Neutral Citation Number: [2024] EWCA Civ 532

Appeal No: CA-2024-000925
Case No: 1637/5/7/24

IN THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Sir Marcus Smith (President), Carole Begent and Dr William Bishop

Royal Courts of Justice
Stand, London, WC2A 2LL

Date: 17/05/2024

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
and
LADY JUSTICE ANDREWS

- -

BETWEEN:

SPORTSDIRECT.COM RETAIL LIMITED

Claimant/Appellant

- v -

(1) NEWCASTLE UNITED FOOTBALL CLUB LIMITED
(2) NEWCASTLE UNITED LIMITED

Defendants/Respondents

Tony Singla KC, **David Bailey** and **Stefan Kuppen** (instructed by **Travers Smith LLP**) for the **Claimant/Appellant** ("Sports Direct")

Tom de la Mare KC and **Alison Berridge** (instructed by **Northridge Law LLP**) for the **Defendants/Respondents** (together "Newcastle United")

Hearing date: 9 May 2024

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JUDGMENT

This judgment was handed down remotely at 10.00am on Friday 17 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

Introduction

1. This is an expedited application for permission to appeal from a decision by the Competition Appeal Tribunal (the Tribunal). The Tribunal dismissed Sports Direct's application for a mandatory interim injunction requiring Newcastle United to continue to supply Sports Direct with its replica football kit for retail sale in its chain of shops and online. Sports Direct alleges that Newcastle United have abused their dominant position in the market for Newcastle United's replica kit (the Market) and entered into an exclusive sales arrangement with JD Sports Fashion plc (JD Sports), which has the effect of unlawfully excluding Sports Direct from the Market. Sports Direct has been a retail outlet for the replica kit for decades. JD Sports has also sold replica kit for a few years.

2. The Tribunal decided that Sports Direct had **not** shown that they had put forward a serious case to be tried. Accordingly, it said that the application failed at its first hurdle. The Tribunal nonetheless decided, because they had been fully argued, what it saw as the three "remaining conditions" for the grant of interim relief. It decided, in outline, that damages would not have been an adequate remedy either for Sports Direct (if an injunction were to be wrongly refused) or for Newcastle United (if an injunction were to be wrongly granted against it), and that the balance of convenience lay in favour of refusing to grant interim relief.

3. It is important to understand at the outset the statutory prohibitions on which Sports Direct relies. Although Sports Direct and the Tribunal concentrated on the allegation of abuse of dominant position, Sports Direct still also maintains its position that Newcastle United have entered into anti-competitive arrangements.

4. Section 2 of the Competition Act 1998 (the 1998 Act) imposes a prohibition on agreements, decisions and concerted practices which prevent, restrict or distort competition (the Chapter I Prohibition), as follows:

> … agreements between undertakings, decisions by associations of undertakings or concerted practices which—
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which—
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment; … .

5. Section 18 of the 1998 Act imposes a prohibition on conduct which amounts to the abuse of a dominant position in a market (the Chapter II prohibition), as follows:

> (1) … any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in—
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers; … .

6. The parties could not agree on the applicable test for abuse of a dominant position. Sports Direct argued that the domestic authorities demonstrated that it was sufficient, as a matter of law, to show that that there was a material effect on or a distortion of competition (see Sir Christopher Bellamy in *Burgess v. Office of Fair Trading* [2005] CAT 25 at [336] (*Burgess*), Mann J in *Purple Parking v. Heathrow Airport* [2011] EWHC 987 (Ch) at [105] (*Purple Parking*), and Rose J in *Arriva v. London Luton Airport* [2014] EWHC 64 (Ch) at [106] and [166] (*Arriva*)). Conversely, Newcastle United argued that Sports Direct was required to show that there had been elimination of effective competition (see *Microsoft Corp v. Commission of the European Communities* (Case T-201/04) [2007] ECR II–3601). Both sides accepted that it was only if their respective hurdles were surmounted that Newcastle United had to show that there was objective justification for what had been done.

7. Sports Direct put its case simply before us. It submitted that, as it had pleaded, Newcastle United had refused to continue supplies of replica kit to an existing customer. Its expert's note to the court had evidenced that such a refusal obviously had a material effect on competition and caused harm to consumers, and Newcastle United had failed to show any objective justification for it. Consumer harm was axiomatic where Sports Direct was the leading sportswear discounter in the country, and Newcastle United were obviously trying to increase prices to the consumer by excluding Sports Direct from the Market.

