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1 Thursday, 25th March 2004

2 (12.00 pm)

3 Closing submissions by MR WEST-KNIGHTS (continued)

4 THE PRESIDENT: Good morning, Mr West-Knights.

5 MR WEST-KNIGHTS: May it please you, sir, gentlemen --

6 THE PRESIDENT: I should have said good afternoon because it
7 is two minutes past 12.

8 MR WEST-KNIGHTS: That may be one reason why counsel are
9 trained never to respond otherwise than "may it please
10 you". My own perception is that lunch is the difference
11 between morning and afternoon.

12 At any rate, sir, gentlemen, it is the requirement
13 of every member of the bar in common with, should I say,
14 good seamen and perhaps good horsemen, but perhaps no
15 other group, that if we make a mistake we say so, and we
16 say so straight away and I need to tell you that I made
17 a mistake yesterday in my breadth and power of the brief
18 submission which I made to you on the subject of
19 inference.

20 I have passed, and I hope you have it, a brief note
21 on the subject.

22 THE PRESIDENT: Yes.

23 MR WEST-KNIGHTS: And I would be grateful if I could have
24 the opportunity of simply going through it very rapidly
25 because that I hope will lay to rest in the tribunal's

1 mind any, as it were, remaining difficulty in respect of
2 any issue arising from the inference of what we have
3 described as non-disclosure.

4 THE PRESIDENT: We have read the note.

5 MR WEST-KNIGHTS: That was quick.

6 THE PRESIDENT: Admittedly we have read it fairly quickly.

7 We will read it again more slowly, but we can see what
8 is in it.

9 MR WEST-KNIGHTS: The short point is, I have, in the brief
10 time this morning, set out a number of primary facts.
11 It may be that there are some more. The compliments
12 between certain dates and all of that sort of thing, but
13 for our purposes, the primary facts are, I think,
14 unassailable, and that the effect is there set up.

15 The question of inferences to be drawn, I said quite
16 wrongly yesterday that the inference was to be drawn
17 from these primary facts that both Mr Ronnie and
18 Mr Ashley were to be treated as completely dishonest in
19 every respect. That was plainly an inaccurate and
20 inappropriate submission, and I apologise for it.

21 THE PRESIDENT: So that is withdrawn, is it, that
22 submission?

23 MR WEST-KNIGHTS: As arising out of the inferences to be
24 drawn on this document.

25 THE PRESIDENT: From these documents.

1 MR WEST-KNIGHTS: Certainly, yes. Let me make it plain, as
2 both sides on this side, as it were, have, that we do
3 submit that it is clear from the evidence given by both
4 of those witnesses, and in their different ways from
5 their demeanour, that their evidence was thoroughly
6 dishonest, but it is quite wrong of me to make a blanket
7 statement which was, in addition, ambiguous as to its
8 extent, to say that the general proposition arises out
9 of the inferences to be drawn from non-disclosure.

10 The only sensible inferences to be drawn from the
11 non-disclosure are those set out on my note, that there
12 is something about or connected with these arrangements
13 which is, as yet, unknown to the rest of us, that both
14 Sports Soccer and Umbro are unwilling to reveal.

15 The unwillingness, I say, in all probability has
16 nothing to do with commercial confidence because you
17 have been astute to protect such matters by going into
18 camera and so forth.

19 But the effect is there can be no doubting the
20 primary analysis which flows from the primary facts.
21 The reason for the unwillingness is immaterial. They
22 had chosen, for whatever reason, not to displace the
23 primary conclusions which have been drawn so they must
24 be, as I put it there, at least correct. There may be
25 something more in it which is germane to this case, but

1 logically we need to say there may not. There may be
2 collateral reasons for matters connected with this case
3 which give rise to that mutual unwillingness.

4 It is for that reason that I say that anything else
5 is speculation but in truth we need no more. We have
6 the primary conclusions which are necessarily to be
7 derived from the primary facts. They are not displaced.
8 They are not displaced by choice and so they stand.
9 Anything more than that we do not need. It may be that
10 there is more in this even than meets the eye that is
11 relevant to this case but that is speculation. The
12 point is that none of the primary conclusions can be or
13 are displaced, that is on that footing, as I say, that
14 I withdraw the assertion that I made yesterday but
15 maintain in common with JJB the proposition that as
16 regards their evidence neither of those two gentlemen
17 were being honest.

