



Neutral citation [2024] CAT 24

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

Case No: 1637/5/7/24

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

12 April 2024

Before:

SIR MARCUS SMITH  
(President 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/Applicant

- and -

**(1) NEWCASTLE UNITED FOOTBALL COMPANY LIMITED**  
**(2) NEWCASTLE UNITED LIMITED**

Respondents/Defendants

Heard at Salisbury Square House on 9 April 2024

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**RULING (INTERIM RELIEF)**

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## APPEARANCES

Mr Tony Singla, KC and Mr Stefan Kuppen (instructed by Travers Smith LLP) appeared on behalf of the Claimant/Applicant.

Mr Tom de la Mare, KC and Ms Alison Berridge (instructed by Northridge Law LLP) appeared on behalf of the Respondents/Defendants.

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## A. INTRODUCTION

1. The Applicant/Claimant is a large sports retailer and supplier of sportswear and sports equipment. We refer to it as **Sports Direct**. Sports Direct is a part of Frasers plc and (save where the contrary is stated or the context otherwise requires) we use the term Sports Direct to refer to the entire group of companies.
2. By a Claim Form dated 14 March 2024, Sports Direct claims that the Respondents/Defendants – collectively **Newcastle United FC** – have: (i) abused their dominant position in failing to supply Sports Direct with Newcastle United FC’s replica kit (a term that will require further elucidation) for the 2024/2025 football season contrary to the Chapter II prohibition of the Competition Act 1998; and (ii) have infringed the Chapter I prohibition by entering into arrangements with another sports retailer – JD Sports (defined more specifically below) – that are exclusive and have the effect of foreclosing Sports Direct from the market for Newcastle United FC’s replica kit.
3. As we shall see, these alleged infringements of the Chapter I and Chapter II prohibitions are closely linked; and, for the sake of clear exposition, it is better to view the alleged infringements through the prism of dominance and abuse, which is what we will do.
4. Sports Direct seeks an expedited trial of its claims. We deal with that application at the conclusion of this Ruling. This Ruling is primarily concerned with Sport Direct’s application for interim relief in the form of an injunction obliging Newcastle United FC to supply it with replica kit until judgment or further order. Self-evidently, this is a mandatory rather than a prohibitory injunction: however, the parties were agreed in their submissions that an arid “box-ticking” exercise was not appropriate, citing in support the words of Lord Hoffmann in *National Commercial Bank Jamaica Ltd v. Olint Corp Ltd*, [2009] UKPC 16 at [20] and [21]. Accordingly, whilst we will be sensitive to the fact that the injunction sought by Sports Direct is mandatory in nature, we will consider the application for an interim injunction through the usual prism of *American Cyanamid Co v. Ethicon Ltd*, [1975] 1 AC 396.

5. It is appropriate that we briefly articulate the test propounded in that case, having due regard to the later case law that further articulates that test.

**B. THE TEST FOR GRANTING AN INTERIM INJUNCTION**

6. The Tribunal may by rule 67 of the Competition Appeal Tribunal Rules 2015 grant an injunction in all cases in which it appears to the Tribunal to be just and convenient to do so. Section 47D(2) of the Competition Act 1998 obliges the Tribunal to apply the principles which the High Court would apply in deciding whether to grant an injunction under section 37(1) of the Senior Courts Act 1981. As is well-known, that provision accords a wide discretion on the court, which discretion is structured by the *American Cyanamid* test.

7. The structure laid down by the House of Lords and followed in many subsequent cases may be articulated as follows:

- (1) *The first condition.* The Tribunal must be satisfied that there is a serious issue to be tried or – to put it the other way round – that the applicant has no real prospect of succeeding in their claim for a permanent injunction at trial. Whilst it is possible to conduct a long analysis regarding the precise nature of this test, that is not particularly helpful. What must be stressed is that: (i) fanciful or frivolous or vexatious claims are to be denied; (ii) the Tribunal should in no way conduct a “mini-trial” and that factual investigation must therefore be kept to a minimum; and (iii) as a consequence, assumptions must generally be made, in this regard, in the applicant’s favour.

