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1 Thursday, 13th May 2004

2 (10.30 am)

3 THE CHAIRMAN: Good morning, Mr Green.

4 MR GREEN: Good morning. Just one very minor housekeeping
5 matter, a slight change of order of witnesses this
6 morning. Mr Cowley will be going first, Mr Riley will
7 be going second, because he is taking a day off work, so
8 he can get away; then Mr Burgess, and then Ms Gornall.

9 My first witness this morning is Mr Alan Cowley.

10 THE CHAIRMAN: Yes, thank you.

11 MR ALAN COWLEY (sworn)

12 Examination-in-chief by MR GREEN

13 THE CHAIRMAN: Thank you, Mr Cowley. Do take a seat, make
14 yourself at home. Thank you for coming today. There
15 will be some questions coming from over there, but if
16 you could in general direct your answers over here, so
17 that we can understand what you are saying. Thank you
18 very much.

19 MR GREEN: Mr Cowley, there should be a bundle of documents
20 in front of you, witness statements volume 1, tab 10.

21 Is that your statement in front of you?

22 A. Yes, it is.

23 Q. Could you turn, please, to the last page; do you see
24 a signature there?

25 A. I do.

1 Q. Is that your signature?

2 A. It is.

3 Q. Can you confirm that this statement is true to the best
4 of your knowledge and belief?

5 A. I do.

6 MR GREEN: Thank you.

7 Cross-examination by MR DOCTOR

8 MR DOCTOR: Good morning, Mr Cowley.

9 A. Good morning.

10 Q. Mr Cowley, you have been employed by Littlewoods in the
11 buying department for approximately 12 years,
12 responsible for a range of toys, is that right?

13 A. That is correct.

14 Q. You became responsible for pre-school toys in 1991, and
15 from 2000, musical toys.

16 A. That is true.

17 Q. Was that in addition to or in replacement of the
18 pre-schools?

19 A. In addition to.

20 Q. In addition to, so from 2000 you have got pre-schools
21 and musical toys.

22 A. Correct.

23 Q. If you look at your witness statement, paragraph 3,
24 under the heading, "The retail market for toys", you
25 say:

1 "The retail margins on branded toy products are low.
2 This leads retailers invariably to go out at recommended
3 retail prices."

4 By "invariably" -- that usually means in English
5 that all the retail prices on all the toys are always
6 simply the RRP. That cannot possibly be correct, can
7 it, Mr Cowley?

8 A. We are talking here about branded toy products. By
9 branded toy products, I mean high branded products, TV
10 promoted products which are in the eye of the public.

11 Q. Yes. Those branded products, it cannot possibly be
12 true, certainly before autumn/winter 1999, that all
13 branded toys always go out at the recommended retail
14 price, and there are no exceptions.

15 A. No, that is not true.

16 Q. It is not true. Now we have heard for years that Argos
17 have been aggressive price cutters, always pre-empting
18 the market and seeking to be the lowest, and this alone
19 suggests that even if everyone else was charging RRP, at
20 least Argos, when its catalogue came out, was always
21 lower than the RRP.

22 THE CHAIRMAN: Would you say that was right, Mr Cowley?

23 A. Yes.

24 MR DOCTOR: Indeed, if we go to the pricing analysis, if we
25 can have a look at that document, it will be given to

1 you.

2 THE CHAIRMAN: You have probably not seen this before,
3 Mr Cowley.

4 A. No, I have not, sir.

5 MR DOCTOR: This is an analysis of the prices in certain
6 catalogues on the branded toys which are the subject of
7 this matter. If you look, for example, in the bundle in
8 front of you, there is a tab B and then a 3.

9 If you go to the second page in that, let me just
10 tell you what you are looking at. You are looking at a
11 comparison between the Argos and Littlewoods catalogue
12 prices of these named toys down the left-hand side,
13 together with the RRP's in the particular catalogues
14 referred to at the top.

15 The one I want to look at is autumn/winter 1999.

16 THE CHAIRMAN: I am sorry, what page are you on, Mr Doctor?

17 MR DOCTOR: It is the second page of B3. This is the other
18 toys category, not Action Man, not core games, but
19 the --

20 THE CHAIRMAN: Other boys' toys?

21 MR DOCTOR: Yes. If you go to autumn/winter 1999, at this
22 stage, as far as we know, the alleged events of this
23 case did not yet apply to these toys; Mr Cowley, you
24 will see that the statement you make in your witness
25 statement is belied in this catalogue alone.

1 If we start with Monopoly, the recommended retail
2 price is £29.99, the Argos price is £28.99, and the
3 Littlewoods price is £29.95.

4 Bop It, £19.99, £19.99, £19.99; that seems to be the
5 same.

6 Then we have Baby All Gone, £19.99, £19.50, £19.89.

7 "Get Set" Chocolate Factory, £19.99, £18.99, £19.50.

8 "Get Set" Mastering Mosaics, £19.99, £19.45, £19.50.

9 Then Spirograph, £14.99, £14.99, £14.75.

10 Super Sticker Factory, £17.99, £17.90 and £18.50.

11 So it looks as if in only one example is any of these
12 two distributors charging the recommended retail price,
13 and they are both charging different prices, so I think
14 to say, as you did in your statement, that on branded
15 toys retailers invariably go out at the recommended
16 price certainly did not apply in 1999 to these toys, did
17 it?

18 A. It would appear not, from what -- from the evidence you
19 have given me, yes.

20 Q. We have heard also that Littlewoods wanted to be seen in
21 the market as price cutters; would you agree with that
22 as well?

23 A. Yes.

24 Q. Even in your own category of pre-school toys, I think
25 your statement is probably incorrect; have a look in the

1 witness bundle at tab 9. Do you have a typed version of
2 an interview with you conducted by the OFT on
3 17th October?

4 A. Yes, I do.

5 Q. So this was an interview conducted with you on that
6 date, and you have signed it at the end, I see.

7 A. Are you asking me? Sorry, I thought it was a statement
8 you were making. Yes, that is correct, I did.

9 Q. And presumably you were happy that it recorded
10 accurately the contents of what you had said in the
11 interview?

12 A. Presumably so, yes.

13 Q. If you look on the front page, it says, near the bottom:

14 "AC: Hasbro is not one of my bigger accounts, I just
15 do pre-school with Hasbro. Most manufacturers recommend
16 prices. We look at these, and sometimes we go out at
17 that price. The pre-school market is very competitive.
18 Suppliers recommend prices, but we usually take it with
19 a pinch of salt, and think others will go below it, so
20 we often go below it."

21 So that too is wholly inconsistent, is it not, with
22 the statement in paragraph 3 of your witness statement?

23 A. Well, it was written six months before the other
24 statement, I believe.

25 THE CHAIRMAN: The statement in the interview with the OFT

1 that we have just looked at, about the pre-school market
2 being very competitive, "We often go below RRP", is that
3 right, Mr Cowley?

4 A. That is correct, sir, yes.

5 THE CHAIRMAN: Thank you very much.

6 MR DOCTOR: Catalogue retailing is largely about prices, is
7 it not?

8 A. Yes.

9 Q. Small differences have a very large impact, and the
10 public will notice these differences and react
11 accordingly; would you agree with that?

12 A. Largely so.

13 Q. They will go for the lower price in preference to the
14 higher price; it makes sense, does it not?

15 A. In general, yes.

16 Q. Do you agree with that?

17 A. In general, yes.

18 Q. Now you mention in paragraph 5 of your witness statement
19 the GUS takeover of Argos, and the change in the
20 attitude of Argos. Do you want to have a look at that?
21 You say:

22 "Following the takeover of Argos by GUS in 1998,
23 Argos made it publicly known that they would in future
24 seek more margin. At Littlewoods, we assumed therefore
25 that Argos' prices would not be as competitive in the

1 future as they had been in the past. Everybody in the
2 industry knew of this change of policy. I remember
3 reading about it this in the Times or the Telegraph.
4 This change of policy by Argos was bound to affect the
5 retail market as a whole, because Argos' earlier
6 aggressive volume building, but price cutting, tactics
7 were forcing other retailers to trade at little or no
8 profit, or even at a loss in some areas."

9 Now this sentence next I want you to think about:

10 "The new Argos policy meant that it was now very
11 likely to go out at recommended retail prices."

12 It must follow from that statement that if the
13 policy meant that it was going to go out at recommended
14 retail prices, and if you came to know of that policy,
15 and if it is true, as you say, that the public is very
16 sensitive to even small differences in price, and if, as
17 you say, Littlewoods wanted to be seen as a price
18 cutter, then putting all of those together, surely
19 Littlewoods would have taken the opportunity in its
20 autumn/winter 1999 catalogue to undercut the RRP?

21 A. Is that a question?

22 Q. Yes.

23 A. Not necessarily so, we were also looking for margin at
24 the same time.

25 Q. But you could still get some margin by going close to

1 RRP but undercutting by a small amount which would give
2 you the advantage of beating Argos, coming out at the
3 lower price, and all the advantages that would follow
4 from that.

5 A. I did not see it that way at the time, no.

6 Q. You did not. Well, as a matter of fact, it may not have
7 been your area, but in the autumn/winter 1999 catalogue,
8 on the core games and Action Man toys, the two
9 organisations came out at exactly the same prices on all
10 the items that were common, except for one. Are you
11 aware of that?

12 A. Not at the time, no. I am aware now, yes.

13 Q. What I am going to suggest to you is that contrary to
14 what you say here, that the Argos policy meant it was
15 now very likely to go out at recommended retail price,
16 in fact there was no such policy of Argos at the time;
17 there was, as you say, a policy that Argos was going to
18 go out at recommended retail price, or very likely to go
19 out, that there was no such policy.

20 A. It was hardly a policy.

21 Q. Well, exactly, and more importantly, let us put it this
22 way, the newspapers you read never said, "Argos now has
23 a policy in which it is very likely to go out at RRP".

24 A. But the newspapers did say, to the best of my
25 recollection, and it is four or five years ago, that

1 Argos would be looking for increased margin; that was
2 commonly accepted in the trade.

3 Q. Yes, but as we have heard in the tribunal over the last
4 few days, there are many, many ways in which
5 an organisation can achieve increased margin which do
6 not include going out at recommended retail price. So
7 why would you have concluded at the time, as you say you
8 did from these Times and Telegraph newspapers, that this
9 meant that Argos was likely or very likely to go out at
10 recommended retail price?

11 A. It was just common knowledge within my working
12 environment and within the toy industry in general, that
13 Argos prices would be higher that year, in order to gain
14 a greater overall margin.

15 Q. You see, elsewhere in your statement, you appear very
16 reluctant to accept or believe reports that you
17 received. You say that suppliers often phone you up and
18 say that Argos --

19 THE CHAIRMAN: Where are we, Mr Doctor?

20 MR DOCTOR: We are, for example, at the end of paragraph 7.
21 You say that suppliers often phone you -- do you want to
22 have a look at that:

23 "Suppliers often ring up and say that Argos are
24 going out at such and such a price, and try and persuade
25 you to go out at the same price as well. However,

1 I have been caught too many times by that device to
2 believe it. If I went out at £14.99 and Argos went out
3 at £12.99, I would have had a lot of egg on my face."

4 So when people actually phone you up and say, "Argos
5 is going out at RRP", you do not believe that, but when
6 you read something in the newspaper which says they want
7 to increase margin, you say that means it is very likely
8 to go out at RRP. What I am suggesting to you is that
9 that statement cannot be true, Mr Cowley, can it?

10 A. Well, in reply to that I can only state that if a
11 supplier rings me up and tells me that Argos or
12 Toys R Us or anyone are going out at a greater price,
13 I would not believe it, because that is their job, to
14 try and persuade me to do that.

15 When I talk about it was generally believed that the
16 Argos prices would go up in order to get greater margin,
17 this is because it was stated by the chief executive of
18 the company, Stuart Rose, and his -- the chap who came
19 after him. It was public knowledge from the top of the
20 tree, so to speak.

21 Q. Yes, that they wanted increased margin, no one is
22 disputing that. The question is how you could have, as
23 you say, say that the policy meant -- that is what you
24 say it meant. What you read in the newspapers, the
25 policy meant that Argos was very likely to go out at

1 RRP. What I am asking you to do is to concede, unless
2 you want to justify it, that that statement is not
3 correct; it did not mean that at all, to you or --
4 A. That was my perception at the time.
5 Q. I am sorry?
6 A. That was my perception of it at the time and it still
7 is.
8 Q. I am suggesting it could not have been your perception
9 at the time, because you are a naturally sceptical
10 person, and you are very hesitant to believe reports
11 that you receive that anyone is going to go out at RRP.
12 A. I am not quite sure what you are asking me.
13 Q. Well, I am suggesting to you that this was not your
14 perception at the time, you have just written that in
15 your statement, that Argos was very likely to go out at
16 RRP. This was not a perception you obtained from the
17 newspapers and from general reports in the industry?
18 A. Why was it not?
19 Q. Well, I am putting it to you that it was not, because
20 even when you do receive a report that they are from
21 a supplier, you do not believe it; why would you have
22 believed it when you simply read in the newspapers that
23 Argos was seeking margin?
24 A. Because this was a public statement by the managing
25 director of the company.

1 Q. Yes, that they are seeking margin. Why does that mean
2 that they are very likely to go out at RRP? I am
3 offering you an opportunity to try and explain that --

4 A. Because that was the obvious way to increase their
5 margin.

6 Q. Well, there are many ways they can increase their
7 margin, we have been through all of that. They can
8 change the product mix, bring in more non-branded goods,
9 and do all sorts of things, make themselves leaner, sack
10 people. There are many things they can do. Why does it
11 mean -- or try and explain why it means that it is very
12 likely that they are going to go out at RRP on branded
13 toys.

14 A. Because that is the obvious way of increasing your
15 margin.

16 Q. Well, it is one of the ways, Mr Cowley.

17 A. It is one of the ways, but the major way.

18 Q. But it is the one way, in the case of branded toys --
19 you say the market is extremely competitive; why should
20 Argos therefore have simply wanted to go in at RRP?

21 A. In order to increase their margin.

22 Q. All right. I just want to deal briefly with the
23 position of Argos in the marketplace. It was generally
24 understood at the time, was it not, that Argos was the
25 price leader in the market?

1 A. Correct, yes.

2 Q. And that was when Argos was the lowest in the market.

3 A. Lowest what?

4 Q. It was the price leader at a time when it was the lowest
5 generally in the market.

6 THE CHAIRMAN: Lowest on price.

7 A. Oh yes. Indeed, yes.

8 MR DOCTOR: So you make the point in paragraph 5 that if
9 Argos went up to RRP, then the major High Street
10 retailers would do the same.

11 A. Sorry, I am not with you. Whereabouts are you?

12 Q. Well, without looking at your statement, would you agree
13 with that as a general proposition?

14 A. Would you repeat that, please?

15 Q. If Argos went up to RRP, then major High Street
16 retailers would do the same.

17 A. Yes.

18 Q. You say that that is generally true as a proposition at
19 the time.

20 A. Generally true, yes.

21 Q. But have a look at what you have actually written in
22 your statement. Paragraph 5:

23 "The new Argos policy meant that it was now very
24 likely to go out at recommended retail prices. If Index
25 did the same it was in our view also likely that the

1 other major High Street retailers such as Woolworths and
2 Toys R Us would take the opportunity to maximise their
3 margins by doing the same thing."

4 There is a crucial assumption there, is there not,
5 a crucial assumption on which this would follow. The
6 other High Street retailers would follow Argos if Index
7 did the same; is that not correct?

8 A. Yes.

9 Q. If Index undercut Argos, it would not any longer be the
10 price leader to which all the High Street retailers
11 would follow; that is Argos would not any longer --

12 A. That Argos would not be.

13 Q. If Index was going out at a pound below RRP, or below
14 Argos, the High Street retailers would follow Index.

15 A. That is a difficult one, I am afraid to say, because
16 Argos' situation -- although Argos is a discounter and
17 had the same retail operation as ourselves, as Index,
18 a catalogue retailer, we were unique in that area, there
19 was only two of us in the UK.

20 However, Argos was huge compared with Littlewoods,
21 compared with Index; Argos had, in the toy trade,
22 something like 19 per cent of the market, and Index had
23 something like 3.5 per cent of the market. So we were
24 alike in that we were both discounters, but we were not
25 as important to the rest of the trade as Argos were.

1 We looked upon Argos as our major competitor by far;
2 Argos did not look upon Index as a major competitor,
3 their major competitors were Woolworths and Toys R Us,
4 who also had a similar sort of percentage of the market.
5 So people would not necessarily have to follow
6 ourselves, they would have to follow Argos, and they
7 would take into consideration our prices, but would not
8 necessarily follow our prices.

9 Q. Look at your own witness statement, Mr Cowley,
10 paragraph 6:

11 "Catalogue retailing, particularly as conducted by
12 Argos and Index, who are regarded as discounters, is
13 largely about price. Most of our customers will tend to
14 have the Index and Argos catalogues at home."

15 All right? They are making comparisons between
16 these two catalogues. If Argos and the High Street
17 retailers start a policy of going for recommended retail
18 price, and Index is consistently, over a number of
19 catalogues, beating them, because for some reason they
20 are all now going for RRP, and Index beats them over
21 a wide range of well publicised toys, over a number of
22 catalogues, that situation is not going to remain the
23 same, with the High Street retailers having themselves
24 outsold by Index, is it?

25 A. No, it would not, because we would be out of business.

1 If we have consistently undercut Argos for a number of
2 years, as you suggest, on prices, then we would be
3 making no money at all, we would make a negative
4 contribution, and Index would simply no longer exist.
5 We would go out of business.

6 Q. You mean unless everybody charges RRP, you are going to
7 go out of business? Come off it, Mr Cowley.

8 A. I am not saying that.

9 THE CHAIRMAN: I think he said, "If we were undercutting
10 Argos for a number of years" then you would be in
11 difficulty.

12 A. Yes.

13 MR DOCTOR: Argos is charging RRP; all the other High Street
14 retailers are charging RRP, just concentrate on that.
15 If Index is undercutting them over a number of
16 catalogues, by a small amount, enough to draw the
17 attention of the public to the fact that Index is always
18 cheaper, Index is not going to go out of business,
19 Index's business is going to grow.

20 A. That is one way of looking at it, but we are talking
21 here of a toy department in which -- if I as a toy buyer
22 consistently undercut Argos over a number of catalogues,
23 which is what has been suggested, I would not be making
24 the margin required in my department which I have to
25 meet -- we have a target to meet, given to us by senior

1 management, and I would be failing to reach that if
2 I was doing what has been suggested.

3 Q. But that is only on the suggestion that Argos itself is
4 price cutting. If Argos is charging the highest price
5 in the market, RRP, and you are undercutting them
6 consistently, you are going to do rather well, if you
7 could actually bring about such a situation. But just
8 let us assume theoretically that this can happen: Argos
9 goes out over two or three catalogues at the highest
10 price in the market, and Index comes in at 50p lower,
11 consistently, that is going to have a dramatic effect on
12 Index's business, is it not?

13 A. In that hypothetical situation, yes, it would.

14 Q. Yes. Well, that is the only hypothetical situation we
15 are talking about, because I said to you: if Argos goes
16 out at RRP, the other High Street retailers will follow
17 it, but only as long as it is the lowest. If Index is
18 lower, the High Street retailers will follow Index.

19 A. No, I am sorry, I cannot go along with that.

20 Q. Look, the whole thing is totally hypothetical, is it
21 not, because it is unlikely to reach a situation in a
22 market in which Argos for some reason or other decides
23 to go out at RRP and consistently chooses RRP when it
24 sees that in every catalogue Index is pricing lower than
25 it on these high-profile goods; that is totally

1 impossible anyway, is it not, in any proper market.?

2 MR BREALEY: Sir, from yesterday's criticism of not taking
3 up an unfair question, we have got a hypothetical
4 possibility economic model here which I think is very
5 unfair to the witness.

6 THE CHAIRMAN: Can we try and break some of these questions
7 down a little bit into more bite-sized chunks, I think,
8 Mr Doctor?

9 MR DOCTOR: I will, sir.

10 Mr Cowley, I agree that it is not the real world,
11 but we are starting from your premise that Argos has now
12 announced a policy when it is going to go out at RRP,
13 okay? Let us assume that, that that is what happened,
14 and what you say you understood from the Times and the
15 Telegraph.

16 You also say that the rest of the market always
17 follows Argos, so the rest of the market, for some
18 bizarre reason, is all going out at RRP, okay? I am not
19 saying this can happen, I am saying on your postulate
20 this is what happens.

21 Index does not have to have deep discounting, it
22 just cuts 50p off the RRP; Index is the cheapest in
23 those circumstances, right?

24 A. Yes.

25 Q. We know that it is not going to happen in the next

1 catalogue, because your competitors are going to respond
2 to that. They are not going to allow a situation to
3 develop whereby Index is always 50p cheaper than
4 everybody else in the marketplace.

5 A. No.

6 Q. Very soon, Index is going to have 100 per cent of the
7 business, and the others will all be wiped out, if they
8 stick to this mad policy; correct?

9 A. Are you saying that is correct?

10 Q. I am asking you: if everybody agrees to stick to RRP,
11 but Index, with 7 million catalogues out in the market,
12 charges 50p lower than everybody else consistently over
13 a period of time, will not the public rather choose to
14 buy their goods for 50p less, or whatever the difference
15 is, than go to the high cost retailers and Argos?

16 A. Mm.

17 Q. Does it not follow?

18 A. Well, it would only happen for one catalogue.

19 Q. Exactly. Well, Mr Cowley, that is the point. You say
20 that the rest of the High Street retailers were all
21 followers of Argos, but as you say in your statement, if
22 Index followed Argos as well then the High Street
23 retailers would also follow Argos, but if Index
24 undercuts Argos, the High Street retailers are going to
25 follow Index, not Argos.

