Neutral citation [2024] CAT 59

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1637/5/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 October 2024

Before:

BRIDGET LUCAS KC
(Chair of the Competition Appeal Tribunal)
CAROLE BEGENT
DR WILLIAM BISHOP

Sitting as a Tribunal in England and Wales

BETWEEN:

SPORTS DIRECT.COM RETAIL LIMITED

Claimant

- and –

(1) NEWCASTLE UNITED FOOTBALL COMPANY LIMITED
(2) NEWCASTLE UNITED LIMITED
(3) JD SPORTS FASHION PLC

Defendants

-and-

(4) ADIDAS (U.K.) LIMITED
(5) ADIDAS AG

Proposed Additional Defendants

Heard at Salisbury Square House on 3 October 2024

RULING (CMC DIRECTIONS)

APPEARANCES

Mr Conall Patton, KC and Ms Daisy Mackersie (instructed by Travers Smith LLP) appeared on behalf of the Claimant.

Mr Tom de la Mare, KC (instructed by Northridge Law LLP) appeared on behalf of the First and Second Defendants.

Mr Tristan Jones, KC (instructed by Addleshaw Goddard LLP) appeared on behalf of the Third Defendant.

Mr Kieron Beal, KC (instructed by Baker McKenzie LLP) appeared on behalf of the Proposed Fourth Defendant.

1. This Ruling arises from the first case management conference ("CMC") in these proceedings which took place on 3 October 2024 at which we gave directions leading to a trial which will commence on 2 February 2026. In light of the objections raised by the Claimant to this course, this Ruling briefly sets out our reasons.

2. By way of background, these proceedings relate to a dispute between the Claimant and the Defendants as to the decision of the First and Second Defendants (together "the Club") having appointed Adidas U.K. Limited ("Adidas UK") to manufacture the Club's "Replica Kit", and granted certain exclusive rights to market and sell the Replica Kit to the Third Defendant; and to no longer to supply Replica Kit to the Claimant. The Claimant commenced its claim by a Claim Form issued on 14 March 2024, and 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 were in breach of Chapter I 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.

3. At the same time as issuing the Claim Form, the Claimant applied to the Tribunal for an interim injunction. That application was refused ([2024] CAT 24), although a speedy trial was proposed. Following an expedited appeal, the Court of Appeal also declined to grant interim relief (albeit that it concluded that the Tribunal had erred in its reasoning). The Club filed its Defence on 7 May 2024.

4. In the course of the interim relief application, the Claimant was provided with certain disclosure, including the agreements between the Club and the Third Defendant, and with Adidas UK. The First and Second Defendant sought to join the Third Defendant (an application which was granted by order dated 1 May 2024). The Claimant then also applied by letter dated 6 September 2024 to amend the Claim Form; to join Adidas UK and its German parent company, Adidas AG; and for permission to serve Adidas AG out of the jurisdiction (together "the Claimants' Applications"). In the meantime, the Tribunal had fixed the first CMC for 3 October 2024 ("CMC"). In light of objections

from the Club to the joinder of Adidas AG in particular, the Claimant's Applications were adjourned to the first CMC.

5. In support of its application for joinder and service out of the jurisdiction, the Claimant filed 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. That witness statement referred to enquiries made of the Foreign Process Section ("FPS") of the Royal Courts of Justice. The result of those enquiries was that it would take approximately two to four months from submission of the documents to the Senior Master before they would be forwarded to the relevant Central Authority in Germany. It would then take approximately three months to serve those documents *"and potentially even longer"*. The timeframe can be expedited, *"but only in circumstances where a trial date has been set (in this eventuality, an application can be processed within a few business days)"*.

6. By the time of the CMC, the Defendants' respective positions had crystallised such that Adidas UK did not oppose its joinder or the proposed amendments (its consent in any event not being required, it not yet being a party) save in so far as those amendments related to Adidas AG, a separate entity which had not submitted to the jurisdiction. The Third Defendant adopted a broadly neutral stance. The Club opposed the applications in so far as they related to Adidas AG.

