



**IN THE COMPETITION APPEAL
TRIBUNAL**

Case No: 1637/5/7/24

BETWEEN:

SPORTSDIRECT.COM RETAIL LIMITED

Claimant/Applicant

- v -

(1) NEWCASTLE UNITED FOOTBALL COMPANY LIMITED

(2) NEWCASTLE UNITED LIMITED

(3) JD SPORTS FASHION PLC

Defendants/Respondents

(4) ADIDAS (U.K.) LIMITED

(5) ADIDAS AG

Proposed Defendants/Respondents

**REASONED ORDER
(SERVICE OUT AND JOINDER)**

UPON the application by the Claimant dated 6 September 2024 pursuant to Rule 32(1)(b) of the Tribunal Rules to amend its claim form (the "**Amendments Application**")

AND UPON the application by the Claimant dated 6 September 2024 pursuant to Rule 38(1) of the Competition Appeal Tribunal Rules 2015 ("**the Tribunal Rules**") to add Adidas (U.K.) Limited ("**Adidas UK**") and Adidas AG as parties to the Proceedings as co-defendants (the "**Rule 38 Application**")

AND UPON the application by the Claimant dated 6 September 2024 pursuant to Rule 31 for permission to serve the claim form and supporting documents on Adidas AG out of the jurisdiction (the "**Service Out Application**") (together, the "**Applications**")

AND UPON reading the second witness statement of Barnaby Simon James Stannard made on behalf of the Claimant in support of the Applications and the accompanying exhibit

AND UPON reading the written submissions of the Claimant, the First to Third Defendants and Adidas UK ahead of the first Case Management Conference held on 3 October 2024 in the above proceedings ("**the First CMC**")

AND UPON hearing counsel for the Claimant, counsel for the First to Third Defendants and counsel for Adidas UK at the first Case Management Conference held on 3 October 2024

AND UPON Adidas UK having consented to joinder and to the Claimants' proposed amendments other than those relating to Adidas AG

AND UPON Adidas AG having been unrepresented at the First CMC and having filed no written submissions in relation thereto

AND UPON the Tribunal's decision that the trial of these proceedings shall start on 2 February 2026 and that service should be effected on Adidas AG with due expedition

AND HAVING REGARD TO the Tribunal's powers under Rule 53 (case management) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015/1648)

IT IS ORDERED THAT:

1. Pursuant to Rule 18 of the Tribunal Rules, the Proceedings are to be treated as proceedings in England and Wales.
2. Further to the Rule 38 Application, Adidas UK and Adidas AG shall be added as the Fourth and Fifth Defendants to these proceedings.
3. Further to the Amendments Application, the Claimant has permission to make the amendments contained in its amended claim form, and shall file the Amended Claim Form on or before 11 October 2024, and shall serve the amended claim form on the First to Fourth Defendants on or before 15 October 2024.

4. Further to the Service Out Application, the Claimant shall serve (i) the amended claim form, (ii) the Service Out Application, and (iii) any supporting documentation, on the Fifth Defendant by any method permissible by Part 6 of the Civil Procedure Rules.
5. Service of the claim form in accordance with paragraph 3 above shall include service of the Tribunal's form of acknowledgement of service and a copy of this Order on the Fifth Defendant.
6. The Claimant shall notify the Tribunal of: (i) the method by which service in accordance with paragraph 3 above has been effected; (ii) the date of deemed service; (iii) the periods for acknowledging service and filing a defence.
7. The trial date having been fixed for 2 February 2026, the Claimant shall serve the amended claim form, the Applications and any supporting documentation as soon as practicably possible in accordance with paragraphs 3 to 5 above.
8. The Fifth Defendant may apply to have this order set aside or varied but must make any such application no later than the latest date by which it may dispute the Tribunal's jurisdiction (as set out under Rule 34).
9. The costs of the Applications shall be costs in the case save that:
 - (i) the Claimant shall pay the costs of and arising from the Amendments Application reasonably incurred by the First and Second Defendants; and
 - (ii) the costs relating to the Applications as regards the Fifth Defendant are reserved to the determination of any application made pursuant to paragraph 7 above or, if no such application is made, to the next case management conference.