18 MR HOSKINS: Sir, I just want to correct, because our
19 contention is not that they were thoroughly dishonest.
20 You have read our closing submissions. Our submission
21 is primarily that their recollection is not reliable.
22 We do not set the bar quite as high as that.

23 MR WEST-KNIGHTS: I am in error.

24 THE PRESIDENT: If I could just talk across you for a
25 moment, if I may Mr West-Knights, to Mr Hoskins.

1 Certainly, as I recall it, that was how Lord Grabiner
2 was putting it to Mr Ronnie. That is also your position
3 in relation to Mr Ashley?

4 MR HOSKINS: That is certainly our primary position. You
5 will see from your notes there are certain aspects of
6 the evidence, for example things said at the end of
7 re-examination et cetera, that we say do not stack up,
8 is the phrase we use, but we certainly do not put our
9 case on Ronnie and Ashley are thoroughly dishonest.

10 THE PRESIDENT: It is not a dishonesty case. It is
11 a mistaken case.

12 MR HOSKINS: That is certainly the thrust of our case, sir,
13 thank you.

14 THE PRESIDENT: But your case, Mr West-Knights, is
15 a dishonesty case.

16 MR WEST-KNIGHTS: Yes, but if you do not share our view of
17 their evidence, it does not alter the fact that you have
18 to look at their reliability.

19 THE PRESIDENT: We only need to understand at this stage
20 what your case is and that is how you put it.

21 MR WEST-KNIGHTS: And that was the footing upon which
22 I cross-examined both of them expressly. In addition,
23 of course, mainly to test what they were saying. In
24 a sense, it is not material. You could, if every party
25 was simply saying, "Well, they are not reliable", if you

1 came to the conclusion that they were not assisting you
2 and not attempting to assist you, that would be
3 a conclusion that you would be entitled to come to. It
4 does not matter what we say, it is what you think. Now,
5 on that note, I was reminded by looking at the
6 transcript that at one stage you say, the president
7 asked me whether the pointers section of our closing
8 submissions was a complete list of the matters that we
9 relied upon as being, as it were, pointers to
10 dishonesty. The answer to that question is no.

11 They are, as it were, highlights in principle.
12 I would hope that the tribunal will judge the evidence
13 of those two gentlemen both on its contents and the
14 demeanour and that is quintessentially a matter for you.
15 It would be unhelpful at best if we were to have, as it
16 were, gone through the entire transcript and say "Do you
17 remember the tone of voice, the inflection, the delay,
18 the pause, the bravado?", whatever it were.

19 THE PRESIDENT: Evidently, yes.

20 MR WEST-KNIGHTS: So the answer to that question is no, sir,
21 as I hope is clear and understood.

22 What I would like to do, sir, is just go back to the
23 chronology and make one correction and add in a couple
24 of dates.

25 THE PRESIDENT: Of course.

1 MR WEST-KNIGHTS: And in doing so pick up one or two dates
2 in slightly more slow time. You were very kind to me
3 yesterday afternoon; under pressure of time I was
4 frankly racing.

5 THE PRESIDENT: You are taking your time now.

6 MR WEST-KNIGHTS: And then I have about ten minutes' worth
7 of headline submissions on the two charges against my
8 clients.

9 THE PRESIDENT: That is very helpful.

10 MR WEST-KNIGHTS: If I could ask you, please, to pick it up
11 as depressingly early as page 5.

12 THE PRESIDENT: Of course.

13 MR WEST-KNIGHTS: It is an addition and a reminder. At the
14 bottom of the page you will recall that letter of
15 7th April 2000 setting out a detailed proposition in
16 respect of licensed arrangements.

17 THE PRESIDENT: Yes.

18 MR WEST-KNIGHTS: I think I just need to remind you that we
19 have a great deal of unclarity as to when either of
20 these arrangements were, as it were, struck, never mind
21 the bits of paper, and secondly, when they became
22 effective.