8. Sports Direct submitted that the Tribunal ought to have decided that it had shown there was a serious case to be tried, and that the balance of convenience favoured maintaining the *status quo*, which was the continued supply of replica kit to Sports Direct pending the speedy trial that the Tribunal had said was made more urgent by its refusal to grant interim relief [36]. The matter was urgent because the new season's replica kit was due to be launched on 7 June 2024, and Newcastle United should be required to supply what Sports Direct had ordered well in advance of that date. Sports Direct placed great emphasis on the supposed inconsistency between the Tribunal's holding that it had no serious case to be tried and its intended order for a speedy trial.

9. Newcastle United supported the Tribunal's reasoning, but said that even if there were a serious case to be tried, the balance of convenience favoured the refusal of an injunction. Moreover, damages were an adequate remedy for Sports Direct, which had delayed excessively in making an application for an injunction – long after the window for ordering replica kit for the 2024-2025 season in October 2023. Newcastle United made a wholesale rebuttal of Sports Direct's case theory. It contended that (as the Tribunal had accepted at [34(1]) the relevant comparison was not with what happened before Newcastle United was taken over in October 2021, but with the position after

the sale of Newcastle United and after the new owners had exercised their right to develop its merchandising business.

10. Newcastle United complained that Sports Direct had never provided any evidence of its discounting strategy or of the previous distribution arrangements when Michael Ashley (the owner of Sports Direct) had owned Newcastle United. The reality was that, before the change of ownership, Sports Direct had been allowed by Newcastle United and its manufacturers, J Carter Sporting Club Limited (trading as Castore), to sell replica kit exclusively in the first 30 days after each season's launch. That was the crucial period when most sales were made. There was no evidence that the replica kit had been discounted by Sports Direct in that period. In truth, Newcastle United had increased competition by replacing the old arrangements with new arrangements whereby Adidas AG (Adidas) manufactured, and Adidas, JD Sports and Newcastle United sold replica kit. There was no consumer harm and Sports Direct was merely trying to disrupt Newcastle United's new and entirely legitimate marketing strategy.

11. I have decided that Sports Direct's appeal should be dismissed, even though I think that the Tribunal ought to have held that it had established a serious case to be tried. The Tribunal was right to think that, though damages would not be an adequate remedy for either side, the balance of convenience favoured refusing interim relief and ordering a speedy trial.

12. Against this background, I will deal with the appeal under the following headings: (i) further factual background and the Tribunal's reasoning, (ii) the principles applicable to the grant of interim injunctive relief, (iii) whether Sports Direct has established a serious case to be tried, (iv) the adequacy of damages, (v) the balance of convenience, and (vi) my conclusions.

Further factual background and the Tribunal's reasoning

13. It is hard to disentangle the Tribunal's reasoning from its treatment of the facts. In these circumstances, it is easier to deal with both together. The following paragraphs in this section seek to summarise, as briefly as possible, how the Tribunal dealt with the application and the relevant facts.

14. The Tribunal approached the application for mandatory relief through the prism of *American Cyanamid Co v. Ethicon Limited* [1975] 1 AC 396 (*American Cyanamid*). It described the *American Cyanamid* structure at [7] as being made up of four conditions:

    i) The Tribunal must be satisfied that there is a serious issue to be tried or that Sports Direct has no real prospect of succeeding in their claim for a permanent injunction. In that context, it explained that fanciful claims were to be denied, a mini-trial should be avoided, and assumptions should generally be made in Sports Direct's favour.

    ii) The Tribunal must next be satisfied that damages would not be an adequate remedy for Sports Direct, on the premise that broad brush estimates of damage were acceptable (see *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] 1 AC 130 at 143).

iii) The Tribunal must then consider whether the undertaking in damages would adequately protect Newcastle United in the event of the interim injunction having been wrongly granted. If it would, the injunction should be granted. If it would not, the Tribunal proceeds to the balance of convenience.

iv) The Tribunal said that the balance of convenience allowed the Tribunal to weigh up the rival factors in favour of granting or refusing interim relief.

