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

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

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

29<sup>th</sup> April 2005

Before:  
SIR CHRISTOPHER BELLAMY  
(The President)  
THE HONOURABLE ANTONY LEWIS  
MS VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

**BETWEEN:**

ARGOS LIMITED  
&  
LITTLEWOODS LIMITED

Appellants

and

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

Respondent

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

Miss Marie Demetriou (instructed by DLA LLP) appeared for Littlewoods Limited.

Mr. Brian Doctor QC and Miss Kassie Smith (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Transcribed from the Shorthand notes of  
Beverley F. Nunnery & Co.  
Official Shorthand Writers and Tape Transcribers  
Quality House, Quality Court, Chancery Lane, London WC2A 1HP  
Tel: 020 7831 5627 Fax: 020 7831 7737

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**PROCEEDINGS AFTER JUDGMENT**  
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1 THE PRESIDENT: The Tribunal is handing down judgment today on the penalty aspect of the  
2 case of Argos Limited and Littlewoods Limited v Office of Fair Trading. For the reasons set  
3 out in our Judgment we fix the penalty on Argos at £15 million; we fix the penalty on  
4 Littlewoods at £4.5 million. To that extent the decision is set aside and varied. Subject to the  
5 foregoing the appeals of Argos and Littlewoods against the OFT's decision of 21 November  
6 2003 are dismissed. There will be interest on the penalty to run, subject to any further  
7 submissions the parties wish to make, at 1 per cent above the Bank of England base rate from  
8 21 November 2003 until payment or judgment under section 37(1) of the Act.

9 That, I think, unless there are other particular applications or observations anybody  
10 wishes to make, takes us to the question of costs. Mr. Doctor, when we said at the end of our  
11 judgment we wanted to hear argument on the issues of costs we did actually want to hear  
12 argument on the issues of costs because we have not yet had occasion to consider costs in  
13 a penalty case involving price fixing and previous judgments of the Tribunal have clearly left  
14 open the possibility of costs orders in a case such as the present. So I would be quite glad if  
15 you could enlighten us as to what exactly has been going on in that respect, bearing in mind  
16 that we are considering the taxpayers' money?

17 MR. DOCTOR: Yes, indeed. Sir, the decision regarding the question of costs has been subject to  
18 close consideration by the OFT for its part and, no doubt, by the appellants for theirs since this  
19 judgment was given in draft. The background against which the various decisions were made  
20 was the understanding of the OFT, and no doubt of the other side, that has arisen through  
21 various dicta of this Tribunal, in particular the dictum in *Napp*, which if I can remind you very  
22 briefly was in general we would lean against costs' orders against unsuccessful appellants in  
23 cases involving penalties unless there were particular exceptional circumstances justifying  
24 such orders.

25 "The appellant in such cases has already suffered the penalty and possibly further  
26 directions, as well as having to bear its own costs. To make a further order for costs  
27 may well be excessive in many cases".

28 We also bore in mind that these remarks were qualified later on in *Aberdeen Journals* where  
29 the dictum appeared that experience showed that it might in future be appropriate to award  
30 costs against an unsuccessful appellant where the cases are not kept within what was described  
31 as "manageable bounds."

32 Against that background and also the fact that there is no case so far where the mere  
33 fact of success has led to the OFT obtaining its costs in a matter, there always being some  
34 additional element required which would lead to the Tribunal departing from these general  
35 principles, it was decided that the OFT could not submit that either the case had some

1 exceptional aspect to it which would require the appellants to pay the OFT's costs or indeed  
2 that any of the parties had abused the procedures or dragged the proceedings out or taken  
3 points that they ought not to have taken or anything of that kind, and so in the end  
4 consideration was given as to whether this was an appropriate case to try to persuade the  
5 Tribunal that it should resurrect the principle in these sort of cases that the loser pays. After  
6 taking both legal and policy considerations into account it was felt that this was not an  
7 appropriate case for that and accordingly in discussions between the parties an agreement was  
8 entered into that the parties would pay their own costs; and I might add, without wishing to  
9 disclose any privileged information at all, that amongst other things which did concern the  
10 OFT was the fact that this had been a case where it was said on several occasions that there  
11 was a certain amount of learning involved on the OFT's part. The OFT had asked for an  
12 indulgence at one stage that it should be allowed to put in additional evidence. That had been  
13 granted and whilst it was plain that that might have involved the other side in some additional  
14 costs which would not otherwise have been incurred with them that was one of the facts which  
15 made the OFT feel that this was not an appropriate case to simply rely on the proposition that  
16 we are the winner and therefore we should have our costs paid – there was something to be  
17 said going both ways.

18           Given all of that we entered into an agreement that, indeed, we would not ask for any  
19 order for costs. The question of cost would be disposed of by agreement between the parties.  
20 That being so, if the Tribunal was minded to do anything more in this case it would have to  
21 grapple with the fact that is now a fact, which is that first of all as between the parties the issue  
22 has fallen away and that there is an agreement between the parties which would have to be  
23 taken into account by the OFT in overriding. There is some authority in the High Court  
24 – if the Tribunal is interested I can show it to you. It is a decision of Mr. Justice Neuberger in  
25 *Centrehigh Limited (t/a Shono U.K.) v Amen & Ors* which deals with a slightly different  
26 problem. What happened there was a consent order was made so the case was settled and the  
27 parties had asked the court to make a consent order which included not only settlement of  
28 liability issues but also of the issue of costs, and so essentially the case is concerned – or the  
29 vast bulk of it – with the question of whether the court can go around its own consent order,  
30 questions of *functus officio* and estoppel arise. At p.6 of this decision, which is the only page  
31 which is really relevant to the point dealt with here, the court dealt with the underlying  
32 agreement that underlay the consent order. It is said there:

33           “So far as the first argument is concerned, it is well established that a consent order  
34 does indeed embody a contract as well as being an order of the court. Save in  
35 exceptional circumstances at any rate, it seems to me that it is simply not open to the