- (2) *The second condition.* Where the first condition is satisfied, the Tribunal must next be satisfied that damages would not be an adequate remedy for the applicant. If damages would be an adequate remedy, it is in principle wrong to make an interim order against a respondent obliging it, before trial, to do or refrain from doing some act. That is because if the applicant fails at trial, the respondent will have been enjoined to no purpose; and if the applicant succeeds, the absence of injunctive relief prior to trial is not serious, because damages can be awarded and (by

definition) will be an adequate remedy. When considering the adequacy of damages as a remedy, a pragmatic approach needs to be taken. Where damages can, in theory, be assessed, but (even with the application of a “broad brush”) present intractable or difficult questions of assessment, then damages may very well not be an adequate remedy. In *Garden Cottage Foods Ltd v. Milk Marketing Board*, [1984] 1 AC 130 at 143, Lord Diplock referred to insuperable difficulties of estimation.

(3) *The third condition.* The Tribunal will, almost always, require an undertaking in damages from the applicant as the “price” for the granting of interim relief. Although such undertakings have a standard form, typically seeking to hold the respondent harmless against all damage sustained as a result of the applicant’s claim at trial failing and the interim injunction therefore having been “wrongly” granted, such undertakings cannot be compelled but are voluntarily offered up as the condition for the Tribunal exercising its discretion. The undertaking can, and should, be framed according to the circumstances, and can extend to the protection of third parties. Where the first and second conditions are satisfied, the Tribunal must consider whether the undertaking in damages will adequately protect the respondent in the event of the interim injunction having been “wrongly” granted. The third condition is the converse of the second condition. If the undertaking in damages will adequately protect the respondent, then the interim injunction ought to be granted. If the injunction is not granted, the applicant will be inadequately protected should their claim succeed at trial (*ex hypothesi*, damages will not be adequate), whereas if the injunction is granted, provided the third condition is satisfied, the respondent will adequately be protected. If the third condition is not met, it is necessary to proceed to the fourth condition.

(4) *The fourth condition.* Where the second condition is met, but the third condition is not met, the Tribunal must consider the balance of convenience, weighing up the rival factors in favour of granting or refusing interim relief. It is not particularly helpful to seek to list the relevant factors, for it is accepted that there is no fixed list of factors and

that the Tribunal must look at all the relevant facts of the case, and weigh them accordingly.

8. We turn to consider these four conditions in the order set out above.

**C. THE FIRST CONDITION: SERIOUS ISSUE TO BE TRIED**

**(1) Market definition and dominance**

9. We are here concerned with a refusal, on the part of Newcastle United FC, to continue to supply Sports Direct with Newcastle United FC replica kit.

10. The term “replica kit” is often used as a term of art to refer to authentic reproductions of the strip (home, away, third, goalkeeper, etc) worn by the players of a particular football club. For purposes of this application, we consider that definition to be too narrow (although that is the definition used by Sports Direct in the Claim Form at paragraph 19). We will use the term more broadly to embrace any form of sports clothing or kit to which a football club’s trademark is applied, and we will – in the case of Newcastle United FC kit – refer to this as **NUFC Replica Kit**.

11. We have adopted this wide definition because the form of injunction sought by Sports Direct was itself widely framed, seeking to oblige Newcastle United FC to supply a wide range of product, going well-beyond the narrow, term of art, definition of “replica kit”.

12. The consequence of this wide definition is that it makes the question of dominance significantly harder to establish. Whilst one can easily imagine a supporter of Newcastle United FC refusing any substitute for an authentic replica of the home shirt, including “unbranded” shirts and (in particular) the shirts of other football clubs, the same might very well not be true of a Newcastle United FC branded tee shirt. We consider this question to be a question for trial, and not for this application. We proceed on the basis that Newcastle FC is dominant in the market for NUFC Replica Kit, in that there are no feasible substitutes for such kit. We stress that this is a matter that will likely

be contested at trial; and that the point was in no way accepted by Newcastle United FC on this application. Nevertheless, since we cannot and should not conduct a mini-trial, this is the proper basis on which to approach the application. Any other approach, significantly narrowing the meaning of “replica kit” from our definition of NUFC Replica Kit would (from the outset) significantly narrow the interlocutory relief that could be granted to Sports Direct. We do not consider that to be consistent with the approach in *American Cyanamid*. Put another way, we consider that the market definition we have articulated, and the acceptance (for the sake of argument) that Newcastle United FC are dominant in this market, to both constitute serious issues to be tried.

