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IN THE COMPETITION COMMISSION APPEALS TRIBUNAL

The Competition Commission  
Room 309 New Court  
48 Carey Street  
London WC2

Thursday 22nd January 2004

Before:

THE PRESIDENT  
SIR CHRISTOPHER BELLAMY QC  
(CHAIRMAN)

MR. BARRY COLGATE  
and  
MR. RICHARD PROSSER OBE

B E T W E E N :

1019/1/1/03	UMBRO HOLDINGS LIMITED	Appellant
	- and -	
	THE OFFICE OF FAIR TRADING	Respondent
1020/1/1/03	MANCHESTER UNITED PLC	Appellant
	- and -	
	THE OFFICE OF FAIR TRADING	Respondent
1021/1/1/03	ALLSPORTS LIMITED	Appellant
	- and -	
	THE OFFICE OF FAIR TRADING	Respondent
1022/1/1/03	JJB SPORTS PLC	Appellant
	- and -	
	THE OFFICE OF FAIR TRADING	Respondent

CASE MANAGEMENT CONFERENCE

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A P P E A R A N C E S

Appellant:

UMBRO HOLDINGS LIMITED	KELYN BACON
MANCHESTER UNITED PLC	PAUL HARRIS
ALLSPORTS LIMITED	LAWRIE WEST-KNIGHTS Q.C. & GEORGE PERETZ
JJB SPORTS PLC	ANTHONY GRABINER Q.C. & MARK HOSKINS

Respondent:

THE OFT	STEPHEN MORRIS, JON TURNER & ANNELI HOWARD
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1 THE CHAIRMAN: Good morning, ladies and gentlemen. We are  
2 grateful for the work that has been done since we last met  
3 and for the progress that has been made. As you may have  
4 seen, the Tribunal has circulated under a letter from the  
5 Registrar, probably sent yesterday, a list of order of  
6 matters which we thought was perhaps a convenient way of  
7 dealing with the various applications and issues that are  
8 outstanding at the moment. Unless there is any major  
9 objection, we propose simply to go through those order of  
10 matters and deal with the issues one by one.

11 If you will forgive us, we have got quite a lot to  
12 get through this morning, so we propose to move at a  
13 reasonably smart pace. Unless there are any particular  
14 initial observations, we can turn first to disclosure  
15 issues relating to confidentiality, which is the first  
16 thing we put on our list.

17 We have now got the advantage of the discussions  
18 that have taken place between counsel and submissions from  
19 all the parties on confidentiality. What we propose to  
20 do, unless there is objection, is simply to rule in  
21 writing on the basis of the material that we have got on  
22 what we consider to be confidential and what is not,  
23 unless there are any further remarks or observations that  
24 anybody wishes to make on the confidentiality issue.

25 MR. HARRIS: Sir, just one minor point, if I may. In the OFT  
26 skeleton today it mentions providing to All Sports and JJB  
27 the materials upon which there is going to be guidance for  
28 the Tribunal. It may have been simply by oversight, but  
29 Man. United would like to be provided with those copies as  
30 well or at least be able to pass them on to non-external  
31 legal advisers in the same manner.

32 THE CHAIRMAN: Have you been involved, Mr. Harris?

33 MR. HARRIS: No, not in the detail and do not propose to be.

34 THE CHAIRMAN: Have you been involved in the discussions that  
35 have taken place?

36 MR. HARRIS: We have been copied in on some if not all of the  
37 correspondence, but I just notice that in the OFT skeleton  
38 for today it does not mention Manchester United in this

1           regard. I think that may simply have been an oversight.  
2   THE CHAIRMAN: It may have been an oversight, it may not; I  
3           do not know.  
4   MR. HARRIS: In any event, as the Tribunal is well aware, the  
5           whole leniency aspect concerning Umbro does materially  
6           bear upon our appeal.  
7   THE CHAIRMAN: Yes.  
8   MR. HARRIS: Thank you.  
9   THE CHAIRMAN: Yes, Ms. Bacon?  
10  MS. BACON: Sir, just one short point. Could the Tribunal  
11           confirm that circulation of the judgment will be  
12           restricted to external legal advisers, counsel only, if it  
13           is going to involve disclosure of some those very  
14           confidential matters that we were seeking to protect?  
15  THE CHAIRMAN: Our normal practice is to give advance notice,  
16           as it were, on a restricted basis, giving a short time for  
17           those affected with the possibility of signalling to us  
18           whether they want to appeal. If they say they do not want  
19           to appeal, we circulate it fully. If you did want to  
20           appeal, the application for permission to appeal would be  
21           an opportunity to ----  
22  MS. BACON: -- express any concerns about possible reductions.  
23  THE CHAIRMAN: Yes.  
24  MR. WEST-KNIGHTS: With some reluctance, sir, but very  
25           briefly. There is one issue which is unclosed. I must  
26           speak in code because we are not only external legal  
27           advisers present. There is a matter arising out of the -  
28           accidental it appears - non-redaction by the Office of a  
29           particular paragraph in the materials attached to Mr.  
30           Ashley's witness statement which reveal the existence of  
31           matters which it is Sports World's desire not to be  
32           revealed. That witness statement was sent, amongst other  
33           people, to my lay clients some time ago and, consequently,  
34           it is now for Sportsworld to make an observation as to the  
35           position, which appears to be that, for whatever reason,  
36           that cat is out of the bag.  
37  MR. HANSON: Sir, I wonder if I might address that matter.  
38           There was in fact an oversight on our part, not the Office  
39           of Fair Trading. When we provided the schedule just

1 before Christmas, we failed to identify a particular  
2 paragraph reference. We intended to claim confidentiality  
3 in relation to it; we still do. We have sought  
4 undertakings from all the parties that the matter not be  
5 disclosed to lay clients. We have received the  
6 undertaking to that effect from JJB. We do understand,  
7 however, that the relevant document without that redaction  
8 was provided to Mr. Hughes and we would ask that they  
9 retrieve it from him.

10 THE CHAIRMAN: We will do our best to sort that out, if we  
11 can.

12 MR. HANSON: Thank you, sir.

13 THE CHAIRMAN: Are there any other points on confidentiality?

14 MR. MORRIS: The only other matter that was signalled, sir, in  
15 your schedule was the question of the OFT's suggestion in  
16 relation to costs. I do not know whether you wish to hear  
17 us any further on that.

18 THE CHAIRMAN: It was simply to remind myself, to say that  
19 that is a matter with which we deal at the end of the case  
20 in the context of costs generally.

21 MR. MORRIS: I am grateful for that indication. As far as the  
22 structure for the hearing is concerned, our impression is  
23 that the parties are not too far apart on what is an  
24 appropriate structure for the hearing. We propose not to  
25 make any further indications on that at this stage. We  
26 have still got one more pre-hearing date put in the diary  
27 and then we simply leave it over for the time being until  
28 then, because things seem to be progressing reasonably  
29 well and, as with all these things, we need to give  
30 ourselves a certain latitude. It is difficult to tie  
31 oneself down to precise days and so forth, except to say  
32 that, as far as the Tribunal is concerned, we have not at  
33 all abandoned the objective of finishing this case in the  
34 fortnight or very early the following week. We do not  
35 want it to slip if we can possibly help it. Yes, Ms.  
36 Bacon.

37 MS. BACON: Sir, I have one issue to raise with profuse  
38 apologies on the part of Umbro in having overlooked this  
39 until yesterday evening. When I looked carefully at the

1 proposed schedule from the OFT for the hearing, I realised  
2 that Umbro is now, according to the OFT proposal, to be  
3 scheduled on the morning of Monday, 22nd March. As the  
4 Tribunal may recall, the two week window was fixed in view  
5 of, amongst other things, Mr. Green's availability or,  
6 rather, unavailability during the week beginning 22nd  
7 March.

8 The situation is this. Mr. Green goes into a two  
9 week Court of Appeal hearing which commences on the 22nd.

10 I have made enquiries as to whether it might be possible  
11 for that to start, for example, the Monday afternoon. Mr.  
12 Green thinks that that would be effectively impossible,  
13 given the number of other parties in that hearing and the  
14 fact that, even at this stage, we do not know that the  
15 hearing in our case is definitely going to come on on that  
16 Monday morning.

17 I was going to make the following proposal, given  
18 that, for obvious reasons, I also will be unavailable  
19 during that week or am likely to be unavailable during  
20 that week. We wondered, given the fact that we only have  
21 a half day hearing and we are content to deal with it in  
22 half a day, if it looks like the Tribunal proposes to deal  
23 with the penalty appeals immediately after the liability  
24 appeals, i.e. without giving judgment first on the  
25 liability appeals, Umbro's appeal should be interposed on  
26 either the Thursday or the Friday, as was originally  
27 scheduled, which Mr. Green would be able to do. So that  
28 would be on the 18th or the 19th.

29 I understand that that would not be a problem in  
30 terms of availability of counsel for the other parties,  
31 because everybody is, in any event, going to be around at  
32 the end of that week and the following week. However, the  
33 OFT have indicated that they perhaps would object to that  
34 in terms of their preparation for the hearing, so you  
35 might want to hear what Mr. Morris has to say about that.

36 From our point of view, it would be extremely  
37 unfortunate and very disproportionate if we were going to  
38 have to instruct new counsel at this late stage for a half  
39 day hearing after Mr. Green has been involved in this case

1 since the dawn raid.

2 THE CHAIRMAN: Is that a fixed date in the Court of Appeal?

3 MS. BACON: That is a fixed date in the Court of Appeal, yes.

4 THE CHAIRMAN: Sometimes fixed dates in the Court of Appeal  
5 turn out to be less fixed than one thought they were.

6 MS. BACON: As far as I understand, it is a fixed date and,  
7 yes, he is leading counsel in the case.

8 THE CHAIRMAN: Thank you. Do you want to make any comment,  
9 Mr. Morris?

10 MR. MORRIS: Sir, first of all, we are slightly surprised at  
11 this being raised now - about five minutes ago - but it  
12 has to be dealt with. Secondly, we do think that it would  
13 be somewhat unfair to interpose this as the penalty matter  
14 into, effectively, the closing submissions in relation to  
15 liability in the week before. It will mean the OFT having  
16 to deal with its own closing submissions on liability and,  
17 at the same time, be preparing the penalty appeal in  
18 relation to Umbro. It then takes the penalty appeals out  
19 of the proposal at the moment, which is to have all the  
20 penalty appeals being dealt with together, after having  
21 the weekend when liability has finished.

22 We would suggest that if there were steps that could  
23 be taken to allow Mr. Green to be available for that  
24 morning on the 22nd it would, in the OFT's submission, be  
25 a fairer and better approach. It may be something which  
26 can be addressed in the next week or so, but at present we  
27 are concerned ----

28 THE CHAIRMAN: I think the Tribunal's initial reaction would  
29 be to see whether the parties can sort something out  
30 behind the scenes, either Registry of the Court of Appeal  
31 or otherwise. If not, initially speaking, we would have  
32 some sympathy with Umbro's desire to retain the same  
33 counsel that it has had since the beginning and we might  
34 be prepared to see if we can slot them in at the end of  
35 that second week, perhaps on the Friday.

36 Since the Umbro appeal is really a very short point  
37 and very self-contained, I do not think it would be too  
38 difficult for anyone to prepare. Some preparation is  
39 necessary, but you have probably got the point in your

1 head anyway, even now.

2 MR. MORRIS: I am not sure I have got it in my head at the  
3 moment.

4 THE CHAIRMAN: All we can do at this stage is just to note  
5 that request from Umbro and to see whether we can find a  
6 solution, which we will try to do for Umbro.

7 MR. MORRIS: Very well, sir, thank you.

8 MS. BACON: Sir, just on the point of approaching the Court of  
9 Appeal, the point that you raised at the start of this  
10 conversation about structure, which is that there is still  
11 some flexibility and latitude, we cannot go to the Court  
12 of Appeal and request a particular morning, a reading  
13 morning, for example, unless we know for certain that the  
14 appeal is going to get on then. Even then, it may be  
15 difficult, but I am just making the observation that  
16 unless it is fixed we cannot even approach the Court of  
17 Appeal.

18 THE CHAIRMAN: If you could kindly ask your instructing  
19 solicitors to write to us so that we make sure it is dealt  
20 with at the level of the Registry, we will see what we can  
21 do to sort it out.

22 The third item is bundles. We are grateful for the  
23 progress that is being made. As far as the Tribunal is  
24 concerned, we will, of course, read the pleadings and so  
25 forth, but the principal documents on which we will  
26 concentrate are the decision, the documents referred to in  
27 the decision and the witness statements. That will be our  
28 internal core reading. Bundles that will meet that  
29 particular requirement are the priority, particularly a  
30 convenient bundle of the witness statements. Apart from  
31 that, let us just hope the bundling process proceeds  
32 efficiently from here on.

33 MR. MORRIS: Sir, may I, on that subject, suggest that after  
34 the rather successful last meeting - moving this forward -  
35 that some provision can be made for a further meeting  
36 along the lines - I think a further schedule of bundles  
37 has been produced this morning with counter proposals.  
38 Can I just flag the possibility of a further meeting  
39 between solicitors and your staff to take the matter



1 forward.

2 THE CHAIRMAN: If you would be kind enough to ask those  
3 instructing you to telephone the Registry and fix that up,  
4 Mr. Morris, it would be highly convenient.

5 MR. MORRIS: I am grateful.

6 THE CHAIRMAN: We now get onto the more contentious issues.  
7 At this stage, Mr. Morris, it is the various directions  
8 that you seek.

9 MR. MORRIS: Thank you, sir. I am happy to be able to tell  
10 you that things have moved on and I can tell you that the  
11 first item on the list of Part 2, Item 4, Umbro, OFT  
12 leniency notes, that has been resolved. Umbro have  
13 consented. Secondly, Umbro leniency notes of the 26th  
14 have now been disclosed, so that issue has been dealt  
15 with. Thirdly, we then have the issue of the JJB order  
16 cancellations. That is an application which is not  
17 pursued by the OFT.

18 We then move onto JJB matter, KPMG. In relation to  
19 that, sir, the OFT does ask for this to be moved on with  
20 the support of an order from the Tribunal. I am sure you  
21 are familiar with the background to this. It is dealt  
22 with in our skeleton at paragraphs 35 to 38 of our CMC  
23 submissions, page 8.

24 THE CHAIRMAN: We have read it.

25 MR. MORRIS: The main points are these, sir. As long ago as  
26 August 2002 ----

27 THE CHAIRMAN: There has been a certain amount of dragging  
28 going on, so you say.

29 MR. MORRIS: That is basically it. The last time we had a  
30 best endeavours order. We still have not got to the  
31 bottom of it. My latest understanding is that there is an  
32 indication that KPMG hoped to have made progress by  
33 tomorrow in coming back with the information. We would  
34 ask for an order that we get a response within seven days.

35 The best endeavours order has been tried, has not really  
36 succeeded and an order with a cut off date is likely to  
37 concentrate the mind. We are working on the assumption  
38 that there is no objection to JJB and KPMG.

39 THE CHAIRMAN: We will see what Lord Grabiner says. Lord

1 Grabiner?

2 LORD GRABINER: The reason for the delay is that, when  
3 asked to provide us with particulars of precisely what it  
4 is they require, the OFT has failed to provide us with  
5 that information. I am not going to get involved in that  
6 debate. The delay is not attributable to fault on our  
7 part.

8 The second point is that we deal with the facts in  
9 paragraph 10 of our skeleton argument. The material with  
10 which we are concerned here is in the possession, control  
11 and custody of KPMG: it is neither held nor controlled by  
12 my clients. That fact appears, even now, not to have  
13 impacted itself upon the mind of my learned friend. We  
14 would respectfully suggest that it is entirely  
15 inappropriate for an order to be made against my client,  
16 because the court is not in the business of making orders  
17 which cannot ultimately be enforced.

18 We are assured by KPMG that the task of reviewing  
19 their files will be concluded tomorrow and we have  
20 communicated that fact to the OFT and I am not sure that  
21 there is anything more that we can do, but we do say that  
22 we have done our best and we are not aware of anything  
23 more that we can do to ensure production of this  
24 documentation from KPMG.

25 THE CHAIRMAN: The Tribunal's view is that we ought to make an  
26 unless order now, that is to say, unless this material is  
27 produced within seven days JJB will not be allowed to rely  
28 on the KPMG report without the permission of the Tribunal.

29 That should help JJB to get KPMG to treat this matter  
30 with the urgency that is now required in view of the  
31 imminent date of the hearing.

32 LORD GRABINER: If I may, I would respectfully resist the  
33 unless order. I take your point, sir, but I would resist  
34 the unless order because the only way to unravel  
35 responsibility, so to speak, for this would in fact be to  
36 go back through the history (which I am certainly not  
37 inviting you to do) in order to decide whether at some  
38 stage in the story the OFT should have been a little more  
39 precise about exactly what it was that it wanted.

1                   I would invite you not to make that order, but there  
2                   is nothing more that I can do, given the imminence of the  
3                   hearing and the history.

4   THE CHAIRMAN:  If we make an order in the terms we have just  
5                   indicated, Lord Grabiner, if this material is not produced  
6                   within seven days you can still come back to the Tribunal  
7                   and ask for permission if it is produced subsequently.

8   LORD GRABINER:  Then I am grateful.

9   THE CHAIRMAN:  It is an order that we should make now in view  
10                  of the approaching trial date.

11   LORD GRABINER:  I have got a locus poenitentiae and I will  
12                  hang onto it, thank you.

13   THE CHAIRMAN:  So we will make an order in those terms on that  
14                  issue.  Yes, Mr. Morris, the next on the list?

15   MR. MORRIS:  The next matter on the list is an application for  
16                  Mr. Lane-Smith to produce his notes of the board meeting.  
17                  Sir, we have, since the time of the last case management  
18                  conference, helpfully received the board papers for that  
19                  meeting.  We would respectfully suggest that Mr. Lane-  
20                  Smith's notes of that meeting - you will recall that Mr.  
21                  Lane-Smith has given a witness statement in respect of  
22                  that - should also be provided to complete the picture.  
23                  It is the case that this has been raised in our skeleton  
24                  and we have not had a response from JJB on this point as  
25                  yet.  That is not a criticism of JJB not responding.  The  
26                  matter has been raised.

27   THE CHAIRMAN:  When was it first raised?

28   MR. MORRIS:  It was first raised in our skeleton, so it was  
29                  raised quite recently.  We do say that JJB rely positively  
30                  on the events of that meeting and we submit that it would  
31                  be helpful to the Tribunal to complete the picture for  
32                  those notes to be provided.

33   THE CHAIRMAN:  Yes.  Yes, Lord Grabiner?

34   LORD GRABINER:  There are all sorts of arguments one could  
35                  put forward by way of resistance, but the short answer is,  
36                  Mr. Lane-Smith is the senior partner of those instructing  
37                  me and he has notes of that meeting.

38   THE CHAIRMAN:  He has no notes?

39   LORD GRABINER:  None at all.

1 THE CHAIRMAN: Is that a matter that is covered in his witness  
2 statement?

3 LORD GRABINER: No, I do not think it is. The point is  
4 that the witness statement was produced for the purposes  
5 of the Rule 14 procedure and, of course, at that stage at  
6 the OFT no reference was made to any minutes of the  
7 meeting that there may have been and I think the matter  
8 has there rested until we received their skeleton  
9 argument. There is no adverting to any notes of any  
10 meeting. The point has just suddenly arisen, as has just  
11 been indicated, for the first time.

12 THE CHAIRMAN: Mr. Morris, can you just remind me? I am on  
13 page 9, paragraph 40 of your submissions for the CMC. You  
14 were asking us to recall that Mr. Lane-Smith was tasked  
15 with writing up a note of ----

16 MR. MORRIS: I have the passage in his witness statement.

17 THE CHAIRMAN: That is a reference to his witness statement.

18 MR. MORRIS: Yes. He says:

19 "I suggested that I would prepare a separate note of  
20 Mr. Whelan's report of the meeting which I would  
21 retain on my own file. In the event, however, I  
22 subsequently overlooked the preparation of such a  
23 minute."

24 It says:

25 "If I have said there 'was tasked', it may be that  
26 it was self-tasked rather than tasked by anybody  
27 else."

28 Mr. Turner reminds me that Mr. Beaver says that he was  
29 asked to do it, but either way that was the basis upon  
30 which we raised the matter.

31 THE CHAIRMAN: We are told on instructions (presumably express  
32 instructions) that there are no notes.

33 LORD GRABINER: On express instructions.

34 THE CHAIRMAN: So that is as far as we can take that. Mr. May  
35 is the next one on the list.

36 MR. MORRIS: Both on Mr. May and in relation to the question  
37 of amendment to the defence to Allsports, we would  
38 respectfully suggest that that is a matter which falls  
39 into part two of today's proceedings because it is

1           inextricably linked. Whether it is dealt with at the same  
2 time as the Allsports application or immediately following  
3 - I think there is a nod from my right that that might be  
4 the most appropriate with which to deal with it.

5 THE CHAIRMAN: It is better to deal with it as a passage.

6 MR. MORRIS: Yes, then perhaps item 5 is also me. As to the  
7 defence amendment as far as Allsports is concerned, we  
8 have moved onto part two. As to the JJB defence, the  
9 position is this. As has been noted in your schedule,  
10 sir, there is no formal application. In the light of the  
11 indication that the OFT has given in relation to item 6,  
12 there is one short amendment only that will be sought in  
13 respect of the defence to JJB's notice of appeal. That  
14 amendment is the amendment in relation to making reference  
15 to the notes of the leniency meeting of the 26th February.

16 We have provided a draft and we have provided a revised  
17 up-dated draft amended defence to JJB. My understanding  
18 from their submissions - although they raise a point about  
19 it - is that they do not object to that amendment, and so  
20 I would formally ask for permission to make that one  
21 amendment to the JJB defence.

22 THE CHAIRMAN: Thank you. Is that resisted, Lord Grabiner?

23 LORD GRABINER: Again, it is not resisted. There will be  
24 other things I will want to say at an appropriate moment  
25 in relation to that in camera hearing.

26 THE CHAIRMAN: We give permission for that amendment to be  
27 made to the JJB defence.

28 LORD GRABINER: I am grateful.

29 THE CHAIRMAN: Does that deal with the OFT for the time being?

30 MR. MORRIS: It does, sir, yes.

31 THE CHAIRMAN: Now we come to the imbroglio that has arisen as  
32 regards the disclosure of the various in camera matters.  
33 Are there any particular submissions the parties wish to  
34 make further to the ones which they have made in writing  
35 before I give an indication of how the Tribunal sees the  
36 situation?

37 LORD GRABINER: I just want to say one thing. The reason I  
38 want to say it is because it is in response to something that  
39 we received last night from the OFT. They go out of their way

1 to provide, as near as damn it, an apology to Allsports. They  
2 make no apology for the irresistible inference that was  
3 intended to be conveyed to this Tribunal, namely, that my  
4 clients had interfered with witnesses in advance of the  
5 hearing. That was, if I may say so, a disgraceful episode.  
6 It was disgraceful for a couple of reasons.

7 First if all, allegations of that kind must never be  
8 made unless the counsel making them has got credible  
9 material in front of him to support the allegations. It  
10 is fairly obvious in this case that no such material was  
11 available. Indeed, it was embarrassingly obvious because,  
12 as you read through the transcript, Ms. Bacon's  
13 intervention demonstrates quite clearly that there was  
14 probably never even any conversation between them in  
15 advance of making the application. So there was no  
16 credible material in the first place.

17 Secondly, a decision was taken to do that exercise  
18 in private and in secret. That was disgraceful. It would  
19 have been very, very simple indeed to have picked up the  
20 telephone to me and to have discussed the matter and at  
21 least tried to resolve it in advance, but that was never  
22 done. No attempt was made to communicate with me on the  
23 subject and it came as a complete surprise to me when I  
24 came to read the transcript, which very helpfully you  
25 provided to us.

26 The third point essentially is that now, having seen  
27 our response (and I do not repeat what we say in our  
28 response, which is strongly worded, but, in my submission,  
29 the reaction was entirely justified) we do not even get a  
30 half apology for that behaviour. It is calculated  
31 behaviour, calculated to insinuate to this Tribunal, which  
32 has to decide the case, that we have behaved in a  
33 completely reprehensible fashion. That is denied, and I  
34 am quite confident that you can wipe these matters from  
35 your mind in any event. However, the behaviour is  
36 unacceptable. I cannot reasonably expect an apology in  
37 open court, but I think I can have an acknowledgement in  
38 terms that no such charge is maintained against my clients  
39 and, hopefully, the forthcoming proceedings will be

1 conducted in a more appropriate and, if I may say so - and  
2 I say it with some regret - with a more professional  
3 approach.

4 MR. WEST-KNIGHTS: Sir, one does not want to make too much of  
5 what occurred on that occasion but, by the same token, it  
6 would be wrong to make too little of it. I do not wish to  
7 repeat, but I do wish to emphasise, if I may, my support  
8 for the remarks which my learned friend Lord Gabor has  
9 made.

10 At the very best for the Office, this episode  
11 betrays a profound lack of judgment which we say permeates  
12 aspects of these proceedings going beyond that which  
13 occurred on 12th December.

14 It is said in the latest round of submissions that  
15 there is not - and never has been - any suggestion or any  
16 basis for any suggestion whatsoever that Allsports have  
17 been engaged in the application of commercial pressure to  
18 Umbro or in the improper dealings with any of its  
19 witnesses.

20 My learned friend's submissions go on to say that  
21 the other matters to which he refers - I think it is to be  
22 inferred that the 4th March conversation dealt exclusively  
23 with JJB - were at the time inchoate - by which I imagine  
24 he means wholly unformed, just begun - and he says in his  
25 footnote, "They were not relied upon as a basis for any  
26 application made."

27 In those circumstances, it must follow that there  
28 was no basis for any suggestion against Allsports and no  
29 proper basis for making any such suggestion. It is no  
30 excuse to say these matters were not relied upon; indeed,  
31 it compounds, in my submission, the impropriety of what  
32 occurred because it makes the reference to that material  
33 absolutely gratuitous.

34 It is not apparent from the transcript that no  
35 allegation was being made against Allsports. You will  
36 recall that the opening of that occasion was caused by  
37 Umbro's reference to two letters which they had received,  
38 one of which required Umbro to give details to the Office  
39 of approached by JJB or Allsports, whether it be direct or

1 indirect, commercial or other pressure on Umbro and  
2 witnesses.

3 That was the opening of that; and it was only when  
4 you and your colleagues pressed the Office as to the  
5 reason for those letters that they began to say, "The  
6 issue is not that serious", and then they reverted to  
7 saying that it was very serious. But nowhere is there the  
8 slightest hint in that transcript of abrogating any  
9 suggestion that Allsports were involved. So, plainly, the  
10 whole matrix of that hearing was an allegation against  
11 Allsports because they were defending the sending of that  
12 letter, for which there was no foundation whatsoever.

13 I detect in the submissions no apology to Allsports,  
14 merely a withdrawal; but it is a withdrawal of something  
15 that did not exist in the first place and ought not to  
16 have been mentioned in the first place.

17 Assuming in my learned friend Mr. Morris' favour  
18 that this was not a deliberate attempt to taint the  
19 Tribunal, it represents a profound want of judgment.  
20 That, it would appear, is not quite finished, because  
21 proposition at 7(c) of the latest skeleton is that, "If  
22 you, or Allsports or even, it is said, JJB remain unhappy,  
23 then the Office would wish you to see the transcript of  
24 4th March." There is no suggestion (which would be the  
25 appropriate suggestion) that we should see it first and  
26 then discuss whether it would be appropriate for the  
27 Tribunal to see it, but that it should come out of the bag  
28 and further taint the Tribunal and then, after that, we  
29 should have the opportunity of making submissions upon it.

30 I am bound to say that the withdrawal, such as it  
31 is, has plainly only taken place because of the  
32 submissions which were made by both Allsports and JJB and,  
33 whilst the language used was stern, it was appropriate.  
34 But I wish to make it clear that we are wholly satisfied,  
35 subject to how the Tribunal itself feels - this Tribunal  
36 plainly has the intellectual capacity to put out of its  
37 mind any slur which was made. It is entirely for the  
38 Tribunal to determine how it feels about what was done in  
39 the end to it in those circumstances. I have no further



1 submissions to make.

2 THE CHAIRMAN: Mr. Morris, do you want to respond?

3 MR. MORRIS: Yes, if I may briefly respond, firstly to my  
4 learned friend Lord Grabiner.

5 The OFT at no time has meant to suggest that it is  
6 in possession of evidence that particular witnesses have  
7 been tampered with. We do not make that allegation. We  
8 have never had such material in our possession and, to  
9 that extent, we accept that if that was not clear it  
10 should have been made clear.

11 Secondly, however, the OFT does not resile from its  
12 position that there was material in the 4th March  
13 transcript which gave rise to a reasonable concern ----

14 THE CHAIRMAN: It is very difficult to make that suggestion  
15 without anybody knowing what is in the 4th March  
16 transcript.

17 MR. MORRIS: I agree, sir.

18 THE CHAIRMAN: Either you shut up or you disclose it. The  
19 latter course is perhaps fraught with various other  
20 problems.

21 MR. MORRIS: There it is. I say no more, other than the fact  
22 that, if the criticism is that the OFT had no basis  
23 whatsoever for pursuing this matter, that is a criticism  
24 which is resisted. I say no more about it.

25 THE CHAIRMAN: Willing to wound, but afraid to strike is a  
26 very difficult situation for a public authority to get  
27 itself into. It is probably the least said soonest  
28 mended, I think, Mr. Morris.

29 MR. MORRIS: I leave it there then, sir. The second criticism  
30 made by Lord Grabiner is that this was done privately. I  
31 hope that we have explained in paragraph 5 of our response  
32 that there was no intention whatsoever to seek to draw  
33 this matter to the Tribunal's attention on an ex parte  
34 basis. You, sir, will recall from that hearing that at  
35 all times during that hearing I had no issue: I was,  
36 indeed, keen on the matter being disclosed openly. It was  
37 being dealt with at that stage on an ex parte basis only  
38 in the context of Umbro's concerns about the prior ex  
39 parte transcript. It may be that this is the way it has

1 happened, but I can assure JJB and Allsports that the OFT  
2 has at no time wished to take the matter before the  
3 Tribunal behind their backs.

