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**IN THE COMPETITION  
APPEAL TRIBUNAL**

Case No. 1014 and 1015/1/1/03

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

23 February, 2004

Before:  
SIR CHRISTOPHER BELLAMY  
(The President)  
THE HONOURABLE ANTONY LEWIS  
MRS VINDELYN SMITH-HILLMAN  
  
Sitting as a Tribunal in England and Wales

**BETWEEN:**

(1) ARGOS LIMITED  
&  
(2) LITTLEWOODS LIMITED

Applicants

and

THE OFFICE OF FAIR TRADING  
(formerly the Director General of Fair Trading)

Respondent

Mr Mark Brealey QC and Mr Mark Hoskins (instructed by Burges Salmon) appeared for Argos.

Mr Nicholas Green QC and Miss Marie Demetriou (instructed by DLA) appeared for Littlewoods.

Mr Brian Doctor QC (instructed by Director of Legal Services, Office of Fair Trading) appeared for the Respondent.

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**PROCEEDINGS**  
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1 THE PRESIDENT: Good morning. Yes, Mr Brealey?

2 MR BREALEY: Sir, as you will have seen from the skeleton Argos is seeking the  
3 exclusion of the remainder of the leniency documents, correspondence relating to  
4 Hasbro's interpretation of the redacted passages in Hasbro's original representations,  
5 and I would like to look at those in a moment, and the remainder of the transcript of  
6 Hasbro's oral hearing.

7 THE PRESIDENT: Just let us make sure we have those.

8 MR BREALEY: It is in paragraph 1 of the skeleton. It is the correspondence relating to  
9 Hasbro's leniency application.

10 THE PRESIDENT: Yes.

11 MR BREALEY: Secondly, the redacted passages in Hasbro's written representations, and  
12 thirdly, the remainder of the transcript of the oral hearing.

13 THE PRESIDENT: Yes.

14 MR BREALEY: The bottom line, we say, is this is relevant and we see no justifiable  
15 reason why we should not have access to the relevant information, and we set out in the  
16 skeleton why we say it is relevant. We set out three reasons.

17 The first is more of a general observation which is that information provided on  
18 a leniency application will very often concern the relevant party to the alleged cartel.  
19 The reason for that is that the information must concern the existence and the activity  
20 of the cartel. So it does concern us. It may be inculpatory, it may be exculpatory, it may  
21 be neutral, but we would adopt the language the Tribunal used in *Umbro* that, at least at  
22 this stage, it cannot be excluded as irrelevant. That is the first reason - that is a general  
23 observation.

24 The second is more concrete and we can at least test this by reference to the  
25 written representations, and they are set out in paragraph 4 of the skeleton. I do not  
26 know whether the Tribunal still have access to the written representations?

27 THE PRESIDENT: If you would be kind enough to tell us where they are, I am sure we can.

28 MR BREALEY: I think we are still looking at the old - mine is headed "C3".

29 THE PRESIDENT: Yes, it is bundle C3 and it begins at tab 18. Yes, we are there, thank  
30 you.

31 MR BREALEY: I flagged one passage - I do not know whether the Tribunal has to hand,  
32 Sir, the Decision. It is a new Decision and these are old bundles. It may be that it has  
33 been inserted into volume 1. For example, paragraph 43 of the new Decision sets out  
34 the pricing initiative. As the Tribunal will be aware this is a very, very important issue

1 in this appeal. What is this pricing initiative? What is meant by the pricing initiative?  
2 Was it, or did it lead to a price-fixing agreement.

3 THE PRESIDENT: That is why, Mr Brealey, we must make sure we are on the right  
4 Decision. Yes.

5 MR BREALEY: If you go, for example, to paragraph 42.

6 THE PRESIDENT: “Setting out the Initiative”.

7 MR BREALEY: Setting out the Initiative”, this is the pricing initiative, and this is the real  
8 crux of the OFT’s case. This pricing initiative is the initiative that either was, or led to  
9 the price fixing agreement. Paragraph 43 sets out a number of initiatives to improve  
10 retail margins, and through the remainder of this document, really this is the factual, we  
11 have repeated references to the pricing initiative. The Tribunal has been aware from  
12 the various case management conferences that this is really a key, if not the key, to this  
13 appeal.

14 THE PRESIDENT: Yes.

15 MR BREALEY: When we come to Hasbro’s written representations at paragraph 6.1, and  
16 again a pricing initiative is not our initiative it is Hasbro’s pricing initiative. On my  
17 documentation it is 628 at the bottom right hand side, and paragraph 6.1 on Hasbro’s  
18 written representations.

19 THE PRESIDENT: Yes.

20 MR BREALEY: Section 6 – “Analysis of the Directors’ Conclusions on the Evidence of  
21 Facts”. This refers back to the old Rule 14 Notice. The Pricing Initiative, throughout  
22 paragraph 53 to 61 of the Notice, and that is the relevant bit that we have just been  
23 seeing in the new Decision, “the Director confuses Hasbro’s mortal pricing initiative  
24 (referred to hereafter as the pricing initiative) and the arrangements”. Then the rest is  
25 blank. It may well be that it is neutral, it may be irrelevant, but one certainly cannot  
26 say at this stage that it is irrelevant. The whole section concerns Argos, the whole  
27 section concerns the allegation made against us. Hasbro is saying that the OFT have  
28 confused the pricing initiative, and yet the remainder is good.

29 Another example, if one goes on---

30 THE PRESIDENT: For example, according to you, there may be material in there which  
31 suggests that the pricing initiative was a perfectly lawful step to take.

32 MR BREALEY: Yes.

1 THE PRESIDENT: It did not necessarily involve arrangements that might in some way  
2 undermine what is being said or throw new light on what is being said in paragraphs  
3 42, 43, and so on.

4 MR BREALEY: Absolutely. So it is not only evidence in itself, but a year ago we were all  
5 ready for trial and the OFT came to the Tribunal and said that this whole case depends  
6 on factual dispute that was in the skeleton argument, and that you can see in the  
7 transcript. It is a factual dispute, and it may well be that we would want to put this  
8 passage to the three Hasbro witnesses and see whether they agree that the OFT had in  
9 fact confused the Hasbro price initiative.

10 THE PRESIDENT: Yes.

11 MR BREALEY: I obviously will not labour the point, but we can go on further in the  
12 written representations at paragraph 6.25, it is page 633 in the bottom right of the page.  
13 You may recall that one of the key documents that the OFT rely on is the 18<sup>th</sup> May  
14 email and again this sets out extending the arrangements in a limited number of Hasbro  
15 products, and we see there the whole of paragraph 6.2.6 blanked out. So this is  
16 obviously a relevant section. It concerns a key piece of evidence, and we do not really  
17 know what Hasbro are saying about it.

18 So the first two reasons: we say “Is this material relevant?” Yes, in general  
19 information that is provided on a leniency application will be relevant to the person  
20 who is remaining.

21 THE PRESIDENT: Can we just be clear, Mr Brealey, this document that we are looking at,  
22 9<sup>th</sup> July, 2002, is Hasbro’s response to the first Rule 14 notice?

23 MR BREALEY: Yes.

24 THE PRESIDENT: It is not exactly – or is it – part of the leniency application as such? It is  
25 just their response to the Notice, or what? How would you characterise this document?

26 MR BREALEY: Well, on one view that is correct. We have sought disclosure of this, and  
27 the retort has always come back that this is part of the leniency application, so it is not  
28 us saying “This is a leniency document”. We say “This is relevant, why haven’t you  
29 disclosed it?” And the OFT come back to us and say that it was part of the leniency  
30 application.

31 THE PRESIDENT: We may need to explore a little what exactly it is. Is it part of the  
32 leniency application, or is it simply a reply to a Rule 14 Notice by a co-member of an  
33 alleged cartel?

1 MR BREALEY: We may well do, but it is the OFT that can say that. The grounds for  
2 withholding or redacting these passages are done on the basis that it is part of the  
3 leniency programme, which takes me to the third point. The first is a general point that  
4 information which is provided on a leniency application or by a company that seeks  
5 leniency will, in general terms, concern the person who has left. The second point, in  
6 actual fact it is relevant, the third point as I set out in paragraph 6, we say the OFT have  
7 effectively acknowledged the relevance of the material.

8 We have been provided very helpfully with a bundle of correspondence for the  
9 case management conference. I do not know whether they have been passed up to the  
10 Tribunal. It is a bundle of correspondence that contains letters---

11 THE PRESIDENT: Just a moment. Correspondence bundle.

12 MR BREALEY: There is a letter of 12<sup>th</sup> December, 2003.

13 THE PRESIDENT: Yes, tab 4.

14 MR BREALEY: This is the rejection. We sought disclosure and these are the reasons for  
15 the Office of Fair Trading rejecting our application. At the bottom of the page:

16 *“Argos is able to challenge the evidential value of the statements made by*  
17 *Hasbro personnel in October, 2001 without recourse to the documents that we*  
18 *seek. Hasbro’s solicitors contacted the OFT before any investigations were*  
19 *commenced asking for leniency. All documents that were provided in support of*  
20 *this request for leniency were treated as evidence by the OFT and were made*  
21 *available to your clients as part of their access to the file during the initial Rule*  
22 *14 procedure in this case”.*

23 We say “We have disclosed some of the documents, because you think they are  
24 at least relevant to Argos and Littlewoods, so on what basis do you say that the  
25 redacted passage we have just seen is irrelevant?”

26 THE PRESIDENT: I see, so if the written representations are to be characterised as a  
27 document provided in support of the request for leniency, a lot of those documents have  
28 already been disclosed and there is no reason why this one should not be disclosed as  
29 well?

30 MR BREALEY: Yes. Essentially what we are trying to do is in two stages. We say is this  
31 material relevant? If it is relevant then why should it be excluded? You are, Sir,  
32 correct, it is blowing hot and cold. So those are the reasons we say this material is  
33 relevant. One then asks why is it then we should not have access to it? As we all know  
34 in this room, we are entitled to a fair trial, and a fair trial means access to all relevant

1 material, and what is the reason to exclude the relevant material, and for obvious  
2 reasons we rely on the Tribunal's Judgment in *Umbro*. We say that *Umbro* applies for  
3 the two reasons we set out in the skeleton at paragraph 8. First, the *Umbro* judgment is  
4 clearly of wider application than mere discriminatory penalties. The Office of Fair  
5 Trading tried to confine the Judgment in *Umbro* in a wilderness essentially to a limited  
6 case if you are saying I should have got a lesser penalty. We say on any clear reading of  
7 the Judgment, paragraphs 14 and 40 that it is quite clear that there were parties there  
8 seeking disclosure on the facts of the case. So that is the first reason we say that the  
9 OFT has not distinguished the Judgment sufficiently.

