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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**

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

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30 And

31 **Defendant**

32
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**

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Thursday, 25th July 2024

(2.00 pm)

MR TIDSWELL: Good afternoon, everybody. I see we have a document. I don't know whose that is. Is that -- it is yours, Mr Macfarlane? Yes. That's great. Thank you very much. That's effectively your speaking note. Good. Thank you.

Just before we get started, Ms Berridge, can we deal with the documents that have arrived late? Do you mind if we just have a word about that first? I was a little bit surprised to see what was said by Stobbs in their letter to Mr Macfarlane about it.

MS BERRIDGE: Understood.

MR TIDSWELL: Because it rather suggested that they didn't think that there was an obligation to search for the documents and that somehow the tribunal's order of 7th February absolved them of that. I have the references if it is helpful. I don't know if I have the Stobbs letter. I have the Stobbs letter. I don't know if I have a reference but it may be in the D bundle. I don't want to take a lot of time on it.

MS BERRIDGE: No.

MR TIDSWELL: But on the other hand, I am exercised about, firstly, how this has happened and, secondly, the nature of the explanation, which seems to me to be somewhat short of what might be expected when a document was produced in those circumstances as late as it was in the proceedings.

MS BERRIDGE: That's understood and the tribunal and the claimant (inaudible).

MR TIDSWELL: It may go a little bit beyond that. What bothers me about it -- perhaps we should pull it up. I think it has found its way into the D bundle. I hope it has.

MS BERRIDGE: I am told the letter is not in the D bundle.

MR TIDSWELL: Are your instructing solicitors able to give you a copy of it?

MS BERRIDGE: Thank you. Yes. I have the letter.

1 **MR TIDSWELL:** The difficulty that struck me is the first sentence of the third
2 paragraph:
3 "Unfortunately these documents were not identified by the defendant in carrying out
4 their previous disclosure searches which were confined to the categories set out within
5 the ruling of disclosure dated 7th February."
6 In the parameters and the form N265.
7 Then it says a bit late later on the defendant's position, the last paragraph:
8 "The searches conducted were proportionate in the circumstances."
9 Now I am struggling a little bit about that. We have these in the bundle if you want to
10 look at them and I can pull them up. Just so you are clear about where I am coming
11 from, when we wrote about disclosure in February, the tribunal's letter said:
12 "The tribunal anticipates" -- this is clear from the last entry in the annexe "the tribunal
13 anticipates the parties will provide disclosure on a standard basis in accordance with
14 the CPR 31.6."
15 It sets that out. Then if one goes -- I will give you a reference for that in case it is
16 helpful. It is I/46, but don't feel a need to look at it.
17 Then if you go to the schedule there is an entry in the schedule where the claimant
18 requested a copy of the referred SDA agreement. The ruling that I made was:
19 "The defendant will need to provide reasonable and proportionate disclosure
20 according to the standard disclosure test of all material relevant to the selective
21 distribution issue."
22 Now I am struggling to see how that order and that letter could be taken as confining
23 the categories of disclosure and I am also struggling to see how in those
24 circumstances these searches conducted were proportionate if they did not disclose
25 what on their very obvious face were important documents relating to the brand
26 strategy.

1 So we are left with the difficulty that it is not at all clear to me what has happened here
2 and why this has gone wrong. I appreciate -- I am not sure if you have even seen this
3 Stobbs letter before now, which I am not criticising you for if you had not. You are
4 probably in no position to answer any of the questions that I have suggested to you.
5 So just to be clear, I am not expecting you to tell me the answer to any of that, but I do
6 think that it is an unsatisfactory position that probably requires some further resolution.

7 **MS BERRIDGE:** Thank you. I am grateful for that indication. It may be that overnight
8 has been quite an intense period and the letter did not receive the attention it should.
9 So may I suggest that we take that away and write to you again.

10 **MR TIDSWELL:** What I might do is ask you to take instructions. We will have a break
11 at some stage and if you need a bit longer to do that, then you could do that. At the
12 moment, subject to anything Mr Macfarlane has to say, I am minded to ask for a further
13 explanation probably in the form of a witness statement not just about what has
14 happened here but how the disclosure has been conducted, because it concerns me
15 that the letter as it is portrayed suggests that it might be an awful lot narrower than
16 I would have expected given the tribunal's letter of 7th February.

17 Can I leave that with you?

18 **MS BERRIDGE:** Yes.

19 **MR TIDSWELL:** I am just going so see if Mr Macfarlane has anything to say about it.
20 Obviously I am obviously not saying that's the answer but that's something which I
21 think you might want to consider and indeed if you want to suggest an alternative.

22 The reason, just to be absolutely clear, it does concern me not only that it turned up
23 on the last day of the trial or indeed after the trial and, of course, Mr Macfarlane has
24 not been able to ask anybody -- or indeed us -- ask anybody any questions about it.
25 Also the letter from Stobbs rather suggests an exercise which is different from the one
26 I would have anticipated.

1 **MS BERRIDGE:** Thank you. I am grateful for that. We will -- I will take instructions
2 in the break and then perhaps we will come back to you and make a suggestion.

3 **MR TIDSWELL:** Yes. Thank you very much, Ms Berridge.
4 Mr Macfarlane, I don't know if you want to add anything to any of that. You have heard
5 what I said.

6 **MR MACFARLANE:** Yes, sir. It has been a bit of a rush, having just got the e-mail
7 this morning whilst we were in the middle of preparing the closing statements today.
8 So we have only just managed to open the document.

9 I do have some comments on the document and its impact upon that if you want to
10 hear them from me. I will say, if you don't want to hear from me, I won't, sir.

11 **MR TIDSWELL:** There is a question, there is a separate question I think about what
12 use the document should be put to, because we are in the slightly strange world where
13 we have not had any opportunity to explore them with the witnesses and, therefore,
14 I have some reservations about the weight that we would be prepared to put on them.
15 Now that rather depends a little bit on who wants to put the weight on them, if one can
16 put it that way.

17 In other words, if you have been prejudiced because there are things that you want to
18 say, then that seems to be quite a powerful point and obviously I will need to hear
19 Ms Berridge on that. We dealt with that. On the other hand, if Ms Berridge says
20 "I want to rely on them and they are terribly important to my case" then one might have
21 slightly less sympathy because of the way in which they have turned up. That's not
22 intended to give an answer to your question.

23 I think what I suggest at the moment is that you deal with them in your opening as you
24 wish to. At the moment the status of those documents is that they are not as far as
25 the tribunal is concerned admitted into evidence, and we will make a ruling on that if it
26 is required either during the course of this afternoon or at some later date.

1 **MR MACFARLANE:** Yes.

2 **MR TIDSWELL:** I do think, just to be clear with you -- I don't think you want to make
3 this into too much of a mountain, because certainly as far I can see the documents are
4 quite consistent with what Mr Yates told us yesterday. You may have some other
5 things to say which are interesting, in which case you should make them and we will
6 decide in due course how we deal with that.

7 **MR MACFARLANE:** Sir, your suggestion, so I am clear on that point, is that if I have
8 anything to say about that, I should include it in my closing statement.

9 **MR TIDSWELL:** About the documents.

10 **MR MACFARLANE:** About the documents.

11 **MR TIDSWELL:** We are at cross purposes. When you are saying you have things to
12 say about what has happened and how we have got here.

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

14 **MR TIDSWELL:** About the documents.

15 **MR MACFARLANE:** I have concerns.

16 **MR TIDSWELL:** Ms Berridge, would you object to that. I am really parking the
17 problem, because I rather suspect it is not going to be a problem -- it seems to me that
18 I don't think we can treat these as being documents which are in the evidential base
19 of the case because of the way they have turned up and the fact that Mr Macfarlane
20 hasn't had the chance to cross-examine on them but on the other hand I don't want to
21 exclude them just yet. So I am planning to keep them limbo until we see what
22 happens. Is that understood?

23 **MS BERRIDGE:** That's understood. Can I ask a question? Should we have a copy
24 of your note?

25 **MR TIDSWELL:** Sorry, do we not have that? Mr Macfarlane, you need to give a copy
26 of that.

1 **MR MACFARLANE:** I don't have a spare one.

2 **MR TIDSWELL:** Have you got one? I think that's probably not going to work -- what
3 we will do I think is -- how many copies do you have? You've only got one.

4 **MR MACFARLANE:** Sadly we had to rush out and we only have four copies.

5 **MR TIDSWELL:** Have you got one there?

6 **MR MACFARLANE:** No. One.

7 **MR TIDSWELL:** I see what you mean. We will send one-off. We will get some copies
8 and I will manage without. I can always -- we can share.

9 Mr Macfarlane, just one other thing before we start, actually really about starting.
10 Timing. I am quite keen not to go much past 4.30. We can go a bit past if we need
11 to. Timing is quite tight. Let me just explain how this is going to work. I think the
12 timetable had you on for 60 minutes and then Ms Berridge for 60 and then you were
13 going to get 30. We have just spent 15 minutes talking about those documents and
14 we are going to have to have a ten minute break in the middle as well. So it is probably
15 going to be more like 50, 50 and 20 something.

16 So if you could aim to -- I think at the moment if you were to aim to finish as close as
17 you can to 3 o'clock, that would be helpful and consistent with the way that the
18 timetable ought to work. I appreciate it is probably a bit shorter than you thought but
19 hopefully it is enough for you to get through.

20 **MR MACFARLANE:** (Inaudible) printing off is that I thought I may not get through it
21 anyway but you have the document in front of you anyway that you can read later.

22 **MR TIDSWELL:** Good. If you get started then, let's get on.

23

24 **Closing submissions by MR MACFARLANE**

25 **MR MACFARLANE:** If I may, I am going to make some comments on the document
26 that has arrived rather suddenly today. The document in particular -- I really had to

1 work quickly on this. The document that arrived on page D, 303.

2 **MR TIDSWELL:** Do you want us to have a look at them? Shall we get them up?

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

4 **MR TIDSWELL:** 303.

5 **MR MACFARLANE:** Sorry. The numbing is out. D, 308. Sorry.

6 **MR TIDSWELL:** 308.

7 **MR MACFARLANE:** Sorry. That's me misreading.

8 **MR TIDSWELL:** This is part of a document. It starts at 397, the strategic account
9 meeting. Is that the right document?

10 **MR MACFARLANE:** It is D, 308.

11 **MR TIDSWELL:** D, 308 is a graph. Is that what you mean?

12 **MR MACFARLANE:** Yes.

13 **MR TIDSWELL:** Just before you say anything else, I don't know, Ms Berridge, if you
14 had a chance to even consider this, but is there likely to be any confidentiality in any
15 of this? If there is any risk of that, maybe we just avoid numbers.

16 Mr Macfarlane, if you could just be very careful not to mention any numbers.
17 I appreciate you may want to show us things on the graph and you are welcome to do
18 that. It may be better not to be too precise about the position of competitors. If you
19 want to say to us "Look at, for example, where the HOKA brand is in 2018" we can do
20 that, of course. You don't need to tell us what the number is.

21 **MR MACFARLANE:** (Inaudible). I will work really hard to avoid that.
22 The only point I wish to make about this is that the HOKA brand in that blue
23 line climbing up in 2019 to show levels of 30% --

24 **MR TIDSWELL:** That's what we don't want you to do, Mr Macfarlane.

25 **MR MACFARLANE:** I do apologise.

26 **MR TIDSWELL:** Just stick with the name and we can follow it. Give us the name and

1 the date and we'll be able to follow the number.

2 **MR MACFARLANE:** Sorry, sir. That particular blue line growing to what it says there,
3 it is completely and totally different from the market share, bearing in mind we haven't
4 had a chance to interrogate this document yet, but it is completely and totally different
5 from the market share shown in Dr Majumdar's report, which was a single figure
6 percentage I think.

7 **MR TIDSWELL:** Yes. The difficulty is that we don't know what it is, do we? That's
8 really precisely the point I was making earlier about you not having had the chance to
9 cross-examine on it. You have made that point. We have got that. What it means
10 and what it doesn't mean I don't know but you have made the point.

11 **MR MACFARLANE:** The point I am trying to make, sir, is that we feel that this report
12 could possibly undermine the report from Dr Majumdar.

13 **MR TIDSWELL:** Yes, quite. I get the point, yes.

14 **MR MACFARLANE:** It may be misrepresentative of the true market position that we
15 don't know about now. This has thrown complete confusion into the pot.

16 **MR DERBYSHIRE:** If I could make a suggestion. We obviously don't know what it is
17 because we were not told what it is. It looks to me like a certain percentage of not the
18 whole market. It is a segment of the market that they are aware of.

19 **MR MACFARLANE:** Yes, it's the new UTMB (inaudible), as I say (inaudible) but
20 beyond the last minute timing, sir.

21 **MR TIDSWELL:** Ms Berridge has jumped up to help us I think.

22 **MS BERRIDGE:** Yes. I do apologise for interrupting. I understand that these
23 represent the runners in this particular race, the UTMB, which is the Ultra
24 Mountain -- thank you very much. So they do represent the shares of a market but
25 perhaps quite a niche one.

26 **MR TIDSWELL:** Not one you are instinctively familiar with.

1 **MR MACFARLANE:** If I can say, sir, I am very familiar with Iron Man and UTMB, and
2 it is more representative, whereas this particular graph has been drawn from what's
3 called a shoe count with real people standing at the side of the road literally counting
4 the models of shoes on people's feet. Very sad I know but that's what some people
5 do.

6 **MR TIDSWELL:** Well, look, I understand the point. I think, as Mr Derbyshire says,
7 there may well be a perfectly sensible reason why the numbers are different and
8 indeed it does sound as if there is. You have made the point. In the interests of
9 time -- if there is anything else you want to say by all means do but I don't think you --

10 **MR MACFARLANE:** No. Thank you.

