



**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1615/5/7/23

BETWEEN:

**UP & RUNNING (UK) LIMITED**

Claimant

- v -

**DECKERS UK LIMITED**

Defendant

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**ORDER**

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**UPON** the Order of the Chair made on 1 December 2023 and drawn on 4 December 2023

**AND UPON** the Case Management Conference held on 18 January 2024

**AND UPON** the Ruling (Split Trial and Fast-Track Procedure) ([2024] CAT 9) of the Tribunal dated 6 February 2024 (the “Ruling”)

**AND UPON** the rulings by the Chair on the categories of disclosure to be provided by each party, as set out in Schedule 1 to this Order

**AND UPON** the parties having agreed the following Directions to Trial in this matter

**IT IS ORDERED THAT:**

**Split Trial**

1. There be a split trial in these proceedings in the following format:
  - (a) Trial 1 to deal with questions of liability under the Chapter I prohibition, injunctive relief and causation.

- (b) Trial 2 to deal with questions of the assessment of loss or damage suffered by the Claimant, if it is successful in Trial 1.

### **Fast-Track**

- 2. These proceedings remain subject to the Fast-Track Procedure, with the starting point for the purpose of the six month period under Rule 58(2)(a) being the date of the Ruling.

### **Disclosure**

- 3. Disclosure in accordance with the following paragraphs shall be given by 4pm on 5 April 2024.
- 4. Each party shall make and serve on the other party a list of the documents within its control which relate to the issues it is required to provide disclosure on (as set out in Schedule 1), together with copies of all documents over which it does not claim a right or duty to withhold inspection.
- 5. Each party's list of documents shall also include all documents which:
  - (a) adversely affect that party's own case;
  - (b) adversely affect another party's case; or
  - (c) support another party's case.

### **Factual Evidence**

- 6. The parties are to file and serve factual witness statements dealing with the issues in dispute in Trial 1 on or before 4pm on 24 May 2024. Witness statements should be strictly confined to the matters in issue in Trial 1.
- 7. The parties may apply to file and serve witness statements in reply on or before 4pm on 31 May 2024. Any application must identify the matters in the opposing party's witness statement to be addressed.
- 8. Any witness statements in reply for which permission is given shall be filed and served or exchanged no later than 4pm on 14 June 2024.
- 9. The witnesses may be cross-examined at trial.

## **Expert Evidence**

10. The parties shall make any application for permission to adduce expert evidence for Trial 1 by 4pm on 28 February 2024. In the event any such application is granted, the timetable will be varied to allow for the date by which that evidence must be filed.

## **Pre-Trial Review**

11. A pre-trial review of ½ day shall be listed for a date not more than 6 weeks prior to the date fixed for trial.

## **Trial**

12. The Defendant's legal representatives shall, no later than 4pm on 14 June 2024, serve on the Claimant a list of all documents that it proposes to include in the trial bundle.
13. The Claimant shall, no later than 4pm on 21 June 2024, serve on the Defendant's legal representatives its comments on the proposed trial bundle index.
14. The Defendant's legal representatives shall, no later than 4pm on 28 June 2024, serve on the Claimant an agreed electronic bundle of documents, and no later than 8 July 2024, file the agreed electronic bundle and hard copies of the bundles (the number of which to be directed in due course) with the Tribunal.
15. The Defendant's costs incurred in preparation of the electronic bundles and the printing of the copies of the bundles for the Tribunal are to be split with the Claimant.
16. Time estimates for opening and closing submissions and cross examination of the parties, and a reading guide for the Tribunal, shall be filed by 4pm on 17 July 2024.
17. The Claimant shall file and serve a skeleton argument on or before 4pm on 8 July 2024.
18. The Defendant shall file and serve a skeleton argument on or before 4pm on 15 July 2024.
19. The time allocated for Trial 1 is 3 days with one day in reserve.
20. Trial 1 shall take place in the window 22-26 July 2024.

## **Miscellaneous**

21. The parties may agree to extend any date by which they are to take a step indicated in this Order for a period or periods of up to 7 days in total without applying to the Tribunal for variation of the Order, provided that this does not affect the date given for any pre-

trial review or the date of the trial. The parties shall notify the Tribunal in writing of the expiry date of any such extension.