23 THE PRESIDENT: Yes.

24 MR WEST-KNIGHTS: But the reminder is this: we have a draft
25 agreement for February 2001 which is one of those four

1 pieces of paper which emerged. That has as its stated
2 effective date the 7th April. So it harks back to that
3 meeting which, on the evidence we have, was at least the
4 second occasion of price-fixing in respect of England
5 and the Manchester United home shirt that we know about
6 taking place between Umbro and Sports Soccer, because
7 there is the finding by the OFT of an April agreement.
8 But what they did not have was a note of that meeting or
9 a date for it. But the probability is that this letter
10 will have given rise to a meeting and the probability
11 is, as with the other meetings, that where there is
12 a substantive meeting on the licence agreement it is
13 also an occasion where price-fixing occurs but there is
14 an April agreement and we do not have a date for it.
15 When I say the second, I remind you of Mr Ronnie's
16 evidence that there was at least one antecedent
17 price-fixing agreement in March about which until now
18 nobody had known anything.

19 So that is, as it were, a piece of stress. I have
20 already mentioned but I pick it up again in the middle
21 of page 6, this is in the context of the England
22 Agreement, the express evidence of Mr Ronnie, that
23 whatever else happened between that April agreement and
24 the 24th May agreement there was during that period no
25 pressure from Allsports, pressure even on Mr Ronnie's

1 definition of the word.

2 THE PRESIDENT: Yes.

3 MR WEST-KNIGHTS: Speaking of Mr Ronnie's definition you
4 asked me also yesterday whether we asserted anything in
5 respect of the probity of witnesses of Messrs Fellone
6 and Prothero.

7 THE PRESIDENT: Yes.

8 MR WEST-KNIGHTS: It will have been apparent from my
9 cross-examination of both those gentlemen that I was
10 seeking gently to have them speak the truth and in our
11 judgment they did. And in our submission they did.

12 THE PRESIDENT: Yes.

13 MR WEST-KNIGHTS: However, at the earlier stage both of them
14 toed the party line. Whether that was because of
15 a misconception on their part, certainly it appeared
16 shared by Mr Ronnie that anything that led to any form
17 not wholly consensual or wholly identical aims as
18 between the retailers and them, translated into the word
19 pressure, or whether it was because it was a house
20 perception.

21 You will be as aware as anybody, all of you
22 I venture to suggest, that if you belong to an
23 organisation you acquire the organisation's view of the
24 rest of the world. Army officers have a habit, for
25 instance, of describing the rest of the world as "Civvy

1 Street", but that is, as it were, the product of being
2 inside an institution, and undoubtedly there will have
3 been a house perception inside Umbro that they may have
4 been, as it were, infected with that perception, as we
5 say, if it was held was inaccurate of course.

6 At any rate, we do say that at an early stage
7 Messrs Fellone and Prothero got it wrong but I hope you
8 will share our view that the evidence they gave, as it
9 were, cancelled their previous wrongness and was frank.

10 Turning over the page, but reminding us that it was
11 in this April monthly management report that there was
12 the report of bad weather at Easter in respect of
13 Allsports' sales and the business about Celtic football
14 club, we come again to the material period, 16th May, in
15 the middle of page 7, the scrapping of the price promise
16 and the next material event, the 24th May meeting
17 between Allsports. I have done it again, damn it.

18 Could I ask you please on the bottom of page 7 of my
19 chronology, where it says "Ronnie note for meeting with"
20 to strike out the short word "Allsports" and insert the
21 words "Sports Soccer".

22 THE PRESIDENT: Yes.

23 MR WEST-KNIGHTS: Thank you. Over the page of course you
24 will recall, this is in the middle of the page, the
25 detailed note of that meeting made by Mr Attfield.

1 I did not stress yesterday but do now of course the
2 presence of the chief financial officer of Umbro at that
3 meeting. Plainly something of significant financial
4 effect was being discussed and Mr Ronnie was accompanied
5 by somebody who would have a great deal more actual
6 authority in respect of financial matters than he might.

7 THE PRESIDENT: Yes.

8 MR WEST-KNIGHTS: I say "might"; he is the chief operating
9 officer, he is not the chief executive officer, but he
10 certainly has with him the chief money man. I have made
11 an error in this. It is in the middle, it says "MA said
12 by matching the highest price...". That was
13 a misreading by me many moons ago of the words "high
14 st". It says "high" space "st". I misread that many
15 moons ago. It should be high street price.

