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IN THE COMPETITION COMMISSION  
APPEAL TRIBUNAL  
New Court,  
Carey Street,  
London WC2A 2JT

Case Nos. 1014/1/1/03  
1015/1/1/03

Monday, 1st December 2003

Before:

**THE PRESIDENT, SIR CHRISTOPHER BELLAMY**  
**(Chairman)**  
**THE HONOURABLE ANTONY LEWIS**  
**MS VINDELYN SMITH-HILLMAN**

- - - - -

ARGOS LIMITED

and

LITTLEWOODS LIMITED

Appellants

v.

THE OFFICE OF FAIR TRADING

Respondent

- - - - -

**Mr Mark Brealey QC and Mr Mark Hoskins** appeared for the  
Applicant, Argos Limited.

**Mr Nicholas Green QC and Ms Marie Demetriou** appeared for the  
Applicant, Littlewoods Limited.

**Mr Brian Doctor QC and Ms Kassie Smith** appeared for the Office  
of Fair Trading.

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Transcribed from the shorthand notes of  
Harry Counsell & Co  
Clifford's Inn, Fetter Lane, London EC4A 1LD  
Telephone: 0207 269 0370

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**CASE MANAGEMENT CONFERENCE**

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1 THE PRESIDENT: Good afternoon, ladies and gentlemen. I think  
2 the principal point, or at least the first point, that we  
3 need to discuss this afternoon is the timing of this case  
4 hereon and, before we hear from the parties, it might be  
5 convenient if I just sketch out what the tribunal's  
6 thinking is.

7 As some of you may know, we have a case called the  
8 Football Shirts case starting just after the beginning of  
9 March. That raises for us the question whether it would be  
10 feasible to fit in a hearing in this case before then, i.e.  
11 some time at the end of February or at the beginning of  
12 March. At the moment we are of the view that that would be  
13 rather difficult.

14 On the hypothesis that it would be difficult to hear  
15 this case before the beginning of March, Football Shirts is  
16 not likely to end before at least 22nd March and, for  
17 various reasons, there is some problem with the  
18 availability of the tribunal between then and April, which  
19 in fact begins this year on the 9th. That is progressively  
20 pushing us to the other side of Easter.

21 In those circumstances we had very provisionally in  
22 mind the possibility of dates that begin on 10th May; for  
23 example, the week beginning 10th May and the week beginning  
24 17th May are clear at the moment. In any event, we would  
25 need obviously at some point a case management conference  
26 to plan the hearing and we have provisionally thought in  
27 terms of Wednesday, 25th February for that purpose.

28 That is where the tribunal is at the moment very  
29 provisionally on timing. I don't know whether you would  
30 like a little bit of time just to think about that, or  
31 whether you would like to react almost immediately, or  
32 what. Clearly there are questions of availability. Would  
33 you like us to rise for a few minutes while you have a  
34 chat?

35 MR GREEN: On the face of it, those don't look too bad as far  
36 as we can see but we probably need to do some checking back  
37 at the ranch to ensure that they are not all disappearing  
38 to Hong Kong again and, the moment you say May, they say,

1 "Right, May, Hong Kong!"  
2 THE PRESIDENT: Yes.  
3 MR GREEN: By the sound of things it does not look too bad.  
4 THE PRESIDENT: I have started with possible dates for the  
5 hearing because we can then work back, as it were, for  
6 dates for notice of appeal and defences and so forth. How  
7 would you like to proceed, Mr Doctor?  
8 MR DOCTOR: We will need to find out from our witnesses.  
9 THE PRESIDENT: Yes. This is all subject, of course, to  
10 witness availability and all that sort of thing.  
11 MR DOCTOR: Yes. Apart from that, I know that my own  
12 preference was to do it earlier, in February if it could  
13 not be done in March; from what I understand, is it not  
14 possible at all or is it still worth trying?  
15 THE PRESIDENT: The answer to that is that I think it is quite  
16 difficult one way or the other. It is potentially quite a  
17 heavy and complicated case, you need to get it up properly  
18 and we need to give ourselves time to do it, to think of  
19 all the arguments and so forth. So I am a bit reluctant to  
20 take a risk and try and squeeze it.  
21 MR DOCTOR: Yes.  
22 THE PRESIDENT: I have not heard from Mr Brealey. Do you have  
23 any first reaction?  
24 MR BREALEY: I think we are in agreement so we are happy with  
25 those provisional dates.  
26 MR GREEN: There must be something wrong! (Laughter)  
27 THE PRESIDENT: It is marvellous to find ourselves in agreement  
28 over something!  
29 MR DOCTOR: May I add that Miss Smith knows already that she  
30 is not available on 25th February.  
31 THE PRESIDENT: There is more flexibility about that date.  
32 Might I suggest that, for planning purposes, we  
33 provisionally identify those two weeks, that is to say the  
34 week beginning 10th May and the week beginning 17th May,  
35 and we leave it that the parties will see if they can  
36 establish the availability of possible witnesses for those  
37 dates. Unless there is any major problem in that regard,  
38 we will try to go with those dates. Is that a good basis?