REASONS

1. The Claim Form in these proceedings was issued against the First and Second Defendants ("the Club") on 14 March 2024, and on the same date the Claimant applied for an injunction against them by way of interim relief. The dispute relates to the decision of the Club no longer to supply its "Replica Kit" to the Claimant, the Club having appointed Adidas UK to manufacture the Club's Replica Kit and having granted the Third Defendant (a

competitor of the Claimant) certain exclusive rights to market and sell its Replica Kit subject to certain carve outs permitting sales by Adidas UK and the Club itself.

2. The Claimant has made three applications by letter dated 6 September 2024, pursuant to the Competition Appeal Tribunal Rules 2015:
 - a. First, an application for permission to amend the Claim Form pursuant to Rule 32 (“the Amendments Application”);
 - b. Secondly, an application pursuant to Rule 38(4)(b) of the Tribunal Rules for permission to add Adidas (U.K.) Limited (“Adidas UK”) and Adidas AG as defendants to these Proceedings (“the Joinder Application”); and
 - c. Thirdly, an application for permission to serve Adidas AG out of the jurisdiction pursuant to Rule 31 (“the Service Out Application”).

The Joinder and Service Out Applications are supported by the second witness statement of Barnaby Stannard, a partner in the firm of Travers Smith LLP, solicitors acting for the Claimant, dated 6 September 2024.

3. By way of further context, the Claim Form alleges that the Club held a dominant position on markets for the retail and wholesale supply of its Replica Kit in the United Kingdom and that its conduct amounted to an abuse of that dominant position; further or alternatively, that the Club’s agreements with the Third Defendant and/ or Adidas UK breached the Chapter I prohibition of the Competition Act 1998. The Claimant alleges that its inability to sell the Club’s Replica Kit would cause it to suffer loss of profit and reputational harm; and would harm consumers by restricting their choice of outlet and price competition.
4. The application for an interim injunction was refused by the Tribunal ([2024] CAT 24) on 12 April 2024 - primarily on the basis that the case against the Club did not raise a serious issue to be tried. The Tribunal nevertheless ordered that there should be a “speedy trial” of the claim. Following an expedited appeal, the Court of Appeal ([2024] EWCA Civ 532), on 17 May 2024 decided that the Tribunal had erred in finding that there was no serious

case to be tried, but concluded that the balance of convenience did not favour the grant of interim relief.

5. In the course of the application for interim relief, the Claimant was provided with certain disclosure, including copies of the Club's agreements with the Third Defendant and with Adidas UK. By order dated 1 May 2024, the Tribunal, on the application of the Club, ordered that the Third Defendant be added to the Proceedings.
6. The Claimant now seeks permission to amend the Claim Form to take account of the disclosed materials and the addition of the Third Defendant to the claim, and also seeks permission to add Adidas UK and Adidas AG to the claim. The Club also filed a claim against the Third Defendant pursuant to Rule 39 on 7 May 2024, which it has permission to serve, but which will be stayed pending the outcome of the present proceedings as between the Claimant and the Defendants.
7. Adidas AG is incorporated in Germany and its address is Adi-Dassler-Strasser 1, 91074 Herzogenaurach, Germany. If permission is granted to amend the claim to add Adidas AG, permission is also required to serve Adidas AG out of the jurisdiction. The Claimant's Joinder Application is brought under Rule 38(4)(b) of the Tribunal Rules: *"there is an issue involving the new party and an existing party that is connected to the matter in dispute in the proceedings, and it is desirable to add the new party so as to resolve that issue"*.
8. The Claimant submitted that the applications could be dealt with on the papers. However, a case management conference ("the CMC") had already been listed to take place on 3 October 2024. In light of opposition from, in particular, the Club to the joinder of Adidas AG, the applications were adjourned to be dealt with at the CMC.
9. The proposed case against Adidas AG in the draft Amended Claim Form is that the agreement between the Club and Adidas UK significantly contributes to an unlawful exclusivity arrangement between the Club, the Third Defendant and Adidas UK; alternatively that agreement itself has the effect of preventing, restricting or distorting competition in the UK; alternatively, Adidas UK agreed with, and contributed to, the implementation of the agreement between the Club and the Third Defendant. The Claimant alleges (a) that Adidas AG and Adidas UK form part of a single economic unit (i.e. an