4 Sir, unless there is anything else that you wish me  
5 to address, I do not propose to say any more on the  
6 matter.

7 THE CHAIRMAN: No, thank you, Mr. Morris.

8 The Tribunal has asked itself the question whether,  
9 in the light of what has happened there are grounds for  
10 the Tribunal to consider the possibility of recusing  
11 itself. The Tribunal's own response to that question is  
12 that there are no such grounds at the moment.

13 The concern that we had in the course of the ex  
14 parte proceedings was that we were being told things that  
15 were not being said to the other parties in the case. The  
16 Tribunal, accordingly, decided to disclose everything  
17 being said so that everybody could see what had been said.

18 Now everybody is in the picture as to what was said.

19 As we see it, we are not, therefore, in the position  
20 of a judge, for example, in the Crown Court who has had a  
21 PII application made to him and is in possession of  
22 matters that are not in the possession of the prosecution  
23 or the defence. Everything, as far as we are concerned,  
24 is on the table. So that aspect of the matter is, we  
25 trust, dealt with.

26 As far as what was actually said to us is concerned,  
27 contrary to popular belief, a Tribunal does not actually  
28 go on what is said to it at the Bar by counsel but what it  
29 has got by way of evidence. We have absolutely no  
30 evidence of any kind in support of any of the allegations  
31 that may or may not have been made in the course of the  
32 proceedings with which we are concerned.

33 As far as we are concerned, it is simply a question  
34 of wiping the tape, as it were, and leaving the matter  
35 entirely on one side and concentrating on the main issue  
36 in the case, which is whether the relevant agreements or  
37 concerted practices were made or not. That is the only  
38 issue the Tribunal has to decide in the light of the  
39 evidence it has on that issue, and it is not prepared to

1 go into collateral issues.

2 As far as whether these various suggestions should  
3 have been made or not in the first place, we can see to  
4 some extent that a somewhat complicated situation may have  
5 been in the course of developing but it is, however, of  
6 cardinal importance that suggestions are not made to the  
7 Tribunal, unless those making the suggestions are prepared  
8 and able to back them up with available and credible  
9 material.

10 To that extent, one can regard the events that  
11 happened as somewhat unfortunate, but since the Tribunal,  
12 as far as the Tribunal is concerned, is wiping the tape it  
13 does not seem appropriate to go into more detail on that  
14 aspect at this stage.

15 As far as we are concerned, the incident is closed  
16 and there is no recrimination or other adverse comment on  
17 any of the appellants before us.

18 Does anybody want to make any further applications  
19 in the light of that indication of how the Tribunal sees  
20 the position?

21 MR. WEST-KNIGHTS: Sir, no, for my part. The marker was  
22 properly made and we regard the line as having been drawn  
23 under that, but our eyes and ears are open.

24 THE CHAIRMAN: What does that mean exactly? I hope they  
25 always are.

26 MR. WEST-KNIGHTS: That those responsible for this imbroglio  
27 (as you put it) will regard this as a warning shot so that  
28 this does not happen again.

29 THE CHAIRMAN: The appropriate course now is to move on to  
30 other issues. The next item we have on our list is the  
31 question of Mr. Ronnie's diary. Yes, Mr. Morris?

32 MR. MORRIS: It is not really no application, but can I just  
33 complete the picture on that as far as the OFT is  
34 concerned?

35 THE CHAIRMAN: Yes.

36 MR. MORRIS: I can tell the Tribunal that my instructions are  
37 that we have made further contact with Mr. Ronnie since  
38 our letter of 16th January. We have asked him again and  
39 he still thinks he left the diary at Umbro, but he is

1           checking again at home. I understand that the OFT has  
2           chased again on Tuesday of this week. It made further  
3           enquiries on Tuesday of this week. That is the up-to-date  
4           position from our end.

5           THE CHAIRMAN: Thank you. Now, Mr. West-Knights, what do you  
6           want us to do, if anything?

7           MR. WEST-KNIGHTS: We cannot produce the diary if it has in  
8           fact gone. The latest information is that it was left  
9           with Umbro on the departure of Mr. Ronnie. It is plainly  
10          a document of considerable significance. Some of its  
11          pages were provided in photocopy form, as we understand  
12          it, by Umbro to the Office at an earlier stage of the  
13          investigation.

14                 There are two aspects to this, the first of which is  
15          the missing pages, slap bang in the middle of the key  
16          period - an even "keyer" period (if such an expression is  
17          appropriate) because Mr. Ronnie has now purported to  
18          refine the date upon which he made his various phone calls  
19          and, in fact, puts them directly into a period previously  
20          described as "irrelevant" by the non-copying of that page  
21          of his diary. The diary has a week, as it were, on two  
22          opposing pages, so each page has either three or four days  
23          on it.

24                 The other is finding out what Mr. Ronnie was doing  
25          at other times which are material to this case and what  
26          the pattern of his diary is. I do not wish to go into any  
27          details, but there are entries in the diary pages which we  
28          do have which it would be extremely helpful to match to  
29          other entries to see whether they reflect past notes,  
30          future notes or whether they are, in fact, reflecting  
31          things that he plans to do and does.

32                 What we require, if I may submit, is the equivalent  
33          to what would occur in litigation, where an important  
34          document is, unhappily, no longer available, which is that  
35          Umbro, who appear to have been the custodians at the time,  
36          make a formal statement that they have undertaken all of  
37          the appropriate inquiries, that they have searched for it  
38          here, there and everywhere and that it is not to be found.

39                 Whether that be by way of affidavit or witness statement

1 is probably a matter of semantics. The question, though,  
2 is whether there should be a formal statement. The  
3 purpose of such formal statements is that it focuses the  
4 minds of those making them to making sure that they have,  
5 indeed, conducted the appropriate inquiries.

6 It is a document of considerable significance. Had  
7 this been litigation, I fancy it would not have gone  
8 missing. Had this been litigation, I would be making  
9 rather more stern observations. But Umbro is not, vis-a-  
10 vis us, directly a party; we can only apply these rules  
11 by analogy. It is deeply unfortunate.

12 We would also quite like to know what steps were  
13 taken in a legal sense to cause its preservation. In  
14 other words, what advice was given to Umbro. In ordinary  
15 cases where documents go missing one looks for two things:  
16 were they warned to keep it and then (if it was not kept)  
17 what went wrong or they were not warned to keep it (which  
18 in this case may be the case, because it is only quasi  
19 litigation), in which case it is slightly more  
20 understandable that it has gone. But it has gone during  
21 the currency of these proceedings, not antecedently to the  
22 investigations. It appears to have gone missing on the  
23 occasion of Mr. Ronnie's move in February 2003 - this year  
24 - during a peak time of the investigation by the Office.

25 It is a matter of great regret that the Office did  
26 not include a request for Mr. Ronnie's diary in the  
27 Section 26 notices, but it did not. Apparently on the  
28 dawn raid they were told that it was kept by Mr. Ronnie on  
29 his person, and he was away in Malaysia at that time.

30 It does not appear to have been followed up in an  
31 administrative or enforcement way. Nonetheless, it is  
32 plainly a document of significance to everyone.

33 THE CHAIRMAN: Thank you. Ms. Bacon I need to look to you, I  
34 am afraid, on this point. We have got a slightly  
35 complicated, triangular situation here with you and the  
36 OFT and Allsports. I do appreciate that Umbro has at  
37 various times in this litigation been caught in an  
38 uncomfortable crossfire.

39 MS. BACON: It seems that we have on this occasion. The

1 position is absolutely set out in correspondence as  
2 attached to Allsports skeleton.

3 THE CHAIRMAN: We had better have a look at that just to  
4 remind ourselves.

5 MS. BACON: Sir, it is annex 3, page 1. Sir, this is  
6 obviously not the original correspondence: this is the  
7 correspondence between the OFT and Allsports rather than  
8 OFT and Umbro, but the OFT has extracted in its letters to  
9 Allsports Umbro's responses. On page 1, Catherine  
10 Rosevere, Umbro's general counsel, explained what the  
11 position was: she had conducted a search; it was not  
12 held; she explained that at the time of the leniency  
13 witness statements copies of the relevant sections of the  
14 diary were taken; the OFT was aware of the existence of  
15 this diary; they never asked for it; they did not ask  
16 for any further copies of pages to be produced; at some  
17 stage thereafter, the original diary went missing. We do  
18 not know whether it is still with Mr. Ronnie. It may be  
19 at Umbro's offices somewhere, but an extensive search has  
20 been conducted and nothing has been found. And there it  
21 is.

22 THE CHAIRMAN: Ms. Bacon, you are about to take us there, I am  
23 sure, but having read that bit it then goes on to say:

24 "We have asked Umbro to state what steps they have  
25 taken to preserve Mr. Ronnie's diary or a copy of  
26 it, either at the time his statement was prepared or  
27 subsequently during the investigation."

28 What is the answer to that?

29 MS. BACON: The reply to that was on page 5. Some  
30 clarification was provided. This was a week later. On  
31 9th December Catherine Rosevere stated:

32 "Umbro was not in possession of Chris Ronnie's  
33 original diary."

34 That is page 5 of the annex.

35 "True copies of the diary were taken for the  
36 purposes of the exhibits to the original witness  
37 statements, i.e. true copies of the pages which were  
38 annexed to those witness statements. The OFT never  
39 asked for a copy of the whole diary as part of the

1 investigation and were seemingly satisfied with the  
2 relevant copies of the diary as exhibits to the  
3 witness statements."

4 That answers the question: all that Umbro did was take  
5 relevant pages, which it annexed to the witness  
6 statements, and returned the original diary to Mr. Ronnie.

7 THE CHAIRMAN: So the answer to the question, "What steps have  
8 they taken to preserve Mr. Ronnie's diary or a copy of it  
9 at the time that his witness statements were prepared or  
10 subsequently", is, by inference, that no steps were taken,  
11 except those mentioned by Ms. Rosevere.

12 MS. BACON: Precisely. If you would like to read further down  
13 the page on 5, she explains again:

14 "Where necessary copies of the relevant pages of the  
15 original diary were taken and annexed. You have  
16 copies of these pages. I do not have any more.  
17 There is nothing else to produce. The original  
18 diary was returned to the owner."

19 Umbro is in a difficult position: it can say no more.  
20 This is exactly the position. We simply do not see what  
21 further can be achieved by a formal witness statement when  
22 the OFT and Allsports now know precisely Umbro's position.

23 It simply puts Umbro to extra time and expense in  
24 preparing this witness statement when it has fully  
25 explained the situation in correspondence with the OFT.

26 THE CHAIRMAN: Mr. West-Knights, we could, formally speaking,  
27 direct Ms. Rosevere to file a witness statement confirming  
28 the contents of what she has said to the OFT. I am not  
29 completely sure that, as a formal step, it is entirely  
30 necessary. There is no reason to doubt that we have not  
31 got as near to the bottom of it as we are ever going to  
32 get as far as Umbro is concerned.

33 MR. WEST-KNIGHTS: Sir, the implication that nothing was done  
34 is not quite the same as a statement as to anything was  
35 done. Secondly, this diary went missing during the course  
36 of an extant leniency application by Umbro, during which  
37 time it was plainly under an obligation to make available  
38 to the OFT ----

39 THE CHAIRMAN: It apparently went missing - we do not quite

1 know when it did go missing.

2 MR. WEST-KNIGHTS: Page 4, sir, at the top. This is us:

3 "We note in this context, assuming the move referred  
4 to in the extract you quote from Umbro's letter is  
5 Mr. Ronnie's leaving his job at Umbro, the diary  
6 appears to have disappeared in February 2003, right  
7 in the middle of the final stages of the OFTs'  
8 administrative procedure."

9 And, of course, as we now know but did not know then,  
10 during the course of an Umbro leniency application which  
11 was rejected orally on 26th February.

12 THE CHAIRMAN: What is it exactly that you want to know that  
13 you do not already know?

14 MR. WEST-KNIGHTS: I would like to have in one place a formal  
15 statement, first, that, copies having been provided to the  
16 Office of what Umbro perceived to be relevant pages, no  
17 steps were taken to preserve the diary; it was returned  
18 to Mr. Ronnie; he was not advised to look after it; he  
19 was given neither general nor specific instructions to  
20 retain it; that the best information that Umbro can  
21 provide is that it went missing some time after Mr.  
22 Ronnie's move in February 2003; and (perhaps this is the  
23 important thing) that there are no further steps that  
24 Umbro can take now to attempt to locate it. It appears  
25 that Ms. Rosevere has been searching for it. I would like  
26 to be satisfied that every step has been taken and that no  
27 further step can be. It is not a question of semantics,  
28 sir, it is a question of focusing on every step having  
29 been taken that can be taken. Whether that means that Ms.  
30 Rosevere would like to have ten days with Umbro to make a  
31 final intense search and enquire inside Umbro, not merely  
32 by herself as in-house counsel, then that would, of  
33 course, be appropriate. But we would wish to know that no  
34 stone has been left unturned.

35 MS. BACON: Sir, as to Mr. West-Knight's last suggestion, I  
36 have just had a conversation with Ms. Rosevere. She says  
37 she has been searching for it; she asked all the relevant  
38 people. The only thing that she can do further is to  
39 personally ask every single person within the Umbro



1 building whether they have seen the diary and whether they  
2 have it in their cupboards. That is the only further step  
3 that can be taken. She is willing to do that.

4 As to whether she should then file some kind of  
5 formal statement, I am concerned at the tenor of Mr. West-  
6 Knights' request. There seem to be in Allsports' demand  
7 for this diary some inference that Umbro is to blame in  
8 not preserving the diary.

9 We would stress that the OFT were at all times aware  
10 of the existence of the diary and they did not ask for it.

11 It was not incumbent upon Umbro to then preserve relevant  
12 pages upon the hypothesis that at an appeal several years  
13 in the future another party might want to use different  
14 pages. That is all I can say. Umbro did take the  
15 necessary steps. It did not seek to conceal the existence  
16 of this diary from the OFT.

17 THE CHAIRMAN: We would not draw an adverse inference of that  
18 kind against Umbro, Ms. Bacon.

19 MR. WEST-KNIGHTS: No adverse inference is sought to be drawn.

20 It is a great shame though where you produce a witness  
21 statement that exhibits by way of copy some pages from a  
22 diary and neither the originals of those pages nor a copy  
23 of any of the rest of it is retained as a matter of common  
24 sense. It cannot have been a big surprise to Umbro that  
25 the statements which were being made by Mr. Ronnie were  
26 controversial.

27 THE CHAIRMAN: I think, Mr. West-Knights, a lot of the  
28 specific confirmation that you seek is more or less  
29 implicit in what we already have, but if you wish to be,  
30 as it were, finally sure I do not - thinking aloud - see  
31 any particular reason why your solicitor should not write  
32 directly to Umbro to say that those are the inferences  
33 that you draw and just seek directly from Ms. Rosevere an  
34 answer to whether there is anything that Umbro wishes to  
35 add to that.

36 MR. WEST-KNIGHTS: Provided that it is formally confirmed. I  
37 am grateful for the suggestion. I do not know how many  
38 people work in the Umbro building; I have not got the  
39 slightest idea of the size of the organisation; I have

1 the feeling it is not that big. But the fact is that  
2 cupboards do contain bits and bobs and people do shove  
3 stuff in cupboards in offices, and there may be a box of  
4 Ronnie's stuff sitting in a cupboard that is just  
5 mouldering, and then we would find the diary. This is not  
6 an attempt to embarrass anybody: it is actually an  
7 attempt to make sure that, so far as we can, we try hard  
8 and find the diary and it may in fact flush the diary out,  
9 to put an e-mail round everybody in Umbro.

10 THE CHAIRMAN: Ms. Rosevere, throughout this case, has made  
11 valiant efforts to help us with a lot of difficult points.  
12 If she is prepared to have one final search and therefore  
13 confirm that all stones have been turned up as far as is  
14 humanly possible to do it (within reason), then that would  
15 be helpful for the case.

16 MR. WEST-KNIGHTS: I am very much obliged; that would meet  
17 the bill. Thank you very much, sir.

18 THE CHAIRMAN: If you want further written confirmation, then  
19 I think you should write direct to Umbro and copy us in  
20 with the correspondence.

21 MR. WEST-KNIGHTS: We will write a note confirming what has  
22 passed between us today and ask Ms. Rosevere to let us  
23 know - however long it is going to ask the employees to  
24 have a look in their cupboards - to let us know what the  
25 result is.

26 THE CHAIRMAN: It is in the transcript, so we know what has  
27 passed.

28 MR. WEST-KNIGHTS: I am very grateful to you, sir, thank you.

29 THE CHAIRMAN: There is an application from Manchester United  
30 for permission to amend.

31 MR. HARRIS: Sir, if I can take item 8, I hope extremely  
32 quickly, I think the Tribunal, as well as all the parties,  
33 have been copied in on the proposed amendment which arises  
34 out of the provision of information after the lodging of  
35 the original notice of appeal about 8% applied at step one  
36 to, on the one hand Umbro and on the other hand the FA,  
37 and Manchester United seeks to plead that it has been  
38 unfairly and disproportionately treated by reference to  
39 them.

1 THE CHAIRMAN: Is that opposed?

2 MR. HARRIS: I do not understand it to be opposed.

3 MR. MORRIS: It is not opposed.

4 THE CHAIRMAN: Then permission to amend.

5 MR. HARRIS: I am very grateful. Number nine is also me on  
6 behalf of the football club. Formal application to submit  
7 this reply. I do not understand this to be formally  
8 opposed, though the OFT does have an issue with some of  
9 the content of paragraph 13. It is perhaps appropriate  
10 for me to leave it to them to make any submissions they  
11 want and deal with it in that way, but I ask for formal  
12 permission for that whole reply,

13 THE CHAIRMAN: Is that opposed, Mr. Morris?

14 MR. MORRIS: Sir, there is only one point in the proposed  
15 reply that the Office considers is too vague and which we  
16 ask should be clarified before the reply is formalised.  
17 In a nutshell, we say, as the Tribunal has seen, that you  
18 will be considering the overall penalty in the round and  
19 that it is relevant that the OFT acted, as we say, very  
20 conservatively on one part of the fine calculation, that  
21 related to the Umbro sponsorship income, royalties for the  
22 grant of a trademark licence.

23 We have said in our defence that we took the lowest  
24 figure and that we could reasonably have taken a higher  
25 figure and that that would have eclipsed all of the heated  
26 argument about turnover on kit or shirts.

27 In the proposed reply, Manchester United note that,  
28 and they say that for us to have taken a higher figure  
29 would have been unsustainable in fact and in law. We have  
30 said, "Why do you say that?" They have said it is  
31 sufficiently pleaded.

32 Perhaps I do not need to take the Tribunal to the  
33 paragraphs. I believe I have summarised it accurately.  
34 We say that it should be clarified now. First, because,  
35 obviously, the rules of the Tribunal say that matters such  
36 as that should be pleaded fully at the outset. That is  
37 all the more so when one has a late pleading such as the  
38 introduction of a reply. Thirdly, it is unsatisfactory to  
39 leave this to skeletons, if that was what was going to be

1 proposed, given the late stage and all of the other things  
2 that the Office will have to do at that time. It is a  
3 simple point and it should be clarified now by paragraph  
4 of further pleading.

5 THE CHAIRMAN: Yes, Mr. Harris?

6 MR. HARRIS: Sir, if I may, we do resist that for a number of  
7 very simple reasons. First and foremost, if one has  
8 regard to paragraph 20 of the defence, this point is  
9 raised by the OFT for the first time, and it reads:

10 "The OFT took an extremely conservative view about  
11 MU's relevant turnover ..."

12 It then goes on to say that it might have chosen higher  
13 figures or could reasonably have chosen "a somewhat higher  
14 figure". So the point there is raised in general, rather  
15 nebulous and certainly wholly unparticularised and non-  
16 specific terms.

17 In response, in the proposed reply it is dealt with  
18 in exactly the same manner: in general terms. It is said  
19 in general terms, "Not a bit of it. If you'd have tried  
20 anything higher it would have been unsustainable and it  
21 would have been appealed." So a general point has been  
22 met by a general proposed reply.

23 If the OFT now wishes to put flesh on the bones of  
24 its general point and say, "We could have done such and  
25 such and such and such by reference to this, that and the  
26 other", so be it. They have not chosen to do so in their  
27 defence. There is obviously no need for us to set up in a  
28 proposed reply a whole series of possible hypotheses about  
29 what they say they might or could reasonably have done in  
30 order to knock them down: that would be absurd.

31 The second reason is equally profound, and it is  
32 that the whole thing is irrelevant, as pleaded in our  
33 proposed reply. It cannot possibly be relevant, we submit  
34 - and this is the second part of the proposed paragraph 13  
35 - for the OFT to defend a penalty appeal - this is a broad  
36 general point - by saying, "Oh, well, of course, you say  
37 your penalty was too high. We could have made it a lot  
38 higher, so therefore what you've got is all right."

39 In my respectful submission, this is a bit of a

1 storm in a teacup; we should have permission for the  
2 general response; if the OFT wish to make more of it, it  
3 is for them to put forward particulars and how they seek  
4 to do so, whether by way of letter or by way of skeleton  
5 argument, is a matter for them.

6 THE CHAIRMAN: Mr. Harris, the general principle in relation  
7 to pleadings of this kind is that we should try to avoid  
8 surprise at the hearing. You have actually pleaded here  
9 that the assertion in the defence would have been  
10 unsustainable in fact and in law. If there are any  
11 particular matters of fact on which you rely or any legal  
12 principles to which you wish to refer, it would be useful  
13 for the Tribunal to know in advance on what you rely and  
14 for the OFT to know also. If that involves you at the  
15 same time in asking the OFT to expand on paragraph 20 of  
16 the defence, that is an application you are in a position  
17 to make. But I would have thought it is not unreasonable,  
18 when you have pleaded in fact and in law, for the OFT to  
19 ask, "To what facts and what legal principles are you  
20 referring?"

21 MR. HARRIS: Manchester United are content to leave it as it  
22 is. It says here quite clearly that no higher basis would  
23 have been sustainable. That is the end of the matter.

24 THE CHAIRMAN: What you are saying is, there are no facts and  
25 no legal authority to which you wish to refer in order to  
26 sustain that argument.

27 MR. HARRIS: Yes, that is right. It is quite clear as it is.  
28 They say, "We could have chosen something higher"; we  
29 say, "No, you couldn't."

30 THE CHAIRMAN: It is an argument, but they are not seeking to  
31 rely on any particular facts or any particular legal  
32 principles, so you can deal with the argument on that  
33 basis, can you not, Mr. Turner? You may say that it is a  
34 rotten argument. Whether it is a rotten argument or not  
35 we will see, but we do not know that we need any more  
36 particulars at this stage because they say they are not  
37 relying on anything except the argument.

38 MR. TURNER: It may be that my learned friend will think  
39 better of this after the case management conference.

1 THE CHAIRMAN: If he does, he will not be allowed to raise it  
2 without our permission.

3 MR. HARRIS: Sir, I am afraid I cannot leave it at that  
4 because, firstly, I resist the inference that I will go  
5 back and think about this some more and suddenly have a  
6 volte face. Actually, the situation is really rather more  
7 complex. There was a whole raft of lengthy, difficult,  
8 detailed correspondence between the OFT and my lay client  
9 concerning what the appropriate level of turnover under  
10 the Umbro sponsorship agreement would have been.

11 A number of points were put forward by the OFT,  
12 including some that were patently absurd. They were all  
13 rejected in detail in that inter partes correspondence.  
14 In the end, the OFT came out with, "Oh, we'll take what  
15 they've now called a generous low figure." It could be  
16 the case that Manchester United could reiterate and repeat  
17 everything that went on in that inter partes  
18 correspondence. That, in my respectful submission, would  
19 be a total waste of time and resources.

20 If the OFT now wishes to say, "Oh, no, we were  
21 thinking of doing this. We could have done it", why have  
22 they not pleaded that? All they have made is one  
23 generalised point, "We could have been a little bit  
24 harsher upon you." In general terms, we have replied,  
25 "No, you couldn't." We are meeting a general point that  
26 is made by the OFT. It is absolutely not necessary for us  
27 to go into further specifics of, "Oh, well, if you were  
28 thinking of doing this, then we would have said that. If  
29 you were thinking of doing the other, we would have said  
30 that."

31 What I would be happy to do is to provide a clip of  
32 that inter partes correspondence and, if needs be, annex  
33 it to the reply so that the Tribunal is fully alert to  
34 that lengthy - some of these letters are five pages long,  
35 talking about market definition and so on. We would be  
36 more than happy to do that. That summarises everything  
37 and it would be all out in the open. But it would be, in  
38 my respectful submission, a totally disproportionate  
39 response to add it in by way of pleading.

1 THE CHAIRMAN: The inference I am getting is that this is  
2 background that is relevant to your case on penalty, that  
3 there was a long argument about it and at the end of the  
4 day they came to this approach and they are stuck with it.  
5 If we need to go into that, then you say we need to know  
6 what the background is.

7 MR. HARRIS: No, we do not say that. It is the OFT's case  
8 that they say, "We could have done something more." They  
9 raised it. In my respectful submission, it should be for  
10 them to annex this correspondence or somehow particularise  
11 it or plead it or refer to it.

12 Our case is, it is totally irrelevant because it is  
13 illegitimate for a fining authority such as this to posit  
14 that it might have done something harsher without  
15 particularising it. In an effort to be helpful to the  
16 Tribunal, I am happy to put that correspondence clipped  
17 together and whether you call it annexed to my reply or to  
18 their defence seems to me neither here nor there. But  
19 what I do firmly resist is the idea that I should be put  
20 to the trouble of meeting five hypothetical defences that  
21 have never been made.

22 It is quite stark, if I may respectfully say, that  
23 in paragraph 20, where the OFT plead that it took an  
24 extremely conservative view and, in the final paragraph,  
25 could reasonably have chosen "a somewhat higher figure  
26 which would have eclipsed the disputed £357,000". They do  
27 not go on to say, "And this is the basis upon which we  
28 would have chosen 'somewhat higher' figure and these are  
29 the facts and matters upon which we rely, including legal  
30 argument."

31 They do not say that, so all that we have done in  
32 response is to say, "No, you couldn't and if you had we  
33 would've appealed." With the greatest respect, this is an  
34 about face. This is Mr. Turner or his team, who should be  
35 putting forward these particulars and we can then attack  
36 them. As it is, we have said, "No. In general terms, no.

37 And, in any event, as a matter of submission in our  
38 reply, it is all irrelevant."

39 THE CHAIRMAN: I would have thought the easiest way in which

1 to deal with this is for you to serve the reply as it is  
2 and to serve with it the correspondence so that we have  
3 got it.

4 MR. HARRIS: I am very happy to do that, sir.

5 THE CHAIRMAN: Then we will know, roughly speaking, where we  
6 are. Mr. Colgate is seeking to clarify whether, in  
7 addition to what you have already told us, there are any  
8 other legal points or other legal submissions of which we  
9 ought to be aware as soon as possible on this issue. When  
10 you say "in fact and in law", do we simply square bracket  
11 or strike the words "in fact and in law"?

12 MR. HARRIS: No, I certainly do not invite you to do that. I  
13 think the matter will be clearer with the clip of  
14 correspondence. I have a fairly good recollection of it  
15 in my mind as we speak and it does go through both issues  
16 of fact and arguments of law in some considerable detail  
17 as to why it would have been totally inappropriate and/or  
18 unwarranted to have taken a higher level of "relevant  
19 turnover" under the sponsorship agreement than that which  
20 was taken.

21 If needs be, post further perusal by both parties of  
22 that clip of correspondence, it could be developed in  
23 skeleton arguments. I rather suspect it will not to be  
24 because these letters were carefully drafted and are  
25 rather long.

26 THE CHAIRMAN: As far as you are concerned, the kernel of the  
27 argument on relevant turnover is in the correspondence.

28 MR. HARRIS: Yes, and of course skeletons will be exchanged in  
29 advance, so if the OFT wishes to make more of a particular  
30 way in which they say they could have chosen a higher  
31 figure, so be it.

32 THE CHAIRMAN: But it is undesirable that that waits till  
33 skeletons.

34 MR. HARRIS: Perhaps it can be introduced further in inter  
35 partes correspondence after the clip is put together. I  
36 am happy to undertake to put together a clip within, say,  
37 seven days and pass it round the houses.

38 Formally, sir, there are two very short witness  
39 statements that come as part of or annexed to the reply.



1 I do not understand there to be any objection to them and  
2 I ask for formal permission. That is the second of Mr.  
3 Beswitherick and the second of Mr. Kenyon, a very short  
4 one.

5 THE CHAIRMAN: Yes. Mr. Turner?

6 MR. TURNER: Sir, if the kernel of argument is in the clip it  
7 would be at least helpful if Mr. Harris could draw  
8 attention to the passages which contain the argument,  
9 because I think that would then clarify it and meet our  
10 point.

11 So far as legal principles are concerned, I am not  
12 absolutely clear where we stand on that. It would be  
13 helpful if Mr. Harris or Mr. Roth could explain the legal  
14 principles which make our case that we could have raised  
15 the fine by a £375,000 figure unsustainable in law as well  
16 as in fact.

17 THE CHAIRMAN: What would be helpful to us, Mr. Harris, if you  
18 do not mind is this. When you serve this reply, you also  
19 serve with it the correspondence and you indicate in a  
20 covering letter the passages in the correspondence you  
21 would particularly like us to read.

22 MR. HARRIS: Yes, I am very happy to do that.

23 THE CHAIRMAN: If there are any particular legal arguments  
24 that are not in the correspondence, would you be kind  
25 enough to indicate in a covering letter the nature of the  
26 arguments so that we can start to think about them?