1 (No dissent) Good.

2 I don't know whether anybody has got as far as  
3 thinking in terms of how long we are actually going to need  
4 for this hearing when it actually comes. At least several  
5 days, I anticipate?

6 MR DOCTOR: For the hearing itself?

7 THE PRESIDENT: Yes, for the hearing itself.

8 MR DOCTOR: I think, in a skeleton which somebody has  
9 somewhere, we had previously in July said that we  
10 anticipated at that stage that, if prior witnesses were  
11 allowed in, there would be three witness we would be  
12 calling who would take, we thought, something like - I can  
13 break it down if I am not held to this - a day and a half.

14 We had identified 15 witnesses who will be cross-examined,  
15 which we estimate will take about four days; that is not  
16 terribly long with everybody. That is five and a half  
17 days. There is I think a day and a half of opening which  
18 would make it seven days, a day's break before the end,  
19 eight, and then a bit of injury time. Ten days.

20 THE PRESIDENT: We need to plan for at least two weeks I think  
21 at this stage.

22 MR GREEN: That sounds about right, yes.

23 THE PRESIDENT: We had better plan for that and perhaps even  
24 keep a little question mark about being available if we go  
25 over.

26 Sticking to the timetable on that basis, what then is  
27 the parties' position, at least provisionally, about what  
28 should happen next as regards written pleadings? What  
29 should happen and in what time scale should it happen?

30 MR GREEN: Can I take it in two stages. We think that a sense  
31 of real politique would lead us to the conclusion that any  
32 party should be entitled to put in whatever additional  
33 pieces they need to put in to complete the jigsaw. I would  
34 have thought it would be unnecessary to go back to formal  
35 pleadings because we all know very well what each other's  
36 case is. There may be a bit of disclosure, the odd witness  
37 statement, an odd note, an amendment, a rejoinder, what-  
38 have-you, but within a timetable. If we then complete what

1 we think needs to be done and then the OFT completes what  
2 they think needs to be done, that will be an incremental  
3 approach which will reduce costs, keep the additional work  
4 to a minimum and hopefully bring everybody up to par. We  
5 would suggest that we don't need to produce a new notice of  
6 application.

7 THE PRESIDENT: I think it is very much up to the parties to  
8 some extent to judge what they feel they need or ought to  
9 do. From some points of view - although of course the  
10 tribunal, like you, is very keen to keep the costs down -  
11 just for practical purposes, there is sometimes an  
12 advantage in working on a new piece of paper that is  
13 directed to the current position rather than finding one's  
14 way through an old piece of paper that has been largely  
15 superseded by events. I think the parties can be assumed  
16 to know how best they want to present their case. It is a  
17 bit easier for us if it is presented "cleanly".

18 MR GREEN: I think that is a fair point and we take that.

19 THE PRESIDENT: No doubt there is quite a lot in the existing  
20 material which is useable and will not mean reinventing the  
21 wheel.