11 **MR TIDSWELL:** Are you going to get on with your note then? You are going to --

12 **MR MACFARLANE:** Yes. Sir --

13 **MR TIDSWELL:** Keep going, Mr Macfarlane.

14 **MR MACFARLANE:** Gentlemen, I will firstly address the question -- I will firstly
15 address the question of an SDA if such exists. Secondly, I want to the show that the
16 internet sale restrictions are restrictions by object. Thirdly, I will recap the evidence
17 which shows that the conduct of the defendants constitutes an RPM. Fourthly and
18 finally, I will touch on why VABEO is not available to the defendant, and if I don't get
19 through these, then please cut me off because I recognise the constraints.

20 Firstly, does the SDA exist in this case? The defendant needs there to be an SDA to
21 save its restrictive terms. My view is that there is no SDA for the following reasons.

22 1. Not at any time in 2020, '21, '22 was there any mention of an SDA that might be in
23 place.

24 2. The first mention of such an alleged agreement suddenly arrived in the defence
25 document dated 14th December 2023. The claimant says that it is very likely that it
26 came as much of a surprise to the senior management of Deckers that one existed as

1 much as it was a surprise to the claimant.

2 The premise that such an SDA existed is supported by the conduct in this case of the
3 defendant in this matter. If one existed, one would have expected to see
4 Mr Henderson and Mr Hagger to have used that instrument to give a reason for refusal
5 on 14th August 2020.

6 There are some reference numbers in here. I don't think I need to go to the --

7 **MR TIDSWELL:** If you think it is something you really want to reinforce. We are pretty
8 familiar with those core documents, so I don't think you need to do that.

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

10 **MR TIDSWELL:** We will certainly tell you if we want to have a look at anything as you
11 go. We have the references and we can always go back to them later. If you want to
12 show us something because you think it's particularly important and you don't think we
13 have spent much time on it, then by all means do.

14 **MR MACFARLANE:** Thanks. Factually they didn't. However, factually it was asked
15 for several times without any response.

16 The next point is that at no point during the previous case was it offered as a response
17 to the arguments for breaches of competition. Mr Henderson said yesterday that there
18 was no need to respond to it as it was a simple debt claim. That is not true. Both he
19 and Mr Hagger responded in the form of witness statements and addressed the
20 competition issues at that previous case, which is shown at C whatever it is. We shall
21 say that if they brought such an agreement to the notice of the court then, then that
22 would have brought those proceedings to an end very quickly indeed. They did not.
23 It did not exist either factually or even in their minds.

24 The defence had an ideal opportunity to put forward the premise that -- the premise
25 when responding to effectively an information request in the e-mail document and
26 there could have been no better opportunity to have put one forth at that time. Indeed,

1 Mr Hagger said in a document there that Deckers do not have a strategy in writing,
2 which also reflects on the document we have just been looking at today, because there
3 apparently is one.

4 One would have expected that there was no better opportunity for Mr Hagger to bring
5 the alleged SDA to our attention. The alleged SDA is said to arise from a mishmash
6 of selected parts of, one, its terms and conditions, two, its informal view and opinions
7 and, three, its strategy document. It was admitted by Mr Hagger during
8 cross-examination that the defendant, and I quote:

9 "Does not have a select selective distribution agreement, but instead it was said to
10 have an informal arrangement."

11 That's on the particular date listed there. It is in his words enforced by their standards
12 but they do not share any of those details or of those standards with any dealers or
13 wholesalers. Nobody knows what the standards are other than Deckers and nobody
14 can know how to structure their business so as to conform with the purported SDA. It
15 was kept a secret for years of protracted exchanges between the parties but it was
16 never brought to any one's attention and only now has been floated in the defence in
17 these proceedings.

18 **MR TIDSWELL:** Is it helpful, Mr Macfarlane, to think about -- just put aside agreement
19 for a minute. Obviously agreement is terribly important here because it is key to the
20 relevant statutory provision, but just put aside agreement for a minute and just think
21 about selective distribution as a concept and maybe as a system. Might it be fair to
22 say that there are elements here in the factual pattern of things that you might expect
23 to see in a selective distribution system like, for example, the requirements that are
24 imposed in relation to the bricks and mortars store and the terms and conditions, but
25 that it is not all in one place and, as you say, it is not necessarily all recorded in
26 a contractual form? So it doesn't necessarily have a coherence as an agreement, but

1 | there are some recognisable elements of selective distribution. Would you agree with
2 | that?

3 | **MR MACFARLANE:** I think as a general outline I recognise that paragraph, clause 5,
4 | for instance, which sets out a specific criteria but that is a criteria applied for bricks
5 | and mortar stores. Anything else that would have been in there, it would have been
6 | nice to know about it.

7 | **MR TIDSWELL:** Yes, in a sense I am not pushing back and obviously, you know,
8 | Ms Berridge will have things to say as well, but I am not pushing back on your point
9 | about transparency and so on. I think what I am saying to you is that -- I think we have
10 | had this debate in some of the case management sessions about this concept of there
11 | being an agreement as a physical document that sits on somebody's desk. I think you
12 | are recognising here that you have moved away from that sort of narrow thought
13 | process and you are recognising that you could have an agreement that comprised
14 | some other things and could actually be brought into play because you all know that's
15 | how it works, if one can put it that way, but actually the key point I am really trying to
16 | just make sure we have some agreement on is that you could have elements of
17 | selective distribution arrangements which you can pick out from some of the facets of
18 | this case, not necessarily all of them and not necessarily -- for example, you make the
19 | point about bricks and mortar as opposed to something else, but I think you are
20 | agreeing with me that at least as far as bricks and mortar goes there are some things
21 | you can point to to say there are some elements of selective distribution.

22 | **MR MACFARLANE:** I would say, sir (inaudible) we were already in the lead on that
23 | one as far as that is concerned and we are talking mainly here an infringement on
24 | internet sales, and if there were a criteria that we would have had to comply with, it
25 | would have been nice to know about it.

26 | **MR TIDSWELL:** Yes. No. I understand. That is helpful. Thank you.

1 **MR MACFARLANE:** Thank you.

2 I am going to move on if I can to is the selective distribution genuinely necessary? It
3 is well-known that one cannot have an SDA in place without a good reason for doing
4 so. An SDA is an ancillary restraint. So it affords the defendant the opportunity to
5 include contract terms that are restrictive of competition that it would not otherwise be
6 able to do.

7 The relevant test that the defendant needs to meet in order for it to operate an SDA is
8 this. Do the nature of the goods require an SDA? The CMA VABEO guidance on this
9 point states that operating a selective distribution system may also be necessary for
10 luxury goods. The quality of such goods may result not just from their material
11 characteristics but also from the aura of luxury surrounding them.

12 The CMA goes on further to say:

13 "Therefore, establishing" -- I will call it an SDA, "which seeks to ensure that the goods
14 are displayed in a manner and contributes to sustaining this aura and luxury may be
15 necessary to preserve its quality."

16 The authority refers there to Coty.

17 Let me be clear. I have said that HOKA is a great shoe, but it is just that, a running
18 shoe. It is not a luxury running shoe. It not a Ferrari and it is not a Chanel handbag.

19 As an experienced person that has operated within this specialist field, all running
20 shoes are the same. As has been spelt out in Dr Majumdar's report, paragraph 37, all
21 running shoes, in my view, they all turn the same colour when you have been out in
22 them for three runs and all running shoes have a level of support and all running shoes
23 have a level of cushioning that needs to be considered.

24 The reason given by the defendant to justify this alleged SDA is that retailers must
25 have a sufficient number of fully trained staff to provide the consumer with information
26 and usage advisory guide in the product. We say this is achievable by just about every

1 sports shop within the UK inside or outside of an SDA, and in any case Up and
2 Running satisfies that and indeed it is impossible anyway for internet operators to
3 apply that criteria.

4 **MR TIDSWELL:** That quote comes out of the terms and conditions. That's
5 paragraph 5, is it, of the terms and conditions?

6 **MR MACFARLANE:** That's paragraph 5 of the terms and conditions, yes, sir, which
7 is applicable only to bricks and mortar stores.

8 **MR TIDSWELL:** Yes.

9 **MR MACFARLANE:** So if we touch on the terms of the SDA, at least the ones we
10 know about, which is not in the mind of -- which are not in the mind of the Deckers'
11 executives, we can boil down Deckers' SDA as applied in runningshoes.co.uk to just
12 one so-called signposting issue. It will therefore be necessary for the defendant to
13 show that the requirement for signposting was genuinely necessary, and even if this
14 was ever present in the criteria, the criteria was applied uniformly.

15 Helpful Mr Hagger gave evidence on that point where on day two, page 108, line 14
16 he said:

17 "Regarding signposting on Running Shoes' website that customers would not care as
18 long as they were serviced correctly."

19 This is then supported by Mr Henderson when he says:

20 "My understanding is that the prime reason is lacking our signposting."

21 Day 3, 83, line 2. Therefore, if the customers are not going to care about signposting,
22 the defendant can't say that this requirement is genuinely necessary. It does not
23 pursue a genuine aim. There is no link between this requirement and the measurable
24 benefit. The logical conclusion is that there were other reasons for the refusal. We
25 say this is RPM.

26 So does the purported SDA meet the Metro criteria, which is mentioned yesterday?

1 Sir, I will walk through the criteria in a moment but I will start by going backwards. The
2 reading of the Metro criteria is based on the passage in Pierre Fabre where the court
3 held:

4 "As regards agreements constituting a selective distribution agreement system, the
5 court has already stated that such agreements necessarily affect competition in the
6 Common Market."

7 I have set the case numbers out there. Such agreements are to be considered in the
8 absence of objective justification as a restriction by object.

9 We say that the only logical reading of that passage is that if the SDA fails the Metro
10 test, it at the very best leans in favour of the restriction being by object, and
11 I understand that position is supported by competition commentators and Mr Colomo
12 himself referred to such as Mr Whish.

13 **MR TIDSWELL:** I think, as I understand what you are saying here, you are not arguing
14 that Pierre Fabre means if you fail a Metro test it is automatically object. You are not
15 saying there is an automatic read through but you are saying it is a powerful indication
16 that it is going to be an object restriction. Is that the way you would put it?

17 **MR MACFARLANE:** Yes. We took the time to read Professor Colomo's article last
18 night. We acknowledge that even if Metro is satisfied or if it isn't satisfied, one then
19 moves on to the next stage in proceedings to see whether it can be covered under the
20 object analysis.

21 **MR TIDSWELL:** Yes. That is very helpful. Thank you.

22 **MR MACFARLANE:** The first Metro criteria the products demanded a selective
23 distribution system and actually demands that there is a system in place for the first
24 Metro criteria. I have now set out my position on this. Running Shoes do not require
25 an SDA as its products are not even close to being Coty products.

26 The second Metro criteria the qualitative criteria, to join the system an objective and

1 applied without discrimination and uniformly.

2 Deckers are required to apply their criteria uniformly and objectively as set out in the
3 second Metro criteria. We can understand that the website required signposting and
4 staging by Mr Henderson is their primary reason in which Running Shoes did not
5 comply with their criteria.

6 In the case of George Donald, however, the case I brought forward in my submissions,
7 the account was supplied by Deckers, has three stores and a website of Excell Sports
8 and multiple bricks and mortar stores with a variant of Intersport and Just Right. That
9 simply did not fit that criteria.

10 We can note there is no signposting or references and was admitted to be an oversight
11 by Mr Hagger on Day 2, as this criteria has not been uniformly applied.

12 I then go on to address the case of ShoeFit, which is a separate account and was
13 formed from the operating name of Precious Soles with no requirement of signposting
14 other than the exception to their objective and uniform criteria. In that case -- I am
15 going off script here and I will get told off -- in that case there was clearly an effort to
16 avoid a conflict similar to ours, so they simply opened an account with them rather
17 than follow the same line with Running Shoes.

18 Professor Colomo questioned Mr Hagger as to the fact. That's the signposting to
19 Precious Soles is no longer a consideration or a factor -- it says factory here -- to which
20 Mr Hagger said no.

21 This is an overt example in which the objective criteria is to avoid its own definition
22 due to its application by Deckers.

23 I move on now to the third criteria, the Metro criteria. They do not go beyond what is
24 necessary to attain the legitimate aims and pursued by the supplier. It is difficult to
25 give too much detail on this because we simply don't know all of the criteria given that
26 it is informal and in the minds of the Deckers' team. However, the issue that Deckers

1 say is central to their refusal is the lacking of signposting.

2 If I can just stop there and make this point. You heard Ms Berridge and the
3 Defendant's witnesses say over the course of this trial that there was no signposting.
4 That, of course, is not true. It was accepted, not large, not prominent, but there was
5 signposting. It was, however, no more less prominent than other technical or legal
6 information that one would expect to be seen on a website. It is our view and the view
7 of Mr Hagger that it is not important to customers. It is therefore not fair or accurate
8 for Ms Berridge to categorise it as a deliberate deception to the customer.

9 Mr Hagger does go further to say that he understands why we would have done it and
10 that was not to deceive anybody. We really did not do it to deceive anybody.

11 I am going to move on now to are there any quantitative elements to the alleged SDA.
12 Mr Colomo made the point around the quantitative
13 element -- Professor Colomo -- sorry -- to the element. Purely qualitative selective
14 distribution where dealers are selected only on the basis of objective criteria required
15 by the nature of the product does not put a direct limit on the number of dealers.

16 There are quantitative elements to Deckers' SDA. An example of this was in
17 Mr Hagger's evidence, Day 3:
18 "We wouldn't necessarily want to work with a partner offering exactly the same thing
19 if we already had a partner within a couple of streets away."

20 Mr Yates made the point that their business strategy to drive more into larger accounts
21 to reduce the amount of open accounts is an example of this and can be seen at the
22 Day 3, page 98.

