us to implement those restrictions. There is no

1 reference on that one?

2 **A.** Sorry. Where are you seeing that?

3 **Q.** C, 282?

4 **A.** So the same document.

5 **Q.** The same bundle. I think I am going to have to drop the third one. Right.

6 In Mr Henderson's -- Mr Hagger's second witness statement where he gave the
7 reasons that the logistics and the financials were the issues. I think we all know that
8 one, unless you want me to dig it out?

9 **A.** No. I think that's a fair reflection of (Overtalking).

10 **Q.** Thank you for that. The first reasons were given in 2021 and the last reasons were
11 given in 2024.

12 My question is does this not demonstrate inconsistencies in the stories that have been
13 given between August and the final witness statement I think was May of 2024? Does
14 this not demonstrate that there are inconsistencies in the reasons why Deckers didn't
15 wish to --

16 **A.** I would respectfully disagree with that. One reason was given but Carl had
17 explained to me -- I don't remember when but at some point between the discussions
18 that there were essentially concerns about Up and Running's ability to run a second
19 website but that Carl chose not to say that to yourself and your colleagues at Up and
20 Running, because he didn't want to appear to be insulting your ability to operate more
21 than one website.

22 **Q.** I am uninsultable. Let me put this point to you. Why were many of these reasons
23 not included in the previous case? Why was the SDA never mentioned until
24 August -- until December of 2013 (sic), when this case we are in now commenced.
25 Why were those notes that Mr Hagger produced which would have been
26 devastating -- I have lost it -- would these have not have been presented a little bit

1 earlier in the process and why did we have to wait up to four years almost?

2 **A.** So I believe you asked me three questions there.

3 **Q.** Yes.?

4 **A.** I will do my best to answer them one by one but I might need you to remind me
5 what they were. Why don't we start there. So the first question was?

6 **Q.** Why were these documents and these reasons, some of them not given until 2024,
7 why were they not brought earlier?

8 **A.** If are you referring to why were they not raised in the previous case, the previous
9 case, as you will recall, was a debt collection matter. Up and Running had failed to
10 pay their final invoice for the autumn/winter '21 season. We thought it was a very
11 straightforward matter. Up and Running had received the goods. We were focusing
12 on proving that. Up and Running had not paid for the goods. We were focusing on
13 proving that. We didn't believe that we needed to respond to -- the reason we did not
14 pay was because you were price fixing or whatever the allegations were. Even if you
15 were to be correct that there was price fixing, which obviously we refute, that was not
16 a valid defence to the failure to pay the debt. So there was no need for us to produce
17 those reasons at that time.

18 **Q.** Whilst I take that on board, Mr Henderson, would it not have helped with that case
19 then and this case to bring these cases to an earlier conclusion?

20 **A.** If the subject matter of the previous case had been were you engaged in price
21 fixing, then yes, but that was not the subject matter of the previous case. The previous
22 case was Up and Running had failed to pay a debt.

23 **Q.** Do you not recall that it was argued as a defence, the competition matters?

24 **A.** If I am not mistaken, the court essentially said that's not a valid defence.

25 **Q.** That was the end of the process, Mr Henderson. At the end of the process the
26 court did rule. You are quite right, but leading up to that event many of these reasons

1 that you have given for refusing the website were never tabled?

2 **A.** That is true. We don't think at the time they were necessary in providing as
3 complete a picture as we could for the current case, we went back and reviewed the
4 decisions. As I said Carl had said to me previously "Yeah, we didn't think they were
5 capable -- we didn't think they did a good job of running the first website, much less
6 taking on a second website" but we didn't want to insult Up and Running and Mr
7 Macfarlane in particular, so we just gave the reason initially that it didn't comply with
8 our brand strategy and then subsequently we informed you that it was also -- it was
9 primarily about the fact that there was no linking back to Up and Running through the
10 second website.

11 **Q.** I really what to move on. So I can summarise in the fact that you didn't think that
12 it was important to tell us the reasons why we have ended up in this situation. Is that
13 summarising it really?

14 **A.** No.

15 **Q.** No?

16 **A.** No. We chose to give you the reasons why we didn't supply. That was made clear,
17 not maybe on 14th August, but it was subsequently made clear, and the fact that at
18 some point after that Up and Running chose to add the badge on the website that says
19 "Powered by Up and Running" to me indicated you understood the reasons why we
20 chose not to supply and you were taking steps to hopefully remedy that problem.
21 Unfortunately we were only informed of that in I think it was May of 2021, at which
22 point for the reasons that were reviewed previously, the relationship had broken down.

23 **Q.** I think I've made my point, Mr Henderson.

24 Only one more question you will be quite relieved to hear.

25 **A.** Yes.

26 **Q.** Right. I am going to put something to you, Mr Henderson. If Up and Running's

1 shop changed its name to Shoes on the Street, for instance, would we be required to
2 change the website?

3 **A.** That's an interesting hypothetical. Probably yes. It would depend on the
4 circumstances. Just to be clear, amongst the reasons why for us it was so important
5 that the website either be upandrunning.co.uk or it be identified is when we
6 first -- I wasn't part of the decision -- when Up and Running was first appointed as
7 a retailer you spoke very positively about HOKA yesterday. We would say when we
8 chose to supply Up and Running, whenever we did so, back in 2014, we did so
9 because Up and Running has a very good reputation in the running shoes industry.
10 We are keen for consumers who, whether they are going to the bricks and mortar shop
11 or buying on the website, to know that they are buying from a well respected, trusted
12 running shoe brand.

13 So in your hypothetical if you changed your store name to a completely different name
14 that people did not recognise, we may well have an issue with you changing the name.
15 If it was new website, formerly Up and Running, we would probably be okay with that
16 because it explains to the consumers we have changed our name but we are still the
17 same people we were before, just with a different name. Then we assume that as part
18 of that change you would also move to a new URL, because it would not seem to make
19 sense to have a bricks and mortar store with one name and a website with another,
20 but if you kept Up and Running -- say you could not get the URL for the new store
21 name, then on the Up and Running website it said the URL was upandrunning.co.uk
22 but the page was headed the new store name, now trading as Newco, formerly Up
23 and Running, as hypothetical as all that is, we would probably be fine with that.

24 **Q.** Final question. Doesn't what you have just said there boil down to you running our
25 business for us? Surely the business decisions that we make are our business. It has
26 been said by Mr Hagger, for instance, that in lockdown -- this was one of the reasons

1 in December -- Up and Running should be concentrating on its bricks and mortar.
2 Maybe you could explain how we could concentrate on bricks and mortar in the middle
3 of lockdown?

4 **A.** Well, we were in the same position for the -- we didn't operate a HOKA store at the
5 time, but we operated another store. So we absolutely appreciate -- we knew that
6 legally you had to have the stores closed. Our preference was that you do the same
7 as us and all of the other retailers and sell from your website and in the case of Up
8 and Running that you would sell on the Up and Running website, not on a new website,
9 which had no connection to Up and Running.

10 **Q.** But you acknowledged at one stage that our internet sales amounted to between
11 3 to 5% of --

12 **A.** I think you have introduced that into evidence and I am perfectly happy to accept
13 it.

14 **Q.** That was Carl Hagger's statement rather than mine, but we are agreed on those
15 sort of numbers?

16 **A.** Yes.

17 **Q.** You can explain since you know it was that number how on earth would Up and
18 Running have survived?

19 **A.** So nobody could go into a bricks and mortar store to buy running shoes or any
20 other products, because the stores were all closed. So everybody's bricks and mortar
21 sales were going to go from whatever percent they were to zero, and we assumed
22 that, just like us, the sales we lost at our own bricks and mortar would be somewhat
23 made up for by online sales. I would point out that compared to the other retailers in
24 the UK irrespective of what the actual selling percentage is, because Up and Running
25 has 30 stores and it is a well known, well respected running shoe brand, people are
26 more likely to be aware of the Up and Running website than they are smaller

1 independents who have a website that people would only know to go to if they
2 happened to know the store. So from that perspective we felt, although we did not
3 particularly dwell on it at the time, we would have assumed that Up and Running would
4 have every chance as good as most of the other bricks and mortar retailers of having
5 sales that weren't happening in store migrating to their website.

6 **Q.** As you know, we have both agreed there are only two retailers in the UK that had
7 the 30 store or thereabouts. I think Runners Need had more stores, but they are part
8 of a large conglomerate. So Up and Running was standing alone by itself and had to
9 face still the rents and rates, etc. Do you agree that -- I will put another question to
10 you.

11 Do you agree that if I had not acted in a proper, professional way and we had gone
12 bust, who would you be looking for?