**(2) Supply of NUFC Replica Kit before and after the sale of Newcastle United FC**

***(a) The change in ownership***

13. Although Newcastle United FC does not itself manufacture the NUFC Replica Kit, it is the appropriate defendant to these proceedings because it owns the intellectual property and branding rights (we are being deliberately vague here because it is unnecessary to be specific about these rights) that enable NUFC Replica Kit to be differentiated from other products, in particular the replica kit of other football clubs. It is this ability to differentiate otherwise fungible products that is the source of Newcastle United FC’s market power.
14. The manner in which Newcastle FC has chosen to exercise that market power – or, to put it more prosaically, how Newcastle FC has chosen to sell NUFC Replica Kit – has changed with the ownership of the football club. Prior to October 2021, Newcastle United FC was ultimately owned (the precise ownership structure does not matter) by Mr Mike Ashley. Mr Ashley is also the ultimate (majority) owner of Sports Direct. In October 2021, Mr Ashley sold Newcastle United FC to its present owners. The details of that sale do not matter.
15. What does matter is that with the change in ownership, there was a re-consideration of the manner in which Newcastle United FC caused NUFC Replica Kit to be manufactured and sold. There is a great deal of controversy



about this change, which it is inappropriate to go into in an application of this sort, for to do so would be to conduct precisely the sort of mini-trial that is antipathetic to interlocutory applications. Thus, for instance, Newcastle United FC contended that one of the reasons for the change was “the extent and depth of the negative feeling amongst the Club’s fanbase towards the previous ownership” (to quote from paragraph 10 the first statement of Mr Silverstone (**Silverstone 1**, made on behalf of Newcastle United FC). That negative feeling was said to inform not merely a desire to move the sale of NUFC Replica Kit more “in-house”, but also to inform a desire to ensure that Sports Direct was not involved in the future sales of NUFC Replica Kit.

16. It may very well be that such facts and matters are relevant at trial; and, if relevant, can be established to the requisite standard. For the purposes of this application, we do not take such matters into account. However, we do proceed on the basis that even a dominant undertaking is entitled, without automatically triggering the Chapter II prohibition, to structure its business as it wishes in order to maximise its profits or further other interests. The Chapter II prohibition is not intended to shackle the commercial operations of the dominant undertakings. Put another way, before a restructuring of operations can be said to be abusive, the facts (to the extent that they can be uncontroversially be ascertained) need to be established and the nature of the abuse alleged identified.
17. We will consider the abuse alleged in due course. For the present, we are concerned with the uncontroversial facts, i.e. those that can be relied upon for the purposes of assessing a serious issue to be tried.

**(b) *Manufacture of NUFC Replica Kit: before and after***

18. J Carter Sporting Club Ltd (operating under the name **Castore**) is a UK sportswear manufacturer. The NUFC Replica Kit is currently manufactured by Castore under an agreement dated October 2020. According to Mr Silverstone (at Silverstone 1/[11]):

The Club’s replica kit is currently manufactured by [Castore] under an agreement dated 29 October 2020 between the Club and Castore (the **Castore Agreement**). The Castore Agreement grants Castore the exclusive production,

sponsorship, retail and distribution rights for all club-licensed product, including (but not limited to) the Club's team kit, apparel and accessories, as well as non-sports products such as bed linen, Christmas jumpers and mouse mats. The Castore Agreement is due to terminate seven days after the Club's final match of the 2023/24 football season. That match is expected to be the Club's Premier League Fixture on 19 May 2024 against Brentford.

19. Mr Silverstone has a great deal to say about the "one-sided nature" of the Castore Agreement (Silverstone 1/[12]). Again, that is a matter (to the extent it is relevant) to be left to trial. The only point to note for present purposes is that one reason for reconsidering Newcastle United FC's NUFC Replica Kit arrangements was access to sales data, as well as bringing sales to an extent "in-house" (Silverstone 1/[13]).
20. We do not consider that the circumstances under which the Castore Agreement came to an end to be a matter that requires further consideration; and is (to the extent relevant) likely to be contentious. Accordingly, this is another matter we leave to trial.
21. The new manufacturer of NUFC Replica Kit is Adidas AG (**Adidas**), a German sportswear manufacturer, the largest in Europe and one of the largest globally. Going forward, and in place of Castore, Adidas is the exclusive manufacturer of NUFC Replica Kit.

***(c) Distribution and supply of NUFC Replica Kit: before and after***

22. Again, the precise facts and matters do not matter for the purposes of this application; and to the extent that they do, are likely to be contentious and so matters for trial. The Claim Form says this:
  27. Historically, the Club has not manufactured or sold replica kit items itself. Most recently, it has licensed the manufacture and distribution of replica kit, and the operation of the Club's own on-site store, to Castore since the 2020/21 season.
  28. During that period, Castore consistently supplied Sports Direct with the Club's replica kit, and Sports Direct had every expectation that this supply would continue from Castore, or any successor. Indeed, Sports Direct has been supplied with and has sold the Club's replica kit without interruption, at least since Newcastle United joined the Premier League in its second season. The Claimant believes that it is one of the largest retail sellers of the Club's replica kit in the UK.