22. Liberty to apply.

**Ben Tidswell**

Chair of the Competition Appeal Tribunal

Made: 16 February 2024

Drawn: 19 February 2024

**Schedule 1: Ruling on Categories of Disclosure**

	<b>Category</b>	<b>Position</b>	<b>Defendant Comment</b>	<b>Claimant Comment</b>	<b>Chair's Ruling</b>
<b>Categories requested by the Defendant</b>					
1.	All missing annexes referred to in the final and agreed Claim Form: a. DM17; b. DM18; c. DM19; d. DM20.	Claimant agrees to disclose.		These will be provided in the amended Claim due 29 <sup>th</sup> January 24	No Ruling required, Claimant has agreed to provide these documents.
2.	The following company information in respect of both Up & Running UK Limited and Running Shoes Limited: a. Annual report and statutory accounts and profit and loss accounts from 2016 – 2023; b. Full ownership details of all shareholders; c. Board minutes and any emails/other documents evidencing Mr Macfarlane's authority to conduct this litigation.	Issue to be determined at CMC.	Relevant to quantum as well as to Mr Macfarlane's authority to conduct this litigation and potential liability for costs. Accounts at Companies House do not show profit and loss or absolute % shareholdings.	These are all available at companies house. You will find that I am registered as 50% holder along with my Wife. This is just silly for want of a better word.	Assessment of damages is now in Trial 2, so there is no present need for disclosure for that purpose. Companies House records are sufficient for all other purposes.
3.	Information regarding Up & Running's stores in the UK, including store count, employee count (specifically for sales staff) per store, products sold, information regarding sales staff training and your bespoke fitting service from 2016 until 2021.	Issue to be determined at CMC.	Relevant to compliance with the selective distribution criteria.	In the defence the Defendant has said that they have visited all stores. Have they changed their minds? Defendant staff has said there is no written criteria.	I am not convinced that this material is relevant (as opposed to material which the Defendant had at the point of termination about these matters, which will be in the Defendant's possession). The primary question is what was the motivation for the

	Category	Position	Defendant Comment	Claimant Comment	Chair's Ruling
					Defendant's decision to terminate.
4.	Financial information regarding Up & Running sales of HOKA products compared with other running specialist brands sold by Up & Running in its stores.	Issue to be determined at CMC.	The Claimant has said that it can only divulge this information on a contingent basis but has provided no explanation as to why.	Is only required in regard to Quantum, if trial is split will be provided in the event we are successful	It is not clear to me why this information is relevant, beyond the question of damages (which is now in Trial 2). Not required unless such a reason is given.
5.	The signed accounts set up form/credit application returned to the Defendant in 2016, referred to at paragraph 34 of the Defence.	Parties agreed this won't be supplied.	The Claimant denies that any such document exists.	I do not understand why the Defendant is asking for documents that should be in their possession.	No Ruling required, parties have agreed this won't be supplied.
6.	Any minutes of the Directors meeting in or about June/July 2020 after the first lockdown as referenced at paragraph 14 of the Claim Form.	Issue to be determined at CMC.	The Defendant seeks these documents to support paragraph 14 Claim Form.	Many subjects are discussed at board meetings. All of which are private. Are also irrelevant to this case.	The Claimant should disclose any passage in the minutes which records the discussion referred to in [14] of the Claim Form. The Claimant may redact any other part of the minutes which is not relevant to the issue in [14].
7.	Any minutes or notes of the meetings (and a copy of any business plan) held in or around August 2020, as arranged by Up & Running's general manager with all suppliers to discuss a new business plan referenced at paragraph 17 of the Claim Form, including the meeting on or around 23 July 2020 referred to at paragraph 37 of the Defence.	Issue to be determined at CMC.	The fact that the Defendant should already have a copy of a document does not mean that the Claimant should not disclose it. Parties are obliged to disclose all relevant documents in their control.	That document is supplied Already DM4 in amended Defence due 29 <sup>th</sup> Jan 24 As in 7 above. Discussions with other suppliers are not relevant here.	No Ruling required, Claimant says it has already provided these documents insofar as they relate to the Defendant. It is not clear why material relating to other suppliers is relevant.
8.	Any note from the August 2020 meeting between Up & Running and Deckers, referenced at	Parties agreed this won't be supplied.	The Claimant denies that any such document exists.	The defendant is being mischeivious.	No Ruling required, parties have agreed this won't be supplied.