22 What do you envisage, Mr Brealey? What do you propose  
23 to do?

24 MR BREALEY: Broadly along the same lines as Mr Green we don't  
25 see the need for new notices of appeal. There will be a  
26 timetable for witness statements and then obviously in a  
27 skeleton argument we could pull everything together.  
28 Essentially we know all the issues and therefore we did not  
29 anticipate a new notice of appeal. We have a certain  
30 period of time in which to serve witness statements and  
31 then the Office can have a certain time, if they want, to  
32 deal with the witness statements if they can, but I would  
33 have then thought the case could be done by way of skeleton  
34 argument. That would be your new piece of paper which  
35 would encompass the case.

36 THE PRESIDENT: I see.

37 MR BREALEY: We do know what the issues are now and we can  
38 pull everything together in one piece of paper and that

1 would be the written opening.

2 THE PRESIDENT: Does that way of doing it really go for the  
3 defence? I don't know if there is anything left for the  
4 defence now, is there, Mr Doctor?

5 MR DOCTOR: I think it would follow, if there is not going to  
6 be any amended or revised notice of appeal, that I would  
7 not think it is necessary to put in a revised defence. I  
8 agree with my colleagues that we all know what it is about  
9 and certainly it will become clearer in any skeleton what  
10 the precise issues are. I don't think anyone would suggest  
11 that anyone is going to be taken by surprise. If there is  
12 need for further refinement, it will happen in the skeleton  
13 argument.

14 Perhaps the next step would be, if they are going to  
15 serve additional or supplementary witness statements, that  
16 would come next and then perhaps a time ought to be laid  
17 down by which that will happen. We would then, subject to  
18 the rules obviously, have the right to react to that - let  
19 me put it no higher than that for the moment.

20 THE PRESIDENT: Yes, exactly.

21 MR DOCTOR: That would be within a time after that, and then  
22 the next thing after that would be skeleton arguments at  
23 some stage.

24 THE PRESIDENT: Yes. On this basis what Mr Doctor is  
25 suggesting is that, within a time that we will now discuss,  
26 the next step is for the appellants to serve any  
27 supplementary witness statements they wish to serve, or  
28 presumably time for any evidence in reply to that from the  
29 OFT in so far as is properly admissible, and exchange of  
30 skeleton arguments after that. Does that sound reasonable?

31 MR GREEN: It is likely to be witness statements but I don't  
32 foreclose the possibility that there may be additional  
33 documents that we would want disclosed.

34 THE PRESIDENT: No.

35 MR GREEN: If there is a disclosure document, we may want to  
36 disclose that and use it, but really whatever needs to be  
37 done incrementally. It is likely to be statements, I  
38 think.

1 THE PRESIDENT: How much time would you like at this stage to  
2 prepare those statements?

3 MR GREEN: I think Mr Brealey probably has a bigger issue than  
4 I have on this.

5 MR BREALEY: Really, we would ask for two months. Working  
6 backwards, if we are looking at 10th May, we would say two  
7 months, that is 21st January, and that gives everybody  
8 plenty of time, I would have thought.

9 THE PRESIDENT: I would have thought that is not unreasonable  
10 with Christmas and everything. If we said appellants to  
11 serve supplementary witness statements by 21st January, the  
12 OFT to serve any evidence in reply by - when do you think,  
13 Mr Doctor? It is difficult to predict but we had better  
14 have a date of some kind for planning purposes.

15 MR DOCTOR: Three weeks as presently advised.

16 THE PRESIDENT: That is by 11th February.

17 MR BREALEY: That is before the case management conference so  
18 everything is quite neat.

19 THE PRESIDENT: Yes. Before we go to skeletons, just let's now  
20 insert at this point the case management conference. That  
21 is probably going to be the next event. I think you told  
22 me there was a difficulty over 25th February. We have a  
23 certain amount of flexibility in that week.

24 MR DOCTOR: If at all possible, the 24th?

25 THE PRESIDENT: I think the 24th is the difficult date. A bid  
26 for the 23rd? It looks as if it is being sold for the  
27 23rd.

28 MR BREALEY: I am sure one of us can do that.

29 THE PRESIDENT: We will have the case management conference on  
30 23rd February. I would certainly envisage that at that  
31 conference we would try to make a more detailed plan for  
32 the hearing itself in terms of exactly who wants to call  
33 who and who wants to cross-examine who and all the rest of  
34 it so that we have a good picture of the scale of the  
35 thing.