1 A. I am sorry, I cannot accept that.

2 Q. Well, all right, we have taken it as far as possible.

3 Let me put this to you: you are perfectly aware that
4 unless you had an assurance of some kind that Argos
5 would go out at RRP, an assurance in your own mind that
6 it was going to go out at RRP, your natural instinct
7 would be to try and undercut it, if possible.

8 A. That is a difficult question to answer. Certainly on
9 some lines, yes.

10 (11.00 am)

11 THE CHAIRMAN: Why was it difficult, Mr Cowley?

12 A. I meant really that I would not try to undercut them on
13 every line, I would only go for certain lines, to show
14 that we were cheaper in what I thought would be the most
15 successful products.

16 MR DOCTOR: In May 2000, you received and you saw the e-mail
17 which Mr Thomson had sent to various personnel at
18 Littlewoods. Do you want to just have that put in front
19 of you? It is the core bundle, page 91.

20 You will see at the bottom of that list of prices
21 and products is three of your products.

22 A. Yes, that is true.

23 Q. Tweenies: All Standard Plush, £14.99, All Story Time
24 Product, £24.99, and Cuddle and Squeeze Doodles, £24.99.
25 Those are the pre-school products on this list?

1 A. That is true.

2 Q. So plainly, this e-mail would have been of some interest
3 to you.

4 A. It involved my products, yes.

5 Q. Now by the time --

6 THE CHAIRMAN: Just hang on, Mr Doctor, Mr Cowley is helping
7 himself to a well deserved glass of water.

8 A. Thank you.

9 MR DOCTOR: By the time you received this, May 18th 2000,
10 you already knew what Hasbro's RRP's for any of these
11 items were, did you not?

12 A. I knew what they had been pricing in the current
13 catalogue, yes.

14 Q. No, I am asking if you knew what Hasbro's RRP's --
15 Hasbro's recommended prices, the list they send you --

16 A. Yes, I would.

17 Q. You would have known that. And you already knew by this
18 stage what items you were going to include in the
19 Littlewoods catalogue for autumn/winter 2000.

20 A. Yes, that is true.

21 Q. Due to be published in July 2000.

22 A. Yes.

23 Q. Here it tells you that Mr Thomson is confirming (a) the
24 list of products which Argos will include in the
25 autumn/winter 2000 catalogue, and (b) the prices that

1 Argos have committed to; do you agree? That is what it
2 says.

3 A. Yes.

4 Q. It makes no mention of the RRP's in relation to these
5 listed items, does it?

6 A. No, it does not.

7 Q. Right. In your witness statement at paragraph 14, you
8 refer to the fact -- just leave that open, and look at
9 paragraph 14. You say that the e-mail mentions various
10 price points and opportunities to make more margin, and
11 you say that these are common issues for discussion with
12 suppliers in the trade.

13 A. Yes.

14 Q. Well, what is not common, is it, is to be told in an
15 e-mail, or at all, that your biggest competitor has
16 committed to include certain products in its next
17 catalogue, and to price them at a particular price.

18 A. No, it is not.

19 Q. That is extremely uncommon; in fact, highly surprising
20 and most unusual.

21 A. Yes, it is.

22 Q. And in fact, you say in your discussions with Mr Thomson
23 you would never tell him what prices you are going out
24 at.

25 A. No, I would not.

1 Q. That is highly confidential information, is it not?

2 A. It is.

3 Q. So if that is correct, you would presumably have been

4 very surprised if any other retailer had divulged that

5 secret information to Hasbro, and more so if Hasbro had

6 passed it on to you.

7 A. Yes.

8 Q. So an e-mail which sets that out in fairly public form,

9 at least to the people involved in this e-mail, would be

10 something extremely out of the ordinary.

11 A. Yes, it would.

12 Q. Yet you say in paragraph 14 that you did not attach any

13 importance to the e-mail.

14 A. I do.

15 Q. Now that suggests that you were not surprised by it.

16 A. Well, you may suggest that, but my reason was that I did

17 not -- I did not attach much importance to it. It

18 seemed to me to be largely to do with products which

19 were not mine, it was talking about core games and

20 Action Man at the beginning, then it went through

21 a whole list of other products which were not mine, and

22 ended up with three products only of mine.

23 THE CHAIRMAN: Yes.

24 A. I got the impression that Mr Thomson was doing that in

25 order to try and persuade ourselves in some sort of

1 psychological way that these were the general prices and
2 that is what we should be going out at. I saw it as
3 a bit of PR on Thomson's behalf to try and impress us
4 that these were the prices, and I did not believe him.

5 MR DOCTOR: Mr Cowley, I am going to suggest that the reason
6 why you did not express much surprise was because it
7 fitted in essentially with what you were expecting to
8 see, namely that Argos and Littlewoods, through the
9 supplier, are arranging to charge similar prices on
10 these items that are mentioned.

11 A. I am sorry, what is the question?

12 Q. I am saying the reason that you did not express or
13 evince surprise at the time was because it fitted in
14 largely with what you really expected was going to
15 happen, maybe not quite as starkly as this, but
16 nevertheless, that is what was going on, that Argos and
17 Littlewoods were exchanging this information through the
18 suppliers that they would both go out at these prices in
19 their next catalogue.

20 A. That is an absolute rubbish explanation.

21 Q. Well, I am saying that if it had been as surprising and
22 unexpected as you suggest, and as unusual as you
23 suggest, you would have reacted in a very different way.

24 A. If what?

25 Q. If it had been as unusual, as out of the ordinary as you

1 say that it normally is, I suggest you and indeed --
2 well, let us --

3 THE CHAIRMAN: Just deal with the witness at the moment.

4 MR DOCTOR: You would have reacted in a very different way.

5 For example, let me help you: you might have gone to one
6 of your colleagues and said, "What on earth is going on
7 here? Is this chap mad? What is going on? Do you know
8 anything about this?"

9 A. May I explain here --

10 THE CHAIRMAN: Yes, please.

11 A. There are only three products here which are mine. This
12 might sound strange for such a large company as Index,
13 or for any large company, but our buyers are all -- we
14 have our own job to do, we work separately. We work
15 together obviously as a unit, but we have our own
16 targets to reach, and we do tend to get quite parochial.
17 All I am concerned about at that time is doing my job,
18 to look after pre-school and do the best job I could
19 with pre-school products.

20 THE CHAIRMAN: Yes.

21 A. I am really not interested in what the other three
22 buyers are doing, and what they were doing, provided it
23 did not interfere with myself. So this e-mail here is
24 just, to me, an e-mail from a supplier saying that these
25 are the prices that Argos are going to go out to, and

1 I just thought it was rubbish -- well, not rubbish, that
2 is not the right word. I believed -- these were the
3 prices I was going out at anyway, and I really gave it
4 no importance. I did not give the e-mail much
5 importance at all.

6 MR DOCTOR: Well, you are working there in an open plan
7 office, with people easily accessible to you.

8 A. Yes.

9 Q. And you speak to your colleagues easily and often.

10 A. Reasonably so, yes.

11 Q. Here is an e-mail which says:

12 "I am able to confirm the list of products and
13 prices that Argos have committed to. Games and
14 Action Man prices will continue to be adhered to ..."

15 A. This had nothing to do with me, sir.

16 Q. It may have had nothing to do with you, but it seemed to
17 include at least three of your products.

18 A. Mm.

19 Q. And these were three fairly important products, were
20 they not, at the time?

21 A. Yes.

22 Q. And it seems to be suggesting something going on as part
23 of a larger arrangement; if this came to you out of the
24 blue, as something completely surprising, I suggest you
25 would have raised it with somebody else and said, "What

1 is this, does it have anything to do with me?"

2 A. I just took them to mean these prices were what Hasbro

3 expected Argos to be going out at.

4 Q. And no one came to you and said, "What is this about?"

5 A. No, no one did.

6 THE CHAIRMAN: Prices that Hasbro expected Argos to be going

7 out at.

8 A. Yes.

9 MR DOCTOR: It certainly expresses it in much stronger terms

10 than that, does it not, Mr Cowley? It does not say,

11 "This is what we think Argos is going out at", it says,

12 "This is what Argos have committed to".

13 A. I can only remember that at the time, I did not give it

14 much serious consideration, because I was only concerned

15 with the three lines at the end, and they were the

16 prices which I already had in mind that we would go out

17 at.

18 Q. And these prices were the prices you had already chosen.

19 A. Yes, they were.

20 Q. And I put it to you that that confirmed that it was safe

21 then to go out at those three prices on your products,

22 because you knew now that the competition, Argos, was

23 going out at the same price.

24 A. But those were the prices that had already been set in

25 the marketplace.

1 Q. Yes. Well, let us go to that. You see that about six
2 months earlier you had had an exchange with Mr Thomson
3 about some Tweenies dolls. It is in paragraph 7 of your
4 witness statement.

5 This is taking us back to autumn 1999. At that
6 stage, as we understand it, the arrangement which we say
7 existed extended only to Action Man and core games, but
8 that was not your area, was it?

9 A. It was not, no.

10 Q. Now the Hasbro RRP for Tweenies Plush, back then in the
11 second half of 1999, is £14.99, and you say that at some
12 stage in the course of late 1999, Ian Thomson telephones
13 you and says to you that it is safe to go out on that
14 product at £14.99 because Argos were going out at that
15 price.

16 A. Yes.

17 Q. Now, at that stage --

18 THE CHAIRMAN: I am sorry, Mr Doctor, I have just lost where
19 we are in the witness statement.

20 MR DOCTOR: It is paragraph 7.

21 THE CHAIRMAN: Yes, thank you very much.

22 MR DOCTOR: At that stage, the second half of 1999, Tweenies
23 had just been introduced and were a hot new product,
24 were they not?

25 A. Yes.

1 Q. As far as we know, there is no agreement or anything
2 about that, and the agreement concerns lines you are not
3 involved in; Mr Thomson phones you up and says, "You can
4 go out at our recommended retail price because Argos are
5 also going out at that price", but you say in
6 paragraph 8 that you were intending to go out at £12.99
7 in spring/summer 2000.

8 A. Yes.

9 Q. And that was because it was a hot new product which all
10 the kids would want, and you wanted to put it in at a
11 good price; is that not so?

12 A. Well, not totally true, no, I was already selling this
13 item at £12.99; my intention was to keep the whole of
14 the price to £12.99 in the spring/summer catalogue.
15 That was all --

16 Q. I do not think it had been -- had it been in a previous
17 catalogue, the Tweenies doll?

18 A. No, but it had been in the Christmas catalogue of
19 autumn/winter 1999.

20 Q. Well, we are talking about late 1999.

21 A. Yes.

22 Q. We are talking about the publication of a catalogue
23 which is going to come out in January 2000.

24 A. Correct.

25 Q. And about that time you would like to go out at £12.99,

1 because obviously -- the recommended retail price is
2 £14.99?

3 A. Sorry, my wish was to go out at £12.99, because I was
4 already selling it at £12.99 prior to Christmas 1999.

5 Q. Well, that is not what you say in your witness
6 statement, Mr Cowley. What you say is:

7 "... I was going out on the Tweenies dolls
8 [paragraph 7]. At the time Argos and Index were
9 competing quite strongly on price, particularly on TV
10 promoted products. Ian's recommended retail price was
11 £14.99, but I did not believe that Argos would go out at
12 £14.99. I thought that because this was a high-profile
13 item, they might well choose to discount and move to
14 £12.99."

15 So it is not true --

16 A. But if you look at paragraph 8 --

17 Q. It is not true, Mr Cowley, as you are trying to suggest
18 now, that the only reason you were interested in £12.99
19 was because of inertia, you had committed yourself to
20 £12.99 in the Christmas catalogue, and therefore you did
21 not think of changing it. You were going out at £12.99,
22 as you explain in your witness statement, because you
23 thought that Argos would undercut on that highly
24 promoted must-have item, and that is why you decided to
25 go out at £12.99.

1 A. Well, yes, that is partially true, but I was already
2 selling this item for £12.99 prior to Christmas.

3 THE CHAIRMAN: Now you wanted to --

4 A. Ian Thomson -- sorry, if I may finish?

5 THE CHAIRMAN: Yes, carry on.

6 A. Ian Thomson wished me to price it up to £14.99 in
7 spring/summer. I felt it should go out at £12.99,
8 because I was already at £12.99, and Argos no way would
9 go out at £14.99, in my opinion, because they knew I was
10 already selling it at £12.99, so I thought that they
11 would try to meet me or match my price and go out at
12 £12.99.

13 THE CHAIRMAN: I see, so as long as you were at £12.99, they
14 would not go at £14.99?

15 A. I did not feel they would.

16 THE CHAIRMAN: You did not feel they would anyway. Now did
17 you want to tell us something about paragraph 8 of the
18 witness statement a minute ago, or have we already --

19 A. I was just trying to -- yes, thank you.

20 THE CHAIRMAN: Take your time.

21 A. Paragraph 8 says:

22 "I refused to confirm to Ian that I would go out at
23 £14.99. I intended to stick to my £12.99 price."

24 What I mean by that "stick to my £12.99 price" was
25 my price I was already currently standing at.

1 MR DOCTOR: Yes, all right. Anyway, that price was driven
2 by the fact that you thought Argos would not go to
3 £14.99.

4 A. Yes.

5 Q. When Ian Thomson phoned you, and he said, "Argos are
6 going to go out at £14.99, so it is safe for you to go
7 out at £14.99", you were very sceptical, as you say,
8 because suppliers are always telling you this sort of
9 thing, and you do not believe what they say.

10 A. Yes.

11 Q. So he told you to look at the Argos and Index catalogues
12 for the Action Man prices, and you would see that they
13 had both been at RRP's in the last catalogue.

14 A. Sorry, are you asking me a question?

15 Q. Yes, I am just asking --

16 A. I thought you were making a statement.

17 Q. That is what you say he told you.

18 A. I do, yes indeed.

19 Q. He said, to try and persuade you of the truth of what he
20 was saying, that Argos were going to go out at £14.99,
21 you had expressed your scepticism, but he said, "Well,
22 have a look in the last catalogue, autumn/winter 1999,
23 and have a look at the Action Man, and you will see
24 there that Index and Argos both went out at RRP";
25 correct?

1 A. Yes.

2 Q. And you said, "Well, even that is no guarantee; that is
3 Action Man, mine is pre-school toys".

4 A. Yes.

5 Q. So he then suggested to you that you should speak to
6 John McMahon, who was your buying director at the time;
7 correct?

8 A. Yes.

9 Q. Which you did.

10 A. I did.

11 Q. And presumably you told McMahon that Thomson had phoned
12 you, and that he said that Argos was going out at £14.99
13 on the Tweenies doll, but it was therefore safe for
14 Littlewoods to do the same, and that Thomson had asked
15 you for an assurance that Littlewoods would do the same,
16 but you had refused to give him that assurance.

17 A. Would you like to just say that again? I did not quite
18 follow that, I am sorry.

19 Q. Presumably, you told Mr McMahon about this conversation,
20 that Thomson had been trying to get an assurance from
21 you that you would go out at £14.99 just as Argos was
22 going to go out.

23 A. I do not think I actually told him that Mr Thomson
24 wanted an assurance. Mr Thomson was advising me that
25 Argos' price would be £14.99 and suggested I should be

1 at the same price; yes, that is true.

2 THE CHAIRMAN: Well, Mr Cowley says in his statement that he

3 explained the situation to Mr McMahon.

4 A. Yes.

5 THE CHAIRMAN: So that is what you did, presumably.

6 A. Yes, sir.

7 MR DOCTOR: Yes, and he said to you that he and

8 Mike McCulloch had had a discussion about prices, and he

9 recommended that you went along with the suggested price

10 of £14.99.

11 A. Yes.

12 Q. You were still concerned about it, but you agreed to do

13 it.

14 A. Well, I had no choice. He was my buying director.

15 Q. You say he did not tell you what he had been discussing

16 with Mr McCulloch; he mentioned that he had been

17 speaking to McCulloch of Littlewoods, but he did not

18 tell you what he had discussed with him.

19 A. No, he did not.

20 Q. Notwithstanding your own concern, you then went out at

21 £14.99 in the spring/summer catalogue.

22 A. Correct, yes.

23 Q. On that particular item, you must have been waiting

24 quite anxiously to see the outcome.

25 A. I was.

1 Q. Because you were concerned about it, and when you saw
2 that it contained the same price in both catalogues as
3 Mr Thomson had said, you must have been relieved.

4 A. Yes, I was.

5 Q. So when you saw the e-mail of 18th May, about six months
6 later, or five months later, the one we looked at which
7 is on your right-hand side, in the other bundle, that
8 must have reminded you of this earlier incident.

9 A. It did not, no.

10 Q. Either you thought, "Well, that is very strange, it is
11 happening again" --

12 A. I think you are putting thoughts into my head, sir.

13 Q. Well, I am trying to explore --

14 THE CHAIRMAN: You say exactly what you can remember, Mr
15 Cowley. Do not let anything be put into your head that
16 is not already there.

17 Go on, Mr Doctor.

18 MR DOCTOR: Mr Cowley, let me make it clear: I am putting to
19 you various propositions, you must respond to them as
20 you wish. You certainly have not given any indication
21 that you would do otherwise.

22 I suggest to you that when you saw that e-mail, it
23 must have reminded you of the earlier incident. Here
24 was Thomson coming along again, with your own products,
25 and saying what Argos were going to go out at, and if

1 you thought it was strange the first time, it would have
2 presumably reminded you of that incident when you saw
3 this again?

4 A. No, it did not, I am afraid, sorry.

5 Q. I suggest to you that the reason why you were not
6 surprised by the second e-mail was because by that
7 stage, you and the rest of Littlewoods were involved in
8 a scheme whereby Hasbro was passing on to you Argos'
9 prices in this way, in return for obviously assurances
10 that Littlewoods would price similarly at RRP on these
11 items.

12 A. That is not true.

13 Q. There was another incident, was there not, where Thomson
14 had mentioned reductions in an RRP? Late in 2000, later
15 that year, there was an incident over a Tweenies Plush
16 doll, I think it was. First of all, Thomson had phoned
17 you to tell you that the price -- well, first of all,
18 they had set a price on this doll of £16.99.

19 A. Oh yes.

20 Q. You remember that?

21 A. I do, yes.

22 Q. Then after that, there was a telephone call which I can
23 date at about the middle of November in which they said,
24 "No, the recommended price is now £14.99".

25 A. I believe that is right, yes.

1 Q. When he phoned you on that occasion, he responded
2 angrily to this reduction in the RRP, and indeed you put
3 the phone down on him.

4 A. So I believe, yes.

5 Q. He then telephoned you about two weeks later, so it is
6 now a third time, and he tells you on this occasion that
7 they are reducing the RRP on the Tweenies Plush for the
8 spring/summer 2001 catalogue from £14.99 now down to
9 £12.99.

10 A. Yes.

11 Q. On that occasion, your reaction was explosive, because
12 you believed that you had already set the price in your
13 catalogue at £14.99, and your catalogue, you thought,
14 had already gone to print.

15 A. Yes.

16 Q. Your concern was that your competition, Argos, would be
17 able to make the change in their catalogue, and they
18 would therefore come down and print the new price of
19 £12.99, was it not?

20 A. Yes.

21 Q. It turned out in fact -- I think that phone call was on
22 30th November, you say you thought at that stage it was
23 too late to change, but in that phone call Thomson
24 actually said to you that Argos would have time to
25 change their retail price.

1 A. Did they? I cannot remember, I am afraid.

2 Q. I put it to you that is what infuriated you, that you
3 thought you were committed and Argos would be able to
4 make the change. You nod your head.

5 A. Yes.

6 Q. What I am suggesting to you is that this passing of
7 information between yourself and Hasbro in relation to
8 the RRP's and the fact that Argos is going to also charge
9 the RRP is something which by that stage you were quite
10 familiar with.

11 A. We were both at the same price, as was the whole market.
12 That was the accepted market price at that time.
13 Everyone was selling it at that same price.

14 Q. Yes, but this had come about, certainly on these
15 products, because during the course of 2000, Littlewoods
16 and Hasbro, together with Argos and Hasbro, had entered
17 into a kind of understanding or arrangement that the
18 previous good deal on core games and Action Man would
19 now be extended to this range of goods, everyone would
20 go out at RRP.

21 A. That is nonsense.

22 Q. Well, look at your e-mail of 28th December which is at
23 page 100 in that bundle. You say -- this is from you to
24 Mr Thomson after you had in fact discovered that you
25 could change your catalogue and bring the price down:

1 "Reference our conversation pre-Christmas regarding
2 Hasbro's late decision to reduce the price of the
3 Tweenies soft toy featured in the Index spring/summer 01
4 catalogue. Fortunately for both of us, we were in fact
5 able to amend the selling prices at the last minute due
6 to an unexpected delay in catalogue production."

7 Just pausing there, "for both of us", who is both of
8 us?

9 A. Hasbro and Index.

10 Q. Hasbro and Index. I can certainly see it was fortunate
11 for Index, but what is the fortune Hasbro gets, that you
12 were able to reduce the selling price in your catalogue?

13 A. Well, we would sell more of the doll concerned, and that
14 was obviously to Hasbro's advantage.

15 Q. Right. It says:

16 "This, however, literally meant holding up the
17 presses, entailing an additional cost of £4,000, which
18 will be debited to your account shortly. I will not
19 elaborate on the consequences if we had been unable to
20 do so, resulting in our being undercut by Argos and
21 other High Street outlets ..."

22 Just pausing there, what would the consequences have
23 been that you did not want to elaborate on? I mean,
24 apart from the fact that you would not have sold so many
25 goods, were there any other consequences?