	<b>Category</b>	<b>Position</b>	<b>Defendant Comment</b>	<b>Claimant Comment</b>	<b>Chair's Ruling</b>
	paragraph 19 of the Claim Form.			They know Fulwell it was virtual.	
9.	Any internal correspondence/documentation that Up & Running holds in respect of the decision to go ahead with runningshoes.co.uk and sales of HOKA upon this website, despite Deckers not agreeing to this, as referenced at paragraph 20 of the Claim Form.	Parties agreed this won't be supplied.	The Claimant denies that any such document exists.	No such document exists, in any case It is our choice as to where and how Decisions are made. It is not for the defendant to Question my decisions unless we Break the law, which is not the case.	No Ruling required, parties have agreed this won't be supplied.
10.	Any note of the call between Mr Macfarlane and Mr Yates referenced at paragraph 23 of the Claim Form.	Issue to be determined at CMC.	This was a typo and intended to be a note of the call between Mr Macfarlane and Mr Hagger. The Defendant seeks any such document.	There is no references to Mr Yates at para 23.	If the Claimant has a note of the conversation between Mr Macfarlane and Mr Hagger as referred to in [23] of the Claim Form, it should disclose that.
11.	Any note of the call between Mr Macfarlane and Mr Hagger referenced at paragraph 39 of the Defence.	Parties agreed this won't be supplied.	The Claimant denies that any such document exists.	We do not have this, does the defendant?	No Ruling required, parties have agreed this won't be supplied.
12.	Any note of the call between Mr Macfarlane and Mr Yates referenced at paragraph 26 of the Claim Form.	Issue to be determined at CMC.	This was a typo and intended to be a note of the call between Mr Macfarlane and Mr Hagger. The Defendant seeks any such document.	There is no call referenced at 26 to Mr Yates. I do hope we are not being charged for the defendants typo's	If the Claimant has a note of the conversation between Mr Macfarlane and Mr Hagger as referred to in [26] of the Claim Form, it should disclose that.
13.	Evidence that Running Shoes Limited, the company behind the website runningshoes.co.uk, is wholly owned by Up & Running UK Limited, as referenced at paragraph 28 of the Claim Form.	Claimant agrees to disclose.	The Claimant asserts in letter of 11 January 2024 that it holds a franchisee contract between the two businesses. The Defendant seeks a copy of this agreement.	The defendants have been told many times that runningshoes is a Franchisee, the same as the Franchisees that have been accepted by the defendant. The franchise contract will be Provided. Along with its separate	No Ruling required, Claimant has agreed to provide these documents.