1 court to add to or vary a consent order unless there are grounds which would justify  
2 re-opening or setting aside the contract embodied in the order ----”

3 THE PRESIDENT: This is when an order has already been made?

4 MR. DOCTOR: Yes.

5 THE PRESIDENT: Which is not our case.

6 MR. DOCTOR: No, it is not the case, but it is the end of this paragraph ----

7 THE PRESIDENT: Yes.

8 MR. DOCTOR: It goes on:

9 “... it seems to me that it is simply not open to the court to add to or vary a consent  
10 order unless there are grounds which would justify re-opening or setting aside the  
11 contract embodied in the order – for instance on the grounds of fraud,  
12 misrepresentation or mistake. It may be that, in exceptional circumstances, the court  
13 could nonetheless re-open a consent order given that the contract will have been  
14 entered into in the context of an action which itself is subject to the CPR, in the light  
15 of the overriding objective, with its public interest dimensions.”

16 and then it points out that:

17 “In this case, the parties were engaged in commercial litigation, and they were all  
18 separately advised by solicitors and, it would appear, by counsel. The litigation was  
19 settled by agreement – i.e. by a contract, which on its face disposed of all issues ...”

20 and so on. The point would be that to go around the agreement the court would need to have in  
21 itself a reason, if it is not to be found in ordinary contractual law principles, which obviously  
22 do not apply here at all, it may be that the court could get around that on the basis suggested  
23 by the learned Judge, namely, that the agreement will have been entered into under the regime  
24 of the CPR with its overriding objective and that would apply here as well. The agreement  
25 was entered into under the regime applicable in this Tribunal, which also refers to the  
26 overriding objective of speedy litigation reducing costs dealing with things appropriately and  
27 proportionately. So on that basis the Tribunal might feel itself entitled to override the  
28 agreement but it would have to do that in order to, as it were, reopen the issue, because as  
29 between the parties the matter is agreed and neither party could, unless it relied on these sort  
30 of issues, seek to persuade the court to undo the agreement that has been entered into.

31 May I just briefly say this, obviously the question of costs is always one which in so  
32 far as it affects the OFT does bring into account public money, as it were, because the OFT is  
33 publicly funded. Nevertheless it is plain that the OFT is ultimately the arbiter and controller  
34 of its own funds and of the funds available to it and the Tribunal is not, as it were, an upper  
35 guardian to see if these funds are properly handled. In the absence of any suggestion that

1 a wrong decision in principle has been made, or that the circumstances are such that no proper  
2 authority applying its mind to the facts could have decided to, as it were, enter into this  
3 agreement. I would suggest it would not be appropriate for the Tribunal to intervene in what  
4 has been agreed. I would also just mention that obviously one of the other factors that the  
5 Tribunal will take into account is precisely the desire that issues should be limited, including  
6 issues of costs which can sometimes take up a long time and can generate a lot of heat and  
7 light and additional costs in resolving. It is certainly in accordance with the overriding  
8 objective that the parties should be encouraged, where reasonable and where appropriate,  
9 where proportionate to agree sensible orders as to costs.

10 Finally, if it were the fact that the parties were asking the court to make an order  
11 regarding the costs by consent, there are provisions in the Rules which deal with consent  
12 orders and, although they do give to the Tribunal a discretion as to whether to make the  
13 consent order obviously, the nature of those rules shows that they are not directed to this sort  
14 of agreement which does not affect competition. Those rules allow them to specify the court  
15 would intervene and require certain amounts of assurance and so on where competition is  
16 affected. Where it is not, where it is simply a matter affecting this particular litigation we  
17 would submit that, unless there were some exceptional circumstances, the court would make  
18 the consent order. But, as I say, in this case we are not even asking for a consent order and,  
19 unless you wish to hear any more, I have set out the reasons why.

20 THE PRESIDENT: Are you in a position to help us at all on what you referred to a minute ago as  
21 “the policy considerations”?

22 MR. DOCTOR: Yes, as I understand it the OFT keeps under constant review this question of  
23 whether the regime which appears to be in force in the Tribunal, namely that costs do not just  
24 follow the result, should or should not be challenged. It accepts that that is the prevailing  
25 principle applied in the Tribunal and, as I understand it, whenever it wins a case it considers  
26 whether it is an appropriate case to seek to challenge that. Apart from the practical effect in  
27 any particular case and the amounts involved, what has happened in the case, all other things  
28 being equal, in other words where a case arises where it started and ended straightforwardly,  
29 there were no ups and downs, no hiccups, whether in those circumstances it may be  
30 appropriate to raise the issue before the Tribunal whereby it would be argued that on no other  
31 ground than the fact that it has won that principle should be reconsidered by the Tribunal.

32 This was not considered ----

33 THE PRESIDENT: That case is not this case because?

34 MR. DOCTOR: Because of the two Rule 14s, because of the fact that the penalty was slightly  
35 reduced because of the fact that the case was handled, in everyone’s view, as expeditiously as

1 possible – we do not believe there was any shilly-shallying on either side – and for those  
2 reasons it was felt that this was not a case to raise this issue. There was also the danger, of  
3 course, that we considered that if we applied for our costs there may be a counter application  
4 for the costs associated with the fact that there had been two Rule 14s and some consideration  
5 was given to the amounts involved in those two exercises and ultimately it was felt that this  
6 just was not the right case, that something could be said either way and this was not the case  
7 where this issue needed to be erased.

8 THE PRESIDENT: Thank you very much. Mr. Brealey, do you have any observations on the  
9 situation?

10 MR. BREALEY: No, Sir, basically I endorse what Mr. Doctor says. On costs I make just two points.  
11 First, as you know, Sir, you are performing a judicial function and, as such, the Tribunal's  
12 discretion is essentially based on a *lis*, an agreement or disagreement between the parties. If  
13 there is no disagreement between the OFT and Argos then really it is not the function of the  
14 Tribunal to be making a Ruling on something where there is no disagreement. That is the first  
15 point, there is just no *lis*, there is no application.