1 A. Well, yes, obviously we would not have sold so many
2 goods.

3 THE CHAIRMAN: Yes.

4 A. But the public would be aware that we were £2 or
5 whatever more expensive than -- not just Argos, but the
6 whole of the High Street, because the whole of the High
7 Street, Argos, Toys R Us, Woolworths, would all be at
8 the lower price. We would seem to be expensive in the
9 eyes of everyone, and therefore psychologically, the
10 consumer would think that we were expensive, and that
11 feeling would not just be because of the Tweenies, but
12 that would sort of grow --

13 THE CHAIRMAN: And have a knock-on effect on perception?

14 A. Yes, on other products, not just the toys, but the whole
15 of the Index catalogue. It would be disastrous for us
16 if that had happened.

17 MR DOCTOR: I am going to suggest to you, Mr Cowley, that
18 that is not the way one would have referred to those
19 sort of economic consequences of selling more or less
20 goods, because look at the rest of the sentence:
21 "I will not elaborate on the consequences if we had
22 been unable to do so, resulting in our being undercut by
23 Argos and other High Street outlets, especially ..."

24 So you are not one to elaborate on the consequences,
25 but:

1 "... when you had earlier been so insistent that we
2 all went out at the same price."
3 A. Yes, what he means --
4 Q. Who is "all"? That means you and Argos, does it not?
5 A. All means the High Street, everyone.
6 Q. But particularly Argos.
7 A. All the High Street.
8 Q. Well, if Argos was lower, the High Street was going to
9 follow Argos?
10 A. (inaudible) referring in the previous -- Argos and other
11 High Street outlets, and still talking about "all"
12 meaning the whole of the UK toy retail outlets.
13 Q. Well, certainly "all" would have to include Argos, would
14 it not?
15 A. Yes.
16 Q. So, "... when you had been so insistent that we all went
17 out at the same price"; that is a reference to the fact
18 that there was an arrangement whereby everybody goes out
19 at the same price, everybody goes out at the recommended
20 retail price, and here they had done something which
21 would have resulted, if you could not have changed the
22 catalogue, in following that, through no fault of your
23 own; correct?
24 A. I am not quite sure what the question is, I am sorry.
25 Q. I am saying that what you are saying here is that there

1 had been some kind of arrangement whereby all, that is
2 the whole market, went out at the same price; you would
3 not have gone out at that price, you would have gone out
4 at a higher price, because of this very late change, and
5 it is that that you are referring to when you say,
6 "I will not elaborate on the consequences if we had been
7 unable to make the change".

8 A. No, that is not true, I am sorry.

9 Q. Well, it is what you say here.

10 A. I do not say that. I say, "I will not elaborate on the
11 consequences if we had been unable to do so". The
12 consequences were that we would lose sales and we would
13 have a bad image in the public as being expensive.

14 Q. That stands to reason, if the whole market is going out
15 at £12.99 and you are printed at £14.99 --

16 A. Well, that is what would have happened, yes.

17 Q. The consequences that you were referring to there, I am
18 going to suggest to you, is that Index would have
19 rethought, or certainly you and Index would have
20 rethought their commitment to this plan whereby all go
21 out at the same price.

22 A. No, that is pie in the sky, sir, I am sorry.

23 Q. All right. Let me just put one other thing to you: what
24 you are also doing is you are charging Index for the
25 cost of the change.

1 A. Charging Hasbro?

2 Q. I beg your pardon, Hasbro; you are seeking to charge
3 Hasbro for the cost of the change.

4 A. That is correct, yes.

5 Q. And the e-mail gives the impression that Hasbro is being
6 held responsible for something which they have done, and
7 that they have to recompense you for some loss that you
8 have suffered.

9 A. No, the charge was a charge that was necessary, raised
10 to change the plates.

11 Q. Well, they had no contract with you that they would pay
12 those sort of charges, did they?

13 A. I am sorry?

14 Q. They had no contract with you or commitment that they
15 would pay those sort of charges?

16 A. No, but it was their fault that we had to change them.

17 Q. Yes. What you were looking for, and the whole thrust of
18 this e-mail is that they had done something wrong, and
19 that you were holding them responsible for the loss that
20 you had suffered; you had managed to bring the price
21 down, so you would not suffer that loss, but that had
22 cost you £4,000 to reprint part of the catalogue, or
23 reset --

24 A. To change the plates on the catalogue pages, yes.

25 Q. And that suggests that they had in some way been in

1 breach of some agreement with Index.

2 A. No, not at all.

3 Q. For which they had to pay --

4 A. I would do this with any supplier in these sort of
5 circumstances.

6 Q. For which they had to pay some kind of damages or
7 recompense.

8 A. They had to pay for the charges involved by Littlewoods
9 in replacing the plates.

10 Q. Yes, but only because there was an agreement between
11 Littlewoods and Hasbro that it would go out at these
12 RRP's, and obviously that meant that Hasbro would give
13 the RRP's to Littlewoods in good time, and stick to them.

14 A. I am sorry, that is all fiction.

15 Q. If Hasbro was just a supplier of toys, which is
16 supplying toys to you, and it had offered you a price
17 and subsequently reduced it, I suggest you would have
18 adopted a very different attitude towards them.

19 A. Well, it depended whether we were able to change the
20 price or not in the catalogue really.

21 Q. Well, if they were just some supplier who had quoted you
22 a price earlier in the year, and they were now quoting
23 somebody else a different price, what does that have to
24 do with you or with them? You could go to them and say,
25 "You gave them a better price, I am very upset, very

1 cross", but you would not have had this sort of
2 conversation, and this sort of exchange, would you?

3 Some supplier in Hong Kong fixes a price with you;
4 you subsequently discover that they have got some
5 different price for somebody else. What does that have
6 to do with you? Would you write to them and say,
7 "I will not elaborate on the consequences if you ever do
8 this again"?

9 A. Well, yes, I may well just do that.

10 Q. Well, I suggest, Mr Cowley, that the assumptions behind
11 this e-mail are that there is some agreement which
12 Hasbro was in breach of by giving you the prices at one
13 stage and then changing them at a stage when it might
14 have been too late for you to effect the change in your
15 catalogue.

16 A. The charges we made were, as I say in the e-mail, that
17 we had to -- thankfully, we were able, at that late
18 stage -- and looking at the date here, we are talking
19 about 28th December. The catalogue goes out about 10th
20 January. Luckily because the catalogue production was
21 running late, we were able to change the price, but it
22 involved holding up the presses, literally, in order to
23 do that, and that was the costs involved in making that
24 alteration, and I did not see why Index should be held
25 responsible for that cost when it was the fault of

1 Hasbro.

2 Q. You say in paragraph 16 of your witness statement that
3 in your discussions with Thomson generally, you would
4 never say what price you would be going out at.

5 A. I do, yes.

6 Q. You may not have said it, but obviously he had a very
7 good idea of what price you were going out at.

8 A. Really?

9 Q. On at least two occasions, yes. When he is phoning you
10 up to tell you what the price is going to be.

11 A. I am sorry, I am not --

12 Q. On the first occasion, you phone him up and he says,
13 "You should go out at £14.99", and you say "No, I am
14 going out at less than that", and eventually it brings
15 the --

16 A. I do not say that. I did not say I was going out at
17 less than £14.99.

18 Q. Well, you would not give him an assurance that you would
19 go out at £14.99.

20 A. Correct.

21 Q. So he must have had some idea of what you were going to
22 go out at, certainly he knew it was lower, and he was
23 trying to bring about a situation where you were going
24 to commit to a price that he would know about, ie the
25 RRP.

1 A. I am sorry, you have lost me there. I do not really
2 quite --

3 Q. I think you do follow that, Mr Cowley.

4 THE CHAIRMAN: Put the question again, Mr Doctor.

5 MR DOCTOR: Mr Thomson phoned you on, as it happens, three
6 occasions -- in fact, we know now, four occasions. Once
7 in the previous year, where he tells you that the price
8 is going to be £14.99, and three times in 2000, where he
9 tells you the price is going to be respectively
10 £16.99 --

11 A. What his recommended price is going to be, yes.

12 Q. On each occasion -- you may not tell him, "Oh, I am
13 definitely going to go out at that", but what is being
14 discussed is the price you are going to go out at.

15 A. No.

16 Q. He has got a very good idea, and he brings about a
17 situation on each occasion where you do in fact go out
18 at the price that you are discussing with him.

19 A. Well, he would guess what my price would be, but
20 I certainly did not tell him what that price was.

21 Q. Can we just go back to the e-mail of 18th May? I am
22 nearly done. Page 91. And also could you look at your
23 interview with the OFT, the note of that, in tab 9?
24 We have looked at this before; would you go to
25 page 2 of this witness statement?

1 THE CHAIRMAN: Page 2 of the witness statement?

2 MR DOCTOR: I beg your pardon, of this interview note. You

3 were being asked about those three items at the bottom

4 of the e-mail of 18th May, do you recall that?

5 A. At the bottom of page 2?

6 Q. No, it is in the middle of page 2, but it refers to the

7 three items at the bottom of the e-mail.

8 A. Yes.

9 Q. In the middle of the page --

10 A. Yes, I have it.

11 Q. "Which are the three lines which you deal with?

12 "AC: The bottom three.

13 "SF: The Tweenies products?

14 "AC: Yes.

15 "SF: And you say that they went out at the prices

16 indicated on the e-mail?

17 "AC: To the best of my knowledge, they went out at

18 those prices, yes. The price for the basic product had

19 already been established in the previous spring/summer

20 catalogue."

21 A. Mm.

22 Q. Now the price in the previous catalogue had been

23 established at £14.99 for spring/summer 2000, but what

24 you did not mention in this is that that price had been

25 established after that exchange with Mr McMahon

1 following his conversation with Mr McCulloch, and
2 otherwise, if that had not taken place, the
3 spring/summer catalogue, you would have gone out at
4 £12.99. The basic product is that first one, is it not,
5 the one that is going out at £14.99?

6 A. Yes, it is. I am just trying to figure out what you are
7 saying there.

8 Q. Well, you are explaining to the OFT why the price is at
9 £14.99, and you thought it was important to tell them
10 that that price had already been established in
11 spring/summer.

12 A. That is correct, yes.

13 Q. But what you did not say was that that price in
14 spring/summer had been brought about as a result of that
15 conversation between you and Mr McMahon, and prior to
16 that, McMahon and McCulloch, in which he told you,
17 having spoken to McCulloch, "Yes, you should go out at
18 £14.99".

19 A. Yes, but I --

20 Q. So that price we know had been established by some sort
21 of contact between Hasbro and Littlewoods.

22 A. Well, I do not believe that, no.

23 THE CHAIRMAN: How are you getting on, Mr Doctor? Do you
24 want to just finish?

25 MR DOCTOR: I have no further questions, thank you.

1 THE CHAIRMAN: Mr Cowley, could I just ask a couple of
2 things, just to help me understand your job and how it
3 works? In your witness statement at paragraph 7,
4 towards the end, where you are describing the phone call
5 in which Mr Thomson rang up and said Argos would be
6 going out at £14.99, you said you commented that you had
7 heard that kind of story before, and then you go on:

8 "Suppliers often ring up and say that Argos are
9 going out at such and such a price", and tried to
10 persuade you to go out at the same price as well.

11 A. That is right, yes.

12 THE CHAIRMAN: Can you just paint a picture for us: does
13 that often happen, people are ringing up and telling you
14 what they think the Argos price is going to be?

15 A. It used to be a fairly common occurrence, but as
16 suppliers began to realise that I would not believe
17 them, and took no notice of them, then the rate of it
18 being asked was -- declined, shall we say.

19 THE CHAIRMAN: You say here, "Suppliers often ring up", I do
20 not know whether you can give us some sort of impression
21 as to how often that happens?

22 A. Well, not a lot. I say "often"; it would happen two or
23 three times a catalogue, perhaps, so half a dozen times
24 a year.

25 THE CHAIRMAN: That was one point. I had one other

1 question: I think when we were looking at the e-mail of
2 18th May which had these three prices of yours down
3 towards the end, I think you told us that you saw these
4 prices as the prices that Hasbro expected Argos to be
5 going out at.

6 A. Correct.

7 THE CHAIRMAN: My question is: why would Hasbro be telling
8 Littlewoods the prices that they expect Argos to be
9 going out at?

10 A. Because Hasbro were trying to persuade us to go out at
11 that price which they expected to be the High Street
12 price.

13 THE CHAIRMAN: Right, thank you.

14 MR GREEN: I have no questions.

15 THE CHAIRMAN: There do not appear to be any further
16 questions now, Mr Cowley. I think that is therefore the
17 end of your evidence.

18 A. Thank you.

19 THE CHAIRMAN: Thank you very much for coming.

20 (The witness withdrew)

21 THE CHAIRMAN: We will take a short break now until 11.55.

22 (11.50 am)

23 (A short break)

24 (11.58 am)

25 MR GREEN: My next witness is Mr Riley.

1 MR PHIL RILEY (sworn)

2 Examination-in-chief by MR GREEN

3 THE CHAIRMAN: Thank you, Mr Riley, do sit down.

4 MR GREEN: Mr Riley, do you have a copy of your statement in
5 front of you?

6 A. I do.

7 Q. This is at tab 55 of the witness statements, volume 2.

8 Now would you turn to the last but one page, where you
9 should see your signature?

10 A. I do.

11 Q. Is that your signature?

12 A. It is.

13 Q. Can you please confirm that this statement is true to
14 the best of your knowledge and belief?

15 A. It is.

16 MR GREEN: Thank you.

17 Cross-examination by MR DOCTOR

18 MR DOCTOR: Good morning, Mr Riley.

19 A. Good morning.

20 Q. Mr Riley, you say in paragraph -- well, let us first of
21 all start: you were the buyer designate for various
22 goods such as boxed games, junior sports, outdoor and
23 character bikes.

24 A. I was, yes.

25 Q. From September 2000, and then from September 2001,

1 a year later, you became the buyer.

2 A. Correct.

3 Q. So the one we want to think about is boxed games; you
4 became involved in that, or were dealing as the
5 designate buyer in September 2000, and then a year
6 later, you were the actual buyer.

7 A. I was.

8 Q. As the designate buyer, would you be doing the same sort
9 of tasks as you would be doing as the actual buyer, or
10 assisting somebody else?

11 A. The buyer designate position was basically a 12-month
12 period where you were given a range to deal with, you
13 were not a full buyer, I was still kind of -- the full
14 responsibility of the range was not with me, but for all
15 extents and purposes, yes, I was the buyer on the range.

16 Q. So you are the buyer, but it is a kind of probationary
17 period or something, they want to see how you do the
18 job?

19 A. Absolutely.

20 Q. You say in paragraph 4 of your statement that you are
21 very conscious of competition on the heavily branded
22 lines.

23 A. Sorry, at what point is that? Yes, sorry, indeed.

24 Q. Paragraph 4:

25 "I am very conscious of competition on the heavily

1 branded lines and am never really in a position to
2 recommend putting the price up on, for instance, boxed
3 games because of the strength of competition."

4 So that would influence you in the way that you
5 would go about setting prices, would it not?

6 A. What would, sorry?

7 Q. Well, this knowledge that you have that there is
8 competition on the heavily branded lines, and it is very
9 difficult to put your prices up.

10 A. Yes, when there is a price established in the
11 marketplace -- well, it is anathema to put your prices
12 up, is it not, for the reasons that have already been
13 given this morning.

14 Q. You have been sitting in court this morning?

15 A. I have.

16 Q. Have you been here before today?

17 A. I have not.

18 Q. Also paragraph 19, I think, just go to that, the second
19 sentence:

20 "If you are undercut in the catalogue, you feel it
21 reflects on yourself."

22 So what you mean by that is in your area of
23 responsibility for boxed games, you would feel that it
24 would reflect on yourself if the catalogue comes out and
25 you are undercut by the competitor.

1 A. Yes.

2 Q. And we mean, of course, Argos.

3 A. No, we mean all competitors in the High Street.

4 Q. Well, including Argos, obviously.

5 A. Yes, but not just Argos.

6 Q. Certainly when the catalogues come out at the same time
7 as Argos', that would be an important point of
8 comparison.

9 A. In the same way as it would be important when TRU
10 launched their new range, or when Woolworths launched
11 their new range, it would all reflect on me.

12 Q. You also described how you would sit down at meetings
13 with Lesley Paisley and you would discuss setting the
14 prices for a catalogue.

15 A. Yes.

16 Q. And you would make recommendations to her.

17 A. I would.

18 Q. In respect of the items which fall within your
19 responsibility, is that correct?

20 A. That is correct.

21 Q. Right. You say that you --

22 A. Sorry, where am I?

23 Q. Paragraph 5:

24 "Catalogue retailing is rather special in that it is
25 known that many customers keep both Argos and Index

1 catalogues at home and will compare prices very easily.
2 Catalogues are now also on the Internet, but the paper
3 catalogue is still the main instrument of sale of Index.

4 "Changes occurred in the marketplace following the
5 takeover of Argos by GUS. Following the takeover,
6 buyers became aware that Argos was less aggressive on
7 pricing. This was generally known throughout the retail
8 world. Argos are no longer trying to be the cheapest on
9 all lines. They generally follow RRP's with the major
10 branded accounts."

11 That was the impression you got on the takeover of
12 Argos by GUS.

13 A. That was the impression I was given through the people
14 I spoke to within the toy trade, in that -- sorry, let
15 me just elucidate, in terms of I was not probably around
16 when that takeover took place, nor indeed would it have
17 meant that much to me, but yes, after the event, it was
18 commonly talked about that that was something that was
19 happening in the marketplace.

20 Q. So it was expected that Argos and others would follow
21 the RRP's with these major branded accounts.

22 A. It was not expected, it was a fact.

23 Q. It was a fact, right.

24 A. In terms of -- when I had the range, it was a fact they
25 followed the RRP's.

1 Q. So it was almost a certainty that that was what was --

2 A. It was not a certainty, there is no such thing as

3 a certainty, is there?

4 Q. Well, it was a fact, let us put it that way.

5 A. Yes, it was a fact.

6 Q. That is your word. You say in paragraph 8 that when you

7 are making recommendations in prices, your only guide is

8 the RRP and your own intuition, okay?

9 A. Sorry, where does it say that?

10 Q. The last sentence:

11 "I will take into account the RRP for branded

12 products, as the RRP and my own intuition are the only

13 guides I have got as to our competitors' likely pricing

14 for new products."

15 A. Correct.

16 Q. Now let us see, you join in September 2000 and you take

17 over responsibility, but at that stage I presume that

18 the spring/summer 2001 catalogue was already quite

19 advanced?

20 A. No, that is not correct. Sorry, just put that question

21 to me again? When I started in -- you have got to

22 appreciate that for two years before I became

23 a designate buyer, I was still a trainee buyer.

24 Q. So you were a trainee buyer?

25 A. Yes, for two years, and then you become a designate

1 buyer in the third year of your training plan.

2 Q. All right. Let us go back then to -- well, let us start
3 from this period at the end of 1999, okay? That is
4 a year before you become the designate buyer, but you
5 are already a buyer at that stage, a trainee buyer at
6 that stage.

7 The spring/summer catalogue is in preparation.

8 A. Which spring/summer catalogue, sorry?

9 Q. 2000.

10 A. 2000.

11 Q. Yes.

12 A. Yes, that is correct.

13 Q. And you are under the impression at that stage, and so
14 is everyone else, you say, that Argos has a policy of
15 charging RRPs, and it is a fact.

16 A. I can speak for myself, I cannot speak for everybody
17 else obviously.

18 Q. That is a very, very fair comment.

19 A. Well, in the autumn/winter 1999 catalogue, RRPs were
20 adhered to, so by the time of spring/summer 2000, that
21 was a fact, yes.

22 Q. So you knew that in autumn/winter 1999, RRPs had been
23 adhered to.

24 A. Well, it was a fact, because the catalogue was printed
25 and the RRPs were there.

1 Q. Indeed, it is a fact that Argos are going to be going
2 out at RRP's in 2000 spring/summer, is it not?

3 A. That is not a fact at all.

4 Q. Well, it is a very racing certainty, is it not?

5 A. I do not know what that means, sorry.

6 Q. What word would you like to use?

7 A. To me, it is a likelihood that they would continue with
8 the same price they had in autumn/winter.

9 Q. Because you say they had a policy.

10 A. I do not know if they had a policy or not. That was not
11 my --

12 Q. Well, you are the one who mentioned some policy change:
13 "Changes occurred following the takeover ..."

14 A. I do not mention a policy change, unless I am --

15 Q. Well, whatever it is in paragraph 6, would you like to
16 just use whatever word you like?

17 A. Changes occurred in the marketplace. I became aware
18 from conversations with people within the toy trade that
19 Argos were going to be relaxing their pricing in order
20 to take more margin on lines.

21 Q. And they generally follow RRP's --

22 A. Well, they had generally --

23 Q. -- on the branded goods.

24 A. On the branded goods, yes.

25 Q. And on these branded goods, in autumn/winter 1999, you

1 had seen that they had in fact priced at that.

2 A. Yes.

3 Q. So your expectation was that it was very likely, highly
4 likely that they would also price at RRP in --

5 A. It was fairly likely, I would say, because every season
6 had to be dealt with differently. You could not presume
7 they would continue at the same price, season upon
8 season. They had a tendency that one season they might
9 be very competitive on a certain area of the catalogue,
10 like boxed games, and then the next season, they might
11 go on girls' toys.

12 THE CHAIRMAN: Switch their fire somewhere else.

13 A. Or even away from toys into the electrical area, so no,
14 you could never presume anything would remain the status
15 quo for any period of time. Every pricing meeting
16 I had, you would have to start afresh.

17 MR DOCTOR: Yes. So are you saying that in fact, you were
18 not -- each time you started afresh; it was as if Argos
19 might have charged anything.

20 A. On a new line, indeed.

21 Q. On a new line; and on existing lines?

22 A. Well, where I had an existing price in the marketplace,
23 that gave me some indication that they may continue at
24 that price, but I could never be certain that they
25 would, no.