27 MR. HARRIS: Yes, I am very grateful. I am happy to do that.

28 THE CHAIRMAN: There is a reply from Umbro too, is that right?

29 MS. BACON: There is. Sir, you will have seen that and, I  
30 hope, also the witness statement of Catherine Rosevere.

31 THE CHAIRMAN: Yes.

32 MS. BACON: I do not understand this to be objected to. I  
33 should just add one thing. We would propose to attach to  
34 the reply formally copies of the OFT manuscript and typed  
35 notes of that leniency meeting. In addition, we agreed  
36 yesterday to disclose Umbro's notes of the leniency  
37 meeting, so we would also be attaching those and that  
38 would give rise to a few small substantive amendments to  
39 the text of the reply and Ms. Rosevere's witness

1 statement. But Umbro's notes do not differ substantially  
2 from those of the OFT. They are somewhat more polished.

3 THE CHAIRMAN: So the reply and witness statement that you  
4 will finally serve will be slightly amended from the draft  
5 which we have got in front of us.

6 MS. BACON: To reflect Umbro's notes, yes.

7 THE CHAIRMAN: Thank you. Is there any objection, Mr. Turner?

8 MR. MORRIS: No, we do not have any objections, sir.

9 THE CHAIRMAN: Permission then on that basis. The next thing  
10 I have got on my list is an almost throw away line from  
11 Allsports at the end of their submissions for this CMC  
12 about evidence on what I think they refer to as price  
13 series or something of that kind. It is a bit late now,  
14 Mr. West-Knights, to be going into this sort of thing.

15 MR. WEST-KNIGHTS: With respect, I will tell you what it is.

16 THE CHAIRMAN: I just wanted to flag up that we have noticed  
17 it and thought, "That's a bit late."

18 MR. WEST-KNIGHTS: It is not new evidence. I will tell you  
19 what it is, and the Tribunal can make a decision about it,  
20 plainly. Price series - when I first looked at it, I am  
21 bound to say I was not quite sure what the reference was.

22 There is a deal of information in the papers, not least  
23 because during the course of the investigative process  
24 these materials were collated by the Office.

25 There is a good deal of information about the dates  
26 on which the prices moved in respect of different types of  
27 replica shorts, including (so far as is material)  
28 Manchester United and England.

29 As part of the dispute on penalty, there is an  
30 argument between the parties as to which is the relevant  
31 market. The bid for Allsports is that the relevant market  
32 in question is replica shirts. The bid for the office is  
33 that it is replica kit in respect of the particular club -  
34 adult replica shirts, we say.

35 Whether or not something belongs to the same market  
36 is a mixed question of economics and law, but the  
37 information which is available enables one - it is a dull  
38 job, but it produces an interesting comparative result -  
39 to see whether or not when the price of an adult replica

1 shirt changes there is any connection between that event  
2 and a change in price of the associated junior shirt,  
3 shorts, socks and so forth. That is to say, whether  
4 replica kit for Manchester United, to take an example,  
5 operates as a whole or whether there is in fact no  
6 connection between the changes in price of, say, the adult  
7 shirt and any other aspects of the kit.

8 If there were no connection between the two, then it  
9 would tend to suggest that they operated in a different  
10 market or that they could not be said to be allied  
11 together in the economic fashion which underlies the  
12 thesis of the Office or one of the theses of the Office  
13 that these pieces of kit should be treated as all one  
14 single market.

15 THE CHAIRMAN: So this goes to penalty.

16 MR. WEST-KNIGHTS: It goes to penalty and it is really only a  
17 statistical drawing together of information which has  
18 already been tabulated out by the Office in respect of  
19 price changes for various aspects of the same kit. I  
20 apprehend that it would be produced in tabular form, which  
21 would be simple, and it would show either that there was  
22 or was not a correlation between the price movements,  
23 shirt as against the rest of the kit. It is as simple as  
24 that. It is only drawing together information which is  
25 already in the file. It might be done by an economist, it  
26 might be done by an accountant, it might be done by me.  
27 It does not frightfully matter, so long as the Office is  
28 satisfied that it is an accurate re-drawing together of  
29 tables which are already around and one of which is in  
30 fact attached to the decision, which is the various  
31 changes of prices in the replica shirts.

32 The exercise can, in fact, be conducted and has been  
33 conducted in draft, not merely for Man. U. and England but  
34 in respect of other shirts, because, again, it would tend  
35 to suggest, if it is not merely confined to Manchester  
36 United and England, that there is no serious correlation  
37 between the price of the shirt on the one hand and the  
38 rest of the kit on the other.

39 We have information - because of the other alleged

1 infringements - in relation to various other football  
2 clubs, the names of which escape me, but the identical  
3 statistical information is similarly available on the file  
4 and in the papers in respect of other shirts and kit. So  
5 it is not a complicated exercise, it goes only to penalty  
6 and it is a pure question of drawing together material  
7 which is already there, which is why we say it should be  
8 produced in advance of the skeletons with the underlying  
9 material, so that all somebody has to do is to check that  
10 we have not made a mistake about producing the figures,  
11 but it produced them in a way which will be helpful to the  
12 Tribunal as part of its exercise in deciding what the true  
13 market is. It is as simple as that.

14 I appreciate that the words "price series" barely  
15 begins to convey that which I have just explained, but  
16 that it is: that is what we are after. In those  
17 circumstances, I would hope that you would revise your  
18 preliminary view.

19 THE CHAIRMAN: Do you have any view on this, Mr. Morris?

20 MR. MORRIS: I have two observations on it, sir. The first is  
21 that we would submit that the exercise that is suggested  
22 is not necessarily a matter of pure mechanical fact but  
23 that, effectively, economic conclusions will be sought to  
24 be drawn from those facts. The conclusions to be drawn  
25 are then in turn matters of economic expertise.

26 It would then follow from that that if this were a  
27 matter which were to be pursued it would be a matter,  
28 strictly, for expert evidence. It may be short expert  
29 evidence, but nevertheless expert evidence.

30 The second point is this, and that is timing. If  
31 this is a matter that is to be sought to be relied upon,  
32 it should be done as soon as possible, certainly not one  
33 week before the lodging of Allsports' skeleton in  
34 circumstances where that is the day upon which - this is  
35 on penalties, I apologise. I had assumed it was on  
36 liability. Nevertheless, this point still applies. If  
37 this is a matter that is now to be raised, it is  
38 effectively a short expert's report on the pricing  
39 relationship and that is a matter which should be done as

1           soon as possible; certainly within the next couple of  
2           weeks at the latest.

3       THE CHAIRMAN: I had not understood Mr. West-Knights to be  
4           saying there was going to be an expert's report. I had  
5           understood him to say someone is going to collect up a lot  
6           of figures and present them.

7       MR. WEST-KNIGHTS: I personally do not think that it requires  
8           an economist to make sensible submissions - after all, one  
9           of the purposes of this Tribunal is that it is able to  
10          take judicial notice of economic and legal matters. It is  
11          because there are three of you who have mixed legal and  
12          economic expertise. I happen to have half a degree of  
13          economics; perhaps that is why I am at fault, if I am,  
14          here. But I was proposing to say that if there is no  
15          relationship between the price changes then plainly they  
16          do not operate in the same market. It is as simple as  
17          that.

18                 If my learned friend thinks that an economist should  
19                 give that evidence then, no doubt ----

20       THE CHAIRMAN: It is not up to him, it is up to you to decide.  
21                 It is always very difficult to be sure what inference you  
22                 are drawing from this sort of material.

23       MR. WEST-KNIGHTS: I am very happy to provide with the figures  
24                 the inference which we say we draw, but, to be blunt and  
25                 frank, the likelihood is that these tables will be  
26                 prepared finally by a person who would be qualified to  
27                 give an opinion. If my learned friend would prefer to see  
28                 the same person say, "And the conclusion which I draw,  
29                 being an MA in economics (or whatever) is that these  
30                 things operate in a different market or a sufficiently  
31                 different market to make them, for the purpose of the  
32                 penalties, capable of being separated out", then I am  
33                 quite content that that should be done.

34       THE CHAIRMAN: But then he might need to get evidence in reply  
35                 and so forth and so on and we get into a sub-argument in a  
36                 rather telescoped way as far as the timetable is  
37                 concerned.

38       MR. WEST-KNIGHTS: I am slightly surprised that this is  
39                 causing a problem, but there it is. I was not

1           anticipating using expert evidence for the purposes.  If  
2           we do, it will be short, because I have already said what  
3           the conclusion we are seeking to put forward is, namely,  
4           that there is no correlation between the pricing and  
5           therefore it is not the same market.  I am bound to say  
6           that I regard that as a broadly self-evident proposition,  
7           but if he wants to have an economist to have a quick look  
8           at that it is not going to be very complex.

9   THE CHAIRMAN:  Can we just have a think about the timing?  You  
10           have said one week before lodging the opening skeleton  
11           arguments.

12   MR. WEST-KNIGHTS:  Yes.

13   THE CHAIRMAN:  You mean the arguments on liability.

14   MR. WEST-KNIGHTS:  Yes.  I cannot remember what that date is.

15   THE CHAIRMAN:  I think they were going to be lodged, with any  
16           luck - was it by 27th February that we said?

17   MR. MORRIS:  Sir, the position on liability is that the OFT  
18           goes first on the 23rd February and the appellants go a  
19           week later, which I think is the 1st or 2nd March.

20   THE CHAIRMAN:  That is right, the Monday morning.

21   MR. WEST-KNIGHTS:  I assumed it to mean seven days before the  
22           opening shot.

23   THE CHAIRMAN:  Yes, quite.

24   MR. WEST-KNIGHTS:  Before the OFT's skeleton.  So that would  
25           bring us back to some date in the middle of February.

26   THE CHAIRMAN:  Which is the 16th February, which is  
27           effectively two weeks from today.

28   MR. WEST-KNIGHTS:  Three and a half weeks.

29   THE CHAIRMAN:  Yes, that is right.

30   MR. WEST-KNIGHTS:  I do not want to pick nits about this.  I  
31           cannot warrant that we can do this in a fortnight, but we  
32           can certainly do it within three weeks.  However, if you  
33           would like us to use best endeavours to do it within  
34           fourteen days plainly we will.

35   MR. MORRIS:  Sir, we would really ask that it be done within  
36           fourteen days.  It was a fairly simple exercise, as my  
37           learned friend has just described it.  If we do need to do  
38           some work on it ourselves and we do need to look into it,  
39           with the week leading up to our main skeleton occupying,

1 no doubt, lots of other matters, the OFT would find it of  
2 great assistance to have it sooner than three weeks from  
3 now. We would ask that if it is to be provided it is to  
4 be provided within two weeks of today.

5 THE CHAIRMAN: Mr. West-Knights, shall we say best endeavours  
6 by the 9th February and if you run into insuperable  
7 problems you can come back, but if the task is as simple  
8 as you say it is then I think there is still time to do  
9 it. Everybody has got a lot on their plates, and the  
10 sooner it is done the better.

11 MR. WEST-KNIGHTS: Sir, I am very grateful, that was my  
12 proposition. I should make it clear that it has not been  
13 done in respect of England. That is my only caveat. I  
14 have seen these coloured schedules in respect of  
15 practically every other football club in the world but  
16 not, oddly enough, England. But there it is. I am more  
17 than content with that and very grateful.

18 MR. COLGATE: Could I just ask one question to make sure this  
19 is absolutely clear? This is going to be based on  
20 information which is already in the file.

21 MR. WEST-KNIGHTS: Yes.

22 MR. COLGATE: And there is to be no new analysis prepared.

23 MR. WEST-KNIGHTS: That is correct, sir. As far as I am  
24 aware, we have no source of information other than that  
25 which is in the files. We certainly have no intention of  
26 bringing in any new evidence. The analyses which have  
27 been conducted to date have been conducted on information  
28 which has come from the Office in the course of these  
29 proceedings.

30 THE CHAIRMAN: Not necessarily information actually in the  
31 decision, but information that is in the documents.

32 MR. WEST-KNIGHTS: Not necessarily information which is in the  
33 decision, although there are a large number of tables in  
34 the decision relating to the prices of various shirts,  
35 including, I think, Notts. Forest. I cannot warrant that  
36 it is material in the decision, but it is material which  
37 is around and has been tabulated prior to our seeing it.  
38 That is my understanding.

39 MR. COLGATE: So you are simply re-formulating information

1           which is already in the system.

2   MR. WEST-KNIGHTS: It is in the domain. Exactly, sir, that is  
3           very helpful. It is simply drawing it together and  
4           putting it into a straight line for comparative purposes  
5           and, indeed, colour coding it, broadly speaking, so that  
6           if it is the right colour there is a correlation and if it  
7           is the wrong colour there is not.

8   MR. COLGATE: My only other question is, is it being done on a  
9           national basis? There has been comment made about price  
10          variation sometimes across the country.

11   MR. WEST-KNIGHTS: Pass. I am sorry. "I do not know" is the  
12          frank answer. Plainly, if there is a piece of analysis  
13          which might be reduced in significance by that aspect, it  
14          will have to be asterisked or starred, but I am afraid I  
15          cannot give any more particulars on that.

16   MR. MORRIS: Sir, can I raise one matter following on from Mr.  
17          Colgate's remarks? We would ask that when this material  
18          is provided a cross-references to where the source is is  
19          fully provided - I am sure it will be - so that if we need  
20          to look at it we know where we can go amongst the  
21          documents.

22   MR. WEST-KNIGHTS: Speaking for myself, I shall be  
23          disappointed if we cannot do better than cross-references:  
24          the thing ought to have the tables in it either showing  
25          that it is a table from the Office or it is derived from  
26          information therefrom.

27   THE CHAIRMAN: We are asked to rise in any event because we  
28          need to change over the shorthand writers. Are there any  
29          matters in the case management conference that we need to  
30          deal with before we rise or can we rise with a view to  
31          starting the strike out argument shortly?

32   MR. MORRIS: The only other matter that has arisen is the  
33          question about live note and transcripts, which we  
34          suggested at the last CMC and Allsports have suggested or  
35          raised in the context of their CMC submissions. The OFT  
36          respectfully suggest that it would be helpful in this  
37          case.

38   THE CHAIRMAN: I think you need, Mr. Morris, to communicate  
39          with the Registrar on that point. We are in the middle of



1 a nightmare regarding moving to the new building and I  
2 think it is up to the Registrar whether this can be  
3 arranged or not.

4 MR. MORRIS: Very well. We will take the matter up with him.

5 MR. WEST-KNIGHTS: We only flag this so that it is not lost in  
6 the wash. I am personally unconvinced. It is jolly  
7 expensive.

8 THE CHAIRMAN: Obviously, we do not have an unlimited budget.  
9 It is nice to have it, but whether it is strictly  
10 necessary or affordable or feasible, I just do not know.  
11 It is a technical matter.

12 MR. WEST-KNIGHTS: Whether feasible or not is something that  
13 would be quite nice to determine at an early stage and  
14 then the parties can discuss the question of expense.

15 THE CHAIRMAN: I think you need to raise this with the  
16 Registrar.

17 MR. MORRIS: One other matter Mr. Turner asked me to ask was  
18 that Man. United provide their information within seven  
19 days, which is the clip of correspondence together with  
20 the short explanation.

21 THE CHAIRMAN: Yes, if we say service of the reply within  
22 seven days together with what we have indicated, is that  
23 all right, Mr. Harris?

24 MR. HARRIS: Yes, sir.

25 MR. ANDERSON: Could I raise just one point on behalf of  
26 Sports World before we rise because I do not suppose we  
27 will be staying for the strike out application?

28 THE CHAIRMAN: Yes.

29 MR. ANDERSON: I simply request that in our capacity as an  
30 informal observer we be included on the list for  
31 circulation of notifications and transcripts and draft  
32 orders and so on where they concern issues such as Sports  
33 World documents, witnesses employed by Sportsworld,  
34 because, for example, we were not included on the standing  
35 order agenda for this morning, so we did not know when the  
36 confidentiality issues would arise.

37 THE CHAIRMAN: Yes, point taken, Mr. Anderson. We will do our  
38 best to copy you in.

39 MR. ANDERSON: Thank you.

1 THE CHAIRMAN: Very well, we will rise for 15 minutes and  
2 start again at 5 to 12.

3 (A short adjournment)

4 (Manchester United and Umbro representatives had withdrawn)

5 THE CHAIRMAN: Yes, Mr. West-Knights.

6 MR. WEST-KNIGHTS: I do not propose to read to or at you my  
7 skeleton. What I would like to do, if I may - and I will  
8 be in the Tribunal's hands as to how this matter should  
9 develop - is to start with where we started on 23rd  
10 October, with one or two observations on the transcript of  
11 that occasion to remind ourselves of where this came from.

12 I understand that copies are available for everybody, but  
13 you may have them in any event.

14 THE CHAIRMAN: What we need to have clearly in our heads, all  
15 three of us, is what paragraphs in the defence you are  
16 actually seeking to strike out so that we can see it very  
17 plainly, because there has now been a further version of  
18 the amended defence. Perhaps it is logical just to remind  
19 ourselves by starting there.

20 MR. WEST-KNIGHTS: I would rather do that after lunch for the  
21 reason that I do not have a list of those paragraphs which  
22 would go. Bluntly, if, as a matter of principle, the  
23 decision is that they cannot change their case in this way  
24 then we can very rapidly, between ourselves, decide those  
25 bits which go, because they are dotted about a bit.  
26 Indeed, it may involve taking sub-sets of paragraphs or,  
27 indeed, amending certain paragraphs which are there to  
28 reflect their limited relevance if they remain. If I may  
29 say so, that is a mechanical exercise which may follow  
30 from the result.

31 Before I start with the transcript, perhaps I could  
32 just headline what this is about. First, as a matter of  
33 principle we say the defence represents an attempt, which  
34 is quite wrong in law, to change the OFT's case. As a  
35 matter of principle.

36 It is common ground that the finding resulting in  
37 the finding of infringement against Allsports is the  
38 evidence in Ronnie III that Allsports agreed not to  
39 discount. My reference to that being common ground is OFT

1 skeleton 3(b)(ii). Second, there are no findings in the  
2 decision relating to what we call retailer pressure by  
3 Allsports. The reference for that is the same sub-  
4 paragraph and 3(b)(iii).

5 The appeal is based on the rules of the Tribunal,  
6 which is to identify what is wrong with the decision. The  
7 finding in the decision is that Allsports agreed on the  
8 phone with Ronnie to fix the price of the shirt at 39.99.

9 That is it.

10 The fundamental question of principle is that it  
11 cannot be possible for the OFT at this stage to bring into  
12 the appeal matters upon which there are no findings in the  
13 decision: it is an appeal against the decision. At the  
14 risk of repeating myself - but I may say this another  
15 eight times - there is not one single finding in the  
16 decision that Allsports engaged in pressure on Umbro.  
17 That is common ground.

18 The statement and the explanation for it is this.  
19 This is again the skeleton from the other side.

20 THE CHAIRMAN: Reference - paragraph?

21 MR. WEST-KNIGHTS: Paragraph 3(b)(2), page 2:

22 "The case on retailer pressure was not deliberately  
23 abandoned' by the OFT in the decision (i.e. it was  
24 not effectively determined by the OFT not to have  
25 merit)."

26 I shall come back to that.

27 "It was simply unnecessary, in the Decision, to rely  
28 upon complaints and pressure from Allsports in order  
29 to conclude that Allsports was party to the England  
30 Agreement - the evidence in Ronnie III ----"

31 Which was the only Ronnie there was at the time of the  
32 decision.

33 "-- that Allsports agreed not to discount was  
34 sufficient in itself to establish the matter."

35 Second, they assert at sub-paragraph (iii):

36 "There is no principle of law precluding the OFT, as  
37 a responsible public authority, from pursuing (on  
38 appeal or on remission) or the Tribunal from  
39 examining (on appeal) an issue which was raised at

1 the administrative stage, but which was not subject  
2 to an express finding in the OFT's decision."

3 This case started with my saying, at page 39 of the  
4 first transcript:

5 "It is not my job to give [the OFT] a blueprint ...

6 "The existing witness statements will do, but there  
7 are two caveats to that. One, they contain material  
8 which the OFT, if I can call it that, has disavowed.

9 That is to say, there are from time to time  
10 allegations made by those witnesses which had formed  
11 support for matters contained in the original Rule  
12 14 notices, which fell by the wayside, which were  
13 abandoned by the Office and in respect of which no  
14 infringement was found."

15 What I am referring to here is exactly the material which  
16 now finds its way back into the frame.

17 "Indeed, there are passages in the decision where  
18 Mr. Ronnie, for instance, has his witness statement  
19 quoted, but they skip bits, because 'the bits' are  
20 material only to, for instance, an allegation that  
21 Allsports was guilty of putting pressure on Umbro -  
22 an allegation which is not now pursued."

23 So I make our position on that occasion crystal clear.

24 That statement was not gainsaid at any time during  
25 the case management conference. Furthermore, we say on a  
26 number of occasions in our notice of appeal that matters  
27 of pressure are not being pursued. The notice of appeal  
28 plainly proceeds upon that basis. In particular, at  
29 paragraph 6.4, we said and say that no attempt is being  
30 made now to rely upon vague and unparticularised  
31 assertions of retailer pressure.

32 THE CHAIRMAN: Could you give me that reference again?

33 MR. WEST-KNIGHTS: It is paragraph 6.4 of the notice of  
34 appeal. If I can just remind you now, when we look at  
35 what the OFT says about our notice of appeal - you will  
36 recall the statement which counsel make optimistically -  
37 the paragraphs beginning with 6 are where we deal with the  
38 findings in the decision. Paragraphs beginning with 5 are  
39 where we attempted to deal with the material which was

1 difficult to characterise, that is to say, observations  
2 from time to time in the decision, for instance, that the  
3 writing in the letter by Mr. Gourlay in 1999 had the  
4 effect of making clear to Umbro what Allsports' pricing  
5 policy was; and there is a criticism of that, implicit.  
6 It is said that that kind of conduct facilitated the  
7 making of the agreements.

8 There are other matters contained in the long  
9 chronological part of the decision where observations are  
10 made about conduct similarly: that they facilitated the  
11 agreement, but they are not being treated, ipso facto, as  
12 infringements. But they are nonetheless observations  
13 which are adverse to the parties in respect of which they  
14 are made. In particular, if I can pick up another example  
15 (we will come back to it), there was an observation made  
16 about a meeting between Miss Charnock and Umbro way after  
17 the event, in October 2000, which is characterised as  
18 being pressure by Allsports, but it is after the event and  
19 no infringement is found in respect of it because,  
20 notwithstanding that suggestion that something was going  
21 on, in the same paragraph the Office say, "Nonetheless, we  
22 regard the infringement as coming to an end on 1st  
23 October", which was the date when the price fixing in  
24 respect of Manchester United football shirts came to an  
25 end.

26 Staying with the transcript - you will recall this  
27 was in the context of what to me was a fascinating and  
28 constructive debate upon the role of the Tribunal in this  
29 emerging jurisdiction - at page 51, in partial response to  
30 my observation about witness statements - and I did  
31 suggest that the witness statements should be marked up,  
32 because, although they were comprehensive, parts of them  
33 were no longer relied upon in respect of Allsports. Mr.  
34 Turner responded in respect of how the Office saw the  
35 case:

36 "I will deal only with those [the difficulties he  
37 was expressing]. The idea that it is incumbent upon  
38 the Office to offer, proffer all relevant witnesses.  
39 I would like to stand back and just focus on what

1                   that actually means in practice."

2                   "THE PRESIDENT: Well, we are talking about this  
3 particular case.

4                   "MR. TURNER: In this case, yes. The extent to  
5 which, for example, Mr. Marsh or Mr. Prothero or any  
6 of the other individuals mentioned in the decision  
7 are relied upon for any proposition is to be found  
8 in the defence."

9                   That turns out to be not such a Freudian slip as it might  
10 have appeared to be.

11                   "It is fully cross-referenced, it is fully noted.  
12 It is apparent from the document itself.

13                   "THE PRESIDENT: In the decision, you mean?

14                   "MR. TURNER: In the decision, and it therefore must  
15 not be forgotten, no particular instance has been  
16 drawn to your attention where that is not the case.

17                   It is a very conscientious decision in that  
18 regard."

19                   In other words, this is part of the discussion we were  
20 having when the OFT were saying that their opening was the  
21 decision; and that the decision would identify those  
22 passages of the witness statements upon which reliance  
23 would be placed. As you will have noted in the skeletons  
24 already, there have been specific exclusions from the  
25 quotations of the witness statements in the decision for  
26 the precise purpose of excising any finding that might -  
27 who knows? - have been made but was not in respect of  
28 retailer pressure.

29                   It was for that reason - the clarity of the approach  
30 which Allsports had to the England agreement - that I made  
31 the closing observation on that day where I said:

32                   "I have only one more thing which I do want to say,  
33 equally for the transcript, that I trust and hope  
34 that, when leading counsel for the OFT reviews these  
35 papers, conscientious thought will be given as to  
36 whether it is proper to oppose Allsports' appeal in  
37 respect of the 'England ring around'. I know what  
38 that means, the person who reads this will know what  
39 that means, but it is the alleged telephone call

1 between Ronnie and somebody at Allsports, as to  
2 which there will never be any further particulars  
3 because that has been gone through in the  
4 administrative procedure below."

5 I will give you the reference. It is quoted in the notice  
6 of appeal at 6.21.3 at tab 4 of your bundle. The office  
7 wrote to Umbro in respect of Mr. Ronnie's witness  
8 statement about the England ring-around - and the two  
9 paragraphs in particular - and the answer was, "There are  
10 no written records of any of these telephone  
11 conversations. Umbro cannot provide you with any further  
12 information about this at all."

13 So what we were told then was that there would be no  
14 further particulars beyond the firm and express statement  
15 made twice by Mr. Ronnie that he had telephoned JJB and  
16 Allsports in order to cause them to agree the price and  
17 that they did.

18 THE CHAIRMAN: When you say, "The statement made twice by Mr.  
19 Ronnie" --?

20 MR. WEST-KNIGHTS: Yes, in two successive paragraphs. He says  
21 he rang up in order to cause them to agree and, in the  
22 next paragraph, JJB and Allsports agreed.

23 THE CHAIRMAN: That is in Ronnie III.

24 MR. WEST-KNIGHTS: That is in Ronnie III. There therefore can  
25 be no doubt whatever at that stage that Allsports  
26 proceeded correctly on the basis that the England  
27 agreement was a telephone call during which an agreement  
28 was reached. Second, that we were proceeding entirely  
29 accurately upon the premise that there were no findings in  
30 the decision and that was a conscious choice by the Office  
31 that Allsports had engaged in retailer pressure.

32 The fundamental point of principle is this. If you  
33 are subjected to an appeal regime where the decision that  
34 forms the basis of the Office's case and it is incumbent  
35 on an appellant to identify what is wrong with it, you can  
36 only address the findings which the decision contains. If  
37 it were otherwise, the position would be fantastically -  
38 and I mean that in the literal sense - elastic.

39 It is now said by the Office, through counsel - or,

1 indeed, possibly just by counsel - that had it been  
2 necessary for the Office to do so it would have found that  
3 there was pressure placed by Allsports on Umbro. There is  
4 no basis for that submission whatsoever, because the  
5 decision is not the first step in the proceedings.

6 There was a finding, albeit that we said at the time  
7 it was vague, unparticularised and unsatisfactory, of  
8 retailer pressure by Allsports in the Rule 14 notices.

9 THE CHAIRMAN: Not at that stage a finding; an allegation.

10 MR. WEST-KNIGHTS: A prima facie finding, subject to  
11 representations made to the contrary by the object of  
12 those findings.

13 Representations were made by my learned friend Mr.  
14 Peretz at length, with some vigour and with some success  
15 to the effect that that preliminary view should not  
16 translate into findings because of the unsatisfactory  
17 nature of the evidence and, in particular, its vagueness,  
18 the impossibility of properly responding to  
19 unparticularised allegations and the other material that  
20 would tend to show that there was not a safe conclusion to  
21 be drawn on the evidence of Ronnie and others, but in  
22 particular Ronnie.

23 In those circumstances, it simply cannot be possible  
24 for counsel on an appeal simply to assert, "Oh, well,  
25 let's treat the decision as if it would have contained  
26 those findings or did contain those findings." There are  
27 a large number of other matters which were canvassed in  
28 the Rule 14 notices, both at the original and at the  
29 supplementary stage, in respect of my clients and others  
30 which resulted in the end in no adverse finding in the  
31 decision.

32 The effect of what is being suggested is that at any  
33 moment the Office, by mere assertion, can turn anything  
34 that was canvassed at the Rule 14 stage into a finding  
35 without the Director in fact going through the process  
36 required to make that finding.

37 The blunt fact is that this could have been  
38 different. Had the decision said, for instance, "We find  
39 that there was, in the following respects and to the



1 appropriate burden and standard of proof, pressure placed  
2 by Allsports upon Umbro in the following ways ... On that  
3 footing, they were parties to a cartel. However, we also  
4 find that there was an express agreement made on the  
5 telephone at some stage between 24th May and 2nd June",  
6 which was the only particularity which was then available,  
7 "between Mr. Ronnie and an unnamed person at Allsports, an  
8 express agreement to fix the price of the shirt. We find  
9 that to be an infringement and, furthermore, it is an  
10 infringement which is independent of the underlying  
11 findings as to pressure."

12 In that event, I would not be troubling you, because  
13 the Office would say, "We lose the express agreement case  
14 because the evidence for it has disappeared; we maintain  
15 the findings as to pressure", but there are none. It is  
16 axiomatic that the Office cannot create a finding where  
17 there is none. I appeal the decision; the decision  
18 contains no findings as to pressure. Whether they are not  
19 there because they were considered to be unnecessary or  
20 whether they are not there because they were considered to  
21 be incapable of proof is a matter of speculation, but it  
22 is an irrelevant speculation. There ain't nothing in the  
23 decision about pressure. On the contrary, there are  
24 matters pleaded, found as facts, which are expressly not  
25 used for the purposes of a finding of pressure.