13 **MR TIDSWELL:** Mr Macfarlane, I am not sure that's a helpful question and I don't see
14 really how Mr Henderson could answer it. I think, if you don't mind me saying so, you
15 rather drifted into some points which are not effectively part of your case. I quite
16 understand why you want to make the points. I think you have made them very firmly
17 to Mr Henderson.

18 **MR MACFARLANE:** Thank you for pulling me up, sir.
19 Mr Henderson, I am finished.

20
21 **Questions from THE TRIBUNAL**

22 **MR TIDSWELL:** Mr Henderson, we do have a few questions for you. Professor,
23 Ibáñez Colomo is going to start.

24 **PROFESSOR IBÁÑEZ COLOMO:** Thank you, Mr Henderson. The first point is in
25 Bundle A, page 27. Just to introduce the topic, it is all about the multiple websites
26 issue. I understood that the starting point would be to allow only one website per

1 retailer but there is the potential to allow multiple websites?

2 **A.** In theory correct, yes.

3 **PROFESSOR IBÁÑEZ COLOMO:** I was just wondering what criteria was followed to
4 decide whether or not more than one website was allowed or whether this was
5 something that was decided on a discretionary basis depending on the case.

6 **A.** So generally speaking I would say that would be a hypothetical but fortunately we
7 have the real world example of what happened with Up and Running, so I can
8 speculate a bit or I can (inaudible) what we did with Up and Running. As Carl and
9 Steve did, Carl sent the e-mail in 2019 which says (inaudible) "that has the same name
10 as bricks and mortar if you want to sell from another website, please let us know".

11 So our intention was essentially exactly what happened, that Up and Running or any
12 other retailer would come to us with a proposal for the second website. We would look
13 to evaluate the reason for it, how it would impact our brand, and whether we felt that
14 there were legitimate commercial reasons, not so much -- we understand, and Mr
15 Macfarlane makes a good point. It is up to him and his colleagues to run the Up and
16 Running business. That is not our concern or business. What is our concern is how
17 they run their business as it impacts on the HOKA brand.

18 So if a proposal was made that we were satisfied that met all of our brand criteria, then
19 we may well have said "Okay. We will give you permission for a second website".

20 In terms of why we were keen to limit as a starting point to just one website, as I said
21 earlier, we want to have a good idea of where our products are being sold. If we start
22 giving permission to one retailer "Yes, you can sell on another website" then other
23 retailers will be made aware of that and soon we might have loads of retailers. We
24 are keen to know where our products are being sold, whether it is bricks and mortar
25 or a website and that is why -- also we also feel that this is consistent with what
26 happens in practice, as in as far as I am aware all of our customers do just sell HOKA

1 from a single website, but if somebody had a good reason to propose a second one,
2 as in the case with Up and Running and Running Shoes, we're happy to consider it.

3 **PROFESSOR IBÁÑEZ COLOMO:** Thank you. I have another question concerning
4 the sales strategies. This takes me back to bundle C, page 1018.

5 **A.** Sorry, sir. You said referring to sales to and I couldn't hear the last word.

6 **PROFESSOR IBÁÑEZ COLOMO:** Sales strategies.

7 **A.** My apologies. Okay.

8 **PROFESSOR IBÁÑEZ COLOMO:** If I understand the point you made -- it takes us to
9 the end of paragraph 4. If I understand the point you made about this, if I understood
10 correctly you were saying that your expectation is that retailers would have the full
11 range and would not simply have sort of the out of stock or previous season's product.
12 Right?

13 **A.** That would be our preference and that would be part of our brand strategy to have
14 the primary focus of their business be current season, but allowing for the fact, as
15 I said before, we understand there is always going to be leftover inventory. We would,
16 to be clear, prefer they clear as much of the autumn/winter 2022 inventory as close to
17 the end of the autumn/winter 2022 season as they can, and that is why Mr Hagger
18 referred to at the start of the season you don't see as much discounting and then as
19 the season goes on and the product is not selling through, you see more and more
20 discount but, you know, we accept there is always going to be some product which
21 may not sell during the season or immediately after it, but we would want the focus of
22 what the consumer sees to be the current range as in right now we are just
23 transitioning from Spring/summer '24 to autumn/winter '24.

24 **PROFESSOR IBÁÑEZ COLOMO:** But this is a requirement that is a formalised one
25 or simply the practice you have followed with the retailers?

26 **A.** It is a practice. We don't say -- we don't talk about it in our terms and conditions

1 but we do talk about "We would like you to take a" -- we have -- I don't know -- 20
2 different types of shoes. We would not want a retailer to just pick the Cliftons, which
3 are the most popular size. We would want them to take a range of HOKA shoes, but
4 in a small retailer that range might be six styles. In a bigger retailer like Up and
5 Running we might expect them to take 15 size. We might say "We don't want you to
6 cherry pick the popular stuff. We want the consumers to see we are not just one
7 particular product. We have a range of products".

8 **PROFESSOR IBÁÑEZ COLOMO:** Thank you. I think building on that, there is one
9 retailer, I am coming back to something that was said before about one specialised
10 retailer in this kind of product. Then how does the -- so how does this retailer fit with
11 the overall strategy, because I understand -- is it fair to see this as an exception to the
12 overall policy whereby retailers have the full range of products?

13 **A.** I must confess I am not myself familiar with the product range that's sold on that
14 website, but as part of our overall distribution strategy we do acknowledge that, you
15 know, we -- I don't know exactly what products are sold on that website.

16 **MR TIDSWELL:** Just to help, our understanding of the evidence, and this may not be
17 right, but as I understand the Professor's question, is if you assume it is largely -- it
18 sounds as if it has largely been utilised by Deckers for disposal of Deckers' surplus
19 stock during the season, so stock that has over manufactured and, if you like, and is
20 not ordered by other retailers. So it is almost like it is a mechanism for Deckers to
21 dispose of --

22 **A.** If that's how we operate, then that would be an exception to our overall policy and
23 we would consider Up and Running along with virtually all the other specialist running
24 shoes stores, we would want them to focus on current season product as opposed to
25 what the discount website is looking to achieve.

26 **PROFESSOR IBÁÑEZ COLOMO:** Thank you.

1 **MR TIDSWELL:** Thank you. That is very helpful. Can I ask you just one question on
2 that. If we go back -- we don't need to turn it up unless you want to. Mr Macfarlane
3 asked you about that initial e-mail that Mr Yates sends back.

4 **A.** Sorry. Is this the e-mail from 15th September --

5 **MR TIDSWELL:** 14th August e-mail, the first time. Why don't we have a look at it?
6 I have it at C1, 98, tab 18.

7 **A.** So, the e-mail from Mr Yates?

8 **MR TIDSWELL:** Yes, at the bottom of the page. Do you see the last sentence on the
9 page before the number:

10 "The proposition of Runningshoes.co.uk goes against the fundamental principles of
11 our brand strategy."

12 **A.** Yes.

13 **MR TIDSWELL:** It is quite interesting hearing you talk about that positioning of
14 premium and older stock, and in a way that's quite consistent with what Mr Yates is
15 saying here. As Mr Macfarlane has explored with you, that seems to have been
16 a discussion that took place and came out of the discussion between you, Mr Hagger,
17 Mr Yates and Mr Black. I mean, do you think that that is recording in part the point
18 you have just discussed with the Professor, when you talk about brand strategy? Is
19 that getting at that, do you think?

20 **A.** I must confess I do not know exactly what Mr Yates meant when he wrote that. My
21 instinct is that he was trying to give not an overly specific reason, but as to whether
22 that was -- you know, as we have talked about, the real issue was that this was
23 a website which had no link to Up and Running or anybody else. It's a website literally
24 nobody had ever heard of, and we were not comfortable with HOKA being sold on that
25 website with no link to Up and Running.

26 **MR TIDSWELL:** That is quite a different point, though, isn't it, from the one we have

1 | just been debating? I mean, they are distinct points, aren't they? There is no logical
2 | connection between them, is there? Just to be absolutely clear with you, there is this
3 | point which comes out of the debate that you and I had before the short adjournment,
4 | which is the distinction between the two websites, which led us to this discussion about
5 | the preference from a brand point of view of seeing the premium product and not
6 | having solely outdated product.

7 | Now that I think is a different point altogether from the point you have just referred to
8 | which is the signposting point.

9 | **A.** My interpretation in part because what Mr Yates goes on to say where he says "If
10 | you want to sell excess inventory, you are free to sell it on the Up and Running website
11 | or the Up and Running stores".

12 | **MR TIDSWELL:** That's later, isn't it? It is not in this e-mail. It is in a later e-mail.

13 | **A.** With respect, I believe it is. If you turn over to the next page, it is the next sentence:
14 | "However, we would need to be clear that this could have no connection to
15 | runningshoes.co.uk -- am I okay to read?

16 | **MR TIDSWELL:** Please do, yes.