29. With effect from next season, the Club has terminated its agreement with Castore and has licensed Adidas as its exclusive manufacturer. It has also granted Adidas certain distribution and retail rights in various jurisdictions but, so far as the Claimant presently understands, has reserved wholesale distribution, or the right to direct wholesale distribution, in the UK exclusively to itself.
23. The position regarding the new regime has been evolving, and (unsurprisingly) Sports Direct does not have direct knowledge of Newcastle United FC's plan. In fact, paragraph 29 of the Claim Form is largely accurate but materially incomplete:
- (1) Adidas does indeed hold certain distribution and retail rights in regard to NUFC Replica Kit. Broadly speaking, these rights relate to on-line sales generally and physical sales outside the UK.
  - (2) Newcastle United FC will play a major role (or, perhaps better, hopes to play a major role, since these are all plans) in UK physical sales and on-line sales generally.
  - (3) Additionally, JD Sports Fashion plc (**JD Sports**) has a right to sell NUFC Replica Kit on-line and (subject to the rights of Newcastle United FC) exclusively in the UK. JD Sports is a sports fashion and lifestyle retailer, operating a chain of stores in the UK and with an on-line presence.
24. The central point, however, is that there is no place for Sports Direct in these distribution and supply arrangements, and this is the essence of Sports Direct's complaint.
25. Given the centrality of expectation to Sports Direct's claims (see, for example, paragraph 28 of the Claim Form), it is surprising that Sports Direct could not be more specific as to the nature of its arrangements with Castore in regard to the supply to it of NUFC Replica Kit. No written agreement was produced by Sports Direct, and leading counsel for Sports Direct, Mr Singla, KC, was unable to say anything material about the terms that subsisted between Sports Direct and Castore save to stress (as we accept) that Sports Direct received supply from

Castore and that the draft order for interim relief was based upon the volumes of supply provided by Castore to Sports Direct previously. Beyond this, we are in the dark about the arrangements between these companies, in particular as to whether Castore provided Sports Direct with a period of exclusivity on the launch of new replica kit (which occurs every year). Of course, that is when demand (from fans in particular) will be at its highest. Mr de la Mare, KC, leading counsel for Newcastle United FC, made much of what he suggested were potentially one-sided terms between Castore and Sports Direct, favouring the latter. He referenced a number of documents strongly suggesting the existence of an exclusive period vesting in Sports Direct.

26. At the end of the day, this is another area where we consider we must tread carefully, because these are facts and matters for trial, not for this application. But, given Sports Direct's emphasis on expectation, we cannot leave the point without stressing that the absence of detail provided by Sports Direct as to the arrangements it had with Castore is telling:

- (1) This is information that is obviously important, given the way in which Sports Direct's claim is pleaded. Sports Direct's expectations of continued supply will be informed (at least in part) by the arrangements it has (or had) with Castore.
- (2) This is information within Sports Direct's own knowledge. It may be that Sports Direct's arrangements with Castore are entirely undocumented. But that would not prevent Sports Direct from articulating the nature of those arrangements, and it has not done so.
- (3) Whilst we certainly made no inferences against Sports Direct in this regard, the furthest we can go in terms of the basis on which Sports Direct was supplied by Castore is to note that substantial quantities of NUFC Replica Kit were, as a matter of fact, supplied by Castore to Sports Direct.
- (4) We do not know the extent to which Sports Direct was preferred, in terms of supply, by Castore over other retailers. Although there was

clearly some evidence suggesting this, we prefer to treat this matter as a contentious matter for trial, and to leave it out of account for present purposes.

**(3) An assessment of Sports Direct’s claim: serious issue to be tried**

27. It is no infringement of competition law to be a dominant undertaking. A finding of dominance – and we are proceeding on the basis that Newcastle United FC is dominant in both the wholesale and (relatedly) retail markets for the supply of NUFC Replica Kit – entails additional responsibilities and burdens on the dominant undertaking which, if not observed, may result in a finding of abuse. The question we must consider is whether a claim for abuse arguably arises on the facts of the present case, as we have articulated them.