16 The second point, which really picks up Mr. Doctor's point, is that the OFT has, for  
17 its own commercial and policy reasons, decided not to seek costs and, as such, the Tribunal  
18 really should not be second guessing those reasons. It is undoubtedly true that we did intend  
19 to seek or counterclaim for the costs that we wasted because of the two Rule 14s and we  
20 would have gone through the various case management conferences (and there were several of  
21 them) when we were trying to work out what to do, and had all that been done right at the  
22 beginning those case management conferences would never have taken place and we would  
23 have sought our costs wasted as a result of the two Rule 14 Notices. So obviously the OFT  
24 has taken that into consideration in deciding not to seek its costs from us. So that is essentially  
25 the second reason, that the OFT have their reasons – their commercial reasons and their policy  
26 reasons – and really if there is no application the Tribunal should not be second guessing ----

27 THE PRESIDENT: Does Rule 55 depend on there being an application?

28 MR. BREALEY: In my submission it does. Essentially the wide discretion as to costs depends on  
29 someone applying for their costs and, if that person is not applying, then that discretion does  
30 not arise.

31 THE PRESIDENT: Yes.

32 MR. BREALEY: It may well be that if it did come to a detailed assessment the OFT would have to  
33 pay some costs over to us and for its own reasons that is why it is not applying.

34 THE PRESIDENT: That pre-supposes that we would be minded to give you your costs of the earlier  
35 stage.

1 MR. BREALEY: Absolutely, yes, but you did in your earlier Judgment, I think on 30<sup>th</sup> July 2003,  
2 recognise that there might be some wasted costs which would have to be subject to an order  
3 because, as the Tribunal held, the original case has not been investigated properly – I think  
4 those were the Tribunal’s words, and so there was a fair inference from 30<sup>th</sup> July 2003  
5 Judgment that there would be some liability on OFT as regards costs to us.

6 Sir, those are my two submissions, first, no *lis*; and secondly, please do not second  
7 guess the reasons why.

8 THE PRESIDENT: Thank you. Miss Demetriou, do you want to follow?

9 MISS DEMETRIOU: I have nothing further to add, but we endorse the submissions made by both  
10 counsel.

11 THE PRESIDENT: The Tribunal will rise for a few moments.

12 (The hearing adjourned at 2.20 p.m. and resumed at 2.40 p.m.)

13 (For Ruling see separate transcript)

14 THE PRESIDENT: Unless there are any other applications I think that concludes our proceedings  
15 for this afternoon. Mr. Brealey?

16 MR. BREALEY: I am sorry, I think it is Rule 58 that says I can apply orally for permission to  
17 appeal.

18 THE PRESIDENT: Yes.

19 MR. BREALEY: I wonder if I can take this opportunity, I will not be very long, but ----

20 THE PRESIDENT: Do you wish to do so?

21 MR. BREALEY: Yes.

22 THE PRESIDENT: Yes?

23 MR. BREALEY: I have nothing in writing but I have three points of law that I would ask  
24 permission to appeal on. The first concerns the trilateral concerted practice. To a certain  
25 extent the Tribunal has already dealt with this, but this is at para.225 of the penalty Judgment.

26 THE PRESIDENT: Do we not need to go to the main Judgment?

27 MR. BREALEY: I will do but I can read it out:

28 “225. Nor do we accept that the Tribunal’s reasoning as set out at paragraphs 778 to  
29 790 of the Liability Judgment involves any new principle of law.”

30 That is going back to a submission that we made about what I called the “A, B, C” point.

31 “The prohibition on *indirect* contacts between economic operators the object or effect  
32 of which is to influence the conduct on the market of an actual or potential competitor,  
33 or to disclose a future course of conduct, or reduce uncertainty on the market, has  
34 been established at least since *Suiker Unie*.”

1 That then takes me to the liability Judgment at para.779. The point I was trying to make there  
2 was that this is an issue of law.

3 THE PRESIDENT: Do you not need to frame the question of law that arises? Perhaps you are  
4 going to but it is useful on an application for permission to appeal on a point of law to be able  
5 to see what the point of law is, as it were, framed or written down, or in some way  
6 encapsulated.

7 MR. BREALEY: I do apologise, I have not encapsulated it, but maybe if I can go to para.779 of the  
8 Liability Judgment and it is the paragraph from the Football Shirts case [659]. This is 779 of  
9 our Judgment and that refers to para.659.

10 THE PRESIDENT: Yes.

11 MR. BREALEY: This, as I understand it, is the principle that has been applied to Argos, Hasbro and  
12 Littlewoods in the concerted practice.

13 “[659] Thus, for example, if one retailer A privately disclose to a supplier B its future  
14 pricing intentions in circumstances where it is reasonably foreseeable that B might  
15 make use of that information to influence market conditions, and B then passes that  
16 pricing information on to a competing retailer C, then in our view A, B and C are all  
17 to be regarded on those facts as parties to a concerted practice having as its object or  
18 effect the prevention, restriction or distortion of competition. The prohibition on  
19 direct or *indirect* contact between competitors on prices has been infringed.”

20 Essentially the question of law is whether that statement is correct in law.

21 THE PRESIDENT: But it does not arise here, Mr. Brealey, because of the word “privately”. We  
22 have to remind ourselves of what exactly we did find in the Judgment, but there is no doubt  
23 that at least on more than one occasion Littlewoods was expressly told that what it was getting  
24 was Argos’s prices.

25 MR. BREALEY: This is essentially concerned with Argos, and there is no evidence as far as I am  
26 aware in the Judgment where there is anything other than just private communications  
27 between Argos and Hasbro.