26 So the fundamental premise is this. There is one  
27 finding in respect of England against Allsports; it is a  
28 pressure-free, context-free finding, except for the fact  
29 that Allsports is a competitor, simply that it is one of a  
30 number of retailers engaged in competition with each  
31 other, and that the manufacturer involved it and made it a  
32 party to an agreement - it is a spoke in the wheel type of  
33 agreement - a number of bilateral telephone calls. Full  
34 stop. The evidence for that has gone.

35 THE CHAIRMAN: Is it entirely fair to say that it is a  
36 context-free finding? Every agreement has a context and,  
37 certainly from the point of view of the Tribunal, as and  
38 when we have to address the problem of proof and  
39 credibility of witnesses, the general background context

1 of what is alleged to have happened has a certain  
2 relevance when one comes to make that assessment. Would  
3 that not be fair?

4 MR. WEST-KNIGHTS: Yes, so far, depending on where the  
5 question is going.

6 THE CHAIRMAN: I do not know where the question is going, Mr.  
7 West-Knights.

8 MR. WEST-KNIGHTS: The way in which the Office has sought to  
9 put its new cases in its defence is two-fold. Firstly,  
10 modifying the phone call. So the phone call is now said  
11 to be an assurance back to Allsports. They put it in two  
12 ways. First, that that, coupled with retailer pressure,  
13 makes them party to a cartel. Indeed, that the pressure  
14 alone, without the phone call at all, would be sufficient  
15 to make them parties to the cartel. That is pressure, I  
16 remind the Tribunal (coming up to my eighth), as to which  
17 there are no findings in the decision. There is nothing  
18 to appeal again about all that.

19 THE CHAIRMAN: Am I right in thinking they are actually  
20 putting it in a third way?

21 MR. WEST-KNIGHTS: They now put it in a third way, you are  
22 quite right, to say that the mere receipt of the  
23 information will do. Not quite, because of course I will  
24 take you briefly to the two or three relevant paragraphs  
25 in Cimenteries. We will have a look at exactly what  
26 Lafarge were up to in the context of what is undoubtedly  
27 the high water mark of involvement from the Office's point  
28 of view as a matter of law. They now translate that,  
29 perhaps not unfairly (but we need to unpack it a bit), a  
30 willing recipient of that information.

31 It must be common ground that if there were a vacuum  
32 and it were merely that X telephoned Y with a piece of  
33 information no question of cartel would arise. So  
34 imported into the word "willing" is a good deal of  
35 context.

36 It is very dangerous to invite the Tribunal to look  
37 at that simply on the receipt of information because of  
38 everything that is involved in the word "willing". In the  
39 absence of any findings of pressure in the decision, you

1 in effect simply have the receipt of information. Of  
2 course, the context is that they are competitors, because  
3 otherwise the information would not have been conveyed,  
4 but the only relevant context is that Allsports received,  
5 it is said - I will be inviting you to have a look at the  
6 likelihood of that, but only as a very subsidiary question  
7 - an assurance, that is to say, information as to Sports  
8 Soccer's pricing intentions.

9 I do not want to encapsulate too much what I was  
10 going to say about Cimenteries, but I might as well do  
11 this in two seconds. To be a willing recipient, as the  
12 Office puts it, you either have had to have requested the  
13 information or to have accepted it. In the Lafarge case  
14 there is a great wadge of acceptance in terms of what  
15 Lafarge did as the result of the conveyance of the  
16 information at the meeting of 26th November (or whenever  
17 it was).

18 In this case, there is no evidence of acceptance  
19 beyond its receipt: they did not do anything with it;  
20 there is not the slightest shadow of a finding that  
21 Allsports changed its conduct in any way as a result of  
22 that information in terms of its pricing policy. The  
23 complaint raised and met in the background part of our  
24 submissions was that in April 1999 Mr. Gourlay had  
25 somehow, in a way which was unfortunate, conveyed to Umbro  
26 Allsports pricing intentions.

27 THE CHAIRMAN: I think, Mr. West-Knights, very provisionally,  
28 arguments based on the structure of the Act - fairness,  
29 due process and all the rest of it - have one place in  
30 this application. Arguments of law as to what the actual  
31 extent of a concerted practice is in terms of the evidence  
32 that is or is not finally available are matters about  
33 which we are a bit hesitant about taking any final view at  
34 this stage without the full picture.

35 MR. WEST-KNIGHTS: I understand that. Just let me put it in  
36 context as to why I put it in that way. I am not asking  
37 you to decide that there is no prospect of Ronnie being  
38 believed, for instance, because you might take the view  
39 that that would be inappropriate on the basis of a narrow

1 matrix of experience.

2 The point is this. Had there been a Lafarge finding  
3 (if I can call it that), a willing recipient of  
4 information, there would have been set out in terms those  
5 findings of fact upon which the Office relied as  
6 establishing either the request for the information or its  
7 acceptance to a sufficient degree of materiality to  
8 establish the Cimenteries type of infringement. There is  
9 no such material in the decision.

10 Had there been a finding that without the telephone  
11 call the pressure was enough to involve Allsports in the  
12 cartel, then there would have been detailed findings in  
13 the decision and a disquisition as to how, therefore,  
14 those findings of fact translated as a matter of law into  
15 the participation in the cartel in that way: there are no  
16 such findings.

17 I am not addressing you on the footing that you  
18 should doubt the evidence; I am addressing you on the  
19 footing that there are no such findings in the decision  
20 and it is simply not open to counsel to say, "I'll have  
21 six bits from the first Rule 14 notice which don't appear  
22 in the decision; I'll have nine bits from the  
23 supplementary Rule 14 notice; and, whilst I'm at it,  
24 here's a new witness statement from somebody from whom we  
25 could have taken a witness statement a year and a half  
26 ago. We'll put that all together and make an entirely  
27 different case, a case which" - and I am going to use this  
28 word advisedly - "the Office elected not to make."

29 THE CHAIRMAN: Can you just remind me, Mr. West-Knights, what  
30 your case was at the Rule 14 notice stage?

31 MR. WEST-KNIGHTS: That it was inherently unlikely that any  
32 such telephone call would have been made. Implicitly,  
33 there was no such phone call.

34 THE CHAIRMAN: Did you have any witness statements at the  
35 time?

36 MR. WEST-KNIGHTS: No.

37 THE CHAIRMAN: So would it be fair to say that your case has  
38 firmed up a bit since then?

39 MR. WEST-KNIGHTS: I am not sure that it has. It may become

1 clearer. It has been characterised by the OFT, if I may  
2 say so, quite mechanistically as having changed because we  
3 now say there was no phone call at all. That is nonsense.

4 I cannot tell you that there was not a telephone call  
5 from Ronnie to Guest during the material period, talking  
6 about the result of Manchester City v. Arsenal. There may  
7 have been a phone call. The point is, we say there was no  
8 such phone call. The phone call which it was alleged was  
9 being made was in Ronnie III. That is the only material  
10 at the administrative stage or at any stage prior to post-  
11 decision events.

12 THE CHAIRMAN: I just want to be clear on what actually  
13 happens. At the administrative stage, did you put  
14 evidence in front of the OFT to rebut what was in Ronnie  
15 III about this phone call?

16 MR. WEST-KNIGHTS: No. We, like other parties, did not put in  
17 evidence but argued the probability or otherwise of that  
18 telephone call.

19 THE CHAIRMAN: On the basis that it was an inherently  
20 implausible argument.

21 MR. WEST-KNIGHTS: Yes, I think that is fair. And that there  
22 was insufficient evidence of it. There were and are  
23 matters of argument in respect of the evidence, even as it  
24 then stood, as to whether it was inherently likely that  
25 Ronnie did make that telephone call; and the point was  
26 made very fairly that it was not likely that anybody would  
27 cause Allsports or seek to cause Allsports to agree any  
28 price when everybody knew perfectly well - indeed it was  
29 one of the underlying complaints made by the office - that  
30 we always priced at 39.99. Indeed, we were at one stage  
31 said to have been the ring leaders - not the ring leaders  
32 but participants - indeed, "ring leaders" is quite wrong.

33 It was always, "JJB - oh - and Allsports." At any rate,  
34 we were rowed in - because we were £40 men - and said to  
35 be trying to be getting other people to be £40 men. So  
36 there would be no sense in Ronnie ringing us up to get us  
37 to agree.

38 The only firming up is to make express that which  
39 was completely implicit, that is to say, no such phone

1 call. That remains our position: no such phone call.  
2 That is now the OFT's position: no such phone call.

3 In fact, it now avers a different phone call, one in  
4 which Ronnie passed information to us about Sport Soccer's  
5 intentions, allegedly, according to him, pursuant to the  
6 express requirement of Mike Ashley, who said, according to  
7 Ronnie, "If anybody else breaks ranks, I'll break back  
8 again."

9 One of the things that I have no doubt was in Mr.  
10 Peretz's mind at the time was that Mr. Ashley has never  
11 made any such assertion of having imposed such a  
12 condition, not even now. I say "not even now", his new  
13 witness statements reaffirm his original position, which  
14 excludes that pre-condition.

15 That is the position in principle. It is an  
16 important point of principle. I would now turn to  
17 particulars, but before I do so there are two matters in  
18 respect of discretion which I only rely upon as a fall-  
19 back.

20 They cannot depart from the phone call upon which  
21 they relied. They found that the agreement was caused by  
22 a phone call in which we expressly agreed something. That  
23 has gone. You can modify it, you can use all the other  
24 weasel words you want. It has gone. It has gone in, if I  
25 may say, extraordinary circumstances, where Mr. Ronnie, in  
26 his new witness statement, merely quotes, "I did not" -  
27 quotes - and then he sets out - he does not say that it is  
28 him, but he sets out the contents of what had been the  
29 relevant parts of his previous witness statement and says,  
30 "That didn't happen." There is no explanation from him as  
31 to how it came to be withdrawn. Then he sets out the new  
32 assertion, namely, that the phone call was for an entirely  
33 different purpose. That cannot be done. I am going to go  
34 to Argos in just a second.

35 The rebuilding of the case by putting in findings  
36 which were not in the decision is plainly impermissible,  
37 but they contain - and this is the fall-back point - it is  
38 only a fall-back point, but it may have acquired undue  
39 prominence because once you start looking at particulars

1 it covers lots of bits of paper - there are two further  
2 objections. One, that the allegations remain as vague and  
3 unparticularised as they were below, which, in my  
4 submission, plainly led the Director to come to the  
5 conclusion that he was unable to make a finding. Second,  
6 the specifics which are now raised of so-called pressure  
7 fall into two categories. The first is, material in the  
8 decision which was expressly not used for that purpose  
9 and, second, new material where there is no excuse for its  
10 being new. In any event, the new material is parasitic  
11 upon the selection from the Rule 14 materials where there  
12 is no finding in the decision.

13 We have over-stated our case in one place, for which  
14 I apologise - and the fault is entirely mine - in respect  
15 of one of the specifics where we have said that a witness  
16 did not deal with that matter in his witness statement;  
17 he does, in a line and a half.

18 This is the other discretionary part. We cannot  
19 now, as we could not below, deal with unspecified and  
20 vague allegations of pressure. Secondly, those  
21 allegations which are made are all, according to Mr.  
22 Ronnie's latest statement, post the 24th May. In other  
23 words, there is no case to be had that the meeting of 24th  
24 May between Sports Soccer and Umbro was in any sense  
25 procured or encouraged or participated in by way of  
26 cartel-style activity on the part of Allsports. It  
27 became, shortly after, Mr. Ashley had promised to reduce  
28 the price of the England shirt, but he did not, and Umbro  
29 themselves say they cut off his deliveries.

30 There are said to be other examples of pressure  
31 prior to that, but either the office has simply got the  
32 date wrong or, like the letter from Mr. Gourlay to Mr.  
33 Guest and vice-versa, April 1999, relied upon for the  
34 critical - that is in the sense they criticise us for it -  
35 for the facilitation of agreements by simply letting Umbro  
36 know what our pricing policy was. It is not an  
37 infringement - not found as such - not pressure - not  
38 found as such - but simply dealt with because it was  
39 there.

1           If we have - and we have in places - dealt en  
2           passant, either expressly or because it is part of a  
3           general disquisition in our witness statements, with  
4           matters now characterised as pressure, it was for a good  
5           reason. Anything which looked as if it was critical of a  
6           witness was dealt with. Plainly, I would wish the  
7           Tribunal not to be faced with a criticism of Allsports in  
8           the decision, even if it does not amount to any part of  
9           the findings of infringement, and in those respects our  
10          witnesses have dealt with those critical observations.  
11          They are also dealt with in the notice of appeal under  
12          heading 5, "Background Information".

13           The notice of appeal and the witness statements are  
14          of a very different character to what they would have been  
15          had we known or had we been facing a case that we,  
16          Allsports, brought pressure to bear on Umbro and that that  
17          had resulted in this Sports Soccer/England price fixing  
18          agreement.

19           Merely picking up and dealing en passant with a  
20          specific particular is not the same as mounting a positive  
21          case. There is no persuasion or evidence or analysis in  
22          the notice of appeal to show why we did not, would not  
23          have and could not have mounted pressure on Umbro: none,  
24          nothing. Nor are the witness statements designed to  
25          support that proposition. We would have to start again in  
26          terms of mounting our case and we would have to put in a  
27          great deal of material to show why we attacked the case on  
28          pressure. The reason why we have not attacked the case on  
29          pressure is that there is no such case in the decision.

30           I wonder if it would be a good moment for me to take  
31          you briefly to the passages in Argos, where the Tribunal  
32          very helpfully, as it were, wrapped up its previous  
33          thoughts in the Napp cases on where this stands and just  
34          compare that situation with what is said by the Office  
35          now. I can do that by reference to my skeleton, because,  
36          unless anybody wants any other passages, the material  
37          passages are all set out in it.

38          THE CHAIRMAN: I am sorry to interrupt you, Mr. West-Knights.

39           I was looking for the defence just to see exactly what



1 the OFT is now saying in its pleading, and then to relate  
2 that, formally speaking, as it were, to your application  
3 to strike out to see what it is in formal terms that we  
4 are focusing on, so that I have got the formality of the  
5 thing in my head before we plunge into a bit more detail.

6 Would you forgive me for a moment?

7 MR. WEST-KNIGHTS: What I was proposing to do, once I had  
8 looked at Napp and had a quick look at Cimenteries, was to  
9 go through the OFT's counter submissions, which highlight  
10 the specific matters of principle, which would then give  
11 you the flavour of it, but otherwise I am very happy to go  
12 through the defence itself.

13 THE CHAIRMAN: I just want to be sure that I have got the hang  
14 of it. What you are actually striking out is, what, the  
15 whole of paragraph 21 of the defence, is it?

16 MR. WEST-KNIGHTS: As I said to you (I hope frankly), I cannot  
17 tell you which bits will go as a result of the principal  
18 decision, but I have no doubt my learned friends Mr.  
19 Morris or Mr. Peretz and Mr. Turner could sit down and do  
20 so pretty rapidly after the decision is made and say, "The  
21 consequence of that is that these passages will have to go  
22 or be modified."

23 It starts on paragraph 21, because there is nothing  
24 that ----

25 THE CHAIRMAN: We do need to know exactly what the target is,  
26 I think.

27 MR. WEST-KNIGHTS: If I may say so, with great respect, the  
28 target is a simple one. It is characterised as a strike-  
29 out, but, in truth, what I am asking for is judgment on my  
30 appeal. No, it is very simple.

31 THE CHAIRMAN: I am not implying that there is anything at all  
32 improper in what you are asking. It was a rather rueful  
33 self-comment, I suppose.

34 MR. WEST-KNIGHTS: I hope the ruefulness is unwarranted,  
35 because what we have said is, we have attacked the  
36 decision. The decision contains one sole finding: that  
37 we were guilty of the England agreement because we agreed  
38 it on the phone with Ronnie. That has gone.

39 THE CHAIRMAN: So you are asking us, effectively, to allow the

1 appeal on the England agreement.

2 MR. WEST-KNIGHTS: Yes, and with consequential removals of all  
3 the other gubbins. Everything about England would go,  
4 except insofar as the Office - I suppose we might have a  
5 slight sub-spat as to whether the other material is  
6 relevant to Manchester United.

7 THE CHAIRMAN: That is a useful clarification.

8 MR. WEST-KNIGHTS: I am grateful to you, sir, because it stops  
9 us having to nit pick about the words and it is the  
10 principle. But I just do remind you that what we have  
11 said in respect of what would need to be swept away is  
12 that they do not need any material to demonstrate that  
13 there is a propensity in David Hughes to behave in an  
14 anti-competitive way, because we admit that his motive for  
15 arranging the 8th June meeting was anti-competitive.

16 THE CHAIRMAN: I suppose what was in the back of my mind - if  
17 you do not mind me thinking aloud ----

18 MR. WEST-KNIGHTS: No, it is immensely helpful, particularly  
19 if you are against me, if I may say so.

20 THE CHAIRMAN: I am neither for you nor against you at this  
21 stage, Mr. West-Knights.

22 MR. WEST-KNIGHTS: Of course not, sir, but you are entitled to  
23 form preliminary views and, if you do and you are adverse,  
24 I would be jolly pleased to know.

25 THE CHAIRMAN: What was going through my mind at that point  
26 was this. The case is now apparently put on these bases.

27 MR. WEST-KNIGHTS: I am not sure if I had pinged the third one  
28 until the skeleton.

29 THE CHAIRMAN: Let us assume for argument's sake for the time  
30 being that there are three bases. There is the phone call  
31 plus pressure; there is the mere pressure; and there is  
32 the mere phone call.

33 MR. WEST-KNIGHTS: I am not sure if the mere phone call is, in  
34 fact, in the defence. Perhaps it is in (d) in 21.

35 THE CHAIRMAN: For argument's sake, let us assume that it is  
36 there. Conceptually speaking, one could imagine the  
37 Tribunal saying, "It is true they have modified the  
38 content of the phone call, but they have kept within the  
39 four corners of the original allegation, you are simply

1 facing a less serious allegation than you were facing  
2 before."

3 MR. WEST-KNIGHTS: But it cannot be context-free.

4 THE CHAIRMAN: Let me go on for a minute. And that, if they  
5 wished to maintain that modified but lesser case, that is  
6 something which it would be difficult to stop them doing  
7 at this stage. That would be one possible thought.

8 MR. WEST-KNIGHTS: That would be a wrong way of looking at it.

9 THE CHAIRMAN: It may be a wrong way of looking at it, but it  
10 is possible. In relation to the second one, which was  
11 phone call plus pressure, conceptually it might be  
12 conceivable to say to oneself, "While they never actually  
13 pleaded the pressure in the decision, they cannot really  
14 bring in the pressure except, arguably, indirectly as part  
15 of context but not as pressure as such."

16 MR. WEST-KNIGHTS: Not unless it is there. Not unless it is  
17 in the decision.

18 THE CHAIRMAN: Not unless there is something in the decision.

19 And the third one might be a pressure only case, which  
20 you might say had never been made as such at all and is  
21 not in the decision and therefore should not be allowed.

22 Within all those three possibilities, there is the  
23 further question of whether what is relied on, if it could  
24 be relied on, is sufficiently particularised to enable it  
25 to be fairly relief on.

26 MR. WEST-KNIGHTS: That is a very helpful disquisition. There  
27 is a spectrum. Anything that has got pressure in it we  
28 say is obviously completely and absolutely illegitimate,  
29 both as a matter of law and as a matter of discretion, but  
30 that does not arise. That is the classic - not just a  
31 moving target, but it is a brand new target. It is, "Take  
32 down that goal and stick another one up on the other side  
33 of the field."

34 That only leaves the possibility - and it is a false  
35 possibility - of suggesting that somehow, because it still  
36 relies upon a telephone call, it is therefore  
37 fundamentally the same case, but it has been modified.  
38 But it would have to be, first, just a phone call. It  
39 would have to be a pressure-free phone call. And there

1 would need to be pleaded in the decision either the  
2 circumstances giving rise to the request for the  
3 information or the circumstances said to amount to its  
4 acceptance. The mere receipt out of the blue by us of a  
5 piece of information from Ronnie, with which we do  
6 nothing, is not an infringement. There is no suggestion  
7 that we did anything with the information and there is no  
8 suggestion that we asked for it.

9 It is just not there. This is an appeal. We attack  
10 what is in the decision. The mere fact that the mechanics  
11 of the entirely different case - let us assume, if I may,  
12 that it was alleged that we had become party to a cartel  
13 because somebody had sent us a telex. The Office then  
14 decided it was going to revise the factual matrix of its  
15 allegations completely, but suggested that they were  
16 somehow the same but modified because they too were  
17 contained in telexes. The mere fact that the new matrix  
18 is also said to have been a phone call is, in fact,  
19 misleading. The character of the infringement is wholly  
20 different. One is simple. As the office itself says, no  
21 findings of pressure, an express agreement reached on an  
22 unspecified date between Ronnie and an unspecified person.

23 The other kind of infringement necessarily involves  
24 a great deal more material than the mere receipt of a  
25 phone call. What there is not - and that would be both  
26 wrong in law and grossly unfair - is a clear  
27 identification of those circumstances which turn that  
28 phone call into an infringement.

29 If your desire to look at the defence is currently  
30 satisfied ----

31 THE CHAIRMAN: Yes.

32 MR. WEST-KNIGHTS: -- I wonder if I could now take you to - it  
33 must be invidious having one's words quoted back to one.

34 THE CHAIRMAN: Yes, it is.

35 MR. WEST-KNIGHTS: But there it is.

36 THE CHAIRMAN: Mr. Colgate is expressing the general concern  
37 which is in all our minds as to what extent these  
38 arguments - potentially relevant though they are - should  
39 be ruled on by the Tribunal at this stage without having

1 actually heard any of the evidence.

2 It is quite difficult to know how the significance  
3 of this alleged change of position by Mr. Ronnie, which  
4 you say is major and they say is minor, until we have  
5 heard his evidence.

6 MR. WEST-KNIGHTS: With great respect, I can understand why  
7 you may start from that position, but it requires to be  
8 looked at the other way round. It is very simple, the  
9 evidence, now - the proposed finding upon which it is now  
10 proposed I should appeal. It was an agreement made on the  
11 phone; it is now assurance given on the phone. That is  
12 it.

13 What the Tribunal can do, should do and must do now  
14 is have a look at the decision to the extent invited by  
15 either party to see whether there are the findings in the  
16 decision to see where that fits the findings in the  
17 decision. There are a number of possibilities, as you  
18 have said: it is a mere phone call (about which we have  
19 said no infringement); a phone call with context (which  
20 we say is insufficiently set out anywhere to be proper  
21 and, in any event, not in the decision); and everything  
22 combined with pressure.

23 THE CHAIRMAN: But it is quite difficult to form a fair view  
24 on whether a particular phone call does or does not  
25 sufficiently constitute evidence of a concerted practice  
26 or an agreement without having a feel both for the context  
27 and for what the witness is actually saying about the  
28 phone call.

29 MR. WEST-KNIGHTS: The witness does not say any more about the  
30 phone call than I have told you.

31 THE CHAIRMAN: Yes, we have got the witness statements but, as  
32 we all know ----

33 MR. WEST-KNIGHTS: I am not going to cross-examine Mr. Ronnie  
34 as things stand at the moment. Let me say this. The  
35 Office have said that if you rule against them on this  
36 they will appeal forthwith: they will ask for a stay.

37 THE CHAIRMAN: They have said that, yes.

38 MR. WEST-KNIGHTS: I will do likewise if you do not either  
39 rule in my favour or decide it today. I am not saying

1 that in terrorem, but I will give the reasons for it. I  
2 am being frank. The reason is this. We cannot go to the  
3 hearing not know which case we face. We cannot go to the  
4 hearing facing unparticularised allegations of pressure  
5 and the mess and nonsense which is created both by the  
6 defence, the arguments on it and the witness statement of  
7 Ronnie IV.

8 We would have to re-build our case in its entirety.

9 I am not going to advise my clients that this is an  
10 appropriate step to take de bene esse, pending some ruling  
11 made on the 8th or 9th March.

12 THE CHAIRMAN: We will do our best to sort out what case it is  
13 you face. What it is more difficult to sort out is  
14 whether the case you face is a good case or not.

15 MR. WEST-KNIGHTS: It is not material as to whether it is a  
16 good case or not; I have said that it is a secondary part  
17 of my submissions. It is plainly not a clear one; and  
18 that is part of the discretion.

19 THE CHAIRMAN: What we have got to try to sort out is what the  
20 case is and whether it is a case the OFT can legitimately  
21 put.

22 MR. WEST-KNIGHTS: I will tell you what the case is, with  
23 great respect. They accept that their case is that I  
24 entered into an agreement with Ronnie on the phone  
25 somewhere between the 24th May and 2nd June and, in that  
26 telephone call, I agreed to fix my price at 39.99. That  
27 is the case in the decision. That is the only case there  
28 is.

29 The other case they have got is that we are not held  
30 to have applied any retailer pressure on Umbro at all.  
31 There is no such finding in the decision. This is an  
32 appeal from the decision. I appeal the finding that I  
33 committed an infringement by agreeing to fix my prices at  
34 39.99. That is why I win: because the appeal should now  
35 be allowed. That is the case I meet. That is a question  
36 of law. The secondary question of law is whether, in the  
37 circumstances where I say I have won, it is open to the  
38 Office to select from amongst a vast and - dare I say the  
39 word? - inchoate bunch of material from below and assert

1 that, had things turned out differently, the Director  
2 would have made findings from amongst that material. For  
3 all I know, they could pick a piece of allegation in the  
4 Rule 14 notices and say, "Let's treat the decision as  
5 containing a finding that one of your employees told a lie  
6 on a particular day."

7 It is plainly and obviously wrong as a matter of law  
8 to permit the Director - or counsel on his behalf - to  
9 build a different case from amongst unspecified and  
10 available avéré monter, it would appear, materials which  
11 had been roved over in the Rule 14 process and not found  
12 their way into the decision. We are not in remission  
13 country here, although the Office, interestingly, puts it  
14 on the basis ----

15 THE CHAIRMAN: That is not a plausible ----

16 MR. WEST-KNIGHTS: Plainly not. It is prospectively and  
17 technically, theoretically possible in respect of, shall  
18 we say, Mr. May. Mr. May's witness statement it is that  
19 says, for the very first time, that there was retailer  
20 pressure brought to bear on Umbro by Miss Charnock - on  
21 him. I can say with absolute certainty there was not a  
22 breath of a suggestion of retailer pressure at that level  
23 or by Miss Charnock or on that individual, although Mr.  
24 May was, save for the meeting between the two of them on  
25 24th October, which was after the event which was  
26 expressly found not to have caused the ----

27 THE CHAIRMAN: I think you were going to go to Argos, Mr.  
28 West-Knights. I took you out of your way.

29 MR. WEST-KNIGHTS: I was, but I was, I am glad to say,  
30 interrupted by you and I am very glad that I was because  
31 the blunt fact is that we cannot not deal with this, and  
32 we can deal with this because, in principle, it is a  
33 matter of law.

34 As I said to you at the outset - and perhaps it is  
35 becoming now a little clearer why - there is a lot of  
36 paper on the specifics, because once you start looking at  
37 a specific allegation you start doing little bits and each  
38 one takes half a page. That is very secondary. I will  
39 briefly show you - and I will tell you what it is on the

1           specifics - the bottom line.

2           Whatever the Office now says in respect of its list  
3 of materials which it has decided to cull, either out of  
4 the decision that was used for another purpose or from  
5 antecedent matters which we say were abandoned, but anyway  
6 not in the decision, you then have to go and look at Mr.  
7 Ronnie IV.

8           Ronnie IV, you will appreciate, is what we call the  
9 Ronnie statement in the appeal. It is very recent. He  
10 makes a number of allegations of unspecified retailer  
11 pressure; and there is a paragraph in which he says, "I  
12 recall the follow specific bits of pressure being brought  
13 to bear on me by Allsports." It excludes any reference to  
14 anything that the Office is now trying to turn into  
15 pressure in its argument and in its defence, save for  
16 three events which post-date the 24th May.

17           What on earth is the Tribunal going to be able to do  
18 with a brand new witness statement from Mr. Ronnie which  
19 says, "I now recall the following specific examples",  
20 which excludes large numbers of things that they want to  
21 revive from the administrative process to which one would  
22 expect Mr. Ronnie to speak. That is the headline on the  
23 specifics.

24 THE CHAIRMAN: You are saying, effectively, that the specifics  
25 relied on are a sort of collection of things that have  
26 been collected up from the debris of the administrative  
27 procedure.

28 MR. WEST-KNIGHTS: Or borrowed from the decision but used for  
29 a different purpose.

30 THE CHAIRMAN: Or re-characterised, but which are not,  
31 according to you, specifically referred to in a relevant  
32 witness statement as being the pressure which the witness  
33 experienced.

34 MR. WEST-KNIGHTS: It depends what you call relevant, because  
35 that is where I started, sir - again, this is immensely  
36 helpful. It was not just to warm myself up that I started  
37 with that bit of the transcript on 23rd October. The  
38 observation was that we faced a practical difficulty,  
39 which was the witness statements dated from and led to the



1 Rule 14 notices, which accused us of A to P, but the  
2 decision, which in fact only finds us guilty of A to E.  
3 Therefore I was quite anxious that there should be marked  
4 the allegations in respect of F onwards, because they have  
5 fallen by the wayside.

6 I cannot say that in Ronnie III there is no  
7 reference to some of this stuff, but it was considered at  
8 the Rule 14 stage and not proceeded upon. That is part of  
9 the debris, if you like. There may be witness support of  
10 historic significance for some of the allegations - and we  
11 can identify which - and I can go through them and say,  
12 "That's new new; that's new revived; that's re-  
13 characterised."