28. As to this:

(1) Assuming – contrary to the facts of the present case – no prior arrangements regarding the supply by a dominant undertaking, it is for the dominant undertaking to determine (in all respects) the manner of that supply. The dominant undertaking may elect to supply the market exclusively itself or licence another undertaking exclusively or (by multiple licencing or other arrangements) create a market with multiple suppliers.

(2) Of course, this ability to determine the manner of supply is in no way unconstrained. It is possible to trigger the Chapter II prohibition (i.e. abuse a dominant position) in many ways, ranging from abusive pricing (not alleged here) to margin squeeze (not alleged here) to failure to supply. Failure to supply is alleged. But, taking as our starting point the absence of any prior arrangements, we do not consider the proposition that a refusal by a dominant undertaking to supply another undertaking gives rise to an arguable case of abuse without some further allegation or averment. For instance, if it is said that the supply comprises the supply of an essential facility, then that is a material matter very easily

giving rise to an argument that a position of dominance is being abused. No such point was made in the present case.

(3) We do consider that the presence of prior arrangements regarding the supply by a dominant undertaking to be material. Where the undertakings participating in a given market have, for a period of time, proceeded on the basis of an established market structure, and that market structure is unilaterally changed by the dominant undertaking, then we consider that it is permissible to take a long hard look at that unilateral change. Whether the change amounts to an abuse of dominance or an arguable abuse of dominance will depend upon the facts of the given case, but the following (overlapping) matters will generally be material:

- (i) The reason for the change.
- (ii) Whether the change was truly unilateral or whether external circumstances, beyond the dominant undertaking's control, have played a part.
- (iii) The degree of notice given.
- (iv) The extent to which undertakings receiving the supply from the dominant undertaking have an expectation of continuity of supply, and the extent to which that expectation is reasonably founded.
- (v) The length of the supply chain – or the number of intermediaries – between the dominant undertaking and the undertaking alleging abuse.
- (vi) The harm that will or may occur as a result of the change.

In setting out this list, we are not attempting to be exhaustive.

- (4) Turning to the facts of the present case, Sports Direct is contending that where a dominant undertaking (here: Newcastle United FC) has historically supplied a non-substitutable product (here: NUFC Replica Kit) in a certain way (here to Castore and, via Castore, to others further down the supply chain, including Sports Direct), then it is an abuse of dominance for the dominant undertaking to change the manner in which it supplies the market in the future if that change involves ceasing to supply a single (previously supplied) undertaking (such as Castore and/or Sports Direct).
- (5) Put as baldly as that, we do not consider this proposition to be arguable. It amounts to a contention that where a dominant undertaking chooses to vary the manner in which it supplies the market, such that some undertaking in the supply chain is materially prejudiced, then that prejudiced undertaking can contend to trial that the Chapter II prohibition has been infringed. In order to render this proposition arguable, we consider that something more needs to be shown. We stress that the burden of making such an averment lies on Sports Direct. It is not (at this point, at least) for Newcastle United FC to say that its conduct can be objectively justified. It is for Sports Direct to make out an arguable case and – if that has been done – for Newcastle United FC to say what it can (and that will be relatively little at the interlocutory stage) by way of objective justification.
- (6) Accepting, as we do, that the serious issue to be tried condition represents a low hurdle, we consider that no arguable case of abuse has been made out by Sports Direct in this application. We reach this conclusion for the following reasons:
- (i) The expectation of continuity of supply on the part of Sports Direct was, in this case, low. In the first place, we have no clear understanding (see paragraphs 25 and 26 above) of the supply position as between Sports Direct and Castore. Castore had exclusive distribution rights (Sports Direct could not obtain supply of NUFC Replica Kit from anyone other than Castore),

and we do not know on what basis Castore could refuse to supply Sports Direct. That is a potential fragility in Sports Direct's supply chain that has nothing to do with Newcastle United FC.

- (ii) Secondly, as we have noted (see paragraph 14 above), the ownership of Newcastle United FC changed in October 2021. We consider that the new owners of the dominant undertaking were entitled to revisit the supply arrangements for NUFC Replica Kit, to consider changing those arrangements and in fact to change them. There is no basis for suggesting that the arrangements between Castore and Newcastle United FC were unlawfully terminated; nor has any suggestion been made that the substitution of Adidas for Castore itself constituted an infringement of competition law. If Newcastle United FC was entitled to substitute Adidas into the supply chain in place of Castore, then it is very difficult to see how the consequences of that substitution (viz, Castore being unable to supply Sports Direct) can in and of themselves amount to an infringement of the Chapter II prohibition.
  