28 THE PRESIDENT: We would take a lot of persuading that that was the case, I think.

29 MR. BREALEY: When we go on to look at the evidence in the later paragraphs really all the  
30 Tribunal is saying – this is on the concerted practice between A (Argos) and C (Littlewoods)  
31 that we were giving our pricing intentions to Hasbro and we should have known, or it was  
32 reasonably foreseeable that that would be passed on to Littlewoods. So the question of law is  
33 whether there is a sufficient consensus between Argos and Littlewoods.

34 THE PRESIDENT: Well I think it is between Argos, Hasbro and Littlewoods, to give rise to  
35 a trilateral concerted practice between the three.



1 MR. BREALEY: Yes. The only reason I hesitate – I make no admission – but there may be  
2 a concerted practice between Argos and Hasbro (A and B) but the question, and this is the  
3 question of law, is whether there is a sufficient consensus between the two competitors A and  
4 C.

5 THE PRESIDENT: And what is the argument then?

6 MR. BREALEY: The argument is in that example at 659 which has been applied, as far as we take  
7 it, to the facts of our case the argument is that Argos cannot be party in law to a concerted  
8 practice with C.

9 THE PRESIDENT: And you support that on what basis?

10 MR. BREALEY: The basis of that is that whether it is an agreement or a concerted practice there  
11 must always be a degree of consensus between A and C. In other words A knows that C  
12 knows, and C knows that A knows. Merely a situation where A is communicating information  
13 to B and it is reasonably foreseeable that that may be passed on to C is not sufficient in law for  
14 concerted practice.

15 THE PRESIDENT: And the authority for that is?

16 MR. BREALEY: The authority for that is *Bayer* which says there must be a concurrence of wills,  
17 not only for an agreement but also for a concerted practice. I do not know if the Tribunal  
18 wants me to set out the principle of law.

19 THE PRESIDENT: Well it is not very easy to decide on an application for permission to appeal on  
20 a point of law without having the point of law very clearly framed.

21 MR. BREALEY: I appreciate that but the Rules do say I can make the application orally.

22 THE PRESIDENT: Yes.

23 MR. BREALEY: That is the first principle of law, whether in that para.659, which is applied to  
24 Argos there is in law a concerted practice.

25 THE PRESIDENT: What is applied in this case is the facts in 780 to 790. Whether you have  
26 a concerted practice is a factual matter but that is the evidence.

27 MR. BREALEY: That is true but the evidence has to be applied to the legal principle and if the legal  
28 principle is wrong then it does not matter what the facts are. So if, for example, the facts  
29 support that legal principle set out in para.659 we would say that in law the facts do not  
30 support a conclusion of concerted practice because there is not sufficient ----

31 THE PRESIDENT: Well what you would have to argue, I think, is that the factual findings set out in  
32 para.780 through to 790 do not support the finding of a tripartite concerted practice.

33 MR. BREALEY: That is essentially what I am submitting.

34 THE PRESIDENT: Whether that is a question of fact or a question of law may be a slightly  
35 troublesome point, but that is probably what you are seeking to submit. Yes?

1 MR. BREALEY: For example, in this situation we are not trying to overturn any finding of fact.

2 THE PRESIDENT: No.

3 MR. BREALEY: Which is essentially what the Court of Appeal was concerned with in *Napp*. That  
4 is why I went to para.225 of the penalty Judgment when the Tribunal said you did not agree  
5 that it raised any new principle of law, and we submit when one looks at *Suiker Unie* and  
6 *Bayer* the principle of law is that you need consensus between A and C.

7 The second legal issue, and this is essentially a legal characterisation of facts, this  
8 relates to the exchange of information point. As the Tribunal knows we submitted – certainly  
9 in the penalty hearing – that when one looked at the evidence, and again we are not seeking to  
10 overturn the evidence, this is not a price fixing agreement in law but at its highest (although  
11 we do not accept it) an exchange of information. As the Tribunal knows, and the OFT know  
12 because it is in their Guidance (OFT 401) there is a distinction in law between a price fixing  
13 agreement and an exchange of price information.

14 THE PRESIDENT: Are we talking now about the trilateral concerted practice or about all three?

15 MR. BREALEY: We are talking about the bilateral and the trilateral?

16 THE PRESIDENT: So you are saying that, on the facts we have found, Argos is informing Hasbro  
17 that it is going to price at Hasbro's RRP's and not agreeing with Hasbro to do so?

18 MR. BREALEY: That is right, and then if one looks at the American jurisprudence, it does make  
19 a clear distinction, as the OFT appears to do in its guidance, between a price information  
20 exchange, communicating one's intentions and agreeing to go out at a certain price. Again,  
21 we say that when one looks at the evidence, and the evidence of the Autumn/Winter 1999  
22 when there was the decision of the unilateral increase (so the Decision said) of prices, well  
23 that falls away because of the Spring/Summer 1999 catalogue. The evidence of the meetings  
24 was inconclusive so essentially we are left very much with the evidence of Mr. Wilson against  
25 Argos. When one looks at his evidence we would submit that the legal categorisation of that  
26 evidence is one of a price information exchange and not a price fixing agreement.

27 That is the second issue of law, and in my submission the test is whether our  
28 argument is fanciful on this. In the Court of Appeal permission is granted if there is a realistic  
29 prospect as opposed to a fanciful prospect and we would say what I am submitting to the  
30 Tribunal is not fanciful.

31 THE PRESIDENT: I am still grappling with what the point of law is – I am beginning to doubt  
32 whether it is actually useful to proceed with this orally because it is potentially from your  
33 point of view quite difficult for us to deal with this sort of thing without being taken back to  
34 the particular paragraphs in the Judgment and being directed to where we have allegedly made  
35 an error and all that sort of thing.

1 MR. BREALEY: Well it is not an error of fact, as such, you can take the facts as you have found  
2 them, the question is whether those facts in law amount to a price fixing agreement or should  
3 it be categorised, at its highest, as a price information exchange? I do not need necessarily to  
4 go to any particular paragraph. We are not seeking to overturn the facts on this. Obviously,  
5 comment would be made on certain findings of fact but we accept Mr. Wilson's evidence as it  
6 is subject to any cross-examination that the Tribunal ----

7 THE PRESIDENT: Whether it is an exchange of price information or an agreement on the prices to  
8 be charged is itself a question of fact, is it not? I am just trying to find the findings as against  
9 Argos.