14 THE CHAIRMAN: If it is in Ronnie III, why is it not in Ronnie  
15 IV?

16 MR. WEST-KNIGHTS: There you are. That is the point. What am  
17 I to do with a Ronnie IV that says, "I remember A, B and  
18 C" and Ronnie III is still being waved about at me, which  
19 has not yet had marked out the bits that the Office no  
20 longer relies upon, not least because the Office now seeks  
21 to rely upon them, having had that material in front of it  
22 at the administrative stage and having, as a result of it,  
23 chosen not to make a finding of infringement as a result  
24 of it. It is a frightful mess.

25 It is, if I may say so, characteristic of the  
26 approach which the Office has demonstrated over the last  
27 few days, which is that by hook or by crook they want to  
28 get everything in. They appear, if I may say so, with not  
29 a great deal of respect, to be standing too close to their  
30 case.

31 THE CHAIRMAN: That may be so, but let us just stick to the  
32 legal argument for the time being without too many side  
33 swipes.

34 MR. WEST-KNIGHTS: Let us stick to the law. Do you want to  
35 have a look at Argos? Page 12 of my skeleton. It is  
36 actually quite interesting, because almost every paragraph  
37 resonates ----

38 THE CHAIRMAN: We have got these huge volumes that people have  
39 given us.

1 MR. WEST-KNIGHTS: I have not even opened any of those.

2 THE CHAIRMAN: Do you discourage us from doing so?

3 MR. WEST-KNIGHTS: I certainly do, but I fear that my skeleton  
4 may be in one of them.

5 THE CHAIRMAN: Yes, it is the first tab of volume 1.

6 MR. WEST-KNIGHTS: Is that a convenient moment, though?

7 THE CHAIRMAN: Yes, I think it is actually, Mr. West-Knights.  
8 Do you just want to signal to us where you are going?

9 MR. WEST-KNIGHTS: Although the quotation from Argos starts at  
10 the bottom of page - they have probably all got different  
11 page numbers because of electronics. Paragraph 5.1 starts  
12 with quoting paragraphs 61 and 62 of Argus and, subject to  
13 my reading this over lunch, I am going to pick it up at  
14 paragraph 65 and go through each of the sub-paragraphs  
15 there to show why, with repeated use of the word a  
16 fortiori, what is being attempted cannot be done.

17 THE CHAIRMAN: When you have done that, is that or less the  
18 end of your submissions?

19 MR. WEST-KNIGHTS: No. It would be helpful if I was to whiz  
20 through the particulars. They are secondary. There is no  
21 doubt about it. My principal observations are ones of  
22 absolute law: no question of discretion - cannot be done.  
23 I do pray in aid the additional difficulty, about which I  
24 do not need to say much more, in respect of unspecified  
25 material. How do you deal with it?

26 We have such specification as there is, seemingly,  
27 in Ronnie IV, subject to the fact that that does not fit  
28 Ronnie III and we do not know what to do with it, but it  
29 will take me 15 minutes to go through the specifics, as  
30 far as I want to.

31 The other thing I was going to do was to have a  
32 quick look - there is only a tiny extract in the bundle -  
33 at the Cimenteries case and what happened at the Lafarge  
34 meeting.

35 THE CHAIRMAN: We need to rise at half-past four today or  
36 before half-past four.

37 MR. WEST-KNIGHTS: That would be extremely generous to me and  
38 I would be grateful.

39 THE CHAIRMAN: It would be quite convenient for us too. You

1 have had an hour. If you could more or less manage to  
2 wind up not long after half-past two, if we take an hour  
3 for lunch, half-past two, quarter-to three.

4 MR. WEST-KNIGHTS: I will stop at half-past two.

5 THE CHAIRMAN: If you stop at half-past two, that will give  
6 the Office an hour and a half to reply.

7 MR. WEST-KNIGHTS: And me half an hour to reply, reply.

8 THE CHAIRMAN: Is that reasonable?

9 MR. WEST-KNIGHTS: E&OE.

10 THE CHAIRMAN: That is the sort of framework we have in mind.

11 MR. WEST-KNIGHTS: I am very grateful.

12 THE CHAIRMAN: We will read Argos over lunch, gentlemen.

13 (The luncheon adjournment)

14 THE CHAIRMAN: Can I ask one question, Mr. West-Knights,  
15 without wishing to tie you down at this stage in any way?  
16 Your comment that you are reserving the question of  
17 whether you might wish to cross-examine Mr. Ronnie or not  
18 - if you did not cross-examine Mr. Ronnie, presumably  
19 neither Mr. Guest nor Mr. Hughes would be able to deny  
20 that a telephone call of the sort Mr. Ronnie says in  
21 Ronnie IV took place. You would have to put to Mr. Ronnie  
22 anything that Mr. Guest and Mr. Hughes were denying, would  
23 you not?

24 MR. WEST-KNIGHTS: I was being slightly flippant, which is  
25 always a mistake.

26 THE CHAIRMAN: Probably it is, in this context.

27 MR. WEST-KNIGHTS: But only slightly. If the Tribunal were to  
28 decline to decide this or to decide it adversely to me,  
29 then a number of choices arise, one of which is to apply  
30 for a stay and an immediate appeal. Another is to try and  
31 do the best we can and get the alternative case swept up,  
32 insofar as it is capable of being met, and meet it. The  
33 third is to proceed on the basis that the Tribunal was  
34 wrong in not determining this matter in my favour and to  
35 go to the hearing and not deal with the pressure case,  
36 lose and then go to the Court of Appeal on the footing  
37 that that was not a case we should have met. It is on  
38 that footing, which, as I say, is only slightly flippant,  
39 I would not cross-examine Ronnie, I would accept his

1 evidence that there was no phone call as alleged and any  
2 other evidence he gave which was immaterial to the point.

3 That is a deeply risky process, but it is a live  
4 possibility. I am not saying it is probable, but it is an  
5 option. Obviously, the temptation to cross-examine Mr.  
6 Ronnie is almost infinite, because it is going to be fun.

7 Paragraph 65 is where I said I would take it up with  
8 you, page 13 of my skeleton, tab 1, bundle 1. It is the  
9 only reference about which I have the remotest  
10 authoritative knowledge.

11 "The appeal before the Tribunal is directed against  
12 'the decision ...'"

13 THE CHAIRMAN: You do not have to read it, I think.

14 MR. WEST-KNIGHTS: That is point one again, and I remind you  
15 that it is not only in that part of my learned friend's  
16 skeleton, to which I was rather looking for a better  
17 reference. They actually say in terms at paragraph 21 of  
18 their skeleton, in response to the complaint about  
19 generalised assertions:

20 "Allsports' submissions add nothing of substance ...  
21 Since in the decision the OFT did not make any  
22 finding based on complaints or pressure by Allsports  
23 then it is hardly surprising that the decision  
24 contains no specific reference to the general  
25 evidence relating to it."

26 Without repeating myself, we do not know whether the  
27 Director decided that Ronnie's evidence in respect of that  
28 was incredible.

29 The only thing that the decision does in respect of  
30 this is to recite at an early stage that it had been  
31 asserted by Umbro's witnesses that Allsports had applied  
32 such pressure. That is plainly not a finding: it is a  
33 recital; it is part of the unsatisfactory swathe of the  
34 decision where the status is sometimes a little unclear.

35 So it is the decision, then that is confirmed by the  
36 rules. Over the page, we are reminded that we have to  
37 contend that it was based on an error which necessarily  
38 implies the appeal is principally concerned with the facts  
39 as found.

1            "... must determine the appeal on the merits but by  
2            reference to the grounds of appeal set out in the  
3            notice of appeal."

4            There is no possible procedure whereby, having won at the  
5            Rule 14 stage, you ever face the risk of, when you attack  
6            the decision, saying, "We'll pick bits --" We simply do  
7            not know what the status of that material is, except that  
8            it is not in the decision and therefore it cannot fall for  
9            appeal.

10           "It follows the Tribunal is concerned with the facts  
11           in the decision as contested and not with the  
12           correctness of other facts sought to be adduced as  
13           evidence of the infringement after the notice of  
14           appeal has been lodged and which by definition the  
15           notice of appeal has not dealt with."

16           This is this case.

17           Turning to the principles from Napp, one is the  
18           normal position:

19           "... prepared to defend the decision on the basis of  
20           the material before him when he took it."

21           Just en passant, it is said frequently by the Office  
22           that because they parked the leniency materials they were  
23           incapable of using them. That is, of course, untrue.  
24           They then adduce the reason that there was a different  
25           case officer, who seemingly was unaware of the leniency  
26           materials. They are perfectly entitled to use the  
27           leniency materials for the purposes of advancing their  
28           investigation. They cannot go and whack Umbro over the  
29           head with them, but they can look at it and say, "Golly,  
30           that's a jolly good line of inquiry"; indeed, you would  
31           expect them to follow those lines of inquiry.

32           It appears, in fact, that the Office never even  
33           spoke to Mr. Ronnie until just now, because, having had  
34           two witness statement, as to which the Director wrote in  
35           terms to Umbro saying they were regarded as unsatisfactory  
36           - and there was a bit of going backwards and forwards  
37           between Umbro and the Office, where Umbro were saying,  
38           "Why? Hard luck. We think they are not satisfactory. No  
39           leniency." Then it was Umbro who produced Ronnie III.

1           Apparently, Ronnie was not spoken to by the Office. That  
2           is an Umbro witness statement. That is the way they chose  
3           to proceed, apart from on the 26th February, which of  
4           course pre-dates that statement. They parked that too,  
5           seemingly, as part of the leniency materials and did not  
6           go back and check to see whether there were any lines of  
7           inquiry to follow.

8           So normally defend on the basis of the decision.  
9           That is one. Otherwise (and that is the reason in 2,  
10          which is where we are here), the Rule 14 procedure would  
11          be diminished or even circumvented. That is precisely  
12          where we are: not just diminished or circumvented, but  
13          rendered utterly nugatory. We have been there and done  
14          this on Rule 14.

15          Presumption against the Director putting in new  
16          evidence that could have been made available in the  
17          administrative procedure. All of the evidence in this  
18          case either could have been or was. That is the a  
19          fortiori, the first of my a fortiories. The  
20          administrative procedure has been gone through.

21          Four, may be rebutted, notably where the OFT wishes  
22          to adduce evidence in rebuttal of a case made on appeal.  
23          In places, the Office, unsurprisingly, characterises what  
24          it is trying to do as just that and that is not the case.

25          Our case on appeal is, "Not guilty. Didn't have that  
26          phone call."

27          On the other hand, where the new evidence goes to an  
28          essential part of the case which it was up to the OFT to  
29          make in the decision (which is this case), there is  
30          nothing to stop them, if the Director was satisfied about  
31          pressure, from saying, "We find Allsports guilty of  
32          pressure." They found JJB guilty of pressure. That is  
33          one reason why there is such a difference between myself  
34          and my lord Grabiner as to the approach to this: he has  
35          got to deal with pressure anyway.

36          The Tribunal will not admit evidence that was not  
37          put to the parties in the course of Rule 14 procedure.  
38          That is Aberdeen Journals. This approach applies where  
39          the evidence in question goes to an essential part of the

1 case. If there was anything ever more essential to this  
2 part of the case, it is the phone call which is said to  
3 have been made. But we have dealt with that phone call in  
4 the administrative procedure, so again a fortiori.  
5 Plainly, this is for the purposes of upholding an  
6 essential element in the decision.

7 Six. Should resist a situation where matters of  
8 fact or meaning to be attributed to particular documents -  
9 I say again, a fortiori the meaning to be attributed to  
10 particular findings - counsel will say, "That fact is  
11 present there; I now twist it round to have a different  
12 meaning" - resist a situation in which matters of fact or  
13 meanings to be attributed are canvassed for the first time  
14 at the level of the Tribunal when they could and should  
15 have been dealt with in administrative procedure and dealt  
16 with in the decision. They were dealt with in the  
17 administrative procedure and are dealt with in the  
18 decision inasmuch as a conscious decision was made not to  
19 make findings against Allsports in respect of pressure or  
20 in respect of an assurance - a Lafarge type infringement,  
21 as distinct from the one which is in the decision.

22 If there is relevant evidence sought to be adduced  
23 on appeal which has not been the subject of the procedure,  
24 then you can remit.

25 In my submission, although the Office says,  
26 accurately, there is no law in the sense that there has  
27 been no case in which this situation has arisen before, I  
28 say two things. First, the principles govern it. Second,  
29 it is hardly surprising. I will not bang that drum any  
30 more by reference to Argos.

31 If I can take you briefly to Lafarge. It is in  
32 bundle 3. It is the last pages of bundle 3. The high  
33 water mark of this is to be found in paragraphs 1847 and  
34 following. Lafarge are objecting to the fact that the  
35 Commission appeared to be relying solely upon a document  
36 promulgated by Lafarge to all of its companies, recording  
37 the results of a meeting with Buzzi.

38 "In any event, it does not make it possible to  
39 disregard the statements, cited above, which it made

1 to Lafarge during the meeting of 26 November 1998."  
2 This is statements made by Buzzi at the meeting.

3 "No desire to enter Côte d'Azur to upset the market  
4 ...

5 "A war is pointless.

6 "Agreements must be concluded to avoid conflict."

7 So in the context of Buzzi wanting to move into  
8 cement production in the South of France, a meeting was  
9 held between two competitors and those statements were  
10 made at that meeting.

11 "Secondly, Buzzi maintains that the Commission, by  
12 merely stating that Buzzi had informed Lafarge of  
13 the conduct which it planned to adopt on the market  
14 in question, without stating that Lafarge did  
15 likewise vis-à-vis Buzzi, has not shown that there  
16 was an element of reciprocity, which is necessary in  
17 order to prove that there was a concerted practice  
18 within the meaning of Article 85(1) of the Treaty.  
19 Lafarge claims for its part that the fact that one  
20 party lets another party know of its personal point  
21 of view cannot reasonably lead to the conclusion  
22 that there is a concerted practice.

23 "In that connection, the Court points out that the  
24 concept of concerted practice does in fact imply the  
25 existence of reciprocal contacts ..."

26 It cites the opinion of the Advocate General in Woodpulp  
27 II.

28 "That condition is met where one competitor  
29 discloses its future intentions or conduct on the  
30 market to another when the latter requests it or, at  
31 the very least, accepts it. Perusal of the covering  
32 letter with which Mr. Liduena of Lafarge distributed  
33 within his company the minutes of the meeting of 26  
34 November 1988 reveals that the meeting was held at  
35 the behest of Lafarge."

36 So there is a request at least for the meeting, maybe in  
37 anticipation of the receipt of that type of information.

38 "Moreover, there is nothing in those minutes drawn  
39 up by Lafarge which shows that its representative



1 expressed any reservations or objections whatsoever  
2 when Buzzi informed it of its position regarding the  
3 market in the south of France. In those  
4 circumstances, the applicants cannot seek to reduce  
5 Lafarge's attitude during the meeting in question to  
6 the purely passive role of a recipient of the  
7 information which Buzzi unilaterally decided to pass  
8 on to it, without any request by Lafarge."

9 So there is a finding of a request.

10 "It may be inferred therefrom that the contacts  
11 between Lafarge and Buzzi were motivated by the  
12 element of reciprocity essential to a finding of  
13 concerted practice. Accordingly, the applicants'  
14 arguments must be rejected."

15 Against the context of that type of situation, where  
16 one large concern invites another large concern which it  
17 knows is proposing to move into its territory and has a  
18 meeting and receives that information and minutes it and  
19 writes a letter, a round robin, internal within the  
20 company, reciting those minutes, then it is easy to see  
21 and easy to sympathise with the Commission when it made a  
22 determination that the objection to the absence of  
23 reciprocity was a poor one. It is all there.

24 That is the high water mark and is translated by the  
25 Office into the soubriquet of a willing recipient of  
26 information. But, in order to have the requisite elements  
27 and not merely to be a passive recipient of the  
28 information, you have to have the requisite facts laid out  
29 in the decision, which will tell the recipient of the  
30 decision whether it is request or acceptance and,  
31 whichever, what the particulars of each of them are.

32 Under the time constraint, to which I mildly regret  
33 having acceded but with which I will attempt to comply.

34 I made some submissions about particular matters.  
35 There is an annex to the submissions for the Office called  
36 "Retailer Pressure - Response to Allsports' Submissions on  
37 Specific Examples." This, if I may say so, is important  
38 because it indicates how dangerous it is to allow, as per  
39 Argos, the different characterisation of events or facts

1 for the first time before the Tribunal. It is immediately  
2 after page 14.

3 "This letter is not new evidence or material."  
4 That is correct.

5 "It was relied upon in the administrative stage. It  
6 is referred to and relied upon in the Decision."  
7 It is referred to in the decision inasmuch as the letter  
8 is simply said to have the effect of:

9 "... facilitating the agreements the agreements  
10 described in this decision ..."

11 Because it made plain to Umbro what Allsports' likely  
12 pricing intentions were back in April 1999. But let us  
13 read on.

14 "[The finding] does, by necessary implication,  
15 contain a reference to some form of 'complaint' by  
16 Allsports."

17 With great respect, that is eyewash. That is ex facie  
18 nonsense. A letter is recited and it says, as it were, in  
19 square brackets "[Unfortunately] that letter conveyed to  
20 Umbro Allsports' likely pricing intentions and that  
21 facilitated the making of the agreements." That is now  
22 characterised as being a complaint.

23 The relevance of that is that when we come to Ronnie  
24 IV briefly it contains a passage which says, "By reason of  
25 the complaints and pressure, we entered into the agreement  
26 with Sports Soccer on 24th May." So it is quite important  
27 to know what the Office thinks a complaint is. The Office  
28 now says that a complaint can be virtually anything. It  
29 was, in a sense, a complaint inasmuch as the letter said,  
30 "We would like to have some discounts on the wholesale  
31 price", and the result of that letter was that they did  
32 get some discounts on the wholesale price. But the result  
33 upon which the Office relied was that, by that mechanism  
34 of complaining at the level of wholesale prices, it  
35 revealed the retail price and therefore facilitated the  
36 agreements because Umbro knew what Allsports would charge.

37 Turning that into a complaint is nonsense, dangerous and  
38 illustrates that this must not be allowed.

39 "The indication of Allsports' likely pricing

1 strategy can only have 'facilitated the agreements'  
2 [i.e. with others] by enabling Umbro to use  
3 Allsports' indication in its discussions with those  
4 others to secure such agreements."

5 No. It is just a known fact: it is a tiny bit of the  
6 jigsaw which is not held to be an infringement but is  
7 noted as a fact on the way through. It is absolutely not  
8 cited as an example of pressure, still less complaint in  
9 the sense of putting pressure on Umbro.

10 We did deal with the letter, because it was in the  
11 decision as an apparently critical, that is to say,  
12 adverse comment. It is in that part of the defence which  
13 deals with background material. It is plainly not  
14 sensible to leave on the table an adverse remark: it was  
15 dealt with and cleared up.

16 They say that the last part of our submissions are  
17 completely muddled. Let us just see what it was that we  
18 said that was so muddled. Paragraph 6.9:

19 "Nor can it be said that the purpose of reviving the  
20 allegation now is to rebut any new case made by  
21 Allsports in its appeal. The purpose of Allsports'  
22 comments on that letter at 5.29 [the background  
23 section] of its notice of appeal was to respond to  
24 the above paragraph in the decision; as is said at  
25 5.32 of the notice of appeal, the point being made  
26 is that the letter in question [was legitimate]."

27 There was a slur that it was illegitimate.

28 "Moreover, Allsports expressly relies in its notice  
29 of appeal, as it did below, on this letter for the  
30 very purpose for which it was relied on by the OFT  
31 below and in the decision, namely that if, as held,  
32 Allsports' retail pricing intentions were at all  
33 material times clear ..."

34 Then there was no point in anybody ringing us up to ask us  
35 to agree them. That was a point made forcibly below: we  
36 won that point.

37 THE CHAIRMAN: Mr. West-Knights, I am struggling in my own  
38 mind with what is relied on as direct evidence of an  
39 infringement and what is legitimate background material

1 that is part of the context of the whole case. If the  
2 Office's case was that, "This phone call took place and,  
3 to help the Tribunal decide whether it did take place or  
4 not or the likelihood of its having taken place, we draw  
5 your attention to a whole lot of background things that  
6 were going on at the time - the golf day and all the rest  
7 of it - which show that there was a context in which it is  
8 more probable than it would otherwise be that such a phone  
9 call might take place, i.e. it did not come out of the  
10 blue", would there be anything wrong in the OFT putting  
11 that to the Tribunal at this stage.

12 MR. WEST-KNIGHTS: With respect, it would depend on how the  
13 decision was framed. In this case, we have a number of  
14 matters which go into the decision - not just this one:  
15 there are several - where it is said that it is not said  
16 to be an infringement, but it facilitated the making of  
17 the subsequent agreements. There are other matters which  
18 are plainly just put in as part of the narrative  
19 background.

20 What the decision then goes on to do in the material  
21 paragraphs that make the findings is, where appropriate,  
22 cross-refer back to the same facts which have appeared in  
23 the chronological background and in the specifics, draw  
24 them together, list them - and it says, "These are the  
25 reasons why we find as we do find." These observations  
26 are never picked up again.

27 It would be wonderful, I suppose, if the Director  
28 could have a large swathe of material, two or three  
29 hundred pages of stuff, and then say exactly why he has  
30 reached his decision not in reliance on that stuff but,  
31 because the stuff is there as a recital, re-use it or re-  
32 characterise it, to go back to the Argos thing, for a  
33 different purpose for the first time before the Tribunal.

34 THE CHAIRMAN: That is where I have got a slight problem.

35 MR. WEST-KNIGHTS: Sir, can I just interrupt? This is said to  
36 be retailer pressure. There are no findings - let us just  
37 remind ourselves - the Office itself says there are no  
38 findings of retailer pressure in the decision. So  
39 whatever this was in the decision it was not a finding of

1 retailer pressure. They now seek to characterise it as  
2 such. We say (a) that is nonsense as a matter of fact,  
3 but (b) out of their own mouths this is not in the  
4 decision as an example of retailer pressure; they now  
5 wish to make it one. That is the point.

6 They have elected how these facts are to be treated,  
7 so, if you like, you can take it that they are in a  
8 hypothetical part of the decision that says, "These facts  
9 are not relied upon as being or evidence of retailer  
10 pressure. We make no such finding against Allsports."  
11 That is a red box which is on every page of this decision,  
12 we now know for sure. We knew it before, but now you are  
13 told it expressly by the Office.

14 Mr. Guest did deal with that point, but that is not  
15 the point, because if it is part of the larger matrix of  
16 overall retailer pressure one thing we have not done in  
17 the statements in the notice of appeal is meet that case  
18 at large.

19 Guest and Ronnie about JD Promotion. I am just  
20 going to try to go through this very quickly. This is  
21 where we over-stated our case. Mr. Guest does, in a throw  
22 away line, say, "I knew nothing about this and, what's  
23 more important, I didn't talk to Ronnie about it." But  
24 the point is this. It was relied upon by the OFT in a  
25 supplementary Rule 14 notice, as the Office says.

26 THE CHAIRMAN: In a sense, it would be artificial for the  
27 Tribunal to get into a situation where it could not look  
28 at relevant background. It is not denied that there was a  
29 golf day, for example. The golf day happened. The golf  
30 day is very close in time to the alleged telephone call.

31 MR. WEST-KNIGHTS: But it is relied upon as procuring the  
32 meeting of the 24th May, which is rather unfortunate  
33 because it happened the day afterwards.

34 THE CHAIRMAN: That is a point that can be fairly made, but  
35 the fact that the golf day happened might be relevant to  
36 deciding whether there was some pattern of contact between  
37 Allsports and Umbro which in turn was relevant to whether  
38 or not the telephone call was made.

39 MR. WEST-KNIGHTS: I have not the slightest doubt that the

1 Director considered that. It is not in the decision.  
2 This is an appeal from the decision. I am sorry to bang  
3 on, but this is not at large. We started on 23rd October  
4 with the promise by the Office that its opening and its  
5 stall were the decision, that it was carefully and  
6 conscientiously cross-references and that all we needed to  
7 do was to look at the decision and the evidence referenced  
8 in it. That was the case we faced. They had by then  
9 already had our defence for three weeks. There was not a  
10 breath of, "Oh, no, we'll start again." It is just wrong.

11 However fascinating it might be for any of us to  
12 want to re-visit the work which was done by the Office,  
13 either at the Rule 14 notice stage or at the sub-  
14 peremptory Rule 14 notice stage or at the decision stage,  
15 the decision is where the line stops. I appeal against  
16 that decision, not against some hypothetical document  
17 which does not exist.

18 There we are. We are looking at the defence and you  
19 can see that they match through. We have got Allsports'  
20 pressure on Umbro as the first one. You were looking at  
21 paragraph 55.

22 "It is clear and unambiguous evidence of pressure  
23 being placed on Umbro by Allsports."  
24 That is precisely what the Director did not find. There  
25 is no finding of pressure on Allsports in the decision.  
26 Whether my learned friends now seek to characterise it as  
27 such is for them now, seemingly, to want to go over the  
28 underlying material and come up with a different decision,  
29 a decision which we are not allowed to see, which was not  
30 produced by the Office and is not the one which I am  
31 appealing.

32 This is still the 20th April 1999 - I cannot do this  
33 by half-past 2, I am sorry.

34 THE CHAIRMAN: No, you go on. You take your time, Mr. West-  
35 Knights.

36 MR. WEST-KNIGHTS: I doubt that we will finish this today.

37 THE CHAIRMAN: Let us go on and do what we can.

38 MR. WEST-KNIGHTS: Going back to the OFT's supplement, the  
39 second particular upon which they rely ----

1 THE CHAIRMAN: The annex.

2 MR. WEST-KNIGHTS: -- as retailer pressure. Yes. This is  
3 said to be Mr. Guest expressing concern to Mr. Ronnie  
4 about the JD hat promotion. The observation by the Office  
5 is:

6 "This evidence is not new and was expressly relied  
7 upon by the OFT in the supplementary Rule 14  
8 notice."

9 THE CHAIRMAN: But not in the decision.

10 MR. WEST-KNIGHTS: But not in the decision.

11 THE CHAIRMAN: Yes.

12 MR. WEST-KNIGHTS: In fact, there is only a very vague  
13 reference to it in the supplementary Rule 14 notice at  
14 paragraph 63. What Allsports go on to say, in our  
15 submission, about the need for further evidence - and Mr.  
16 Guest is once more wrong. Well, he is not once more  
17 wrong, in this instance, as I say, it was inaccurate to  
18 say that he had not dealt with it in his evidence at all:  
19 he said in half a line, "I didn't know about it, and I  
20 didn't talk to Ronnie about it." So it is right that en  
21 passant it has been dealt with. It is part of the matrix,  
22 part of the continuum of his witness statement.

23 I should simply say this. We know now from  
24 extrinsic evidence that the JD cap promotion went public  
25 on 23rd May. I doubt that that will be subject to  
26 challenge, because it comes from the Director's file and  
27 it is the disclosure by JD Sports of their internal  
28 memorandum sent by management, contrary to the witness  
29 statement of Mr. Bound, which they have now corrected. It  
30 is an internal memorandum to all stores, saying, "This is  
31 to go inside the shops on the Saturday and it is to go on  
32 the windows on the Monday." The Monday is the 23rd May.  
33 I have got that document here.

34 THE CHAIRMAN: It is a bit difficult for us to go into detail  
35 on this kind of application.

36 MR. WEST-KNIGHTS: It is not detail, sir, because in a sense  
37 the document is so plainly self-proving and it is part of  
38 the file. I doubt that you have got our bundles. I doubt  
39 that, when they reminded themselves of the documents, the

1 Office would conscientiously suggest that I was wrong  
2 about this.

3 We had, amongst the materials, the source material  
4 from JD Sports, which includes the actual offer and the  
5 posters and stuff that they were going to put up in the  
6 shops. It includes:

7 "Initiative to be completed in-store, Sunday  
8 21st/Monday 22nd May. Windows Tuesday 23rd May. It  
9 is extremely important all stores get behind this  
10 promotion due to its limited duration."

11 This was the Euro 2000 shirt going in shortly before the  
12 commencement of Euro 2000.

13 If that is simply disregarded as a matter of detail,  
14 the fact is that this was mentioned at the supplementary  
15 Rule 14 stage and catches no mention whatever in the  
16 decision. So here is a classic example of somebody  
17 burning the midnight oil to rove through any old bit of  
18 rubbish that was there below and revive it.

19 Three:

20 "Concern about Blacks' discounting in the South  
21 East."

22 This is only in the leniency statements of Mr. Ronnie: no  
23 reason why it should only be there; there is  
24 no reason why it should have stayed locked in  
25 there. It was material available to the OFT  
26 for external investigation. "The OFT did not  
27 rely upon it in either the administrative  
28 procedure or in the decision because it could  
29 not do so."

30 That may be right as against Umbro, but in truth the  
31 excuse given is that there was a different administrative  
32 officer who did not know about the existence of this  
33 stuff.

34 "It was 'not adopted or pursued' because it could  
35 not be. Now that the leniency materials have been  
36 disclosed ... as a matter of principle [we can use  
37 it]."

38 We remind you that the Office has congratulated itself for  
39 being scrupulous and fair to the defence in their



1 disclosure.

2 THE CHAIRMAN: Let us press on without too many side comments,  
3 Mr. West-Knight.

4 MR. WEST-KNIGHTS: Forgive me. That is brand new. So it has  
5 never come out before. There is no particular reason why  
6 it should not have come out before. It could have been  
7 investigated at the investigative stage, not necessarily  
8 even with the Umbro people, but with anybody else.

9 The golf day. It is not new evidence. It was  
10 referred to and relied on in the decision, but it is wrong  
11 to say that the distinction between receiving information  
12 and pressure being illusory because we know as fact that,  
13 whatever else the Director intended to do with his  
14 reliance upon the golf day, it was next to a big red box  
15 that said, "This is not a finding of retailer pressure".  
16 It is as simple as that.