10 Secondly, the policy considerations referred to by the Tribunal in *Umbro* apply  
11 equally to the present case if you set them out – the relevant paragraphs in the  
12 Judgment – where parties such as Argos have had damages imposed on them it is of  
13 overriding importance that they should be able to exercise their rights of defence  
14 without having possibly relevant material held back – paragraph 33. There was never  
15 any guarantee that Hasbro received confidentiality” – paragraphs 35 and 42. It is also a  
16 case where the needs of fairness and transparency clearly outweigh any other interests  
17 such as keeping Hasbro's submissions confidential and on that point, and if we do pick  
18 up the point the Tribunal has made in a recent letter, we still do not know if Hasbro are  
19 claiming confidentiality – it seems to be the OFT who are taking the lead.

20 Lastly, the fact that they got leniency was made public, they got their £15  
21 million fine, so it is public and there has been disclosure of some documents, and we  
22 say well, how are we harming the leniency process if the rest are disclosed? Those are  
23 the reasons we would seek disclosure of the correspondence relating to the leniency  
24 application, the redacted passages in the written reps, and the redacted passages in the  
25 oral hearing.

26 THE PRESIDENT: Just for my benefit, Mr Brealey, if we just take those three categories,  
27 have we got a list somewhere of the correspondence relating to Hasbro's leniency  
28 application and do we know what we are actually talking about in terms of documents?  
29 Will we find that in some file somewhere?

30 MR BREALEY: I am pretty certain we do not.

31 THE PRESIDENT: So this is a rather general category? It is the best you can do at the  
32 moment?

33 MR BREALEY: It is the best we can do, yes.

1 THE PRESIDENT: Yes, quite, I am not being critical, I just want to identify what we are  
2 actually talking about in terms of actual documents with dates on.

3 MR BREALEY: I cannot say “It is a letter dated 13<sup>th</sup> November”.

4 THE PRESIDENT: No, I see, thank you. We have been looking at the redacted passages  
5 and the written representations, and the transcript of Hasbro’s oral hearing. That is  
6 disclosed in part, the transcript? Could you just quickly take us to that?

7 MR BREALEY: It is my tab 25 in the same bundle.

8 THE PRESIDENT: Let us just remind ourselves about this document while we are there. T  
9 his is the one with pages and pages of blanks on it.

10 MR BREALEY: He has got “Thank you, sir”, and then we go on to---

11 THE PRESIDENT: Yes, there are two other points at this stage. When you say the  
12 documents are relevant, or potentially relevant in what sense are we discussing  
13 relevance? Does one mean that one is looking at documents that potentially support  
14 Argos’s case, or weaken the OFT’s case, which is the classic test applied, for example,  
15 in a criminal context. Or are you advancing more general test of relevance, that these  
16 documents form part of the background and understanding of the case and should  
17 therefore be disclosed without having to necessarily submit that they are potentially of  
18 a nature that would weaken the OFT’s case or assist yours?

19 MR BREALEY: I think at the beginning I said that we would look for documents that were  
20 inculpatory and exculpatory or neutral.

21 THE PRESIDENT: Yes.

22 MR BREALEY: And by “inculpatory” obviously that weakens our case, exculpatory  
23 supports our case. So, for example, on written reps may well support our case that the  
24 OFT are confused on the pricing initiative. Very often a document has a new meaning  
25 in different contexts. So we would seek documents that are neutral that concern us.  
26 They still concern Argos in the sense that they must be relevant to the allegation and  
27 the event and facts that arise from the case.

28 THE PRESIDENT: Relevance is part of the background, even if they are not specifically  
29 inculpatory or exculpatory.

30 MR BREALEY: Yes. It is too narrow to say it has to be either exculpatory or inculpatory.  
31 The OFT, for example, rely on the 18<sup>th</sup> May email. It may well be that there is some  
32 other material there which puts that 18<sup>th</sup> May in new light. You may say that is  
33 exculpatory. If one starts getting into categories it can become dangerous.

1 THE PRESIDENT: Yes. My other question is this: how can the Tribunal go about deciding  
2 this without seeing the parts of the documents for which confidentiality is claimed, and  
3 if that is so how can we do it as a matter of procedure without getting ourselves into the  
4 difficulty that we might have to disqualify ourselves in certain circumstances? Can it be  
5 decided without looking at the documents in question?

6 MR BREALEY: Well, as a matter of principle one can say that this is relevant and half of  
7 the documents in the leniency, or relating to Hasbro have been disclosed, and as a matter  
8 of policy the Tribunal could see no justifiable reason why the rest should be disclosed.  
9 I do not think we are necessarily in the position where we were when I made the  
10 comment that it is the oldest trick in the book to adopt a submission putting the witness  
11 statements in, allowing the Tribunal to look at them and then work out whether or not  
12 they were relevant. As a matter of policy here what they say must be disclosed.

13 THE PRESIDENT: Yes. That is the full extent of your application.

14 MR BREALEY: That is my application.

15 THE PRESIDENT: You are not concerned with the drafts of the new witness statements?  
16 That is not your application, that is entirely Littlewood's application?

17 MR BREALEY: That is right.

18 THE PRESIDENT: Thank you.

19 MR BREALEY: Although obviously I support what Mr Green says.

20 THE PRESIDENT: That is what I wanted to know, are you making that application or not?

21 MR BREALEY: I am not making that application.

22 MR GREEN: It may assist the Tribunal to know that nor are we.

23 THE PRESIDENT: You are not making it?

24 MR GREEN: We are not making that application. We had originally sought those  
25 documents. We are not making it because we accept the OFT's legal argument, we just  
26 simply decided we do not need to see them, we do not really want to see them, we do  
27 not think there is anything that is going to materially assist us.

28 THE PRESIDENT: You are not seeking drafts of them.

29 MR GREEN: No, we are seeking the same material as does Mr Brealey, namely, redacted  
30 material relating to the leniency application, subject to the caveat that we do not  
31 necessarily accept that all the material referred to in the Decision under the heading  
32 leniency is necessarily correctly so described, which is a point you made earlier.

33 THE PRESIDENT: So let us just establish what it is you are seeking, Mr Green.



1 MR GREEN: It is the OFT's skeleton at paragraph 3, which is a reflection of our paragraph  
2 1. It is correspondence between Hasbro and the OFT relating to their application for  
3 leniency and redacted passages in the written representations and the transcript relating  
4 to leniency. I think it would also follow that if you were with us on that we would wish  
5 to see the Decision in unredacted form in so far as it relates to those matters, and there  
6 are certain paragraphs I will take you to shortly, which actually I think identify quite  
7 crisply what the OFT views as the relevance of that material, and the Decision itself  
8 demonstrates, we submit, that that material is in fact relevant.

9 THE PRESIDENT: So you are in addition seeking an unredacted version, or partly  
10 unredacted version of the Decision.

11 MR GREEN: Yes, that would follow, we would submit.

12 THE PRESIDENT: That would follow, yes.

13 MR GREEN: I do not propose to repeat what Mr Brealey has said, I adopt what he said in  
14 relation to the documents, and I will confine myself to making supplementary  
15 submissions.

16 I start by explaining what we mean when we say that this material is relevant. We say  
17 that the material is relevant because it goes to the weakness and the strengths of the  
18 parties' respective cases. We say it goes to: (1) to the credibility of the OFT witnesses,  
19 because the weakness and the strengths are the parties' respective cases. (2) the  
20 credibility of the OFT's witnesses on certain key issues and this is, of course, Mr  
21 Bottomley, Mr Thompson and Mr Wilson; and (3) pleaded issues, in particular in  
22 relation to fines; and we submit that it is the necessary factual context for the  
23 assessment of other parts of the case.

24 If I can take those a little more slowly and elaborate a little.

25 THE PRESIDENT: Yes.

26 MR GREEN: First, the leniency material tends, we submit, to show inconsistencies in the  
27 evidence of Mr Bottomley, Mr Thompson and Mr Wilson. We have identified a long  
28 list of inconsistencies in the evidence which will obviously explore during the hearing,  
29 the most obvious one is that Hasbro, in the course of their leniency application,  
30 apparently denied that they were guilty of any infringement at all. The OFT have  
31 treated their application as implicitly involving some form of acceptance of culpability  
32 but on the documents that we have seen Hasbro were quite firmly of the view that the  
33 evidence that they submitted to the Office of Fair Trading did not reveal any form of  
34 breach.

1 THE PRESIDENT: Can you just take us to an illustration of that.

2 MR GREEN: One illustration is paragraph 319 of the Decision. About half way down that  
3 paragraph it says:  
4 *“The OFT notes that Hasbro’s application for leniency necessarily implies that*  
5 *Hasbro that Hasbro admitted to a possible infringement of Chapter 1*  
6 *prohibition.”*

7 THE PRESIDENT: Paragraph 319 of the version I have in front of me is on page 108.

8 MR GREEN: We have the non-confidential version, perhaps it is paginated slightly  
9 differently.

10 THE PRESIDENT: This says on it “Non-Confidential Version for Issue to All Parties”.

11 MR GREEN: My paragraph starts: “OFT’s response: In his Decision that the Chapter 1  
12 prohibition had been infringed...”

13 THE PRESIDENT: Yes, that’s fine.

14 MR GREEN: And then seven or eight lines down---

15 THE PRESIDENT: “The OFT notes...”

16 MR GREEN: Yes  
17 *”The OFT notes that Hasbro’s application for leniency necessarily implies that*  
18 *Hasbro that Hasbro admitted to a possible infringement of Chapter 1*  
19 *prohibition. In the OFT’s view the most reasonable interpretation of the*  
20 *redacted version of the Hasbro representations that was given to Argos is that*  
21 *while Hasbro denied infringing the Chapter 1 prohibition as set out by the OFT,*  
22 *the original Rule 14 Notice, it did not deny that it had admitted an infringement*  
23 *of some kind”.*

24 Now, on the evidence that we have seen – perhaps I can just give you the  
25 references.

26 THE PRESIDENT: Yes.

27 MR GREEN: In Hasbro’s own reply to the Rule 14 Notice, as far as we can see from  
28 reading those documents they were firm in denying any form of infringement, and the  
29 relevant paragraphs are 5.1 thro’ to 5.3, 6.15, 6.19 and 6.21.