15. On market definition and dominance, the Tribunal said at [9]-[10] that the case concerned Newcastle United's refusal to continue to supply Sports Direct with replica kit, a term it defined broadly to include all branded wear, thus making dominance "significantly harder to establish" [12]. It said that there were serious issues to be tried as to whether Newcastle United was dominant in the Market and as to market definition.

16. The Tribunal said at [13] that, because Newcastle United owned the intellectual property and branding rights, they were the right defendants even though they did not manufacture the replica kit themselves. It was those rights that enabled their replica kit to be differentiated from other football clubs' products and gave them market power. At [14]-[17], the Tribunal explained how Mr Ashley's sale of Newcastle United had led to a change in marketing strategy. It declined to go into the circumstances or the evidence for fear of conducting a mini-trial of highly controversial material. It recorded, but did not take into account, that Newcastle United had contended that the change was caused to some extent by "the extent and depth of the negative feeling amongst the Club's fanbase towards the previous ownership" and led to a desire to ensure that Sports Direct was not involved in future sales of replica kit.

17. The Tribunal said it was proceeding on the basis that even a dominant undertaking was entitled, without necessarily making its actions abusive, to structure its business in order to maximise its profits or further other interests. The following sentences show how the Tribunal actually approached the question of whether there was a serious case to be tried as to whether Newcastle United's actions were abusive:

> 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.
>
> For the present, we are concerned with the uncontentious facts, i.e. those that can be relied upon for the purposes of assessing a serious issue to be tried.

I should say, at once, that that is not the correct legal approach. On an application for an interim injunction, the court must take the claimant's pleaded and evidenced case at face value, unless it is shown to be plainly false or fanciful. In evaluating whether there is a serious case to be tried, the Tribunal cannot disregard contested facts. When it comes to the balance of convenience, of course, the strength of the case and the evidential value of what is supporting it may be weighed (see Laddie J at pages 12-13 in *Series 5 Software Ltd v. Clarke* [1996] FSR 273 (*Series 5 Software*)).

18. At [18]-[26], the Tribunal explained the arrangements with Castore, which are to terminate on or about 26 May 2024, and the new arrangements that have been entered into with Adidas and JD Sports. In the course of doing so, it said it was disregarding a number of contentious matters. But then at [25]-[26], the Tribunal made a number of

criticisms of Sports Direct's failure to give details of its sales and exclusivity arrangements with Castore. Sports Direct had failed to produce any written agreement and had not disclosed the terms. The Tribunal referred to documents that suggested that Sports Direct had indeed sold the replica kit for an exclusive period in past years, but said that Newcastle United had no place for Sports Direct in its new arrangements. The Tribunal found it surprising that Sports Direct had not been more forthcoming about the nature of its arrangements with Castore, given the centrality of expectation to Sports Direct's case, but then said:

> 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.

And concluded that:

> 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.

19. The Tribunal dealt with the question of whether there was a serious case to be tried, which it said was whether a claim for abuse arguably arises on the facts as it had articulated them, at [27]-[29].

20. The Tribunal emphasised the dominant undertaking's freedom to determine the manner of market supply. It said (correctly, I might interpose) that it was possible to trigger the Chapter II prohibition by failure to supply (as was alleged here) in addition to abusive pricing and margin squeeze (which were not). It then took as its starting point the absence of any prior arrangements, and said that a refusal by a dominant undertaking to supply another undertaking could not give rise to an arguable case of abuse without some further allegation. That said, prior arrangements and unilateral change by the dominant undertaking were material matters deserving of a "long hard look" taking into account the following non-exhaustive factors: (i) the reason for change, (ii) whether the change was truly unilateral, (iii) the notice given, (iv) the reasonableness of the expectation of continuing supply, (v) the length of the supply chain, and (vi) the harm likely to occur.

21. The Tribunal then said at [28(2) and (5)] that Sports Direct's case was unarguable, without something more being alleged. That case was, it said, that "where a dominant undertaking … has historically supplied a non-substitutable product … in a certain way … then it is an abuse of dominance for the dominant undertaking to change the manner in which it supplies the market in the future" by ceasing to supply those previously supplied. It was not up to Newcastle United at this stage to show that their conduct could be objectively justified.