17 So it is an event, which is in the decision, the  
18 principal purpose for which it is present and upon which  
19 it is relied is to show that Manchester United were  
20 involved because of the remark said to have been made by  
21 Mr. Draper at that meeting to all and sundry that a  
22 discounting of the Manchester United shirt on launch would  
23 bastardise the product.

24 In his latest statement, Mr. Ronnie asserts that he  
25 found that embarrassing and that it was pressure upon him  
26 by Mr. Draper, but in the original statements that he made  
27 the only embarrassing thing that he found about that was  
28 that David Hughes had blurted out the number of shirts  
29 that had been ordered by Allsports from Umbro.

30 Whatever the nuances here, it is there but it was  
31 not a finding of retailer pressure and it is not to be  
32 revived as such. For all we know, the Director decided  
33 positively that it was not. We just do not know, but we  
34 must not be required to speculate.

35 Of course, Mr. Hughes has dealt with the golf day in  
36 his statement and he has dealt with Mr. Ronnie's statement  
37 about it. This is not, "On this point, we would need a  
38 lot of specific new material." This is part of the wider  
39 point that, although he deals with that event, he does not

1 deal with it in the context of or as part of an attack on  
2 the pressure notion.

3 The third point about this is that if it is being  
4 deployed in support of the receipt of information it is  
5 again being re-characterised. It is suddenly now in an  
6 inchoate and unspecified way that perhaps we have got to  
7 assume is either the request or tends to lead to the  
8 inference of acceptance of the material in a Lafarge way.

9 But we should not be required to speculate and nor should  
10 the character of the information be changed once the  
11 decision is published.

12 The mere fact that there may be some facts in a  
13 decision from which you could make a different case from  
14 the one that the Director made does not help, because the  
15 case that we must meet is the one that the Director did  
16 make.

17 "'Holding back' by Allsports on England kit."  
18 There is a passage in the monthly report for May for Umbro  
19 reciting that until latterly we, Allsports, had been  
20 holding back on taking delivery of some shirts, but by the  
21 time that was written those shirts had been received.

22 That is now relied upon as being evidence of  
23 Allsports' propensity or capacity to exert pressure in  
24 response to a statement that the boot was on the other  
25 foot and that Umbro held sway. Fine. They are entitled  
26 to rebut the suggestion that Umbro ruled the roost if  
27 material, but what it cannot be used for is evidence of  
28 actual retailer pressure. The particular reason is this.

29 This has been hatched up by counsel. Nowhere does  
30 any witness say that this event was or was evidence of a  
31 capacity to exercise pressure. It is a fact, but Ronnie  
32 does not say, "That was a bit sinister" or "That indicated  
33 to us that they could mess us about on deliveries."  
34 Nothing of the kind. There was a period during which  
35 Allsports was about to take delivery of stuff and it did  
36 so as and when it was convenient to do so. It had not and  
37 it did. So this is a construct with no evidence at all to  
38 support it: merely the statement in a management report  
39 that, for a period, Allsports had not been taking delivery

1 (as it was perfectly entitled not to) and subsequently  
2 did.

3 This is a creation; this is non-evidence; there is  
4 no evidence that this is either retailer pressure or  
5 capacity to exert it. It is made up.

6 THE CHAIRMAN: So it is not in Ronnie's statement.

7 MR. WEST-KNIGHTS: It is not anywhere in Ronnie. Nobody  
8 speaks to this at all, except Miss Charnock because she  
9 picked up the reference to it in the decision, which is  
10 one of those inchoate bits that simply recites it, and  
11 explains it because there was something about it that  
12 might have been read as if we were doing something wrong -  
13 we were not.

14 "Meeting between Mr. Hughes and Mr. Ronnie on 2nd  
15 June."

16 The whole of Ronnie's statement was available and referred  
17 to by the OFT at the administrative stage, but the point  
18 about this is that, when quoted, that bit of Ronnie III  
19 which really contains the sting was specifically excluded  
20 from the quotation in the decision; and the paragraph  
21 which deals with Hughes expressing the view that price  
22 discounting might adversely affect the relationship  
23 between Umbro and Manchester United is there simply as a  
24 remark by Mr. Hughes.

25 The statement went on to say that this mattered  
26 because Hughes knew a lot about MU because he was the  
27 official retailer. That is expressly edited out of the  
28 decision because the Director had made a policy decision  
29 that he was not going to lay at Allsports' door any  
30 allegations of retailer pressure.

31 Whilst there is reference to the meeting between the  
32 two of them, first, it is next to a big red box that says,  
33 "Caution. This is not being relied upon as an example of  
34 retailer pressure, because I make no such finding.  
35 Second, the relevant paragraphs of Ronnie are expressly  
36 excised from the quotations in the decision."

37 THE CHAIRMAN: Mr. West-Knights, would this be - at least  
38 conceptually - slightly clearer? I am on 21(b) of the  
39 defence, where it says:

1 "In the case of Allsports and JJB, Mr. Ronnie has  
2 now clarified that the telephone calls he made after  
3 the meeting on 24 May and before 2/3 June were made  
4 to inform those retailers of the fact that, in  
5 response to Allsports and JJB pressure and  
6 complaints, Umbro ..."

7 Would it be a possible approach to say that, as a first  
8 step, one has got to look at Ronnie IV and see what it is  
9 he says about pressure and complaints in relation to which  
10 his telephone call was a response.

11 MR. WEST-KNIGHTS: We can do that. I can tell you what it  
12 says, but by all means let us go to it.

13 THE CHAIRMAN: If we did that, we would at least know what the  
14 witness is saying in this respect.

15 MR. WEST-KNIGHTS: Yes. You have got to go and see it in a  
16 minute to compare it with the allegations made by the  
17 Office. It is at bundle 2, tab 16.

18 THE CHAIRMAN: This is the first but fourth, is it not?

19 MR. WEST-KNIGHTS: Yes. There is in fact a fifth, but it is  
20 relevant only to JJB.

21 "7. In order to achieve this strategy [having a  
22 wide product range and selling stuff other than  
23 replica kit] Umbro was reliant on retailers  
24 'supporting' or stocking a wide range of Umbro  
25 products. This gave the retailers a lever with  
26 which to exert pressure on Umbro in relation to  
27 replica kit. Umbro was especially vulnerable as its  
28 top three accounts (JJB, Sports Soccer and  
29 Allsports) ... JJB's business alone accounted for  
30 [blank] per cent. of Umbro's overall business in  
31 spring 2000. The threat of any of these major  
32 accounts - but especially from JJB in footwear -  
33 withdrawing their support from a wider range of  
34 Umbro's product than just replica, thus represented  
35 a serious threat to the success of the Umbro  
36 business.

37 "8. When we received complaints from Allsports and  
38 JJB about discounts offered by other retailers,  
39 there was an underlying threat that they would

1 withdraw support for Umbro as a brand in their  
2 stores if we did not do something about it. This  
3 would have serious repercussions for the Umbro  
4 business.

5 "9. Also, perceived pressure (because nothing was  
6 explicitly stated) came in the form of order  
7 cancellations, a sudden reduction in the volume of a  
8 particular product that had been ordered and a  
9 perceived reluctance to place orders for Umbro  
10 products in future."

11 If that is directed at Allsports I have not the slightest  
12 idea, but I think it is not; but that is one of the  
13 problems with this.

14 "These actions were not limited to replica kit but  
15 extended to apparel, footwear and other sports  
16 goods. Their timing would normally coincide with a  
17 recent retail promotion by one of Allsports' or  
18 JJB's competitors."

19 That is a handy way of describing, perhaps, Sports Soccer.

20 "10. I received complaints from Allsports directly  
21 from David Hughes or Michael Guest, Allsports'  
22 buying director, who controlled their buying and  
23 merchandising decisions on a day-to-day basis.  
24 Although Allsports' buying power was less than  
25 JJB's, they were still one of our top three accounts  
26 and there was an underlying threat that Allsports  
27 would reduce support across the range of Umbro  
28 products.

29 "11. It is difficult now to recall particular  
30 examples of pressure exerted by Allsports ... but  
31 these always hung unspoken in the background. I  
32 would say that Allsports were just as vocal as JJB  
33 about discounting."

34 This is the unspoken vocality about which we commented in  
35 our skeleton.

36 "12. Specific examples of pressure from Allsports  
37 that I do recall include ..."

38 That is naughty, but, at any rate, he only sets out three:

39 "(a) the criticisms made by David Hughes at the

1 Allsports Golf Day on 25 May 2000, in front of  
2 Manchester United and Umbro's competitors, regarding  
3 Umbro's supposed lack of control over the retail  
4 situation of the MU product. This was at a  
5 sensitive time when David Hughes knew Umbro was  
6 renegotiating the renewal of its sponsorship  
7 contract with MUFC."

8 That is new, because Ronnie III has David Hughes launching  
9 an attack on all of the brands; and the only  
10 embarrassment that Ronnie faced was the blurting out of  
11 the actual number of shirts which had been sold. That is  
12 paragraphs 36 to 39 of Ronnie III.

13 That is the golf day, but this is a whole new aspect  
14 of golf day of which we have never heard previously.

15 "(b) the implicit threat during David Hughes'  
16 meeting with me on 2 June 2000 that if Umbro did not  
17 take steps to stop JD's 'hat trick promotion' that  
18 it would create a problem for Umbro's relationship  
19 with Allsports (see paragraph 45 of my OFT  
20 statement)."

21 Paragraph 45 was expressly excluded from the decision:  
22 where they quote paragraphs 43 to 46 of Ronnie's witness  
23 statement, 45 is removed and is nowhere else relied upon.

24 So it does not feature in the decision; its contents do  
25 not feature in the decision; they are not mentioned.

26 So far, do not let us forget that these are the only  
27 three - and they are all after the 24th May:

28 "(c) David Hughes' comment on 2 June 2000 that if  
29 Umbro could not ensure that the new MU shirt would  
30 not be discounted, it would affect Umbro re-signing  
31 the Manchester United deal (see paragraph 46 of my  
32 original statement)."

33 You may think, "That looks like pressure." The statement  
34 at paragraph 46 of Ronnie III ends with the sentence - I  
35 am paraphrasing - that mattered, because it was not just  
36 David Hughes' personal view, because he was "in" with  
37 Manchester United, he was their official retailer, so he  
38 would know. That sentence was excluded from the decision.

39 The sting, therefore, of that paragraph has been removed

1 and, in any event, in the decision it contains a red box,  
2 saying, "This is not being relied upon as an example of  
3 retailer pressure, because we make no such finding." That  
4 is it.

5 What are we to make of this? We have to go back to  
6 Ronnie III and square bracket everything which is not  
7 relied upon as retailer pressure in the decision; in  
8 other words, anything which mentions retailer pressure by  
9 Allsports has got to be square bracketed out to make it  
10 consistent with the findings in the decision.

11 Then we get this - all of which post dates the 24th  
12 May - I have not forgotten the unspecified, vague  
13 assertions previously. I will come back to them in just a  
14 second. These all post dated the 24th May. Second, they  
15 suffer - each of them severally - from the defects which I  
16 have just mentioned in terms of their admissibility here  
17 and now. And that is it. But it does get slightly worse.

18 I should just say at 13 that it is another general  
19 blather:

20 "... Complaints from retailers would be received by  
21 the account manager at Umbro (especially Phil Bryan,  
22 Umbro's key account manager for JJB) ..."

23 This is exactly the flavour below. We are tagged on:  
24 "It's usually JJB" and then sometimes it will be "and  
25 Allsports". Sometimes it would just be "major retailers".

26 That was the principal objection made by Mr. Peretz  
27 below, which found favour with the Director. He said,  
28 "I'm not making any such findings."

29 All this kind of generalised evidence was put  
30 forward below, but it was rejected or, at any rate, did  
31 not lead to any finding of such pressure having been  
32 placed upon Umbro by Allsports.

33 He then turns in paragraphs 14 to 16 to some much  
34 later events concerning only JJB. Then we come to:

35 "17. It was largely as a result of these complaints  
36 ..."

37 What are these complaints? Specifics? They cannot be  
38 because they post date the 24th May.

39 "... and the pressure placed upon Umbro by JJB ..."

1 Or is it the complaints that he is talking about in  
2 respect of JJB in the preceding paragraphs?

3 "It was largely as a result of these complaints and  
4 the pressure placed upon Umbro by JJB ..."

5 In other words, is that expressly limited to JJB?

6 "... that ... I met with Mike Ashley and Sean Nevitt  
7 on Wednesday 24 May 2000 to force them to increase  
8 the price of the England shirts ... I do not think  
9 that we fixed a precise date at the meeting ..."

10 Then he goes on to explain how it was that he was informed  
11 that the prices had eventually been put up.

12 The call to Allsports is where he resiles from the  
13 evidence upon which the Director has relied.

14 "22. I have reviewed Allsports' and JJB's notices  
15 of appeal and the witness statements of David Hughes  
16 and David Whelan."

17 We have characterised our position so far as having  
18 demolished this case on appeal and the OFT say, "Oh, no,  
19 it's just a frank clarification by Mr. Ronnie." If it is  
20 a frank clarification, it resulted from his having read  
21 the notices of appeal and the statements, in particular,  
22 of Hughes and Whelan and, in particular, paragraph 59 of  
23 David Hughes' statement:

24 "... I have read, in particular, paragraph 59 of  
25 David Hughes' statement, where he denies receiving a  
26 call from me regarding the retail price of the  
27 England home shirt and states that I did not tell  
28 him that Sports Soccer had stopped discounting the  
29 England shirts."

30 David said, in his statement, "For the avoidance of doubt,  
31 nor did I get any assurances." He was not, as it were,  
32 dealing with a wholly different case based on assurance  
33 and context and pressure, because the Office itself said  
34 there would be some logic in a call being made at least  
35 for assurances to be given. But that was a hypothetical  
36 statement that formed no part of the findings.

37 There is Mr. Ronnie. He says:

38 "... I have also seen paragraph 12 of David  
39 Whelan's second statement ..."



1 "23. I would like to clarify a point ...  
2 "24. I did call Allsports and JJB to tell them that  
3 Sports Soccer had agreed to launch the shirt at  
4 £39.99. Obtaining Sports Soccer's agreement to such  
5 an increase was a considerable 'result' for Umbro,  
6 which I relayed to the retailers in response to  
7 their persistent complaints about Sports Soccer's  
8 discounting and the need to do something about it.  
9 I also informed them of our achievement in an effort  
10 to secure JJB and Allsports' commitments to  
11 supporting Umbro on a wider range of products."  
12 That is new.  
13 "I definitely called Allsports as they had been as  
14 vocal as JJB about the pricing of the product.  
15 "25. I cannot now remember exactly who I spoke to  
16 at Allsports. My instinct tells me that I would  
17 have spoken to Michael Guest ..."  
18 Previously we had been told that he could not say who it  
19 was.  
20 "... as he was more involved in the day-to-day  
21 running of the replica kit business within Allsports  
22 ...  
23 "26. My recollection is that I rang Duncan Sharpe  
24 at JJB ..."  
25 Paragraph 27 is where the resiling occurs:  
26 "27. So far as I was concerned, the task I had to  
27 carry out was somewhat different from Phil Fellone's  
28 ... I did not ring Allsports and JJB 'to ask them to  
29 agree to maintain prices on the England home kit'.  
30 That is a quote from Ronnie III. That is not a quote from  
31 our notice of appeal. That is not a quote from any other  
32 person. This is him, although you might expect him to  
33 have said that.  
34 "There was no need to extract any formal agreement  
35 from those particular retailers, as they both were  
36 pricing at £39.99 anyway."  
37 Yes, that was our case below and, once the decision had  
38 come out, in our notice of appeal.  
39 "The purpose of the call to them was to inform them

1 that Umbro had got a guarantee from Sports Soccer.  
2 I warned them not to undercut the £39.99 price as  
3 Sports Soccer would use any excuse for retaliation.

4 Once Sports Soccer had agreed that price, and these  
5 other retailers (Allsports and JJB) had been told  
6 this, they would not go below it.

7 "28. Phil Fellone rang JD, Debenhams, First Sport  
8 and John Lewis. Some of these retailers were  
9 smaller accounts and more prone to discounting the  
10 kit, so he may well also have wanted their agreement  
11 to stick to the £39.99 price point."

12 That is where the case has changed.

13 What we are left with then is general allegations  
14 and the principal objection below to the Director was, "We  
15 can't meet these vague and unparticularised allegations."

16 There is nothing to stop the Office going to see Mr.  
17 Ronnie at any stage. After all, Umbro, having failed in  
18 their leniency application, were still up for co-operation  
19 and had vouchsafed it. They said, "Come on, Ronnie, give  
20 us some examples. If you say that Allsports are involved  
21 in the spoken threat of order reduction, you must be able  
22 to tie it into a particular reduction, particularly as you  
23 are talking about non-replica kit. Are we talking about  
24 Addidas boots?", or whatever. There must be some  
25 particularity to be had.

26 It is impossible to cross-examine somebody: "Can  
27 you give us any further information about this?" "No."  
28 "It happened, did it?" "Yes." "When?" "Can't say."  
29 "Who said it?" "Can't say." "What did it involve?"  
30 "Can't say."

31 For that reason - properly, we say - in this respect  
32 the Director rejected the idea of making any findings  
33 based upon that kind of material and, indeed, rejected  
34 such particulars as were put forward, excised them from  
35 the decision expressly, excised reference to the witness  
36 statements expressly and put the big red box on every  
37 page, saying, "There are no findings of pressure."

38 THE CHAIRMAN: Does that cover your submissions?

39 MR. WEST-KNIGHTS: Not quite, but more or less. I will, if I

1 may, spend five minutes - because I have over-run already  
2 - just wrapping up the points in the annex to the  
3 skeleton.

4 We had got to page 5 at (g), "Generalised  
5 assertions". Here it is said that:

6  
7 "Allsports's submissions add nothing of substance.  
8 Since in the decision, the OFT did not make any  
9 finding based on complaints or pressure by  
10 Allsports, then it is hardly surprising that the  
11 decision contains no specific reference to the  
12 general evidence."

13 That again is a reference to the big red box.

14 "Just as the absence of overall finding on the issue  
15 of complaints or pressure does not indicate  
16 abandonment, then absence of findings on this  
17 general evidence cannot amount to abandonment."

18 We must be living on different planets here. Whether you  
19 call it abandonment or not being pursued, the question is,  
20 is a finding made in the decision? The answer is, yes, in  
21 effect, that there was no pressure or, at least, that  
22 there is an absence of finding that there was pressure,  
23 notwithstanding that at the investigative stage and in the  
24 Rule 14 notices that was what the OFT had been going for.

25 "22. Further, insofar as Allsports criticises  
26 reliance upon 'generalised assertions' because they  
27 are generalised and not specific ... this criticism  
28 is unfounded. Clear evidence, such as that in ...  
29 (paragraph 11 of Ronnie IV) ..."

30 Which was the vague and general stuff.

31 "... is admissible and significant evidence,  
32 regardless of the fact that it is not specific about  
33 dates, places, persons etc."

34 The other references there of course, to Ronnie III and to  
35 Fellone were the material that was below, was looked at at  
36 the Rule 14 notice period and resulted in no finding.

37 Quite right too.

38 "23. As to Allsports' contention that there was no  
39 relevant pressure from Allsports prior to the 24 May

1 agreement ... this is not correct. Plainly both Mr.  
2 Ronnie's and Mr. Fellone's evidence of generalised  
3 pressure refer to times before 24 May 2000."

4 Yes, so they do.

5 "As stated above, there is no reason why these  
6 allegations cannot be pursued on appeal."

7 Yes, there is: because they were pursued below and did  
8 not find their way into the decision.

9 "Moreover, the following specific complaints and  
10 pressure pre-dated 24 May:

11 "(a) the 20 April 1999 letter ..."

12 THE CHAIRMAN: We have got the list.

13 MR. WEST-KNIGHTS: I am grateful. Guest, Ronnie, JD Sports is  
14 new, although it was available below; dealt with below,  
15 but creeps into the appeal; (c) is brand new - there is  
16 no good reason whatever why they could not have spoken to  
17 Mr. May or asked Umbro for a statement from Mr. May at the  
18 investigative stage. And can I remind you that (b) and  
19 (c) must be delimited by the public knowledge of the JD  
20 caps promotion, which went public on 23rd May. That is a  
21 date point, but the fact is that this stuff should not go  
22 in because (b) was below and was rejected, (c) is brand  
23 new and there is no good reason for it. Then (d) derives  
24 from leniency material and therefore is new new. But, in  
25 any event, the leniency material says that it took place  
26 around the week commencing 29th May. Ronnie II, paragraph  
27 144. If that is handy in the same bundle, I might make  
28 that good.

29 THE CHAIRMAN: I think we want to stick to the point of  
30 principle at the moment, Mr. West-Knights. Whether they  
31 can make it out, if they are allowed to make it at all, is  
32 another matter.

33 MR. WEST-KNIGHTS: I make the point - and I make it baldly -  
34 with the exception of the 20th April 1999 letter, there is  
35 no sensible evidence that these complaints and pressure  
36 could have procured the meeting of 24th May;  
37 particularly, if they had taken place the day before the  
38 24th May, even Mr. Ronnie might have said, "This is the  
39 kind of thing you would remember, because I set the

1 meeting up straight away. I had these people on the  
2 phone, saying, 'What's this about a cap?' No such  
3 evidence.

4 THE CHAIRMAN: And the April 1999 letter you say is over a  
5 year before anyway.

6 MR. WEST-KNIGHTS: And, more materially - because it is  
7 nothing to do with the relevance of the evidence - it has  
8 got a big red box next to it, saying, "This is not relied  
9 upon as evidence of retailer pressure."

10 As to the last part:

11 "The OFT relies upon paragraph 144 of the decision  
12 ... to establish that Allsports was concerned about  
13 discounting ..."

14 Paragraph 144 of the decision recites the fact that  
15 Allsports did not like the price of £39.99. It is  
16 precisely the opposite point. What Allsports are recited  
17 as wanting was to charge more than £39.99 but they could  
18 not because JJB went public in 1999 to say, "That's our  
19 ceiling price. We will never charge more than £40 for a  
20 shirt." So, bluntly, nobody else can. But Mr. Hughes and  
21 Allsports have never made any bones about it, particularly  
22 in respect of the Manchester United shirt. They thought  
23 it was a cracker of a product and it could have gone out  
24 at £45 or even £50, but it was impossible.

25 That is the statement at 144 and it shows, it is  
26 said, that Hughes was concerned about discounting.

27 "The existence of that concern is then in turn  
28 relied upon as relevant to the issue of complaints  
29 and pressure."

30 Again, this is all turning existing material upside down  
31 and whether or not Mr. Hughes was concerned about  
32 discounting is immaterial to the question if there are no  
33 findings that that ever turned itself into pressure  
34 brought to bear on any other third party.

35 I am sorry to have laboured that, but the fact is  
36 that, even as a matter of practicality, you are left with  
37 a mess. Where is the clear and precise disquisition of  
38 the pressure that gave rise to the meeting of 24th May?  
39 Answer, not in the decision. Second answer, not in the

1 defence, where it should not be anyway. Where is the  
2 clear and concise disquisition on the context, be it  
3 request or acceptance, which would turn the receipt of an  
4 assurance into an infringement? Answer, not in the  
5 decision because no such case is made. Answer, not in the  
6 defence, where it should not be because it is all over the  
7 place.

8 What about the witness statements? What are you  
9 going to make of Ronnie IV? The answer would be, if it  
10 were admissible, reject the vague and unparticularised  
11 nonsense, as the Director did, and the rest of it falls  
12 away with it.

13 In any event, you have then got Ronnie III, which  
14 ought to be square bracketed out insofar as anything in it  
15 - or at least that needs a red stamp all over it, saying,  
16 "This is not to be relied upon to establish retailer  
17 pressure by Allsports."

18 I am sorry to bang on, but this is a point of  
19 substantial principle and I make no apology for making the  
20 application.

21 THE CHAIRMAN: Thank you very much.

22 LORD GRABINER: Could I have two minutes?

23 THE CHAIRMAN: Yes, Lord Grabiner. If it really is two  
24 minutes.

25 LORD GRABINER: I am very happy to do that, because  
26 everything that could have been said on the subject has  
27 just been said.

28 I just do not want you to feel that because I am  
29 not, so to speak, making a similar length application that  
30 I do not support it, because I do.

31 We set out our position on the last page of our  
32 skeleton argument for today, paragraphs 25 to 27. We see  
33 the point very shortly indeed. The decision that we are  
34 appealing against is a decision which alleges and  
35 concludes against us that an agreement, albeit  
36 unparticularised, was made between us or somebody at our  
37 end of the story, unparticularised, and Mr. Ronnie. That  
38 case is now abandoned.

39 How you achieve that without going through a

1 remission process is impossible to deduce from the rules  
2 of the court or from the process that has been followed or  
3 is supposed to be followed.

4 If you want to go back and start again, you ask for  
5 a remission, which is obviously unrealistic in the context  
6 of this case. But, of course, you do not need to go  
7 through a remission process if, in fact, you can come to  
8 this Competition Appeal Tribunal and just re-frame and  
9 produce a new charge, which is all that has happened.

10 What they are now saying is that, "The charge that  
11 we previously succeeded on we are now abandoning and here  
12 is a brand new, virtually equally unparticularised charge  
13 on a completely different basis", both amounting to a  
14 breach of the Chapter 1 prohibition but this one on a  
15 completely differently particularised basis: a new  
16 charge; a different case.

17 In our submission, that is a fundamental alteration  
18 for which there is no justification and it should not be  
19 permitted. It is as simple as that.

20 THE CHAIRMAN: Thank you. Yes, Mr. Morris?

21 MR. MORRIS: Can I start by inviting the Tribunal to step back  
22 from the detail and look at what has really happened and  
23 why we are here today? I am going to do it in a number of  
24 short propositions.

25 First, there has been an unforeseen and unsolicited  
26 change in the evidence of one witness as to the content of  
27 one and the same telephone call. Secondly, that evidence  
28 was not obtained unfairly by the OFT, nor in an attempt to  
29 improve its case on this appeal.

30 THE CHAIRMAN: The evidence about the phone call?

31 MR. MORRIS: The evidence about the phone call. Moreover, the  
32 suggestion that that change of evidence in those  
33 paragraphs is in response - and only in response - to what  
34 is being said now by Allsports is also not correct  
35 because, as you will have seen, it is consistent with what  
36 Mr. Ronnie had told the OFT in the leniency process back  
37 in February 2002.

38 Thirdly, the Office of Fair Trading is not engaged  
39 and has not been engaged here in a premeditated and

1 tactical moving of the goalposts. This evidence has come  
2 to light and the OFT is presenting that evidence as it is  
3 now being stated by Mr. Ronnie. Indeed, I would invite  
4 the Tribunal just to consider what the position would have  
5 been had this not happened in this way but had Mr. Ronnie  
6 in the witness box in March, when cross-questioned about  
7 this, said then what he now says in the witness statement.

8 Fifthly, this evidence as changed discloses an  
9 infringement. Indeed, we say, contrary to the recent  
10 remarks of my lord, Lord Gribner, that this evidence  
11 discloses one and the same infringement. It is an  
12 infringement, an agreement or a concerted practice about  
13 the same shirt - the England shirt - made at the same  
14 time, in the same phone call, made between the same  
15 parties about the same price.

16 THE CHAIRMAN: That is taking the telephone call, as it were,  
17 standing alone.

18 MR. MORRIS: Subject to one observation. It is important,  
19 sir, that you bear in mind precisely the content of  
20 paragraph 24 of Ronnie IV, which is at tab 16 of volume 2,  
21 where he says:

22 "I did call Allsports and JJB ... Obtaining Sport  
23 Soccer's agreement to such an increase was a  
24 considerable 'result' for Umbro, which I relayed to  
25 the retailers in response to their persistent  
26 complaints about Sports Soccer's discounting and the  
27 need to do something about it. I also informed them  
28 of our achievement ... I definitely called  
29 Allsports as they had been as vocal as JJB about the  
30 pricing of the product."

31 So he does say there, "One, I informed them. Two, I  
32 informed them in the context of or in response to the  
33 complaints by both Allsports and JJB."

34 THE CHAIRMAN: Is that second element, that he was informing  
35 them in response to something that they had done, an  
36 essential ingredient in the existence of a possible  
37 infringement?

38 MR. MORRIS: As to that, we say, as you pointed out, rightly,  
39 sir, in the course of argument, no, strictly not. We do



1 put our case on the basis of mere communication. You have  
2 seen that in the course of argument, but I can take you to  
3 further passages in our defence. But we do go on to say  
4 this, sir - and we very much urge this upon the Tribunal -  
5 it would be artificial to cut up the cases and to allow  
6 part of the case to proceed - in other words, one or more  
7 of those three ways of putting the case to proceed but not  
8 all three - because of the very fact of Mr. Ronnie's own  
9 evidence, where he is saying it is in the context of the  
10 background of pressure and complaints. We would submit  
11 that at this stage, for example, to permit the mere  
12 communication case to go forward and then to disregard the  
13 context would be an artificial way of allowing this appeal  
14 to proceed.

15 THE CHAIRMAN: How do we get over the problem raised by  
16 Allsports and JJB that the decision does not put the  
17 telephone call in the particular context which is now  
18 alleged?

19 MR. MORRIS: We say that there is and should be no bar upon  
20 this Tribunal considering a matter which is not made the  
21 subject of a finding in the decision on this appeal,  
22 subject, of course, to questions of fairness, which you,  
23 sir, rightly pointed out at the outset. If it would be  
24 unfair to Allsports to allow that issue to be canvassed in  
25 the course of this appeal, then of course that would be a  
26 matter which would be taken into account. But there is no  
27 bar as a matter of principle that if you do not mention it  
28 in the decision you cannot go ahead.

29 That leads on, if I may come back to the points I  
30 was making, to the sixth proposition. It is this. It is  
31 one related to the set-up of the whole structure under the  
32 Act.