36 MR DOCTOR: (After a pause) I am sorry, I did not realise I  
37 was holding everything up! Perhaps I put it no higher than  
38 this. I have heard on the grapevine that there is still

1           some question mark about the Football case in March, the  
2           date of that. You may, Mr Chairman, know much more about  
3           it than I do but, from what I heard, it had not yet been  
4           writ in stone and I was saying no more to Mr Brealey then  
5           that, if it became clear in the next short while that that  
6           date had again become available, I would want at least to  
7           attempt to revise these dates. By simply agreeing to them  
8           I did not want, as it were, to close off my options. If  
9           this eventuality, which for all I know may now be closed,  
10          were to become free again, I could make this application to  
11          have it brought forward.

12        THE PRESIDENT: You can always make an application at any time  
13          but I don't think there is much doubt about Football Shirts  
14          as far as I know.

15                 Very well. On that basis what, at least  
16          provisionally, would be a sensible programme for the  
17          exchange of skeleton arguments?

18        MR GREEN: In terms of a date is this?

19        THE PRESIDENT: In terms of a date, yes.

20        MR GREEN: Are we assuming consecutive exchange?

21        THE PRESIDENT: I would have thought that it would be probably  
22          useful ----

23        MR GREEN: I have no objection to consecutive exchange.

24        THE PRESIDENT: - for the two appellants to go first and for  
25          the OFT to reply.

26        MR GREEN: I have no problem with that. The reality is that  
27          we will probably have heavier closing submissions once we  
28          have seen the evidence and analysed that than opening  
29          submissions, but that is often the way in trials. It may  
30          be sensible to do it ten days before and five days before.

31        MR BREALEY: Is that necessarily the right way round?  
32          Although it is our appeal, Mr Doctor was going to open the  
33          case.

34        THE PRESIDENT: At the moment, Mr Brealey, analytically  
35          speaking, despite the fact that there is a decision, as  
36          soon as you put that decision in issue by appealing, the  
37          burden remains on the OFT to satisfy us that it is proved.  
38          Now, you could logically say that that involves the OFT



1 opening and going first. In this particular case the OFT  
2 sets out its stall, however, more or less in the decisions  
3 so, apart from what is in the decision and any further  
4 witness statements that it has, that is its case. I would  
5 have thought logically next comes your synthesis, as it  
6 were.

7 MR BREALEY: I am happy.

8 MR DOCTOR: Can I just say that I think we had discussed this  
9 previously and either agreed, or at least I understood that  
10 we had agreed, that we would call our witnesses first, even  
11 though we said that we did not mind if the appellants  
12 opened the case first. If they would like me to open  
13 first, I am happy to do it but I will stand by what I  
14 agreed to then.

15 MR GREEN: That is as I understood it. Technically, the OFT  
16 has burden of proof; we open the case and they call their  
17 witnesses first. On that basis, if we have produced our  
18 skeleton ten days before the hearing and then the OFT  
19 produced its skeleton five days before, that would give the  
20 tribunal ----

21 THE PRESIDENT: Just looking at the calendar, 3rd May is the  
22 May bank holiday so, if we are talking about five working  
23 days, that would suggest that, if the OFT served its  
24 skeleton on 30th April and you were to serve yours the  
25 Friday before, which is the 23rd ----

26 MR GREEN: I have a slight problem. I am doing a two week  
27 arbitration in Amsterdam during that week. That would be  
28 effectively 17 days before the hearing started, if it is  
29 the 23rd.

30 THE PRESIDENT: We, the tribunal, need everything at least a  
31 few days before, so at least by the 4th. What is your  
32 suggestion, Mr Green? We will fit in round you. There is  
33 no reason why you should not do it earlier, if you want!

34 MR GREEN: I would have to speak to Miss Demetriou!

35 THE PRESIDENT: The week before is Easter.

36 MR GREEN: My problem is that my arbitration is the two weeks  
37 in the middle of April. I am not certain which days these  
38 are, the 27th or the 28th. Would Wednesday the 28th be

1           satisfactory?

2   THE PRESIDENT:  If you served yours on Wednesday the 28th, that  
3           would leave the OFT to serve theirs on - would Wednesday  
4           the 5th be a possible day?  There is the bank holiday in  
5           the meantime.