undertaking) which has infringed competition law and Adidas AG is, as a matter of law, jointly and severally liable for that infringement; alternatively (b), that Adidas AG held and exerted decisive influence over Adidas UK during the relevant period and is accordingly liable for its unlawful conduct.

10. The Claimant relies on the decision of the Grand Chamber of the CJEU in Case C-822/19 *Sumarl SL v Mercedes-Benz Trucks Espana SL* in support of the proposition that any member of “an undertaking” (or economic unit) can be held liable for that undertaking. The Claimant argues that Adidas AG and Adidas UK are part of the same undertaking and therefore jointly and severally liable for any harm suffered by the Claimant.
11. In support of its alternative case based on the exercise of decisive influence, the Claimant relies upon the rebuttable presumption that a parent company exercises decisive influence over a wholly owned subsidiary and is correspondingly liable for the conduct of that subsidiary: (see *Media Saturn Holding GmbH v Toshiba Information Systems UK Ltd* [2019] EWHC 1095 (Ch) at [85] to [86]; Case C-155/14P *Evonik Dgussa*, EU:C: 2016:446 at [27] to [28]; *Churchill Gowns Ltd v Ede & Ravenscroft ltd* [2022] CAT 34 at [210]).
12. The Claimant submits that, had Adidas AG been named in the first place as a defendant, there could have been no reasonable objection (subject to any dispute based on jurisdiction, to which we shall turn).
13. By the time of the CMC, the position of each of the Defendants (and proposed Defendants) on the three applications was as follows:
 - a. The Club consented to the proposed amendments, save only in relation to the addition of Adidas AG as a party, and the proposed amendments relating to the claims made as against Adidas AG. The Club objected principally on grounds of delay. First, it was said that the Claimant had delayed in seeking to join Adidas AG, and secondly, that the effect of granting permission to do so would result in further delay to the proceedings. This latter point was reinforced by reference to Mr Stannard’s evidence given on behalf of the Claimant, which was to the effect that service could take between five and seven months. The Club suggested that such delay was inconsistent with the Claimant’s original insistence that the matter was

urgent and required expedition. The Club also argued that the test for joinder under Rule 38(4)(b) was not satisfied, because there was insufficient connection between the claims sought to be brought against Adidas AG to the matters in dispute in the present proceedings, and because it was not desirable that Adidas AG be joined (this latter point being made principally on the basis that it would be inefficient to deal with parental liability in these proceedings, and would add to the costs incurred by all parties).

- b. The Third Defendant adopted a broadly neutral position.
- c. Adidas UK, did not object to the terms of the proposed amended Claim Form (albeit its consent was not strictly required in any event, given it was not yet a party). Adidas UK consented to the application that it be joined as the Fourth Defendant, and the first CMC proceeded on the basis that the directions made would apply equally to Adidas UK. However, Adidas UK made clear that it was not in a position to provide consent to any of the Claimant's three applications on the part of Adidas AG, and nothing said on behalf of Adidas UK was to be taken as a submission to the jurisdiction on the part of Adidas AG. Counsel and Solicitors instructed to appear at the CMC on behalf of Adidas UK did not have instructions to represent Adidas AG.
- d. Adidas AG, through its solicitors Baker & McKenzie LLP (the same solicitors as were being instructed on behalf of Adidas UK) was provided with a copy of the draft amended Claim Form by letter dated 22 July 2024. Baker & McKenzie made clear by letter that Adidas AG did not submit to the jurisdiction, stating that Adidas AG was not a party to any agreement with the Club, and that no reasonable basis had been articulated to justify joinder or an order for service out of the jurisdiction. Baker & McKenzie confirmed that they did not have instructions to accept service on behalf of Adidas AG. Adidas AG did not appear before the Tribunal, and took no part in the CMC.