- (iii) From this, follows the third point. Sports Direct pleads (paragraph 28 of the Claim Form) that it “had every expectation that this supply would continue from Castore, or any successor” (emphasis added). For the reasons already given, we consider that there was no reasonable or legitimate expectation on the part of Sports Direct of continuity of supply from Castore. To suggest that there was some obligation on Newcastle United FC and Adidas to ensure in their arrangements (i.e. between the Club and Adidas) that supply to Sports Direct be maintained over time represents a significant fetter on competition, not an enhancement of it. The contention is that an undertaking that “operates the largest network of sports retail stores in the UK” (paragraph 8 of the Claim Form) is (at least arguably) entitled to a guaranteed future supply. We do not consider that proposition, on the facts as we have articulated them, to be arguable.



29. It follows that the application for interim relief fails at the first hurdle. Because we were addressed on the other conditions at some length, and because the application is obviously a significant one, we propose to consider the remaining three conditions notwithstanding this conclusion in regard to the first condition. Before we turn to these later conditions, we make three final points relating to the first condition:

- (1) Sports Direct contended that it was highly material that it was a “well-known discounter of prices” (paragraph 2 of Sports Direct’s Written Submissions). We want to make clear that (for the purposes of this application) we accept this as fact and have proceeded on the basis that Sports Direct’s prices (assuming a continuity of supply for the next season) would undercut by a material amount the prices of Newcastle United FC, Adidas and/or JD Sports. Whilst we accept the factual assertion, as we have described it, we consider it to be immaterial. The fact is that pricing is as much a question of the dominant undertaking’s right to determine manner of supply as any other: absent an argument of unfair pricing by Newcastle FC (directly or indirectly), there is nothing to this point. No unfair pricing contention was articulated by Sports Direct.
- (2) We consider that at trial it might well be arguable that Sports Direct had received ample notice of Newcastle United FC’s intentions in regard to change of supply. This, as we have noted, might be a relevant factor in the question of abuse (see paragraph 28(3)(iii) above). For the purposes of this application, we consider this to be a question of fact into which we should not stray. It may be relevant at trial.
- (3) We have said very little about the allegation of an infringement of the Chapter I prohibition on the part of Newcastle United FC. Clearly, if Sports Direct’s claim in regard to an infringement of the Chapter II prohibition was arguable, it could also be argued that the arrangements with Adidas and JD Sports were improperly collusive under the Chapter I prohibition as a result. However, absent an arguable claim in regard to

the Chapter II prohibition, we cannot discern any arguable infringement of the Chapter I prohibition.

**D. THE SECOND CONDITION: DAMAGES NOT AN ADEQUATE REMEDY**

30. Sports Direct alleged three broad heads of loss and damage:

- (1) Loss of profit in regard to sales of NUFC Replica Kit that (because of the cessation of supply) Sports Direct would fail to make. It was accepted by Mr Singla, KC that this head of loss was quantifiable. That concession was rightly made.
- (2) Loss of profit in regard to sales of other goods sold by Sports Direct that would have been purchased with a purchase of NUFC Replica Kit. This was, at times, referred to as the “halo effect”. The proposition – which we accept – is that customers induced by the availability of NUFC Replica Kit from Sports Direct would be induced, by that very availability, to buy other products (other than NUFC Replica Kit) which purchases would not be made but for the supply of NUFC Replica Kit. We consider that this is a head of loss that is eminently capable of quantification, either by reference to purchases of NUFC Replica Kit over previous years (it would be easy to show what other spending there was) or by reference to purchases of replica kits of other football clubs from Sports Direct (where again it would be easy to show what other spending there was). Although Mr Singla, KC sought to contend that this head of loss was not quantifiable, we reject that contention for this reason.
- (3) Loss of profit due to the loss of repeat business by Sports Direct. This head of loss was described by Sports Direct as “loss of reputation”, and that is a label that we reject as inaccurate. More specifically, as regards this head of loss:

- (i) Sports Direct markets itself as the “home of football”, and prides itself on stocking and making available for sale replica kits from the majority of football clubs in the Premier League (15 out of 20). For present purposes, we accept these propositions as fact.
- (ii) This reputation as the “home of football” will attract football fans of all clubs, including (but not limited to) supporters of Newcastle United FC. To the extent that a Newcastle United FC supporter emerges disappointed, in that they have not been able to purchase the NUFC Replica Kit they want, not only will Sports Direct lose the profit on that sale, but also Sports Direct will have (through no fault of its own) created a disappointed customer, no longer viewing Sports Direct as the “home of football”.
- (iii) The likelihood of losing repeat business for the purchase of non-NUFC Replica Kit was, so Sports Direct contended, likely to be high and unquantifiable. We agree that losses of this kind are likely to arise. It seems to us that if a supporter of Newcastle United FC were successfully to purchase NUFC Replica Kit from Sports Direct, that the chances of that supporter becoming a repeat customer of Sports Direct for purchases other than NUFC Replica Kit are material and extremely difficult to quantify.

31. For these reasons, we conclude that the second condition is met, and that damages would not be an adequate remedy for Sports Direct were the action to proceed to trial, and Sports Direct to succeed.

**E. THE THIRD CONDITION: ADEQUACY OF THE UNDERTAKING IN DAMAGES**

32. As we have described, one of the virtues of the undertaking in damages is that it is extremely flexible in terms of its nature and extent (see paragraph 7(3) above). Taking full account of this flexibility, we nevertheless conclude that the

undertaking in damages would not adequately compensate Newcastle United FC were it to be concluded at trial that any interim injunction should not have been granted. Our reasons are as follows:

- (1) Sports Direct contended that the granting of the interim injunction (whether as drafted by Sports Direct or as modified by the Tribunal) would make minimal difference to the development of Newcastle United FC's new NUFC Replica Kit business. All that Sports Direct were seeking was the diversion of a limited amount of stock (over all lines, around 14%) away from Newcastle United FC to Sports Direct. Although not in line with Newcastle United FC's preferred business model, Sports Direct contended that this model would substantially be able to continue – albeit with an additional retail supplier in the form of Sports Direct – and that all that would need to be quantified in terms of loss and damage was the margin on sales lost by Newcastle United FC (which would be quantifiable for the reasons given in paragraph 30(1) above).
  
- (2) Mr de la Mare, KC, for Newcastle United FC, disputed this on two grounds. The first ground was that the terms of the injunction sought were – at the mechanistic level – in and of themselves too intrusive. Thus, no account was taken of the additional costs that would be incurred by Newcastle United FC in actually diverting NUFC Replica Kit to Sports Direct. Equally, so he contended, the draft order gave priority to the interests of Sports Direct in terms of order of supply which would damage Newcastle United FC's business to a greater extent than allowed for by Sports Direct. We accept both of these points as valid: but they could – were we minded to grant an injunction – be dealt with easily in the drafting of the order. Thus, were we minded to grant an injunction, it would be straightforward to make provision for Newcastle United FC's costs; and we consider that the priority of supply question could be resolved by obliging Newcastle United FC to transfer a fixed percentage of NUFC Replica Kit to Sports Direct as and when received by Newcastle United FC. In short, although these are valid issues, they are resolvable in the drafting of the order making the injunction.

Whether this results in a form of order that requires such a level of court supervision as to render the order one that should not be made is a point we consider later on, under the fourth condition. For present purposes, we reject these contentions insofar as they go to the adequacy of the undertaking in damages.

- (3) Mr de la Mare, KC's second ground was more general and, we consider, well-founded. As we have described, the new owners of Newcastle United FC are endeavouring to restructure the NUFC Replica Kit business of the Club. That is no small undertaking, and it requires considerable expenditure of time, effort and money. Thus, existing relationships (for instance with Castore) need to be terminated, and new relationships (for instance with JD Sports and Adidas) forged. The interim injunction, if granted, would throw a substantial spanner in these delicate and complex works, and the fact that we cannot be more specific is, we consider, an indication not that the damage to the Club is unreal, but that it is very real but unquantifiable. To give just one example, we have noted that the new arrangements accord to JD Sports a measure of exclusivity in the UK market (see paragraph 23(3) above). JD Sports pay handsomely for this right, and the granting of the injunction will materially deprive JD Sports of its exclusivity. JD Sports has already indicated that it would regard the Club's supply of NUFC Replica Kit to Sports Direct as a breach of Newcastle United FC's contract with JD Sports. Whether that is in fact the case is open to question: certainly, Newcastle United FC would be able to contend that supply to Sports Direct would be pursuant to mandatory order of this court – and whether that supply could constitute a breach of contract might (as we say) very well be open to question. But the damage to relations between the Club and its suppliers would, we consider, be very real, and impossible to assess. This is a big and important business for Newcastle United FC. The revenues anticipated from this venture are – over time – likely to be considerable. Newcastle United FC are right to be concerned at the significant disruption to their business that would occur were the

injunction to be granted, even on more limited terms than Sports Direct presently seek.