7. The Club objected principally on the basis of delay. The Club pointed to the fact that the proceedings had been on foot for nearly six months, and a copy of the relevant agreements had been provided to the Claimant on 28 March 2024. The attempt to join Adidas AG was therefore being made relatively late, and would then (if granted) result in a further five to seven months delay whilst service was effected. Such delay was said to be irreconcilable with the Claimant's previous claims that this matter was urgent, and that an expedited trial was necessary. The Claimant had originally applied for expedition with a trial to be listed in September 2024. The Club complained that no explanation for the Claimant's complete change in position had been provided. The Claimant had previously suggested, in correspondence, that the expedited process was no longer necessary because it intended to bring a wider claim, but no such claim has been articulated or issued. The Club suggested that the delay that would be caused were Adidas AG to be joined to these proceedings, would result in clear prejudice by

prolonging the cost and uncertainty engendered by the proceedings. The Club also raised specific objections to joinder based on (i) whether or not the claim against Adidas AG was sufficiently connected to the issues in dispute, in circumstances where the issue as between the Claimant and Adidas AG was one of parental liability, and (ii) whether it was desirable to join Adidas AG to the claim, again stressing the additional costs that would be involved. The Club also pointed to the fact that a "full-blown" jurisdiction challenge would likely lead to further delay, over and above the five to seven months in relation to service. That might take the parties beyond the period they had provisionally agreed in the draft directions order for disclosure.

8. That brings us to the directions which the parties had agreed prior to the CMC. The directions were set out in a proposed draft order attached to the Claimant's skeleton argument. Those directions envisaged the following:

    a. The Amended Claim Form would be served on 11 October 2024; Defences on 8 November 2024 and Reply on 6 December 2024.

    b. The Claimant would then serve a draft list of issues for disclosure on 6 December 2024. There would then be a process of meetings between the parties' experts to agree disclosure and information requests; exchange of Electronic Disclosure Questionnaires, engagement on the List of Issues, and provisional exchanges of expert information and disclosure requests. This process would culminate on 28 February 2025 with the filing of agreed requests for disclosure and any disclosure requests remaining in dispute. It was proposed that there would be a further CMC to resolve disclosure disputes after 14 March 2025. That is 5 months from the first CMC and, on that timetable, 12 months after the claim form had been issued no disclosure would have been exchanged at all.

9. Despite the fact that this was the parties' agreed position, whether or not Adidas AG would be joined to these proceedings, we did not consider this to be a satisfactory position. There is, in our view, some force in the Club's complaint that delay in these proceedings is inconsistent with the Claimant's insistence both to this Tribunal and to the Court of Appeal that the matter is urgent. The Claimant's change of position on this is not explained by reference to an as yet unarticulated, possible wider claim.

10. We also do not consider it to be acceptable that the Claimant proposed the joinder of Adidas AG without also seemingly having applied its mind to the potential impacts of the resulting delay to trial, and (importantly) any steps that could be taken to keep any delay to a minimum. We say this because the Claimant is fully aware (1) that were Adidas AG to be joined, this would import a potentially significant delay - with all the issues that may present in terms of case management if that party is to "catch up" (and leaving aside any jurisdiction challenge); but also that (2) the delay might be ameliorated, at least to some extent, if a trial date is fixed now and service expedited.

11. With that in mind, and regardless of whether or not Adidas AG is to be joined to these Proceedings, at the outset of the CMC we proposed that directions be given - not just up to the fixing of a second CMC at which disputed disclosure issues could be considered - but up to trial.

12. We outlined a possible timetable along the following lines: Disclosure to be provided on 30 April 2025; a CMC to consider disclosure issues to be listed in May 2025; witness statements to be exchanged on 27 June 2025; expert reports exchanged on 29 August 2025; a third CMC (if required) in October 2025; a PTR in the first week of January 2026, and trial commencing on 2 February 2026. It seemed to us that, whether or not we granted permission to join Adidas AG, that timetable ought to provide a reasonable period for each step in the litigation process, whilst ensuring that the matter proceeded to trial within a sensible timeframe and without undue delay. To put the timetable into context, it would mean that the case would be coming on for trial just short of two years after it had been issued. That is not break- neck speed and, given the Claimant's initial view that this case could be brought on for trial six months after issue, ought to be achievable.

13. If permission to join Adidas AG is granted then, on the basis of Mr Stannard's evidence, that also ought to mean the process of service could be expedited, which in turn should allow for a decent period of time to resolve any jurisdiction challenge that might be brought, enabling Adidas AG to "catch up" should any challenge ultimately not succeed.