30 THE PRESIDENT: Just while we have it, let us quickly glance at those paragraphs. I think  
31 we go back to the big file.

32 MR GREEN: My reference is bundle C3, tab 18, and 5.1 to 5.3 should be, at least on my  
33 page numbering – I am taking it from the Notice of Application – 627, 628.

1 THE PRESIDENT: Yes, it is. Well 5.1 would appear to be a denial – at a quick look. 5.2 is  
2 blank. 5.3 says why he is not able to do it.

3 MR GREEN: That is right. Then a similar point is made in 6.15, which should be page 631.  
4 That, in our submission, read in the context of 5.1 go 5.3 supports the conclusion of  
5 non-infringement. 6.19 is to the same effect. The next page:

6 *“The pricing initiative did not inevitably mean that there would have been an*  
7 *infringing agreement/concerted practice between Hasbro Argos and*  
8 *Littlewoods. Argos or Littlewoods could have taken BIM [Brought In Margin]*  
9 *under the pricing initiative on its own assessment and the competitiveness or*  
10 *otherwise of Hasbro’s RRP’s and the price at or around these RRP’s at its*  
11 *discretion.”*

12 Then 6.21:

13 *“No contemporaneous documentary evidence in discussions in 1998 with either*  
14 *Argos or Littlewoods. Mike McCulloch’s statement to the OFT is the only*  
15 *evidence of these discussions It does not show or permit the inference that it*  
16 *was Hasbro which considered it necessary to reassure Argos that Littlewoods*  
17 *was also committed to pricing at Hasbro’s RRP’s, in fact it is clear from his*  
18 *statement that he does not accept any responsibility for the arrangements to*  
19 *reassure Argos at all...”*

20 Then they are referring to the notes of the interview where he denies such  
21 responsibility. We read the reply to the Rule 14 as a denial in the broadest possible  
22 sense, and an allegation of infringement. The Decision suggests that Hasbro has in  
23 some way implicitly acknowledged or accepted that there was a breach. What Hasbro  
24 said to the OFT is plainly relevant – it is relevant to our submissions about the fine, and  
25 it is relevant to the question “Was there, or was there not a breach?” We have three  
26 employees from Hasbro who are going to give evidence that there was or may have  
27 been a breach, yet Hasbro, having had an opportunity to speak to those three employees  
28 was of the view, when he made submissions to the OFT, that there was no such  
29 infringement.

30 However, the arguments that it made to the OFT in that regard we submit may  
31 be plainly relevant to the issue of the breach or non-breach, but it ought to be to the  
32 credibility of the three witnesses. Have they changed their story? Why did Hasbro, on  
33 the basis of those three employees, come to the conclusion there was no infringement.

1           The second point relating to relevance is that the OFT has now chosen to rely  
2 upon the evidence of these three individuals but it has ignored the evidence of other  
3 individuals whose evidence it relied upon at an earlier stage and indeed relied upon in  
4 the course of the Decision. Mr McCulloch is the principal example of this, even in the  
5 latest Decision, we rely upon him at paragraph 308. In the seventh line there is a  
6 sentence starting:

7           *“There was equally persuasive evidence in the statement of Mike McCulloch*  
8           *and Leslie Paisley amongst others that it was indeed Hasbro’s that put the*  
9           *initiative in proposing a move to RRP’s.”*

10 THE PRESIDENT: Yes.

11 MR GREEN: This is part of the evidence which the OFT relies upon. What the OFT said,  
12 and I can make the point now to save coming back, plainly the OFT in paragraph 308  
13 are referring to a representation which is redacted in paragraph 307 of our version, and  
14 this is evidence which we have not yet seen, but it is evidence that the Office of Fair  
15 Trading is relying upon to prove that Hasbro were the initiators of an arrangement  
16 which fell into breach. Now, who knows, the OFT could very well have made  
17 submissions about Mr McCulloch’s evidence, we do not know – they may have made  
18 submissions about other people’s evidence. There were many other Hasbro employees  
19 who were interviewed, and upon whom Hasbro, certainly we have been advising them,  
20 would have relied. Many exculpatory statements were referred to in the Hasbro notes of  
21 interviews. One would have thought that those statements would have been the basis of  
22 submissions that there was no breach.

23 THE PRESIDENT: Mr Green, when we talk about the redactions in the Decision, are you  
24 effectively talking about paragraphs 305, 307, 309 and 310?

25 MR GREEN: Yes, indeed.

26 THE PRESIDENT: Those are the ones you are talking about.

27 MR GREEN: It is in section E of the Decision that the principal redactions are found.  
28 A third relevance is that if the Office of Fair Trading is right and that something in  
29 Hasbro’s application for leniency led the OFT to conclude that there was an implicit  
30 acceptance of liability, then in some way, shape or form Hasbro will have sought to  
31 shift blame to Argos and Littlewoods, in which case it is plainly relevant material. It is  
32 material upon which we might wish to cross-examine the OFT witnesses – after all, the  
33 OFT clearly believed that, as they put it, reasonably construed Hasbro’s submissions in  
34 relation to leniency did amount to an implicit acknowledgement of liability.

1 THE PRESIDENT: Forgive me for interrupting you for a moment, Mr Green. My eye has  
2 just fallen on paragraph 315 of the Decision, which refers to "...the representations  
3 made by Hasbro, Argos and Littlewoods redacted pursuant to section 56(2) and (3) of  
4 the Act." So it may well be that the redactions that we have just been discussing are  
5 redacted pursuant to section 56(2) and section 56(3) of the Act, which, as I recall, is the  
6 confidential information section – the old confidential information section?

7 MR GREEN: Yes, that is right. I think that is the basis upon which the OFT skeleton is  
8 founded, that confidentiality is material. I was going to come to that shortly. What I  
9 was proposing to do is to explain why we say it is relevant and then deal with the  
10 Office of Fair Trading's justification.

11 THE PRESIDENT: Yes, thank you.

12 MR GREEN: The fourth main reason why it is relevant is that it does go to a pleaded issue,  
13 which his our case on penalty which, of course, as the Tribunal appreciates is an  
14 alternative argument, but we have set out in some detail in our Notice of Application  
15 the grounds which make Hasbro's application highly relevant, in particular at  
16 paragraph 5.27 and onwards. We submit that Hasbro's application for leniency resulted  
17 in 100 per cent. reduction of the fine. We submit that that was unfair and  
18 disproportionate. We have submitted that in fact the Director was simply anxious to  
19 make a point about leniency at the time, and we submit that he bent the rules – this is  
20 5.27(a). We have also submitted that it is clear from the documents that we have seen  
21 that Hasbro did not admit to the existence of any infringement, and that is, or maybe a  
22 relevant factor. We submit that admitting liability is, or may be, a condition for  
23 obtaining leniency under the OFT's own Rules.

24 There are other factors we submit are relevant such as whether they were the  
25 instigator, and if they were the only instigator, and all these are matters which Hasbro  
26 would've made submissions about in its application for leniency. So the material goes  
27 directly to a matter which is pleaded in our alternative case on fines. Now, those are the  
28 main points that we rely upon in relation to relevancy.

29 So far as the Decision goes, if you could please go back to 305, one sees what  
30 the OFT itself made of the redacted material. First of all there is a blank in paragraph  
31 305, and the gist of what follows is that the OFT cannot prove that there was an  
32 infringement. We do not know what evidence is referred to in that redacted material.  
33 The OFT's response is that it is no part of the OFT's case that Argos and/or  
34 Littlewoods were actively involved in agreeing with Hasbro at what level RRP's would

1 be set so the redacted material, and the submissions which might've been made may  
2 have referred to the extent to which Hasbro entered into discussions/negotiations with  
3 Argos and Littlewoods, therefore it is a central issue in the appeal. They say also that  
4 nor is it part of the OFT's case that it was Hasbro's monitoring of the price initiative  
5 that was itself unlawful. Again, that would appear to be part of Hasbro's submissions. It  
6 was, as the OFT finds, the fact that Hasbro's pricing initiative developed in to unlawful  
7 agreements between Hasbro, Argos and Littlewoods to fix resale prices of certain toys  
8 and games normally at Hasbro's Recommended Retail Prices, although for particular  
9 reasons in relation to particular products the agreed price was less than the original  
10 Recommended Retail Price. So Hasbro's submissions therefore related to the way in  
11 which it is alleged by the OFT that the price initiative, turned into, revolved into some  
12 form of unlawful arrangement. We would submit that goes right to the very heart of the  
13 case. It is difficult to say why that necessarily is to be categorised as a matter going to  
14 leniency. These are facts which go more broadly to other issues in the case.

15 Then in paragraph 307, this is under a heading "The Pricing Initiative is distinct  
16 From Price Fixing Agreements". There is complete redaction but it is clear from the  
17 heading that that is the key issue in the case, and these are representations made by  
18 Hasbro about that key issue. The OFT's response, which presumably involves some  
19 degree of reflection as do Hasbro's submissions, is as follows:

20 *"The OFT's case is that what may have started as a lawful pricing initiative by*  
21 *Hasbro led directly to the infringing agreements"*

22 One presupposes that Hasbro was addressing the fact that in its submission the  
23 initiative started as lawful and remained as lawful, and the OFT disagrees and says that  
24 it started as lawful and it evolved into something which was unlawful, but that is an  
25 issue at the heart of the appeal. They refer to evidence, both documentary and in the  
26 statements of Hasbro employees that it was a vital part of the pricing initiative to  
27 persuade, rather than make, which the OFT accepts that Hasbro was not in a position to  
28 do, retailers to move towards adhering to RRP's.

29 Now here we have a reference to Hasbro's employees and their statements, an  
30 unparticularised reference, but it may very well be the case that Hasbro, on the basis of  
31 the notes of interviews conducted by the OFT with its employees, make submissions  
32 along the lines that we did that there were many exculpatory comments and statements.  
33 It is difficult to see why that should be anything other than evidence going to the very  
34 heart of the appeal, and the rest really follows suit. There is even a reference to the 18<sup>th</sup>

1 May email, and that is an important document on anyone's case, and one presupposes  
2 that Hasbro made submissions about that which are in the redacted material.