	<b>Category</b>	<b>Position</b>	<b>Defendant Comment</b>	<b>Claimant Comment</b>	<b>Chair's Ruling</b>
				bank account	
14.	All correspondence and documentation between Up & Running and Deckers relating to the appointment of U&R as an authorised retailer.	Issue to be determined at CMC.	The fact that the Defendant should already have a copy of a document does not mean that the Claimant should not disclose it. Parties are obliged to disclose all relevant documents in their control.	Fishing. I shall request the same from Defendants, including any reference To a selective distribution system.	Claimant should disclose all correspondence and documentation between Up & Running and Deckers relating to the appointment of U&R as an authorised retailer. Claimant rightly points out that Defendant should do the same.
15.	All correspondence and documentation between Up & Running and Deckers relating to the termination of U&R as an authorised retailer.	Issue to be determined at CMC.	The fact that the Defendant should already have a copy of a document does not mean that the Claimant should not disclose it. Parties are obliged to disclose all relevant documents in their control.	As above and designed to run costs Up, but no reason given for requiring it.	Claimant should disclose all correspondence and documentation between Up & Running and Deckers relating to the termination of U&R as an authorised retailer. Defendant should do the same.
16.	Any note of the call between Mr Macfarlane and Mr Hagger referred to at paragraph 51 of the Defence.	Parties agreed this won't be supplied.	The Claimant denies that any such document exists.	No such document exists. Maybe the defendant has a copy?	No Ruling required, parties have agreed this won't be supplied.
17.	All correspondence and notes of meetings held between Up & Running and the CMA.	Issue to be determined at CMC.	The Claimant denies existence of a meeting. The Defendant seeks correspondence, notes and evidence of any communication between the Claimant and the CMA.	We are writing to the CMA to ask their permissions to divulge such Information. There has been no physical meeting.	Claimant should disclose all correspondence and notes of meetings held between Up & Running and the CMA.
18.	Evidence that Up & Running is the largest major retailer within Deckers UK Limited's prime UK market, as referenced at paragraph 29, on page 11 of the Claim Form.	Issue to be determined at CMC.	The Claimant asserts that it is the largest independent retailer. The Defendant seeks evidence of this assertion as this is relevant to market share.	Chapter ii The defendant has misinterpreted The word independent should be used, it is therefore without question	This is a request for evidence, not disclosure, and is denied.

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19.	The missing Annexes referred to in the Reply to the Defence, which are DM006, where the body of the email is missing and the emails referred to at page 23, para 81(b) and (d).	Claimant agrees to disclose DM006. Otherwise, issue to be determined at CMC.	The fact that the Defendant should already have a copy of a document does not mean that the Claimant should not disclose it. Parties are obliged to disclose all relevant documents in their control.		This was dealt with at the CMC, by way of an order that the Claimant produce a full bundle of attachments to the Reply.
20.	Full email chains containing the emails included as exhibits to the Claim Form and Reply to the Defence, to be provided as native email files.	Claimant agrees to disclose.			This was dealt with at the CMC, by way of an order that the Claimant produce a full bundle of attachments to the Reply.
21.	The 'reliable information' held that sportshoes.com say that HOKA is their biggest selling brand in respect of running shoes in the UK, referenced at page 1 of the Reply to the Defence.	Issue to be determined at CMC.	The Claimant has not explicitly agreed to this category of disclosure, but has not denied its existence. If no document can be provided, the Defendant asks that identity of the 'senior individual' referred to in the Claimant's Response on Disclosure of 11 January 2024 be addressed in witness evidence.	This has been confirmed verbally, but of course we could subpoena the company concerned, however it is information already held by the defendant as when we held an account, Deckers wanted it of us.	Claimant denies there is a document. This is a request for evidence, not disclosure, and is denied.
22.	A copy of the page grab of the Marks and Spencer website referred to at page 10 of the Reply to the Defence.	Issue to be determined at CMC.	The Defendant is not clear which page of the Marks and Spencer website specifically the Claimant relies upon.	Freely available to anyone who wishes, this is just filibustering.	If the Claimant has a copy of this page grab in its possession it should be disclosed.
23.	Evidence that Up & Running's shops opened for three weeks over Christmas 2020, but that no sales were made, as referenced at paragraph 41, page 17 of the Reply to the Defence.	Parties agreed this won't be supplied.		It is not said that no sales were made.  It is meant that the quantities of sales were very poor given covid was still rife.	No Ruling required, parties have agreed this won't be supplied.