1 Q. Why would you make mention, specific mention in your
2 statement, in the context of changes that had taken
3 place, that generally the retailers would follow RRP, if
4 what you are now saying is that each catalogue was
5 completely fresh, the only indication was that they had
6 charged RRP in the past, and that was no indication at
7 all as to what they would do in the future.

8 A. Generally, they followed RRP, historically speaking.

9 Q. Yes.

10 A. Well, from what I could see. Going forward into a new
11 season, yes, there was a chance they would follow the
12 RRP. It was not a certainty or a racing certainty or
13 whatever you want to call it. I would have to look at
14 each line on an individual basis and decide what
15 I thought they would do on that particular line.

16 Q. So they may just as easily -- was there any probability
17 that they would charge RRP in the next catalogue?

18 A. Yes, of course there was.

19 Q. Would you say it was more than likely or less than
20 likely, or just a matter of entire surprise to you when
21 it happened?

22 A. Sorry, could you just repeat that?

23 Q. Yes, I am just trying to find out what your thought
24 processes were in winter 1999, when you are thinking
25 about the prices that are going to be set in the

1 catalogue for spring/summer 2000.

2 A. Okay, I think I said before it was fairly likely they
3 may continue with their RRP's.

4 Q. Fairly likely; so more likely than not?

5 A. No, fairly likely. Not more likely than not, just
6 fairly likely.

7 Q. If you thought it was fairly likely, why did you not
8 recommend to Mrs Paisley, "We should go in at 25p below
9 RRP, because it is fairly likely that Argos is going to
10 come out at RRP, and I recommend we go in at 25p below".

11 A. Okay, you are aware of how low the margins are on the
12 Hasbro products, to the point where we probably did not
13 make any money on them anyway, that they were so low, by
14 the time you have taken into account distribution to
15 stores, paying for the stores, paying for the overheads
16 of the stores. To continually undercut those prices,
17 you just get to the point where your costs are getting
18 so close -- you know, the business is going to go down.

19 These branded products, for the reasons I give
20 earlier on in my statement, I did not have the freedom
21 to keep undercutting these products, because of the
22 margin restrictions.

23 Q. Mr Riley, these branded products are the products which
24 are highly advertised on television.

25 A. They are.

1 Q. They are the ones where there are traditionally low
2 margins, but nevertheless, they bring the customers into
3 the store.

4 A. Correct.

5 Q. You feel that if you are not the lowest in the market,
6 this reflects on yourself.

7 A. Indeed I do.

8 Q. Well, I am suggesting to you that here was a marvellous
9 opportunity, if you felt that the prices that Argos were
10 going to charge in the next catalogue were fairly likely
11 to be RRP, for you to go in in the Index catalogue at
12 a price just below the RRP, thereby showing that Index
13 was the lowest on these items in the market.

14 A. But I could show that we were the lowest in the market
15 without going below their price, could I not, because
16 I would still be the lowest? Okay, I think there is
17 a big difference between lower than everybody else and
18 being the lowest in the market. You can be the lowest
19 in the market, you do not need to be lower than
20 everybody else.

21 The problem I had is with being higher than
22 everybody else, that is where the problems started, if
23 that makes sense; that is where my professional
24 credentials would come into question, if I was more
25 expensive than everybody else. By being lower than

1 them, what was the benefit? We would take less money on
2 the lines?

3 Q. No, we have been told that consumers are very
4 price-sensitive, they respond to even the smallest price
5 differences in the catalogues in dramatic fashion.
6 Being lower, even by a small amount, would bring Index
7 all sorts of additional benefits, including increased
8 turnover, better reputation, wider acceptability by the
9 public for always being the cheapest, and so on; those
10 are all the advantages that would come to it.

11 A. I cannot comment on those. I have no idea if that is
12 true or not.

13 Q. Well, come, Mr --

14 A. What I am telling you is if that I went lower than those
15 prices, we would be precariously close to making -- in
16 fact, we made no money on these lines, I am almost
17 certain of that; we came precariously close to being
18 stupid in what we were doing. I cannot make that any
19 clearer. Now to suggest that by going lower we would
20 somehow have all these other tangible benefits, you
21 know, if we do not make any money, these other benefits
22 are no good to us.

23 Q. But I am also interested to hear that you suggest that
24 there is a definite benefit to Index in being at the
25 same level as everyone else. Is that how you perceived

1 it at the time --

2 A. No, there was a benefit to being the lowest in the
3 market with everyone else.

4 Q. Provided everyone else was the same?

5 A. Well, no, provided I was low -- not everybody else --
6 the lowest price in the marketplace, as long as
7 I matched that price, that was where we wanted to be.

8 Q. I do not understand this. If you wanted to be the
9 lowest in the marketplace, you could not be the lowest
10 in the marketplace if Argos had a lower price; is that
11 right?

12 A. Yes, that is correct.

13 Q. So when I said to you, if you knew that Argos was going
14 to go out at RRP --

15 A. Yes.

16 Q. -- you know that nobody in the marketplace is going to
17 be much higher than RRP, are they?

18 A. No.

19 Q. So everybody -- if Argos goes out at RRP -- is likely to
20 be at RRP, correct?

21 A. Yes, correct.

22 Q. So if Index prints its catalogue which is slightly
23 below, you will be the lowest, will you not?

24 A. Indeed, but I would still be the lowest if I went out at
25 the same price as Argos.

1 Q. If you went out at the same price as Argos, with
2 everyone else going out at RRP, you would certainly be
3 the lowest, that would bring advantages; the advantages
4 that nobody would be able to undercut the other, because
5 you were all at the same price.

6 A. Sorry, that does not follow.

7 Q. Yes, it does. If Argos is at RRP, everyone else is at
8 RRP, and you go out at the same price as Argos, you are
9 all at the same price.

10 A. Yes.

11 Q. Well, that is the advantage, is it not? No one is
12 undercutting the other.

13 A. Well, the advantage is I am the lowest in the High
14 Street.

15 Q. How can you be the lowest? You are as low as everybody
16 else.

17 A. I am still the lowest, am I not?

18 THE CHAIRMAN: You are among the lowest, as it were, if
19 everybody is at the same point.

20 A. I am amongst the lowest, sorry.

21 MR DOCTOR: And if everybody is at that price, you are all
22 the lowest.

23 THE CHAIRMAN: What you are worried about is being higher
24 than everybody else.

25 A. Not lower than -- we do not make enough money to be

1 lower than everybody else. I cannot make this point
2 clear enough to you. You make it out as if we can just
3 keep cutting prices and cutting prices, to the point
4 where -- we cannot. On the branded products, our
5 margins are so slight that we cannot continue to do
6 that.

7 MR DOCTOR: One of the disadvantages, of course, of going
8 out at a lower price than Argos is that Argos might
9 respond to that in the following catalogue, might they
10 not?

11 A. Indeed, they would. They would probably respond before
12 the following catalogue.

13 Q. They would not like it if they found that they were
14 charging RRP and they found their competitor, Index,
15 charging lower prices.

16 A. I would suspect they would not.
17 (12.15 pm)

18 Q. And that would set off a chain of price cuts, would it
19 not?

20 A. Presumably so, yes.

21 Q. In paragraph 18 of your witness statement, if you just
22 look at that, you describe some conduct of yours whereby
23 you say that:

24 "If Ian Thomson or anybody else indicated that Argos
25 ... was likely to go out at RRP, and it transpired that

1 they did not do that, but rather undercut those prices,
2 I might be angry with them for giving me false
3 information, or perhaps for trying to encourage me to
4 follow RRPs when I was under threat of being undercut.
5 Any time I was undercut, which happened from time to
6 time, I employed a tactic designed to obtain more
7 discount. I would ring the supplier in question to ask
8 him to explain why this had happened, and I would
9 suggest that the obvious reason was that he had given
10 a lower cost price to the competitor. If that had
11 happened, it might be possible for me to get the same
12 lower cost price for Littlewoods. I might threaten to
13 discontinue the line in future seasons. If the supplier
14 did not lower the cost price in response to my pressure,
15 I might still get some special offer ... If I get
16 something out of such an 'angry' phone call two times
17 out of ten, it is worth doing. Obviously, if the
18 supplier has tried to encourage me to adopt that
19 particular RRP, I am entitled to be put out."

20 So what happens is that if you go out at a certain
21 price and you are undercut, you phone them up and you
22 accuse them of giving you false information?

23 A. No, what I accuse them of is having RRPs that were
24 inconsistent with what actually happened in the
25 marketplace.

1 Q. Well, as I understand it, you are saying that they say,
2 "Well, X is likely to go out at RRP", and if you find
3 that has not taken place, you phone them up and say,
4 "You gave me false information".

5 A. I might not use those words, but along those lines, yes.

6 Q. In fact, you put on an act of being very angry.

7 A. Well, it is not an act, I am actually quite angry.

8 Q. Yes, all right; because they gave you false information.

9 A. Yes.

10 Q. But as I understand it, unless they said to you that
11 Argos, or whoever the competitor is, is going to go out
12 at that price, why is it false?

13 A. Sorry, would you say that again?

14 Q. Unless they say to you, "Argos is going to go out at
15 that price, we can guarantee that", why is the
16 information that they give you false, if it turns out
17 that they did not go out at that price? If all they
18 said to you was, "I think Argos will go out at that
19 price; I cannot be sure but I think so", why is it
20 false?

21 A. Because I want to get some recompense from them.

22 Q. You follow this entirely, do you not?

23 A. I do, but I am not quite sure what you --

24 Q. You are phoning them up and saying --

25 A. If you just let me finish, what they say to me is, "This

1 is the RRP for the product". Now if I go out at that
2 RRP and then find out the marketplace is much lower than
3 that, I will make a call to the supplier and give them
4 a hard time about it, because they suggested to me this
5 is where they thought the product would sell. I use
6 that RRP as part of my mix of my whole pricing. I have
7 used it as part of my pricing, therefore my price is
8 reflected.

9 Now if that turns out to be useless, in terms of the
10 RRP is no use to me, I would go back to the supplier in
11 order to try and get a better cost price, so that I can
12 match the High Street. That is all it was, no more, no
13 less. Now whether I was right in doing that, and
14 whether there was any logic to me doing that is
15 something else, but yes, if two times out of ten I got a
16 better cost price or I got some money to do something
17 with, then it would have been a worthwhile call.

18 THE CHAIRMAN: Right.

19 MR DOCTOR: Mr Riley, the only way in which you can describe
20 that information as false information is if they had
21 given you an assurance of some kind that Argos would go
22 out at that price.

23 A. Why?

24 Q. Because if they simply said to you, "I do not know, that
25 is our RRP, Argos might or might not go out at that",

1 how could you phone them up and say, "You told me Argos
2 might or might not go out at RRP, that was false"?

3 A. Look, I am trying to get some money out of these guys,
4 I am trying to get a better cost price from them. I am
5 trying to use every tool I can in order to do that. Now
6 if I use the terminology "false information", it is to
7 try and ram home a point, and to try and get something
8 from them. No other reason than that; it does not mean
9 that there was an agreement, it does not mean anything
10 else was said.

11 Q. But the chap you phone up is likely to say, "What are
12 you talking about, Riley? I said to you, 'This is our
13 RRP, I hope that everyone else goes out at it'". You
14 phone up and you say, "No, you did not, you promised me
15 they would go out at it" --

16 A. I do not ring up and say, "You promised me that they
17 would go out at it".

18 Q. Well, if you phoned up and simply said, "You told me
19 that this was your RRP, and you hoped that others would
20 go out at it" --

21 A. Or it looked like --

22 Q. You would not say to him that was false, because that
23 was true.

24 A. Indeed, but -- if I have worked my whole life around
25 that premise -- you know, I am trying to get something

1 back from them, in order to get our price to where it
2 needs to be. In other words, as part of a negotiation
3 tool, I would say, "You told me something, that turned
4 out not to be the case, I want some money from you to
5 help me out".

6 THE CHAIRMAN: But in this case, what you are talking about
7 here is what he has told you is the price he expects
8 your competitors to go out at, is that right?

9 A. Yes, that is correct. Now that turned out to be false,
10 that did not happen.

11 MR DOCTOR: The only way it is false is if he conveyed to
12 you it would happen. It is not false if all he said
13 was, "I hope they go out"; it is a hope, the hope is not
14 false.

15 The only reason you would accuse him of being false
16 is if he had given you the impression that he could
17 bring it about, that he could be sure that it would be
18 RRP.

19 A. Okay, a supplier could never assure me what price
20 a retailer was going out at, nor would I believe them if
21 they told me. That would not stop me going back to them
22 and telling them that I felt their information had been
23 given to me falsely. What you have got to understand is
24 the bigger picture, and what I am trying to achieve by
25 this phone call, which is to get some recompense in

1 order to price our product where it needs to be.

2 Now the semantics of it might be in question, that
3 is correct, but the principle remains the same, that
4 I would make the phone call and accuse them of giving me
5 false information, as part of my negotiation tactic in
6 order to get some kind of recompense.

7 Q. Well, I think we have taken that as far as we can.

8 However, all this conduct of yours of phoning up and
9 accusing someone of going out at a false price could not
10 apply to Mr Thomson, because in your field, and on these
11 goods, Argos did go out at the RRP.

12 A. Yes. I begin, "If Ian Thomson or anybody else", I do
13 not say he did, so the whole thing is theoretical.

14 Q. Now the e-mail of 18th May, which is in the core bundle
15 at page 91. You received this e-mail?

16 A. I did.

17 Q. And you say that you do not -- in your statement, you
18 said that you did not remember receiving it, but do you
19 now remember receiving it?

20 A. No, I do not.

21 Q. You do not?

22 A. No.

23 Q. You say in your statement:

24 "I do not remember receiving any e-mail of this kind
25 in relation to my own lines. It does not concern any of

1 my own lines, so I would have deleted it in any event,
2 having seen the list of products."

3 A. Correct.

4 Q. But you were certainly involved in games.

5 A. I was.

6 Q. Well, if you look at the e-mail and read the third line,
7 it says:

8 "Games and Action Man prices will continue to be
9 adhered to, and the retails are on your range sheets
10 provided by me."

11 So it certainly concerns your lines, does it not?

12 A. Okay, what I meant was the list of products below does
13 not include any of my products at the time, it does not
14 include any boxed games.

15 Q. Yes, but it has got some vital information about games.
16 If one reads the whole thing, it says:

17 "I am able to confirm a list of products and prices
18 that Argos have committed to. Games and Action Man
19 prices will continue to be adhered to, and the retails
20 are on your range sheets provided by me."

21 So this e-mail does most certainly concern your
22 responsibility for games, does it not?

23 A. It does for games.

24 Q. Well then, I suggest to you that you would not have
25 received this e-mail and deleted it for the reason that

1 you give in your witness statement, ie it simply does
2 not concern you.

3 A. I would have placed no importance on the e-mail, for the
4 reasons I have already given you, that what it is
5 suggesting is that Argos would continue at their RRP's.
6 Now I have already stated that I would not believe that
7 statement, nor would I think that Hasbro could in any
8 way influence Argos to go out at any price.

9 Q. Well, you say you do not remember receiving this, so
10 I suppose it is not worth asking you whether you went
11 and discussed it with anyone else.

12 A. I did not, no. I do not remember receiving it. It is
13 likely I deleted it, as one of many e-mails I would have
14 received that day, from one of the many suppliers I have
15 that we deal with, plus another 100 that we do not deal
16 with that send me e-mails. It would have been deleted.

17 Q. I am going to suggest to you, Mr Riley, that the fact
18 that you regarded this e-mail as not in the least bit
19 surprising, or as not having particularly stood out as
20 out of the ordinary, or anything like that, is because
21 it simply confirmed what you already understood.

22 A. No, you are incorrect.

23 Q. Argos was conveying its prices through Hasbro to you.

24 A. No, it was not. What it was saying was Hasbro -- they
25 were trying to tell me that Argos would continue at

1 their RRPs. I did not believe any of that; in fact,
2 I would not have believed it if anyone else had told me
3 that.

4 Q. Why would you not believe that?

5 A. How would Hasbro know what price Argos were going to go
6 out at?

7 Q. Because they had been told that, and because --

8 A. If you believe Argos would tell Hasbro what prices they
9 were going to retail at, I would not believe you.

10 Q. But if it is that surprising that you could never
11 believe that Argos would ever tell Hasbro their prices,
12 the e-mail would have come to you as an amazing shock.

13 Here is Mr Thomson saying:

14 "Games and Action Man will continue to be adhered
15 to ..."

16 Then he sets out a list of other products where
17 Argos have committed to certain prices.

18 A. It was not an amazing shock, no.

19 Q. It must have been a fantastic surprise, that a supplier
20 would tell you not only what games are going to be in
21 the next catalogue, but would actually set out their
22 prices?

23 A. They do not tell me what games are going to be in the
24 next catalogue, do they?

25 Q. I am sorry, what toys are going to be in their next

1 catalogue, and to set out the actual prices.

2 A. Sorry, could you just repeat that last statement?

3 Q. Yes. If, as you say, you would never have believed it

4 possible for a retailer to give Hasbro his prices in his

5 next catalogue, then the fact that this catalogue

6 contains just that, and says that Argos has committed to

7 these prices, must have struck you as being extremely

8 strange -- or it would have struck you --

9 A. It would have struck me as strange and irrelevant, to be

10 honest.

11 Q. Strange and irrelevant, but then that would have drawn

12 your attention to it, and you would have noticed that it

13 was also suggesting that there was some sort of

14 commitment in relation to your area.

15 A. It does not suggest a commitment. What it says is games

16 prices will continue to be adhered to, and retails are

17 on the range sheets. This comes from Hasbro, not from

18 Argos.

19 Q. Mr Riley, the plain thrust of the e-mail is that it is

20 passing on information from Argos.

21 A. That is what is suggested.

22 Q. And it is passing it on in the form of saying that Argos

23 have committed to these prices.

24 A. It is.

25 (12.30 pm)

1 Q. And if, as you say, that was so unusual and uncommon, if
2 you had regarded that as unusual and uncommon, you would
3 not simply have forgotten about this, you would remember
4 that you had received this very strange e-mail.

5 A. You underestimate just how many e-mails, how many phone
6 calls and how many meetings we have on a daily basis.
7 We have an awful lot of them. This could possibly have
8 taken up 5 seconds of my time, and I do not remember it.

9 Q. Well, I am suggesting to you that this e-mail would have
10 been seen by you at the time as wholly consistent with
11 your expectation of what was going to happen, which was
12 that there were going to be common prices and common
13 products in the next catalogue, in your field and in
14 other fields as well.

15 A. What it is is a supplier trying to tell me that they
16 know what the Argos prices are going to be, and they
17 know what the Argos listings are going to be. Nobody
18 knew what the Argos prices or listings were going to be
19 until that catalogue was launched, as far as I am aware.
20 Certainly within our business, no one knew what my
21 prices were going to be, nor -- to a certain extent,
22 lines were dropped before the catalogue was printed, so
23 no, I do not think it is the revelation you believe it
24 to be.

25 Q. It was consistent, was it not, with your understanding

1 that, as you put it, Argos was fairly likely to go out
2 at RRP's, and that is something which had come about
3 because of the agreement on the original areas of games
4 and Action Man, which you were fully aware of at the
5 time.

6 A. Can you say that again for me, please?

7 Q. You found this e-mail to be fully consistent with what
8 you expected to happen at the time, which is that this
9 sort of information was being passed on to Index from
10 Argos, through Hasbro, and that was just the sort of
11 information which you expected to get before your prices
12 were finalised for the next catalogue.

13 A. Maybe I have not made myself entirely clear. I do not
14 believe Argos would ever give their prices to a retailer
15 to give to us, okay? I am sure I have made this clear,
16 so no, this did not work as any part of an agreement or
17 anything. It was a supplier trying to convince me that
18 Argos were going to go out at certain prices. I would
19 not have believed that statement.

20 MR DOCTOR: No further questions.

21 THE CHAIRMAN: Thank you.

22 MR GREEN: Nothing further.

23 THE CHAIRMAN: I think that is the end of your evidence.

24 Thank you very much, Mr Riley. Thank you for coming.

25 A. Thank you very much.

1 (The witness withdrew)

2 MR GREEN: Sir, my next witness is Mr Burgess.

3 MR ALAN BURGESS (sworn)

4 Examination-in-chief by MR GREEN

5 THE CHAIRMAN: Thank you, Mr Burgess, please sit down.

6 MR GREEN: Tab 5 of the witness statement bundle, volume 1.

7 Mr Burgess, is that your statement in front of you?

8 A. Yes, it is.

9 Q. Could you turn to the last page, please? Do you see
10 a signature?

11 A. I do.

12 Q. Is that your signature?

13 A. It is.

14 Q. Can you confirm that this statement is true to the best
15 of your knowledge and belief?

16 A. I can.

17 MR GREEN: Thank you.

18 Cross-examination by MR DOCTOR

19 MR DOCTOR: Good morning, Mr Burgess.

20 A. Good morning.

21 Q. You have been a buyer with Littlewoods responsible for
22 all the channels in relation to boys' toys, electronics
23 and construction games since 2000?

24 A. Yes.

25 Q. At some stage, Mr Riley took over boxed games from you.

1 A. Correct.

2 Q. And your buying manager is or was at that time

3 Lesley Paisley.

4 A. That is correct.

5 Q. I understand that if you are out of line on prices in a

6 catalogue, this can lead to a drop in sales volumes.

7 A. Yes, that would be true.

8 Q. Both Argos and Index are regarded as price discounters;

9 do you agree with that?

10 A. I think I would agree with that, with some

11 qualification. We are both in the same sector of the

12 market together. Argos have been there, at the time

13 that Index was born, some 20 years before us, so yes,

14 they were price discounters. Index came into this

15 market; I think the thrust of the Index business is

16 really not to be a price discounter, I think the thrust

17 of the Index business is to try and make margin, and

18 that is possibly the main reason why year after year

19 after year, Index fail to be as competitive as we would

20 have liked to be in our famous win/lose/draw situation,

21 much to my despair.