23 The focus that we had behind the brand would have been focused behind the strategic
24 accounts or the market activity and everything that we were doing to drive that
25 business certainly would have been concentrated towards a smaller number of
26 accounts is what was said.

1 Professor Colomo further noted in his point by noting that there had been a decline in
2 the number of acceptances and that there had been more rejections over time. These
3 references can be seen on Day 3, 20, line 19.

4 Mr Yates goes on to state that:

5 "The account of Running Shoes did not really get over the first line, as it would have
6 been a website for disposing of residential stock primarily and that in that strategy we
7 already had an existing partner for the job, for that particular job."

8 This point was further reiterated by Mr Tidswell to ensure that he was sure as to what
9 Mr Yates was admitting:

10 "Just so I am clear about that we have talked about that really being the disposal of
11 your stock."

12 To which Mr Yates agreed.

13 Furthermore, Mr Yates indicated his desire as the accounts taking different -- as to the
14 accounts taking different seasons of stock as to the effect of their pricing structures.

15 Up and Running along with virtually all of the other specialist Running Shoes stores
16 we will want them to focus on the current season products as opposed to what the
17 discounted website is looking to achieve.

18 We all know what current season product means.

19 Internet sale restrictions that remove the benefits --

20 **MR TIDSWELL:** Before you move on, to be clear about that -- I think this is clear, but
21 I want to make sure we are all on the same page. I am not quite sure that they are
22 always put in the same order, but I think I would have put the thing about quantitative
23 elements in the second Metro criteria or indeed it might have been number three. It is
24 one of the Metro criteria, so we are clear about that, aren't we?

25 **MR MACFARLANE:** Yes.

26 **MR TIDSWELL:** So we might number -- I think I would number that probably 2(a).

1 Just in terms of where it fits in the argument.

2 **MR MACFARLANE:** I want to cover the internet sales restrictions that remove the
3 benefit of the block exemptions. I am lost on this one. The restriction of the buyer's
4 ability to determine its sale price without prejudice to the possibility of the supplier to
5 impose a maximum sale price or recommend a sale price provided that they do not
6 amount to fixed or minimum prices as a result of pressure from the incentives offered
7 by the parties.

8 This is a quote from -- I am sure you are well aware it is from the vertical block
9 exemptions, order 22.

10 We say that there was pressure brought upon us to disincentivise to operate.

11 I want to move on quickly, because I have lost a quote from the print-off.

12 **MR TIDSWELL:** Just before you do, I think -- the quote you have just referred to is
13 the bit in the block exemption where it talks about hardcore restrictions and that's
14 where it says if you have a hardcore restriction, you don't get into the block exemption,
15 I think that's right, isn't it?

16 **MR MACFARLANE:** Yes. That's very helpful.

17 **MR TIDSWELL:** That does get right to a point. I am not sure -- I am not sure where
18 this fits in your note, but at some stage if one -- if as on your argument Metro doesn't
19 apply, so the Metro criteria have not been met, then the next question, or indeed if one
20 does it in this order and there may be a debate about that -- we need not get into
21 it -- one has to ask oneself the question; is there an object restriction; in other words,
22 what is the reason why this restriction exists, assuming one has got to this point in the
23 chain. I am not indicating any provisional view on anything, but if one has got to the
24 point you have got to, then one would be asking is there an object restriction.

25 **MR MACFARLANE:** Yes, sir. I will be moving on to that.

26 **MR TIDSWELL:** You are going to deal with that.

1 **MR MACFARLANE:** It is in here.

2 **MR TIDSWELL:** I see. That's helpful. I just want to make sure we are clear about
3 where we are in the sequence of the argument, because obviously the object
4 restriction is for you an important prerequisite.

5 **MR MACFARLANE:** Yes, indeed.

6 **MR TIDSWELL:** For getting into the disapplication of the block exemption. You follow
7 that. Good.

8 **MR MACFARLANE:** I am just going to cover off RPM for the moment and then I will
9 be coming on to these four requirements of the vertical and the horizontal block
10 exemptions as well. Steep learning curve, sir.

11 **MR TIDSWELL:** You are doing well. Carry on.

12 **MR MACFARLANE:** RPM is defined in VABEO.

13 **MR TIDSWELL:** That's the same quote again, isn't it?

14 **MR MACFARLANE:** It is, sorry.

15 **MR TIDSWELL:** Don't worry, that's fine.

16 **MR MACFARLANE:** The restriction of the buyer's ability to determine its sales price
17 without prejudice to the possibility of the supplier imposing the maximum. I have
18 covered that off -- as a result of pressure. As the tribunal will know, we say that the
19 terms and enforcement of them pursue RPM.

20 **MR TIDSWELL:** When you say pursue, you mean you are now talking about
21 objective, are you?

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

23 **MR TIDSWELL:** I understand. Thank you.

24 **MR MACFARLANE:** The RPM is supported by the fact that the defendant restricts
25 supplies of clearance product to its retailers, such as Up and Running, bricks and
26 mortars, shops and as demonstrated in this action regarding Running Shoes as well.

1 **MR TIDSWELL:** I think you are saying that their objective is to avoid clearance. Is
2 that what you are saying?

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

4 **MR TIDSWELL:** Yes.

5 **MR MACFARLANE:** We say the reasons for refusing was not lack of signposting and
6 I have taken you through the evidence of the defendant's own witnesses on this where
7 they say it is not necessary for customers and that they did not pursue it for all of the
8 others either.

9 We say that on the balance the refusal is more likely to be RPM than not. The Tribunal
10 has seen a wealth of evidence in this case which says that the defendant is keen on
11 full price selling. We say that for the following reasons the evidence is in favour of
12 there being an RPM agreement.

13 The Tribunal was taken to the article quoting the CEO, Mr Powers, to attributing
14 HOKA's success to its high levels of full price selling, a culture visible throughout
15 Deckers is our view. Deckers say that they do not allow discounters and they refer
16 to -- they do allow discounters -- sorry -- and then they refer to Sports Pursuit as
17 an example of this.

18 However, in Mr Yates' evidence and some of the written evidence on this they are only
19 there to dispose of Deckers' old stock. So not as a general discount site. That stock
20 being discounted is only stock that Deckers give to them to sell off so they retain full
21 control, and that is in Day 3, page 99.

22 When questioned as to whether HOKA follow a full price strategy, Mr Hagger admitted
23 where possible, yes, within reason. Mr Henderson also admitted as to reasons as to
24 the rejection of Running Shoes' proposition was that all of the product was going to be
25 sold on Running Shoes was going to be previous seasons. It was well-known.
26 Mr Yates confirmed to us that Running Shoes fell over and was that it would be

1 a website for disposing of residual stock. Day 3, page 109.

2 Does the VABEO therefore apply? The starting point can be found in the VABEO
3 guidance, which says:

4 "When in particular a case of a selective distribution agreement that benefits from the
5 block exemption restricts competition appreciably at the supplier or distribution level
6 and does not generate efficiencies and outweighs the effects of the restriction, for
7 example, because the selection criteria are not linked to the characteristics of the
8 product or are not necessary to improve the distribution system of the product, the
9 benefit of the verba is likely to block exemption -- sorry, is likely to the block exemption
10 may be withdrawn."

11 As I have set out already, there is no link between the characteristics of the product
12 and the criteria specifically they need to signpost. Given that this fundamental creation
13 is not met, it is not necessary to go on to consider the criteria in the articles of the
14 exemption.

15 However, I note that for the BE to supply -- sorry -- the block exemption.

16 **MR TIDSWELL:** We knew that.

17 **MR MACFARLANE:** To apply, it must not contain any hardcore restrictions or RPM
18 and the internet sale restrictions we have articulated over the course of this trial both
19 constitute hardcore restrictions such that Fabre does not apply.

20 The horizontal block exemptions. A pertinent point on the horizontal exemptions is to
21 be found at 2.4 of the guidance on the block exemptions order. The chapter 1
22 prohibition prohibits agreements or concerted practices between undertakings or
23 decisions by undertakings -- of undertakings -- associations of undertakings which
24 have as their object or effect the prevention, restriction or distortion of competition
25 within the UK and which may affect trade within the UK.

26 Paragraph 2.10 of section 9, CA98, sets out the conditions that must be met for

1 | an agreement to benefit from individual assessments.

2 | First, agreement must contribute to clear efficiencies. The claimant says there are
3 | obviously no clear efficiencies in here.

4 | Second, it must provide a fair share of the resulting benefit to the consumer. The
5 | claimant says that there are no resulting benefits to consumers by elements of this
6 | alleged agreement.

7 | Third, the restriction on competition that it provides for must be indispensable to
8 | achieve those benefits. Well, I have covered that off a little bit earlier, that we feel
9 | anybody could do it. Right?

10 | Fourthly, it must not give the parties to the agreement the possibility of eliminating
11 | competition from a substantial part of the relevant product. The most obvious
12 | infringement is this element. Both Up and Running and Running Shoes being taken
13 | out of the market for HOKA shoes.

14 | The claimant says that none of the above requirements has been met by the
15 | defendant.

16 | **MR TIDSWELL:** Before you move on can I make sure I am clear about how this fits
17 | in? I think what you have just been describing is objective necessity in relation to
18 | a Chapter 1 infringement and obviously that could apply whether it was horizontal or
19 | vertical. I am not quite sure where the horizontal bit fits in. I mean, obviously there
20 | was a horizontal element here, because to the extent that you could see the two
21 | entities as being in competition, but that's not really what's going on here. I think we
22 | have been looking at it as a vertical --

23 | **MR MACFARLANE:** There is a horizontal competitive position. They are both
24 | retailers. In this case the defendant are not defending independent -- what was
25 | word -- they are not advancing the difference on individual exemption on this occasion.

26 | **MR TIDSWELL:** So in the individual block exemption it makes this plain it does cover

1 the situation where you have vertical distribution but also horizontal competition. It
2 covers it, obviously it excludes it and brings it back in again I think is the way it works.
3 So I just want to be clear with you -- I don't know whether you are advancing
4 something beyond -- are we looking at something beyond the application of the 2010
5 notice, the block exemption?

6 **MR MACFARLANE:** No, sir. I have been advised to close one's gob and move on.

7 **MR TIDSWELL:** I think I understand. That is helpful.

8 **MR MACFARLANE:** Now I have lost my place again.

9 **MR TIDSWELL:** Just about the middle of page 12. You were about to launch into
10 clause 15.

11 **MR MACFARLANE:** Clause 15. I feel a little bit stronger on clause 15. The retailer
12 may only sell products on a website that he owns and operates if the retailer has been
13 granted to make online sales of products and the website is fully compliant with the
14 company's website requirements as are communicated from time to time by the
15 company and the content of the website have been approved in writing. The claimant
16 says that this is one of the most important focus points of this trial. Taking the second
17 part first, the only communication is that of an e-mail from Mr Hagger dated 2019 in
18 the bundle.

19 Despite what the defendants say, there's no criteria that the claimant or any retailer
20 should have a website with a name that's identical. The requirement is just to notify
21 the defendant, nothing more than that. There has been no notification of a change of
22 that position from the defendant.

23 So what we say there is that there is no specific requirement in that element and we
24 are there.

25 Selling online without specific authorisations by Guess. The company had on this
26 occasion had full discretion for its authority, which was not based on any specific

1 quality criteria. In questioning, Mr Henderson admitted that Deckers retained full
2 discretion as to whether a dealer could use the internet for selling HOKA or not.

3 I refer the tribunal to the transcript of Day 3, page 66, 21 to 25. Mr Henderson agreed
4 that it could be said that the defendants held a complete discretion and was able to
5 say yes or no to the effective use to the internet. Further, as in Guess, the defendant
6 demanded their permission is obtained before being able to make effective use of the
7 internet. The only outstanding requirement is that of a specific qualitative criteria. We
8 say that a specific qualitative criteria has not been demanded.

9 We already know there was no specific qualitative criteria shown in any of the terms
10 and conditions or appertaining to the website. It cannot be said that the single e-mail
11 from Mr Hagger is of a qualitative nature. It attempts to request a mere confirmation
12 that a retailer should inform them of their plans.

13 **MR TIDSWELL:** That reference there is -- this is the 2019 e-mail. Is that what you
14 are referring to?

15 **MR MACFARLANE:** Yes.

16 **MR TIDSWELL:** Yes.

17 **MR MACFARLANE:** It stands, therefore, that there is no specific qualitative criteria
18 linked to the website and as such, as set out in Guess, this represents a hardcore
19 restriction within the meaning of CA 98.2.

20 I am on the last page, sir. Have I done that?

21 **MR TIDSWELL:** Certainly as far as I am concerned you got to the end of it.

22 **MR MACFARLANE:** That is it. I have finished.

23 **MR TIDSWELL:** That is admirable. You have complied very adequately with my
24 exhortation to be done by 3 o'clock. So thank you very much. Let me just see whether
25 any -- any questions? That has been very helpful. Thank you very much,
26 Mr Macfarlane.

1 Ms Berridge, I think we will start unless you would prefer to have the break now. We
2 may as well get you going and go for 10 or 15 minutes and take then a break, but if
3 that is going to be disruptive, then --

4 **MS BERRIDGE:** No, I am very happy to get started.

5 **MR TIDSWELL:** Good.

6

7 **Closing submissions by MS BERRIDGE**

8 **MS BERRIDGE:** Good afternoon. We have heard a great deal of material this week
9 ranging across a huge variety of topics and what I am going to try to do now in the
10 time available is to try to distil all of that material down and focus on what really matters
11 in this claim.

12 I see that we have the written version of this to hand up. (Handed).

13 **MR TIDSWELL:** Thank you.

14 **MS BERRIDGE:** So having handed up a very large document, I was in the middle of
15 saying that I was going to try to distil the material down and focus on what really
16 matters. So without apology I am going to start at the most basic level and ask what
17 is the theory of harm advanced by the claimant and what does that tell us about which
18 questions we should be paying attention to?