3 Paragraph 309 is completely redacted, so we do not know what is contained in  
4 that paragraph but again it would appear to be related to the distinction between the  
5 pricing initiative and some form of alleged illegal agreement. That would appear to be  
6 borne out by the redaction in paragraph 310, that the pricing imitative did not involve  
7 the maintenance of retail prices on the relevant products. That was a representation,  
8 there are further representations made.

9 THE PRESIDENT: 309 is a redaction apparently of part of the OFT's response, whereas the  
10 other redactions are redactions of Hasbro's representations. Is that right?

11 MR GREEN: It might be the case, we would surmise similarly. If it is then presumably it  
12 is redacted because it refers to Hasbro's submissions which themselves have the right  
13 to be redacted – that would be our surmise.

14 311 is a response to 310, and is plainly a response in large measure to that  
15 which is redacted. Then there is nothing further redacted from 312 and 313, but there is  
16 an important point at the end of 312, in the last sentence:

17 *“Any breach of the Chapter 1 prohibition occurred when Argos and Littlewoods*  
18 *sought reassurance on each other's pricing intentions in relation to products*  
19 *covered by Hasbro's pricing initiative.”*

20 Now, one deduces from this that Hasbro might have submitted that there was no  
21 infringement, but if there had been hypothetically it would have arisen in a particular  
22 way which they were not guilty of, or they were innocent facilitators, or an innocent  
23 conduit pipe. Now, if that is an allegation which Hasbro made, then it is plainly  
24 relevant to the key issue in this case. It is relevant to the pleaded issue in relation to  
25 fines and infringements, because it goes to the issue is there or is there not an admission  
26 as to liability.

27 Can I turn from the Decision to the OFT's arguments, and I can summarise their  
28 skeleton as raising five points. First, the OFT says that the material is confidential. This  
29 is made in circumstances where Hasbro does not appear itself to assert confidentiality.  
30 We submit that in any event confidentiality is not *per se* a reason for non-disclosure. In  
31 any case, before the Tribunal we would submit that the Tribunal (a) decides whether  
32 the material attracts confidentiality; and (b) if it does, whether that confidentiality is  
33 sufficient to outweigh the rights of the defence is the two part test. The OFT have not  
34 applied that two part test, they simply assert confidentiality in relation to material

1 which, we would submit, on any view, is utterly stale. Once Hasbro achieved its 100  
2 per cent. immunity, and there is no appeal, Hasbro can no longer be at risk and the  
3 basis upon which it obtained its 100 per cent. immunity is academic to it. It is not  
4 suggested that there is material which has lingering relevance to its business, and all  
5 we have is a simple blanket assertion by the Office of Fair Trading that there is  
6 confidentiality, but no particular identification of what that confidentiality is in any  
7 particular case. In so far as we have heard nothing from Hasbro seeking to support that,  
8 in our submission it does not lie in the mouths of the OFT to persist in such an  
9 application. If it is serious for Hasbro, Hasbro should have put forward evidence – it  
10 need not have turned up, but it should have put forward evidence – which we could  
11 then have assessed and the Tribunal could have weighed. Even if, for the sake of  
12 argument, there was even a grain of confidentiality in this material we submit it has to  
13 be balanced against the rights of defence and we submit that in these circumstances any  
14 confidentiality is very weak indeed and cannot trump the rights of the defence.

15 The second ground that the Office of Fair Trading rely on is a policy ground  
16 based upon the effectiveness of its leniency programme.

17 THE PRESIDENT: Just hold on there, Mr Green, before you go on. As far as the Tribunal is  
18 concerned the confidentiality provision is to be found in Schedule 4 of the Enterprise  
19 Act, which is to be found at page 470 in the new 9<sup>th</sup> Edition of Butterworths, and it  
20 works in a somewhat funny way because it refers to the Tribunal's final Judgment.

21 MR GREEN: That is right, you dealt with this in the *Aberdeen Journals* confidentiality  
22 application.

23 THE PRESIDENT: Yes, but what we have to do is to exclude things, as far as practicable,  
24 either if it is information which would be contrary to the public interest, or:

25 *“(b) commercial information, the disclosure of which would, or might in its*  
26 *opinion significantly harm the legitimate business interests of the undertaking*  
27 *to which it relates”.*

28 MR GREEN: Yes.

29 THE PRESIDENT: What I am grappling with is how we can apply this without actually  
30 knowing what is information is sought to be protected.

31 MR GREEN: Can I address the question of procedure at the end?

32 THE PRESIDENT: Yes.

33 MR GREEN: We would be concerned if the Tribunal felt that this was equivalent to a PII  
34 application in which it had to take information into its own possession in order to assess



1 it. We think that should be dealt with on a broader basis. Hasbro does not, and we  
2 invite you to conclude that they do not, assert confidentiality. If they had any serious  
3 concerns at all it was incumbent upon them, having had a full opportunity to do so, to  
4 put those concerns in writing or to appear today and they have not done so.

5 MR DOCTOR: I am going to show the Tribunal a letter---

6 MR GREEN: Well, this is most unsatisfactory. We have not been shown the letter, and  
7 making submissions on the very question.

8 THE PRESIDENT: I think we did ask, Mr Doctor, last week, what Hasbro's position was?

9 MR DOCTOR: Yes, we got something to through on Friday.

10 THE PRESIDENT: I think it would have been helpful if someone had tipped us off about  
11 Hasbro. I think we had better see it now, if we may, please. [**Document handed to the**  
12 **Tribunal and counsel**]

13 MR GREEN: This appears to be clasping at straws. The OFT---

14 THE PRESIDENT: Sorry, Mr Green, we are just having a quick look at it. [**Pause for**  
15 **reading**] Yes?

16 MR GREEN: What appears to be said, the OFT put into Denton Wilde Sapte's mouth, that  
17 they ought, in effect, to agree that disclosure would harm Hasbro's business interest in  
18 two or more customers, that rightly or wrongly Hasbro that has acted in a way contrary  
19 to their business interest. This is the broadest possible allegation, no particulars of that  
20 are given, and we have seen the reply to Rule 14. We have seen that, as matters stand,  
21 they deny liability. We have seen the statements they gave in response to interviews.  
22 We are looking for the last 5 to 10 per cent. of that particular jigsaw. This is an answer  
23 which Hasbro gave on 19<sup>th</sup> November, 2002 and they have managed, on the basis of an  
24 invitation from the OFT to simply say "yes", conveniently, "we still agree". We would  
25 invite you to conclude that there really is nothing in that.

26 Before I turn to the question of procedure, can I just deal with the OFT's  
27 submission on policy, which is the alternative ground to confidentiality. The ground is  
28 put broadly in terms of the effectiveness of their leniency programme. This is advanced  
29 as a broad brush assertion. No sensible reasons are given in support of it, it was not a  
30 proposition which was ultimately accepted by the Tribunal in Umbro. We would  
31 submit that it is clearly outweighed by the counter considerations and, as a policy  
32 consideration, it is weak. An applicant for leniency has a temporal interest in  
33 confidentiality if it has any interest at all. That interest lapses when it makes the

1 decision. If it gets 100 per cent. then it has won hands down, it is thrilled, it pops open  
2 the champagne and frankly what happens after that is of limited interest to it.

3 When you make an application for leniency you cannot have a legitimate  
4 expectation that the Tribunal at a later stage may not wish to see those documents. At  
5 the very most you would have an expectation that the Office of Fair Trading would do  
6 what it could to preserve confidentiality, but it can never be an absolute expectation.  
7 That expectation, we submit, would lapse after the date of Decision, once the  
8 proceedings fall into the realms of an appeal. So we would submit that it is a weak  
9 policy ground.

10 The third ground that the OFT advance in paragraphs 16 to 18 of their skeleton  
11 is one which they describe as “need”. They say we do not “need” the material . They  
12 say we can cross-examine on the basis of the material that we have in its absence. Now,  
13 we do not submit that we are unable to cross-examine on credibility without this  
14 material. Our position is that we are better able to cross-examine. The Office of Fair  
15 Trading argument, if it were correct, would be an excuse for refusing to disclose all the  
16 relevant documents because in theory you could cross-examine on just a little bit, but  
17 not as effectively as you can to protect your rights of defence if you have all the  
18 material. So with respect what is said in paragraphs 16 to 18 does not wash.

19 The fourth point that is made in paragraphs 19 and 20 is that it is only the fact  
20 of leniency which is relevant. With respect, we do not understand the argument. We  
21 dealt with this already. It is the content of the leniency application. It is what is said and  
22 how it is demonstrated to be relevant in particular by reference to the Decision that  
23 makes it relevant material.

24 THE PRESIDENT: Mr Green, from time to time you have referred to the “leniency  
25 application” or the “content of the leniency application”, what document do you  
26 identify, as far as you know, as being the leniency application?

27 MR GREEN: We have to rely upon what the OFT have told us about it, because we do not  
28 have any definitive list of documents. We can only really refer to broad categories of  
29 documents. We do not know whether or not it is comprising letters, notes of meetings,  
30 or what? We plainly know that they made an application for leniency in the course of  
31 the Rule 14 Notice, both the written and oral procedures. But over and beyond that we  
32 do not know.

33 THE PRESIDENT: Yes.

1 MR GREEN: The final point which I need only refer to because we have already dealt  
2 with, the OFT says that this case is distinguishable from *Umbro* because the material  
3 here is not relevant, and I think we have made our submissions on relevance already, so  
4 I do not need to repeat those.

5 Finally, so far as procedure is concerned, we would invite you simply to rule on  
6 the basis of principle. You have seen the Decision so you know that the OFT concludes  
7 that this material is relevant and what it is relevant for. If you have to have another  
8 hearing in order to decide whether it is relevant, we would submit that that is an  
9 unnecessary step.

10 THE PRESIDENT: When you say that they say it is relevant in the Decision, what are you  
11 referring to?

12 MR GREEN: The paragraphs I took you through.

13 THE PRESIDENT: 319, for example?

14 MR GREEN: Yes. The material is relevant to the existence of agreement, and the evidence  
15 which goes to the existence of agreement, why Hasbro apparently advanced the  
16 proposition which is inconsistent with the evidence which employees are now going to  
17 give on those same issues, and Hasbro's view, on its own evidence, is plainly a  
18 benchmark against which you could measure what its own employees are now saying  
19 in the new witness statements.