22. The Tribunal's key reasoning in rejecting Sports Direct's submission that it had a serious case to be tried is at [28(6)] and [29(1)]. It said that it was a low hurdle. There were four reasons: (i) Sports Direct's expectation of continuity of supply was low, where there was no clear understanding of the arrangements, nor of the basis on which Castore could have refused to supply Sports Direct, (ii) the new owners of Newcastle United were entitled to change their supply arrangements, including replacing Castore with Adidas, (iii) the suggested obligation to continue to supply Sports Direct was more

a fetter on competition than an enhancement of it, and (iv) the likelihood that Sports Direct would undercut other retailers was irrelevant, absent an allegation of unfair pricing. Finally, absent an arguable claim that Newcastle United had abused its dominant position, there was no arguable claim that the arrangements with Adidas and JD Sports were improperly collusive.

23. The Tribunal then decided at [30(3)] that damages would not be an adequate remedy for Sports Direct on one ground only. It decided that damages would be adequate as regards the profits on sales of replica kit and sales of other goods alongside it. It was not, however, an adequate remedy for the alleged loss of repeat business that Sports Direct would suffer from disappointed Newcastle United fans who might no longer think of Sports Direct as the "home of football".

24. In addition, the Tribunal decided at [32(3)] that damages would not be an adequate remedy for Newcastle United if the injunction were wrongly granted essentially because the injunction would "throw a substantial spanner in [the] delicate and complex works" of forging new supply arrangements.

25. Finally, the Tribunal decided at [34] that the balance of convenience lay in favour of refusing an injunction for three reasons in descending order of importance: (i) the existing position was not the regime established whilst Mr Ashley owned Newcastle United (i.e Castore), but the position after the sale and the new owners' right to develop their business "according to their rights", (ii) greater harm in terms of long-term business would accrue to Newcastle United rather than Sports Direct, and (iii) the injunction would require considerable policing. There were three factors that the Tribunal regarded as either neutral or of no relevance. The neutral factor was consumer benefit in the form of lower prices. Both Sports Direct's delay and its lack of clean hands drew the Tribunal into deciding facts that it was not prepared to find at this stage, and were, therefore, of no relevance.

26. The Tribunal concluded by saying, as I have already mentioned, that refusing interim relief made a speedy trial more, and not less, urgent.

<u>The principles applicable to the grant of interim injunctive relief</u>

27. It is perhaps useful to cite first the classic statement of the law in this area. Lord Diplock said this at pages 407-8 in *American Cyanamid*:

> … The use of such expressions as "a probability," "a prima facie case," or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. … So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any

> real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
>
> As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.
>
> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

28. Few glosses are necessary on that passage, but it is perhaps helpful in the circumstances of this case to cite also Lord Hoffmann in *Sutradhar v. Natural Environment Research Counsel* [2006] UKHL 33, [2006] 4 All E.R. 490, where he said at [6]:

> I therefore approach this appeal on the basis that the claimant's allegations of primary fact must (unless plainly fanciful, which is not the case here) be accepted as true and allowance must be made for the possibility that further facts may emerge on discovery or at trial. The question is whether, on these assumptions, he has a real prospect of success.

29. As it seems to me, the Tribunal in this case fell into error in completely disregarding contested facts. That is not, as I have said, the correct approach. The claimant's allegations of primary fact must be accepted as true, unless plainly fanciful. As Lord Diplock explained, the court must not try to resolve conflicts of evidence or law. That is for trial. But that does not mean that disputed questions are disregarded. The question is whether the material available to the court shows that the claimant has a real prospect of succeeding in its claim for a permanent injunction. If so, the court proceeds to consider the balance of convenience.

30. Whilst I accept that the 4-stage process described by the Tribunal (see [14] above) reflects Lord Diplock's description, the process is perhaps a little more nuanced. The

question of the adequacy of damages for both sides can perhaps be regarded as part of, rather than entirely distinct from, the exercise of determining where the balance of convenience lies. The difference may well be immaterial in this case.

Has Sports Direct established a serious case to be tried?

31. Once one feeds back into the equation of "serious case to be tried" the facts that the Tribunal disregarded on the grounds that they were contested, it seems to me that one can see that Sports Direct had indeed established a serious case to be tried. As the Tribunal accepted, if that were the situation in relation to Sports Direct's preferred case of abuse of market dominance, it would also be so for its secondary case that Newcastle United's new supply agreements distorted competition in the Market. As Mr Tom de la Mare KC, leading counsel for Newcastle United, effectively accepted in oral argument, this appeal was all about the balance of convenience, because, even if Sports Direct had failed to articulate a serious case to be tried at the initial hearing, it would probably be able to do so by amendment after further disclosure. That pragmatic approach seems to me to explain to some extent the apparent inconsistency between the Tribunal saying, on the one hand, that Sports Direct had no serious case to be tried, and, on the other hand, ordering a speedy trial of that unarguable case.