14. At the outset of the CMC, and for the reasons explained in a separate ruling (“the CMC Ruling” ([2024] CAT 59), the Tribunal proposed that directions be given leading to a trial commencing on 2 February 2026. The directions were intended to minimise delay, but also

to provide sufficient time for any dispute as to jurisdiction to be determined, were permission to be granted to amend the Claim form to join Adidas AG, and to serve out of the jurisdiction.

15. Whilst the Claimant made various submissions as to why the trial date should not be fixed, for the reasons given in the CMC Ruling, the Tribunal listed the trial to commence on 2 February 2026. The result is that the objections of the Club to the joinder of Adidas AG were not pursued. As such, the Tribunal did not hear oral submissions on the Claimant's three Applications, and it now falls to me to decide the applications on the papers. It goes without saying that Adidas AG, not having been served or appeared before the Tribunal at the first CMC, is at liberty to make such arguments as it sees fit should it decide to challenge jurisdiction. The Club having withdrawn its opposition to the applications being granted, I am deciding this application on an *ex parte* basis, and solely on the basis of the evidence and submissions provided by the Claimant.

Adidas UK

16. In light of the position adopted by Adidas UK, which has no objection either to being joined to these proceedings or to the amendments to the Claim Form save in so far as they relate to Adidas AG, I will grant the Claimant's Joinder and Amendment Applications in relation to Adidas UK. Adidas UK is party to the agreement with the Club said to contribute to the unlawful exclusivity arrangement between the Club, the Third Defendant and Adidas UK. It seems to me that the relevant tests under Rule 32, and Rule 38(4) are satisfied, and Adidas UK has not argued the contrary. As I have indicated, the CMC proceeded on the assumption that Adidas UK would be joined, and that is reflected in the directions that have been given to trial.

The Amendments and Joinder Application: Adidas AG

17. The Amendments Application, in so far as it relates to Adidas AG, is contingent on whether or not the Joinder Application is granted, and so I will deal with that first.
18. As to the Joinder Application:

- a. I am satisfied that the claim against Adidas AG as pleaded in the draft Amended Claim Form has a real prospect of success. The proposition that any member of an undertaking can be held liable for that undertaking's infringement of competition law is recognised in the *Sumal* decision. As regards the Claimant's alternative case, the case law also establishes that there is a rebuttable presumption that a parent company exercises decisive influence over a wholly owned subsidiary, and that it may be jointly and severally liable for the acts of the subsidiary. It is for the parent company to rebut that presumption.
- b. It follows, for the purposes of Rule 38(4)(b), that there is an issue between the Claimant and Adidas AG as to whether or not Adidas AG is jointly and severally liable to the Claimant for the breach of the Chapter I prohibition alleged in relation to the agreement between Adidas UK and the Club. That issue is connected to the underlying question of whether or not there is a breach at all.
- c. It also appears to me that it is desirable for the issue of the joint and several liability of Adidas AG to be determined as part of the current proceedings. Whilst Adidas AG's liability raises issues that are not currently part of the present proceedings, such as the extent to which it exercises decisive influence over Adidas UK, it is also dependent on whether or not there is in fact a breach at all. It is desirable for that issue to be determined in proceedings to which Adidas AG is a party, and in which Adidas AG would be bound by such findings as the Tribunal may make as regards the underlying breach.

19. I will therefore order that Adidas AG be joined to these proceedings. It follows that I will also grant the Amendments Application as against Adidas AG.