20 THE PRESIDENT: Yes.

21 MR GREEN: We would invite you to decide upon that basis, and move into what is  
22 effectively a PII type procedure we would suggest it is not necessary ---

23 THE PRESIDENT: Yes.

24 MR GREEN: It has disadvantages, first of all, should there be an ex parte procedure, or  
25 should it be an inter partes procedure with the appellants having limited rights to seek  
26 information as one sometimes finds in Crown Court proceedings, there can be a variety  
27 of different forms. How does one protect the rights of the defence in a PII context?

28 THE PRESIDENT: It is a thorny area.

29 MR GREEN: It is a thorny area. We would not want to put the Tribunal at risk of having  
30 to recuse itself. That would be an unfortunate matter - a very unfortunate matter.

31 THE PRESIDENT: We could probably arrange for another Judge to deal with it.

32 MR GREEN: We would probably submit that you could wipe it from your minds in any  
33 event. It is a dilemma which it is unnecessary to have to confront unless it is really  
34 urgent. This is not a case where PII in the traditional sense is asserted, we have a very

1 limited but now identified claim to confidentiality, which could be ruled upon, and we  
2 have a broad policy ground which operates really in the abstract. We are not talking  
3 about the identity of an informant, or the location from where a piece of surveillance  
4 was carried out. We may have cartel cases in the future where that becomes an issue,  
5 but certainly not here, so we would submit it is not necessary for the Tribunal to be  
6 going through that procedure.

7 Unless I can assist further those are my submissions.

8 THE PRESIDENT: No, thank you, Mr Green.

9 MR BREALEY: Could I just make one point on this letter?

10 THE PRESIDENT: Yes, you had not seen the letter so you are entitled to comment, yes.

11 MR BREALEY: The only reason given, it seems, is that Hasbro may feel that Argos may  
12 have some sort of commercial retaliation against it. I think this is what Hasbro are  
13 saying: "...might significantly harm Hasbro's business interests in two of its main  
14 customers" – that's Argos – felt "rightly or wrongly that Hasbro had acted in a way  
15 contrary to business interest".

16 This Tribunal can reject that reasoning out of hand today. It is just not valid for  
17 two reasons. First, it does not stack up when one sees the mountain of evidence that  
18 Hasbro has already given anyway. Knowing what Hasbro have done they are still  
19 trading with them. This is not a small company versus a big company – a small  
20 company at risk.

21 The second reason is that the Tribunal rejected that in the Umbro case, in  
22 paragraphs 27 and 34. Umbro made the same point and quite rightly the Tribunal  
23 rejected it. It is a big company and there is absolutely no risk of commercial retaliation.

24 Those are my final submissions.

25 THE PRESIDENT: Thank you. Good morning, Mr Doctor.

26 MR DOCTOR: Good morning. Can I start with what this application is all about?

27 THE PRESIDENT: Yes.

28 MR DOCTOR: And that is we understood we were facing an application for a defined list  
29 of documents, categories of documents which concerned the application for leniency by  
30 Hasbro. That is what was asked for at the last of the CMCs just before the end of the  
31 last year, when they were told to go away and particularise their application and set out  
32 the grounds. That is what they then did. They sent us a letter which you will find in the  
33 correspondence bundle at tab 1 and tab 2, which specifically refer to Hasbro's  
34 application for leniency, and they say that they would like witness statements, draft

1 witness statements made in the course of that application. They refer to the most recent  
2 witness statements of three witnesses, together with all correspondence relating to  
3 Hasbro's leniency application, which is likely to be subject to the same considerations  
4 as those set out by the Tribunal in paragraph 45 of the Judgment.

5 THE PRESIDENT: Yes.

6 MR DOCTOR: And the letter from Burges Salmon on behalf of Argos is much the same.  
7 What they are looking for is documents relating to Hasbro's leniency applications and,  
8 in particular, witness statements and disclosure of correspondence between Hasbro and  
9 the OFT relating to that application for leniency, as well as redacted passages in their  
10 written representations in the transfer hearing which relates to Hambro's leniency  
11 application.

12 No point is made then or subsequently about this question which has just arisen,  
13 that is whether in fact the material had been rightly or wrongly characterised by the  
14 OFT as confidential and was held on the grounds that it was related to the leniency  
15 application. What happened at the last hearing, you, Sir, I think indicated that it would  
16 be wise if Hasbro's attitude to all of this was established before we heard if there was to  
17 be an application. Indeed, Mr Burke, who instructs me, at that stage contacted  
18 telephonically Denton Wilde Sapte who act for Hasbro - it is apparently no longer  
19 Miss Weitzman, who was dealing with it in 2002, but somebody else - and there were  
20 two conversations, one last year and one earlier this year, in which it was established  
21 that they continued to maintain the confidentiality which they had previously asserted  
22 and they said, however, they did not wish to attend because they believed that the OFT  
23 would put forward arguments which would protect the OFT, their interest, and  
24 therefore there was no need to duplicate any effort.

25 There was then a letter written to the Tribunal a while ago in which it was stated  
26 that Hasbro would not be attending. Mr Burke says that he was somewhat surprised to  
27 receive the letter of last week from the Tribunal dated 20<sup>th</sup> February, which I think is  
28 Friday, but it may have been sent on Thursday night, which said:

29 *"The Tribunal would be grateful if, by the time of the Case Management*  
30 *Conference, the OFT could ensure, if it had not already done so, that if it is the*  
31 *case that Hasbro wishes to claim confidentiality in respect of materials it fully*  
32 *understand the basis on which the claim is made, and that Hasbro understands*  
33 *the Tribunal may rule on it."*

34 It was in response to that that Mr Burke then wrote the letter we have produced to

1 which he got a response which is then going to be produced by me. So it is simply to  
2 confirm to the Tribunal that it was not previously an issue, and that indeed Hasbro's  
3 attitude has remained the same, and that was the reason why this has developed in the  
4 way that it has. No issue was taken in any of these letters which were written or any of  
5 the skeleton arguments that there is, in fact, an issue about whether confidentiality  
6 should have been advanced, or anything like that. The argument is simply on the basis  
7 of Umbro, which is that it gave them an idea, which was that material relating to  
8 leniency could be produced by order of the Tribunal in the circumstances which made  
9 it relevant to the case. So we have not, as it were, devoted any time hitherto to this  
10 question of confidentiality.

11 THE PRESIDENT: Can I just go back to this letter and Mr Burke's telephone conversations.  
12 I think, as at the end of last week, rightly or wrongly, the Tribunal was not completely  
13 clear of what the Hasbro situation was, which was why the letter was written. I do not  
14 know whether Mr Burke kept a note of those conversations or whether, in fact, we had  
15 been told about them before we wrote?

16 MR DOCTOR: We do not have the letter with us, but he has instructed me as he sits here,  
17 he remembers writing a while ago to the Tribunal simply indicating in answer to the  
18 request Hasbro would not be attending the leave matter to be dealt with by the OFT.  
19 He understood that that answered all questions raised. He says that when he received  
20 the letter on Friday he was surprised.

21 THE PRESIDENT: We were still unsure.

22 MR DOCTOR: There is no criticism intended at all.

23 THE PRESIDENT: Well there is no criticism intended from our side either, we just wanted  
24 to get to the bottom of it. You have been focusing on leniency, you have not been  
25 focusing on confidentiality?

26 MR DOCTOR: Yes, entirely on this question of leniency. We might also add this, that we  
27 had not focused at all on Mr Green's application, which has not been mentioned in any  
28 of the documentation leading up to the proceedings, or disclosure of parts of the  
29 Decision, which previously were redacted. I have not even brought a copy of the  
30 Decision with me today, although I have now sent for it and it will be produced shortly.

31 THE PRESIDENT: Would you like some more time?

32 MR DOCTOR: Well I can deal with it in principle without any delay.

33 THE PRESIDENT: Yes, but if you want more time please apply.

34 MR DOCTOR: I will come to that at the end. Dealing then with the application that we

1 thought had been made, which was whether the material regarding leniency, which had  
2 previously been withheld, should now be produced because it would be relevant to an  
3 issue before the Tribunal, we say this: we must be very clear exactly what has already  
4 been produced and what has not. An impression may, perhaps, have been inadvertently  
5 created that there is a morass of material out there which is going to provide a great  
6 deal of possible help and assistance to the applicants in preparing their case, and in  
7 particular in cross-examining the witness. Now, there is no form to fill in, as it were, in  
8 order to obtain leniency, but what happened in this case, as is clear from the Decision,  
9 is that the OFT was investigating some other matter when Hasbro reported itself, as it  
10 were, having discovered the existence of the emails.

11 It produced emails and other documents at that time in support – it reported  
12 itself and at the same time applied for leniency. In the course of that it produced the  
13 material which it said was relevant to the possible infringement, and they also made  
14 available witnesses from within their organisation to be interviewed by the OFT, and I  
15 think there was also one statement which has been disclosed.

16 THE PRESIDENT: I think one of our slight difficulties at the moment is that we do not have  
17 – or at least I do not have, and it is possibly my fault - a clear picture of what you have  
18 just described as the material regarding leniency actually is.

19 MR DOCTOR: Yes, it is now set out in our skeleton at tab 14.

20 THE PRESIDENT: Do we have a list of documents, for example?

21 MR DOCTOR: Not a list of documents, but we have a list of categories. It is page 4 of our  
22 written submissions, under the heading “Leniency Documents”, so this is what we  
23 thought was being discussed. We say that both applicants seek disclosure of  
24 correspondence relating to Hasbro’s leniency application, and that is the category in  
25 their letters which requests this hearing – 3(c) and 5(a) above. 3(c) is all  
26 correspondence relating to Hasbro – that will be between Hasbro and the OFT - “We  
27 think we are entitled to leniency because we have been very good, and we have  
28 complied”, and things like that. Then there are the redacted passages in their written  
29 representations which relate to leniency and the transcript of their oral hearing. Their  
30 written representations, that is what is being asked for---

31 THE PRESIDENT: Just a minute, you have just said “The redacted passages in Hasbro’s  
32 written representations...”

33 MR DOCTOR: Yes.

34 THE PRESIDENT: “...which related to leniency”?

1 MR DOCTOR: Yes, that is what they were asking for, 3.5(b) is the same thing, the  
2 redacted passages in Hambro's written representations. Then we come to what we say  
3 the documents are at page 4 under the heading "Leniency Documents". We say that is  
4 what they're asking for. The factual position in this regard is as follows: Hasbro's  
5 solicitors contacted the OFT ---

6 THE PRESIDENT: Yes.

7 MR DOCTOR: *"All documents provided in support of this request for leniency which  
8 relate to the substantive issue and which were treated as evidence by the OFT were  
9 made available to the applicants as part of their access to the file during the initial  
10 Rule 14 procedure. The fact that leniency was granted was also revealed."*

11 So Hasbro produced the emails and various other documents. They produced  
12 them for the purposes of asking for leniency. These relate to the alleged incidents of  
13 price collusion and all of them were referred to and disclosed in the Decision, the Rule  
14 14 procedure.