16 THE PRESIDENT: So we just strike the E.

17 MR WEST-KNIGHTS: As it turns out, yes, thank you. That of
18 course is perhaps a little bit significant; at that sort
19 of juncture one might expect to see the "as long as
20 nobody breaks ranks" observation but of course that is
21 nowhere recorded.

22 Going over the page, we have, on the 25th May, two
23 significant events, first the Manchester United fax to
24 Umbro which has been described as unsubtle. It is an
25 obvious, we say, example of Manchester United wanting

1 action in respect of Sports Soccer's discounting, and of
2 course, the golf day. It is at this period when the
3 phone call was to have been made. There is nothing
4 particularly material in the rest of this page save for
5 the ringing up, as it was said to be on 26th, and of
6 course that all disappears and there was lunch between
7 Michael Guest and Ronnie on the 31st.

8 THE PRESIDENT: Just before we turn the page,
9 Mr West-Knights, at the bottom of -- you are quite
10 right. It is there. I was going to draw your attention
11 to it but you have already, as usual, been ahead of me.

12 MR WEST-KNIGHTS: That is kind of you.

13 THE PRESIDENT: You have got the note in Mr Hughes' diary on
14 2nd June:

15 "10.30, Chris Ronnie (Manchester United shirts)".

16 MR WEST-KNIGHTS: I have shortened to MU. I hope these
17 references are correct. They came from an earlier note.

18 THE PRESIDENT: Yes.

19 MR WEST-KNIGHTS: I am grateful to you. At any rate, the
20 diaries there match one another, and it is plain that he
21 both intended to, and indeed did obtain a sample of the
22 Manchester United shirt.

23 THE PRESIDENT: He got the shirt at that point.

24 MR WEST-KNIGHTS: Yes, and it is that meeting of 2nd June
25 which we reminded you gives rise to two separate

1 suggested allegations of pressure. First, the
2 discussion about JD and, secondly, the predictive remark
3 in respect of the Manchester United contract which, as
4 I say, has gone through any number of iterations.

5 As I said yesterday, on 2nd June, again it is quite
6 a busy day for Umbro because that is the beginning of
7 the written communications with Debenhams in the middle
8 there.

9 THE PRESIDENT: Yes.

10 MR WEST-KNIGHTS: And the alleged occasion of this tennis
11 tournament. On 5th June at the bottom we have the
12 passage of the telephone numbers between Mr Ronnie and
13 Mr Ashley.

14 THE PRESIDENT: Yes.

15 MR WEST-KNIGHTS: We have Mr Hughes' diary entry on 5th June
16 including the England price. Just pausing there for
17 a moment; no, it does not fit here. I will not just
18 pause there for a moment.

19 On the 6th we have the actual cancellation of the
20 price promise and as I said to you yesterday, on the 6th
21 we also have the first apparent reply to the Manchester
22 United fax of 25th May which talks about receiving
23 assurances from Sports Soccer and JJB only. So whether
24 or not Mr Marsh is right in saying that did not refer to
25 the England Agreement, the only reference is to not us.

1 THE PRESIDENT: Whatever it may not refer to, it does not
2 refer to Allsports.

3 MR WEST-KNIGHTS: Indeed.

4 THE PRESIDENT: So you submit.

5 MR WEST-KNIGHTS: So I submit with powerful force simply
6 because --

7 THE PRESIDENT: Because it is not there.

8 MR WEST-KNIGHTS: Because we ain't there. I can submit that
9 with some confidence.

10 THE PRESIDENT: Yes.

11 MR WEST-KNIGHTS: But then I have been wrong before with
12 some confidence.

13 We then have Mr Ronnie's diary entries both for
14 7th June and for 8th June where he pencilled in --
15 indeed inked in -- to do the monthly report, and his
16 evidence has been so far, that there was not any reason
17 why he should not have done it by then, because the
18 other stuff was in.

19 THE PRESIDENT: Yes.

20 MR WEST-KNIGHTS: I will not weary you very much at all with
21 the May management report.

22 Over the page, the next event then is that meeting
23 of 8th June. I will come back to the memoranda, but
24 probably a little bit more, it may be that all I have to
25 say tomorrow in reply because we do not quite yet know

1 exactly what the Office are going to say about those
2 memoranda.