19 So fundamentally the case relates to the way in which HOKA places its products on
20 the market. It doesn't have a generalised duty to sell to any suitable retailer who
21 wishes to buy HOKA. However, when its actions restrict or limit competition between
22 its retailers, then it is necessary for us to understand how that restriction affects
23 competition and then on the other hand consider how it can be justified. So it's very
24 familiar.

25 There are typically three ways that suppliers might restrict downstream competition. It
26 might be in the form of placing limits on pricing. It might be in the form of placing

1 restriction on customers to whom they may sell and it might be in the form of placing
2 limits on the environment in which retailers may sell the product. We are in the third
3 category, the environment category here today.

4 In HOKA's case it is clear that it had a series of requirements based upon the retailer's
5 selling environment: Presentation, service applied to physical stores and online.
6 HOKA made it clear that all retailers could sell online using the same domain name as
7 their physical stores and it suggested that anyone wishing to sell under a different
8 domain name should contact them. It has given evidence that in such cases it
9 authorises the site with a different name so long as it clearly signposts its connection
10 with the physical stores.

11 Now the problem we are told by Up and Running is that that requirement to use the
12 same name or to clearly signpost the relationship had a particular impact on
13 downstream competition, because it made it more difficult to operate a strategy of
14 simultaneously selling current season stock at a high margin and out of season stock
15 at a lower price. That contention -- you might remember we did this in
16 cross-examination -- relies on two practical assertions that we have from Up and
17 Running. I will just take you through them. These are about the way customers
18 behave and think.

19 The first one. If customers see full price current season stock and discounted old
20 season stock within the same selling environment, we are told they will always buy the
21 cheaper one, because the differences are marginal. They are typically just colour.
22 You will always go for the cheaper one. So the retailer can't realistically do that and
23 hope to sell any of the expensive ones.

24 Then the second practical question or problem is that if a customer goes into a store
25 and buys a full price trainer and then they see that equivalent from last year discounted
26 in the website that has the same name, we are told that they will get upset and they

1 will come in and ask for refunds, and that causes problems within the store.

2 Now neither of those are entirely intuitive. In both cases we are talking about different
3 product even though we are told that the differences are small.

4 Then in relation to this idea, this second idea of the customers who compare the store
5 and online prices, what we have to imagine is there are customers who get really
6 angry. "I have bought my full price trainers in Up and Running. I see similar ones
7 discounted on Up and Running. That upsets me but if I saw them discounted on
8 something called Running Shoes that I didn't know was part of Up and Running,
9 I wouldn't be upset". That seems quite a leap in terms of the intuitive appeal of what
10 we are being asked to accept is the restriction on competition.

11 So importantly when Mr Macfarlane was asked about evidence of these practical
12 aspects that he advances -- so, for example, he was asked about records of customers
13 who seek refunds or make complaints when they have seen a similar shoe discounted
14 online. He said he was unable to provide that. He was unable to provide any sense
15 of how often it happened. He asked us to accept his word that it was enough. You
16 can see that in the transcript.

17 It is also clear that Up and Running and other running retailers do, in fact, do what's
18 said to be so difficult here. So they sell the full priced current season stock and the
19 discounted out of season stock on the same website. We have seen that. We have
20 seen the screenshots in the evidence.

21 When asked how often Up and Running was able to do that and how many sales were
22 made in that environment, Mr Macfarlane said that that was information that was
23 available to him but he had not brought it to this case.

24 **MR TIDSWELL:** Ms Berridge, you may think I am jumping ahead but I am not. When
25 we get on to talking about selective distribution, I think we all know what that involves
26 and why in a classic selective distribution model a wholesaler might want, for example,

1 to promote the brand image and the positioning of the product as premium and so on
2 and we talked a little bit yesterday and Mr Yates was very helpful on that in terms of
3 the prestige product.

4 It makes sense, doesn't it, that in a selective distribute model the retailers would have
5 an aligned interest in that as a matter of generality. It is not surprising in a way that
6 Mr Macfarlane would be saying that he would want to be selling premium product most
7 of the time in his shop and that's how it would appear. Of course, the pricing, as we
8 are no doubt going to come on to, is an inevitable part of that. It seems to me to be
9 somewhat inconsistent with the case you are going to be advancing to us to say
10 Mr Macfarlane does not care at all about how the shoes are presented and therefore
11 the way in which discounting happens around them. Is that something you recognise,
12 that inconsistency?

13 **MS BERRIDGE:** What I am focusing on is what we are being told is the problem for
14 Up and Running in not being able to open this new website and sell HOKA shoes on
15 it.

16 **MR TIDSWELL:** Yes. Forgive me for cutting to the chase a bit. That's partly because
17 we don't have an awful lot of time. It does seem to me this is the other side of the
18 point we are going to need to spend some time on when you get to the selective
19 distribution bit and particularly the by object bit. In a way I am partly raising this to give
20 you a bit of a heads-up so that it doesn't come as a surprise.

21 It does seem to us that there is this very important point in the middle of this case
22 that you have the likelihood that wholesaler and retailer are going to be keen the
23 product that's sought presenting it as a prestige product. There is therefore a question
24 about what do you do with the discounting of old stock and how is that best presented.
25 There is going to be a degree of alignment one would think between wholesaler and
26 supplier. To be absolutely clear, maybe it is easier to talk in the abstract. I am talking

1 about perfectly legitimate arrangements here before we get into some of the details of
2 this case.

3 It just seems to -- I am just not quite sure why we -- in a way if we jump forward and
4 think about that and the acceptance of it, it does seem to be cutting across this idea
5 that Mr Macfarlane would not care about discounting inside his bricks and mortar or
6 inside on his website. Do you see the point I am making?

7 **MS BERRIDGE:** I am just trying to make sure I have understood it. So you are
8 suggesting that Up and Running would have other reasons than have been articulated
9 here which would be about presentation for not having discount shoes in the stores.

10 **MR TIDSWELL:** I think the examples given in your 7A and B are manifestations of
11 that point. The fact that customers complained about it means that you are not
12 succeeding in your desire to present it as a product which people see as being the
13 product they want as opposed to the one over there that is cheaper.

14 **MS BERRIDGE:** The point I am really making is we don't know that customers
15 complain about it. That's speculative.

16 **MR TIDSWELL:** I suppose the point I am making is maybe that's neither here nor
17 there, because it seems to me at the heart of this case is going to be this question
18 about how does one deal with -- at least an issue at the heart of the case, maybe not
19 the only issue, but an issue is going to be how does one deal with a situation where
20 you might have had a perfectly sensible arrangement where people are focusing on
21 the management of prestige shoes and then last season -- this current season and
22 then last season, managing all that. That all makes sense and everybody is happy to
23 buy into all that. When something happens and that doesn't work anymore and
24 somebody wants to do something different which involves a different configuration, if
25 you like, of discounting versus current season then we seem to have a problem. That
26 has created a problem. That seems to us exploring that is going to be really quite

1 an important part of understanding in the context of whatever there is by way of
2 selective distribution, understanding whether or not there is a by object problem or not.
3 So I am unashamedly putting a marker down for you. I don't really want to have
4 an argument with you about customers and what they think.

5 **MS BERRIDGE:** No, of course.

6 **MR TIDSWELL:** I am jumping ahead because it seems to us that is probably a more
7 interesting point in a way than whether Mr Macfarlane is right or not. If one starts on
8 the premise that he has some aligned interests to the point at which he doesn't and
9 he doesn't obviously for different reasons relating to COVID and so on, then it is pretty
10 obvious that everybody is trying to do the same thing, which is make sure they sell as
11 much of the current season's stock as they sensibly can at a sensible price. The
12 question about discounting is how do you manage discounting round that.

13 **MS BERRIDGE:** Yes, but I do want to bring us back to the question that we have to
14 have before we can do anything, before we can go to Metro or object or anything.
15 What is said to be the restriction of competition? So we are not here to discuss
16 restrictions on Up and Running. We are here to discuss restrictions on competition,
17 because that's what the Competition Act is about.

18 **MR TIDSWELL:** Well, I think --

19 **MS BERRIDGE:** So we have to understand what is that restriction and what do we
20 know about it. That must be the first thing that we do.

21 **MR TIDSWELL:** Again, I am probably jumping ahead a bit. We know, don't we, that
22 it is anticipated and expected that a selective distribution system will impact, for
23 example, price. It is inherent -- well, the authorities seem to suggest that it is inherent.
24 It is expected that a selective distribution system will impact price and the reason why
25 they are considered not to be competitive problems is because there are balancing
26 benefits that come in the form of benefits to consumers as to service, quality, efficiency

1 and so on.

2 **MS BERRIDGE:** Yes. What is I think for me very important to think about is there are
3 degrees. So you might have a very, very limiting selective distribution agreement. So
4 you might be like Pierre Fabre and say nothing online at all. You could do other things
5 that were very limiting. Then you would have to -- the quid pro quo in terms of
6 a pro-competitive balancing would have to be stronger, but where the limits are quite
7 slight and the negative impact on competition is also slight or potentially non-existent,
8 then the balancing benefits have to be seen in that light.

9 So if we step away perhaps from Metro, which is I think perhaps quite a formalistic
10 safe hub and think about object restriction, we do have to say what competition is
11 being restricted or limited and by how much and then in a bespoke way per distribution
12 system, not as a generality, is there sufficient balancing benefit?

13 What I am saying is in this one it is quite hard to really see what the problem is. It is
14 not at all like Guess or Pierre Fabre, because every single retailer can have a website
15 that's in the same name. So internet selling, absolutely everyone is doing it.

16 **MR TIDSWELL:** There are lots of interesting things we are going to come back to in
17 there. I think the way you have described the object point may be taking it quite a long
18 way past just the object analysis in the sense that obviously if you were going to then
19 get into exemption either individually or through the block exemption, that's -- in
20 a sense I don't disagree with the way you put it, but just to make that point.

21 I think just to be absolutely clear, what's being said here I think is that in terms of at
22 least the impact on price, and obviously we will talk about the restriction on channel
23 separately, but just so far as price goes if there had not been this restriction there
24 would have been an ability on Mr Macfarlane to discount more heavily than he would
25 do. I appreciate that's why you are taking us through this. I understand that, but just
26 as a basic proposition that -- yes.

1 I was just going to say it comes back to this point about -- I am not saying that this
2 is -- maybe this is seeing it too much in binary terms, but just to make the point if we
3 are trying to work out what's the right way to deal with the approach to discounting
4 here, we have a suggestion that out of the ordinary course of the way things have
5 been dealt with suddenly one of the retailers wants to effectively discount on
6 a clearance or outlet site and that is very different from the way in which the brand has
7 been presented before. Now that will undoubtedly have price implications I think. It
8 is clear that will have price implications just as a matter of basic principle without
9 getting into the question of what customers say. That's really the point I was trying to
10 make to you. You may push back on that but it seems to us that's pretty self-evident.

11 **MS BERRIDGE:** Yes, I do see what you mean, but when you focus very carefully on
12 what Up and Running wants to do, what they want to do is price differentiate. They
13 want to have high prices for people who go into the store and maybe like to have the
14 latest colour, and then they want to have low prices for other people and they want to
15 maintain that differential. That's why they want the separate --

16 **MR TIDSWELL:** That's right. I see that.

17 **MS BERRIDGE:** If they are not allowed to completely separate Running Shoes, the
18 implication of their argument is the prices will have to balance a little bit and so when
19 we think about the impact on price, some people are going to be winners and some
20 people are going to be losers, and in order to establish that this is an object
21 infringement, which is the most serious kind, the tribunal would have to have some
22 means of understanding how that balance might occur and we don't.

23 **MR TIDSWELL:** I am not sure of that. I don't think I accept that I am afraid. You are
24 going to have to work a bit harder on that at the moment. I don't think that is what the
25 object analysis is about, not that sort of granular balancing. The object -- I think just
26 to -- I think it is helpful we are having this discussion now, because to give you a sense

1 of where we are coming at this from. It seems to us -- back to this alignment point. If
2 you start -- maybe we should talk about the contents.

3 It is very plain it appears to us and the evidence I think is very helpfully plain,
4 particularly Mr Yates and Mr Henderson as well about aiming for a prestige product
5 and selling it in that window when it goes on the shelves at the price that it is
6 recommended to be sold at. Everybody thinks that's a good idea. There's an
7 alignment there. The retailer thinks it is a good idea and you can see why and the
8 wholesaler thinks it is a good idea and you see why.

9 Then you get to this difficult question of how you deal with discounting the older stock.
10 The way the orthodox approach to that has been that you -- you know, it is all about
11 timing and about feeding the right amount at the right time so you don't unduly alter
12 that balance. That's a sort of an equilibrium if you like that everybody has worked on
13 and seems to perfectly sensible and it's worked well. Whether it amounts to a selective
14 distribution agreement or not is another question to come on to.

15 What we are talking about here is something quite different from that. We are talking
16 about something where somebody wants to take the old stock and selling it on
17 a completely different basis on what is effectively an outlet or clearance basis where
18 one would expect there would be a substantial difference in the pricing of that.
19 Therefore, it is very difficult to see why -- and everybody understands that's the set-up
20 as far as we can see and it seems very difficult why you don't start with the knowledge
21 that preventing them doing that is preventing the retailer setting their own price. So
22 you are just bang straight into that point.

23 Just to be clear, I am not saying it is an object infringement, but that's sort of the logic
24 of it, and then in a way in order to deal with that point you need I think to be able to
25 balance that, not quantitatively but qualitatively, if you like, by saying to us "Look,
26 actually that's not the right way of looking it because that's not what we thought we

1 were doing. We were doing something else. We were trying to make sure that for
2 everybody's benefit the status quo is retained so we are all getting the benefit of the
3 orthodox approach to positioning the shoe at the right time and the right season.

4 **MS BERRIDGE:** I will reflect on that.