17 | **A.** "However, we would need to be clear that this could have no connection to
18 | runningshoes.co.uk and any excess inventory arising from this will need to be
19 | managed through existing U&R channels" by which he means the B&M stores.

20 | **MR TIDSWELL:** That is consistent. If we can label these so we know what we are
21 | talking about. The first point is the point about the distinct differences about the
22 | premium stock point. Let's call it the premium stock point.

23 | **A.** Yes.

24 | **MR TIDSWELL:** The other point is we have heard a lot about the signposting point
25 | which is the connection between the website. That last sentence in Mr Yates e-mail
26 | is consistent with the premium product point, isn't it? It is not a signposting point at

1 all. He is saying "If we are going to give you more stock, we don't want it disappearing
2 on to effectively a website where it is there is by itself"?

3 **A.** With respect, I interpret this sentence differently. I interpret it to mean it was more
4 about the signposting where he said -- he didn't -- he implied, or at least that is how
5 I interpret it, to mean that the issue here is really that we are fine with you selling on
6 Up and Running but we are not fine with you selling on Running Shoes as opposed to
7 the --

8 **MR TIDSWELL:** Perhaps the best thing we have Mr Yates coming. Maybe the best
9 thing is to ask him. I suppose the reason for asking you about the e-mail at all is it
10 does seem to me, if you look at what you said in your witness statement and the
11 County Court proceedings, which is 30th June 2023, and the point that's made about
12 the premium stock, I suppose I'm trying to in my mind get a sense of -- firstly, the sense
13 I have from that evidence and indeed from other material we've seen is that that was
14 a consideration that would have been in peoples' minds in relation to brand,
15 and -- I think you've confirmed that this morning. I just want to check with you that it
16 is not something that -- let's leave the relevant merits for the moment, but it was
17 a consideration at the time I think is the message I am getting. Do you agree with
18 that? Do you think it was something that was taken into account at the time?

19 **A.** I can't say that for sure because I was not part of the -- I was part of the discussions
20 in terms of are we okay to say to Up and Running "We are not going to give you
21 permission for the second website". I was not part of the discussion in terms of what
22 are the things about this website that we are not happy with?

23 So if Mr Yates meant one of the issues that we have is the fact that it is not going to
24 be our current season and it is going to be excess old stock, that may have been part
25 of the conversation but that was not part of the conversation which I participated in.

26 **MR TIDSWELL:** Isn't it slightly odd, because surely if you are going to give advice on

1 whether or not Deckers was entitled to do it, you would need to know why they wanted
2 to do it, wouldn't you?

3 **A.** Correct and my understanding was the primary reason was the lack of signposting.

4 **MR TIDSWELL:** That's really where I am going with this. So notwithstanding that we
5 have identified this point, which is interesting and possibly has some resonance for
6 Mr Yates' e-mail, actually from your -- in a way that's really what I wanted to come on
7 to ask you about, because I did sort of -- I thought it was slightly curious that when we
8 get to a certain point in your statement, when we get to paragraph 57, you don't
9 actually tell us anything about what then happens and your involvement in the meeting
10 that Mr Hagger describes took place. That's in his -- if you need to look at it, that's in
11 Mr Hagger's statement at paragraph 87 I think. So you have this meeting with
12 Mr Yates and Mr Black and Mr Hagger.

13 **A.** Yes.

14 **MR TIDSWELL:** I just wondered why -- I mean, you say here you understand they
15 are going to deal with it, but given it was obviously going to be quite important for us
16 to understand the reasons, I thought it was -- can you explain to us why you didn't then
17 go on to explain what happened at that meeting?

18 **A.** This is almost four years ago. So I don't know if there was one single meeting that
19 involved all four of us or there was a separate -- which would be entirely normal -- sort
20 of business discussion in which the business people would decide "Are we happy with
21 this new website?" Then I would be brought in towards the end of that discussion and
22 say "Okay. We have reached a decision that we don't want to support this
23 proposition". They would ask me "Are we within our rights to do so". At that point
24 I would say and if there were other reasons explained why we were not happy to give
25 the permission I honestly don't recall. The one thing I have all along thought was the
26 primary reason was the lack of signposting.

1 Q. Do I take it from that that you don't remember the meeting?

2 A. Not specifically, no.

3 Q. Mr Hagger seemed to think it was a Teams meeting?

4 A. It may well have been.

5 **MR TIDSWELL:** I would think because Mr Black was involved.

6 A. At that point even today to be honest we are not in offices the way we were
7 pre-COVID and as has been highlighted, Mr Hagger was in -- sorry -- Mr Black was
8 in -- he was based in the Netherlands. I think Carl, Steve and I all don't live particularly
9 close together. So the days "We will have that chat in the office" are gone. Assuming
10 there was a meeting, which I have no reason to doubt, it would most likely have been
11 on Teams. It may well have been, as I said, there was essentially one meeting to talk
12 about reasons for the decision, which would have been primarily a business meeting,
13 and then I would have joined either towards the end of the meeting or there would
14 have been a separate meeting in which we would have just talked about "I think we
15 have made our decision". Are we okay to refuse permission. Are we okay that the
16 reason we are going to refuse -- are we okay with the reasons we are not giving
17 permission, at which point I would have said "Yes". I was not involved, however, with
18 the communication that Mr Yates said to say. In fact -- so let me -- I would not have
19 been involved at the time the decision was made to not give permission for the website.
20 If there was a meeting at which we talked about it with Mr Black, that would have
21 happened subsequently.

22 **MR TIDSWELL:** I may have the chronology wrong, in which case I am sure I will be
23 corrected, but I think it is paragraph 87 of Mr Hagger's statement, and certainly the
24 impression I took from -- well, the sequence that's described by Mr Hagger -- I will wait
25 until you have it. The sequence described by Mr Hagger in 86, if you just go back
26 a page, he talks about the concerns that Mr Yates and he had here.

1 A. So --

2 Q. Then you see in 87 his record that there was a meeting subsequently which
3 involved you and Mr Black and then he talks about 88, where we see them then talking
4 about the e-mails. I think the sequence -- Mr Hagger suggests the sequence does
5 involve as I described to you?

6 A. So to the best of my recollection in part having looked at this is I believe the
7 sequence of events was website proposed -- request to have a meeting about the
8 website proposal. Meeting takes place. At the end of the meeting Mr Midwood sends
9 the written proposal. I think we -- despite the apparent discrepancies in date -- think
10 that meeting probably happened on 23rd July. On I think it was 7th August actually
11 that Mr Midwood followed up saying "Just to follow up on our meeting, here is the
12 business plan". A week went by and on 14th August Mr Yates wrote back and said "It
13 doesn't meet with our brand strategy". At that point I knew nothing about any of this.
14 I was only made aware of this issue on 15th September when Carl sent me the e-mail
15 basically saying -- at that point the decision had already been made that we were not
16 going to supply and had been communicated.

17 So I think that the meeting that Mr Hagger is referring to here must have taken place
18 some time after 15th September.

19 **MR TIDSWELL:** I don't think that's how Mr Hagger recollects it. It may be nothing
20 turns on it particularly, but my understanding of Mr Hagger's evidence is that he has
21 the meeting -- I don't think he refers to the written proposal being received. Then he
22 says there's the meeting which involves you and then he says subsequently Mr Yates
23 sent the 14th August e-mail. That would position the meeting involving you between
24 7th and 14th August. Now maybe you can't remember any of that.

25 A. I don't remember specifically. I am confident the first time I was made aware of
26 the issue was 15th September, when Mr Hagger sent me the e-mail. So it may have

1 | been that initially Steve and Carl felt confident that (a) we didn't want to supply or
2 | approve the second website and we were within our rights to do so, and it was
3 | only -- which Mr Midwood for what it is worth seemed to accept, and it was only when
4 | subsequently Mr Macfarlane challenged that decision, which I can understand why he
5 | did, only at that point did they come to me and say "Hey, we have made this decision.
6 | Does it stack up legally?"

7 | **MR TIDSWELL:** Yes. Thank you. Well, that's helpful. I mean, obviously there is
8 | a conflict in the evidence there, but I certainly understand what you are saying and
9 | why you are saying it. That's very helpful. Thank you.

10 | There is also the meeting about termination, which is recorded in Mr Hagger's
11 | statement at paragraph 100, if you still have his statement there. That's page B, 79.
12 | I think we are now talking about December 2020?

13 | **A.** Yes, I believe that's -- I can't remember the specific date, but it would have been
14 | in December most likely to the best of my recollection, yes.

15 | **MR TIDSWELL:** And do you recall that meeting?

16 | **A.** That meeting I do recall, yes.

17 | **MR TIDSWELL:** Am I right in thinking that there is no note of that meeting anywhere,
18 | is there?