3 THE PRESIDENT: Yes.

4 MR WEST-KNIGHTS: But I do offer you two thoughts en
5 passant: the first memorandum is practically
6 inexplicable on any footing. Let us assume that there
7 had been struck a deal at £40 between Whelan and Ashley,
8 in particular, although why Mr Whelan would want to get
9 involved in this meeting in that way -- we will look at
10 that again. But assume that there was a deal struck.
11 What a bizarre memorandum to write.

12 In respect of any suggestion about Sports Soccer's
13 possible activity, there was this much verisimilitude to
14 it: may I remind the tribunal and it does not come into
15 focus because it is not any aspect of anybody's appeal
16 here, that on any number of occasions during 2000,
17 Allsports retailed a new shirt at 39.99. Celtic, Notts
18 Forest, whoever, there were a number of infringements
19 found in this case and he said that he was under equally
20 intolerable pressure from other wholesalers to do
21 likewise. And if you were to look -- and I invite you
22 to look in due course -- at the Sports Soccer's pricing
23 schedules, you will see any number of examples of
24 Sports Soccer going out at launch day at 39.99.

25 He will say and did, "Well, of course, I only did

1 that" -- I think he used the expression which in our
2 submission is the sure sign of a dishonest man "on my
3 son's life" that there were no occasions when he went
4 out at 39.99 when it was not the product of external
5 influence and pressure, but the fact is that if you are
6 just looking at the market it is the pattern of
7 Sports Soccer during this period to an external observer
8 to do what other people do, in particular, Allsports, is
9 to go out at launch at 39.99. It is one of those facts
10 that gets slightly blurred because it does not get
11 focussed on but it is, nonetheless, a fact.

12 There is no suggestion that anybody at Allsports
13 would have had any form of contact with Sports Soccer to
14 make them privy to the why of that. Indeed, there is no
15 evidence that there was any discussion whatsoever
16 between anybody at Umbro and Allsports on the pricing of
17 other shirts, so it just sits there as a fact in the
18 marketplace that for whatever reason Ashley has
19 developed a practice of launching replica shirts at full
20 price.

21 If I take you over the page to where I started to
22 get muddled yesterday. At page 14 on the 3rd July there
23 is a meeting between Umbro and Sports Soccer that gives
24 rise to no, as it were, identified infringement because
25 the upshot is that there is a request for Sports Soccer

1 to revise its price back up to £40, it having stopped
2 discounting which was rejected and there was further
3 discussion of the other arrangements.

4 On 13th July -- this is the thing I got completely
5 wrong. This is cited by the Office as the Manchester
6 United July agreement. That is to say, the Umbro
7 Manchester United arrangement about the cancellation of
8 the free football. The significance from the purposes
9 of this appeal being that there is reference there in
10 the context of what is accepted otherwise of being
11 a false boast to the three retailers having agreed, but
12 of course what Mr Prothero's source for that would be
13 would be at best in terms of being second-hand
14 Mr Ronnie.

15 Over the page, this is, as you corrected me
16 yesterday and I was grateful for that, it is on
17 18th July that there is the first of the next two
18 specific agreements about the Manchester United shirt
19 between Umbro and Sports Soccer described by the Office
20 as Sports Soccer July 2000 agreement 1. A bilateral
21 infringement with which Allsports has never been tarred
22 in any way. We have a note of that meeting and once
23 again, there are references to invoicing which must be
24 connected with the licensing arrangements.

25 We then, as I say, have this probable holiday

1 jointly between Ronnie and some people at Sports Soccer,
2 at least, in Portugal -- playing golf it would appear
3 from the name of the place they went to -- and then on
4 the 24th, the second July 2000 agreement as found by the
5 Office. Again, it is in OFT style.

6 THE PRESIDENT: It is Ronnie and Ashley who are playing
7 together in Portugal?

8 MR WEST-KNIGHTS: I cannot tell you that it was Mr Ashley
9 because we did not pursue that with him. We could have
10 been up every avenue and down every byway. From the
11 diary it is plain that it was a Sports Soccer associated
12 event in Portugal, and they were staying somewhere
13 that -- my knowledge of golf is less than that of
14 football -- but we know that Mr Ronnie, inter alia,
15 plays golf.