5 **MR TIDSWELL:** Hopefully it is helpful to have a break and let us have a bit of a think
6 about it. The reason really for -- I appreciate I have jumped right in and taken you off
7 course and jumped quite a long way ahead. But actually that is the bit we are really
8 interested in. I want to signal to you that's the bit in this case that we find -- not the
9 only bit but the bit we find particularly interesting and it would be really helpful to get
10 your reaction to how that sits in the object analysis. Because I have not read your
11 note, I am afraid I have no idea whether you deal with that somewhere else -- you
12 probably do -- or in a different way. I didn't want you to be under any illusion about
13 where our thought process had gone.

14 **MS BERRIDGE:** If I understand that correctly the thought process you are articulating
15 to me is that because Up and Running want to establish a website that's specifically
16 for discounting, it stands to reason that overall pricing will be cheaper as a result.

17 **MR TIDSWELL:** I think probably -- I think it is slightly -- I think I would start it in
18 a different place.

19 **MS BERRIDGE:** Yes.

20 **MR TIDSWELL:** I think for the purposes of this discussion one has to -- let's just
21 assume that you don't satisfy the Metro criteria. Again that's all for discussion. There
22 is no point talking about object unless we know the answer for that. So you have not
23 satisfied Metro but you have got something which you are going to describe as
24 selective distribution. Therefore, as a matter of general principle it seems to us that
25 you have to accept that selective distribution brings with it the impact on price and
26 there needs to be a proper justification for that impact in order for it not to be an object

1 infringement, and that does appear to us to be consistent with the facts here, because
2 actually Mr Macfarlane is saying "Basically I need it for liquidity purposes to get this
3 stock off my books". I think it is pretty plain that means there would have been
4 an impact on price, not just as a matter of theory but a matter of reality. It is not clear
5 how much, and he has not been able to do that.

6 If one is then asking the question what is the objective, you are sort on that middle
7 query of the object analysis, what's the objective, that's what we are very focused on.
8 Are we to be taking from this that your client should have known with a selective
9 distribution arrangement that didn't meet Metro it was interfering with price and
10 therefore that is the objective, or are there other things associated with selective
11 distribution that fit into the objectives analysis and the legal (inaudible) context analysis
12 that should lead us to believe it is not an object infringement.

13 **MS BERRIDGE:** Thank you.

14 **MR TIDSWELL:** As I say, you know, we have been discussing that at some length
15 and we are very interested in understanding what your view of it is and not to the
16 exclusion of other things in the case. Of course, you have to deal with Metro and so
17 on and the block exemptions but we would hate not to have had a proper discussion
18 with you about that point.

19 **MS BERRIDGE:** Thank you. I am grateful for that indication.

20 **MR TIDSWELL:** Shall we take ten minutes? We will take ten minutes and come back
21 at half past sharp.

22 **(Short break)**

23 **MR TIDSWELL:** Ms Berridge.

24 **MS BERRIDGE:** You sent us away with some things to think about over the break.
25 What would you like to hear about?

26 **MR TIDSWELL:** I think I have interrupted you enough. I am conscious you have

1 limited time. So I am happy for to you continue the way you want to. I just wanted to
2 make sure you had that point, which you will no doubt come to.

3 **MS BERRIDGE:** Yes. What I might do is do a short canter through this rather long
4 document so you can see what we have there.

5 **MR TIDSWELL:** Yes.

6 **MS BERRIDGE:** But without necessarily doing all of the content, so more of a "This
7 is what you can read later".

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

9 **MS BERRIDGE:** Then when we get to object we can do it in a little bit more detail.

10 **MR TIDSWELL:** Spend some time on it. Good. That would be helpful.

11 **MS BERRIDGE:** Our section 2. We have just given you some legal framework.
12 I spoke to you about Prochlorperazine in opening. We have also given you Guess,
13 which is about memory and especially evidence that's given some years after relevant
14 events.

15 Then we come on to the legal framework for selective distribution. I have reproduced
16 again the three stage approach in Ping.

17 **MR TIDSWELL:** Yes.

18 **MS BERRIDGE:** Which I remember you didn't like the order so much but we have
19 stayed in it.

20 **MR TIDSWELL:** I have to say, well, certainly it is absolutely clear that this is
21 a perfectly legitimate and indeed endorsed way of doing it. I do think that it is actually
22 quite helpful to start thinking about the objects analysis because it actually requires
23 you to think about all the things -- the context in which it sits and then when you to
24 come to apply Metro, it actually makes it easier, whereas if you do Metro you are doing
25 it almost without really knowing as much as you ought to know about -- when you write
26 a judgment it doesn't make any difference because whatever you have done, you have

1 done them both. I do find it easier actually.

2 **MS BERRIDGE:** I did actually come round to your way of thinking on order. In the
3 document I have stuck to the Court of Appeal. It was always a safe test.

4 **MR TIDSWELL:** I don't think it makes any difference. It may be we adopt the same
5 course when we get to the judgment. Who knows?

6 **MS BERRIDGE:** Interestingly to note that the court did caution that there is as yet no
7 bright line between the three stages. It reminds us very much of what you said, that
8 the same factors really come in and we shouldn't sort of regard them as too artificially
9 separated.

10 Then we come on to an essay question that Professor Colomo set, which was
11 Professor Whish's contention -- Whish and Bailey, many professors, that if you don't
12 fall within the Metro criteria, you are necessarily an object infringement. So I am not
13 going to do that, because while it is fun, it would take too much time.

14 **MR TIDSWELL:** Do you want to give us the answer?

15 **MS BERRIDGE:** Well, yes, I would love to give you the answer.

16 **MR TIDSWELL:** Perhaps slightly mischievously but possibly more interesting, do you
17 disagree with Mr Macfarlane's answer, which I think was that least creates -- what did
18 he say -- it creates -- at the very least it leans in favour of the restrictions being
19 an object if you found Metro. So it doesn't create a presumption but it creates a weight
20 in that direction.

21 **MS BERRIDGE:** I wouldn't agree with that. I would characterise Metro as a safe
22 harbour, a bit like the block exemption. So it assumes quite an extreme degree of
23 harm and it looks for very stringent requirements sort of on the good half of the
24 balance. We should think of it as a safe harbour. If you fall outside of that in the same
25 way as if you fall outside the block exemption, that's not indicative of anything. You
26 need to go to your object analysis with a fresh mind. That's what I would say and I

1 would take that from Ping, who cites the Advocate General in Coty. Not just what Ping
2 says but what Ping does.

3 So Ping analyses a selective distribution agreement that has been found to fall outside
4 Metro. It doesn't say that is enough. It says let's do Allianz Hungária and all of the
5 work. So the way the Court of Appeal conducts itself in Ping seems to me that the
6 authority --

7 **MR TIDSWELL:** I think the section may be quite important and may turn out to be
8 quite important. I think the way I read -- it pops up, as you have cited here,
9 AEG-Telefunken (inaudible). It does seem to me it comes back to the discussion we
10 were having a little bit earlier, which is this recognition that a selective distribution
11 agreement will affect competition adversely but it should be permitted because the
12 balance will favour competitive benefits.

13 If you have got to the position where you haven't managed to make the case and
14 I understand what you say, Metro is a high hurdle and there may be a problem in the
15 way in which this is all set up, but if you have not hit the high hurdle then you are left
16 with somebody who is presumed to have known that they are doing something that
17 affects competition if that makes sense.

18 You may still then have some of the benefits of the -- you do have the benefits of the
19 selective distribution system that was not sufficient to get you into Metro. As you say,
20 you absolutely then have to go and ask yourself the question as to whether they were
21 the real objective or the brand reasons that support those were the real objective,
22 rather than the damage to competition which might be, for example, restricting price.

23 So that's how I had thought about it, but I am not -- I don't know whether that -- I think
24 that is probably consistent with what you are saying, which is it all goes back in the pot
25 to have a look at again.

26 **MS BERRIDGE:** Yes. You use the same facts and principles at each stage. You just

1 sort of are perhaps weighing them a little differently because you are analytically in
2 a different place --

3 **MR TIDSWELL:** Yes, and you are no the trying to hit a hurdle which in some
4 respects -- certainly for some outside a certain category of products is actually quite
5 a high and difficult hurdle, isn't it? Yes. That's helpful.

6 **MS BERRIDGE:** So we have the answer on that. You also -- the Chair set an essay
7 question, which is whether we should focus on a specific restriction.

8 **MR TIDSWELL:** I have a fear that I may not have articulated my essay question
9 accurately. I don't think what you have done is unhelpful, but actually I think the point
10 I was making was not -- I absolutely accept that we have to look at a contractual
11 provision in order to decide whether or not it restricts, but I think the point I was trying
12 to make was that we were anxious in the course of doing that if we are going to be
13 talking about the object box that we do have a proper understanding of the entire
14 selective distribution scheme, because it seems to us it is plain, including I think the
15 quote you have given us from Coty makes it plain you have to look at the contractual
16 provision in the context of the scheme.

17 **MS BERRIDGE:** Absolutely. You will have seen in Mr Hagger's evidence he provides
18 many pages of details about the whole scheme.

19 **MR TIDSWELL:** Yes, so the essay question was not even so much an
20 essay question. I think we were becoming concerned that the focus on the particular
21 provision was perhaps to the exclusion of a full understanding of the selective
22 contribution scheme as it is. I think -- I don't think I am giving away anything that you
23 don't know already -- it is not a selective distribution scheme in the sense of being all
24 singing, all dancing. It is placed in different pieces, isn't it? It appears in different ways
25 in different pieces. I think as everybody has admitted in evidence it is not fully
26 documented, not fully transparent and so on.

1 **MS BERRIDGE:** It is a very young brand, so very different from someone like Asics
2 or Nike. Obviously we have heard that Mr Hagger arrived from Asics and took an ad
3 hoc system and systematised it in those documents that you saw.

4 **MR TIDSWELL:** Yes, exactly. So at least without wanting to characterise it in any
5 particular way, favourable or unfavourable, it is an evolution, in a sense an evolution,
6 isn't it?

7 **MS BERRIDGE:** Yes.

8 **PROFESSOR IBÁÑEZ COLOMO:** If I may follow up with a question so we are clear
9 on the submissions. If we look at page 13 of your closing statement, just so we are
10 clear Coty refers to the system as a whole as opposed to individual clauses. It is
11 paragraph 47, top of page 13.

12 **MS BERRIDGE:** Yes.

13 **PROFESSOR IBÁÑEZ COLOMO:** Just so we are clear that if the system as a whole
14 is not purely qualitative, it is irrelevant that any of these clauses could be seen as
15 Metro complaint. Just to make sure that we agree on the legal analysis. So then if
16 individual clauses are Metro complaint, it is irrelevant the moment we find out that the
17 system as a whole is not purely qualitative. There is quantitative elements to it. So
18 then the moment the system as a whole has a quantitative element, we would
19 immediately be outside of Metro and therefore individual clauses could be seen in
20 a different economical and legal context as Metro compliant but the moment the
21 system as a whole has a quantitative element Metro no longer applies. Just to make
22 sure we agree on that point.

23 **MR TIDSWELL:** That's the point I was trying to focus you on when I made the
24 observation.

25 **MS BERRIDGE:** Yes. Perhaps by focusing on the object restriction we can sort of
26 move away from applying these sort of quite formalistic rules in Metro and focus on

1 the actual harm. I have -- you did ask me to cover the quantitative elements and it is
2 probably quite important to recognise that the evidence that we heard on those is -- it
3 is almost peripheral. Mr Hagger says "Occasionally, geographically if we have
4 an identical retailer, we might say no". Then I think Mr Yates said "Well, for our
5 clearance stock we have focused on existing retailers".

6 You will see what we have written, but I think it is important not to get those perhaps
7 out of proportion and also to remember that they aren't causal here because --

8 **PROFESSOR IBÁÑEZ COLOMO:** I am asking a question not about how the law
9 applies to this particular facet of the case. I am asking a question about the law as a
10 matter of principle, whether we agree that a pre-condition for the application of Metro
11 is that the system is purely qualitative. At the moment it is not purely qualitative, we
12 would no longer apply Metro. So then in the abstract we thought applying the law
13 specifically to the facts specific of this case.

14 **MS BERRIDGE:** I can't answer that off the top of my head. I have clearly answered
15 the wrong essay questions.

16 **MR TIDSLEY:** Don't worry. It is obviously important to the Metro analysis and you
17 are going to come on to that in a minute. Let's see how we go when we get there.

18 **MS BERRIDGE:** Before we plunge into Metro and object analysis and maybe even
19 the block exemption, we have to be very clear what the restriction is that we are talking
20 about. We have obviously spoken about the terms and conditions and the July 2019
21 e-mail quite extensively.

22 I did want to reiterate that we shouldn't go off into a world where we try and construe
23 an e-mail that comes from a brand as if it was a statute. That e-mail was very plain.
24 If you step back and say realistically any retailer would have understood what that
25 e-mail meant. It meant you can have the same domain name and if for some reason
26 that doesn't work for you, come and talk to us and we will probably come up with

1 something that has the same effect.

2 **MR TIDSWELL:** Just to turn it around, and I think Mr Henderson did say it was
3 exceptional -- they were talking about exceptional situations -- but the point that is
4 important for the restriction is the veto, isn't it, the ability of Deckers to refuse to agree
5 to the website and that, of course, is what happened. So it is quite difficult to say that
6 is not the way in which it was intended to be implemented.

7 **MS BERRIDGE:** It happened not as a discretionary veto. It happened in accordance
8 with the way I have described the meaning of the e-mail, which was Running Shoes
9 was assessed to see if it could meet the same aims as the same domain name rule
10 and it didn't because it didn't clearly signpost. So it is not a discretionary -- the
11 evidence is very clear that it was never about pricing and it was about the lack of that
12 clear signposting and that's the contemporaneous evidence.

13 **MR TIDSWELL:** In a way you are now getting into the objective of the restriction.