19 | **A.** I do not have a note of that meeting.

20 | **MR TIDSWELL:** Are you able to tell us -- what we don't know, and really where
21 | I started this in relation to paragraph 67, we don't have any recollection from you of
22 | that meeting. Are you able to give us your best recollection of what was discussed at
23 | that meeting and the reasons for the decision?

24 | **A.** I do recall that discussion and I do recall that we had determined that we weren't
25 | happy with Up and Running selling on the Running Shoes website for the reason
26 | given. It was clear they weren't going to change their mind. They weren't going to

1 make clear on the website that the link back to Up and Running, and so we felt at that
2 point that the appropriate decision was to stop supplying them.

3 **MR TIDSWELL:** I don't know whether you probably would have heard me asking
4 Mr Hagger about this, but there was a sense -- Mr Hagger acknowledges in his
5 statement that there was a hope that Mr Macfarlane might change course and take
6 the HOKA shoes off the Running Shoes website, in which case the position would
7 have been that he might have rescinded the termination?

8 **A.** Correct.

9 **MR TIDSWELL:** That went by the by because of the relationship issues?

10 **A.** Correct and also the fact that we didn't find out until the following May that they
11 had added the banner, which -- who knows whether that would have made
12 a difference had he done that in December, but at the time the decision was made to
13 stop supplying him. They had not added the banner and so we weren't happy for
14 HOKA being sold on a website for which we had not given permission primarily for the
15 lack of a signposting.

16 **MR TIDSWELL:** Yes. Thank you. Can I ask you one other question I have about
17 a document actually? Would you mind having a look at -- actually first
18 paragraph 51(b) of your witness statement. This is in B, 39.

19 **A.** Yes.

20 **MR TIDSWELL:** You talk about the relationship with Millets.

21 **A.** Yes.

22 **MR TIDSWELL:** Maybe we could have a look at the document as well if you don't
23 mind keeping that open and look at C, 17, right at the beginning of the first bundle. Do
24 you see you have given a response?

25 **A.** Yes.

26 **MR TIDSWELL:** And you make clear the point about:

1 "... we must respect the retailers' right to choose the price ..."

2 Then you say:

3 "You may want to separately have a discussion with Millets about them discounting,
4 but you cannot let Up & Running or any other retailer know you are discussing prices
5 with another account."

6 Why would there be any legitimate basis to have a discussion with Millets about
7 discounting?

8 **A.** The primary reason -- well, I don't actually know. I don't know if Carl can recall if
9 he did actually have that conversation. We did talk about it. First of all, the stating
10 point is we had been notified. We -- I think it is Carl -- by an Up and Running
11 franchisee that Millets, another retailer was selling at a discount. That does happen
12 within the industry from time to time where one retailer object about another retailer
13 selling at a discount and will say what are you going to do about it. So the first part of
14 my answer is to say to the objecting retailer "Unfortunately there is nothing we can do
15 about it. Both sides need to respect competition law". So the second part of my advice
16 was to go back to Millets. Understand why they are discounting. First of all, find out
17 is it accurate.

18 At the time of the e-mail it was August. So part of it would depend on what product
19 was being discounted, because in August typically I think back then -- Carl and
20 Steve -- either they were discounting product from spring 2016, because August would
21 still be the tail end of the spring/summer selling season, and if they were and they
22 were discounting at 25%, that would be very common within the industry. If, however,
23 it was new season product and they were discounting it immediately, we would want
24 to understand the reasons why as in did they have concerns that sell through was
25 going slowly. Then we might have expected it to go. Were there things that we could
26 do. It was the end of the season. If it was product from spring '16 in some instances

1 we might say to a retailer "Okay. It is not selling through". We might offer to take
2 some of the stock back.

3 So it would really be to understand what was happening and whether there were things
4 that we could do to help the retailer with the sell through of the products.

5 **MR TIDSWELL:** And am I right in thinking that links back into the premium stock point
6 put we were talking about before, that you would prefer to see the premium stock listed
7 in season at the full price, the full RRP and obviously discounting to take place in the
8 way you described further in the season as the season goes on?

9 **A.** Yes.

10 **MR TIDSWELL:** And within the context, if you like, of the stock flows?

11 **A.** Yes.

12 **MR TIDSWELL:** It is a similar point to that.

13 **A.** Yes.

14 **MR TIDSWELL:** That's very helpful. Thank you.

15 Mr Macfarlane, is there anything that arises out of that that you want to ask
16 Mr Henderson?

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

18 **MR TIDSWELL:** Can you be brief about it?

19 **MR MACFARLANE:** It is just the one question, sir.

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

21 **MR MACFARLANE:** Mr Henderson, if I have got it right, you said when the website
22 was launched there was no indication of Up and Running on there?

23 **A.** That's my understanding, yes.

24 **Q.** Could I refer you to C, 190, the famous red box?

25 **A.** C, 190?

26 **Q.** Yes.

1 **A.** Oh, the red box. Yes.

2 **Q.** The date this site was launched is in the bottom corner there?

3 **A.** Sorry. Where is that?

4 **Q.** The date the site was launched, 27/11. Was it? No, it wasn't?

5 **A.** That's the date that this snapshot was taken. I don't know that that proves --

6 **Q.** Yes, you are right. That's the date of the screenshot?

7 **A.** So I don't know that that proves that was also the date the website launched.

8 I assume Up and Running knows when the website was launched.

9 **MR TIDSWELL:** Maybe we can short-circuit this. I think Mr Macfarlane is trying to
10 correct your statement and it is I think the evidence of Mr Hagger that this is certainly
11 as he became aware of it. You don't know what was on it at the time it was launched
12 because you didn't see it, but do you have any reason to think that that wording was
13 not on there at the date it was launched?

14 **A.** No.

15 **MR TIDSWELL:** So the statement you have made actually is subject -- is incorrect in
16 the sense that it may well be -- you don't know that this was not on there at the time.
17 We certainly know it was on and the inference would be that it was on from an early
18 stage, if not from the start?

19 **A.** We would happily accept that that was within the terms and conditions as of 27th
20 November and if the website launched sooner than when the website went live.

21 **MR TIDSWELL:** Does that deal with the point, Mr Macfarlane?

22 **MR MACFARLANE:** Yes. I am really not good at this.

23 **MR TIDSWELL:** You are doing very well. Don't worry about that. Thank you.

24 Ms Berridge.

25

26 **Re-examination by MS BERRIDGE**

1 **MS BERRIDGE:** Just one question from me. Can I ask you to turn to Bundle C3,
2 page 1074?

3 **A.** Yes.

4 **Q.** If you look halfway down the page, that's an e-mail that Mr Macfarlane took you to.
5 It is from Shopify to Up and Running. It talks about violation of the terms and service
6 and no longer being able to host the store Running Shoes?

7 **A.** Yes.

8 **Q.** Mr Macfarlane asked you some questions about that, didn't he?

9 **A.** He did.

10 **Q.** He I think it is fair to say implied that this must have been something to do with
11 Deckers?

12 **A.** Correct. That is my understanding.

13 **Q.** Can I ask you to turn to page 1076?

14 **A.** Yes.

15 **Q.** And to look at the e-mail on that page. Who is that e-mail from?

16 **A.** It is from Shopify.

17 **Q.** And who is it to?

18 **A.** Mr Macfarlane.

19 **Q.** And could you read the first paragraph?

20 **A.** So the one after "We have received the e-mail".

21 **Q.** No, that one?

22 **A.** Okay:
23 "We have received your e-mail in regards to your case and I can assure you that this
24 review has no relation to the case you have mentioned."

25 **Q.** I appreciate this e-mail was not to or from you but what would you expect that to
26 mean?

1 **A.** Well, assuming that Mr Macfarlane made some sort of reference in his
2 communication to Shopify of the still ongoing dispute with HOKA, that this was Shopify
3 confirming to Mr Macfarlane that the review that Shopify was undertaking has no
4 relation to the case as in the HOKA dispute you have mentioned.

5 **Q.** Thank you. I do have to say to show the tribunal the first e-mail and not the second
6 seems to have been remarkably selective.

7 **MR TIDSWELL:** Well, your point is taken, Ms Berridge, but I think we also have to
8 accept that Mr Macfarlane is doing his best representing himself and, of course, you
9 are here to pick up the pieces. Are you finished with Mr Henderson?

10 **MS BERRIDGE:** I am. Thank you.

11 **MR TIDSWELL:** Mr Henderson, thank you very much for your evidence. You are
12 released from the witness box. Thank you.

13 **A.** Thank you.

14 **(Witness withdrew)**

15 **MR TIDSWELL:** Ms Berridge, you are going to call Mr Yates and actually I think we
16 might have a couple of questions for Mr Yates. You may be going to ask them, but if
17 you are not, then I will.