10 MR. BREALEY: The easiest place to find it is right at the end of the Judgment, when we are  
11 looking at the concerted practice.

12 THE PRESIDENT: This is the bilateral one that I am interested in at the moment. If you take  
13 para.671:

14 "In our judgment the evidence amply establishes that at least from the A/W 1999  
15 catalogue onwards until mid-2001 there was an "agreement" within the meaning of  
16 the Chapter 1 prohibition between Hasbro and Argos to the effect that Argos would  
17 sell Hasbro's Action Man and Core Games ranges at the retail prices recommended by  
18 Hasbro."

19 MR. BREALEY: Yes, Sir.

20 THE PRESIDENT: And that is a finding of fact that the agreement is ----

21 MR. BREALEY: It is a mixed finding of fact and law.

22 THE PRESIDENT: -- to that effect, that they would do it, not that they are simply giving  
23 information that what they are going to do, but they would actually do it which, in fact, they  
24 did.

25 MR. BREALEY: It is mixed fact and law. The Tribunal has found the fact but then the Tribunal  
26 has said that evidence, those facts, amount to – and this is the question of law – an agreement  
27 within the meaning of the Chapter I prohibition.

28 THE PRESIDENT: But it is not whether there is an agreement, you are not saying there was no  
29 exchange between the parties, you are saying they were simply giving information. This is  
30 a finding that there was an agreement to the effect that Argos would sell Hasbro's Action Man  
31 and Core Games ranges at those prices. That is a factual finding.

32 MR. BREALEY: In my respectful submission it is mixed fact and law because it is a legal  
33 characterisation of the facts. If one looks at the OFT's guidelines, the guidelines say that there  
34 is a price fixing agreement, there is something in law amounting to a price fixing agreement,

1 and there is something in law amounting to an exchange of price information – the two are  
2 distinct.

3 THE PRESIDENT: They would both be caught by the Act probably, would they not?

4 MR. BREALEY: They are both caught by the Act but then there are differences between price  
5 information exchange and price fixing agreement. For example, one has to look at the nature  
6 of the information exchanged in price information exchanges to determine whether there is  
7 distortion of competition and that is not the same in a price fixing agreement. In a price fixing  
8 agreement, as the Tribunal knows, *per se* it has as its object the distortion of competition. It is  
9 a price information exchange. One looks at the quality of the information exchanged and the  
10 impact that it has on the market and that is why they are treated differently.

11 THE PRESIDENT: That is a completely different scenario. That is the kind of trade association  
12 collecting/circulating statistics type of scenario, it is not this sort of agreement at all.

13 MR. BREALEY: With respect, no, Sir, because there is no doubt if one looks at US jurisprudence  
14 you can have an exchange of price information between two competitors, it does not have to  
15 be through a trade association. But it is a question of fact and law because let us assume that  
16 all the evidence stands and the Tribunal say “In our judgment the evidence amply establishes  
17 that there was an agreement not to export the products. One would say that that, as a legal  
18 characterisation of the facts, is incorrect. Again, we are not seeking to overturn the facts as  
19 such just what in law they amount to. To take a criminal context one establishes the facts, is it  
20 a s.14 – if that is the right Act? Is it actual bodily harm or grievous bodily harm. It is a legal  
21 characterisation of the facts as found.

22 THE PRESIDENT: Section 18 I think you mean.

23 MR. BREALEY: 18. So that is the question of law, whether when one looks at the evidence it is  
24 a price information exchange within the meaning of para.320 of the guidelines, or whether it is  
25 a price fixing agreement within the meaning of 3.4 of the guidance. We would say if one  
26 accepts the evidence of Mr. Wilson it does not amount in law to an agreement to fix prices.  
27 That is the second question of law.

28 THE PRESIDENT: Well there is no magic in the words “agreement to fix prices”, the question is  
29 whether it is an agreement that restricts or distorts competition, and the agreement that  
30 restricts or distorts competition as found by us at 671 was an agreement to the effect that they  
31 would sell at certain prices. That is the finding on the evidence and there it is. It goes much  
32 further than some suggestion that they were simply informing each other about their respective  
33 intentions as to price.

34 MR. BREALEY: The first sentence of para. 671 is a conclusion that, in law, there was an agreement  
35 to fix prices.

1 THE PRESIDENT: Yes, and then it goes on to say all the evidence that that is based on – over  
2 several pages.

3 MR. BREALEY: We would say that when one looks at the evidence there was no agreement to fix  
4 prices. At the highest there was an exchange of information.

5 THE PRESIDENT: You say that would not have been in the circumstances an infringement of the  
6 Act?

7 MR. BREALEY: First of all that is not what the Decision says. The OFT's Decision said there was  
8 an agreement to fix prices and any exchange of information merely facilitated that. Again,  
9 one goes back to US jurisprudence that an exchange of price information is not *per se*  
10 unlawful, one has to go further and prove that a price information exchange has a distorting  
11 impact on the market. As we know in the Decision there has never been a finding that there  
12 was a distortion of competition. That is why there was no market definition, because if one  
13 looks at Volkswagen one does not have to go through that process if there is a price fixing  
14 agreement. So in law the two do have different consequences.

15 The third legal point is the question of fine and definition of “market”. As the  
16 Tribunal knows it has held that it is not necessary to define an economic market as such and  
17 that the OFT did depart from its guidelines. The question is what are the implications of that  
18 departure? That raises an issue of interpretation of s.38 ----

19 THE PRESIDENT: I do not think we said they departed from their guidelines, did we?

20 MR. BREALEY: Well they certainly did not comply with their own guidelines in defining a market  
21 in accordance with market definition.