14 **MS BERRIDGE:** Yes.

15 **MR TIDSWELL:** But actually I think what I am saying one step before that, if you
16 characterise the restriction, it is ability of Deckers to say "No, you can't do that".

17 **MS BERRIDGE:** Yes. It is very important to remember Mr Hagger's evidence in the
18 whole of the time that he has been at HOKA he's been asked three times.

19 **MR TIDSWELL:** That is really beside the point, though, isn't it? It doesn't really
20 matter, does it, because -- well, it may matter if you are saying that the restriction
21 doesn't give Deckers that entitlement. It doesn't matter how often it has been
22 exercised. The point here is if we have an agreement which is obviously a patchwork
23 of a number of things if you are going to be arguing selective distribution but at the
24 very least includes the terms and conditions and the e-mail, but we have certainly been
25 proceeding throughout the case that the premise is that at the end of the day Deckers
26 had the entitlement and Mr Macfarlane, although he was not particularly focused on

1 the term and conditions, accepted there was a contractual entitlement to say no and
2 Deckers did say so.

3 **MS BERRIDGE:** There was a contractual entitlement but only on the basis of --

4 **MR TIDSWELL:** -- I understand they may have reasons for it. The question you are
5 asking is the nature of the restriction, not the justification for it. The nature of the
6 restriction is the ability to prevent, if you like, a second website with a different
7 business model on. You can put it like that. That would be entirely consistent with
8 a selective -- I am not trying to be difficult. It seems to me that's entirely consistent
9 with in theory at least with the idea that you would want to control how things are sold,
10 which would be consistent with a selective distribution system. I am not trying to trap
11 you into anything. I just don't want us to proceed on -- I don't want us to have to go
12 through the exercise of analysing whether the nature of the restriction is one that gives
13 Deckers effectively a veto to stop that, unless you are telling me I have to do that.

14 **MS BERRIDGE:** I don't want us to treat it as a right of veto. I want us to treat it as
15 a --

16 **MR TIDSWELL:** A veto based on whatever proper -- however we find it is configured
17 that the veto is to be exercised, whether there are criteria or reasons or whatever it is,
18 but that's not really -- that's not the nature of the restriction, is it? It may be to the
19 extent you say -- that's all going to come up in objective, isn't it, in the objects analysis?

20 **MS BERRIDGE:** Yes. If I call it the same domain name/signposting requirement.

21 **MR TIDSWELL:** In a funny way I am not sure it is that helpful really. I don't think
22 that's really what we are talking about. We are not talking about the same domain
23 name obviously because he already has got one. We are just talking about the ability
24 to find another channel separate from the one that exists because it is the second limb
25 of the e-mail e-mail, which -- there's a requirement to notify and the way it has been
26 operated is that Deckers can say no for good or bad reasons. They can say no. But

1 that's the restriction, isn't it? For good or bad reasons he has been stopped from being
2 able to without consent go ahead with a separate website which effectively implements
3 a different business model.

4 **MS BERRIDGE:** Yes. Let's carry on. We spoke about quantitative restrictions. I think
5 we have dealt with those. In our order next would come the Metro criteria but I didn't
6 want to spend too much time on those because we have -- well, we have canvassed
7 them extensively in opening.

8 I did in particular, though, want to refer to our requirement of uniformity. We have
9 heard a lot of examples or apparent examples of non-uniform application of the
10 requirement and it's just really important to be forensic about those. The most recent
11 was the one that was provided to us on Monday morning. You remember Mr Hagger
12 had been unable to find anything out about that. That's called George Donald. In the
13 intervening time we have found out about that. That is fully compliant and we have
14 got an explanation in there and screenshots. So you have what you need on that one.

15 **MR TIDSWELL:** That is slightly unsatisfactory, isn't it, because that's evidence, isn't
16 it?

17 **MS BERRIDGE:** We did receive evidence on Monday morning.

18 **MR TIDSWELL:** I am not sure it matters when you received it. I mean, the evidence
19 closed when we finished yesterday and I don't think we can accept evidence -- that's
20 akin to you giving evidence, Ms Berridge. I don't think we can accept that.

21 **MS BERRIDGE:** It is public information.

22 **MR TIDSWELL:** I am not sure that really matters. Anyway, I am not sure it makes an
23 awful lot of difference and I think I need to put a marker down that I am not sure that
24 we accept that's admissible and that we can take account of it. We have got it.

25 **MS BERRIDGE:** On the other side it would be surprising if you were to accept
26 Mr Macfarlane's version of events, having been provided with what is effectively

1 evidence well after the deadline --

2 **MR TIDSWELL:** That's the way trials work, Ms Berridge. I mean we have had
3 witnesses who gave evidence and been cross-examined on them and that's the
4 evidence that sits on the record.

5 **MS BERRIDGE:** We are just correcting factual misstatements.

6 **MR TIDSWELL:** That is the problem, isn't it? Anyway, let's leave it. I don't think we
7 need to spend time on it but just so you know I am not sure we accept that is evidence
8 that we can rely on.

9 Can I just ask you in terms of the way you have dealt with Metro, unless I am missing
10 something, have you said anything about the nature of the products in question?

11 **MS BERRIDGE:** What we have done -- what I have not tried to do is repeat all the
12 material that I gave to you in opening which was about the brand strategy. So I took
13 you to Mr Hagger's statements in his evidence about the brand and how it sees itself
14 and also about brand investments which we got from an article, and about sponsoring
15 the Ultra Marathon race and things like that. I also took you to Mr Hagger's evidence
16 about how he considered it was very important in terms of the integrity of the brand
17 that the environments in which it is sold are transparent about their connections with
18 other businesses where you might buy them.

19 **MR TIDSWELL:** Yes, although, you know, as the Professor says, obviously we are
20 looking at the whole selective distribution system, not just the clause about
21 signposting.

22 **MS BERRIDGE:** Yes.

23 **MR TIDSWELL:** I am just curious, because I think, you know, the analysis normally
24 starts with the nature of the products in question and necessitates a selective
25 distribution system and I didn't see that here, but we can look at your opening.

26 **MS BERRIDGE:** Certainly in openings and I can't remember if it is here as well, but

1 I have submitted that it is very analogous to Coty.

2 **MR TIDSWELL:** Yes, I remember you doing that.

3 **MS BERRIDGE:** Coty is about luxury and the way I put it was that these particular
4 shoes, not necessarily all running shoes, but integrity is part of their value. They are
5 about technical innovation and trusting your feet to these sort of high end, you know,
6 marvellous shoes that will keep you safe and help you to run fast. So that --

7 **MR TIDSWELL:** Yes. I remember you making that point. We can certainly go back
8 and look at that. I was wondering why I didn't see it here. That is fine. We can go
9 back to the openings.

10 **MS BERRIDGE:** I just reminded you how I put those matters in opening. This is
11 perhaps coming to the heart of the matter where you have asked about what is the
12 justification for having a selective distribution arrangement.

13 **MR TIDSWELL:** Sorry to interrupt you. I think the question is not so much the
14 justification as the objective. I think the question we are asking in that sort of three
15 pronged analysis is what did Deckers anticipate or the parties anticipate they would
16 achieve because of the agreement?

17 **MS BERRIDGE:** Yes. We are very mindful you asked some questions of Mr Hagger
18 about this requirement that websites should be open about their ownership and
19 connections with other businesses and you asked about it from a customer point of
20 view and from a brand point of view.

21 **MR TIDSWELL:** Yes.

22 **MS BERRIDGE:** It is perhaps a distinction that's difficult to make, because not every
23 customer will care about it, but the brand, HOKA in its brand strategy and thinking
24 about its brand does see it as very important including through the eyes of the
25 customer, because when the customers -- when something goes wrong, for example,
26 or the customer found out they bought from a website which was not open, that is

1 when things start to impact on the HOKA brand.

2 **MR TIDSWELL:** Just for present purposes I am conscious that you are running out
3 of time and this is a very useful conversation but not the bit of it we are having now,
4 because obviously we can form our own view about whether we think that is both
5 consistent with the evidence and indeed, therefore, what the parties were hoping to
6 achieve with the provision. If we didn't accept that and we took the view, as I have
7 indicated to you, that actually it was more consistent with the idea of trying to maintain
8 the model, the selective distribution model, if I can call it that, in which retailers
9 and Deckers both understood the value of having the stock that was new sitting there
10 with a prestige position and so on and so on, it seems to us the question then becomes
11 what is the reason for that? Is it the pursuit of the legitimate selective distribution aim
12 of managing the prestige brand in that way, or is it actually almost the flip side of that,
13 the desire to make sure that there is not over discounting that takes place. That seems
14 to us to be quite a delicate balance.

15 **MS BERRIDGE:** We have very extensive evidence which we have moved to
16 a schedule to make it easier for everyone to cope, very, very extensive evidence about
17 the motivations of Deckers.

18 **MR TIDSWELL:** Yes. I have to say that some of the evidence that we received
19 seemed to be somewhat conflicting on the point. We need not go through the
20 schedule. Just in order to try and move the discussion into the area we are most
21 interested in, if I indicate to you -- let's just say, and I don't want -- we are absolutely
22 still in the early stages of our thought process, but we are keen to put to you if we were
23 to reach the conclusion that what you have here is largely a partly formed selective
24 distribution arrangement, elements of it which appear plainly to be designed to save
25 business distribution. But let's say it is not complete. It is not recorded in one place.
26 It is not transparent and so on.

1 Therefore, as we said in the object analysis, we are asking ourselves that this clause
2 sits within that. What's the objective of that clause sitting within that framework, if one
3 can put it that way.

4 **MS BERRIDGE:** Yes.

5 **MR TIDSWELL:** If you say to yourself, you know, to what extent should somebody
6 who has a selective distribution arrangement which doesn't tick the Metro boxes and
7 actually may have some other defects -- let's say in this scenario we find that there's
8 problems of consistency or even possibly discrimination. How does one actually fit
9 that into the objectives and the legal and economic context? What is the mix of things
10 and where does one end up making that consideration? I am sure you answered
11 some of that in here, but I just wanted to sharpen that focus for you and see if there's
12 anything particularly you want to say about that, because in a way I don't think
13 there's -- we are not going to be helped by, you know, whether there were concerns
14 about stock or credit. They don't really take us anywhere.

15 **MS BERRIDGE:** They are the positive reasons so you can understand the reasons
16 that didn't exist.

17 **MR TIDSWELL:** Yes.

18 **MS BERRIDGE:** So as not to leave a gap by inference.

19 **MR TIDSWELL:** There is no question that you are back to this point about what is this
20 clause trying to do --

21 **MS BERRIDGE:** Yes.

22 **MR TIDSWELL:** -- and the e-mail. I think on the hypothesis I just put to you what it
23 is really trying to do is sustain this concept of selective distribution whereby the
24 objective is that everybody is happy to see the shoes sold as a prestige product
25 wherever it can be, and then you have a situation where somebody wants to do
26 something very, very different.

1 If we are looking at the way in which it has been set up and the framework of the
2 selective distribution as it stands and however one looks at it, and then you have within
3 that effectively the ability to say "no" when somebody wants to do something different,
4 how does one balance all that when you start to think about the legal and economic
5 circumstances, because effectively --

6 **MS BERRIDGE:** I do think that is a really critical question and it is not an easy
7 question.

8 **MR TIDSWELL:** No, I agree.

9 **MS BERRIDGE:** I don't think the case law helps you at all on this question.

10 **MR TIDSWELL:** No.

11 **MS BERRIDGE:** Potentially we have not had the kind of evidence we would have
12 needed to resolve that question today, and that is not the defendant's problem. It is
13 the claimant's problem.

14 So I do want to put to you that what you are being asked to do today is create a new
15 category of object infringement and to say that it is an object infringement of the
16 chapter 1 prohibition to prevent your retailers establishing a website that deliberately
17 disguises who it is owned by. So you are being asked to absolutely protect that right
18 in the strongest possible terms under competition law. This is not an effects case. It
19 is not being run as an effects case. There is no evidence on effects.

20 **MR TIDSWELL:** I absolutely understand that submission, but what if that's not the
21 conclusion we reach about the objective? What if the conclusion we reached about
22 the objective was that it was to maintain the positioning of current season shoes in
23 shops at a premium price?

24 **MS BERRIDGE:** That would be contrary to the evidence.

25 **MR TIDSWELL:** I don't think it would be actually. I think that's exactly what Mr Yates
26 said, not about the clause, but about the business model. It seems to us that there

1 are certainly evidence that might connect that. I mean, that is for us to decide, but
2 I am putting it to you as a possibility, and I would like to understand, if I may, how you
3 would see that in terms of the case law on object. That's really the point I am trying to
4 push you towards. I appreciate I am doing it rather agriculturally. Forgive me for doing
5 that. I am just conscious -- I don't want you to sit down without giving you the chance
6 to say about it.

7 **MS BERRIDGE:** That's something Professor Colomo talked about on the first day,
8 which is the relevance of subjective intention and objective. In my mind -- and I think
9 this is supported by case law -- it is not part of the analysis. It might be evidence as
10 to the actual effects. If someone thinks it is going to happen and they are in a position
11 to know, then it is helpful to you, but if you want to establish a new object infringement,
12 you have to think about the actual effects on competition and not about -- this is not
13 a sort of thought crime area of law. It is a forensic area of law that deals with economic
14 effects. You have to be very clear what those economic effects are, and what I have
15 been saying is that in circumstances where only three websites have ever come to
16 Deckers with this request and two of them have been granted permission, and where
17 the harm that's put in front of you is an inability to differentially price between
18 consumers who are more savvy and consumers who are less savvy, and you don't
19 know which ones are going to pay more and pay less and how many of them there
20 are, I really would have concerns about concluding that that meets the requirements
21 in Allianz Hungária or Cartes Bancaires. That does concern me greatly in this case.
22 Also -- sorry -- one final thing.