33. Accordingly, had we concluded that the first condition was met, we would be obliged to proceed to a consideration of the fourth condition, the balance of convenience.

#### **F. THE FOURTH CONDITION: BALANCE OF CONVENIENCE**

34. This list of relevant factors is not closed. We set out below the factors that we have considered. We focus on those that we consider properly material given the facts as we have described them, and we indicate in which direction (whether for or against the grant of the injunction) they point. Our overall conclusion is that although these factors point in both directions – it would be surprising were that not to be the case – they preponderantly favour the course of not granting interlocutory relief. More specifically:

- (1) Mr Singla, KC, rightly placed weight on the importance of an injunction preserving the *status quo ante bellum*. We agree, but in this case the *status quo* is not the regime that pertained when Newcastle United FC was owned by Mr Ashley. The *status quo* is the position after the sale of the Club to its new owners and their *prima facie* right to develop the business according to their rights. The relevant *status quo* is not the situation which pertained when Castore was the exclusive distributor of NUFC Replica Kit. This factor points clearly against the granting of an injunction.
- (2) We consider that it is important to weigh relative harm to both Sports Direct and Newcastle United FC were the injunction to be not granted/granted. For the reasons given above, in the case of both actors, damages will not be an adequate remedy. We consider that greater harm, in terms of long-term business damage, is likely to accrue to Newcastle United FC. But since, as we have found, the harm in both cases is unquantifiable, we place relatively little weight on this point. Marginally, it points against the grant of injunctive relief.

- (3) Sports Direct also placed weight on consumer benefit, alleging that if Sports Direct were supplied there would be lower prices for consumers. For the purposes of these proceedings, we have assumed that retail supply by Sports Direct would indeed result in somewhat better prices for consumers next season – a matter on which we had no reliable evidence and which would have to be proven at trial (see paragraph 29(1) above). To the extent of this assumption, there would be some benefit to consumers. On the other hand, consumer benefit can be assessed by reference to market structure. There can also be benefit to the consumer – especially over time - in allowing undertakings to structure their distribution in the way they judge most profitable and effective (even if, as we accept for present purposes, that undertaking is dominant). On balance, we regard consumer benefit as a neutral factor in our assessment.
- (4) In terms of the mandatory/prohibitory classification of the injunction sought, we have noted that this is a mandatory injunction, but that this is a label that should not be determinative (see paragraph 4 above). Looking to the substance, we consider that this injunction would require considerable court policing in circumstances where neither party would be approaching matters in a spirit of commercial give and take. There would undoubtedly be significant inconvenience and cost imposed on Newcastle United FC and equally we are confident that Sports Direct would not be slow in pressing its rights and ensuring that the injunction would be observed to the letter. Had we been minded to grant the injunction, we would have significantly re-worked it so as to make it as practicable and workable as possible. Even so, we consider that the order would have had to be closely supervised by the Tribunal; and that there would be a real risk of the Tribunal being sucked into the administration and resolution of day-to-day commercial disputes. This is a minor point, but it points against the granting of an injunction.
- (5) Mr de la Mare, KC placed significant weight on what he said was Sports Direct’s delay and its lack of “clean hands”. We accept that in theory both factors are relevant to this stage of consideration. But, for reasons

we have given, both factors draw us into the need to consider and find facts that we are not (at this stage) prepared to find. Accordingly, we reject these two grounds as being of no relevance to our consideration.

35. The balance of convenience points clearly in favour of refusing the application of injunctive relief.

**G. DISPOSITION**

36. For the reasons we have given, the application for interim injunctive relief is refused. We consider that this refusal makes a speedy trial more, and not less, urgent. At the conclusion of the hearing, we urged the parties to give careful consideration as to how quickly a trial could come on, focussing on the necessary (and not merely desirable) procedural steps in the run up to trial. We expect speedy (and, ideally, agreed) proposals from the parties, failing which the Tribunal will, in short order, make its own proposals.

37. This decision is unanimous.

Sir Marcus Smith  
President

Carole Begent

William Bishop

Charles Dhanowa, OBE, KC (Hon)  
Registrar

Date: 12 April 2024