22 Q. And in this area, prices are of critical importance in

23 the contest between Argos and Index.

24 A. Yes, that would be true to say.

25 Q. You have mentioned in the 1990s Argos had built up

1 a reputation for low prices as a result of an aggressive
2 price cutting policy, correct?

3 A. That is correct.

4 Q. And you say in your witness statement that at the time
5 of the takeover of Argos by GUS in 1998, it became known
6 that Argos was changing its policy and looking for more
7 margin.

8 A. That was my impression.

9 Q. So prior to 1999, the market is very competitive,
10 correct?

11 A. Yes.

12 Q. And we are talking about toys, obviously, all the time,
13 we are talking about your sphere of responsibility. In
14 this area, RRP's are a guide, but it is dangerous to
15 adhere to them on key value lines, because it is likely
16 that Index would be undercut, particularly by Argos.

17 A. We are talking about the period before 1999, before the
18 takeover, yes?

19 Q. Yes. Then there is the takeover, and there is a change
20 of policy, okay?

21 A. Yes.

22 Q. You say that it naturally took some time for the change
23 of policy to become apparent from the Argos catalogue.

24 A. Yes.

25 Q. And you say:

1 "Towards the end of 1999 [I assume you must mean the
2 autumn/winter catalogue and its influence] it was
3 apparent that the market was not as price-sensitive as
4 it had been."

5 A. The only thing I can say on that is yes, that is what
6 I said; it became apparent to me afterwards that in
7 terms of my memory, I might not have been as precise as
8 I ought to have been, because in looking back, I see
9 that it was probably prior to that catalogue that the
10 market was moving.

11 Q. It is not the timing so much as the way that you have
12 put it in your witness statement, paragraph 5:

13 "The takeover of Argos by GUS was in April 1998.
14 Naturally, it took some time for the policy to be
15 apparent from the Argos catalogue. However, towards the
16 end of 1999/start of 2000, that is for the autumn/winter
17 1999 catalogue, it was apparent that the market was not
18 as price-sensitive as it had been. This was because of
19 Argos' change of policy. We decided that it was now
20 much safer to adhere to recommended retail prices, and
21 this became our general practice."

22 What I want to say and ask you to comment on is that
23 that is a very strange way of describing the most
24 striking feature of the autumn/winter 1999 catalogue in
25 relation to these key items on your goods.

1 THE CHAIRMAN: I think you had better suggest why you say it
2 is a strange way of --

3 MR DOCTOR: The strange feature of that catalogue on these
4 goods is that there is complete parity of pricing on the
5 Action Man and core games items, with one exception, and
6 it is a very strange way of describing that outcome, by
7 simply saying that as a result of the policy, it became
8 apparent that the market was not as price-sensitive as
9 it had been.

10 A. Well, I can only repeat what I said a few minutes ago,
11 that in terms of my recollection of the timing of the
12 events, I simply misremembered the date that it did
13 become apparent. To me, the dates, on looking back and
14 checking that it did become apparent -- it was evident
15 in the early part of spring/summer 1999.

16 Q. Well, what was evident in the early part of
17 spring/summer 1999 is that the situation of Argos always
18 being the lowest had reversed itself. That catalogue,
19 on Action Man and core games, shows that the historical
20 rivalry, whereby Argos had always won, had actually
21 reversed itself to a situation where Littlewoods was
22 actually the lowest on most of the items.

23 A. Well, I am sorry, that is not my recollection of the way
24 that the situation was, so -- if that was the case,
25 then -- it is not my understanding that that was the

1 case.

2 Q. You have been in court the last three days, have you
3 not?

4 A. I have.

5 Q. You have seen us go through these comparisons. The
6 spring/summer catalogue 1999 shows a remarkable
7 reversal, in that whereas previously Littlewoods is
8 consistently higher than Argos, occasionally the same,
9 in that catalogue, there is a marked change; Littlewoods
10 is lower on the majority of items than Argos. That is
11 what comes out of that catalogue.

12 A. I mean, if you look at the pure figures, and you are
13 right, I have been in this court and listened to this,
14 so I have seen you go through these figures many, many
15 times. I can only repeat what I have thought many times
16 in the questioning of other people, that it may
17 appear -- if you look at the figures on those sheets,
18 yes, Index do appear to be looking more competitive on
19 prices.

20 However, the situation as far as we are concerned
21 within Littlewoods is that .99 price points and .95
22 price points we see as the same; we see that they have
23 absolutely zero effect on the consumer's purchase
24 decision.

25 THE CHAIRMAN: Yes.

1 A. So where I look at those, I do not see the price
2 differences that you talk about, I see a parity.

3 THE CHAIRMAN: Mrs Paisley made a similar point.

4 MR DOCTOR: You see them, you say, as parity; that is
5 a difference of between .95 and .99.

6 A. Yes, I see them as similar prices.

7 Q. Let us just think about what you are saying then. You
8 are saying that this parity of pricing, which you say
9 occurred in spring/summer 1999, as well as in
10 autumn/winter 1999 -- this parity of pricing has come
11 about just because of the change of Argos policy, that
12 is all.

13 A. I am saying that this change came about entirely as
14 a result of the change in Argos' policy. I can qualify
15 that to some extent by saying that I have worked in the
16 toy industry for a good many years, and despaired at the
17 low prices that we as a retailer were looking to try and
18 exist on. At the time that the Argos announcement in
19 terms of GUS acquiring them came about, this was, within
20 the toy industry, a huge, huge thing. The toy industry
21 were very, very concerned, and had been for many years,
22 the retailers, that the low margins were forcing
23 businesses into a situation of loss.

24 To get to a situation where something happened, and
25 in this case the GUS acquisition of Argos, was a huge

1 change within the industry, a huge change, and it should
2 not be talked down.

3 THE CHAIRMAN: Yes, thank you.

4 MR DOCTOR: All right, well, let us go back a bit. I am
5 going to suggest that you have never really believed
6 that to be the reason for the change.

7 A. Well, if you suggest that, sir, that would be entirely
8 wrong to do so.

9 (12.45 pm)

10 Q. Let us go back to the end of 1998 and the beginning of
11 1999. There is a meeting with Hasbro at which Hasbro is
12 presenting its 1999 business plan. You were present at
13 that meeting; do you remember that?

14 A. Yes, I do recall that meeting.

15 Q. They have got a new business plan in which they are
16 suggesting that there are ways in which they can inject
17 more margin into the business, if everybody in the
18 industry goes out at their RRP's, their recommended
19 prices.

20 A. Right, well, I --

21 Q. Well, if you go out at -- let us start there. They are
22 suggesting you should go out at this RRP and they will
23 charge you certain prices, and in that way, you can make
24 more margin.

25 A. Right, can I tell you that that is not my recollection

1 of the meeting or the thrust of that meeting at all?

2 THE CHAIRMAN: Yes.

3 A. Obviously, and clearly since that meeting -- and I am
4 talking about as recently, perhaps, as two months ago,
5 when obviously I was preparing for this situation, and
6 reviewing, you know, the details of that meeting, of
7 that 1999 plan, it did become apparent to me as recently
8 as that how manipulative and deceitful Hasbro had been
9 towards Littlewoods and Index so I do not --

10 THE CHAIRMAN: What do you mean by that, Mr Burgess?

11 A. Well, entirely in terms of what is being suggested to me
12 here, that this meeting was about putting more margin
13 into the business, on the basis that Index go out at
14 RRP's. That is where, I think, the deceit has come,
15 because that was certainly not the thrust of the meeting
16 or any part of the meeting that I recall.

17 THE CHAIRMAN: So what was the thrust of the meeting in your
18 recollection?

19 A. The thrust of the meeting was to discuss the 1999
20 business plan for Index. Key to that was that Hasbro
21 believed that they could put more margin into our
22 business, and that was the thrust of the business plan.

23 THE CHAIRMAN: And how were they going to do that?

24 A. What they were going to do was put two new rebates on
25 the table. One was a core rebate for boxed games and

1 Action Man, which was 3.5 per cent; in return for a full
2 listing of those two concepts, at the end of the year,
3 we would be entitled to 3.5 per cent rebate.

4 There were other rebates on the table, some
5 existing, but there were other new rebates on peripheral
6 products, opportunistic products, things like Nerf, they
7 were putting on the table I think 5 or 5.5 per cent if
8 we listed a number of those items, again to be repaid at
9 the end of the year. That was entirely the thrust of
10 the meeting. I have to say that I have no recollection
11 whatsoever that Ian Thomson or anyone at that meeting
12 from Hasbro said to us, "You have to go out at
13 recommended retail prices". I know that absolutely
14 categorically, and I can tell you why I know that
15 categorically, if you wish me to.

16 THE CHAIRMAN: Yes, please.

17 A. What again was not apparent to me at the time at that
18 meeting, and I am incensed by this, as you can perhaps
19 tell, was that they were raising the cost prices on
20 their product, which they were doing because that was
21 going to force us as a retailer to go out at a retail
22 price.

23 Now had they said any one of those two things to me,
24 I think the meeting would have ended there and then. As
25 a retailer, we do not like to be dictated to, in terms

1 of where we go on retail prices, and you can imagine if
2 any supplier, Hasbro or anybody, came into our offices
3 and said, "This is what we are going to do, Mr Index, we
4 are going to increase our cost prices to you, so that
5 you have no choice but to go out at retail prices,
6 because there is no margin to do anything but; there
7 would not be a retailer in the land who would have
8 accepted that at all.

9 The reason I feel that Hasbro were extremely
10 deceitful at that point was they did not tell me and
11 draw out to me that the cost prices were going to be
12 increased, and they did not say to me, "You are going to
13 make more margin by going out at retail prices", and
14 they could not do, because it would not have been true,
15 because they had put the cost prices up.

16 So the thrust of that meeting was entirely that we
17 would make rebates if we ran with their products, and
18 I have to say, at that time, there was awful, awful
19 margin within the Hasbro business, and we were actually
20 making a loss on those products; the fact that there was
21 a rebate on the table probably took my attention.

22 I thought, "Yes, this may be some margin coming into the
23 business".

24 THE CHAIRMAN: So you missed the other implication about
25 RRP's?

1 A. I do not know whether there was another implication on
2 RRP's, because I do not remember it.

3 THE CHAIRMAN: Right.

4 A. I think that had it been talked about and put on the
5 table in a very open way, I would have remembered it.

6 THE CHAIRMAN: Just to be absolutely clear, you say -- you
7 used the word "incensed", you were "incensed" --

8 A. I would have been, had I understood that at the time.

9 THE CHAIRMAN: I see, thank you.

10 MR DOCTOR: Mr Burgess, Mr Thomson says that during the
11 course of that meeting he presented the new terms that
12 they were suggesting for 1999, and there were
13 spreadsheets which were produced which showed that Index
14 would need to price at the new .99 price points in order
15 to make the necessary profit margin.

16 A. Yes, Ian Thomson would have presented, as part of the
17 plan, spreadsheets which would have indicated the
18 margins that we might have made in a number of
19 hypothetical situations, and I have to emphasise that,
20 because they were hypothetical situations, and
21 therefore, for that reason, we never really paid much
22 attention to that.

23 Q. Well, he says that at the meeting both John McMahon and
24 Lesley Paisley saw that the products in the core games
25 and Action Man ranges would have to be retailed at a

1 certain price point in order to maintain that margin.

2 A. Well, quite frankly, I do not recall that Ian Thomson
3 said that to anyone at that meeting.

4 Q. I am not saying that he said that; he is saying, and he
5 said to this court, that McMahon and Paisley saw that
6 the products in their core games and Action Man would
7 have to be retailed at certain price points, in order to
8 maintain the margin.

9 A. Well, I do not think I can comment on what Ian Thomson
10 might have thought that Lesley Paisley or John McMahon
11 were --

12 Q. Well, it is not what he thought, because he said they
13 expressed grave concerns over whether that could be
14 done.

15 A. Well, I am sorry, I can only say what I have said:
16 I have no recollection of there being discussions on
17 recommended retail prices at that meeting.

18 Q. In other words, how would Index be able to do this, to
19 price at these recommended retail prices, if in fact
20 other competitors, such as Argos, in the market would
21 not do the same thing, would not price at those points,
22 which would result in Index being undercut?

23 A. Sorry, can you just repeat what you want me to answer?

24 Q. This is what Mr Thomson told the court, that the issue
25 at the meeting, or one of the issues at the meeting was

1 precisely this, that these price points were presented,
2 McMahon and Paisley saw the products would have to be
3 retailed at a certain price point in order to maintain
4 the margins that were being suggested, they both said,
5 "Well, how could we do this, how can we price at these
6 points if our competitors might not, they might undercut
7 us?" So this is theoretical, "We cannot make this
8 margin if our competitors are pricing below this, they
9 are a direct threat to our catalogue if we go along with
10 your suggestion".

11 A. Well, you keep saying "your suggestion"; what I said
12 before is that Ian Thomson, as did a number of other
13 account managers, did a lot of work for his
14 presentations to Index. The two areas which fell down
15 on that price plan, which rendered it therefore at best
16 a discussion document, was, firstly, his choice of what
17 our selling price might be, his recommended retail
18 price; and secondly, the volume that we might achieve on
19 that line, because it is those two ingredients which he
20 can latch on to, as any supplier can latch on to, and
21 say, "In those situations, we can give you this sort of
22 margin".

23 Now I know that the volumes that he guesses at are
24 purely guesstimates. What I also know is that they will
25 be there to persuade me that we can make these sort of

1 margins; in other words, he will make the estimates look
2 good on lines which have a higher margin than he will on
3 those with a lower margin. I understand that as
4 a tactic, because I have been in the trade long enough.

5 And secondly, he will put his recommended retail
6 prices down, and fair enough, he has got nothing else to
7 go with, so he will do that.

8 Now if I, at that meeting, say, "Yes, that is all
9 well and good, we can hit that profit level if
10 everything falls right within that plan", it is
11 meaningless, and I would say at that point, "It is
12 unlikely we can go with those RRPs. That is our
13 business; you might assume we can, but it is our
14 business that we go with those RRPs", and at that point
15 there would be a debate, "Can we go at those RRPs?" But
16 that is no different to a debate we would have at any
17 time with anybody.

18 Q. I do not think there is any dispute, if you are saying
19 this is a conversation that might well have taken place.
20 Thomson says it did take place: they suggested that they
21 were restructuring their business plan, and part of it
22 included choosing particular price points which the toys
23 would be sold at, which meant therefore that you would
24 make a certain margin, given the prices they were
25 charging you; but you would only make that margin if you

1 went out at their particular price point.

2 From what you have just said, he may well have said
3 that.

4 A. Well, I think we need to be clear on one thing: what was
5 never suggested to me or at that meeting was that Index
6 had to go out at those retail prices.

7 Q. Well, when you say "had to", it can mean two things. It
8 was never said that Index had to go out at that, "Or we
9 will not sell you the goods, you are under some legal
10 obligation to", that is not what was meant at all.

11 A. That is good.

12 Q. Are you suggesting also that they did not say, "If you
13 want to make this margin, you have to go out at the
14 recommended retail price"; why should he not have said
15 that?

16 A. Because I think he would have been stating the entirely
17 obvious, do you not?

18 Q. Well, this is the plan he is putting to you. He is
19 suggesting, "Here are the RRP's, they are at certain [we
20 have heard] natural price points, or advantageous price
21 points; if you go out at that price, based on the price
22 we are going to charge you, the list price, you will
23 make a certain margin".

24 A. Well --

25 Q. In a sense, "You have to go out at that price in order

1 to make that margin", is a statement, as you say, which
2 is perfectly obvious. You are saying he never said
3 that?

4 A. I am saying he never drew it to the attention of the
5 meeting that we would be in any way -- giving any more
6 credence to their RRPs than we would do at any
7 presentation that we have had over the years.

8 Q. Well, he may not have said to you, "You have to go out,
9 we are going to force you to go out at that", but what
10 he may well have conveyed, as I understand what you are
11 saying, is, "If you want to make this margin on this
12 plan, then you have to go out at that point. If you do
13 not want to make the margin, go out at some other point,
14 but if you want to make this margin, you have to go out
15 at that point". Did he not say that?

16 A. No, I do not think he ever did say that, and that is
17 where I think the deceit came in. He never actually
18 said that.

19 Q. But you say it is obvious anyway. If this is the price
20 that he is charging you, it is obvious that in order to
21 make a margin of X, you have to go out at a certain
22 price.

23 A. Well, what would be obvious is that whatever price he
24 put on that, whether it was an RRP, a cut price or
25 an overprice, if we went out at those prices, we would

1 make that margin that was stated on it. That would be
2 obvious.

3 Q. Mr Burgess, perhaps you would like to explain again why
4 it is deceptive for a supplier to say to you, "Here is
5 my list price; if you go out at a certain recommended
6 price, you will make a margin of X, but if you want to
7 sell it for something else, you will make a margin of
8 something different"; what is deceptive about that?

9 A. What is deceptive about that entirely is at no point in
10 that meeting did he indicate to me that I had no choice
11 in the matter; in other words, that he had put the cost
12 prices up as well.

13 THE CHAIRMAN: I see.

14 A. That was the deceit.

15 MR DOCTOR: That he did not tell you that he had put the
16 list price up?

17 A. He did not tell me he had put the list price up.

18 THE CHAIRMAN: I think we will break there, Mr Doctor.

19 Mr Burgess, please do not now, while you are giving your
20 evidence, discuss the evidence or the case with anybody
21 else while you are in the witness box.

22 A. I understand, thank you.

23 THE CHAIRMAN: 2.00.

24 (1.00 pm)

25 (The short adjournment)

1 (2.00 pm)

2 THE CHAIRMAN: Mr Doctor, before we resume, could I just
3 signal on the housekeeping front that we have to rise
4 tomorrow at 3.00, not because, I hasten to add, it is
5 Friday afternoon, but because I have other duties to
6 perform.

7 Looking at the way we are getting on with the
8 witnesses, it seems to me possible that we would be
9 finished tomorrow by 3.00 anyway, but one would not
10 particularly want to take any risks on that point, so
11 I am mentioning it now, in case anybody wants to
12 consider the possibility of starting a bit earlier
13 tomorrow morning, in order to be sure of finishing by
14 3.00.

15 I am not expecting an immediate reaction, but you
16 might just think that over in your respective teams.

17 MR DOCTOR: Thank you very much.

18 THE CHAIRMAN: Yes?

19 MR DOCTOR: Mr Burgess, just before I go on, when did
20 Mr Riley take over from you as buyer of games? As
21 I understand it, you were still responsible for the
22 autumn/winter 1999 catalogue in regard to games, and was
23 it after that that he took over?

24 A. Yes, it would have been after that time.

25 Q. When he was still a trainee, he obviously would not have

1 had responsibility on his own for making decisions.

2 A. Yes, that is probably correct.

3 Q. Just before the break, you said that you had been
4 thinking about this matter in preparation for the trial,
5 and you had realised that Hasbro had been deceitful
6 towards Index, particularly at this meeting, where
7 McMahon and Thomson came to speak to you; do you recall
8 that?

9 A. Yes, I said that.

10 Q. And the deception consisted of the fact that they had
11 not told you that their cost prices, that is the price
12 they were charging you, were going to go up; that is
13 what you explained.

14 A. That was how I came to that conclusion, yes.

15 Q. You say that if you had realised that at all, the
16 meeting would have come to a swift end, I think that is
17 something you said.

18 A. Yes, that is what I said.

19 Q. Mr Burgess, do you want to just think about that again,
20 as to whether it is conceivable that Hasbro were being
21 deceptive in not telling you about the cost prices,
22 before we look at the documents that Hasbro gave you on
23 that occasion?

24 A. I am kind of happy to stand by what I said.

25 Q. Right. Well, would you go to the second bundle in the

1 witness statements, tab 48? This is the witness
2 statement of Lesley Paisley, who produces various
3 documents which are attached behind that. One of them,
4 indeed the first document, is the 1999 business plan
5 that was presented on that occasion.

6 A. Yes.

7 Q. And this is a document then which comes from
8 Littlewoods; this is the document you had.

9 THE CHAIRMAN: From Argos -- oh, I see, it is produced by
10 Littlewoods.

11 MR DOCTOR: It is originally put together by Hasbro, but the
12 document that we are looking at is a copy of the
13 document which was in Index's possession, and is the
14 document that was given to them by Hasbro --

15 THE CHAIRMAN: Yes.

16 MR DOCTOR: -- in connection with that meeting.

17 A. Yes.

18 Q. Now this has the usual stuff at the beginning, setting
19 out agenda and mission and so on and so forth. If we
20 then go to a tab called "Appendices", you will see it is
21 the next tab after the 1999 plan, these are the
22 appendices to this document. Would you just look to see
23 what the appendices are? It is the 1998 business to
24 date by brand, 1997/1998 profit analysis, 1999 range
25 plan and profit analysis, 1998/1999 terms, comparisons

1 and so on.

2 Now would you go to the second tab there, 1997 to

3 1998 profit analysis? This is the beginning of

4 an analysis of the past, that is 1997 and 1998.

5 A. Could you tell me what I am trying to find?

6 Q. If you look at the bottom of the page, you will see

7 a number beginning with three 0s and then a number;

8 I would like you to go to page 000425. Do you have

9 that?

10 A. Yes.

11 Q. So this is the beginning of the 1997 year. I am just

12 going to do this in batches: if you go to the next page,

13 427, you will see an analysis of 1997, full year profit

14 on return analysis; POR, profit on return analysis.

15 A. Yes.

16 Q. You will see down there a list of items. We happen to

17 be on the page of Action Man.

18 A. Yes.

19 Q. You will then see the 1997 list, that is the first

20 column; do you see that?

21 A. I do.

22 Q. That shows a price. That was Hasbro's list price for

23 that season, was it not?