32. In these circumstances, I can take this question shortly. Sports Direct argued that the Tribunal had misunderstood its case on abuse of dominant position. The Tribunal's description of Sports Direct's case at [28(4)] (see [21] above) left out the crucial elements of the allegation, namely that Newcastle United had refused to supply Sports Direct, and Sports Direct's expert had said in a note to the court that the refusal to supply Sports Direct and the new arrangements had a material effect on downstream competition to the detriment of consumers. That, submitted Sports Direct, was because the Tribunal wrongly thought, as it had said at [28(2)], and at [34(1)] in relation to the balance of convenience, that Newcastle United's conduct was to be judged on the basis that there was no existing supply to Sports Direct because the existing position was after the sale by Mr Ashley.

33. In my judgment, the Tribunal ought to have looked at Sports Direct's case, its pleading and its evidence as if it would be established at trial, without foreclosing any of the disputed facts against it. It was not suggested that its factual case was fanciful. There were important questions about the definition of the Market and Newcastle United's dominance, and whether Sports Direct was right to say that the question of abuse of dominant position should be considered from the standpoint of the existing supplies by Castore. The Tribunal assumed that the Market and the dominance were as Sports Direct alleged, but arguably looked at its case on the *status quo* on the basis that Newcastle United would win that argument at trial. If Sports Direct were right that the matter was to be viewed as a refusal to supply an existing customer, it was at least arguable that Sports Direct's expert was right to say that the withdrawal of its supply might have a material effect on competition (see the test adumbrated in *Burgess*, *Purple Parking* and *Arriva* at [6] above). It was obviously not for the court hearing an application for interim relief to determine the conflict between those cases and *Microsoft*, if indeed there really is one.

34. I take the view that, had the Tribunal accepted Sports Direct's pleaded case and expert evidence at face value, it would have formed the view that it was possible for it to

succeed in showing breaches of both the Chapter II and the Chapter I prohibitions at trial.

35. The Tribunal was right to say that the serious case to be tried threshold was low, but wrong to reach the conclusion that it had not been crossed. First, its view that Sports Direct's expectation of continuity of supply was low assumed wrongly that its case on refusal of supply would be rejected. In any event, it was not for the Tribunal at this stage to determine the level of expectation. That was indeed something for trial. Secondly, whilst it is true that the new owners of Newcastle United were entitled to change their supply arrangements, that did not foreclose Sports Direct's arguments about refusal of supply and competition harm. Thirdly, the Tribunal could not determine at this stage whether the suggested obligation to continue to supply Sports Direct was a fetter or an enhancement of competition. It could prove to be either at trial. Finally, whilst I can well see how the likelihood of Sports Direct undercutting other retailers is blunted by Newcastle United's argument about Sports Direct's historical exclusivity during the crucial first 30 days of the new season's sales of replica kit, it could not properly be said at this stage that the point was irrelevant absent an allegation of unfair pricing. Sports Direct's status as a cost-cutting retailer with some 480 stores and an online presence was a relevant part of the background to the case it was advancing. The "clean hands" argument advanced before the Tribunal and by way of Respondents' Notice before us (to the effect that Sports Direct had a secret exclusivity deal it wanted to protect) could not be determined one way or another when considering whether there was a serious case to be tried.

36. For these reasons, the Tribunal was wrong to decide that Sports Direct had no serious case to be tried, something that it effectively acknowledged by granting a speedy trial.

The adequacy of damages

37. On the adequacy of damages for Sports Direct, Newcastle United contend by their Respondents' Notice that the Tribunal ought to have decided that damages would have been adequate. Newcastle United say that no evidence has been provided to substantiate the loss of any sales of replica kit and associated purchases on the same shopping visit, leading to material changes in future shopping patterns. It seems to me that it is obvious that Newcastle United supporters coming in large numbers to buy their replica kit as soon as it is launched from Sports Direct are likely to buy other things at the same time, and to become repeat customers for unquantifiable later purchases. If they are disappointed and disaffected by the inability to get replica kit where they have bought it before, trade may well be lost. It will be hard to assess that loss. Accordingly, I agree with the Tribunal's view that, on this limited ground, damages would not be an adequate remedy for Sports Direct.