23 **MR TIDSWELL:** Yes. Go on.

24 **MS BERRIDGE:** These things we have been told about customers don't like it if we
25 price in a certain way and that's why we need a separate website, those are
26 assertions. We have had no evidence. We could have had evidence. It has not been

1 chosen to be led. The person who gave us that evidence has repeatedly made false
2 statements to this Tribunal, the County Court, the CMA and a variety of other people.

3 That is something you do have to take into account in your conclusions I believe.

4 **MR TIDSWELL:** Thank you. I think we are probably in danger of going round in circles
5 on that point. Certainly that has been a helpful discussion. Thank you. Do you want
6 to -- I am just conscious -- to be fair to Mr Macfarlane, we need to give him 25 minutes
7 or so. Do you want to just finish where you are and anything else you want to pick
8 out? We will obviously read it with great care so you need not worry about us missing
9 anything.

10 **MS BERRIDGE:** Well, I will ask you to consider carefully what I have said. Obviously
11 we have a slight difference of approach and maybe both approaches are legitimate,
12 but the analysis that we do in order to establish an object infringement focuses on
13 effect and it is only where the effects -- the damaging effects on competition, not on
14 a particular business who is sitting here today, are so extreme that you don't need to
15 look.

16 **MR TIDSWELL:** But, you see, the difficulty with that is that -- again I don't want to
17 suggest this is where we have got to, but if you view this as a pricing issue -- in other
18 words, there are two ways you can look at this it seems to us when you think about
19 this whole -- if you take it back from the facts a little bit and think about a selective
20 distribution arrangement and the acknowledgment that that is going to affect price.
21 That is what the case law says. The case law says that. That's why in a way the
22 whole system works the way it does, because, if you like, there is a justification for that
23 that will affect competition at least, but certainly once you start to affect price, there is
24 no question that you are putting yourself into the very obvious territory of object, and
25 there's a long line of history that says that restricting the ability to price is an object
26 infringement. That's why it sits as an exception straightaway in the --

1 **MS BERRIDGE:** It is not a direct restriction on the ability to set price. There is no
2 suggestion of a conspiracy or an agreement or a concerted practice as regards price
3 in this case.

4 **MR TIDSWELL:** I am not sure that's right. I mean, I think there is a concerted
5 practice, not an agreement, about discounting.

6 **MS BERRIDGE:** I would be very concerned, because that has never been put to us.
7 We have tried extremely hard --

8 **MR TIDSWELL:** I don't think that --

9 **MS BERRIDGE:** -- to get to the bottom of the case against us. We have in good faith
10 articulated what we understand to be the case against us.

11 **MR TIDSWELL:** I don't think you can say it has not been put to you, Ms Berridge. We
12 have had quite a lot of conversation over the last couple of days about the motivation
13 for Mr Macfarlane wanting to set up the website and about the inevitable
14 consequences of that. Obviously, you know, people have different things to say about
15 that, but it has been plenty talked about what the consequences of not being able to
16 run this website are. It seems to us that that actually could be seen -- I am not saying
17 does -- to be consistent with the whole purpose of wanting to restrict.

18 Actually, just to be clear, as I said to you earlier, I am not sure that that in itself is
19 necessarily anything wrong. That would be in many respects very consistent with the
20 idea of running a selective distribution system. So I am not advancing any hearsay to
21 you I don't think. If we were to reach the conclusion that that actually was what
22 everybody thought they were doing, then it seems to us that that is not of itself -- it is
23 neither here nor there. Then what does one do with that on the analysis?

24 The problems arise much more because of the state of the selective distribution
25 system and how it is recorded and the way it is operated. That's where things become
26 more difficult and why one has to get into these rather difficult questions about how

1 does that fit into the objectives and the legal and economic context discussion.

2 **MS BERRIDGE:** We have spoken about the objectives of the particular restriction.

3 **MR TIDSWELL:** Yes.

4 **MS BERRIDGE:** We could talk a little more about the broader objectives of the whole
5 system, which I think are well articulated in Hagger's evidence.

6 **MR TIDSWELL:** Yes. I think we understand that. In a way we -- I don't think
7 we -- I am not putting to you that there's a problem with selective distribution. Let me
8 put it that way. We understand of course that. I think we also understand the lack of
9 clarity and some of the difficulties that appear from the way that Metro operates, and
10 the need, therefore, to -- the possibility one might find themselves outside Metro and
11 then in the discussion we are having about how does one then fit that into -- how do
12 you then make that analysis and the object analysis, but I think the hypothesis I am
13 putting to you is let's assume that's where we are, in which case how do we deal with
14 it? What are the things that we should be taking into account? I understand why you
15 are resisting that, because you say that's not where we should be. It may be that we
16 shouldn't be there.

17 **MS BERRIDGE:** I don't agree, if I have understood what you have just said correctly,
18 that if we are in the object question, then it is for me to tell you what I believe you
19 should take into account.

20 **MR TIDSWELL:** No, no, I'm not saying that. Sorry. If you took that from what I said,
21 that's not what I meant. What I mean is when we get to that point, I think there may
22 be different ways of looking at the restriction and the objective. You have advanced
23 one and I am advancing another. I am not saying it is the answer, but I am advancing
24 another. It seems to me it is completely consistent with the evidence that was given
25 about the brand strategy.

26 **MS BERRIDGE:** Yes.

1 **MR TIDSWELL:** And not in itself illegitimate to have controls over the channels in
2 which goods are distributed where you have a selective distribution system, but the
3 question then becomes if your selective distribution system is not complete, what are
4 the implications of that when you know that what you have done is affect competition?
5 That is the question that I am really putting to you. So you have got a selective
6 distribution system. Let me put it this way. Another way of thinking about this is you
7 have a selective distribution system. Then you do something which is actually outside
8 a selective distribution system. Obviously the selective distribution system does you
9 no good in protecting that.

10 Here we are somewhere in the middle. We have some of a selective distribution
11 system. Let's say for argument's sake it is not good enough to get you into Metro.
12 Let's say there are some other things about it that are incomplete and yet there is
13 a basis to say actually that is what we are trying to do here, and yet at the same time
14 that comes with the recognition that the mere existence of it affects competition, and
15 if it affects competition in a price way, then actually there is an argument, which is why
16 I think you see Pierre Fabre taking this line, that you could easily end up in the objects
17 box.

18 I think I am inviting you to tell us why in that scenario, which may not be the way you
19 have looked at the case, but it is certainly a way of looking at it, in that scenario why
20 should we not put it in the object box.

21 **MS BERRIDGE:** That scenario, so I make sure I am in the same place that you are,
22 that scenario is where the objective of the restriction that we are talking about is to
23 ensure that HOKA shoes are presented primarily in a full price environment with
24 discounting round the sides of that and not on a specialist discount website which
25 would be --

26 **MR TIDSWELL:** Yes. Sorry to interrupt you. Just to be clear about that, I think I would

1 put it slightly differently. I may have put it like that in order to make the point, but I
2 think the point is it is about the channels to market and it is about providing a degree
3 of control over the channels to market on the internet that you see reflected in clauses
4 5 and 6 in relation to bricks and mortar. It is about saying that part of the deal of being
5 part of the selective distribution network is that you accept that you are not just going
6 to be able to go out and do things like set up a different business model and sell on
7 a clearance basis, because we are all trying to present this as a premium prestige
8 product. A restriction like that I would have thought would be perfectly consistent with
9 that sort of approach.

10 **MS BERRIDGE:** In relation to that we have the evidence that HOKA works with
11 specialist clearance partners like Sports Pursuit. So on the evidence the sort of desire
12 to maintain a sort of premium environment at all costs isn't consistent with what we've
13 heard.

14 **MR TIDSWELL:** I am not sure that's right, because I think certainly some of that
15 evidence -- maybe not all of it -- some of it is suggestive that some of those clearance
16 websites were being used to get rid of excess manufacturing stock.

17 **MS BERRIDGE:** Still HOKA branded, though.

18 **MR TIDSWELL:** Of course. In a way that gives rise to another complication, doesn't
19 it, because you have effectively the manufacturer saying "I am entitled to go out and
20 use a clearance website but the retailers aren't". You potentially therefore have
21 a discrimination point. So that point is --

22 **MS BERRIDGE:** A discrimination --

23 **MR TIDSWELL:** Well, because you have two entities which compete with each other,
24 one of which is restricting the other from behaving in the same way, in terms of the
25 selective distribution model I am saying. I not talking about in a broader competition
26 sense, but it is not operating completely consistently, is it, because you have someone

1 | who is selling directly to consumers being able to do so in a channel that other people
2 | it has a contractual relationship with can't.

3 | **MS BERRIDGE:** So if we go back to thinking about this objective and you will see
4 | I sort of stepped away from it because you were keen that we go and talk about object,
5 | in the written submission we have captured some of the wider discussions about what
6 | were the objectives of the restriction, and we would invite you to look at that very
7 | carefully, because we spoke to a number of people, some of whom were not decision
8 | makers, about who would and wouldn't become a HOKA retailer or be able to open
9 | a website. So the evidence of those people is peripheral.

10 | **MR TIDSWELL:** Sorry. So whose evidence is determinative then?

11 | **MS BERRIDGE:** Mr Hagger. He made the decisions.

12 | **MR TIDSWELL:** Right, and Mr Hagger says?

13 | **MS BERRIDGE:** Said that the purpose of the July 2019 e-mail is --

14 | **MR TIDSWELL:** Is signposting. That's a question of fact for us, isn't it?

15 | **MS BERRIDGE:** Yes.

16 | **MR TIDSWELL:** I appreciate you are entitled to say that as an answer to the point,
17 | but it is not an answer to the question I am asking because the question I am asking
18 | pre-supposes that we have not accepted that evidence. I am not saying that's the
19 | position, but I wouldn't be putting it to you as a hypothesis -- I understand you are
20 | saying that but I am putting to you a hypothesis that pre-supposes that's not where we
21 | are. That is the whole point of the discussion, if I may say so, because if we end up
22 | in that place, I would like to know what you say about it.

23 | **MS BERRIDGE:** We are in a world, we have established on the balance of
24 | probabilities that the objective of the restriction was to ensure that HOKA is displayed
25 | in a full price environment with discounting round the sides, and then I would say
26 | I would expect to have articulated for you exactly what the harm is, the theory of harm.

1 That's where we start -- what the harm is from that. You have had it articulated to you
2 and I say it is not convincing, and I would say that at most what is being prevented by
3 that restriction is the ability to differentially price, and it is very difficult I think for this
4 Tribunal to say it is so unambiguously anti-competitive not to be able to do those
5 differential pricings that it is on object -- it may be effects. We could have a very
6 interesting discussion and we could have some economists and could do data. But
7 we are not there. We are talking about object and it has to be unambiguous and it
8 isn't.

9 **MR TIDSWELL:** Thank you.

10 **PROFESSOR IBÁÑEZ COLOMO:** If I may just ask a question quickly about the
11 objective for the contention has been that the objective is to have premium products
12 with discount on the side, etc. This theory in my understanding is that it only holds if
13 the members of the selective distribution system are required to buy sort of in season
14 products consistently. Is that right? Then there has to be a requirement somewhere
15 to buy the new products and the new season products. Is that right?

16 **MS BERRIDGE:** So before I agree I want to make sure I have understood. So in the
17 world that the chair has painted, which is that the objective is to have this form of
18 display and not the Running Shoes form of display, you are suggesting that that world
19 can only exist if there are supporting restrictions which are about buying in season
20 product regularly.

21 **PROFESSOR IBÁÑEZ COLOMO:** I think my point was about your contention about
22 the object of the system, of the clauses was.

23 **MS BERRIDGE:** That was certainly my contention about the object. It was a
24 hypothesis.

25 **MR TIDSWELL:** To be clear I have been putting it to Ms Berridge as a hypothesis.

26 **MS BERRIDGE:** I strongly reject it but I dealt with the hypothesis.

1 **MR TIDSWELL:** Just to be clear, I don't think I am putting to you that the clause
2 achieves that directly. I am putting it to you that it supports that approach to the brand,
3 which I think came across clearly from the evidence. The approach to the brand came
4 across absolutely clearly from the evidence that that was the objective of the brand
5 strategy, and I think Mr Henderson was very clear about it. Mr Yates was very clear
6 about it, and it was very helpful. I don't think Mr Hagger was -- I think Mr Hagger's
7 evidence is clear about it as well. I think he has a lot of material about exactly this and
8 indeed your defence has a lot of material about it. It is about basically supporting
9 a selective distribution theory and it makes sense. All I am saying is that it seems to
10 us, and this is a point where we may depart from Mr Hagger -- I am not saying we
11 will -- but actually the purpose of the clause is more likely to be supporting that than to
12 be worrying about whether the customers know exactly who assigned the goods to
13 them, except for the extent that it fits within that broader point as well. That is all that
14 I am asking you to accept.

15 Now I think the rest is now chucking another point in, which I think probably is right,
16 that if you are going to have a selective distribution where everybody is agreeing that's
17 what you are trying to do with the brand, in other words the prestige positioning point,
18 then it doesn't make any sense unless you are getting every season's product. It did
19 appear to me from the evidence that certainly Mr Macfarlane was getting and taking
20 every season's product. I don't know whether everybody else was. We are probably
21 past the point anyone could tell us that.

22 **MS BERRIDGE:** My misunderstanding earlier comes to a real point, that if you do
23 consider that was the aim, it would be very difficult to achieve that aim unless you were
24 making retailers take full season product regularly and we don't have that evidence.

25 **MR TIDSWELL:** No. I think -- I am not sure -- what I am struggling with is, on the one
26 hand, I think you are asking us to accept there is a selective distribution system and if

1 there is, I don't know what it is if it is not what I just described to you. It is entirely
2 consistent with what the witnesses were saying which is that there was a desire, which
3 I would assume was mutual for the retailers and Deckers to be able to position the
4 shoes like that. It makes perfect sense. I just don't understand why it is a contentious
5 point.