6   MR DOCTOR:  Yes.

7   THE PRESIDENT:  OK, Wednesday the 28th and then Wednesday, 5th  
8           May.

9   MR GREEN:  Thank you.

10  THE PRESIDENT:  That gives us at least an outline timetable, I  
11           think.  Very well.  What other issues do we need to  
12           address?

13  MR GREEN:  We have one other matter which we have asked for,  
14           what one might describe as residual disclosure in  
15           accordance with the terms of your direction in the Umbro  
16           case.  This relates to Hasbro's application for leniency  
17           and the documents concerning that, including draft witness  
18           statements.  Indeed, we include within that the draft  
19           statements produced for the purpose of this hearing,  
20           because they are now to be treated as documents which were  
21           put to us in the Rule 14 procedure following your last  
22           judgment, and we would have thought it falls within the  
23           scope of your ruling in Umbro, paragraphs 44 and 45.  I  
24           don't know if you want to be reminded of that?

25  THE PRESIDENT:  Well, probably not at the moment, Mr Green.  My  
26           impression is that the last letter from the OFT was to say,  
27           well, can you just be a bit more precise and we will think  
28           about it.

29  MR GREEN:  We have sent a letter.

30  THE PRESIDENT:  Being more precise?  I have seen a letter of  
31           27th November.  Is there something later than that?

32  MR GREEN:  One of today.

33  THE PRESIDENT:  I don't think that has quite got through, at  
34           least to me, yet.

35  MR GREEN:  Perhaps I can hand up my copy.

36  MR DOCTOR:  Perhaps I can just tell you our view.

37  THE PRESIDENT:  Yes.

38  MR DOCTOR:  The letter this morning sets out the request in

1 two paragraphs, two categories. The first category is  
2 Hasbro's application for leniency in this case which  
3 includes any witness statements or draft witness statements  
4 made in the course of that. As we do not know whether any  
5 such statements exist, we would also require disclosure of  
6 the drafts of the most recent witness statements for  
7 Thompson, Wilson and Bottomley. We believe that such  
8 drafts are subject to the same considerations as those  
9 dealt with at paragraph 44.

10 Let me deal with that before going on to the next  
11 point, which is the correspondence. The factual position  
12 is that there are no witness statements which were taken  
13 from the Hasbro employees when the investigation was  
14 conducted. As the applicants know, we made notes of  
15 interviews held which they have had. They have had all of  
16 those and they have had them from the beginning. There are  
17 no other interviews that were conducted which they do not  
18 have.

19 THE PRESIDENT: Yes.

20 MR DOCTOR: With regard to the most recent witness statements,  
21 those were granted not in connection with the application  
22 for leniency but in the year and a half after the leniency  
23 had been completed and they have nothing to do with the  
24 leniency application. Those were prepared for the purposes  
25 of this litigation. They have had the witness statements.

26 Any drafts are obviously subject to litigation privilege,  
27 a subject not covered at all by the Umbro judgment, and, if  
28 there is to be any argument as to whether there is an  
29 exception in the cases before this tribunal, we are not  
30 ready to deal with that yet and we would ask for some other  
31 opportunity to consider that.

32 That is the position with the witness statements.

33 With regard to the correspondence, at the time of the  
34 investigation there was an application for leniency by  
35 Hasbro and there was some response and some further  
36 correspondence about that. The outcome, as is known, was  
37 that Hasbro was granted 100 per cent leniency, so that  
38 exists and, without argument, our position on that is that

1 that has no relevance whatsoever to these issues in dispute  
2 in this case. It is not covered at all by anything that  
3 was decided in the Umbro decision. Indeed, if the Umbro  
4 decision is to be referred to, we will make submissions  
5 about that decision which, far from dispensing with the  
6 requirement of relevance, is based largely on the  
7 requirement for relevance of the documents.