24 A. It was -- well, I presume it was.

25 Q. Well, that is what it says it is.

1 A. Sure.

2 Q. Alongside that, we have "Net £ inc LBL"; I think we have
3 been told that is the net price to Littlewoods, because
4 Littlewoods insists on a special label which is attached
5 at a cost of 7 pence.

6 A. Yes, that is correct.

7 Q. So all of these prices are 7p higher, and this is the
8 cost price to Index; correct?

9 A. Correct.

10 Q. Just in passing, let us notice one thing: in the
11 Action Man category, for example, there are a whole
12 range of different toys, are there not, different items?
13 Street Car Racer, Sniper, Street Commander, Jet Pilot,
14 Moonraker and so on.

15 A. Yes.

16 Q. It is very difficult to make comparisons one year with
17 the next because these individual items within the
18 Action Man range change from year to year, do they not?

19 A. They do.

20 Q. And even if it has got the same name, it has got some
21 additional feature to it which makes it a slightly
22 different product, so it is very difficult to compare
23 one price with a price in the following catalogue or the
24 following year.

25 A. Well, not exactly, no.

1 Q. Well, let us have a look at just one example. We have
2 Action Man -- well, let us have a look. Have a look at
3 427, which is 1997, and have a look at 435; perhaps you
4 can show us why you doubt and question my suggestion
5 that it is difficult to compare them. You just show us
6 how easy it is to compare.

7 A. I am sorry, sir, I did not say it was difficult to
8 compare. All I said is that they do not usually keep
9 the same name of an item with minor differences to it.
10 They usually always change the name of the item if the
11 product is different.

12 Q. What about Dr X in 1997, and in 1998, there is a product
13 called Dr X Refresh.

14 A. Yes.

15 Q. There is a slight change in the item, is there not?

16 A. There is a costume change, yes.

17 Q. A costume change, and they have changed the name
18 slightly. This makes it very difficult to see
19 a carry-through from one year to the next. Not
20 impossible, but it is difficult.

21 A. Yes.

22 Q. Okay. But that in any event is a list of prices for
23 Action Man in 1997; right?

24 A. The first list, yes.

25 Q. Both the list price and the net price to Index.

1 A. Yes.

2 Q. If you go on to page 429, we have Star Wars, and then,
3 at 430, we have games.

4 A. Yes.

5 Q. Let us just look at one that even I would recognise, and
6 that is Monopoly, which is about three-quarters of the
7 way down the 1997 year; the list price in 1997
8 is £10.30, and with the 7p label charge, it is £10.37.

9 A. Yes.

10 Q. Pictionary, which is near the top, is £24.87, and net
11 price £24.94; right?

12 A. Yes.

13 Q. Now let us go to 1998. Beginning at 435, we have the
14 same set of pages, but this time relating to 1998. So
15 we have Action Man, and as I say, it is difficult to see
16 any carry-through, but if one had time, perhaps one
17 could do that. But you have there the 1998 net prices
18 to Index for each individual item; correct?

19 A. Yes.

20 Q. If you go on to page 438, we can see that we have the
21 same for games, the 1998 list and net prices for games.
22 This time, we can make some comparison. Pictionary,
23 which was at a net price of £24.94, has gone up slightly
24 in 1998 to £25.32; right?

25 A. Sorry, just --

1 THE CHAIRMAN: Pictionary is just at the bottom there, three
2 lines up from the bottom.

3 MR DOCTOR: Pictionary is three from the bottom.

4 A. Yes, I have that.

5 Q. So between 1997 and 1998, that price went up.

6 A. It did.

7 Q. And on Monopoly, from £10.37 net price, it also went up
8 in 1998 to £10.67.

9 A. Yes.

10 THE CHAIRMAN: I have £11.67.

11 MR DOCTOR: I beg your pardon, £11.67, yes. So that was
12 quite a big increase in price, between 1997 and 1998;
13 you nod your head in agreement.

14 A. Sorry, yes.

15 Q. Now keeping your finger at the 1998 page, 438, will you
16 go to page 445?

17 A. Yes.

18 Q. It begins by saying this is the part of the appendix
19 called "1999 profit analysis", and this is the fourth
20 and fifth pages of that, relating to Action Man;
21 correct?

22 A. Yes.

23 Q. This is the plan, what Index is going to be charged by
24 Hasbro for 1999 in these particular items, and here are
25 the net prices; is that right?

1 A. That is right.

2 Q. That is Action Man, and if we go to page 451, we see
3 Monopoly; this is the 1999 plans for games: "Fun for
4 all", do you see that?

5 A. Yes.

6 Q. The first one at the top of the page is Monopoly. You
7 have to go one page back to see the column heading. The
8 third column is "Net pounds including label", and that
9 is £12.57.

10 A. Right.

11 Q. So this is the price which Hasbro are going to charge to
12 Index for 1999, as set out here.

13 A. Yes.

14 (2.15 pm)

15 Q. And on Monopoly, whereas previously the net price had
16 been, in 1998, £11.67, it was now going to be £12.57.
17 Can you see Pictionary here anywhere?

18 THE CHAIRMAN: Pictionary is on the following page.

19 MR DOCTOR: Oh, on the next page. There it is, yes.
20 Pictionary Standard; in fact, I had it marked.
21 Previously, the net price was £25.32 for 1998, and it
22 had come down in 1999 to £25.17.

23 A. Yes.

24 Q. So at the meeting at which they are presenting their
25 plan to you, they present to you the list prices for

1 1999, together with a comparison of their prices for
2 1998 and 1997. I would like to put it to you that to
3 suggest that Hasbro were being deceptive because they
4 did not tell you that their cost prices were going up is
5 a grossly inaccurate and unfair description of what
6 happened at that meeting, is it not?

7 A. Well, no, I still stand by what I am saying. The reason
8 that I stand by what I am saying is that at such
9 a meeting, where heads of departments were there, we
10 would not at any stage in this meeting actually pay
11 a lot of attention to the line plans. It was more at
12 the macro level; these line plans were included in this
13 plan purely for my benefit as a buyer, so that when
14 I got round to actually looking at my selections,
15 I would have the information to go back and draw my
16 information from.

17 What is I still believe a deception on the Hasbro
18 part, which I say again I did not know at the time, and
19 only found out several weeks ago, was that they did not
20 draw that to my attention at the meeting, and as we
21 never went through the line plans, because that was
22 something we really did not do at that meeting, it was
23 really a terms package, to look at the overall plan --
24 then I am sorry, I do stand by what I say.

25 THE CHAIRMAN: When did you first, as it were, go through

1 the line plans?

2 A. I could not be very sure on that. This meeting,
3 I believe, was in November of 1998.

4 THE CHAIRMAN: Yes.

5 A. I would have certainly looked at this prior to toy
6 fairs, which would be the end of January.

7 THE CHAIRMAN: Yes.

8 A. It would then have been of a lot more benefit to me
9 after toy fairs, when I had seen Hasbro, when I had seen
10 a load of other suppliers, when I also knew how many
11 pages I had for certain categories, and then could start
12 putting a plan together, in terms of how many items
13 I would do from any category, and then this would be
14 invaluable at that point because then I would start
15 looking at the line plans, reminding myself of the lines
16 within the range and formulating my own kind of ranging.

17 MR DOCTOR: At this particular meeting, you were not, of
18 course, arranging for the purchase of any of the
19 particular products.

20 A. That is correct.

21 Q. So within a month or two, you were busy beginning to
22 plan your autumn/winter 1999 catalogue, at which stage
23 the question of the prices that Hasbro would be charging
24 Index would become one that was at the very forefront of
25 your mind.

1 A. They would certainly become apparent as I got into my
2 selection process, yes.

3 Q. At that point, if it were true, Mr Burgess, that you had
4 been under the impression at this meeting in November
5 that the plan that was being put forward did not involve
6 an increase in prices, and if you had then discovered,
7 within a month or two, that actually, to your great
8 surprise, not only did it involve an increase in cost
9 price, but that Hasbro had been deliberately deceiving
10 you on the previous occasion, if that had happened, you
11 would have, first of all, been conscious of that in
12 January 1999, for a start.

13 A. No, I am sorry -- I mean, it did not then occur to me at
14 that time that this, in my words, deceit had taken
15 place.

16 Q. In fact, you say if it had been clear to you that the
17 prices had gone up, you would have walked out of the
18 meeting, or it would have come to a sudden end.

19 A. Yes, at that particular meeting, that would have been my
20 reaction.

21 Q. Well, two months later, you discover what the prices
22 actually are, and if in fact they involve a hiking of
23 prices, and we have not established that yet, but if
24 they did, assuming you are correct, surely at that stage
25 you would have gone to all your bosses and everybody

1 else and said, "This is absolutely absurd, we have been
2 taken for a complete ride by these deceitful suppliers,
3 we were listening to this presentation about how we were
4 going to increase our margin, and I have suddenly
5 realised that the whole thing was based on a trick, ie
6 they are actually increasing their prices and therefore
7 we have to price at much higher prices". That did not
8 happen, did it, Mr Burgess?

9 A. That did not happen, as the gentleman says.

10 Q. In fact, this suggestion that Hasbro were deceptive at
11 the meeting that they had at the end of 1998, or it may
12 have been early 1999, is something that you have just
13 thought of very recently, have you not, without going
14 back to check the actual documents?

15 A. No, I think that -- I mean, yes, it came to my mind
16 several weeks ago when I was looking at the situation.
17 I wondered why, in fact, that was not put on the table.
18 They came up to present a business plan, which I was at,
19 on the management, actually stating they could put more
20 margin into Index.

21 I think it would have been expected within the trust
22 that you have to have to do business that they should
23 have perhaps said, "Listen, the cost prices are going
24 up, Mr Burgess, but if you go out at your retail prices
25 with this extra core rebate that you get, you will make

1 extra margin". That is what I would have expected.
2 I would not have expected to have to find that out
3 myself.

4 Now, when I started looking at putting my ranging
5 together later on for my selections, I am not sure that
6 it became evident to me at that point that cost prices
7 had gone up.

8 Q. Well, Mr Burgess, if anyone is conscious of the actual
9 cost price of the goods, it would be you, and if at that
10 point you found that there was a vast increase in the
11 cost price, or marked increase in the cost price from
12 the previous season, you would have noticed it
13 immediately.

14 A. We do analyse our cost prices to see which have gone up,
15 because clearly we resist cost price increases. What
16 I am suggesting might have happened here is -- we do not
17 actually analyse our cost prices or did not at that time
18 by supplier. It did become apparent to me that my cost
19 prices had gone up because the margin was different.

20 Q. It would have been very clear to you, the individual
21 concerned with setting the prices of each individual
22 item; not so?

23 A. Well, it would have been. At the end of the day,
24 Action Man is possibly 25 or 30 lines in a range which
25 has 250 lines in. The figure that I would report to

1 management would be the figure of those 250 lines, you
2 know, the margin that these 250 lines, which is the
3 boys' range at that time, or thereabouts, whether it
4 would be hitting the targets or would not be.

5 Q. In fact, what you are saying is the plan that Mr Thomson
6 was putting forward, as he explained himself to the
7 court, did involve having to charge certain prices, at
8 what he calls price points, of .99, that you could only
9 make the margin if you charged at that price, and that
10 is the very thing which Mr McMahon and Mrs Paisley
11 immediately picked up at the meeting, and queried; they
12 said at that meeting, "But in order to go along with
13 this plan, we have to charge these prices, these
14 particular prices that you are recommending; if we do
15 that, how can we be certain that our competition will
16 charge those prices?" That is the whole point of it.

17 A. Yes, but what you are suggesting to me is that Hasbro
18 said to me, or to that meeting, "You ought to go along
19 with these RRPs" for any reason; that was not apparent
20 to me. As I say, the thrust of the meeting was, "We,
21 Hasbro, can put before you extra margin because of these
22 core rebates". I have absolutely no doubt that
23 recommended retail prices will have been discussed as
24 part of that.

25 Q. I was coming to that. I understood earlier you had said

1 something about the fact that pricing was not discussed
2 at all.

3 A. I did not say that.

4 Q. Well, if I have misunderstood that, certainly you now
5 make it clear. Pricing was obviously discussed at a
6 meeting in which one of the problems of the past has
7 been that profitability has been too low on these items.
8 When the supplier and retailer get together, the one
9 thing they are obviously talking about is the prices at
10 which these things will go out; not so?

11 A. Pricing will be discussed, of course it will.

12 Q. Yes. And pricing, both your price and what they can get
13 for it in the market.

14 A. Sorry, what do you mean by that?

15 Q. When we talk about pricing, what was discussed was both
16 the price to Index and the price at which Index would
17 sell on in the market.

18 A. Certainly, both prices.

19 Q. Yes. It was at that point that it became obvious at the
20 meeting that the new pricing plan that Index was coming
21 forward with would involve a necessity for Index to
22 price at certain price points.

23 A. Sorry, what price that Index were coming forward, what
24 price plan that Index were coming forward with?

25 Q. The price plan that they were discussing in their

1 business plan, whereby you would go out at certain price
2 points, you would make your margin by pricing at those
3 points, together with a rebate if you achieved certain
4 volumes, and that is why the thing also mentions
5 volumes.

6 A. This was not a price plan meeting, this was a business
7 plan meeting. We will have discussed retail prices
8 because that is very key to probably a lot of things
9 that are in there. I will have made the point very
10 strongly, I am pretty sure, that any plan that any
11 supplier puts before us will be dependent on certain
12 hypothetical situations. One of those I have already
13 mentioned before is recommended retail prices. I will
14 have said at that meeting, particularly for possibly
15 John McMahon's sake -- who would not be involved in
16 understanding the business at line level the way that
17 I am -- I would have said to him, "Let us all understand
18 that this profit plan is only as good as the guesses in
19 terms of retail price points".

20 THE CHAIRMAN: Yes.

21 MR DOCTOR: Yes, but Mr McMahon would have said, "If we have
22 to go out at these prices, how can we be sure that
23 everyone else will go out at these prices? If we go out
24 at this price and Argos undercuts us, we will not make
25 the volumes on which the rebate is dependent".

1 A. That was the point I was at this meeting. I do not
2 recall Lesley Paisley being there. But I do not recall
3 either a discussion that John McMahon had about that
4 element.

5 (2.30 pm)

6 Q. It was at that point that McCulloch said he had already
7 been discussing his plans with the major opposition, by
8 which he meant Argos, and they were of the same opinion,
9 that this pricing plan made no sense unless Hasbro could
10 get everyone to go along with it.

11 A. You keep saying "pricing plans"; that means absolutely
12 nothing to me. And also, I can only reiterate that I do
13 not recall any discussions along those lines that
14 John McMahon had or that Mike McCulloch had.

15 THE CHAIRMAN: Yes.

16 A. I am not saying they did not happen; all I am saying is
17 the meeting that I was at, I did not hear them.

18 Q. Well, McMahon then said they would go along -- well, let
19 us not call it a pricing plan; they would go along with
20 the plan that Hasbro was putting forward, but if Argos
21 did not stick to it, then obviously Index would not
22 stick to it in the future.

23 A. Well, I can only reiterate that I do not recall that
24 conversation at all.

25 Q. All right. Now let us put ourselves shortly after that

1 meeting at the time of the 1999 spring/summer catalogue,
2 which comes out in January of 1999.

3 A. Yes.

4 Q. You immediately do your win/draw/lose analysis; correct?

5 A. We do.

6 Q. We have seen the figures; on that, we see that whereas
7 in the past, Argos has always been at the lowest price,
8 now the situation is that Argos is either the same price
9 or in most cases Littlewoods is better. When I say
10 "better", I am trying to use a neutral word in the sense
11 that I am trying to cover the difference between 99 and
12 95; you say that makes no difference, but at least, let
13 us put it this way, it is no longer the situation that
14 Argos is undercutting Index, correct?

15 A. That is the case, yes.

16 Q. You say that you understood Argos were going to price at
17 RRP.

18 A. Yes.

19 Q. If it is correct that Index wants to be seen as
20 a price-cutter, if it is correct that Index is in
21 competition, if it is correct that these are
22 high-profile goods advertised on television which make
23 a big influence on consumers, where small price
24 differences can have dramatic impacts, if all of that is
25 correct, I suggest to you that Index would have seen

1 a golden opportunity to undercut Argos.

2 A. All of those things, I think, are correct to say, with
3 one exception: the one exception to that is I do not
4 believe that Index did want to see themselves as
5 a price-cutter, and I stated that earlier.

6 With regards to the next points, Index -- the golden
7 opportunity that Index possibly saw at that time was
8 that we could actually make margin to sustain the
9 business.

10 THE CHAIRMAN: All right. Saw a golden opportunity to make
11 margin to sustain business?

12 A. Yes.

13 THE CHAIRMAN: Yes?

14 MR DOCTOR: And that overrode any possibility that these
15 particular items, which are the key value items that
16 draw the crowds -- that you would not, in fact, try and
17 undercut Argos on these particular items in order to
18 draw the crowds to your business.

19 A. Yes, and, you know, what you, I think, fail to
20 understand is that a business like Index, like any
21 business, do have to make money to survive.

22 I can tell you that the margins that we were on with
23 Hasbro product, particularly these two core ranges,
24 ranged from 1 per cent on boxed games, 1 per cent, to
25 possibly 7 or 8 and possibly 9 per cent on Action Man.

1 If I therefore then say to you -- if we take an average
2 price, which is £9.99, for argument's sake, we take the
3 cost price at 3 per cent, we add VAT to that, we add
4 a handling charge of 90p to that, we would lose 60p on
5 every one of those products.

6 If we double the margin that we make on those same
7 scenarios, so we have a retail price of £9.99, we have
8 a margin of 8 per cent, then the cost price plus VAT
9 plus handling charge will mean we will lose about
10 20 pence on those items. So there is no golden
11 opportunity in actually going down to levels where we
12 would lose money.

13 Q. Well, Mr Burgess, that is fine provided you are fairly
14 confident that Argos are going to be pricing at RRP in
15 the next catalogue, the important autumn/winter 1999
16 catalogue. How could you have known that?

17 A. It is a calculated risk.

18 Q. Well, why would you have taken the risk on these items,
19 on all of these items, to price them -- the core games
20 and Action Man items -- at exactly RRP? Why would you
21 have taken that risk? Why would you not have taken the
22 risk perhaps on half of them, and still try to beat
23 Argos on the rest?

24 A. Sorry, what season are we talking about now?

25 Q. Autumn/winter 1999. Action Man and core games, exactly

1 the same price on all items except for one, I think,
2 Walkie Talkie or something.

3 A. Right, okay.

4 Q. Why would you have taken the risk of pricing at exactly
5 RRP on all items that are common for autumn/winter 1999?
6 Why not take a risk on some of them?

7 A. Well, I think that, you know, there was evidence to
8 suggest that RRPs were going to be sustainable on the
9 High Street.

10 Q. Well, I put it to you, Mr Burgess, that all that was
11 known at that stage, we now know, is that Argos were
12 interested in higher margins, that they had various
13 methods open to them for achieving that, some of which
14 would include putting their prices up, some of them
15 would include putting their prices down, changing their
16 mix, rationalising their stores, changing their image,
17 doing all sorts of things. You could have had no idea
18 whatsoever at that stage, unless you had some
19 arrangement, that in fact Argos were going to charge on
20 these key lines RRP; you would have been completely
21 uncertain about that unless someone had told you this
22 was going to happen.

23 A. Index and Littlewoods had a pricing plan every year. We
24 had a strategy. That strategy was to be as competitive
25 as we could and to make margin. Index, I do not think,

1 ever made a margin in the first seven years of its
2 business. I think it only ever made a margin --
3 a profit one year. Toys in particular within that
4 business, within the Index business, suffered worse.

5 So the overall plan that we had was to be
6 competitive, but also to make margin, so it is
7 a double-edged sword.

8 THE CHAIRMAN: Yes.

9 A. If I can just finish, as I said, and I cannot understate
10 what I have said, there was a sea change within the toy
11 industry as I saw it. I was not the only one that saw
12 it, I was caught up in it, everybody was talking about
13 it. The sea change was the acquisition of Argos by GUS.
14 Argos, a very dynamic company, very driven by volumes,
15 looking for market share, taking very low retail
16 pricing; GUS, on the other hand, were a very established
17 business, not as dynamic, and their business was all
18 about margin, and they had acquired Argos.

19 So my belief and hope was that Argos would not be
20 able to go down the road of cutting prices as much as
21 they had done. With that in mind, I think that my
22 pricing for spring/summer catalogue was to test the
23 water.

24 THE CHAIRMAN: Yes.

25 A. Let us try and put some more margin into our business --

1 THE CHAIRMAN: This is spring/summer 1999?

2 A. Yes, it is a smaller season, there is a risk element,
3 but it is a smaller element, because it is not
4 an autumn/winter season, as far as toys are concerned.
5 I would want to carry on on that strategy clearly
6 because that is going to get margin into my business,
7 but what enables me to do that, to some extent, is that
8 when I see the Index and Argos catalogues coming out in
9 January, well before I have done my selections for
10 autumn/winter or even thought about pricing for
11 autumn/winter, evidence there is, as I hoped, that there
12 is an effect, a big effect, of the GUS acquisition of
13 Argos because, for the first time ever, almost ever, on
14 key items, Argos had gone out at RRP's.

15 MR DOCTOR: Yes, but how did you have any certainty or
16 knowledge that Argos would stick to that?

17 A. I had absolutely none.

18 Q. Yes. In fact, as far as you are concerned, as at the
19 beginning of 1999, as far as you were aware, Argos was
20 just as much in the business of price cutting as they
21 ever had been.

22 A. Sorry, can you justify what you have said?

23 Q. At the beginning of 1999, as far as you were concerned,
24 your perception was that Argos were still
25 a price-cutter, it was a price-cutting business that

1 wanted to be seen in the market as being competitive.