33 The possibility of a change of evidence is, we  
34 submit, inherent in the procedures set up by the  
35 legislation. We have a two-stage procedure. The first  
36 stage is the administrative investigation. In that  
37 administrative investigation there is no power of cross-  
38 examination; the submission of witness evidence by the  
39 subjects of the Rule 14 notice is purely optional,

1 voluntary and, indeed, as was pointed out this morning, in  
2 the case of Allsports, Allsports elected not to put any  
3 such witness evidence before the OFT at that first stage.

4 The second stage is the judicial process. That,  
5 sir, is a process with full powers of compulsion of  
6 documentary evidence, of compulsion of witness evidence  
7 and of the ability for those witnesses to be cross-  
8 examined.

9 We would submit, sir, that with such differences in  
10 those two stages it is inevitable that the fact-finding  
11 process will be refined and, within that, there is an  
12 inevitable risk that there will be the modifications in  
13 the evidence that is given. That takes me back to my  
14 point about, "What if Mr. Ronnie had said this in the  
15 witness box rather than in his statement?"

16 Sir, as to that proposition, I would take you to  
17 certain passages in Argos, with which you will be far more  
18 familiar than I, which go to show that there is a  
19 difference in the two-stage process and the judicial  
20 process is a more refined process.

21 With that background in mind, I come to my seventh  
22 point and I ask this question, "In the circumstances which  
23 have arisen in this case, what is the OFT and, more  
24 importantly, this Tribunal to do in the situation?"

25 We would submit that it cannot possibly be the case  
26 that because one witness - a very crucial witness -  
27 modifies his evidence in a way which nevertheless  
28 discloses an infringement regarding the very same subject-  
29 matter that that modification means that the Tribunal  
30 cannot make a judicial determination of the facts and,  
31 indeed, on Mr. West-Knight's case, there can never ever be  
32 any finding of liability for such an infringement. The  
33 witness changes his evidence in the course of the judicial  
34 process: it is the same issue, it is the same  
35 infringement, it is the same shirt. Too late. We can all  
36 go home.

37 We would submit that that cannot be the case, but we  
38 would submit that that is precisely what my learned friend  
39 Mr. West-Knights is saying. We say that is an untenable

1 and extreme position which cannot possibly have been  
2 contemplated by the legislature.

3 That, in a nutshell, sir, is our position as a  
4 matter of principle.

5 THE CHAIRMAN: While you are on the principle, paragraph 21 of  
6 the amended defence, tab 4, volume 1. At paragraph 21(e)  
7 (i) and (ii) - there are two bits to it. The first bit is  
8 at paragraph 21(b), where you are saying, "It was the same  
9 telephone call, but the content of the telephone call is  
10 modified in this way we have explained. We flag up that  
11 Mr. Ronnie is actually saying that the reason he made the  
12 telephone call was in response to previous complaints - in  
13 response to pressure and complaints." That is all at (b),  
14 but when we get over the page to 21(e) we get an  
15 alternative case pleaded in (e)(ii) on the basis that  
16 there was no telephone call at all.

17 MR. MORRIS: Yes.

18 THE CHAIRMAN: How far can you go with that sort of  
19 alternative at this stage? Does your case really hang on  
20 there being a phone call?

21 MR. MORRIS: I have to say that that is the third case: the  
22 no phone call; complaints and pressure only. It is  
23 certainly the OFT's primary case that there was a phone  
24 call; it is certainly our central case. If, however,  
25 because of all the analysis that has been put in the  
26 notice of appeal, the way the evidence come out, you were  
27 to conclude, "We are not satisfied to the requisite  
28 standard as to what happened on that phone call", we would  
29 go on to say then, nevertheless, having heard the evidence  
30 in the round - because the phone call was in the context  
31 of pressure - if you were satisfied there was pressure and  
32 if you were satisfied that, as a result of that pressure,  
33 the Umbro/Sports Soccer agreement was made on 24th May  
34 2000, we would say as a matter of law that would also  
35 constitute an infringement. But I very much take your  
36 point, sir. That is very much a subsidiary case of the  
37 Office.

38 If I am following your thinking - and I should not  
39 get ahead of myself - while perhaps we should not be

1 allowed to make that case now and that should go, to that  
2 we would respond by saying that if it is permissible for  
3 the Tribunal to consider the context and the pressure as  
4 being the background to the phone call, the Tribunal will  
5 be hearing that material. As long as there is no  
6 unfairness in terms of response as far as the appellants  
7 are concerned, that material is before the Tribunal and we  
8 would suggest that, in those circumstances, even if you  
9 were not satisfied - you see the way it is put in (e)(ii)  
10 - that it took place, we would say that the other evidence  
11 is sufficient. That is the way we would deal with that  
12 third case, sir.

13 We would urge you not to artificially slice it up  
14 and say, "You cannot make this particular case, but you  
15 can make others", because, as was rightly pointed out  
16 earlier in the course of argument, we would submit the  
17 best course, if this matter is to proceed at all on the  
18 England agreement, is for all the material to be before  
19 the Tribunal.

20 Can I then briefly take you to the Argos case and to  
21 two or three passages? Rather than looking at Mr. West-  
22 Knight's skeleton, I would rather take you to bundle 3  
23 itself. It is the penultimate tab in bundle 3. Can I  
24 take you to page 9, paragraph 36? This, you will recall,  
25 sir, was in fact reciting argument. It was the Office of  
26 Fair Trading's argument in that case. I do not know if  
27 you prefer to read it to yourself, sir.

28 THE CHAIRMAN: This is your argument.

29 MR. MORRIS: This is the argument, but we say the point is  
30 still good and, indeed, it is picked up later.

31 THE CHAIRMAN: That is just what you were arguing at that  
32 point.

33 MR. MORRIS: Yes, that is the case. If you then go forward to  
34 50, 50 is citing the Napp preliminary issue ruling. I  
35 would like to draw your attention to paragraph 77 of Napp.

36 "We doubt, however ..." on page 16.

37 "We doubt, however, whether exactly the same liberal  
38 approach to the submission of new evidence can be  
39 applied to the Director ..."

1 I am sorry, I have got the wrong reference. I am trying  
2 to do it chronologically. It is page 77 of Argos, but  
3 before we get to that, can we go to 53 of Argos and the  
4 citation of Hansard, with which you will be very familiar.  
5 That is at page 18. It is the quote within a quote. I  
6 am not looking at 118:

7 "In elucidation of these provisions, we refer to the  
8 statement made in the House of Commons ...

9 "'It is our intention that the tribunal should  
10 be primarily concerned with the correctness or  
11 otherwise of the conclusions contained in the  
12 appealed decision and not with how the decision  
13 was reached or the reasoning expressed in it.  
14 That will apply unless defects in how the  
15 decision was reached or the reasoning make it  
16 impracticable for the tribunal fairly to  
17 determine the correctness or otherwise of the  
18 conclusions or of any directions contained in  
19 the decision. Wherever possible, we want the  
20 tribunal to decide a case on the facts before  
21 it, even where there has been a procedural  
22 error, and to avoid remitting the case to the  
23 director general. We intend to reflect that  
24 policy in the tribunal rules'."

25 Whilst, of course, talking in the context of a  
26 procedural error, the general principle is that the  
27 Tribunal should be there to decide a case on the facts  
28 before it. Then, over the page, a general point about the  
29 Director not being denied a reasonable opportunity. Then  
30 at 134 in the next paragraph:

31 "... In those circumstances it is virtually  
32 inevitable that, at the judicial stage, certain  
33 aspects of the decision are explored in more detail  
34 than during the administrative procedure and are, in  
35 consequence, further elaborated upon by the  
36 director. As already indicated, these are not  
37 purely judicial review proceedings. Before this  
38 Tribunal, it is the merits of the decision which are  
39 in issue. It may also be appropriate for this

1 Tribunal to receive further evidence and hear  
2 witnesses. Under the Act, Parliament appears to  
3 have intended that this Tribunal should be equipped  
4 to take its own decision, where appropriate, in  
5 substitution for that of the director ..."

6 Of course, it is a matter of degree and, in many  
7 ways, what we are arguing here is a matter of degree. If  
8 we look at the Argos case, in that case you considered  
9 that it had gone beyond a line and it had to go back.  
10 Here, we say, on a matter of degree, it is less than the  
11 Argos case. This is not a substantial amplification, this  
12 is a witness whose evidence is modified.

13 Of course my learned friends will stand up and say  
14 that this is a wholesale change in case, but if you step  
15 back, sir, and you look at what we are talking about, as I  
16 have said, these are the same events, the same phone call.

17 It may be - and, indeed, as my learned friend Lord  
18 Grabiner said at the previous case management conference -  
19 of course this is an issue to explore in cross-  
20 examination; it may be the change in case may undermine -  
21 may undermine - the evidence that is heard on this issue.

22 THE CHAIRMAN: What is new compared with the decision is the  
23 emphasis placed on the complaints and pressure; is that  
24 not right?

25 MR. MORRIS: It is right - compared with the decision.

26 THE CHAIRMAN: Compared with the decision.

27 MR. MORRIS: If you are troubled by that, sir, which I can  
28 understand initially you may be, I ask you, what is the  
29 objection to that matter being canvassed here?

30 First, we say that it cannot be the case that the  
31 pressure issue was abandoned by the Office. There was no  
32 finding. It has not been determined. At the very least,  
33 it could properly be the subject of remission. We all  
34 agree that remission is not the practical answer here, so  
35 we have to ask ourselves the question, why should the  
36 Tribunal not be permitted to deal with it?

37 If the matter was not raised in the decision, one  
38 reason could be - and often is - because it was not  
39 canvassed at all at the administrative stage, thereby

1 depriving the now appellants of their important rights of  
2 defence envisaged in the course of the first stage, namely  
3 their opportunity to respond to a Rule 14 notice to put  
4 their case fairly and squarely to the OFT at that stage.  
5 But that essentially, in the case of pressure, is not the  
6 case here. It is not the case that this is a matter which  
7 was not put below: it was put to them below; it was just  
8 not then ruled upon.

9 I then ask the question rhetorically, why then  
10 should it not be dealt with here? The only possible  
11 reason, in our submission, could be if there was no proper  
12 opportunity in the time available before the hearing for  
13 Allsports to address this matter. We would submit, very  
14 firmly, sir, that that is really the nub of the whole of  
15 today's hearing. Are you satisfied that it would be  
16 unfair to Allsports if the pressure allegations were  
17 canvassed in the course of the appeal?

18 In the course of the last case management  
19 conference, you will recall that we at that stage urged  
20 you to deal with this at the time of the main hearing. My  
21 recollection is that, in response, effectively, to my  
22 learned friend's submissions about, "By then it will be  
23 too late because we have got a lot of work to do", my  
24 reading of the transcript was that that was one of the  
25 reasons that persuaded the Tribunal to address this matter  
26 now.

27 We then look at what now is being said about what  
28 those unfair consequences are. We would submit that if  
29 you read our written submissions in detail - and I can  
30 take you to them in a moment ----

31 THE CHAIRMAN: We have read them.

32 MR. MORRIS: It is plain from that that the claims of  
33 prejudice are, at best, grossly exaggerated and, indeed,  
34 almost non-existent. It is the same witnesses. Large  
35 parts of the evidence concerning particular allegations  
36 have already been addressed in witness statements.  
37 Insofar as they have not been addressed in witness  
38 statements of particular witnesses, namely Mr. Hughes  
39 might not have addressed his mind particularly to it, we

1 would respectfully suggest that it cannot take very long  
2 for the matter to be put to him.

3 Essentially, the suggestion that there is going to  
4 be further disclosure is one which we find hard to accept.

5 We submit that if you look at the reality of this there  
6 is no prejudice to Allsports as a result of this matter  
7 being raised.

8 It would have been different if this allegation had  
9 never been in the Rule 14 procedure. Of course, we accept  
10 that; but that is not the case where retailer pressure is  
11 concerned.

12 THE CHAIRMAN: What about the formal problem that we have to  
13 decide the case by reference to the notice of appeal and  
14 the grounds of appeal set out in the notice of appeal?  
15 One argument in Argos as to why you could not raise things  
16 later was that at the time they filed the notice of appeal  
17 the appellant is firing, as it were, at the decision and  
18 if he cannot deal with what is in the decision when he  
19 raises his notice of appeal, that is too late and the  
20 rules do not really contemplate, certainly, any major  
21 change in the course of proceedings.

22 MR. MORRIS: As a matter of formality, I cannot get away from  
23 that proposition, but I would invite you, sir, to look at  
24 the reality. The reality is that there is no finding in  
25 the decision, therefore they could not fire at the  
26 decision. The matter has now been raised in the defence  
27 and if there is sufficient time for the matter then to be  
28 dealt with in a reply or by way of evidence, we would  
29 suggest that that cannot be a reason for not reaching the  
30 conclusion that the Tribunal ought otherwise to reach.

31 If, of course, there is not time or the matter  
32 cannot be dealt with, that is another thing, but we would  
33 suggest that the main reason why you are stuck with the  
34 decision is because of rights of defence. That is the  
35 rationale behind the whole structure. Indeed, sir, you  
36 have gone to great lengths in your judgment in relying on  
37 the point that preserving rights of defence at the  
38 administrative stage is of great importance.

39 THE CHAIRMAN: Yes.



1 MR. MORRIS: But we are not really in that situation here. We  
2 are really in a more formalistic position: "You have  
3 described your reasons, but you have not gone onto another  
4 paragraph and said --" The position may have been that,  
5 having found there was an agreement because of the phone  
6 call alone, we do not need to go on to make a finding in  
7 relation to the pressure.

8 THE CHAIRMAN: You say there is a bona fide modification by a  
9 witness of his earlier statement and there is no prejudice  
10 to the rights of defence in allowing the case to proceed  
11 on that basis; and it is in the public interest that it  
12 should do so.

13 MR. MORRIS: Precisely. We would emphasise the words "bona  
14 fide modification, unforeseen" and the public interest  
15 aspect - I do not need to take you to it but just to give  
16 you the reference. That is paragraph 82 of Argos, where  
17 there is the counter, "Of course there are rights of  
18 defence, but there is also a countervailing public  
19 interest in infringements being brought ----"

20 THE CHAIRMAN: That is why we have not, in cases like Argos  
21 and Aberdeen Journals, simply allowed the appeal. We  
22 have, perhaps over-generously, allowed a second bite of  
23 the cherry.

24 MR. MORRIS: But we would say that that same rationale goes  
25 for this case and we would say, on the jurisprudence of  
26 Aberdeen Journals and Argos, the best that Allsports can  
27 achieve is remission.

28 THE CHAIRMAN: Remission is impractical, I think you are going  
29 to say, so second bite before Tribunal.

30 MR. MORRIS: A second bite? I would say a different bite.  
31 Let us not go down that route.

32 We make the point in our submissions that there has  
33 been no judicial determination on this issue at all. All  
34 that is going to happen is that there is going to be one  
35 judicial determination. It is not double jeopardy; it is  
36 not being tried twice on the same charge. Because this  
37 procedure is so unique, you cannot use analogies with  
38 civil litigation or criminal litigation. You have got an  
39 administrative process and then you have got one judicial

1 bite at the cherry. We would submit, sir, that in this  
2 case there is no reason not to allow that to proceed.

3 Many of the points that my learned friend makes on  
4 the detail about the pressure are points which he can make  
5 in cross-examination, in argument and the like, but they  
6 are not really suitably gone into today nor, we submit,  
7 does it assist you, the Tribunal, in reaching your  
8 determination on this issue of whether it should proceed.

9 Sir, there are many other points I can make. I can  
10 develop some of those in detail. I am conscious of the  
11 time.

12 THE CHAIRMAN: What about the alleged vagueness of some of  
13 these allegations? You have particularised certain  
14 things, but what about the over-arching?

15 MR. MORRIS: The position on this is as follows. In relation  
16 to the pressure allegations, the specific items are  
17 identified in paragraphs 55 to 59 of the defence. In the  
18 annex to our submissions, we go through each of them. The  
19 main criticism about those specific items, as I understood  
20 it was being put this afternoon, is that none of them pre-  
21 date the 24th May. We do not accept that, and that is an  
22 issue to be determined.

23 THE CHAIRMAN: That is a merits point.

24 MR. MORRIS: That is a merits point. We would say - and I do  
25 not wish to take you through it in great detail - that if  
26 you look at the 20th April 1999 letter it plainly contains  
27 a complaint about the discounting practices of others. I  
28 will not go any further than saying that. So that is the  
29 first point.

30 As far as the generalised matters are concerned, we  
31 say that those generalised matters are matters which have  
32 always been there. They were there in Mr. Fellone's  
33 initial statement at paragraph 19. It is a complaint that  
34 they are general. It is, nevertheless, evidence. It is  
35 for you to decide whether, having heard those witnesses -  
36 when they say, "They were constantly putting pressure on  
37 me, but I can't remember when" - whether you believe that  
38 that is credible or not. When they are cross-examined,  
39 "Come on, Mr. Fellone, you must remember. You're making

1 this up", it is for you to decide whether it would be  
2 reasonable for a witness to have a specific recollection  
3 of specific dates and items of complaint or whether, in  
4 fact, it would be more reasonable that, in the  
5 circumstances and in the lapse of time that has occurred,  
6 that somebody knew something had happened but he could not  
7 be specific about it. That again is a matter, we would  
8 submit, for you to assess when you assess the evidence as  
9 a whole.

10 The specific items that we do plead can be dealt  
11 with and, insofar as the rest is generalised, there it is.

12 If the case is not good enough, it will not succeed, but  
13 that is not really a matter for here and now.

14 Can I make one further point? It is this. The  
15 suggestion appears to have evolved from Mr. West-Knight's  
16 submissions that Ronnie IV supersedes Ronnie III in terms  
17 of evidence. That is not the case. The OFT has stated  
18 right from the outset in its defence (paragraphs 27 and  
19 28(b) of its defence) ----

20 THE CHAIRMAN: Tab 4, volume 1, paragraphs --?

21 MR. MORRIS: It is paragraph 27 of the evidence.

22 THE CHAIRMAN: What are we to make of the remark in 21(c) that  
23 certain findings are not adhered to?

24 MR. MORRIS: What is not adhered to is the finding that, in  
25 the course of that telephone conversation, Allsports  
26 agreed to price at £39.99. In other words, the  
27 information was coming back to Mr. Ronnie rather than Mr.  
28 Ronnie telling Allsports about the agreement that had been  
29 made with Sports Soccer.

30 THE CHAIRMAN: But Ronnie III did say Allsports had agreed.

31 MR. MORRIS: If you then go over the page to 28(b), we also  
32 rely on (b)(ii) of Mr. Ronnie's statement. It may be in  
33 27. It should say in brackets, when it says "Mr.  
34 Ronnie ----"

35 LORD GRABINER: Sir, I do apologise but the notion that one  
36 can re-draft on one's feet is ludicrous. They are stuck with  
37 it. We rely on both these statements, III and IV.

38 MR. MORRIS: My lord Lord Grabiner has no application before  
39 this Tribunal in respect of this matter.

1 LORD GRABINER: I do. It is in the back of my skeleton.

2 THE CHAIRMAN: I am just trying to sort out what witness  
3 evidence from Mr. Ronnie is now relied on and to what  
4 extent. You were telling us that Ronnie III is maintained  
5 alongside Ronnie IV, except in relation to this one  
6 allegation; is that right?

7 MR. MORRIS: Yes, because if I can then take you to paragraph  
8 23 of Ronnie IV, which is at tab 16 of volume 2 - in fact,  
9 I think he makes one other change as well. Paragraph 16  
10 is one page 5 and paragraph 23. In paragraph 16 he says:  
11 "There is one part of my OFT statement that I need  
12 to clarify."  
13 The OFT statement is Ronnie III as now designated.  
14 "In the last sentence of paragraph ..."  
15 That having been put to him, he says, fairly:  
16 "... I would like to make clear that these calls did  
17 not last for the whole duration of the tournament.  
18 So far as I can now recall ..."  
19 So he is in IV making a modification to what he has said  
20 in III. He is saying, "I got it wrong in III. It is not  
21 correct." Whether that is a cause for criticism is not a  
22 matter for now.  
23 Then paragraph 23, which is the precursor to 24 to  
24 27, which is the evidence about which we are talking. He  
25 says there:  
26 "I would like to clarify a point made in paragraph  
27 32 of my OFT statement and to reply ..."  
28 So, effectively, Ronnie IV is a modification or he  
29 accepts, "Part of what I said in Ronnie III needs to be  
30 clarified." In our submission, it is plain that his  
31 evidence is contained in Ronnie III and IV and he accepts  
32 in IV that parts of III are wrong.

33 THE CHAIRMAN: So we read them together.

34 MR. MORRIS: Yes.

35 THE CHAIRMAN: But your case on the phone call is essentially  
36 in Ronnie IV.

37 MR. MORRIS: Yes, because he says, "Now that I have been asked  
38 about it and I have seen everything that everybody has  
39 said --" Can I just make this point, sir? I stand to be

1 corrected, but we would point out that Allsports in the  
2 course of the administrative procedure did not say there  
3 was no such phone call, nor did they say it was inherently  
4 unlikely. We have checked the references, but if somebody  
5 can show me a reference where that is said I will  
6 withdraw. However, as far as I am aware, there is no such  
7 reference.

8 I do not wish to take you to it, sir, but at  
9 paragraph 14(c) of our submissions we set out what is said  
10 about the phone call in the written representations of  
11 Allsports and, indeed, we suggest ----

12 THE CHAIRMAN: That is at tab 2 of volume 1. Did Allsports  
13 come to an oral hearing?

14 MR. MORRIS: They did. There was an oral hearing as well, and  
15 there are written representations. It is tab 8 of volume  
16 1, if you want to look at it, sir.

17 THE CHAIRMAN: That is the supplementary rule 14 notice.

18 MR. MORRIS: It is the written representations to the  
19 supplementary rule 14 notice, because it was only at that  
20 stage that Mr. Ronnie's statement was available. It is  
21 page 24, 1754. For your note, sir, half-way down the page  
22 you will see the number 60 on the left-hand side. That is  
23 the paragraph number of the supplementary Rule 14 notice  
24 and this is a response to that. I can take you to it in a  
25 moment, if you wish, but paragraph 60 is the paragraph  
26 which deals specifically with the phone calls:

27 "... Umbro has stated that it contacted JJB,  
28 Allsports, JD Sports ... to secure the retailers'  
29 agreement regarding their own pricing of the England  
30 home and away replica kit shirts during 2000."

31 And it refers to Mr. Ronnie.

32 "... Umbro has confirmed ..."

33 This is that it is responding to.

34 "... that JJB and Allsports agreed to maintain their  
35 prices."

36 There is a footnote reference to Mr. Ronnie, paragraphs  
37 32-33.

38 The only response there, in 60, is:

39 "Having verified the position with David Hughes and

1 Michael Guest, Allsports denies that it entered into  
2 any agreement on pricing or discussed such matters  
3 prior to the 8th June meeting at David Hughes'  
4 house."

5 There is nothing specifically about the phone call.

6 Just for your note, at page 9 - the number in the  
7 middle - page 1739 - this is a paragraph dealing with the  
8 suggestion that Allsports put pressure on Umbro. This  
9 argument is, "No, we didn't put pressure on Umbro." Then  
10 you will see at paragraph (iii):

11 "If Umbro was really responding to pressure from JJB  
12 and Allsports, why would it have been necessary or  
13 appropriate for Mr. Ronnie to phone JJB and  
14 Allsports in order to get them to confirm that they  
15 would maintain prices?"

16 If you look at that carefully and analyse that argument  
17 carefully, that does not have within it a denial of a  
18 phone call. Indeed, the logic of its own argument is that  
19 there was such a phone call. We will not go into any  
20 further detail, sir.

21 THE CHAIRMAN: What about the oral hearing?

22 MR. MORRIS: Mr. Peretz suggests that it is dealt with at page  
23 9, which is tab 9.

24 THE CHAIRMAN: It may be we have to find it later.

25 MR. MORRIS: Page 1974. Sir, conscious of time as I am, I am  
26 perfectly happy to cede the point if Mr. West-Knights can  
27 point out where this is addressed any more explicitly than  
28 it is in the written representations.

29 MR. WEST-KNIGHTS: Forensically delighted though I am to see  
30 my learned friend fumble, I can assist the Tribunal by  
31 giving the accurate references. The first is on page 10,  
32 between line 17:

33 "Without details of the conversations in question,  
34 one simply cannot test whether these were innocent  
35 conversations of the sort that one would expect  
36 between a supplier and a retailer ..."

37 But, more specifically - and I say this because I have  
38 found it - is that at page 19, line 21, Mr. Peretz says:

39 "The second concrete allegation is the alleged ring-

1                   around about the pricing of England shirts ..."  
2                   In essence, it is, even if it is assumed that somebody did  
3                   have such a conversation it could have been along the  
4                   lines of, "He asked Allsports what its pricing intentions  
5                   were and Allsports could quite innocently have replied to  
6                   such a question." In other words, really the flavour of  
7                   this is, as Mr. Peretz said in terms at lines 30 onwards:  
8                   "... no documents recording these alleged  
9                   conversations with Allsports and others, all we have  
10                  is vague generalities, founded in the end on  
11                  paragraphs 32 and 33 of Mr. Ronnie's witness  
12                  statement ... That is it. No details of whom he  
13                  spoke to, when, the words he used, he does not even  
14                  mention what the price was."

15                  In other words, this is, "We couldn't possible remember."  
16                  Our position is firmer than that: it is that there was  
17                  no such phone call. There was certainly no phone call  
18                  procuring agreement.

19                  THE CHAIRMAN: I do not know that it quite is "no such phone  
20                  call". It could equally be, "This is not sufficient to  
21                  prove the allegation."

22                  MR. WEST-KNIGHTS: Even if it is assumed that he did speak to  
23                  someone in Allsports, the conversations could have been  
24                  along the lines that he asked Allsports what its pricing  
25                  intentions were and Allsports quite innocently replied to  
26                  such a question. There is nothing wrong with the  
27                  question; there is nothing wrong with the answer.

28                  Sir, this is, in a sense, speculative, but, whatever  
29                  the effect of it, that is what it says and I do not resile  
30                  from anything that I have said about it.

31                  MR. MORRIS: I am grateful, sir. The point I make is that at  
32                  the very least what is now said in the notice of appeal  
33                  and what Mr. Hughes now goes into in detail is far more  
34                  specific: there is an express denial of a phone call  
35                  having taken place. The position moved on. That is the  
36                  background to the circumstances in which Mr. Ronnie was  
37                  asked about what was now being said, and those were the  
38                  circumstances in which he gave the response which he gave.  
39                  That distinguishes the position where the matter could

1 have been more forensically tested, if possible, at the  
2 administrative stage had there been witness statements  
3 from Allsports and the like.

4 THE CHAIRMAN: Just remind me why you needed to obtain Ronnie  
5 IV in the first place. Why was not Ronnie III enough for  
6 your purposes?

7 MR. MORRIS: We went back to Mr. Ronnie because there were new  
8 witness statements being put in some detail, particularly  
9 from Mr. Hughes and Mr. Guest, about a whole range of  
10 matters.

11 My learned junior, Mr. Turner, points out that that  
12 is what is said in paragraph 3 of his witness statement  
13 itself.

14 I am sure you have had the opportunity, but if you  
15 read Mr. Hughes' witness statement, it is a pretty full  
16 document: it ranges across a whole lot of matters; it is  
17 not a couple of paragraphs. He deals with the meeting  
18 with Mr. Ronnie on 2nd June, he deals with a whole range  
19 of matters. This is primary evidence from one of the  
20 primary players in this case, and this is the first time  
21 he has chosen to give evidence. In those circumstances,  
22 we would submit, it was wholly correct and proper for the  
23 Office to go back to Mr. Ronnie to say, "Here it is. Have  
24 you anything to say?" When that happened, this is what he  
25 said. When he told us what he said, we effectively have  
26 come out with it and told the Tribunal what he said. That  
27 is where we are.

28 Sir, subject to any guidance you would like, we  
29 would not propose going through the annex on the  
30 individual pressure allegations.

31 THE CHAIRMAN: There is nothing from us.

32 MR. MORRIS: The point I would emphasise about the annex is  
33 this. The critical paragraphs of the annex are the  
34 paragraphs where we deal with the question of whether or  
35 not there is, effectively, unfair prejudice in obtaining  
36 further material on the part of Allsports. Those  
37 paragraph number references in the annex are 6, 8, 10, 13,  
38 15 and 20. In those paragraphs we deal specifically with  
39 the question of whether or not there are unfair



1 consequences for Allsports in not being able to meet those  
2 points. We suggest that when you read those paragraphs  
3 you will see that the asserted unfairness disappears.

4 THE CHAIRMAN: Thank you, Mr. Morris.

5 MR. MORRIS: We have not discussed the amendment of Mr. May.

6 THE CHAIRMAN: No.

7 MR. MORRIS: I will deal with Mr. May. If you conclude that  
8 the matter may go ahead, then we will have before the  
9 Tribunal the issue of retailer pressure and we will also  
10 have before the Tribunal Miss Charnock's evidence.

11 MR. WEST-KNIGHTS: I know my learned friend is just about to  
12 start to do the amendment, but I feel bound to draw to  
13 your attention - just to draw a line under this position  
14 about the representations - at page 1754 ----

15 THE CHAIRMAN: Do you want to do this in reply, Mr. West-  
16 Knights?

17 MR. WEST-KNIGHTS: I was just going to do it now. It is a two  
18 second point.

19 THE CHAIRMAN: I would rather you did it in your reply, if you  
20 do not mind, because I am in the middle of listening to  
21 Mr. Morris.

22 MR. MORRIS: We are now at the hearing, we are dealing with  
23 the question of pressure, we have Miss Charnock's  
24 evidence. We have also now evidence responsive to that  
25 evidence from Mr. May.

26 We would submit that, under general principles,  
27 because it is responsive, it is in principle admissible.  
28 We would then need to satisfy you, sir, as to the reason  
29 why it has been put in now. We have explained in our CMC  
30 submissions the fact that, despite efforts in November and  
31 December, we simply could not get hold of him.