15 THE PRESIDENT: Can I just understand this at the moment. *"All documents provided in  
16 support of this request for leniency which relate to the substantive issue and which  
17 were treated as evidence by the OFT.."* Can one infer from that that there are other  
18 original documents?

19 MR DOCTOR: No, there are none.

20 THE PRESIDENT: There are no other---

21 MR DOCTOR: No.

22 THE PRESIDENT: All the original documents?

23 MR DOCTOR: All the original documents.

24 THE PRESIDENT: The whole lot?

25 MR DOCTOR: Yes, which they produced----

26 THE PRESIDENT: Helpful, unhelpful, everything?

27 MR DOCTOR: Yes. All of them were produced, and all of them where we say "and were  
28 relied on" we say they are referred to in the Decision. They say this about them, they  
29 say that about them, but all of those documents have been produced.

30 THE PRESIDENT: So you are able to inform the Tribunal on instructions that all the  
31 original documents provided by Hasbro, in the course of the leniency application, have  
32 been disclosed?

33 MR DOCTOR: Yes. Now, in addition to that there were, of course, discussions between  
34 the OFT and Hasbro, there were discussions about this application for leniency, and we



1 say in addition to the discussions, which are the ordinary discussions, there is a small  
2 amount of correspondence between the OFT and Hasbro's solicitors which related to  
3 Hasbro's leniency application, and the issue of whether it should be mentioned in the  
4 Rule 14 Notice. So the one was the covering letters and so on, and argument - "We  
5 think we are entitled to leniency, here is all the evidence", and so on. There was also an  
6 issue as to whether the fact that they were being granted leniency should be mentioned  
7 at all in the Rule 14 Notice, and that correspondence exists.

8 There was also in their written Rule 14 representations, the one that you have  
9 been taken to, which was indeed their Rule 14 representation, passages which dealt  
10 with leniency, in other words making submissions about the leniency issue, and these  
11 were redacted from the copies available to the applicant. There were separate  
12 representations made by Hasbro, devoted entirely to the issue of leniency, which have  
13 not been made available to the applicants. Finally, in the oral representations which  
14 were then recorded and transcribed, counsel who appeared for Hasbro made  
15 submissions about this, that, and the other, including, of course leniency and those parts  
16 have been redacted from the copies sent to the applicant. Perhaps I should mention that  
17 they have as well the interview notes with all the witnesses. In so far as any Hasbro  
18 witnesses gave evidence, in other words, made assertions about what had happened -  
19 they made all their staff available to give those interviews, they were recorded in  
20 writing and they have been disclosed.

21 So everything which constitutes evidence, in other words, the documents which  
22 were supplied, and the assertions and fact about the events which Hasbro's witnesses  
23 have made have been disclosed. In addition, we have disclosed what Hasbro's  
24 solicitors, Denton Wilde Sapte, said about the main issues in the case in their  
25 representations. Having been served with a Rule 14 notice they then commented on it  
26 and they said "Well, we think that your drawing of this inference is quite unjustified  
27 because Mr Thompson says the following, and Mr So-and-So says something else. We  
28 think that it is a completely rocky conclusion that you have arrived at in the Rule 14  
29 and we have read all those representations - some of them related to leniency - and  
30 because of this decision not to reveal the material relating to leniency, we have redacted  
31 those parts of it". But nevertheless those parts of it are as much submissions by the  
32 lawyers on the primary material.

33 It is that material which the applicants are asking to see. They are asking to see  
34 the correspondence which is agreed correspondence about leniency and they are asking

1 to see the representations made by Denton Wilde Sapte in both written and by counsel  
2 in oral form, in so far as it deals with leniency. Now, we start, we say, from the point  
3 which we thought was not challenged, which was that Hasbro originally and the OFT  
4 considered that was confidential. The OFT also considered that it was in the public  
5 interest and would serve to support the leniency programme if material relating  
6 exclusively to leniency should not be disclosed to the applicants. Except, what was  
7 disclosed of course, was all of the material, the primary material, supplied in the course  
8 of the leniency application, but what would then have been withheld was Hasbro's  
9 comments, and its solicitor's comments on that material. Now, we believe that that is  
10 confidential. Hasbro still considers it confidential, we agree with that. We also believe  
11 that this kind of material should be kept confidential in order to ensure that people  
12 come forward in the future with some confidence that where possible confidentiality  
13 will be maintained.

14 THE PRESIDENT: If we just pause there, Mr Doctor. On confidentiality, presumably you  
15 rely on the recent letter from Hasbro, as far as business confidentiality?

16 MR DOCTOR: Yes.

17 THE PRESIDENT: As distinct from public interest considerations?

18 MR DOCTOR: Yes.

19 THE PRESIDENT: That is the letter from Hasbro. We would like you to develop a little in a  
20 moment the leniency, public interest considerations. One point that perhaps troubles me  
21 a little at the moment is whether when one looks, for example, at documents like the  
22 written representations and the blanks that are in them, whether we can reasonably infer  
23 that the redacted material relates, as you put it, exclusively to leniency. It seems to crop  
24 up in a sort of rather mixed way.

25 MR DOCTOR: I think I am correct in saying, it is said in our skeleton, that the  
26 representations were not redacted exclusively for leniency. I think there was material in  
27 the representations which was also redacted for commercial confidentiality, and I think  
28 we have said that in our skeleton at paragraph 15.

29 THE PRESIDENT: Just let me get on top of that. So what we have at the moment, and I  
30 would like to be corrected if I am wrong, we do not have at all the correspondence  
31 between the OFT and Hambro---

32 MR DOCTOR: No.

33 THE PRESIDENT: ---on the leniency question. We have the Rule 14 representations which  
34 are partly redacted for leniency and partly redacted for confidentiality?

1 MR DOCTOR: Yes.

2 THE PRESIDENT: We do not have at all the separate representations referred to in “C”,  
3 and we have the oral representations which again are partly redacted for confidentiality  
4 and partly redacted for leniency.

5 MR DOCTOR: Yes.

6 THE PRESIDENT: So we have a bit of a mixture on those two documents.

7 MR DOCTOR: Yes. Although I am instructed, as we have recorded here, that the parts  
8 dealing with leniency can be identified.

9 THE PRESIDENT: Parts dealing with leniency can be identified.

10 MR DOCTOR: Yes. We start therefore from the position that the material is correctly  
11 withheld on the grounds that it deals with a matter that is both confidential, and the  
12 OFT considers to be in the public interest to withhold, namely, that it encourages and  
13 allows people in the future to make use of the leniency programme in the knowledge  
14 that what they say will be kept confidential, unless it has some high degree of relevance  
15 to the issues in the case and an application would then be made and the Tribunal would  
16 balance it. Indeed, the Tribunal has recognised in the Umbro Judgment that there is  
17 indeed such a legitimate public interest.

18 Now, we say that in order to counteract or show that the documents should be  
19 produced, and that the public interest factor can be overridden, some substantial ground  
20 should be put forward why these documents should be produced – not that they may be  
21 marginally relevant, or of interest to the applicant, but that there is some material  
22 interest which would be served in so doing. We say that that is clearly what happened  
23 in Umbro because in that case not only did the Tribunal note that actually Umbro itself  
24 was relying on the documents as part of its case, and therefore the documents would  
25 have come out anyway, they could not make their own case without referring to the  
26 documents, they therefore would have to come out. The Tribunal would not rest there  
27 and say “Well that concludes the matter because there is no need to consider anything  
28 else”. What the Tribunal said in Umbro was that it must be relevant to the defence in  
29 some way, meaning it must be relevant to an issue before the Tribunal, and it must have  
30 assumed some material rather than simply insignificant relevance to that material.

31 The very example in Umbro made that absolutely clear. It was that the other  
32 parties were arguing, and amended their case to enable them to raise the issue, that  
33 Umbro had been given a 14 per cent. reduction in penalty whereas Manchester United  
34 had been given only a 10 per cent. reduction. Indeed, the reason why Umbro had been

1 given a greater reduction was because it was alleged it had co-operated more fully with  
2 the OFT than other parties, and that of course would then be an issue, including, since it  
3 was part of Umbro's case, its co-operation as part of the leniency application. So if one  
4 were to see the letters in which Umbro wrote and said this is our position, we have  
5 made full disclosure, and it would be relevant to see whether it took one letter or  
6 perhaps five letters to extract that information, and whether that could be contrasted  
7 with the behaviour of Manchester United which had given some co-operation, and  
8 therefore one would want to weigh up the various bits of co-operation, including the  
9 very thing he talks about, the leniency application.

10 In this case that simply does not arise. I am fully aware of the fact that the  
11 Notices of Appeal refer to discrimination. If one looks at their Notices they simply say  
12 that the penalty they were given was unfair and prejudicial, in view of the fact that  
13 Hasbro was given 100 per cent. leniency. If one takes by way of example, the Argos  
14 application [bundle A, tab 1, page 39 para 104] of its Notice of Appeal. It contains a  
15 complaint that Hasbro was given 100 per cent. leniency, and they said this was wrong.  
16 They say Hasbro was not the first, it was the instigator. Whatever the grounds were on  
17 which the OFT gave Hasbro 100 per cent. leniency, they say Hasbro, on their view did  
18 not fulfil any of this. Finally, they say Hasbro did not co-operate, it did not do this, it  
19 did not do that, that decision, they say, was wrong. Hasbro should not have been given  
20 100 per cent. leniency.