22 THE PRESIDENT: I think what we said was they were not obliged to do that.

23 MR. BREALEY: We would say in law they were obliged to do that. It is a matter of EC law and  
24 a matter of administrative law and public law that they were obliged. If in their guidelines  
25 they say they are going to carry out the penalty assessment in accordance with the market  
26 definition ----

27 THE PRESIDENT: It is putting a lot of weight on a single footnote. The guidance is in a slight  
28 muddle on this point, that is true – in fact, that is probably putting it a bit high – the guidance  
29 has not really thought out the relationship between what is said in 403 and what is said in the  
30 penalties guidance. Our view is that they are not particularly closely related and that is fairly  
31 clear from the circumstances.

32 MR. BREALEY: Well the question is a matter of law.

33 THE PRESIDENT: Anyway you say they have to do a full market analysis on the penalty.

34 MR. BREALEY: Yes, if you are asking the question, yes, then that is a question of law and it is not  
35 limited to abuse type cases, it does extend to Chapter I cases.

1 THE PRESIDENT: Can you just take me to the test we should apply on deciding on permission to  
2 appeal?

3 MR. BREALEY: In the White Book it is Part 52 – this is the 2005 Edition – p.1459. Part 52.3.6.

4 THE PRESIDENT: Yes. “...real prospect of success” and “some other compelling reason”.

5 MR. BREALEY: Yes, and that is the summary judgment test, so if your claim is fanciful then the  
6 defendant will get summary judgment, but if you have a realistic prospect of success then your  
7 claim can go forward. So the Court of Appeal’s threshold is the same for summary Judgment,  
8 one asks the question “does it have some realistic prospect of success? Could a court come to  
9 a different view? Is what I am submitting to the Tribunal fanciful?”

10 THE PRESIDENT: Yes.

11 MR. BREALEY: Those are the three points.

12 THE PRESIDENT: Thank you.

13 MISS DEMETRIOU: Littlewoods also seeks permission to appeal. Would you like me first of all to  
14 deal with our application or do you want to hear Mr. Doctor first?

15 THE PRESIDENT: I think we will deal with them both if we may, Miss Demetriou. If you want to  
16 make an application to appeal you should make it now.

17 MISS DEMETRIOU: We seek permission to appeal on the same grounds as those advanced by  
18 Mr. Brealey, and also for an additional reason, namely, the application by the Tribunal of the  
19 principle of non-discrimination in the context of setting penalties, and we say that the Tribunal  
20 made an error of law for three reasons.

21 First, we say that the Tribunal mis-interpreted the *JFE Engineering* case, and that  
22 there is nothing in that Judgment which indicates that the Ruling of the Court of First Instance  
23 is limited to the position where both the Appellant and the comparator are both before the  
24 court. So we say it is broader than interpreted by the Tribunal at para.97 of its penalty  
25 Judgment.

26 THE PRESIDENT: But we have gone into it anyway so it does not matter – in the alternative,  
27 whatever view we took of *JFE Engineering* we went into at all.

28 MISS DEMETRIOU: Well, perhaps I could come to that when I deal with my next two reasons.  
29 Secondly, we do not accept the Tribunal’s conclusions that Littlewoods and Hasbro are in  
30 a relevantly different position. The Tribunal appears to have found at para.103 that  
31 Littlewoods and Hasbro were in a different position and therefore there can be no issue of  
32 discrimination. We do not accept that, we say that the OFT itself treated them as being in  
33 a relevantly similar position when it set the fines, and so the starting point for the  
34 discrimination analysis is to say that they were in the same position and any difference in  
35 treatment had to be objectively justified.

1 Thirdly, we say that the Tribunal took the wrong approach to objective justification in  
2 finding that somehow there had to be a manifest injustice to Littlewoods in order for the OFT  
3 to be under an obligation to treat them similarly in imposing the fines. We say that is not the  
4 test. The test of objective justification requires closer scrutiny by the Tribunal.

5 THE PRESIDENT: What do you say we should have done then?

6 MISS DEMETRIOU: We say that the Tribunal found, in effect, in its Judgment that Hasbro was the  
7 instigator, that is the outcome of the finding of fact by the Tribunal in its Judgment.

8 THE PRESIDENT: We have not made any such finding, Miss Demetriou.

9 MISS DEMETRIOU: Well we say on a proper interpretation of the Judgment it is clear that the  
10 Tribunal found that Hasbro was the instigator of the concerted practice, of the agreement, and  
11 we say that the ----

12 THE PRESIDENT: Well we expressly disavow that in our Judgment.

13 MISS DEMETRIOU: Well you expressly disavow it to the extent that you say you were not looking  
14 at it for the purposes of the guidance, so we accept that the Tribunal was not, at that stage,  
15 assessing the issue for the purposes of applying the guidance, but we say that the effect of the  
16 Tribunal's findings is tantamount to a finding that Hasbro was the instigator. So we say it  
17 follows from that that the OFT did not apply its guidance properly when granting leniency and  
18 therefore the difference in treatment accorded to Littlewoods and Hasbro is not objectively  
19 justified, and we say that that is the consequence of the CFI case law. So that is the additional  
20 reason that we advance in favour of our application.

21 THE PRESIDENT: Yes, Mr. Doctor?

22 MR. DOCTOR: It is on a point of law that ----

23 THE PRESIDENT: Yes, we had just better look at the section, I think.

24 MR. DOCTOR: Yes, s.49(1)(c) – An appeal lies to the appropriate court on a point of law arising  
25 from any other decision of the Tribunal on an appeal under s.46 or 47. Perhaps one should  
26 just notice s.49(1)(a) from a decision of the Tribunal as to the amount of the penalty, but none  
27 of the grounds put forward here are as to the amount of the penalty.

28 THE PRESIDENT: Whether there should have been a penalty.

29 MR. DOCTOR: Whether there should have been a penalty at all. So the principles of how the  
30 penalty is to be set and so on, that is obviously covered under (c), so that also requires some  
31 point of law.