18 **MS BERRIDGE:** (Inaudible).

19 **MR TIDSWELL:** Possibly they do. I don't know, Mr Macfarlane, whether your position
20 has changed. If he is called, you are entitled to ask him questions. Just so you are
21 clear, I am going to ask Mr Yates questions about the points that we have just
22 traversed with Mr Henderson and particularly this point about what he meant in relation
23 to brand strategy and the 14th August e-mail and the sequence of events there. So if
24 that saves you the trouble of worrying about that, that might be helpful to you.

25 **MR MACFARLANE:** Can I go after you, sir?

26 **MR TIDSWELL:** You can't do that. You have to decide whether you are going at all

1 or not. I am telling you that's what I am going to do. If you are going to do it I probably
2 don't need to. It is up to you to decide.

3 **MR MACFARLANE:** I will go with you, sir.

4 **MR TIDSWELL:** Why don't you wait and see. I will ask you if you have any questions
5 when Ms Berridge has finished.

6

7 **STEVEN DAVID YATES (sworn)**

8 **MR TIDSWELL:** Thank you, Mr Yates. Do you want to take a seat?

9 **A.** Thank you.

10 **MR TIDSWELL:** Do you have water there? Do you have a fresh cup?

11 **A.** I do.

12 **MR TIDSWELL:** If you need it. You have been watching, so you know how the
13 bundles work?

14 **A.** Yes.

15 **MR TIDSWELL:** And you have also probably picked up a message that I don't want
16 you to be rushed with documents. You take your time and if you are not sure what's
17 on the page before or the page after, then ask to have a look or indeed to be shown
18 to any document you think may be relevant. I don't want you to have to rely solely on
19 memory when we have documents to help us.

20 Ms Berridge, I think will confirm your evidence and has a question or two.

21

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

23 **MS BERRIDGE:** Could I ask you to give the tribunal your job title?

24 **A.** Strategic account manager for HOKA.

25 **Q.** Could I ask you to turn to bundle B, tab 6, page 100? Is that the front page of your
26 witness statement?

1 **A.** It is.

2 **Q.** Could you turn to page 105?

3 **A.** Yes.

4 **Q.** Is that can your signature?

5 **A.** It is.

6 **Q.** And is this statement true to the best of your knowledge and belief?

7 **A.** It is.

8 **Q.** Thank you. Can I ask you to turn to Bundle C1, page 98, which is at tab 18?

9 **A.** Okay.

10 **Q.** If we go down towards the bottom of the page, there is an e-mail there from you
11 on Friday, 14th August 2020 to Jonathan Midwood of Up and Running. Do you
12 remember that e-mail?

13 **A.** Yes.

14 **Q.** Thank you. If I can take you to the third paragraph where you say:
15 "The proposition of runningshoes.co.uk goes against the fundamental principles of our
16 brand strategy."?

17 **A.** Yes.

18 **Q.** So could you just expand and elaborate a little bit what you meant when you wrote
19 that?

20 **A.** Sure, yes. Hopefully this is helpful. So I am employed as a salesman for HOKA
21 and joined the business in 2019 and assumed the role of -- a new role of strategic
22 account manager and as part of that inherited seven of our biggest accounts in the
23 UK, obviously of which Up and Running was one of those. So principally concerned
24 with selling shoes into our strategic accounts. Part of the brand strategy that was
25 cascaded down from our global team -- HOKA is a global brand and predominantly
26 driven by what happens in the US. We distil that down into a strategy for Europe and

1 then ultimately for the UK and that's principally my area of concern.

2 So there are really four parts to that strategy that I applied in my thinking to dealing
3 with strategic accounts and that was in an overall sense we were driving sales through
4 strategic accounts as the appetite for the brand was extremely hot at that time and has
5 continued to be so.

6 Secondly was a desire to improve the presentation of the brand across strategic
7 accounts where that was possible.

8 Thirdly was also that we would be selling more product in at least as many accounts
9 as we had or if not fewer globally. This was something that we were finding that the
10 US team were driving, that they were selling more product in fewer accounts on
11 occasions.

12 Lastly, where we had close-out or clearance product, that that would be sold through
13 our existing partners for close-out and clearance and also migrating across to D to C,
14 our director consumer channel, which was starting to emerge at that time.

15 So they were the four parts of the brand strategy that I was principally concerned with.

16 **Q.** Thank you. Then can I ask you to turn over the page? You say:

17 "Should you wish to discuss further the prospect of increasing forward orders for Up
18 and Running and associated support, we can provide for this. Then we would be open
19 to continue this particular conversation."?

20 **A.** Yes.

21 **Q.** Can you just explain what you meant by that?

22 **A.** Well, I think I was very clear on this point and that linked very closely back to the
23 point about driving our business through strategic accounts. I was concerned
24 principally with the Up and Running business. I worked very hard on that account and
25 enjoyed working on that account despite some of the challenges that we had which
26 have been discussed over the last couple of days, but principally that was about

1 helping them find a way of being able to increase the size of the order book, and
2 I would try to work with them and with our business to deliver those increased orders.

3 **Q.** I have no more questions.

4 **MR TIDSWELL:** Mr Macfarlane, do you want to ask any questions?

5 **MR MACFARLANE:** No, sir. I'm fine.

6

7 **Questions from THE TRIBUNAL**

8 **MR TIDSWELL:** Mr Yates, thank you. That has been really helpful. Can I just ask
9 you that brand strategy you have been talking about, is that recorded in a document
10 anywhere?

11 **A.** Internally that would have been part of presentations and documents that would
12 have been distributed around the business.

13 **MR TIDSWELL:** Are you aware of any version of it that appears in the bundle we
14 have got before us?

15 **A.** No.

16 **MR TIDSWELL:** Does that mean you are able to tell us that there isn't something
17 there, in other words, that it has not made its way here, or you are just not sure?

18 **A.** I can't remember seeing that strategic document in any of the bundles as such.
19 I mean, part of my -- I provided joint business plans, which I think we have all seen as
20 part of those bundles, and some of those strategies will be communicated within the
21 joint business plans that I was trying to create for the accounts.

22 **MR TIDSWELL:** Yes. We spoke to Mr Hagger about a document about account
23 classification and we were looking at one, and we can turn it up if it is helpful, but
24 I don't want to ask you detail about it, but can you describe to us the relationship
25 between the brand strategy and that document, as I understand it?

26 **A.** I am not sure if I can explain what the relationship is between the strategy and the

1 document. I mean, part of the strategy would have been an exercise about having
2 more clarity over how we do qualify accounts. So I guess that's where it would fit in.

3 **MR TIDSWELL:** So it would help you for starters to work out who your strategic
4 partners were, for example?

5 **A.** Yes, I guess so. I mean, the strategic accounts were the most established
6 accounts we had in the business. So there would be quite a good level of recognition
7 about where they sat within that framework.

8 **MR TIDSWELL:** I don't know -- I am just taking it you are familiar with the document
9 we were talking to Mr Hagger about?

10 **A.** Yes.

11 **MR TIDSWELL:** We are talking about pinnacle.

12 **A.** Yes.

13 **MR TIDSWELL:** Would there be any correspondence between pinnacle and strategic
14 accounts?

15 **A.** Strategic accounts typically would be the pinnacle accounts.

16 **MR TIDSWELL:** I see. Thank you. In relation -- I think you said that there was
17 certainly a trend in the US of more product going through fewer accounts. Does that
18 mean that there was an objective of reducing, if you like, the size of the customer base
19 and increasing the concentration? Is that how --

20 **A.** I can't speak on behalf of the US specifically, but I think that where -- I don't believe
21 that we did close any accounts in the UK, but there was certainly a desire to focus
22 where we could be driving business through the account base that we had.

23 **MR TIDSWELL:** Yes. I think Mr Hagger was asked whether there was any limit on
24 the number of accounts you might open and he said "no", but it seems to me you are
25 suggesting that actually there would certainly be a preference that there be a smaller
26 number rather than a large number.

1 **A.** I don't think there is a particular preference for a smaller number as such, but
2 obviously a lot of the resource and the focus that we had behind the brand would have
3 been focused behind strategic accounts, or the marketing activity and everything that
4 we were doing to drive that business certainly would have been concentrated towards
5 a smaller number of accounts.

6 Within the industry as well there is consolidation that's happening consistently, where
7 the bigger accounts are tending to get bigger and increase the size of their store
8 portfolios. So that makes perfect sense. I think that is reflected in a huge amount of
9 other industries as well.

10 **MR TIDSWELL:** So let me just see if I have this right and make sure I understand
11 what you are saying. It's almost an adjunct of driving more business through your
12 strategic accounts with that focus that you are going to end up concentrating more on
13 them and actually as a result you may well end up -- indeed, you would be happier if
14 you ended up with fewer accounts?