21 Then they say in paragraph 110, and this is the only link with their own case,  
22 because this is no more relevant than was Argos on any other case it meets, they say  
23 that Argos submits that where the OFT finds that a cartel has existed involving a  
24 number of undertakings and wrongly grants one cartel 100 per cent. leniency, it would  
25 be discriminatory or unfair for it to impose substantial fines on the other cartel  
26 members. So that is the submission. Essentially that is exactly the same as Littlewoods  
27 is saying. It is making the same point. I do not need to take you to it. It is simply saying  
28 "It was wrong to grant Hasbro leniency, and therefore it is unfair to penalise us." The  
29 argument is very straight forward and there is no response to it whatsoever, other than  
30 the continued assertion that it is unfair. We are simply saying that if you analyse it in  
31 any detail, the argument simply does not stand up, there is no argument there. It is  
32 simply a non-issue. The reason I say that is because of the difference between the grant  
33 of leniency which comes after everything else is done, and the imposition of the  
34 penalty. If one looks at the Director's Rules, and we have prepared a bundle of

1 authorities for you and it is in that.

2 THE PRESIDENT: It is in the bundle, is it?

3 MR DOCTOR: It is in the bundle, bundle 18, tab 3.

4 THE PRESIDENT: That is the guidance?

5 MR DOCTOR: Yes, this is the guidance. You can see from the contents the steps for  
6 determining the level of penalty, and then a separate chapter altogether dealing with  
7 lenient treatment for undertakings which come forward with information. The first step  
8 is one of determining the level of the penalty, and without going into any detail, you  
9 have the starting point, you have a number of steps which you go through, up to five,  
10 and you determine the penalty.

11 THE PRESIDENT: That is really what the Director did here?

12 MR DOCTOR: Yes. There is no suggestion that in performing that task there was any  
13 discrimination at all. Argos has a submission that some of the steps in relation to it  
14 were not properly applied.

15 THE PRESIDENT: He went through the motions of determining a penalty for Hasbro in  
16 exactly the same way, you say, as for anybody else?

17 MR DOCTOR: It is not just that I say it, they say no different. It is not an issue. The only  
18 thing they say is that when it came to their turnover the wrong figure was taken and  
19 they should have taken some other figure, and so on and so forth. But there is no  
20 suggestion anywhere, in any document, or that has ever been made, that the treatment  
21 in the imposition of the penalty was any different between Argos, Littlewoods, and  
22 Hasbro. The Director General (as he then was) went through steps and determined the  
23 penalty. It is a small irony, but there is a slight difference in treatment because they got  
24 a 10 per cent. reduction in penalty and Hasbro did not get it, but the discrimination  
25 would work the other way in fact. Hasbro might be able to complain about that, they  
26 cannot.

27 So there is no complaint that there was any discrimination at all, and so all three  
28 cartel members are treated in exactly the same way. We then come, under the  
29 Guidance, to lenient treatment for undertakings which come forward with information.  
30 This has nothing to do with the calculation of the penalty, it is totally independent of it,  
31 and it is applied, rightly or wrongly, for reasons which have nothing to do with the  
32 reasons for the penalty, they are public policy reasons which some people agree with  
33 and some people do not but the OFT believes are important, and in the context of that  
34 Hasbro was given leniency.

1           If the applicants had applied for leniency, and were not given it there may be  
2 some point they could make on discrimination, but they did not apply for leniency. It  
3 simply did not arise in their case. They did not get any leniency because they never  
4 asked for any leniency. Therefore they cannot suggest that there was a discrimination,  
5 unfairness, in the treatment of them and their application for leniency as opposed to  
6 Hasbro's application for leniency. If Hasbro's application for leniency is wrong,  
7 wrongly decided by the OFT, it doesn't concern them. It wasn't done in relation to this,  
8 it was done in relation to Hasbro's application, and it has no bearing on the penalty –  
9 nor could it have any bearing on penalty – there is nothing in the penalty provisions  
10 which allows the Director to reduce the penalty in view of the fact that another party is  
11 getting leniency. It just does not arise. There is one factor which allows you to increase  
12 the penalty if you are an instigator of the infringement, but that does not apply here.  
13 Nobody was given any aggravated penalty, and there is simply no contact between the  
14 two.

15           This is a matter of commonsense and analysis. There is no issue here. It has not  
16 become an issue because the claimants keep repeating it. They have provided no  
17 answer to this point that we have made in a letter last year, we have made in our  
18 skeleton argument and in our defence. They simply do not deal with it. They say that it  
19 is unfair. We would say that it would be a very surprising argument, requiring them to  
20 show where in the penalty guidance the Director General could take account of the fact  
21 that he is going to grant leniency to one of the parties. He does not appear, there is  
22 nothing there, it cannot be raised. By definition the leniency could be seen as  
23 discriminatory because the leniency is granted to a party who might have taken part as  
24 fully as anyone else in the cartel. The whole point about it is, even if you are 100 per  
25 cent.guilty, if you come forward before anyone else and report yourself for public  
26 policy reasons you are accorded leniency, and if you were not the instigator you are  
27 entitled to 100 per cent. leniency. Whatever one may think of that that is the policy, and  
28 so to complain that it would be unfair to put a penalty on the applicants when one of the  
29 parties got leniency is simply an attack on the whole leniency system which is not in  
30 issue here - they are not suggesting it is *ultra vires* or anything like that. The argument  
31 simply does not stand up, and that is the only basis on which they can suggest any  
32 relevance for the leniency documents.

33 THE PRESIDENT: Mr Doctor, what is troubling me slightly at the moment is that, as it  
34 were, the broad arcs of the argument that is being submitted on either side do not, at the

1 moment, seem to be quite intersecting, i.e. what I understand the appellants to be  
2 submitting is that if you look at documents like Hasbro's written representations one  
3 can begin to infer that Hasbro was running a somewhat ambiguous line, or was trying  
4 to ride two horses in saying "Well, there isn't really an infringement, but if there is we  
5 have reported it and we have leniency". In so far as Hasbro might be denying, or it is  
6 suggested that they may be denying that there was an infringement in the first place, the  
7 applicants say that that is potentially relevant to their case and they would like to know  
8 what Hasbro's position really was at the Rule 14 stage. That is the argument at the  
9 moment.

10 MR DOCTOR: Yes. Can I deal with that argument that there is something that might  
11 potentially be relevant because Hasbro, in its representations through its lawyers, in  
12 commenting on the material which we all have, may have vociferously stated, for the  
13 purposes of leniency, that we were not guilty at all, we have not been taking part in a  
14 cartel, by virtue of the fact that the OFT imposed a penalty, and found that they had  
15 taken part in the cartel the court knows and they know that the OFT rejected those  
16 submissions. The fact that they made submissions about the evidence is neither here  
17 nor there. It is of no use to them what actually, if one thinks about it for a moment, are  
18 they going to do with that submission? Indeed, they do not need to see the material,  
19 they can say to the witnesses "The OFT came to the conclusion that you had taken part  
20 in a cartel." To which the witnesses would say "Well, I am not here to tell you what the  
21 OFT is thinking about. I am here to tell you what I know." Well, it is quite clear that  
22 Hasbro submitted to the OFT in the light of your evidence, that there was no price  
23 fixing. There was no cartel to which Hasbro were a party. The witness would say  
24 "Come again? What am I supposed to say in answer to that question?" The witness  
25 will say "If you want to ask me a question about what happened, please do so. But if  
26 you want to ask me about submissions made by the lawyers about the evidence, I  
27 simply can't deal with it. Indeed, the Tribunal would not allow us to continue for very  
28 with the applicants asking the witnesses to comment on what the lawyers had said  
29 about the witness's evidence: "Your lawyers must have put it that you were not  
30 guilty". "Well, I'm telling you what happened". This is completely irrelevant, it has  
31 nothing to do with the real----

32 THE PRESIDENT: It might depend, might it, on the actual contents of what we are looking  
33 at, because although this document was most certainly drafted by legal representatives,  
34 it is submitted on the basis of instructions and is presumably approved by the company

1 before it goes in, and it is in that sense the company's document, it is not just the  
2 lawyer's document. If it contains various arguments that suggest that there never was a  
3 cartel it might conceivably be relevant either as something to be put to the witnesses or  
4 as some more general point to be made in submissions that Hasbro never did accept  
5 that there was a cartel.

6 MR DOCTOR: I can only make the submission that it might, in that sense, be relevant, if  
7 that was in fact a realistic prospect. The submissions made by the parties, about the  
8 evidence, which was not accepted by the OFT, or even if it was accepted by the OFT ,  
9 is going to be neither here nor there. That is why we made the distinction between the  
10 evidence and what the witnesses said about these matters in the course of the  
11 investigation, and the submissions made. The submissions are neither here nor there.  
12 They cannot be of assistance to the applicants, except in the most forensic way which  
13 will get them nowhere in front of the Tribunal. The fact that the OFT rejected the  
14 evidence of somebody, or accepted it, is neither here nor there. They want to confront  
15 the witnesses with material about which the witness are in a position to comment.

16 THE PRESIDENT: We will not allow them to confront the witnesses with material upon  
17 which the witnesses are not in a position to comment.

18 MR DOCTOR: Then, with great respect, Sir, that is why this material is not relevant to  
19 them.

20 THE PRESIDENT: This is completely hypothetical, Mr Doctor, I am only thinking aloud as  
21 we go along to help the debate, I have obviously not formed any view at all. One could  
22 imagine in a general sense that the fact that Hasbro at the time invited the OFT to draw  
23 the inference that there was no cartel and, in particular, to draw various inferences  
24 about the exact nature of the pricing initiative, could in some general sense be relevant  
25 to the overall appreciation of what was actually happening here?

26 MR DOCTOR: Sir, it could in the sense that it might have something to do with it. But if  
27 one is looking for a substantial reason for why this material, which by definition  
28 concerns leniency and is being withheld for that reason, they must go further than  
29 simply saying "It might deal with the issues which are before the Tribunal", they must  
30 show some way in which it is relevant and to what issue. That is why I say the Umbro  
31 case is a clear indication of the requirement that it should relate to some issue. It is not  
32 good enough to say that it relates to the evidence, because by definition of course that is  
33 what it does. It is Hasbro's view, expressed through legal forum, Hasbro's view as to  
34 why the evidence shows X and does not allow you to draw the inference Y. Why they



1 say they were not parties to the cartel. They may have passed information, whatever it  
2 is, and that is their submission. Obviously it is going to deal with all of that.