14. We provided an opportunity for the parties to take instructions. The Defendants were each in principle in favour of the proposed timetable, whereas the Claimant was not.

15. The Claimant made the following points:

    a. The concerns about delay (should Adidas AG be joined, as the Claimant suggests it should be) are "overstated", because in the meantime, on the basis of the proposed draft directions agreed between the parties, progress would be made on disclosure. However, it seems to us that if we do not fix a trial date now, and do grant permission for Adidas AG to be joined, service (should it not be agreed) is unlikely to have been effected even by the time of the next CMC in March 2025 - let alone any challenge to jurisdiction resolved by that date. By contrast, if we fix a trial date now, that risk is reduced. As the Tribunal observed to Mr Patton KC, the Claimant's Counsel, in the course of submissions the possibility that any jurisdiction issue might be determined sooner rather than later, ought to be something that the Claimant viewed as positive rather than negative. Further, our proposed directions do not seek to undermine the timetable already agreed by the parties for disclosure but, rather, reflect it. The parties will have over six months from now to provide disclosure, and five months from the close of pleadings to undertake the disclosure process in a claim that does not appear to be overly complex. We also note that the parties are already aware of a number of the issues arising given that the Club has already lodged its Defence to the original claim, and the Claimant provided its proposed amendments to the Defendants several weeks ago.

    b. Fixing the trial date now will only speed things up at the FPS: it will not necessarily accelerate service in Germany. We consider that, if permission is granted to join Adidas AG, then anything that can be done to expedite the process ought to be done.

    c. A February 2026 trial date is not realistic. The Claimant pointed, in particular, to the relatively short period following the CMC in March 2025 within which our proposed directions suggested disclosure would need to be provided (at the end of April 2025). In our view, this point can be accommodated by allowing

more time for this step: something that is reflected in the directions we ultimately ordered.

d. As a general point, it is unwise for the Tribunal to assume that the steps of negotiating lists of issues, disclosure requests and the like would be "readily agreed". The Claimant maintains that disclosure relating to the Defendants' subjective intentions will be particularly important in this case. Mr Patton submitted that is likely to be controversial and that it is clear that there are going to be fundamental disagreements about the scope of disclosure in this case. For example, there will be a need to look at the arrangements involving other clubs. Mr Patton cautioned against a situation arising where further disclosure is *prima facie* appropriate but, because of the desire to keep an imminent trial date, disclosure is not ordered. As to that, it seems to us that a rolling process of disclosure would assist. This Tribunal expects the parties to co-operate in agreeing the scope of disclosure, and in providing documents that are required to be disclosed. If there is any difficulty at any point, it can be raised directly with the Tribunal and resolved in short order. It does not need to await the next CMC.

16. Mr Patton also pointed to the fact that it may be necessary for the Claimant to change Counsel if the trial was to be listed for 2 February 2026, having had to change counsel once already. However, he fairly acknowledged that this is rarely a consideration that is of particular weight in the Tribunal. In this case, we note that it is also a factor that affects at least some of the Defendants. It is not a factor that we attach significant weight to.

17. In answer to a question from the Tribunal, Mr Patton was unable to say when these proceedings might be ready for trial. We accept that, in light of our intervention at the beginning of the CMC with our proposed directions, it is not a question that was necessarily at the forefront of any of the parties' minds. Be that as it may, there is a marked and unsatisfactory contrast between the initial stance of the Claimant in these proceedings that this case required urgent determination and could be ready for 1 September 2024, and an inability now to provide any timescale within which the Claimant suggests that this trial should be heard, and this dispute determined.

18. For these reasons we gave directions leading to a trial commencing on 2 February 2026. If the Claimant's concerns come to pass and, for example, difficulties with disclosure mean that this case cannot be ready, it is open to any of the parties to apply for an adjournment of the trial. It is our view that, as currently pleaded, this is not an overly complex claim; the directions we have given are not overly onerous (whether Adidas AG is joined to these Proceedings), and that a four-week trial taking place in February 2026 - sixteen months' time - ought to be achievable.

19. This decision is unanimous.

Bridget Lucas KC Carole Begent William Bishop

Charles Dhanowa, OBE, KC (Hon) Date: 23 October 2024
Registrar