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24.	Presentations and documentation relating to the Up & Running website (www.runningshoes.co.uk) from January 2020 (including the presentation first shown to Deckers) to today, including all changes to the graphics and design of the website, as referenced in part at paragraph 51 of the Reply to the Defence on page 18.	Claimant agrees to disclose.	To clarify, the Defendant seeks this category of disclosure to evidence when "Powered by Up & Running" was added to the Running Shoes website.	That will be provided	No Ruling required, Claimant has agreed to provide these documents.
25.	Audio recording (unedited) between Mr Macfarlane and the CMA referenced at paragraph 54 of the Reply to the Defence on page 19.	Claimant agrees to disclose save that this should not disclose WP material.		Does that mean unedited with regard to WP? If so is it agreed that the transcript is also not redacted? It would not be right to have two versions.	The Claimant should disclose the redacted version which has been prepared for the Claim Form (i.e. the WP material should be blanked out)
26.	Evidence that HOKA would have been the top selling shoe and that therefore sales of HOKA products in Up & Running stores would have exceeded £4m and how this exceeds the 10% threshold on de minimis, as referenced at paragraph 76 of the Reply to the Defence on page 21.	Issue to be determined at CMC.		To be supplied after determination and concluded by a forensic accountant.	This is a request for evidence, not disclosure, and is denied.
<b>Categories requested by the Defendant in respect of the Damages Calculation</b>					
1.	Further to point (B) on page 2 of the damages calculation, evidence that Up & Running's sales have historically grown at the same rate as Deckers' sales	Issue to be determined at CMC.		As above	This is a request relating to the assessment of damages and is not necessary for the purposes of Trial 1. If the Claimant succeeds in Trial 1 there will

	<b>Category</b>	<b>Position</b>	<b>Defendant Comment</b>	<b>Claimant Comment</b>	<b>Chair's Ruling</b>
	and evidence to support the figures given.				need to be supplementary disclosure for the purposes of Trial 2.
2.	Evidence demonstrating alleged loss of profits amounting to £2.4m.	Issue to be determined at CMC.		As above	This is a request relating to the assessment of damages and is not necessary for the purposes of Trial 1. If the Claimant succeeds in Trial 1 there will need to be supplementary disclosure for the purposes of Trial 2.
3.	Evidence demonstrating an in-store margin of 45%.	Issue to be determined at CMC.		As above	This is a request relating to the assessment of damages and is not necessary for the purposes of Trial 1. If the Claimant succeeds in Trial 1 there will need to be supplementary disclosure for the purposes of Trial 2.
4.	Evidence that HOKA was the most searched word on Up & Running's website against other brands.	Issue to be determined at CMC.		As above	This is a request relating to the assessment of damages and is not necessary for the purposes of Trial 1. If the Claimant succeeds in Trial 1 there will need to be supplementary disclosure for the purposes of Trial 2.
5.	Evidence of alleged loss of sales on internet.	Issue to be determined at CMC.		As above	This is a request relating to the assessment of damages and is not necessary for the purposes of Trial 1. If the Claimant succeeds in Trial 1 there will need to be supplementary disclosure for the purposes of Trial 2.

	<b>Category</b>	<b>Position</b>	<b>Defendant Comment</b>	<b>Claimant Comment</b>	<b>Chair's Ruling</b>
6.	Evidence of the forecast growth rate of runningshoes.co.uk of £2m rising to £5m by 2023.	Issue to be determined at CMC.		As above	This is a request relating to the assessment of damages and is not necessary for the purposes of Trial 1. If the Claimant succeeds in Trial 1 there will need to be supplementary disclosure for the purposes of Trial 2.
7.	Evidence as to how expected growth for 2024 and 2025 has been calculated, as referenced at points (E) and (F) on pages 2 and 3 of the damages calculation.	Issue to be determined at CMC.		As above	This is a request relating to the assessment of damages and is not necessary for the purposes of Trial 1. If the Claimant succeeds in Trial 1 there will need to be supplementary disclosure for the purposes of Trial 2.
8.	Evidence of franchisees losing 10 sales per week and how this loss has been calculated.	Issue to be determined at CMC.		As above	This is a request relating to the assessment of damages and is not necessary for the purposes of Trial 1. If the Claimant succeeds in Trial 1 there will need to be supplementary disclosure for the purposes of Trial 2.
9.	Evidence of who the seven franchisees referred to in the damages calculation are.	Issue to be determined at CMC.	The Claimant is required to particularise this point regardless of whether the Defendant already has knowledge.	Running up costs, the defendant is being mischievous.	This is a request relating to the assessment of damages and is not necessary for the purposes of Trial 1. If the Claimant succeeds in Trial 1 there will need to be supplementary disclosure for the purposes of Trial 2.
<b>Categories requested by the Claimant</b>					
1.	A copy of the referred SDA agreement, and a copy of at	Partially agreed by Defendant.	The SDA is not written in a single document and the terms and conditions of		The Defendant will need to provide reasonable and proportionate disclosure