3 What the applicants are entitled to have, and which they do have, is the material  
4 on which Hasbro is commenting. That Hasbro makes those submissions is a case of  
5 “They would, wouldn’t they?” But it is not in itself relevant to their case what  
6 Hasbro’s submissions were. What is relevant is the material that Hasbro produced on  
7 which the OFT based itself. Even assuming that, although the OFT says it would not  
8 rely on the redacted material, but assuming that the argument is going to be that Hasbro  
9 made the submission that Argos and Littlewoods were all to blame for what happened,  
10 and assuming that had appeared as one of the reasons that Hasbro told the OFT that  
11 Argos and Littlewoods were to blame and they accepted that submission, that would  
12 not make it relevant to the issue which have to be decided here by the Tribunal, which  
13 is was there a cartel? The fact that one of the parties, on the basis of these facts came to  
14 a conclusion is neither here nor there. The Tribunal is not bound by, or even interested  
15 in, the views of the parties as to whether these acts constitute a cartel on price fixing.  
16 The Tribunal is interested in the facts which are proven facts, and in submissions which  
17 will be made to the Tribunal – not in submissions which were previously made. We say  
18 that if the test is simply that if someone makes submissions about the matter, in the  
19 context of its application for leniency, then in fact there can never be any  
20 confidentiality, public interest confidentiality in leniency material, or in the discussions  
21 about leniency, because these discussions will be about the material in the case. If that  
22 is the test then there cannot be any confidentiality in the leniency material. It will, by  
23 definition, always concern the matters in the case, making submissions about this, that  
24 and the other, but as to the facts it can never be confidential because the test of  
25 relevance on the applicant’s analysis is simply whether it relates to the evidence in the  
26 case. We say that if it is material provided in the course of a leniency application and  
27 discussing whether leniency should be granted – and a secondary issue, the fact of it  
28 should be revealed – that in itself has nothing to do with the issues as long as the  
29 applicants have before them all the material which is being discussed, and which will  
30 be the primary material on which the OFT comes to its conclusion, and ultimately on  
31 which the Tribunal will come to its conclusion.

32 THE PRESIDENT: Can we form a view on that without seeing the material that is under  
33 discussion, do you think, Mr Doctor?

34 MR DOCTOR: Because, Sir, the Tribunal must deal with it - to this extent I agree with my

1 learned friends – as a matter of principle, there must, as a matter of principle, be a  
2 decision that if there is to be disclosure it must relate to an issue, or decision must be  
3 that the disclosure can be ordered upon some wider ground, and we would say that that  
4 issue of principle needs to be grappled with, as also whether the alleged issue is an  
5 issue at all or whether it is just something to be found in the hearing.

6 THE PRESIDENT: Yes.

7 MR DOCTOR: We would say that it may be that if it were outside of the parties'  
8 submissions, and indeed that is all that is being withheld at the moment is the  
9 submissions of Hasbro and OFT in response to that, if it was anything to do with the  
10 primary material, the material they gave us or what their witnesses said about that, then  
11 you may need to have a look at that. But for the moment the question is whether these  
12 representations, which concern the case, obviously, but whether that is a sufficient  
13 ground---

14 THE PRESIDENT: This is all secondary material in your submission?

15 MR DOCTOR: Yes, it is submissions made, they would be of no more than forensic  
16 interest to the applicants, and the very examples they have given, in which they point to  
17 a sentence where, for example, Hasbro says “We do not agree with the OFT’s  
18 provisional statement in Rule 14 that there was or was not something”, and we say  
19 “The evidence will show the following”, then that is not something which has  
20 something to do with the case, it is not a basis on which to disclose it. If that material  
21 should otherwise be withheld on the grounds that it is connected with the leniency  
22 application and for reasons which we say exist for keeping that confidential, we say  
23 that they need to produce some specific issue of relevance.

24 I think I have dealt with what I need to say---

25 THE PRESIDENT: I think it is just the paragraphs in the Decision, if you feel able to deal  
26 with it, but if you do not feel able to deal with it please say.

27 MR DOCTOR: I cannot deal with that because it hasn’t arrived so I cannot even look at it.

28 THE PRESIDENT: We will have to work out some way of dealing with that point?

29 MR DOCTOR: Yes. I am not sure as I stand here why that frame why that material was  
30 redacted anyway. I will have to take instructions. It may be it had something to do with  
31 the leniency application but I do not know.

32 THE PRESIDENT: One way to deal with that, Mr Doctor, would be for you to consider it, if  
33 you would be so kind, and then decide whether you would like us all to meet again so  
34 that you can deal with it, or whether you feel able to deal with it in a written

1 submission.

2 MR DOCTOR: Yes.

3 THE PRESIDENT: You are fully entitled to come along orally?

4 MR DOCTOR: No, no, that's us.

5 THE PRESIDENT: Fair enough. So can I leave it to you to let us know within, say, seven

6 days---

7 MR DOCTOR: Yes.

8 THE PRESIDENT: ---how you would like to proceed with that side of the argument.

9 MR DOCTOR: Yes. Those are my submissions.

10 THE PRESIDENT: Yes, thank you. If you will forgive us the Tribunal will just rise for two

11 or three minutes at this point.

12 **(Short break)**

13 THE PRESIDENT: I understand you may have a slight difficulty, Mr Green. Please feel free

14 to absent yourself when necessary.

15 MR GREEN: Thank you.

16 **[Mr Green left the hearing]**

17 MR BREALEY: I have only a brief reply. May I just remind the Tribunal what Mr Doctor

18 and the OFT said about what this appeal was going to be? On 21 May, 2003, this is

19 from the transcript, it is when the OFT were seeking permission to adduce new witness

20 statements, Mr Doctor said:

21 *“It is obvious, we would say, that at the heart of this appeal is a substantial*

22 *factual dispute between the witnesses, whose evidence was accepted by the*

23 *Director, and the witnesses whose evidence was not accepted.”*

24 It is obvious that at the heart of this is a substantial factual dispute.

25 THE PRESIDENT: Yes.

26 MR BREALEY: In paragraph 11 of the skeleton, again this is the very first skeleton:

27 *“At the heart of these appeals is a substantial factual dispute about what*

28 *actually happened during the years 1997 to 2001 and the appropriate*

29 *inferences are drawn from proven facts.”*

30 So “the appropriate inferences are drawn from proven facts”. As I understand it, Mr

31 Doctor accepts that this secondary material is at least relevant to the inferences. He has

32 admitted that in the written representations there were passages where there would be

33 Hasbro's view why there was inference X and Y – I wrote that down – “Hasbro's view

34 why there was inference X” – I have at least got that down.

1           The simple point is the Tribunal knows there is a public interest in having a fair  
2 trial. We say that extends not only to the disclosure of the primary evidence, the  
3 primary material, the documents, it also extends to the second group of material, that is  
4 to say “Hasbro’s views,” the author’s views – because they are the author of the  
5 documents – “as to the inferences to draw from those documents”. That goes, we say,  
6 to the very issue that Mr Doctor submitted to the Tribunal, the appropriate inferences to  
7 draw from the proven facts. In our Notice of Appeal we do raise the issue of  
8 discriminatory penalties, but it is quite clear from what I have been submitting this  
9 morning that our application is based on a much wider premise, that is to say  
10 “liability.”

11 THE PRESIDENT: Potential relevance to liability is the primary basis of this situation.

12 MR BREALEY: Absolutely. And that is where it ends.

13 THE PRESIDENT: Thank you, Mr Brealey. Yes, Miss Demetriou, you have been left, as it  
14 were, to wind up.

15 MISS DEMETRIOU: I just want to make three short points, if I may?

16 THE PRESIDENT: Please.

17 MISS DEMETRIOU: The first is that Mr Doctor says that the confidentiality point has been  
18 raised for the first time today, and that he is not prepared to deal with it. But, Sir, our  
19 submission is that the general duty on the OFT is a duty to disclose relevant material,  
20 and it is the OFT that is relying on confidentiality as an exception to that general duty,  
21 and we are simply dealing with the OFT’s reliance on confidentiality as an exception.

22           The second point in relation to Mr Doctor’s submissions on relevancy. Mr  
23 Doctor seeks to say that the written submissions made by Hasbro were not accepted by  
24 the OFT. In my submission that is entirely irrelevant, indeed, this is why we are here on  
25 this appeal. It is open to us to challenge the inferences drawn by the OFT on material  
26 put to it, so that is an irrelevant point in my submission.

27           Thirdly, again on relevancy, it seems to me that Mr Doctor’s submissions would  
28 apply equally to the entirety of the written submissions made by Hasbro, and yet the  
29 OFT has chosen to disclose the entirety of the written submissions, apart from the  
30 redacted parts presumably on the basis that they are relevant to the issues in the case.

31 THE PRESIDENT: Yes, thank you very much. Mr Doctor, I think that concludes the  
32 argument, but I would just like to raise one separate point with you, if I may. The  
33 application for disclosure of previous drafts of the recent witness statements has not  
34 been pursued, and you have taken the position that those documents are, in any event,

1 covered by legal professional privilege. That is not an issue that we need now to rule  
2 on. I would, however, just like you to reflect on and, possibly, if you are going to come  
3 back to us anyway you may want to comment on whether, even if there is some kind of  
4 litigation privilege, which we are not deciding, there is still some kind of duty on the  
5 OFT, broadly analogous to that which would apply in other spheres for the public  
6 authority to keep under review the material that it has, and to disclose voluntarily  
7 something that it thinks might assist the defence, or even his own case, notwithstanding  
8 the privilege that you assert. Would you just like to reflect on that?

9 MR DOCTOR: Yes, indeed.

10 THE PRESIDENT: As a general approach.

11 MR DOCTOR: Yes.

12 THE PRESIDENT: We would not entirely like to leave this important issue just hanging,  
13 but I fully understand you have not argued it.

14 MR DOCTOR: Yes. We will consider that, and consider our position. May I ask for the  
15 indulgence in saying one sentence.

16 THE PRESIDENT: Of course.

17 MR DOCTOR: It is a point that I did not deal with, and perhaps there is one sentence –  
18 why did we disclose the other representations which do not concern the application for  
19 leniency, that we concede that they are relevant? We do not concede anything, they are  
20 simply not covered by any public interest privilege, therefore they deal with the matter  
21 and we have made them available.

22 THE PRESIDENT: So they are just available?

23 MR DOCTOR: Yes.

24 THE PRESIDENT: Thank you all very much indeed. We will reserve Judgment on this  
25 matter.

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