6 The contention between us is whether the clause itself is or is not likely to be intended
7 to support that, or whether it is for some other purpose. That is the contention. The
8 point about the way in which the product is presented, the brand is presented, I didn't
9 think was contentious. I am not presenting it as a point that I think is contentious.

10 **MS BERRIDGE:** As I recall, Mr Hagger is very clear that he doesn't have any
11 concerns about HOKA product appearing on clearance sites specialising in clearance
12 in the way that Running Shoes wanted to. They just didn't want another partner,
13 because they already had some, and the number of shoes coming out that way was
14 dwindling. So Sports Pursuit and there was another one whose name I can't recall.
15 This is a factual question. We can go to the transcript.

16 **MR TIDSWELL:** I mean, we will obviously have to deal with the factual point. I don't
17 think there is much point in us debating the factual point. We have all the evidence
18 and we can reach the conclusion we do. I think we have probably done as much as
19 we can on it. I have put the point to you and you have given me some perfectly good
20 answers on it. That has been helpful. I am just conscious of the time and we need to
21 give Mr Macfarlane another go. Is there anything else you wanted to pick up?

22 **MS BERRIDGE:** Yes. I am happy to do the remainder in writing. I just want to point.

23 **MR TIDSWELL:** Please do.

24 **MS BERRIDGE:** We have not troubled you with the block exemption again. You have
25 our submissions from the first day.

26 **MR TIDSWELL:** Yes.

1 **MS BERRIDGE:** Then importantly we have a section on relief, which no-one has
2 really discussed yet, but obviously it was ordered that this trial should deal with
3 causation.

4 **MR TIDSWELL:** Yes. I was going to ask you about that. That was not going to
5 be -- can you just give me in a couple of sentences what you say about that so I can
6 understand it? Obviously I understand in order for them to make out an element -- in
7 order for him to make out the tort he has to show an element of loss. Are you
8 contesting that as a matter of fact? Are you saying there is not any?

9 **MS BERRIDGE:** I am going to invite Ms Lawrence now. Separation of duties.

10 **MR TIDSWELL:** Do you want to just give us -- I am anxious for it to be two minutes
11 rather than ten, if that is all right. I just want to understand what the argument is so
12 that if there is anything that seems odd to me, I can push back on it.

13 **MS LAWRENCE:** Sure, sir. So the premise is basically that we think that there are a
14 number of heads of loss that are set out in the damages letter, which I think is tab 2 of
15 Bundle A, and we would say that the claimant needs to prove at least some loss or
16 causation of at least some loss in relation to each of those heads.

17 **MR TIDSWELL:** At this stage why does he have to do that? Surely all he has to show
18 is any loss at all arising from the tort, doesn't he? The whole point of this is the torts
19 are complete to the losses without loss. If he shows any loss, the tort is complete,
20 isn't it?

21 **MS LAWRENCE:** We have addressed each of the heads of loss in the causation
22 section.

23 **MR TIDSWELL:** Do you say there is no -- I mean, he has put some evidence in
24 section H of his statement on what loss he has suffered.

25 **MS LAWRENCE:** We have addressed -- you might say this is the wrong approach,
26 but we have addressed all lost future profits from the runningshoes.co.uk project

1 separately, loss ascribed to unparticularised longer term damage, this franchisee
2 point, and then loss from future HOKA retail sales.

3 **MR TIDSWELL:** But there are -- just so I am clear, are there heads of loss that he
4 has advanced that you -- you might not accept them, but you are not saying as a matter
5 of principle he has not made them out?

6 **MS LAWRENCE:** There are three that we say as a matter of principle haven't been
7 made out.

8 **MR TIDSWELL:** What about the other ones? Are there others that he has?

9 **MS LAWRENCE:** If say that there is one that if we get to quantum, we would accept
10 that he has the burden of proof to prove.

11 **MR TIDSWELL:** Precisely. So surely that's enough, isn't it? I mean, are you saying
12 as a matter of law that that is not enough?

13 **MS LAWRENCE:** Our position is as set out in writing.

14 **MR TIDSWELL:** Okay. We can have a look at them. That is helpful. Thank you.

15 **MS BERRIDGE:** We also deal with the application for an injunction you have seen.

16 **MR TIDSWELL:** Yes. I don't think I am going to invite you to say anything more about
17 that, but I do want to ask Mr Macfarlane about it. I meant to ask him about it before.
18 So we will see what he says about that. If he says anything new, obviously I'll ask you
19 to -- I should have asked him about it before. I forgot. If he says anything new, I will
20 ask you if you have any observations on that, but can we just leave that and see where
21 he is on that, so we understand? I certainly don't want to -- I see you have got some
22 material there.

23 **MS BERRIDGE:** Yes. Did you want to hear from us about the disclosure issue that
24 we discussed earlier?

25 **MR TIDSWELL:** I was going to come back to it, but -- why don't we just finish and
26 then I will come back and we will deal with it as the last thing?

1 **MR MACFARLANE:** If it is helpful, I have very little to say.

2 **MR TIDSWELL:** I think that is helpful. So you can think about it while you are saying
3 things, I did want to ask you earlier -- I forgot -- about your injunction and about
4 whether you are pursuing that, the final injunction.

5 **MR MACFARLANE:** I do recognise that difficulty for you and especially in view of
6 what has been said, that the relationship has totally broken down and it could be
7 ongoing. I don't see it as that way quite honestly. Very sadly I have been here once
8 before with one of the suppliers.

9 **MR TIDSWELL:** Sorry to interrupt you. All I need to really know I think is whether you
10 want to maintain it, because we are happy to decide it.

11 **MR MACFARLANE:** Yes.

12 **MR TIDSWELL:** I just noticed I don't think there was anything in your skeleton.
13 I wanted to make sure I understood where you were. The answer is you are
14 maintaining it?

15 **MR MACFARLANE:** Yes.

16 **MR TIDSWELL:** Do you want to say anything further about it now? I should have
17 asked you to address it earlier if you -- is there anything particularly you want to say
18 about it?

19 **MR MACFARLANE:** Very briefly that (inaudible). That is all I need to say.

20 **MR TIDSWELL:** Okay. What about the remainder? Do you want to say anything
21 else in response?

22 **MR MACFARLANE:** No, sir. I am fine.

23 **MR TIDSWELL:** You're all done? No last word?

24 **MR MACFARLANE:** No, I am fine.

25 **MR TIDSWELL:** No. Good. Okay. That's very helpful. Thank you.

26 Ms Berridge, the documents then.

1 **MS BERRIDGE:** Yes. (Inaudible).

2 **MR TIDSLEY:** Yes, Ms Lawrence.

3 **MS LAWRENCE:** Over the short break, sir, I took instructions on the disclosure issue
4 and we are now able to address what we think went wrong.

5 At the outset those instructing me would like to clarify that the reference in their recent
6 letter of this morning to disclosure -- to the searches being I think the quote was
7 compliant to the categories set out in the ruling on disclosure dated 7th February 2024,
8 that was intended to be a reference to the full scope of disclosure as ordered by that
9 ruling. So it was not intended to suggest that disclosure was conducted in some
10 narrower way.

11 **MR TIDSWELL:** It is a slightly odd thing to say, though, isn't it, because, I mean, it
12 does suggest that? (Inaudible) suggest that, isn't it?

13 **MS LAWRENCE:** We apologise it wasn't made clear, but the reference to
14 proportionality was actually a reference to something different.

15 So I'm instructed that for a number of the issues of disclosure Deckers conducted
16 electronic key word searches, and for the remaining issues, which included the
17 selective distribution issue, instead of instructing a third party to go and trawl through
18 tens of thousands of documents, a manual search was performed. This was
19 considered to be proportionate in light of the fact that this was a fast track trial and
20 there was a cost cap.

21 **MR TIDSWELL:** What does that mean? Are you going to explain that to me?

22 **MS LAWRENCE:** I will do my best. For those manual searches I understand there
23 were a number of custodians of documents and each of those custodians was
24 informed what the relevant issues were and asked to search their records and return
25 relevant documents. That included Mr Henderson, Mr Yates and a number of others.

26 **MR TIDSWELL:** Yes.

1 **MS LAWRENCE:** As I say, one of the custodians was Mr Yates, and his failure to
2 pick up this document appears to have been an oversight due to a manual error on his
3 part.

4 **MR TIDSWELL:** What about the instructions given to Mr Yates? Poor Mr Yates is
5 carrying the can. Was he given instructions that would have led him -- was he asked
6 to look for documents about brand strategy? You may not know.

7 **MS LAWRENCE:** I have no instructions on this.

8 **MR TIDSWELL:** This is the sharp point of this, isn't it, really? No disrespect,
9 Ms Lawrence. I understand you are doing this on the hoof and it is all late in the day,
10 but this is the point that I am bothered about, because it seems to me
11 that -- I completely understand why the approach has been taken. It seems perfectly
12 sensible to have looked separately at selective distribution. It is obviously an important
13 part of the case, and it's obviously largely about brand, and it seems to me very odd
14 in a way that there wouldn't be some attempt to capture brand strategy documents.
15 This document or some of the documents I think are called brand strategy. So it just
16 seems very odd and I suppose -- I don't think there is any particular criticism to be
17 made of the fact that your instructing solicitors have asked individuals of the
18 organisation to conduct the searches themselves, although one might expect as good
19 practice for there to be some checking of that. I don't know whether that did take
20 place, but what I think is critical really is what the instructions were, and that seems to
21 me to -- it may be that Mr Yates has not followed the instructions. Maybe he was not
22 given the right instructions. All of that is sort of in a way a matter of history save to the
23 extent that it informs us that maybe there is something that has not been done that
24 should still be done, if one can put it that way. In other words, can we be sure there
25 has been proper disclosure in this case?

26 I do think Mr Macfarlane is entitled to know whether or not he has received proper

1 disclosure. So, I mean, if I am -- perhaps the way to deal with this -- I do think that it
2 requires a more transparent explanation.

3 **MS LAWRENCE:** What I would suggest is perhaps if we go back and take a look at
4 those and put something fuller in writing to the tribunal later on and lay out effectively
5 what happened, and if you are satisfied with that, then it ends there, but if you think
6 something further must be done, then, of course, that step can be taken.

7 **MR TIDSWELL:** I think that would be helpful. I did mention preparation of a witness
8 statement. I appreciate that would involve a lot more time and effort. I am conscious
9 of that. I think I do need to make it very plain if the explanation does not properly cover
10 the points that we have just discussed, then I think that probably is the next logical
11 course.

12 **MS LAWRENCE:** Understood.

13 **MR TIDSWELL:** So, Mr Macfarlane, are you content to leave it on that basis in the
14 meantime? They are going to produce a much fuller letter which explains the process
15 they have been through to look for these documents. We are really talking about the
16 selective distribution documents and the way in which they have set up, if you like,
17 their brand strategy. They are going to produce an explanation about what they have
18 done to satisfy us -- allow us to see whether or not actually that exercise has been
19 done properly. You will see that letter and have the opportunity to comment on it, and
20 at that stage we can see whether there's anything that warrants doing next.

21 **MR MACFARLANE:** Yes. The only comment I would make, and it has already been
22 said, about that document is that this document was produced in conference. It had
23 been hidden deeply in somebody's filing system somewhere.

24 **MR TIDSWELL:** We don't really know how it was filed. I take your point. I have made
25 that point to Ms Lawrence, that it is not a document you would expect to be missed
26 by a competent search in relation to selective distribution. That's the question we are

1 | trying to get to the bottom of. So maybe if we proceed on that basis would you be
2 | happy?

3 | **MR MACFARLANE:** Yes.

4 | **MR TIDSWELL:** Then, of course, you will get another bite at this if -- I mean, it's a
5 | difficult situation, because we're at the end of the trial, and it's not a situation where
6 | we can say, "Yes, away and do it again and we can deal with it tomorrow", because
7 | we are not going to be here tomorrow, but I think the best we can do is at least satisfy
8 | ourselves as to what has happened and any questions that then arise we can try and
9 | deal with.

10 | **MR MACFARLANE:** Yes, sir. That is fine.

11 | **MR TIDSWELL:** Thank you.

12 | Ms Lawrence, I think that is the right answer. So we will proceed on that basis. How
13 | quickly can we have that letter?

14 | **MS LAWRENCE:** Would some time over the course of next week be satisfactory?

15 | **MR TIDSWELL:** I think that would be fine. Perhaps if we set 4.00 pm next Friday as
16 | the deadline for that, that would be very helpful. Good. Thank you.

17 | Is there anything else before we finish? No? I would just like to take the opportunity
18 | to thank you all.

19 | Mr Macfarlane, it has been a very impressive effort, and I am not being -- this is not
20 | sort of being unkind when I say that you actually have impressed us all with what you
21 | have done. I am sure there is room for improvement, but well done. Thank you to
22 | your family who have supported you. I see that your litigation friend has --

23 | **MR MACFARLANE:** He had a flight to Edinburgh.

24 | **MR TIDSWELL:** I am going to record for the transcript our thanks to him, because I
25 | think -- it is Mr Chisman-Russell, isn't it?

26 | **MR MACFARLANE:** Yes.

1 **MR TIDSWELL:** His efforts have helped you no doubt and they have certainly helped
2 us as well. So we are grateful to him, as I am sure you are.

3 Ms Berridge, thank you very much. It has been a bit harder than been normal I know,
4 because as much as Mr Macfarlane has tried, it has made it more difficult for both of
5 you. I know that. I am grateful for the extra effort you have made to make things work.
6 So thank you very much.

7 We will reserve our judgment, of course, and try and get that to you as soon as we
8 sensibly can. Thank you very much.

9 **(4.37 pm)**

10 **(Hearing concluded)**

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