2 A. It depends what you mean by -- can you be very precise

3 when you say "the beginning of 1999"?

4 Q. It is difficult to be precise --

5 THE CHAIRMAN: Well, takeover took place when? The takeover

6 took place --

7 A. In 1998.

8 MR DOCTOR: At the beginning of 1999, you see that there has

9 been some movement, but the fortunate outcome is that

10 Littlewoods now seems to be cheaper on the majority of

11 items -- you say it is not cheaper if it is 4p less, but

12 at least on the majority of items, it is no longer the

13 case that Argos is always the cheapest; that is what you

14 see.

15 A. That was good news for me at the time, yes.

16 Q. It must have occurred to you that Argos was doing

17 exactly the same exercise; correct?

18 A. Yes, they would be looking at the Index catalogue, yes.

19 Q. And these are all the items which are advertised on TV

20 and which bring the customers into the store; correct?

21 A. That is also correct.

22 Q. So it must have occurred to you, "Well, I cannot be sure

23 they are going to like that very much. They might want

24 to go up on generally other areas which are not quite so

25 high-profile, but on these items, I do not think they

1 are going to like that very much, that they are no
2 longer the cheapest; in fact, we could legitimately go
3 out and advertise, 'We are now the cheapest'. Argos are
4 not going to like that very much". That is what you
5 would have been thinking.

6 A. I think if we had, in a wholesale manner, undercut Argos
7 in that spring/summer season, I think that for sure that
8 would have played a big part in my guesstimating what
9 might have happened before I set my prices for
10 autumn/winter. It was not evident to me that we had, in
11 a wholesale manner, whatsoever undercut Argos, so I did
12 not see they would react in the way that is being
13 suggested.

14 Q. Well, they might have. It was very uncertain at that
15 time.

16 A. Yes, it was -- as I could put it, it was the start of
17 an era.

18 Q. It could go either --

19 THE CHAIRMAN: Sorry, the start of an era; an era of what,
20 Mr Burgess?

21 A. Of change within the toy industry.

22 MR DOCTOR: It could have gone either way.

23 A. Well, my expectation, on what I had heard, what I had
24 read and what I had seen, what I had been caught up
25 with, in terms of this whole development, the buzz, the

1 talk, the everything that happened at that time, my
2 expectation was that it would continue to move towards
3 RRP's, and, of course, always in the back of my mind is
4 that -- I had thought for years, "How long can this go
5 on?", because Index are not making any money from
6 Hasbro, in particular from Hasbro on toys; therefore, it
7 suggests to me that our major competitor, no matter how
8 big they are, presumably also cannot be making money.
9 So I was always hoping that, you know, something would
10 happen to change the situation.

11 Q. You say, in paragraph 12 of your statement, that
12 Mr Thomson had numerous discussions with you about the
13 low retail margins available.

14 A. Yes, that would be true.

15 Q. You say you would always try and obtain reduced cost
16 prices, better retrospective discounts, improved page
17 contributions.

18 A. Correct.

19 Q. From paragraph 15, what he was trying to do was
20 encourage you to move to recommended retail prices.

21 A. Yes, he would have been trying to do that.

22 Q. But going back to paragraph 12, it seems that while
23 Argos were still cost-aggressive on price, this was not
24 really of much significance.

25 A. I would also agree with that statement.

1 Q. You do record him actually advising you -- this is
2 paragraph 19 -- that he thought Argos might accept his
3 retail prices.

4 A. Yes, I think I do have vague memories that he might have
5 been suggesting to me that that would be the case.

6 Q. He was trying to give you the impression that if you
7 went out at RRP's, you would not be undercut by Argos, by
8 saying those words.

9 A. Yes, I suspect that he used words like that to try and
10 convince me.

11 THE CHAIRMAN: Yes.

12 (2.45 pm)

13 MR DOCTOR: But you say while Argos was still seen as
14 a price-cutter, there was no question of doing that
15 because there was always the danger that in the next
16 catalogue Argos would be lower than you would.

17 A. Yes, that is the case.

18 Q. Well, I suggest to you that just because you had read in
19 the papers that Argos was seeking to improve their
20 margin, and just because you had seen some slight rising
21 of prices in spring/summer 1999, that provides no
22 adequate explanation at all for the fact that in the
23 autumn/winter 1999 catalogue on these key items, you and
24 Argos went out at exactly the same prices, RRP, in all
25 but one item.

1 A. Sorry, the --

2 Q. I am suggesting that the reasons that you give, which is
3 just that you had heard that Argos were seeking to
4 improve the margin, that you had seen some raising of
5 prices in spring/summer 1999, that would not have
6 provided an explanation or that does not provide
7 an explanation for how the autumn/winter 1999 catalogues
8 on these key items are listed at exactly the same prices
9 by both Argos and Index, both of them being at RRP.

10 A. Well, you are entirely wrong to suggest that. I have
11 told you the strategy that I had that Index followed.
12 I can back that up by saying that never at any stage in
13 my working life as a toy buyer have I had any evidence
14 whatsoever that any national accounts manager from any
15 company could, with any certainty, give me information
16 that I could rely on as regards prices that my major
17 competitor would do.

18 THE CHAIRMAN: Yes.

19 A. Many, many times -- Ian Thomson is really no different,
20 and I am not being disrespectful to anyone, to any one
21 of a number of a dozen Ian Thomsons from other
22 companies.

23 THE CHAIRMAN: So there are a dozen Ian Thomsons telling
24 you --

25 A. They all want to be my best friend. They need

1 selections for their bonuses. The only way they can get
2 them is to be my best friend, in their eyes.

3 THE CHAIRMAN: And what are they telling you?

4 A. They are telling me everything possible to get me to
5 select their items. They are telling me, "You can make
6 good margin on our items, I do not think Argos will be
7 running this, you will be okay"; they are telling me,
8 "I think Argos might go out at RRP on this because they
9 did on a similar product two years ago", or whatever;
10 they will say anything that they think will help them to
11 get a listing. There are a million different things
12 that they could say in that respect. I have been in the
13 trade for long enough, I have heard it all before.
14 Ian Thomson at Hasbro is no different to a lot of people
15 I deal with. It is their job, it is what they do.

16 THE CHAIRMAN: So there are, in your words, "other
17 Ian Thomsons" who are also trying to tell you what Argos
18 is going to go out at.

19 A. That is right.

20 MR DOCTOR: In fact, let me just put it to you, so you have
21 an opportunity of commenting on it, the real reason why
22 we find this precise similarity of prices in
23 autumn/winter 1999 is precisely because you, that is
24 Index, were going along with this Hasbro plan,
25 whereby --

1 A. Can I interject there? I really do not understand what
2 "this Hasbro plan" is. Right at the start -- I have
3 been trying to establish what this plan is. I do not
4 know what this plan is.

5 Q. The plan is you will go out at the suggested retail
6 prices, and Hasbro will get everyone else to do the same
7 thing, and you will do it on the basis that Hasbro will
8 give you an assurance of some kind -- obviously you
9 cannot go to court about it, but they will assure you,
10 you will get an assurance, a comfort, everyone else is
11 going out at the same price, and you will see what
12 happens; and that is what happened.

13 A. Sorry, could you say that again?

14 Q. Yes. You will go out at Hasbro's recommended retail
15 prices with the understanding that Hasbro will work hard
16 to get everyone else to do the same thing.

17 A. No.

18 Q. And that is exactly what happened.

19 A. I have told you what happened, and that did not happen.
20 I am sorry, that did not happen.

21 Q. As you say, by 2000, the policy -- well, you say "the
22 policy", you are not referring to this policy, but
23 certainly the policy of charging RRP was in place, and
24 the market had settled down to RRP. That much is clear.

25 A. Yes.

1 Q. In Action Man and core games.

2 A. Yes.

3 Q. Not on the other toys which we are coming to, that had
4 not happened by 2000.

5 A. Well, I do not know, I cannot comment on that. I cannot
6 recall, I have not checked the situation out, I just do
7 not know.

8 Q. Well, let us go to the e-mail of 18th May 2000. It is
9 in the core bundle, page 92. Now this is the e-mail we
10 have seen several times before, addressed firstly to
11 yourself and various other officials at Littlewoods.

12 A. Yes.

13 Q. And this is, in fact, your printed copy of the e-mail,
14 the one that you printed out.

15 A. I believe that to be the case.

16 Q. We see some markings on this document. You say in your
17 statement that is either you or your assistant ticking
18 off these prices against Littlewoods' own prices.

19 A. I am not sure what I said about the ticks in my
20 statement, if we could go to that, that would help me.
21 I do remember stating that I do not remember the e-mail.

22 THE CHAIRMAN: Can we go to the statement, Mr Doctor?

23 MR DOCTOR: Yes, it is tab 5, paragraph 24. You say:
24 "It is an unusual e-mail, I do not recall ever
25 receiving one like it. If it had been significant,

1 I would have remembered it. It looks as if it was
2 ticked by me or my assistant, presumably checking it
3 against our own prices."

4 Why would you be checking it against your own
5 prices, unless there was some reliance on this document
6 in the first place?

7 A. Well, firstly, I do not remember receiving the e-mail,
8 and therefore it is unlikely that these would be my
9 markings on it. However, they would probably be the
10 markings of my assistant, and I do not remember
11 receiving or seeing the document until it was shown to
12 me afterwards. I can put some kind of perspective on
13 that, if that helps.

14 Q. If you want to.

15 THE CHAIRMAN: Yes, why do you not?

16 A. The date of this e-mail is 18th May; this would be
17 pretty close to our final pricing for the catalogue for
18 this year. At this time, bearing in mind that I am
19 responsible for something like 500 lines, 60 or 70
20 suppliers, it is a crucial time to get the information
21 that is going to be printed in the catalogue as correct
22 as it can be because we do not have any second chances.
23 That catalogue is then out there for six months.

24 So at this time, there is a huge amount of paperwork
25 that comes in, e-mails and hard copy, a lot of which

1 will be information which will have no reflection on our
2 pricing. The big problem is trying to find the
3 information that might have an effect on our pricing, so
4 what probably would have happened in this situation,
5 because it is what I adopt now as a working practice, is
6 that I would tend to give all the information to my
7 assistant to sift through and identify if there is
8 anything particularly important that I need to look at.
9 I suspect that is what those ticks are.

10 Now what they might mean, I do not know. They might
11 mean that yes, these are the items -- these items we are
12 running. It might mean the prices on here relate to
13 RRP's, it might mean a lot of things, because I cannot
14 recall.

15 MR DOCTOR: Just by the way, this document was found on your
16 files, the OFT found it on your files.

17 A. Yes, I believe so.

18 Q. When you were interviewed by the OFT -- if you want to
19 have a look at the interview note, it is behind tab 4,
20 on the second page, near the top:

21 "SH then showed AB [Alan Burgess] the document
22 referenced [so and so] an e-mail from Ian Thomson of
23 Hasbro to various people at Littlewoods regarding price
24 points of various products dated 18/5/2000.

25 "SH: Do you remember this e-mail and what does it

1 mean to you?

2 "AB: I do not particularly remember it, and whether
3 I believe it or not is another matter. To me, it just
4 seems like Hasbro giving us their RRP's.

5 "SH: Who put the markings on it?

6 "AB: I do not know. I think all those categories
7 are mine, yes, yes they are. I may have asked my
8 assistant to check if we were going with these prices.
9 It looks like they have been checked as being the same
10 as our prices.

11 "SH: Would you have been asked by Hasbro to commit
12 to these prices?

13 "AB: No. They have not asked me to commit to any
14 prices and I would not commit even if I had been asked."

15 You say this looks like Hasbro's RRP's; the e-mail
16 does not mention Hasbro's RRP's. By this stage, anyway,
17 you had Hasbro's RRP's.

18 A. It might have been purely a mistake that I made.

19 THE CHAIRMAN: That is a mistake, is it?

20 A. I can only assume that might have been, because it does
21 not state RRP's on the e-mail, so that is probably my
22 mistake.

23 MR DOCTOR: Well, I suggest it is a little bit more than
24 a mistake because the one thing it could not possibly
25 have been is Hasbro's RRP's, and you would not have

1 thought, "Oh, Hasbro is sending me its RRP's under the
2 guise of this highly bizarre e-mail"; when Hasbro sends
3 you their RRP's, they send them on a list containing lots
4 of other information, together with their RRP's as well;
5 is that not so?

6 A. Sorry, I can only reiterate as before that I do not
7 remember seeing this at that time. I do not remember
8 seeing this e-mail at that time.

9 Q. Well, you say you do not remember seeing it, but it is
10 on your file, it has been printed and kept by you.

11 A. Well, it has been kept in my files presumably by my
12 assistant. We had so many pieces of paper, I could not
13 possibly remember having seen any of them.

14 The one thing which I will say is that had I seen
15 this document, had I read it, then yes, I would have
16 remembered it because it is something that you would
17 remember, but I do not.

18 Q. Yes. Well, I suggest to you, Mr Burgess, that you did
19 receive this document, either yourself or through asking
20 your assistant, apparently used the document to check
21 against, as you say, your own prices, and -- well, let
22 us stop there. I am suggesting that to you; you can
23 comment on it.

24 A. I would say that is completely untrue.

25 Q. At the time you did not feel any particular surprise at

1 receiving this information.

2 A. As I say, I do not remember seeing the documents, and
3 therefore it would be impossible for me to be surprised
4 about something I do not see.

5 Q. It confirmed what you already knew, that in regard to
6 games and Action Man, those prices will continue to be
7 adhered to; that would have struck you as a statement of
8 the obvious.

9 A. As I say, I cannot really comment on a document that
10 I really do not remember seeing.

11 Q. And you would have seen the expansion of that
12 arrangement currently in place in regard to games and
13 Action Man as being extended to opportunities to make
14 more margins on the following list of products that
15 Argos have committed to.

16 A. I am sorry, I just did not -- I do not remember seeing
17 the document at all.

18 Q. None of your colleagues who received this document
19 raised it with you either, I assume?

20 A. No.

21 (3.00 pm)

22 THE CHAIRMAN: Mr Doctor, I would like to have a better
23 mental picture of the physical state of this file that
24 it is said this document comes from. Perhaps you could
25 see whether the witness has any recollection.

1 MR DOCTOR: Yes. Do you recall what file this was on?

2 A. I have no idea where it came from, no.

3 THE CHAIRMAN: Do not necessarily interrupt your
4 cross-examination, but -- I do not know how you keep
5 your filing system, Mr Burgess. Do you have files for
6 each supplier, for each catalogue?

7 A. We tend to keep our files by season.

8 THE CHAIRMAN: By season, yes.

9 A. We generally have different files for different things,
10 so we will have -- quotes will be in one file, so Hasbro
11 quotes would be in one file, Mattel quotes would be in
12 another section of that file. We would possibly have
13 a supplier file, which is perhaps a general
14 correspondence file. There could be other files for
15 different things.

16 THE CHAIRMAN: I see. And have you got any recollection as
17 to which file this document was in? Do not worry
18 because we can establish that by other means.

19 A. No, I have no idea where it will have been found.

20 THE CHAIRMAN: Thank you.

21 MR DOCTOR: Mr Burgess, in fact, Mr Thomson has said that
22 after the success that had been achieved with the
23 Action Man and core games range in the autumn/winter
24 1999 and then spring/summer 2000 catalogues, where we
25 have this almost precise parity of pricing between Index

1 and Argos, Hasbro were encouraged, and he, that is
2 Thomson, started to talk about expanding the range to
3 you.

4 A. I think that everyone would have been encouraged that
5 more margin could be injected into the business, into
6 the ranges, by everybody, and yes, Ian Thomson will have
7 been one of those people who thought that, yes.

8 Q. When I say he started talking to you, he was starting to
9 talk to you about expanding the range in which there was
10 this co-operation which had previously been confined to
11 core games and Action Man, to other toys.

12 A. As far as I can go on that, and I cannot be precise,
13 Ian Thomson will probably have been trying to influence
14 me to go out on RRP's on more items within his portfolio,
15 as will just about every other account manager --

16 Q. Well, he says you were interested in expanding the range
17 of this arrangement, but you were worried that it would
18 attract too much attention and it would appear that
19 Index and Argos were talking to each other about retail
20 prices.

21 A. Well, I do not understand where that came from, and if
22 that was the thoughts of Ian Thomson, then they are the
23 thoughts of Ian Thomson, but I do not recognise that
24 kind of discussion.

25 Q. Well, he says he indicated to you that both of you could

1 look at a limited range of products that would cover
2 certain items in most of Hasbro's brands.

3 A. I can be categoric that I had no specific discussions
4 with Ian Thomson about extending any product ranges
5 towards RRP's. I had my own agenda in terms of where
6 I thought I could go on this. I am sure that I had lots
7 of encouragement from Ian Thomson and everyone else to
8 go out at RRP's on more products, but I do not remember
9 specific discussions with Ian Thomson on specific lines
10 within his range. Had those discussions taken place,
11 I think I would have remembered them.

12 Q. In relation to the expanded range, he says that he
13 discussed with you the Pokemon and Micro Machines, which
14 were within your range, and possibly Hand Held
15 Electronic games, but he is not sure about that.

16 A. Well, he certainly did not have discussions with me on
17 those products.

18 Q. He says that you were concerned that if he agreed, there
19 would be a risk once again of being undermined by Argos
20 because you were not sure that they would agree to this
21 kind of co-operation on more than the lines which had
22 already been the subject of the earlier catalogues,
23 Action Man and core games.

24 A. We simply did not have discussions on specific items in
25 terms of expanding the range. I do not recall those

1 discussions.

2 Q. What is more, he also says that in his discussions with
3 you, he explained that his colleague, Wilson,
4 Neil Wilson, who was handling the Argos account -- he
5 may not have mentioned the name of the man, but the
6 colleague who was handling the Argos account was having
7 the same discussions with Argos to accept the same
8 proposal as he was putting to you.

9 A. Well, I do not recall him saying that. As I have said
10 before, I did not believe for one minute that
11 Ian Thomson or anyone else could guarantee to me that my
12 major competitor would be doing this, that or the other
13 on prices. It had never ever happened before, and there
14 was no reason why I would even think that that would be
15 possible.

16 Q. He says there is no doubt that you knew that Thomson was
17 passing on to the Argos account handler the contents of
18 his discussions with you, and the position was arranged
19 that discussions would continue and he would come back
20 to you after the Argos account handler had spoken to
21 Argos, and he would tell you what the outcome was.

22 A. Well, I have absolutely no idea why Ian Thomson would
23 have a basis for thinking that.

24 Q. In relation to these discussions, are you saying they
25 did not happen or are you saying you do not recall

1 whether they happened?

2 A. I am saying that I do not recall that they happened.

3 Q. We have had the e-mail of 18th May 2000, and one of the

4 items on that is something called Interactive Pikachu;

5 do you want to just look at that e-mail?

6 A. Yes.

7 Q. It says to you that Argos have committed to this item

8 going out at the price of £23.99.

9 A. Well, I can only say that --

10 Q. That is one of those that has been ticked by either you

11 or your assistant.

12 A. I can only say that I do not remember this document.

13 Q. Mr Thomson says that on or about 25th May, that is about

14 a week later, he telephoned you to tell you that Argos

15 were not going out at £23.99, they were going out

16 at £23.75.

17 A. Well, I would reiterate what I said before, I do not

18 recall having specific discussions on any line with

19 Ian Thomson. I think that had Ian Thomson or anyone

20 else rung me up about a specific line, I would have

21 remembered it. Pikachu, Interactive Pikachu, was a very

22 high-profile product; I think I would have remembered

23 any discussions relating to that. I do not recall any.

24 Q. He says you thanked him for that information.

25 A. Well, how can I respond to that? I do not remember the

1 phone call, so if that is the case, I do not remember
2 thanking him either.

3 MR DOCTOR: I have no further questions.

4 THE CHAIRMAN: Thank you.

5 Re-examination by MR GREEN

6 MR GREEN: Just a couple of matters, Mr Burgess. Could you
7 please go back to the presentation made to Index by
8 Hasbro, which is at tab 49? I just want to show you the
9 contents of the presentation that was apparently made at
10 that meeting, and I want you to just explain to the
11 tribunal whether any of the slides which apparently were
12 shown indicate that list prices were going up. I am
13 going to show you a number of key pages, just answer
14 that question in relation to each.

15 A. Just repeat that, sorry?

16 Q. Well, let me take it step by step. Do you have the
17 presentation there?

18 A. I do, yes.

19 Q. If you turn to page 381, you will see it says "Mission".

20 A. Yes.

21 Q. Do you see that? I am just going to show you pages.
22 Some are just for context, but some are so you can
23 comment on. That is the mission. If you quickly turn
24 over just a few pages, you will see what is in it. This
25 is a market-based review; do you see that?

1 A. Yes.

2 Q. And then on page 386, there is a document headed

3 "Current state of health".

4 A. Yes.

5 Q. Then if you turn again to page 390, you will see "Where

6 are we heading?"

7 A. Yes.

8 Q. We are coming to the crunch pages in a moment. If you

9 then turn to page 400, there is a section entitled "The

10 package"; do you have that?

11 A. I do.

12 Q. Now this section runs through to page 417. What I would

13 like you to just do -- and let me ask you the question,

14 I want you to just look through it: is there anything in

15 this which indicates to you that list prices are going

16 to go up? Do you understand the question?

17 THE CHAIRMAN: You mean prices to Index from Hasbro?

18 MR GREEN: That is right, sir, yes. (Pause).

19 A. At a quick run-through of those pages, there is nothing

20 I can see which would indicate that.

21 Q. Would you go back to page 402 then?

22 A. Yes.

23 Q. Do you see the phrase, "New beneficial trade terms"?

24 A. Yes.

25 Q. Would you just explain to the tribunal how you would

1 construe that phrase?

2 THE CHAIRMAN: How would you understand it? That is rather
3 legalistic.

4 MR GREEN: What does it mean?

5 A. I would understand that to mean that they are putting
6 other things into the package which would be beneficial
7 to the Index business.