38. Sports Direct argued that the Tribunal was wrong to decide that damages would not be an adequate remedy for Newcastle United if the injunction were wrongly granted. As it seems to me, however, the Tribunal was entirely right to say (as it did at [32]) that, if the injunction were wrongly granted, a substantial spanner would be thrown into Newcastle United's new supply arrangements. It would be very hard to disentangle what loss was caused by the different consequences. Newcastle United would be breaking its exclusivity arrangements with JD Sports and possibly its agreement with Adidas. The ramifications might be very complex indeed. Damages would certainly not be adequate for Newcastle United.

The balance of convenience

39. The Tribunal decided the balance of convenience against Sports Direct. The fact that I have held that it was wrong about whether there is a serious case to be tried does not affect its reasoning on this point. Unless it can be shown that it exercised its discretion on the wrong legal basis or took into account matters it should not have done, or failed to take into account matters it should have done, we should not interfere with its decision, especially as it is a specialist tribunal, expert in competition matters.

40. Sports Direct effectively attacked the reasoning of the Tribunal on balance of convenience on the same basis as it attacked its reasoning on serious case to be tried. It said that the Tribunal was simply wrong to look at the matter as if the existing position was after Mr Ashley had sold Newcastle United. The existing position was that, even now, Castore was supplying Sports Direct, and those supplies were being peremptorily withdrawn. Sports Direct was not asking for exclusivity. It was, to put it colloquially, 'no skin off Newcastle United's nose' to supply its order for the 2024/2025 season at the same time as Adidas supplied JD Sports.

41. It seems to me that the Tribunal was, at this stage of its enquiry, entitled to take into account its view of the strength of Sports Direct's overall case (see *Series 5 Software* at [17] above). Even if there were (as I have found) a serious case to be tried, the Tribunal was entitled to judge that it was a weak case for the reasons it effectively gave. By saying that the *status quo* was after the sale of Newcastle United, that the new owners had a right to develop their business, and that greater long-term harm would be caused to Newcastle United rather than Sports Direct, it was performing exactly the exercise that the balance of convenience requires. Moreover, I think it was right to attribute less, if any, weight to the supposed consumer benefit in the form of lower prices and Sports Direct's delay and its alleged lack of clean hands. These were factors that may look very different once further evidence is available. So far as consumer harm is concerned, it is by no means clear that replacing Castore with Adidas, and replacing Sports Direct with JD Sports (as the main retail outlet), will lead to consumer harm. It may, but it may also not. It is very hard to say at this stage.

42. In essence, I agree with the Tribunal's perspective that the balance lies in favour of allowing the new owners to make their own new arrangements without the interference of interim relief. The right course was to order a speedy trial to minimise the damage to Sports Direct. The trial will no doubt be hard fought, but the damage to Newcastle United will be far more fundamental if the injunction is wrongly granted than the damage that will be done to Sports Direct if it misses one, or even two, season's supply. We heard some argument about the kind of order that Sports Direct was seeking, and a new draft was presented to us in the middle of the hearing. The order would be complex and difficult to police as the Tribunal said. It is not simply a question of selling one line item at one time. It would require complex mechanisms to make it work. Whilst it could be done, it is another reason why the balance of convenience lies against the grant of interim relief.

Conclusions

43. For the reasons I have given, whilst I have decided that Sports Direct had established that they had a serious case to be tried, I would not allow its appeal.

44. The question then arises whether we should grant Sports Direct permission to appeal, since this has been an expedited rolled up hearing. I think it is only right to grant permission to appeal on the ground that Sports Direct were able to show that there was both a real prospect of success and some other reasons for the appeal to be heard. Those reasons are: (i) the apparent inconsistency in the Tribunal's disposition of Sports Direct's application, finding no serious case to be tried, yet ordering a speedy trial, and (ii) the Tribunal's inappropriate approach to the facts in refusing to take any account of facts that it thought to be contested (see [17] and [29] above).

45. Accordingly, I would grant Sports Direct permission to appeal and dismiss its appeal.

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT:

46. I agree.

LADY JUSTICE ANDREWS:

47. I also agree.