32 When provisions such as this arise litigants and their lawyers spend a long time trying  
33 to persuade the court that matters which were, on the face of it, matters of evidence and fact,  
34 in fact give rise to deep questions of law. This is done by using words like “characterise” and  
35 “principle” and so on. In fact, this case must be as clear an example of a case which went off

1 purely on its facts, there was almost no legal argument at all which was not agreed between  
2 the parties. Everybody agreed what the principles were, everyone agreed – if one goes back to  
3 the submissions made – I cannot recall a single issue that was controversial as regards the law.  
4 The whole question was these facts. The facts were complicated and difficult, and it depended  
5 on how you saw things, it depended on evidence, the witnesses' recollection of events in the  
6 past, their demeanour in the witness box, their understandings, their expectations, all of that  
7 was ultimately what this Tribunal was set up to decide, i.e. to consider these complicated  
8 issues in the light of experience and practice and to come up with answers. That is what  
9 happened.

10 My learned friend says as regards the first two issues that there is firstly a principle as  
11 to whether in law an indirect communication, such as there was here, could in law amount to  
12 a concerted practice. If he was saying to the Tribunal that the question of law he wants to  
13 argue is that indirect communication as such cannot constitute concerted practice, that  
14 concerted practice means in the law which ought to be applied here direct contact only and  
15 indirect contact is not good enough, then that would be a question of law, undoubtedly. But  
16 that question of law does not arise because he accepts – he is really bound to, there is plenty of  
17 authority – that a concerted practice can consist of both direct and indirect contact and  
18 communication. As to whether there was sufficient evidence before the Tribunal that there  
19 was indirect communication that is a matter of fact. One cannot say that is a matter of law  
20 because whether the evidence could constitute indirect contact is a matter of law, is simply to  
21 stand things on their head. The court heard the evidence and concluded that on those facts  
22 there was indirect communication and indirect contact with the necessary object or effect and  
23 those facts make up the indirect contact that is required in order to establish a concerted  
24 practice.

25 If my learned friend's argument were correct any conclusion that the court came to  
26 could be characterised as a question of law by saying that some other court might take a  
27 different view of the evidence. He did not suggest that there was no evidence at all, that the  
28 Tribunal's conclusions as to indirect contact could not be maintained, what he said was that  
29 the findings that were made do not amount in law to the indirect contact. But the finding that  
30 was made was a finding of indirect contact based on the facts that were put forward and the  
31 characterisation of those facts, whether they constitute indirect contact or not, is a matter of  
32 fact which this Tribunal has to decide and it simply is not a question of law.

33 Likewise the second ground that in fact the facts which were proven give rise to  
34 a conclusion that there was an exchange of information and not a price fixing agreement.  
35 Perhaps the facts do give rise to the conclusion – if that is what the Tribunal was looking at;



1 that in addition to whatever the Tribunal found they also would have grounded a finding that  
2 there was an exchange of pricing information which had an effect on the market such as to  
3 constitute a breach of the prohibition in Chapter I. That may be so. But that does not deal at  
4 all with the problem before the appellants which is that this Tribunal has found that the facts  
5 proven proved that there was a concerted practice or agreement on price fixing. The evidence  
6 (all of it) that the Tribunal heard led it to that conclusion. There is no question that it has led  
7 to that conclusion because it says so in the Judgment. Again, no argument has been put up to  
8 you that your judgment was based on a complete absence of any evidence to that effect, which  
9 might give rise to some legal issue – not the one that is being argued, but another legal issue,  
10 and in the light of that again this is just a matter of fact. What they are effectively asking is  
11 that the Court of Appeal should reconsider the facts and see whether your decision on the facts  
12 was right. The Court of Appeal will not accept such an invitation because the whole purpose  
13 of setting up this Tribunal is that the Tribunal, with its expertise, decides those issues. So  
14 there is nothing at all in this question of trying to re-characterise what happened – a decision  
15 on the facts – as in fact decisions on the law.

16 As regards the question relating to the penalty, it is suggested that there is some legal  
17 issue on the question of whether the Tribunal should have held that it was obligatory on the  
18 OFT in view of the guidance to conduct a proper market survey. The Tribunal held that the  
19 guidance is guidance, that the guidance was not directed to this particular question anyway, its  
20 very terms show that it was guidance more properly directed at the question of market abuse,  
21 and whether it went too far or not one has to adopt a practical approach to this and bear in  
22 mind that we are involved in a case regarding price fixing where there would have been no  
23 purpose served for the liability aspects of this case in conducting the sort of exercise which the  
24 appellants require.

25 Again, to characterise whether the OFT's guidance has turned into a question of law  
26 by virtue of its existence so that it must be applied irrespective of whether it makes sense to do  
27 so, whether there is any practical purpose in doing so, is really to elevate a matter of practice  
28 and commonsense into an issue of law. There is no issue of law here as to whether the  
29 guidance has to be applied in every circumstance. If that were the principle that my learned  
30 friend is seeking to have the Court of Appeal lay down, that the guidance is to be applied as if  
31 it were binding law in every case irrespective of practicality, cost appropriateness,  
32 proportionality, or anything else, one can say now that that proposition has no prospect of  
33 success whatsoever, and the Court of Appeal is most unlikely, highly unlikely to lay down any  
34 such rule. So we would say first that this is not a matter of law, but even if that was the  
35 question of law it would have no prospect of success whatsoever – not even a fanciful one.

1 The guidance is, as the Tribunal held, guidance. The only question as to when it should guide  
2 and when it should not guide, and plainly there must be examples where the guidance does not  
3 have to be applied, where it is plainly inappropriate to do so. Those are the questions raised  
4 by Argos.