15 **A.** We were finding ways to service some of the smaller accounts. So that could be
16 a business to business facility, where they actually would not rely on having
17 a representative physically go visit them and they can order product directly from us
18 via a B to B facility, freeing up other resources. That is a great way of improving
19 efficiency.

20 **MR TIDSWELL:** Your last point about clearance being solved through exiting
21 partners, I just jotted this down and I haven't got a transcript, so I don't want to
22 mischaracterise anything you have said, but I think you said that the idea would be
23 you would sell -- so when we are talking about clearance, we are talking about older
24 stock.

25 **A.** Yes.

26 **MR TIDSWELL:** The idea was you wanted to see them go through the existing

1 partners but you also had a direct consumer channel yourself?

2 **A.** Yes.

3 **MR TIDSWELL:** Is that along -- how does -- does that mean that you -- does that
4 have any relevance to the question of how the existing partners sold it? I think you
5 were listening to the dialogue we had with Mr Henderson about this idea that you want
6 to have the premium product sitting there at the best price it can be sold and then the
7 less premium product sold at a particular time. Do you agree with that? Is that your
8 understanding?

9 **A.** Residual stock, which is kind of what we refer to it internally, is driven by timing.
10 So it is when product becomes -- effectively falls out of season. So on
11 1st January 2025, when we launch our spring/summer, literally on the 1st January
12 autumn/winter '24 becomes residual stock. So there is then a requirement to look at
13 how we execute selling that stock.

14 **MR TIDSWELL:** Are you talking about the stock that you still have in your warehouse?

15 **A.** Yes.

16 **MR TIDSWELL:** Not the stock that's gone to retailers?

17 **A.** It is stock that we have in our warehouse.

18 **MR TIDSWELL:** There is or has been a mechanism to do that through -- we have
19 heard talk of an entity called SportPursuit.

20 **A.** We have several accounts which I am responsible for that we recognise as our
21 partners for disposing of residual stock.

22 **MR TIDSWELL:** I see. So when you talked about the existing partners, is that who
23 you mean?

24 **A.** Yes.

25 **MR TIDSWELL:** You are not talking about the retailers you are selling to?

26 **A.** No, they are retailers that I sell to.

1 **MR TIDSWELL:** Sorry. That's a very poorly worded question. I was not sure whether
2 your observations about clearance were clearance of surplus -- of residual stock that
3 you had or clearance of residual stock that your retailers might have.

4 **A.** Only stock that we have.

5 **MR TIDSWELL:** That's what you are talking about, the price strategy.

6 **A.** We are not concerned about the stock that retailers would have. That's entirely
7 their business. We also have residual stock in our warehouse. We would then open
8 a dialogue with our existing partners that specialise in that area about closing deals to
9 move that stock.

10 **MR TIDSWELL:** Yes. Just before I move on, I just want to check to see whether -- do
11 you have questions on that subject?

12 **PROFESSOR IBÁÑEZ COLOMO:** There is one point I want to understand along
13 these lines. Would it be fair to say there is a dual distribution strategy effectively?
14 There is some retailers that sell the full stock, in particular the in season stock, and
15 then there is another range of retailers that are specialised in --

16 **A.** There are some retailers that specialise just in residual stock, plus there are several
17 retailers that will take a mix across the course of a season or a full financial year.

18 **PROFESSOR IBÁÑEZ COLOMO:** And the criteria for the selection in one category
19 and the other differs? There is the one range of --

20 **A.** They would be classified as different types of businesses if there is a specialist in
21 residual stock. I am not sure what -- could you re-ask me that question?

22 **PROFESSOR IBÁÑEZ COLOMO:** No, no. Absolutely. I just wanted to understand.
23 There is effectively two categories of retailers from what I understand. Is that correct?

24 **A.** In that sense I would agree with that.

25 **PROFESSOR IBÁÑEZ COLOMO:** And then when it comes to selecting them as part
26 of the HOKA team, so to speak, are they subject to the same criteria for selection?

1 **A.** Well, I would guess that a retailer that specialised in buying and selling residual
2 stock wouldn't be measured against the same criteria, because it is not about offer
3 and presentation, because they are dealing with a completely different type of
4 inventory, stock that's old effectively.

5 **PROFESSOR IBÁÑEZ COLOMO:** Thank you.

6 **MR TIDSWELL:** Thank you. That's helpful. If we could just change subject -- that
7 has been very helpful. Can we just come back to the e-mail that started this dialogue?
8 It is page 98. Your observation at the bottom when you talk about:

9 "... the fundamental principles of our brand strategy."

10 I think when you were asked about that, you gave the answer that directed us down
11 that set of principles. Can you just identify for us more precisely what you meant by
12 "brand strategy"? What was it about the brand strategy that was -- that the Running
13 Shoes proposition was contrary to? Can you be more precise about the things we
14 have just talked about? Which of those things was the thing that you didn't like?

15 **A.** It is not that I didn't like them personally. It was the fact that some of them I think
16 ran slightly contrary to the strategy as it was presented to us and that was
17 concentrating on or focusing on driving business through our existing strategic
18 accounts. So that would be number one. So at the top level I was principally
19 concerned with my business with Up and Running.

20 **MR TIDSWELL:** I see. So in your mind, if I get this right -- see if you agree with
21 this -- in your mind you have a strategic account with Up and Running, which is
22 an important account obviously, and there is now going to be another account which
23 is going to be created which is not going to fall within the same category of being
24 strategic. Is that right?

25 **A.** Where are think that fell over was as part of those other parts of the strategy, which
26 was we had, for example -- because the conversation -- the proposal about Running

1 Shoes was very clear to me as it was presented by Jonathan Midwood and in the
2 document, and that was that it would be a website for disposing of residual stock
3 principally.

4 **MR TIDSWELL:** Yes.

5 **A.** And, as I mentioned, in that strategy we already existing partners for that particular
6 job that we were doing.

7 **MR TIDSWELL:** Yes.

8 **A.** And there was, therefore -- that's kind of where it didn't really get over the first line,
9 and I think probably why it didn't with some of the other brands as well, if I am being
10 perfectly honest.

11 **MR TIDSWELL:** Yes, I see. So you are back actually to that fourth item?

12 **A.** Yes.

13 **MR TIDSWELL:** But just so I am clear about that, we have talked about that really
14 being the disposal of your stock?

15 **A.** Yes.

16 **MR TIDSWELL:** Obviously Mr Macfarlane was trying to dispose of his stock?

17 **A.** He was, yes.

18 **MR TIDSWELL:** I think this is all about COVID now, isn't it, because he has a large
19 amount of stock which is suddenly out of date that he needs to get rid of?

20 **A.** Yes.

21 **MR TIDSWELL:** But did you view it in a way through the same prism that it was not
22 in line with the brand strategy to deal with it that way?

23 **A.** You know, I batted very hard for Up and Running in terms of trying to help wherever
24 I could drive that business. I wanted to see them -- as we have said, their online
25 business was by comparison to some of our other partners very small, 3 to 5%. I saw
26 a huge opportunity to drive that business through their own website for all the obvious

1 reasons. They were a well-known business. Customers couldn't go to the stores, but
2 they could go online. That makes sense.

3 **MR TIDSWELL:** I see. That is very helpful indeed. So again, just to make sure I have
4 got this right, in terms of the brand strategy you would prefer to see, firstly, product
5 driven through the Up and Running business and therefore through its website,
6 expanding its reach. That's one element of it. Then on the other side you didn't
7 particularly think it was consistent with the strategy to have what was effectively
8 a clearance outlet sitting alongside that?

9 **A.** Correct.

10 **MR TIDSWELL:** Yes. That's really helpful. Thank you. I think I need to put to you
11 there is this -- obviously there is this question of what has been called the signposting
12 point --

13 **A.** Yes.

14 **MR TIDSWELL:** -- which is a slightly different point I think. It is a point about whether
15 consumers know or don't know who the owner of the website is. It sounds to me as if
16 that's not actually what you meant when you sent your 14th August e-mail from what
17 you have just told us.

18 **A.** No, I was not necessarily directly referring to that. I mean, that was very clear in
19 the proposal and the conversation that Carl, myself and Jonathan Midwood had. I
20 mean, here was the thing. The genius of the idea of Running Shoes was that it was
21 completely separate from Up and Running. That was made very, very clear.

22 **MR TIDSWELL:** For the reasons that --

23 **A.** For the reasons that Mr Macfarlane pointed out, the issue that he had with
24 franchises, etc, etc. So that was very clear. There was clearly no signposting at that
25 point, and again that is why the proposal really fell over at that stage was because the
26 brand strategy -- the points around brand strategy, which really were, you know,

1 | predominantly in my mind from my own view but also the fact that it became -- you
2 | know, it was very obvious that -- in that sense it was assessed as a completely new
3 | entrant into the market for us, a completely new entrant.