8 THE CHAIRMAN: Yes.

9 MR GREEN: If you turn to page 406, you see the phrase:

10 "Additional rebates on core opportunistic ranges."

11 What does that mean?

12 A. Effectively, this is Hasbro trying to influence Index to
13 range these products. The margins will be low, as they
14 are in most Hasbro products, so what they are saying is
15 for a minimum -- if we go to Play-Doh, for a minimum of
16 three products in Play-Doh, they will give us
17 a retrospective discount of 5 per cent in support of the
18 listings, and it goes without saying they are the same
19 situation -- Playskool, for a minimum listing of five
20 products, they will give us 5 per cent, and Hand Held
21 Electronics, 50 per cent of the range, whatever that
22 range was, they would give us 5 per cent on those
23 products.

24 THE CHAIRMAN: Yes.

25 MR GREEN: Okay, if you put that bundle away. The only

1 other document I want to show you, please, is in the
2 core bundle, which is file 26. It is the document
3 starting at page 19. This is entitled "1999 trading
4 terms. A package for continued success".

5 It was presented by Messrs Evans and Brighty. Have
6 you seen this document before? I think you have been in
7 court, you may have heard, this was the internal
8 document presented at Stockley Park.

9 A. Yes.

10 THE CHAIRMAN: Is this arising out of cross-examination,
11 Mr Green?

12 MR GREEN: Yes, it is, sir. If you go to page 34, this is
13 the internal statement within Hasbro -- you will see it
14 says:

15 "1999/1998 games list prices."

16 You will see there is -- well, presumably it was
17 a slide, and you will see that between 1998 and 1999, it
18 says the total games line has a 6.53 per cent increase;
19 17 core games SKU, 5.12 per cent increase.

20 Now you said in response to a question from
21 Mr Doctor that if the matter had been explained to you
22 at the actual meeting, the meeting would have come to
23 an end. If you had seen this slide as part of the
24 presentation, what would your reaction have been?

25 A. My reaction would have been, you know, "Why are you

1 making such a big thing of trying to put margin into my
2 business by giving me additional core rebates when you
3 are giving it with one hand and taking it away with the
4 other? What is the big deal for Index? This would not
5 incentivise me to want to do business with you, would
6 it?"

7 MR GREEN: I have no further questions, thank you.

8 MR DOCTOR: I have a question arising out of that, so I may
9 not be later accused of unfairness towards Mr Burgess.

10 Further cross-examination by MR DOCTOR

11 MR DOCTOR: Mr Burgess, I have just very briefly compared
12 the 1997 and 1998 prices, and from my very inexpert
13 ability to do this, I notice that just about every price
14 in 1998 is higher than it was in 1997 in those list
15 prices that we looked at in the 1999 business
16 presentation. It would be correct, would it not, that
17 a cost price increase by Hasbro year on year was not
18 something that was completely new, was it?

19 A. That would be true to say, yes.

20 MR DOCTOR: No further questions.

21 THE CHAIRMAN: Thank you very much, Mr Burgess. That is the
22 end of your evidence, so you are quite free to go now,
23 if you wish.

24 (The witness withdrew)

25 THE CHAIRMAN: I think we will rise for a few minutes,

1 Mr Green, and start again about 3.30.
2 (3.20 pm)
3 (A short break)
4 (3.30 pm)
5 MR GREEN: Sir, my next witness is Andrea Gornall.
6 MRS ANDREA GORNALL (sworn)
7 Examination-in-chief by MR GREEN
8 THE CHAIRMAN: Thank you very much. Do sit down,
9 Ms Gornall.
10 MR GREEN: Ms Gornall, do you have a copy of your statement
11 in front of you?
12 A. Yes, I do.
13 Q. This should be tab 25.
14 A. Yes, I do.
15 Q. Can you confirm that that is your statement?
16 A. Yes, I can.
17 Q. Would you turn to the last page, please? Do you see
18 a signature there? There are two statements, I am not
19 certain if you are looking -- there should be
20 a signature on page 222.
21 THE USHER: Pages 222 to 225 have been redacted for
22 confidentiality.
23 THE CHAIRMAN: Well, it is in the tribunal's file.
24 MR GREEN: I do not think there is any difficulty with it.
25 Do we have some spare copies -- a clean copy, if

1 possible? (Pause). (Handed). Let us try again. Do you
2 now have the last page to the statement?

3 A. I do.

4 Q. And do you see a signature there?

5 A. I do.

6 Q. Is that your signature?

7 A. It is.

8 Q. Can you confirm that this statement is true to the best
9 of your knowledge and belief?

10 A. It is.

11 Q. Would you turn to tab 26, please? This is entitled your
12 second witness statement; is this your statement?

13 A. It is.

14 Q. Could you turn to the second page, please?

15 A. Yes.

16 Q. Is there a signature there?

17 A. Yes, there is my signature there.

18 Q. Is that your signature?

19 A. It is, yes.

20 Q. Can you confirm that this statement is true to the best
21 of your knowledge and belief?

22 A. I can.

23 THE CHAIRMAN: I think we are missing one copy of this
24 statement.

25 MR GREEN: Let me hand mine up, and I will get one from

1 behind. This is a clean copy. (Handed). Thank you very
2 much.

3 Cross-examination by MR DOCTOR

4 MR DOCTOR: Is it Miss or Mrs Gornall?

5 A. Mrs.

6 Q. Good afternoon. You have dealt with the buying of the
7 creative range of toys since 1997 for Index, is that
8 right?

9 A. That is correct.

10 Q. Except for two periods of maternity leave. Can you just
11 give us the dates when that would have occurred?

12 A. My first maternity leave -- I left the business on
13 10th December 1999, and rejoined the business on
14 1st September 2000. My second maternity leave, I left
15 the business in 2002, in September, around the first
16 week in September, and returned to the business
17 part-time in May 2003, and then full-time from
18 1st July 2003.

19 THE CHAIRMAN: Thank you.

20 MR DOCTOR: Right. So your description of Littlewoods and
21 your pricing on creative toys, which is contained in
22 your first witness statement, that applies to the period
23 from late 2000 onwards, does it, when you came back from
24 your first maternity leave?

25 A. Could you just tell me, which number is that, please?

1 Q. Well, paragraphs 3 and 4. (Pause).

2 A. That would be not necessarily just that period of time.

3 Q. You think it is earlier than that as well?

4 A. Which particular bit of that?

5 Q. Well, all of it, but perhaps the most -- the part I am
6 particularly interested in is paragraph 4:

7 "In respect of creative goods, I invariably proposed
8 that we go out at recommended retail prices on all
9 branded goods, not just Hasbro products. I would not
10 normally expect my prices for these goods to be altered
11 by Lesley, but Lesley may decide to go out below the RRP
12 for particular lines, so I could not guarantee that RRP
13 would be followed."

14 I get the impression --

15 A. Can you just tell me what the original question was,
16 sorry?

17 Q. I was asking whether this description of the policy, the
18 way it is set and the fact that you invariably propose
19 RRP prices, recommended retail prices, applies to the
20 period after you came back from your first maternity
21 leave, that is the latter part of the year 2000, but you
22 say no, it probably applied prior to that as well, or
23 perhaps you would like to think about that.

24 A. No, that actual statement is in regard to the way that
25 this particular range is priced in general, in totality,

1 because this particular range is quite different to
2 other toy ranges that I have actually managed previously
3 and manage now, because it is not such a highly priced
4 sensitive area in totality. There is the odd few lines
5 that have always been, you know, within that branded toy
6 element, but mainly it is unbranded toy area.

7 THE CHAIRMAN: Right. What I think Mr Doctor was asking
8 about was what sort of period are you talking about
9 here, in paragraph 4? Is this true of most periods or
10 are you talking specifically of a period in 2000?

11 A. I think it was just in general.

12 THE CHAIRMAN: In general, yes.

13 MR DOCTOR: Is that why you say in your second statement in
14 paragraph 6:

15 "In my areas, RRPs were generally being followed
16 even before the GUS takeover of Argos. The market had
17 settled at RRPs, and this had become largely
18 self-perpetuating."

19 A. In most cases within this area, RRPs were being
20 followed; however, there were instances where that was
21 not the case.

22 THE CHAIRMAN: Yes.

23 A. But it was on a very, very minimum and very small
24 percentage of the products within this range.

25 THE CHAIRMAN: Yes.

1 MR DOCTOR: Does creative include the Get Set range and
2 Spirograph and Super Sticker Factory?
3 A. Yes, it does.
4 Q. Let us go to the pricing analysis in bundle 28. If you
5 go to tab B3 --
6 THE CHAIRMAN: Sorry, Mr Doctor, B3?
7 MR DOCTOR: Yes -- we see, at the second page, the prices
8 for autumn/winter 1999; the creative toys are at the
9 bottom and there we see -- well, if we look at
10 spring/summer 1999, we see Get Set Chocolate Factory,
11 Argos is at £19.99, but Littlewoods is at £19.45, so you
12 have undercut the RRP there, the RRP being £19.99.
13 In autumn/winter 1999, Argos has undercut you,
14 18.99, and you have changed slightly to £19.50.
15 A. Yes.
16 Q. Do you see that?
17 A. Yes.
18 THE CHAIRMAN: Does that seem right to you? Do those
19 figures seem right to you, Mrs Gornall?
20 A. I do not -- from the document in front of me, yes.
21 MR DOCTOR: It seems that on the Chocolate Factory, £19.99,
22 the RRP, was not being followed by Littlewoods at any
23 stage, and Argos, having followed it at first, obviously
24 came down in autumn/winter 1999 to 18.99, whereas
25 Littlewoods went up slightly to £19.50. Do you see

1 that?

2 A. I do.

3 Q. Just pausing there for a moment, if we put ourselves
4 back to spring/summer 1999, one would see there that if
5 the parties had compared their catalogues, they would
6 have seen that for the Chocolate Factory, Littlewoods
7 had beaten Argos, and one would expect, therefore, that
8 Argos would want to try and undercut that price next
9 time around, which they did, going to £18.99, whereas
10 Littlewoods -- it looks as if they assumed that Argos
11 might stick to the recommended retail price, and so they
12 have allowed themselves to go up by 5p.

13 Would that be the sort of thinking that would be
14 going on round about the beginning of 1999, when
15 planning the autumn/winter catalogue?

16 A. Within this area, there has always been some items that
17 have been priced below RRP, but in the main, it was
18 priced at RRP, and the Get Set range would have been
19 an area that we would have looked at because they are
20 advertised on TV, so we would have probably priced below
21 the RRP if that is what we thought the price should be.

22 THE CHAIRMAN: Yes.

23 MR DOCTOR: Well, I do not think you have really answered my
24 question. I think my question was: while you are
25 preparing for the autumn/winter 1999 catalogue, in the

1 first half of 1999, would that be a fair assumption to
2 make in the thinking of Argos, and in your case
3 Littlewoods, you would look at the previous catalogue,
4 and if you see that you have, in your case, beaten the
5 opposition, you might take the risk of perhaps just
6 going up by 5p, in the hope that they would remain the
7 same, whereas they, on the other hand, having looked at
8 your price, and seen that you undercut them, thinking
9 you might go out at the same price again, they have come
10 in and undercut you?

11 A. I think when we actually sit down and we start analysing
12 and we start looking at pricing any catalogue, we take
13 everything into account: what is happening in the
14 marketplace, what was going on within the industry at
15 that time and what our internal strategy would have
16 been.

17 THE CHAIRMAN: Yes.

18 A. Also, you know, I would have been listening to what
19 John McMahon or Lesley Paisley had given me as my margin
20 targets, so it is not just any one thing that enables us
21 to get to whatever price we decide to price at, it is
22 a whole mix of reasons why we price at that particular
23 price point.

24 THE CHAIRMAN: Yes.

25 MR DOCTOR: Going on with the creative toys, the next item

1 which appears to be common in the autumn/winter 1999
2 catalogue is the Get Set Mastering Mosaics, with
3 a recommended retail price of £19.99; both parties,
4 Argos and Littlewoods, go out below that price. Do you
5 see that?

6 A. I do.

7 Q. The fact that Argos is below you by 5 pence is
8 presumably of some significance, is it not?

9 A. Not really, no. 5p, not at all.

10 Q. You say 5p is nothing; you are confident that the public
11 does not regard that as different?

12 A. Yes.

13 Q. Spirograph, £14.99, £13.85 and £14.75; both parties
14 again are under RRP.

15 A. Correct.

16 Q. And finally, Super Sticker Factory, £17.99, Argos is
17 at £17.90 and Littlewoods is in fact slightly over,
18 at £18.50. So in none of those cases of creative toys
19 does Argos or Littlewoods go out at RRP.

20 Those are the items within creative toys where
21 whatever else may be the case, when you say that RRP's
22 are generally being followed, or invariably being
23 followed, certainly on these items, they are not.

24 A. Correct.

25 Q. And these are the items which we find in the

1 18th May 2000 e-mail being discussed.

2 A. I believe so.

3 (3.45 pm)

4 Q. So if there is a need to try and get the prices
5 together, there would be a good motive to do so on these
6 particular items, would there not?

7 A. Sorry, can you just --

8 Q. Well, if you can be certain that on other products the
9 prices are invariably RRP, on these products they are
10 not invariably RRP, are they?

11 A. No.

12 Q. All right. (Pause). If you just go over the page to
13 autumn/winter 2000, and if you go down to creative toys
14 there, if we look at the Chocolate Factory on the
15 right-hand side, we see the RRP is £19.99, and both
16 Argos and Littlewoods have an RRP of £19.99. But you
17 were not around at that stage for the setting of these
18 prices, were you?

19 A. This is autumn/winter?

20 Q. Autumn/winter 2000.

21 A. Autumn/winter 2000?

22 Q. Yes, which would have come out in July 2000, so this was
23 when you were off.

24 A. Yes.

25 Q. But anyway, that is exactly the same. If we go to

1 Egyptian Adventure, RRP £29.99, and both Argos and
2 Littlewoods now have £29.99. Mastering Mosaics, £19.99
3 is the RRP, and everybody has £19.99.

4 Now Gardens Galore, £24.99 is the RRP, and
5 Littlewoods goes out at £24.99 -- you probably were not
6 there at the time, but we know there was some
7 information passed to Littlewoods to say that Argos
8 would not be carrying that line.

9 Next one, Spirograph, £14.99, you see that the
10 prices are exactly the same; and £17.99 for Super
11 Sticker Factory, the prices are exactly the same. Do
12 you see that?

13 A. Yes.

14 Q. If you go back one to spring/summer 2000, we have the
15 position with creatives -- we have RRP of £19.99 on
16 Chocolate Factory, and Littlewoods goes out at 18.99, so
17 there you had undercut the RRP; do you see that?

18 A. Yes.

19 Q. Argos apparently did not carry it in January 2000. Then
20 we get £19.99 for the Mastering Mosaics, and you went
21 out at £19.45. Spirograph, £14.99, £13.85; and Super
22 Sticker Factory, £17.99, £17.90. So on none of those
23 were you the same when you were there.

24 A. I was not actually doing creative in 2000.

25 Q. Yes, you would have gone off in September --

1 A. No, before that, Katharine Runciman had taken the range
2 over from myself.

3 Q. Right. When did she take that range over?

4 A. Katharine took the range over from myself when we all
5 became group buyers, which actually meant we moved to
6 smaller product ranges, but we were actually buying
7 products for three different catalogues, and that would
8 have been in early 1999.

9 Q. Early 1999. So you were not responsible, you say, in
10 spring/summer 2000, that would have been set during the
11 latter part of 1999; you were not responsible for
12 creatives?

13 A. No, I was not.

14 Q. In your witness statement, you suggest that the prices
15 on creatives are always RRP.

16 A. Which one, sorry?

17 Q. Well, in both; paragraph 4 of your first statement and
18 paragraph 6 of your second statement. The clear
19 impression you are trying to send out at that point is
20 that in the field of creative, the prices are invariably
21 RRP.

22 Prior to autumn/winter 2000, that would seem to be
23 contradicted by the figures we have seen on the items
24 for creative: Get Set, Spirograph and Super Sticker
25 Factory.

1 A. In the main, the items within this area were priced at
2 RRP. It was only a very small percentage of products
3 that might not have been. Sorry, that is what that
4 statement refers to.

5 Q. So you are not there referring to the creative: Get Set,
6 Spirograph and Super Sticker Factory; in those, there
7 always was more competition, and people were tending to
8 price at different prices below the RRP?

9 A. Sorry, the statement actually refers to the range in
10 totality. Generally, this area was not as
11 price-sensitive as others within the toy range.

12 Q. Well, I am not sure you are disagreeing with me. I am
13 asking you just to concentrate on creative, Get Set,
14 Super Sticker Factory and Spirograph, and to confirm
15 that in those areas, prior to autumn/winter 2000, there
16 appears to have been competition between the two
17 catalogue retailers firstly, and secondly, that there
18 appears to have been pricing below RRP.

19 A. Correct.

20 Q. When you say in paragraph 10 of your first statement --
21 you say, about halfway down:

22 "I have never confirmed to Ian Thomson that I am
23 definitely going out at his recommended retail prices.
24 He has never asked me to do this, but on the other hand,
25 he will know as well as I do that these are likely to be

1 the prices [that is RRP] that we will decide upon, and
2 which other retailers will adopt because, in creative,
3 this is the tradition and practice."

4 Again, that does not apply to Get Set, Super Sticker
5 Factory and Spirograph.

6 A. What season are you referring to?

7 Q. Prior to autumn/winter 2000.

8 A. I did not discuss recommended retail prices with
9 Ian Thomson, and I would never have advised him of my
10 intentions to price -- sorry, you know, what my price
11 would have been at the time.

12 THE CHAIRMAN: I think at the moment, Mrs Gornall, we are on
13 the last bit of the last sentence of paragraph 10, where
14 you say that:

15 "It is the recommended prices that are likely to be
16 the prices that we will decide upon, which other
17 retailers will adopt, because in creative this is the
18 tradition and practice."

19 What Mr Doctor is suggesting is that in relation to
20 the three products we have been discussing, it does not
21 appear that that is quite right because they had been
22 priced below RRP before autumn/winter 2000.

23 A. Sorry, yes, those three items were subject to price
24 discounting. However, when making this statement, I am
25 talking about the range in totality, not about specific

1 individual items.

2 THE CHAIRMAN: What other items are you dealing with
3 Ian Thomson about, other than these items?

4 A. I did not mean just with Ian Thomson, I meant the range
5 of products from all the suppliers that supplied
6 creative toys at that time.

7 THE CHAIRMAN: I see. Yes, thank you. Sorry, Mr Doctor.

8 MR DOCTOR: So autumn/winter 2000 comes round, you are not
9 there for that catalogue, and in any event, you are not
10 dealing with these items; correct?

11 A. Yes.

12 Q. Are you saying that Katharine Runciman was dealing with
13 that, at that stage?

14 THE CHAIRMAN: If you cannot remember, do not worry. You
15 are not expected to know what was going on when you were
16 not there.

17 A. I believe it was Katharine Runciman, or it could have
18 been Gary Smith, because Katharine Runciman herself went
19 off on maternity leave when I was on maternity leave.
20 Gary Smith did not!

21 MR DOCTOR: I have no further questions.

22 MR GREEN: Just one perhaps.

23 Re-examination by MR GREEN

24 MR GREEN: How many lines do you have within creative, in
25 total?

1 A. It varies between approximately 70 to 80 items.

2 MR GREEN: Thank you.

3 THE CHAIRMAN: Thank you, Mrs Gornall, I think that is the
4 end of your evidence. Thank you very much for coming.

5 (The witness withdrew)

6 MR GREEN: My next witness is Ms Runciman. I do not know if
7 my learned friend actually wants her. She has to come
8 down from the North, she is bringing a young child with
9 her. We have been discussing child arrangements. So we
10 have two Argos witnesses, I think Mr Needham and
11 Ms Wray, who we will interpose or come next, if you want
12 to continue today. But Ms Runciman needs to be told
13 this evening --

14 THE CHAIRMAN: Mr Needham and Ms Wray are here, are they?

15 MR GREEN: Mr Needham is here.

16 MR DOCTOR: I think the position is that in answer to my
17 learned friend Mr Green, I would like to put a few
18 questions to Ms Runciman. I am sorry if it is going to
19 inconvenience her, but if she can come tomorrow, I would
20 be grateful. As for Mr Needham, I am not quite ready to
21 commence with him, and I nevertheless think that even if
22 we start tomorrow at the normal time, we will be
23 finished all the evidence by 3.00, and if the worst
24 comes to the worst, we might have to go on for a few
25 minutes on Monday, but I do not anticipate that.

1 THE CHAIRMAN: I am nonetheless inclined to suggest that we
2 might start perhaps at 10.15 or some time like that
3 tomorrow morning, just to give ourselves a little
4 margin, just in case unforeseen events arise.

5 MR GREEN: If it is all right with the tribunal and Argos,
6 we could start with Mr Needham, so that if Mrs Runciman
7 is slow on the train or has a problem of a child-related
8 nature, we can at least deal with that.

9 THE CHAIRMAN: Yes. I do not know whether the tribunal
10 facilities or staff can help Mrs Runciman --

11 MR GREEN: I am not suggesting anybody takes time off to
12 play with creative.

13 THE CHAIRMAN: I am sure we can arrange something or other
14 if need be. Our witness care programme is rapidly
15 developing.

16 MR DOCTOR: If it would help, I do not mind if we interpose
17 Mrs Runciman at any time that she arrives, and then she
18 can get away, she does not have to stick around.

19 THE CHAIRMAN: Very well. If everybody is agreeable, let us
20 start at 10.15 tomorrow with Mr Needham.

21 (4.00 pm)

22 (Hearing adjourned until 10.15 am the following day)

23

24

25

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