32 THE CHAIRMAN: He moved down to Cornwall or somewhere.

33 MR. MORRIS: Yes, and we did it as soon as we possibly could,  
34 following all those phone calls.

35 Essentially, we say that if you are with us in  
36 dismissing the application then there is no reason at all  
37 why Mr. May cannot be dealt with.

38 If I may, my learned junior would like to follow on  
39 one point of detail on your technical question about the

1 rules and the decision and the need to meet a notice of  
2 appeal. I am sure he will be no more than five minutes.  
3 MR. TURNER: Sir, I do apologise. It is brief. It is on the  
4 point of principle that under the legislation the Act  
5 envisages that matters will be conducted by reference to  
6 the grounds set out in the notice of appeal, that that  
7 takes one back to the decision and no more than the  
8 decision. It is the fundamental point of principle. What  
9 is said on the other side is that one cannot budge from  
10 that. Once one does, the appeal succeeds.

11 One knows from the case law that exists that that is  
12 not right, certainly in relation to rebuttal evidence and  
13 matters of that kind. Napp has already been the authority  
14 for that.

15 Insofar as it is suggested that the line stops there  
16 and that in no circumstances can the OFT ever add to the  
17 primary case but only add rebuttal evidence, that is, in  
18 our submission, too strict. It must depend on the  
19 circumstances. If one inspects the Rules and the Act, one  
20 sees that that is envisaged by the scheme of the  
21 legislation.

22 If I may just ask the Tribunal to take up the Act  
23 and the Rules, the provision to which we are referring is  
24 in Schedule 8, paragraph 3(1). I have the edition that  
25 was apparently superseded a few days ago.

26 THE CHAIRMAN: The 8th Edition, yes. We cannot afford to buy  
27 the 9th Edition.

28 MR. TURNER: That is on the enumeration, the top right number  
29 220.

30 "The Tribunal must determine the appeal on the  
31 merits by reference to the grounds of appeal set out  
32 in the notice of appeal."

33 The point is that the grounds of appeal are not fixed for  
34 all time by reference to what is in the decision. If one  
35 goes up to paragraph 2(3):

36 "The Tribunal may give an appellant leave to amend  
37 the grounds of appeal identified in the notice of  
38 appeal."

39 So the grounds of appeal which are the subject of the

1 determination by the Tribunal may be amended.

2 One then goes to the Rules, in the rules for  
3 amendment ----

4 THE CHAIRMAN: Are we under the new rules or the old rules?

5 MR. TURNER: I am looking at the new rules.

6 THE CHAIRMAN: We are now under the new rules.

7 MR. TURNER: We are under the new rules.

8 THE CHAIRMAN: This case is under the new rules, yes.

9 MR. TURNER: Rule 11 is the rule that allows amendment with  
10 permission and that rule envisages that an amendment in  
11 Rule 11(3) may be granted, in particular where a ground is  
12 based on matters of law or fact which have come to light  
13 since the appeal was made. So at least to that extent  
14 there is something that envisages amending the grounds to  
15 take account of subsequent developments. And, sir, you  
16 will be aware that in Rule 14 that is incorporated by  
17 reference into amendments for the defence.

18 Then the final body of rules to which I would  
19 briefly draw your attention is, of course, the full  
20 panoply of fact-finding powers that are incorporated in  
21 the Rules. When one puts that altogether, in the OFT's  
22 submission, the Rules and the policy of the legislation,  
23 do envisage that in some circumstances developments might  
24 lead to a need to take into account matters that have come  
25 to light since the decision or at least that cast a new  
26 light on material existing before the decision was made.  
27 Both of those are present in the instant case.

28 Sir, that is the extent of our submissions.

29 THE CHAIRMAN: Thank you.

30 MR. WEST-KNIGHTS: Sir, I think it is me next.

31 THE CHAIRMAN: Yes.

32 MR. WEST-KNIGHTS: I apologise for interrupting. Sometimes it  
33 is helpful, but plainly then it was not and I misread it.

34 I am sorry.

35 Just dealing with the last point, yes, the appellant  
36 can amend his notice of appeal. Yes, in some  
37 circumstances the Office can amend its defence. It may be  
38 that because permission is given in Rule 11 that there  
39 might be some circumstances (but I find them difficult to

1 imagine) where a matter of fact might arise anew that  
2 might give rise to a change in the defence, but what you  
3 cannot do is amend the decision. It is as simple as that.

4 Looking at this is otiose because what we have  
5 looked at is the law. The Rules provide, as it were, the  
6 basic framework, but we have addressed ourselves to the  
7 principles which the Tribunal has enunciated through you  
8 on a number of occasions and has summarised. Indeed, as I  
9 understand it, not even remarked upon adversely in the  
10 summary that is contained in Argos.

11 I am just going to sweep up one or two points.

12 This notion that there will only be one judicial  
13 process, there having been only one process below, is  
14 beguiling perhaps but complete nonsense. The framework is  
15 this. The Director investigates. He then comes to come  
16 preliminary conclusions and gives the object of his  
17 investigation the opportunity of commenting on those  
18 conclusions.

19 I am bound to say that a person in that position is  
20 perfectly entitled to say, "We have seen the Rule 14  
21 notice. Do your worst." In that circumstance, the  
22 Director will come to a decision. It may not be very  
23 different from the Rule 14 propositions. The appeal is  
24 from the decision.

25 Let us assume that at that stage the - shall we say  
26 "passive" - I will not call him recalcitrant - the passive  
27 object of the Director's interest then puts in witness  
28 statements. It does not entitle anybody to go and re-  
29 visit the decision. Let us assume they have said nothing  
30 before then. The Director chooses to come to a conclusion  
31 on the basis of the evidence that he has. He has got to  
32 have evidence before him which is of a sufficiently  
33 compelling nature, however you characterise it, to give  
34 the sufficient standard of proof and he comes to that  
35 determination. Even if it is for the very first time that  
36 the object of his disaffection puts in witness statements,  
37 that does not give rise to any entitlement for anything to  
38 occur but for the decision to be challenged and for this  
39 Tribunal to decide whether, on the merits, the facts found

1 in the decision are correctly found or not. It is as  
2 simple as that.

3 In this case, it is as if my learned friend tries to  
4 characterise that the Director left out pressure, he did  
5 not quite get there and somehow he has not made a  
6 resolution. This is a very carefully drafted decision, it  
7 took a long time to produce, it runs to hundreds of pages,  
8 literally, and it is perfectly capable - and does in the  
9 case of JJB and others - make express findings of retailer  
10 pressure.

11 There was a good deal of canvassing of retailer  
12 pressure in respect of Allsports below. The complaints  
13 made were that they were inherently incredible, unreliable  
14 and vague. The Director made no such findings. It is not  
15 open to the Office at this stage, in any case, to start  
16 lifting bits out of what you have, if I may say so,  
17 perhaps rather derogatorily, called the debris from below.

18 But, in effect, it is debris, because what you have is  
19 two types of allegation below and two types of preliminary  
20 finding: those which find their way into the decision  
21 (which are maintained) and those which do not.

22 It is impossible to go back and to start roaming  
23 over the debris for all sorts of reasons. Secondly, how  
24 does one know what the character of that debris is? Jolly  
25 nearly went in; would have gone in but blunder; would  
26 have gone in but not needed; would have thrown it away  
27 completely. It simply cannot be done.

28 Next, we are told that if any evidence is modified  
29 then somehow the judicial process is to be side-stepped.  
30 That is *reductio ad absurdum* and no doubt done  
31 forensically and deliberately. It is a clever trick. But  
32 the fact is, it depends on how big the modification is.  
33 In this case, the finding of infringement is based solely  
34 upon the say-so of two paragraphs in Ronnie III. All of  
35 it has gone.

36 Let us assume that the case had been founded upon  
37 six witness statements running to a total of a hundred  
38 pages and that those six people had come forward and said,  
39 "We resile from all that." In that instance, the whole

1 thing would fall down. But it must be very rare indeed  
2 where the absolutely pivotal fact, indeed the sole fact,  
3 which gives rise to a finding of infringement disappears.

4 There is some gloss put on that it does not matter  
5 if, somehow, the change of evidence is bona fide or  
6 unforeseen. This is a case in which the Director chose to  
7 accept from Mr. Ronnie a statement, notwithstanding the  
8 history of the Umbro statements, and took it at face  
9 value. It was attacked. It was attacked in two ways.  
10 First in the written submissions by reference to what was  
11 in the Rule 14 notice. I am looking at bundle 1, tab 7,  
12 page 1638. That is the allegation. It is internal page  
13 18 of the Rule 14 notice.

14 THE CHAIRMAN: This is the first Rule 14 notice.

15 MR. WEST-KNIGHTS: No, it is the supplementary one. Paragraph  
16 60:

17 "Following the meeting with Sports Soccer on 24 May  
18 2000, Umbro has stated that it contacted JJB,  
19 Allsports, JD Sports, Debenhams, Blacks and John  
20 Lewis to inform them of the agreement Umbro had  
21 reached with Sports Soccer and to secure the other  
22 retailers' agreement regarding their own pricing ...  
23 As set out in paragraph 137 of the original notice  
24 ..."

25 We do not need to concern ourselves with that.

26 "Umbro has confirmed that JJB and Allsports agreed  
27 to maintain their prices on the England replica kit  
28 during Euro 2000 and that Blacks agreed to increase  
29 its price in line with the agreement."

30 That is the allegation. I hear my learned friend  
31 muttering "footnote". 63, appendix 1, witness statement  
32 of Ronnie, 32 and 33. We are on the same lines.

33 That is the allegation that we now face in the  
34 decision. The answer at page 1754, which is the next tab,  
35 tab 8, internal number 24. Against 60:

36 "Having verified the position with David Hughes and  
37 Michael Guest ----"

38 Of course, at that stage we are still in Ronnie 32/33, so  
39 we have not got a name.

1                   "-- Allsports denies that it entered into any  
2                   agreement on pricing or discussed such matters prior  
3                   to the 8th June meeting at David Hughes' house."  
4                   So there it is in black and white: Hughes says, "No such  
5                   agreement"; Guest says, "No such agreement." That could  
6                   not be clearer.

7   THE CHAIRMAN: It is somewhat sparse about telephone calls.

8   MR. WEST-KNIGHTS: Did not enter into any agreement or discuss  
9                   such matters prior to 8th June.

10   THE CHAIRMAN: It is not putting up any positive case, is it?

11   MR. WEST-KNIGHTS: It does not need to.

12   THE CHAIRMAN: I am not saying it does.

13   MR. WEST-KNIGHTS: It was suggested expressly by my learned  
14                   friends that there had been no denial of the phone call.  
15                   There it is.

16   THE CHAIRMAN: We can see what it says.

17   MR. WEST-KNIGHTS: I am sure Mr. Peretz would say, if he  
18                   drafted this, that it is laconic, but it is there. Hughes  
19                   and Guest say they entered into no agreement. It does not  
20                   matter which bits of it you pick, the allegation is that  
21                   Ronnie says, "Oh, yes, there was and it was in a phone  
22                   call between 24th May and 2nd June." That is put in  
23                   issue. What happened at the oral representations, that  
24                   having been taken as read, that there is a denial on the  
25                   record, Mr. Peretz goes a stage further and says, "And,  
26                   anyway, the evidence is rubbish because it is vague and it  
27                   is unparticularised and it is unlikely." I think you have  
28                   to read page 20 and so on in the oral representations  
29                   which I took my learned friend to during the course of his  
30                   submissions in light of this being on the record already  
31                   in the written submissions. And, of course, one is not  
32                   there on the oral representations to re-state the written  
33                   position, but, as it were, to elaborate on them.

34   THE CHAIRMAN: What is the page reference in the oral  
35                   representations?

36   MR. WEST-KNIGHTS: It was internal page 19/20. It is 1984 in  
37                   this same bundle and it picks up at line 21 at page 19 and  
38                   then runs over. He is taking a rather more subtle  
39                   approach here, but, nonetheless, against the background of

1 the denial of there having been any such agreement, he  
2 deals with the unparticularity of the statement itself.

3 "Even if it is assumed that he did speak to someone  
4 at Allsports, the conversation could have been along  
5 the lines that he asked Allsports what its pricing  
6 intentions were and Allsports could quite innocently  
7 have replied to such a question. Nothing wrong  
8 about the question, nothing wrong about the answer.  
9 "That sort of conversation would have been quite  
10 enough to secure his claimed objective."

11 So what Mr. Peretz is there addressing is the fact that  
12 Ronnie says he did it and he reported at the time that he  
13 had done it - said to Ashley, "I've rung round." We have  
14 always said this.

15 It is easy enough for him to have claimed to have  
16 rung round everybody, especially when it is Allsports and  
17 JJB, because he knows jolly well how we are going to  
18 price: we never do anything different. But there it is.

19 So the idea that that was not put plainly in issue  
20 is, in my respectful submission, wrong, but I suppose my  
21 pure position is that it is irrelevant, because what has  
22 happened is that, for the first time, the Office - and  
23 there is no reason why it should have been the first time  
24 - went to see Mr. Ronnie. They did not just go and see  
25 Mr. Ronnie, he sat down or they sat down with him and he  
26 read, as he says at paragraph 3 of Ronnie IV, "my notice  
27 of appeal, JJB's notice of appeal, including all the  
28 disquisition and argument about how ridiculous it would  
29 have been for Mr. Ronnie to have rung us up and secured  
30 our agreement to the pricing, and including the flat  
31 denial that it had occurred, and including everything  
32 else. Bingo. What happens? "Oh, yes", says Mr. Ronnie,  
33 "it wasn't like that at all."

34 How that fits any notion that this is somehow  
35 unforeseen or bona fide - these must be irrelevant  
36 concepts. The fact is that when it was put to Mr. Ronnie  
37 that the OFT's case was nonsense, he said, "Oh, yes,  
38 that's quite right, it is nonsense." But what is unusual  
39 about this case is that it is the whole of the OFT's case



1 which is nonsense because the whole of the OFT's case was  
2 that we agreed to fix our prices in a phone call. It is  
3 an unusual situation, but to say that whenever there is a  
4 change of evidence by a witness the whole thing must  
5 collapse is obviously hyperbole; only if the entire  
6 substratum of the finding goes does that result occur.

7 We are left then with the suggestion that the OFT  
8 should run phone call plus pressure/context or just  
9 pressure. Anything that has got pressure in it must go  
10 because, as I have said already - this is now the eighth  
11 time and therefore the last - there is no finding in the  
12 decision of any such thing and therefore it cannot form  
13 part of the appeal. But it goes back a stage further than  
14 that - the finding in the decision.

15 It is accepted by the Office (though they do not  
16 like to put it like that) that it has no evidential basis  
17 and it cannot be defended. The attack upon it is made out  
18 and is correct.

19 Mr. Morris asked on a number of occasions what  
20 turned out to be a rhetorical question, "What would have  
21 happened if this had happened in the box with Mr. Ronnie?"

22 He did not give you the answer, but I venture to do so  
23 now. I would sit down immediately, having had the answer  
24 to that question, assuming that there were no other  
25 matters about which I needed to ask him in respect of any  
26 other alleged infringement. I fancy that at a convenient  
27 moment, my learned friend my Lord Grabiner and I would  
28 have stood up and said, "That's the end of the England  
29 agreement then." And you would have so ruled.

30 What alternative could there possibly have been?  
31 That at that stage somehow the Office would say, "No, hang  
32 on a minute. We would quite like to re-formulate our case  
33 on the hoof."

34 THE CHAIRMAN: There is still a phone call; there is still a  
35 ringing round; there is still quite a lot of  
36 circumstantial evidence of one sort or another in the  
37 decision.

38 MR. WEST-KNIGHTS: But none that is properly identified, sir,  
39 with respect.

1 THE CHAIRMAN: That may be a matter for argument rather than a  
2 matter on a strike out.

3 MR. WEST-KNIGHTS: It is not a strike out. I am asking for  
4 judgment on my appeal because the substratum of the only  
5 finding against me in the decision has gone. It is they  
6 who need to be making some sort of application to justify  
7 the material in the defence which departs from the notice  
8 of appeal and departs from the decision. There is no  
9 proper power for that to occur. It is not a matter, if I  
10 may say so with respect, of "Well, there is not in the  
11 decision either the formulated matrix to give rise to an  
12 infringement arising out of the receipt of an assurance."  
13 There is not properly even in the defence, but that is  
14 not where we look.

15 This is a matter of principle; it is not a matter  
16 of discretion; it is not a matter of argument; it is not  
17 a matter of degree.

18 THE CHAIRMAN: May I, out of interest - and it may not be at  
19 all relevant - just ask this? From time to time in the  
20 course of argument, very understandably, analogies have  
21 been drawn with what might happen in a more criminal  
22 context, in a proper criminal context I mean. If we were  
23 sitting not in this Tribunal but in the Crown Court, am I  
24 right in thinking that up to a fairly late stage in the  
25 proceedings it would be open to the prosecution to serve a  
26 notice of additional evidence and, indeed, amend the  
27 indictment, subject to over-riding considerations about  
28 abuse of process?

29 MR. WEST-KNIGHTS: I am guessing here, because it is a long  
30 time since I have sat in the Crown Court and it is a much,  
31 much longer time since I have appeared in one as counsel.  
32 My first reaction, e&oe as usual, is that that is because  
33 the indictment rules specifically provide that the  
34 indictment may be amended. In this case, one thing that  
35 the rules do not say is that the decision can be amended.  
36 That may be a trite answer, but at the moment it is the  
37 best one I can offer.

38 THE CHAIRMAN: Thank you.

39 MR. WEST-KNIGHTS: The Office proceeds upon the assumption

1 that if, in a situation such as this - and God forbid  
2 there should ever be another - the altered matrix cannot  
3 be remitted below and, therefore, somehow it is obligatory  
4 that it must be dealt with in some way by the Tribunal.  
5 But that is to avoid the third and obvious and correct  
6 course, which is where the whole evidential substratum for  
7 a decision disappears then the Tribunal does deal with it  
8 by allowing the appeal.

9           There is nothing unfair, improper or wrong about  
10 this. It is a matter of speculation as to whether there  
11 is a basis for a finding of Allsports' pressure here,  
12 because there is not one. It is a matter of speculation  
13 as to whether the Director would have found that Ronnie  
14 made a phone call in which he gave us assurances, because  
15 there is no such finding.

16           The alternative case against Allsports is pure  
17 counsel-derived speculation from material which was either  
18 not available below or which was not pursued below or  
19 which is brand new. I do not know how anybody would  
20 choose between the two versions of Mr. Ronnie: they are  
21 each in witness statements which he says are true. But  
22 the fact is, you must not start from the assumption that  
23 the OFT has the alternative case. There is no injustice  
24 here. After the rigorous procedures involving not one but  
25 two Rule 14 notices and, in the case of other appellants  
26 (I think three) and a considerable period of reflection  
27 and, no doubt, an enormous amount of work, the Director  
28 came conscientiously to a voluminous decision which is the  
29 start point - and the only start point - of these  
30 proceedings.

31           That decision proceeds upon one basis only. The  
32 injustice would all be against my clients, who have met -  
33 unlike, it is said, JJB, who are criticised for being  
34 opaque - and I am beginning to have some sympathy with  
35 their position - we put our cards slap, bang on the table  
36 and in great detail. It goes before Mr. Ronnie and the  
37 Office comes up with a different proposition. That is  
38 grossly unjust. But I must stress that there is no  
39 assurance that there is this alternative case against me,

1 because there is no such finding. In effect, the Tribunal  
2 is being asked to assume that there is such a case and  
3 then somehow decide for itself whether there is or not  
4 without the protection of the particularisation that  
5 should appear in the decision, without the protection of  
6 our having had the opportunity to deal with this single  
7 alternative matrix.

8 Of course, below we attacked the case on pressure,  
9 but we have never had the opportunity of addressing a case  
10 on the Lafarge principle or upon pressure only resulting  
11 in an infringement. This has always been based since the  
12 original Rule 14 notice - that is not a document which I  
13 think anybody would care to read at great length and  
14 analyse that. It was the best shot at the time, but it  
15 was a mess. The supplementary Rule 14 notice is a rather  
16 more cogent document and it is based on Ronnie, paragraphs  
17 32 and 33.

18 There is no need to find a way in which to deal with  
19 this, because the short point is, if you win below, that  
20 is in the bag. That is exactly what we have done. I do  
21 not say "win" in any clever sense that we have pulled the  
22 right lever and a shilling has fallen out of the machine.

23 No such adverse finding was made. That is the end of  
24 that story.

25 I was going to ask you to look at Fellone paragraph  
26 19, which is at bundle 2, tab 12. I would ask you first  
27 to look at paragraph 14, which is at page 243 ----

28 Whilst everyone is looking for that, Mr. Peretz  
29 makes a point to me which otherwise I am going to forget.

30 If it is right, what the Office is now seeking to do  
31 through its counsel, then an appellant would never know,  
32 having had a lot of stuff to deal with at the Rule 14  
33 stages, whether the appeal the specific finding made  
34 against it - it simply would not know how much of the  
35 stuff not appearing in the decision and therefore it  
36 assumed it had succeeded on below - simply revived at the  
37 whim of counsel - without knowing what status that  
38 material had in the mind of the decision-maker when the  
39 decision was made.

1           It is for that reason that you cannot go behind a  
2 decision, because there lies madness and speculation. The  
3 decision is the start point.

4           Fellone, paragraph 14:

5           "Most of the time retailers gave me implied threats  
6 as to what might happen if we do not help them to  
7 control the retail price of replica products. I  
8 interpret these conversations as meaning if Umbro  
9 does not comply it will have a significant effect on  
10 our business i.e. the amount of orders that they  
11 place. This can range from comments such as 'sort  
12 it out' (referring to other retailers who are  
13 discounting the retail price of replica product) to  
14 asking us to speak to other retailers to pull  
15 promotions."

16          Then there is a passage on JJB. Then 19. This is it on  
17 us from Fellone - and this is the only other bit, apart  
18 from Ronnie III:

19           "Allsports were also one of the first customers to  
20 call us to tell us what other retailers are doing,  
21 putting pressure on us to resolve retail pricing  
22 issues. In the past, they have cancelled orders on  
23 the forward order book, on the grounds that the rate  
24 of sale of these products had decreased due to  
25 Sports Soccer discounting prices, and that they  
26 therefore no longer want the product unless Sports  
27 Soccer increase the price. We would then be left  
28 with excess stock."

29          Under "Specific Incidents" there is nothing which is a  
30 particular of that general allegation.

31           The position with Ronnie is that, as I said on 23rd  
32 October, consistently with the decision, the bits of  
33 Ronnie III which would have been evidence of retailer  
34 pressure and put into for that purpose need to be  
35 bracketed out.

36          THE CHAIRMAN: Bits of Ronnie III or Ronnie IV?

37          MR. WEST-KNIGHTS: Ronnie III. Ronnie IV did not exist then.

38           Ronnie III is the operative document which gave rise to  
39 the decision. It contains allegations against Allsports

1 of retailer pressure. There were no findings of retailer  
2 pressure. Therefore, the Office cannot rely upon those  
3 passages in Ronnie III. That was a point which I  
4 obviously did not quite get through on the 23rd October,  
5 but that was the point I was making.

6 The proper position now should be that one is left  
7 with the redacted or bracketed out bits of Ronnie III and  
8 we seem now to have a Ronnie IV.

9 THE CHAIRMAN: I am not sure that bracketing out is a  
10 particularly attractive solution.

11 MR. WEST-KNIGHTS: Crossing out, blanking out.

12 THE CHAIRMAN: Or even crossing out. I have a feeling it is  
13 an all or nothing, this situation. There is not going to  
14 be much intermediate scope for excluding material that is,  
15 at first sight, relevant.

16 MR. WEST-KNIGHTS: Let us be hypothetical for a minute.

17 Assume that Mr. Smith makes a statement at the Rule 14  
18 stage and includes in it that on 19th June David Hughes  
19 attacked me with an axe. The Office is addressed on that  
20 and has a witness statement and so forth and plainly, at  
21 an intermediate stage, comes to an express finding that  
22 that is all nonsense. Let us assume it says so in the  
23 decision.

24 Whilst that material might stay in the statement for  
25 the purpose of cross-examining Smith, if the Office was  
26 putting Smith forward as a witness of truth, it would  
27 bracket out the allegations about the axe, because it  
28 would be making plain that it was not relying upon those  
29 allegations because it had itself specifically dismissed  
30 them as matters of truth.

31 I do not think you would blank them out, because I  
32 would want to ask Smith, "How did it come about that you  
33 made this allegation?" and, indeed, had Ronnie now not  
34 completely thrown away the OFT's case, I would have asked  
35 him about how it was that he came to make the allegations  
36 about retailer pressure. They are not well-founded and  
37 they are not adopted in the decision; they form no part  
38 of the OFT's result.

39 My submissions are made not for any abstract

1 forensic purpose and not for the purpose merely of saying,  
2 "The result is that Allsports will win that part of the  
3 appeal." It should. It is entitled to. The decision has  
4 made a finding. The finding has turned out to be entirely  
5 wrong on the evidence. It may have arisen lately, but  
6 there is no reason for that (a) to have occurred or (b) to  
7 be relevant. It must be rare that the whole basis for a  
8 decision goes, but here it has.

9 The alternative is to allow some form of wide open  
10 raking over or picking at the carcass of the materials  
11 below in a way which is wholly unsatisfactory, wholly  
12 incapable of being policed, wholly incapable of being  
13 nailed down and quite contrary to the structure of the Act  
14 and quite contrary to the rules of the Tribunal.

15 I have nothing to add. Thank you for your patience.

16 THE CHAIRMAN: Thank you, Mr. West-Knights.

17 MR. WEST-KNIGHTS: I am sorry, I have not dealt with the  
18 amendment. Mr. May. Miss Charnock. There was an element  
19 in the decision which points out that there was a  
20 conversation between Charnock and May at an immaterial  
21 time. The reference is paragraph 222 of the decision. I  
22 may as well read it to you.

23 "In the middle of various paragraphs dealing with  
24 stocks and sales of MU replica kit, an Umbro file  
25 note prepared by Mr. May on 27 October 2000 of a  
26 meeting on 24 October 2000 between Mr. May and Ms.  
27 Charnock, a replica buyer of Allsports states:

28 'The concern being that since contract  
29 announcement and price discounting by Sports  
30 Soccer/JJB sales have dropped 50%. Michelle  
31 Charnock of Allsports felt the above needed to  
32 be a Phil Fellone of Umbro/Michael Guest of  
33 Allsports conversation as she would not bring  
34 into the business.'

35 "This file note was copied to Mr. Ronnie and Mr.  
36 Fellone of Umbro."

37 There is no further comment on it there. It is then  
38 picked up at 452:

39 "So far as Allsports and Blacks are concerned, the

1           OFT notes that they both continued to sell the MU  
2           adult home replica shorts at High Street prices  
3           uninterruptedly until at least late 2001. Further,  
4           the OFT notes that on 24 October 2000 Allsports  
5           informed Umbro that their sales had dropped  
6           dramatically due to 'discounting by Sports  
7           Soccer/JJB'. The OFT regards this as continuing  
8           commercial pressure on Umbro. Nevertheless, the OFT  
9           finds in this decision only that their participation  
10          in the arrangement concerning MU home replica shirts  
11          extended until October 2002. At this time, Sports  
12          Soccer discounted the product."

13          So there is a recital of conversation between Charnock and  
14          May which the OFT regarded as continuing commercial  
15          pressure on Umbro. That must be pressure continuing, as  
16          it were, beyond that laid forward by others, because there  
17          is no other reference to pressure by Allsports in this  
18          decision, but the Office says, "Nevertheless, we will stop  
19          the period of infringement by Allsports prior to that  
20          date." So that no finding is made that that is a material  
21          infringement, particularly as the Manchester United  
22          infringement is treated as coming to an end on 1st  
23          October.

24                 It was in response to that fact being there that  
25          Michelle Charnock said, "It was a perfectly innocent  
26          conversation and I had this kind of conversation with May  
27          all of the time. We never discussed any question of other  
28          people's prices."

29                 I would be the first to say that she may have gone  
30          too far in making that observation. She might have said,  
31          "On that day, I never discussed retail prices with him",  
32          but she told the truth, she said, "I've never discussed it  
33          with him." The Office has then used that as the excuse to  
34          put in a statement by Mr. May not to rebut what Miss  
35          Charnock says about the 24th October but to put in a whole  
36          new raft of allegations, primary allegations, of retail  
37          pressure brought by Charnock on May, that is to say,  
38          Allsports/Umbro, by a completely different route.

39                 I have used the expression "hook or crook" before



1           today and it has resulted in a certain amount of tittering  
2           on my left, but I use it again. This is another example  
3           where, under the guise of rebuttal, the OFT is seeking by  
4           its counsel to put forward a wholly new case. There is no  
5           reason why they could not have spoken to Mr. May in March  
6           2002, because at that time, albeit the leniency had gone,  
7           Umbro had vouchsafed its co-operation. But they never  
8           bothered to talk to him. This is an allegation that was  
9           never floated below, so it fails on two counts: could and  
10          should have been dealt with below but was not - remission  
11          is plainly out of the question here - so that is the  
12          objection.

13                 If there is a problem with Miss Charnock's witness  
14          statement, we will amend it to say, "I did not have any  
15          adverse conversation with May on that day." And then  
16          there can be no possible excuse for trying to bring in a  
17          statement saying, "At all material times Charnock bent my  
18          ear about Sports Soccer discounting."

19                 It is curious. There has not been a breath of  
20          pressure at that level at any stage below, not by any of  
21          the Umbro employees, to whom such pressure would have been  
22          reported, because there is no point Charnock bending May's  
23          ear. May has got to go and bend Ronnie's or Fellone's  
24          ear, one would think, in order for some action to be  
25          taken.

26                 So that is what we say about May.

27          LORD GRABINER: Thank you, sir, I have nothing to add.

28          THE CHAIRMAN: Thank you all very much. We will reserve  
29          judgment. We will try to let you know as soon as possible  
30          what our ruling is.

31