4 | **MR TIDSWELL:** Yes. I think I am getting the sense that there was a -- so your initial
5 | reaction was more based around, if one can put it this way, the brand strategy and the
6 | way it appeared, and, of course, in that the separation of the websites plays quite
7 | a significant role.

8 | **A.** Yes.

9 | **MR TIDSWELL:** But then actually what seems to have happened is when people
10 | thought about it further, and particularly when you get to the meeting at which the
11 | decision is made to refuse it, there is some more focus on the signposting point.

12 | **A.** That is correct.

13 | **MR TIDSWELL:** Would that be fair?

14 | **A.** That's a correct assessment.

15 | **MR TIDSWELL:** Yes. That's really helpful. Thank you. I don't think you made a note
16 | of the meeting, whenever that was in August. Can you remember anything about it
17 | now, the meeting with Mr Henderson, Mr Black and Mr Hagger?

18 | **A.** I can't. I can only assume it would have been a Teams meeting, but in that respect
19 | no. I'm sorry.

20 | **MR TIDSWELL:** Thank you. The same question really about the meeting that took
21 | place later in December where the decision was made to terminate. Do you have any
22 | notes of that?

23 | **A.** No, I don't. I mean, I then -- the conversation had then escalated really beyond my
24 | pay grade.

25 | **MR TIDSWELL:** Yes. Mr Hagger was dealing with it.

26 | **A.** Yes.

1 **MR TIDSWELL:** Do you have any recollection of that, independent of the documents,
2 any recollection of that meeting?

3 **A.** Not specifically. You know, Carl and I work closely together, so there would have
4 been several conversations around this as the situation developed, but I don't -- I can't
5 recall any specifics about that meeting that might help the situation, I'm afraid.

6 **MR TIDSWELL:** Thank you. I completely understand why that is. That is helpful.

7 **MR DERBYSHIRE:** Mr Yates, thank you for that. It is very interesting. I just want to
8 take you back a bit to the residual stock and get a better understanding about Deckers'
9 residual stock and how you dispose of that. You mentioned the kind of specialist
10 retailers who take it off your hands and sell it.

11 **A.** SportPursuit --

12 **MR DERBYSHIRE:** Would be a good example.

13 **A.** -- is a great example.

14 **MR DERBYSHIRE:** Yes. Then you run internet sales?

15 **A.** Yes.

16 **MR DERBYSHIRE:** I don't know if you know much about them, but they have grown
17 a huge amount in the last three or four years.

18 **A.** They have.

19 **MR DERBYSHIRE:** Is that residual stock or is that a mixture?

20 **A.** It is a combination.

21 **MR DERBYSHIRE:** It's a combination.

22 **A.** It's predominantly our own direct to consumer website and now we have a store in
23 London at Covent Garden. It is predominantly the shop window for the brand. So it
24 is predominantly about presenting -- this is the only place you will ever see the full
25 breadth of HOKA, because other retailers physically don't have the space to do that.
26 It is predominantly about a showcase of new, exciting and innovative product at full

1 price, but if you look on the website, you will find on there an outlet function, which is
2 about dealing with residual stock.

3 **MR DERBYSHIRE:** Okay. So the residual stock that you have out of season you will
4 sell directly on your own internet and to specialist retailers like SportPursuit who do
5 that?

6 **A.** Correct.

7 **MR DERBYSHIRE:** And you have existing relationships with a number of those
8 people who take those stock on?

9 **A.** We do.

10 **MR DERBYSHIRE:** Okay. I think that's all I wanted to know actually. Thank you.

11 **MR TIDSWELL:** Mr Macfarlane, anything you want to raise after those questions?

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

13 **MR TIDSWELL:** Ms Berridge, any re-examination?

14 **MS BERRIDGE:** No.

15 **MR TIDSWELL:** Mr Yates, you almost escaped without having to go into the witness
16 box. I'm sorry --

17 **A.** I almost escaped.

18 **MR TIDSWELL:** You thought you were going to get away, but you didn't. Thank you
19 very much, and you are now released from the witness box. Thank you.

20 **(Witness withdrew)**

21 **MR TIDSWELL:** Ms Berridge, I am just thinking about timing. I don't want to prolong
22 the proceedings any longer than we have to, but we should give the transcriber a break
23 at some point. Maybe I will just check. Just in terms of number of questions,
24 Mr Macfarlane, how many do you have for Dr Majumdar?

25 **MR MACFARLANE:** Just two as it is.

26 **MR TIDSWELL:** You have two?

1 **A.** Yes.

2 **MR TIDSWELL:** Just your best estimate. Obviously it depends on how long the
3 answers take, but do you think you could deal with that in ten or fifteen minutes?

4 **MR MACFARLANE:** Oh, easily, sir.

5 **MR TIDSWELL:** So I think, Ms Berridge, we might proceed then and see if we can
6 get things done, if the transcriber doesn't object. Just give them a minute to tell us if
7 that causes a problem. It appears not. Good. So we will proceed. Thank you.

8

9 **DR ADRIAN MAJUMDAR (affirmed)**

10 **MR TIDSWELL:** Do please sit down, Dr Majumdar. You know how this all works
11 I know.

12 **A.** Yes, sir.

13 **MR TIDSWELL:** Do you have some water there? Is there a clean glass for you if you
14 need it? Hopefully --

15 **A.** Yes. Can I have a blank notepad?

16 **MR TIDSWELL:** Yes, of course you may. Obviously you know how the bundles work
17 and you're going to get some assistance with that. Hopefully there will not be too much
18 of that.

19 Ms Berridge.

20

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

22 **MS BERRIDGE:** (Inaudible). If you go to page 109, is that front page of your first
23 report?

24 **A.** Yes, it is.

25 **Q.** Then could I ask you to turn to page 145?

26 **A.** Yes.

1 Q. Is that your signature at the bottom of the page?
2 A. Yes.
3 Q. Is this report true to the best of your knowledge and belief?
4 A. It is.
5 Q. Thank you. Then if we could go to B8 164?
6 A. Yes.
7 Q. Is that the cover page of your second report?
8 A. Yes.
9 Q. And if I could ask you to turn to page 168 --
10 A. Yes.
11 Q. -- is that your signature?
12 A. It is.
13 Q. And is this report true to the best of your knowledge and belief?
14 A. It is.
15 Q. Thank you very much. I don't have any questions. I will hand up over. Thank you.
16 **MR TIDSWELL:** Mr Macfarlane.
17
18 **Cross-examination by MR MACFARLANE**
19 **MR MACFARLANE:** Dr Majumdar, good afternoon.
20 A. Good afternoon.
21 Q. Can I just say at the outset, Dr Majumdar, and this is not a question, that you were
22 highly complimented by Mr Makin as being a very good and efficient person and a nice
23 person.
24 A. Thank you.
25 Q. So this is not going to be unpicking anything. Just a couple of questions, if I may,
26 to try to understand that.

1 In the first report that you did there didn't seem to be anything in there that accounted
2 for the turnover of our franchisees.

3 **A.** The turnover of your franchisees. I believe that was included when I considered
4 the retail share of Up and Running, which would have been in table 11. To the best
5 of my knowledge it was taken into account. However, you will be closer to your figures
6 than I am. So if you would kindly point me to where you think I have missed them,
7 I might be able to comment on that.

8 **Q.** On my calculations -- to be honest with you I was not going to question you on this.
9 My calculations were on our turnover. I am going to be talking a confidential document
10 fairly soon, so I don't want to put any figures and numbers in here --

11 **A.** Understood.

12 **Q.** -- for obvious reasons, but my calculations were that the annual -- you had taken
13 the annual turnover from Companies House and deducted the VAT?

14 **A.** The figures that I used for calculating or estimating the range of your retail share,
15 to be more accurate, would have been received from Up and Running and passed to
16 me via Stobbs. So there will be a source given. I believe it is table 11.

17 I should be clear absolutely nothing turns on this, because if we look at the joint expert
18 statement, annex 2, where Mr Makin and I agree to the figures, nothing turns on this
19 in terms of where the shares end up, just to be clear. So my intention was to take into
20 account franchisees. If I haven't, then I am happy to say I should do, but nothing will
21 turn on it.

22 **Q.** I am happy with where you are on that.

23 **A.** Thank you.

24 **Q.** I would just like to refer you to D, 54. I am going to say at the outset this is
25 a confidential document and it carries sensitive information, which I am not going to
26 disclose. So when I refer to any part of this document, I will be referring to the cell

1 number --

2 **A.** Yes.