8 THE PRESIDENT: Yes. Mr Green?

9 MR GREEN: If I can just take those points, so far as the  
10 leniency application is concerned and the draft witness  
11 statements, it really is not true any longer to say that  
12 they were prepared for litigation. That was in a sense the  
13 real issue that we argued about last time. They have now  
14 been put to us as part of an administrative procedure,  
15 albeit that originally they were prepared for litigation.  
16 That is water under the bridge. Those are the three  
17 witnesses who were interviewed as part of the leniency  
18 application and, to that extent, it is artificial to draw a  
19 distinction between leniency and some other form of  
20 evidence adduced in the course of the administrative  
21 procedure.

22 The purpose of the direction in Umbro was to ensure  
23 that statements and draft statements which may be relevant  
24 to credibility or to veracity in the course of cross-  
25 examination were disclosed. There are some real issues of  
26 credibility and veracity in this case. We now know, for  
27 example, that the OFT do not rely upon some of the notes of  
28 interviews. Mr McCulloch is an example. We don't know  
29 what was said by Hasbro on their behalf in the course of  
30 the leniency application. There is a great deal of  
31 redacted material. It goes to motivation, allegations made  
32 and, in a sense, the real issue of credibility of some of  
33 the witnesses who are going to be put forward, whether  
34 there is inconsistency between what they say and what  
35 Hasbro said. These may be very serious issues when, at the  
36 end of the day, after a ten day trial, you will have to  
37 decide who you believe and who said what to whom.

38 THE PRESIDENT: What are we in fact talking about? Are we

1 talking about earlier drafts of the three witness  
2 statements that are now relied on in the decision or are we  
3 talking about some other documents?

4 MR GREEN: There are those three drafts there. There is  
5 material from Hasbro to the OFT in relation to their  
6 leniency application. We have seen some of that but there  
7 are very large parts of documents which have been redacted.  
8 There is Hasbro's submissions at the oral hearing on  
9 leniency. You may recollect that the transcript is  
10 redacted so far as the first five or ten pages are  
11 concerned. So there are different categories of  
12 information and that is what we have not yet seen.

13 THE PRESIDENT: I think that we are most unlikely to want to  
14 decide this kind of issue today. Apart from anything else,  
15 as Mr Doctor points out, it is quite an important issue and  
16 one which needs quite a bit of thought, that is to say  
17 whether and to what extent earlier drafts of witness  
18 statements relied on by the OFT and/or documents submitted  
19 by another party in the leniency proceedings, in the  
20 circumstances of this case, are disclosable in the course  
21 of an appeal.

22 I would have thought that, if you want to pursue this,  
23 we will need to have a date for an interlocutory hearing on  
24 it, if it is pursued or if it cannot be resolved by  
25 agreement.

26 In relation to the Hasbro material, I don't know  
27 whether there Hasbro now would assert an overwhelming  
28 interest in maintaining confidentiality for that. I just  
29 don't know. It might be a matter for the OFT to check.

30 MR GREEN: Perhaps we can leave it such that the OFT will  
31 check. We will see what answer we get from the OFT once  
32 they have considered our letter.

33 THE PRESIDENT: If you want to pursue it, I think you would  
34 have to make a reasoned application supported by an  
35 argument, the OFT would need to produce at least a skeleton  
36 in reply and we would have to set aside a morning to argue  
37 it.

38 MR GREEN: We can do that if necessary.

1 THE PRESIDENT: I think we will just leave it on that basis for  
2 the time being.

3 Are there other matters that we need to address today?

4 MR BREALEY: Just before the tribunal came in, I was asking  
5 the OFT, although we have been sent the decision by way of  
6 e-mail, we have not actually been served with the annexes  
7 yet. I would ask that the parties be served with the  
8 annexes. I appreciate that we have some attached to Rule  
9 14 and some attached to the original decision, but there  
10 were obviously some questions of what needed to be redacted  
11 from the documents. I think that we should be formally  
12 served with the annexes so that we have a complete  
13 decision.

14 THE PRESIDENT: Yes. That applies to the tribunal as well, I  
15 think. I don't think we have the annexes yet.

16 MR BREALEY: I understand that it is not going to be a  
17 problem.

18 MR DOCTOR: No. We thought we had done it. We will do it  
19 now.

20 MR BREALEY: Thank you.

21 THE PRESIDENT: Let us see that it is done.

22 Very well. If there is nothing else, I think that  
23 does conclude our business this afternoon. Thank you all  
24 very much indeed.

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