	<b>Category</b>	<b>Position</b>	<b>Defendant Comment</b>	<b>Claimant Comment</b>	<b>Chair's Ruling</b>
	least three other retailers copies of an SDA agreement.		<p>appointment have already been supplied.</p> <p>The Defendant will provide evidence of its terms of appointment with 3 other retailers, subject to the potential need for any appropriate confidentiality provisions to be put in place first.</p> <p>Sample size of retailers to be reviewed pending internal search of terms of appointment.</p>		according to the standard disclosure test of all material relevant to the selective distribution issue.
2.	Copy correspondence from your client's recent communication with Shopify, this correspondence exists because all communications are in writing as we have had to deal with the consequences.	Issue to be determined at CMC	The Defendant did not engage in correspondence with Shopify.	Proof is being sought.	If the Defendant has sought (directly or indirectly) to encourage Shopify to take action in relation to the Claimant's business, that could be evidence of intent/motivation and any documents recording that should be disclosed.
3.	We shall require the unredacted documents from the previous case in your clients bundle that were communicated with Alex Henderson the claim of privileged is quite frankly not believed.	Issue to be determined at CMC	Documents protected by legal advice privilege.	We will let the Tribunal decide that The communications were from Mr Hagger and Mr Henderson who is in house and not protected by privilege.	The witness statements of Mr Henderson and Mr Hagger dated 30 June 2023 and filed in the County Court proceedings (Claim No: J6QZ0P41), appear to record and rely on legal advice given by (1) Mr Henderson to Mr Hagger (see Henderson at [4] and Hagger at [5]). Mr Henderson also records and

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					relies on legal advice from an external source (see Henderson at [5]). This would seem to give rise to a waiver of privilege in relation to both instances of legal advice, which would suggest that all documents recording the instructions and the advice are disclosable to the Claimant. The Defendant is directed to provide written submissions to the Tribunal as to whether it accepts this position and, if not, why not. If any factual matters are asserted in those submissions, they should be accompanied by a witness statement attesting to those matters.
4.	Please supply a copy of Mr Henderson's license to operate as a solicitor in the UK, This is required to prove that internal correspondence is privileged.	Issue to be determined at CMC	Not appropriate for disclosure. Mr Henderson's entitlement to act as a solicitor of England and Wales can be checked on the SRA Register.	No comment	Not required. The Claimant can check the SRA register.
5.	Please supply copies of all internal emails between any member of staff that refer to Up and Running and Running shoes since August 2020 inclusive.	Issue to be determined at CMC	This category is too broad and disproportionate. The Defendant proposes that it disclose: <ol style="list-style-type: none"> <li>Internal documents relevant to the market share of the Claimant and Defendant, subject to the potential need for</li> </ol>	Disclosure is not one way. The defendant demand copious quantities of irrelevant information which is designed to drive this matter out of fast track.  The defendants request 34 items for disclosure, many of which they already hold. None	The Defendant should provide disclosure of its documents on the standard basis, as set out in CPR 31.6. This should include documents which the Defendant has suggested, but should also include (without limitation on the duty of disclosure under CPR 31):

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			<p>appropriate confidentiality provisions to be put in place first;</p> <p>2. Internal documents relevant to the appointment of the Claimant as a retailer of Hoka; and</p> <p>3. Internal documents relevant to the termination of the Claimant as a retailer of Hoka.</p>	<p>of which were requested in the previous identical case, purely aimed at getting this out of fast track.</p> <p>The claimant requests 5.</p>	<p>1. Documents created in the period 2016 to 2021 which record the pricing policies and practices of the Defendant.</p> <p>2. Documents created in the period 2016 to 2021 which record the Defendant's views on and approach to:  (2.A.) sales by retailers on internet websites and  (2.B.) price discounting by retailers supplied by the Defendant.</p>