3 **Q.** -- in order to help guide us. Are you aware of when the HOKA shop opened in
4 Covent Garden?

5 **A.** Not the precise date. I understand it was approximately some time in -- I think it is
6 some time in '23/' 24, but I don't know when.

7 **Q.** You are right. It was October/November '23.

8 **A.** Thank you.

9 **Q.** If I can draw your attention to cell number -- I can't catch that cell number -- D/14.

10 **A.** D/14. I can see that, yes.

11 **Q.** Would that represent the sales for the retail shop?

12 **A.** Yes, I can see that.

13 **Q.** If I can now refer you to cell I/9.

14 **A.** I/9, yes.

15 **Q.** It says there "FY 23". I don't think that is confidential.

16 **A.** Yes, I can see that.

17 **Q.** Isn't that supposed to be FY 24?

18 **A.** I don't think so.

19 **Q.** Maybe I am wrong. I will stand corrected, but doesn't FY 23 end at 31st March
20 '23?

21 **A.** My understanding for Deckers is that the financial year would end on 31st March
22 of the year stated. So financial year '23 I would understand to be ending
23 31st March 2023.

24 **Q.** Therefore, the sales for this shop can't have been included in this database,
25 because it wasn't open at 31st March '23?

26 **A.** My understanding is that there are small amounts of HOKA retail sales from things

1 like trade fairs and trade shows. That was explained in one of the meetings on the
2 video. So we are talking about a very small amount here. That wouldn't be something
3 that would lead me to question the financial year in this particular case.

4 **Q.** That, Dr Majumdar, would satisfy me, because the numbers here did appear to be
5 remarkably small for a prestige retail outlet. I think I am satisfied by that. Thank you.

6 **MR TIDSWELL:** Is that all, Mr Macfarlane?

7 **MR MACFARLANE:** It is.

8 **MR TIDSWELL:** Thank you.

9 Do you have any questions? Ms Berridge?

10 Dr Majumdar, that was short and sweet. Thank you very much.

11 **A.** Thank you.

12 **MR TIDSWELL:** We do appreciate your time, and you are now released from the
13 witness box. Thank you.

14 **(Witness withdrew)**

15

16 **HOUSEKEEPING**

17 **MR TIDSWELL:** So I think that is it in terms of evidence, as I understand it. So
18 Mr Tiller, his statement is to be taken as read -- as evidence and the same applies for
19 Mr Makin. You didn't ask him to be cross-examined, so he is treated the same way.
20 That is all the witnesses, as I understand it.

21 Just one thing, Ms Berridge, that just came out of the discussion with Mr Yates. The
22 brand strategy documents, I don't know whether you have had an opportunity to take
23 instructions on that or whether indeed there are any instructions on that. I am just
24 curious as to whether those are documents that have found their way into disclosure
25 and also very curious why they have not found their way into the bundle, because it
26 does seem to us brand strategy, when you are running a case on Metro, is quite

1 important. Are you in a position to tell us anything about that?

2 **MS BERRIDGE:** No. I have not been able to take instructions in the last few minutes,
3 but I will do so.

4 **MR TIDSWELL:** It would be quite helpful and obviously -- it is not the point of the trial
5 where it is particularly helpful if there are other documents which are important and
6 relevant, but clearly if you do discover that, then we had better have them as soon as
7 possible and then we will see what we need to do with them, if anything. So if we
8 could leave that with you perhaps.

9 So I think the next item on the agenda is closings. I was going to suggest that we stick
10 to the schedule and start at 2 o'clock tomorrow afternoon unless there is any objection
11 to that.

12 We have one or two observations we thought might be helpful when you are
13 preparing -- I am sure you are preparing those. I thought we might give you a couple
14 of thoughts about things we are interested in. It is obviously for you to decide what
15 you want to talk to us about, but just to give you some heads up on that.

16 **PROFESSOR IBÁÑEZ COLOMO:** Thank you, Chairman. So going back to the
17 transcript that we have from the first day actually, there were some issues in which we
18 were particularly interested. There was at some point a discussion about the hurdles
19 that the tribunal would have to overcome in order to establish an agreement or
20 a concerted practice.

21 One point that is quite interesting is the second one, the second paragraph of page 57
22 of the transcript. There is a reference to the terms. For an agreement of concerted
23 practice to be established, it would have to come to some view about the terms of what
24 the agreement would be and what the limits on discounts were, etc.

25 So we would like to see some elaboration of how this is consistent with the notion of
26 concerted practice as defined by the Court of Justice and the extent to which coming

1 to an agreement to the terms is always a necessary condition for a concerted practice
2 to exist. So that is one point.

3 **MS BERRIDGE:** Can I ask you to repeat the last sentence?

4 **PROFESSOR IBÁÑEZ COLOMO:** Yes. The extent to which this is consistent with
5 the notion of concerted practice as defined by the Court of Justice. That would be the
6 key question.

7 Another question that has come up in the context of the evidence has to do with the
8 question of whether this system is a purely qualitative one. So there was a discussion
9 on the first day about the Metro criteria, that there is an overarching condition, if one
10 wants to put it that way, that this criteria apply insofar to the extent that the system is
11 a purely qualitative one. So then in light of the evidence we have heard today one
12 question in which we would be interested is the extent to which these overarching
13 conditions would be met in the conditions and circumstances of the case.

14 I think I would leave it there.

15 **MR TIDSWELL:** So one other point about the list. Just to be clear, certainly the
16 way that we are seeing this at the moment is that the argument is about a selective
17 distribution agreement system as a whole sitting within the brand strategy. So
18 I think -- it may be that you are going to tell us that's not the case, but we are very
19 interested in an assessment of Metro through that lens rather than just looking through
20 perhaps the more narrow point of what the criteria are for the approval of separate
21 websites. So hopefully that's -- I see you nodding. So that's not coming as a surprise,
22 but we certainly at least would like to start with an assessment of or at least
23 a discussion of the value of assessment at the wider scale.

24 I think that covers everything from us. Is there anything you want to raise before we
25 send you off to prepare?

26 **MS BERRIDGE:** (Inaudible).

1 **MR TIDSWELL:** In a sense I have not raised that because I was rather leaving it to
2 you and rather suspecting there may be a difference of practice between the parties.
3 So if you -- certainly as far as we are concerned, as I am sure will come as no surprise
4 to you, anything we have in writing is helpful and you are certainly at liberty to put
5 something in, and we also would not expect to see it before you stood up, if that's
6 helpful.

7 **MS BERRIDGE:** That is helpful.

8 **MR TIDSWELL:** Please feel free to -- that could be in the form of an aide memoire or
9 in the form of a more fuller closing. What I think we probably want to discourage is the
10 presentation of written material after the hearing. That, of course, may change if there
11 are things we ask you to go away and do during the course of the hearing. I think we
12 are operating on the basis of one shot at closing, subject to anything else that crops
13 up.

14 Does that make sense to you, Mr Macfarlane? Do you understand the conversation
15 we are having?

16 **MR MACFARLANE:** It does, sir, but unfortunately I didn't hear what the lady said.

17 **MR TIDSWELL:** The question was about written closings. Actually she did not say
18 very much, because I pre-empted her, knowing what she was interested in. So if you
19 wanted to, you could provide us with a note of what you are going to say tomorrow,
20 and you can provide that in as short or full a form as you wish, or you can give us no
21 note at all and we will have the benefit of the transcript and hearing what you say. So
22 a note is not necessary. If you choose to do one, you can make it as short or as long
23 as you want, and you can put in -- you can focus in on bits of the case that you think
24 are particularly important. So really you have full flexibility.

25 What I don't want is hundreds of pages of unfocused material. So if you are going to
26 give us a written note, then really it is all about what are the issues in the case, the

1 law, if you want to address that, and what are the factual points that you would want
2 to draw out from the last couple of days. So that's the plan.

3 The other thing is you don't have to give it to us beforehand. Quite often we say, "Can
4 we have that before?" and we have a chance to read it. That is not going to work on
5 the timetable we have. So if you have it available for when you stand up so we have
6 at least got it and we can follow it as you talk, or if you have no note, we will just listen
7 to you.

8 The last bit of that was we don't want bits of paper after the hearing. So I am
9 discouraging from thinking at some stage you are going to be able to put in another
10 note, because you are not, unless we ask for something, which we may do if there is
11 something we want you to go away and do some more work on.

12 So that is I think a summary of where we had got to. Is that all clear?

13 **MR MACFARLANE:** I have that clearly. Thank you.

14 **MR TIDSWELL:** Good. Thank you. In that case we will rise and adjourn until 2.00
15 pm tomorrow.

16 **(3.07 pm)**

17 **(Court adjourned until 2.00 pm**

18 **on Thursday, 25th July 2024)**

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