5 The additional argument raised on behalf of Littlewoods, we simply say that these are  
6 again questions in which the Tribunal has given reasons for its decision. These are matters of  
7 how the penalties are to be applied, they are not points of law in the sense in which an appeal  
8 is raised. It is not the sort of thing which the Court of Appeal was intended to hear. As the  
9 Tribunal made clear in the course of its Judgment, the Tribunal has a fairly wide remit to  
10 decide what penalty should be imposed and how it should be imposed and various arguments  
11 were dealt with in the course of that. But these arguments, insofar as they were put up by  
12 Littlewoods, were rejected and these do not give rise to issues of law. Alternatively, if it is  
13 considered that these individual points are in fact legal issues, that they give rise to points of  
14 law, we would say that there is no prospect of success on any of these. The *JFE Engineering*  
15 case, as you have pointed out, a view has been taken on that but, in any event, the Tribunal  
16 went on to decide the matter on the alternative basis anyway, so that in itself would not justify  
17 an appeal.

18 As for the question of whether Littlewoods and Argos are in the same position as  
19 Hasbro or not, that is purely a matter again of applying the facts before the Tribunal to the  
20 legal principle. The legal principle is not in dispute, nobody suggests that like should be  
21 treated with unlike. The question was whether they were sufficiently distinct from Hasbro to  
22 justify on some reasonable basis the difference in treatment by the OFT. Certainly, the facts  
23 are not in dispute, none of that is in dispute. The application of those facts to the question  
24 before the Tribunal, were they different in kind, is not a matter of law, it is a matter for the  
25 decision of the Tribunal as a matter of fact. They did not apply for leniency, they did not  
26 assist the OFT, they opposed these applications. Those differences of fact have been applied  
27 by the OFT to the conclusion that this is not a matter of law.

28 Finally, this question of whether there had to be shown a manifest injustice before the  
29 OFT could treat Littlewoods and Argos differently from Hasbro. Again, this is not a matter of  
30 law, this is a matter of applying the facts to the case and, in any event, even if it were a matter  
31 of law it is not a matter on which there could be any prospect of success, because on that issue  
32 it is quite plain that the Tribunal's decision is the only conceivable one. The alternative  
33 conclusion – one only has to think for a moment about what the implications of the  
34 Appellants' arguments would have been. They would have been that the Appellants got off  
35 Scott Free out of all of this for the simple reason that, according to the Appellants, the OFT

1 made some error in applying its own leniency programme to one of the parties in the  
2 programme. Such a conclusion would have been revolting to commonsense, and the Court of  
3 Appeal would not uphold any kind of conclusion of that sort.

4 May I say finally that if the Court of Appeal takes a different view of any of this the  
5 Appellants have their remedies there, but the Court of Appeal would be assisted, we say, by an  
6 indication from this Tribunal that there is no basis for any appeal. Thank you.

7 MR. BREALEY: One short point, just replying to Mr. Doctor's "cannot remember the point of law",  
8 the nub of this case was essentially about the extent to which retailers can communicate  
9 pricing intentions to suppliers and, in the Penalties Judgment the Tribunal has said if and to  
10 the extent the parties themselves submit the discussions about retail selling prices are common  
11 place between suppliers and High Street retailers there is need for a clear message that they  
12 will get heavy sanctions.

13 THE PRESIDENT: If they make an agreement, the nub of the case is whether they had made an  
14 agreement, not how far they can chat around amongst themselves.

15 MR. BREALEY: Very important to the agreement, as the Tribunal has found, is the extent to which  
16 they can communicate between themselves. The Tribunal has held that pricing intention is  
17 very confidential and should not ordinarily be communicated ----

18 THE PRESIDENT: We had three witnesses who came into the witness box, who were not  
19 cross-examined, who said there had been an agreement.

20 MR. BREALEY: Can I just remind the Tribunal ----

21 THE PRESIDENT: We just have to keep our focus on what the case was about and not try to cloud  
22 it with suggestions that it has some wider import. It does not; it is about whether these  
23 particular people made a particular agreement at a particular time.

24 MR. BREALEY: With that in mind can I just make one last submission on the point of law. This is  
25 at para.666 of the liability Judgment where the Tribunal does raise this issue of law.

26 "666. Contrary to the submissions of the Appellants it does not seem to us that the  
27 Judgments in *Bayer* are intended to qualify the principles of *Suiker Unie* and many  
28 subsequent cases."

29 So that was the issue of law that Mr. Doctor with respect cannot remember, and it is an  
30 important issue of law because it does raise the issue as to whether there is a need for  
31 consensus between what I have called A and C. If one goes just two paragraphs up, to para.  
32 664, where *Suiker Unie* is cited, again we get the A, B, C point.

33 "664 Moreover, a concerted practice may arise if undertaking A complains to  
34 undertaking B about the activities of a third undertaking C, and undertaking B acts on  
35 those complaints in such a way as to leads to conditions of competition which do not

1 correspond to normal conditions in the market, for example by prevailing upon C to  
2 limit its competitive activities. In those circumstances A, B, and C may all be guilty  
3 of a concerted practice.”

4 The legal issue is whether in that situation C can be guilty of a concerted practice with A, and  
5 when one goes back to the *Suiker Unie* at paras. 282, 283, that is at para.156 of the Judgment,  
6 we see there that all that paras. 282, 283 are concerned with is A and B. My simple legal point  
7 is that paras. 282 and 283 concern a complaint by A to B essentially about B, so you have the  
8 two competitors one complaining and the other acting on it. It does not go as far as to support,  
9 with the greatest respect, the conclusion in the later paragraph at 664 that A and C may be  
10 guilty of a concerted practice, and that is the legal issue which, in my respectful submission  
11 does arise in this case.

12 THE PRESIDENT: On the trilateral one?

13 MR. BREALEY: On the trilateral one. That is the only point of reply that I wish to make.

14 THE PRESIDENT: Thank you. Very well, we will rise for a few moments.

15 (For Ruling see separate transcript)

16 THE PRESIDENT: Any other applications, Mr. Doctor?

17 MR. DOCTOR: No, thank you.

18 THE PRESIDENT: Thank you very much indeed.

19 (The hearing concluded at 4.15 p.m.)