The Service Out Application

20. Turning then to whether or not I should grant permission to serve Adidas AG out of the jurisdiction, it would be slightly odd to grant permission for joinder if I were then to refuse permission to serve these proceedings on Adidas AG. Nevertheless, I must apply the test as set out in Tribunal Rule 31.

21. It will be apparent from what I have said at paragraph 18 above that I consider that the claim, as currently drafted and relating to Adidas AG's alleged joint and several liability, has a reasonable prospect of success.
22. The Claimant relies on the gateways in paragraph 3.1(9) and 3.1(3). The former is the tort gateway which permits service where the damage alleged to be caused to the Claimant has been and continues to be suffered in England and Wales. The latter would permit service out where the claim form will be served on Adidas UK as of right (being within the jurisdiction) and there is a real issue as between the Claimant and Adidas UK which it is reasonable for the court to try, and Adidas AG is a "proper party" to that claim.
23. So far as the tort gateway is concerned, I am satisfied that the claim against Adidas AG is for damages resulting from breach of the Chapter I prohibition which is a claim for breach of statutory duty, and therefore a claim in tort. The alleged damage consists of losses suffered as a result of lost sales in the Claimant's UK Stores, and principally England and Wales.
24. As far as the "necessary or proper party" gateway is concerned, Adidas UK has consented to be a party to the claim, and there is a real issue which it is reasonable for the Court to try as between the Claimant and Adidas UK. Again, for the reasons I have outlined in paragraph 18 above, I am satisfied that Adidas AG is a proper party to the claim which will be served against Adidas UK in any event. Had Adidas AG been domiciled in England it would properly be a party to the proceedings.
25. I am also satisfied that England and Wales is the proper forum in which to bring the Claim. All parties, bar Adidas AG, are businesses incorporated in England and Wales and have their registered offices in England. The agreement between the Club and Adidas UK which gives rise to the Chapter I claim, is governed by English Law. The claim relates to alleged anti-competitive conduct in the market for the wholesale supply of Replica Kit in the UK, and the damages claimed relate to lost sales primarily in England and Wales. The claim therefore has strong connecting factors with England and Wales. These proceedings have already been served on the Club in England. This Tribunal, and the Court of Appeal of

England and Wales, have already considered and determined the application for an interim injunction. Mr Stannard states that no other proceedings involving Adidas AG are proceeding in any other jurisdiction that address the claim being made by the Claimant. It is also likely that the law of England and Wales will govern this dispute, pursuant to the “Rome II” Regulation which continues in force pursuant to the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019).

26. The fact that some relevant witnesses and documents may be located in Germany is insufficient, in my view, to outweigh those factors, in particular in light of the availability and use of digital technology. Finally, if any witness wishes to give evidence in German, then that can be accommodated with the availability of translators.
27. The Claimant has drawn paragraph 52 of Mr Stannard’s second witness statement to my attention which sets out, by way of full and frank disclosure, various arguments that Adidas AG might make as to why permission ought not to be granted. It remains open, of course, for Adidas AG to seek to set aside this Order if, and to the extent it wishes to pursue those, or indeed any other, arguments. What is said by Mr Stannard does not, at this stage, lead me to conclude that permission ought not to be granted.
28. In those circumstances, I will exercise my discretion and grant permission to serve Adidas AG out of the jurisdiction.
29. Finally, the Claimant contends in the Claim Form (both as originally drafted and as amended) that the proceedings should be treated as proceedings in England and Wales for the purposes of Rule 18 of the Tribunal Rules. I note that the Club, in their Claim Form as against the Third Defendant, assert the same. Mr Stannard’s witness statement in support of the Service Out Application proceeds on the same basis and asserts that the proceedings should be regarded as proceedings in England and Wales and identifies which grounds under CPR PD 6B are relied upon. I will also make an order to that effect.

Bridget Lucas KC

Made: 23 October 2024

Chair of the Competition Appeal Tribunal

Drawn: 23 October 2024