16 THE PRESIDENT: Yes.

17 MR WEST-KNIGHTS: But I cannot tell you that Mr Ashley was
18 there.

19 THE PRESIDENT: No.

20 MR WEST-KNIGHTS: So the 18th July is the first of the
21 two July 2000 agreements, as I say, bilateral findings
22 of infringement by the Office, where the finding of
23 infringement includes fixing the price of the Manchester
24 United home shirt, and on the 24th July a further
25 express bilateral infringement, a straightforward

1 vertical arrangement, again concerning the Manchester
2 United home shirt. We have seen a note of that, as
3 I remind you, a little list which included -- again you
4 will recall the note "MU home stay, 40/30". I had not
5 shown you it, but I have mentioned it on any number of
6 occasions. Can we look at Ronnie paragraph 77? It is
7 the only collateral document that I am going to show
8 you.

9 THE PRESIDENT: Ronnie, which is this one?

10 MR WEST-KNIGHTS: Ronnie 3, witness bundle 3, page 234. It
11 is page 234 which is the actual paragraph in question
12 but in order to make this point fairly I think one needs
13 to go back to -- shall we pick it up at page 232? There
14 is a heading "May Monthly Report" and he talks about
15 that there, although in a great deal less detail than he
16 had in Ronnie 2.

17 Then he goes over the page to a new heading "Pricing
18 of England Replica Kits During and After 2000", and he
19 deals with the change of price being announced by Ashley
20 in the plane back from the game at paragraph 69.

21 THE PRESIDENT: Yes.

22 MR WEST-KNIGHTS: Unlike the other arrangements on this
23 occasion because it was a downward move Sports Soccer
24 did do what they said they were going to do and down
25 they went the following day:

1 "During this time Umbro did ask Sports Soccer about
2 this and asked whether the prices could be raised. One
3 occasion was on 3rd July."

4 We looked at that:

5 "I had informed Lee Attfield prior to this meeting
6 that I wanted him to speak to Sports Soccer about the
7 price of the England home and away kits. We had
8 provided some footballs to be retailed at £3 as part of
9 a promotion. This was a loss-leader for both parties.
10 In exchange for the loss that Umbro had suffered in
11 respect of the footballs we asked Sports Soccer to
12 increase the prices of England home and away and infant
13 kits."

14 They did not agree. This was recorded in a file
15 note.

16 72:

17 "On 18th July 2000 I attended a meeting at Sport
18 Soccer's offices in Dunstable with Lee Attfield. Lee
19 Attfield's file note of the meeting states: 'Agreed 60
20 days rule allowing MA to put the prices down'.

21 And of course the rest of that note and the Office
22 found that to be a specific infringement about fixing
23 the price of the MU home shirt for 60 days.

24 "... Sports Soccer had received a complaint from
25 a consumer that they had bought a product at one price

1 that was subsequently significantly reduced a week or so
2 later, and Sports Soccer would not refund the
3 difference..."

4 I am not sure if that would give rise to an enquiry
5 by the local Office of Fair Trading, but there it is.

6 THE PRESIDENT: It looks more like a trading standards
7 problem.

8 MR WEST-KNIGHTS: Quite so. I am not even sure whether it
9 is a legitimate trading standards problem, but there it
10 is. That was the explanation which he gave.

11 "The individual reported this to the OFT, who then
12 conducted an investigation of the prices of replica kits
13 in those stores.

14 "The second sentence refers to an agreement reached
15 at the meeting [note] that Sports Soccer would not
16 discount the Manchester United home jersey for a period
17 of 60 days from the launch on 1st August. This was in
18 line with the terms on which Nike deal with
19 Sports Soccer in relation to replica products."

20 A point you picked up yesterday about the Nike rules
21 so-called.

22 "On 24th July Sean Nevitt visit confirmed to
23 Lee Attfield that the intended pricing policy for the
24 MUFC home kit was £40 on men's shirts and £30 on kids.
25 The Manchester United away shirt would be introduced at

1 a discounted price of £30 and £22 and the third kit
2 would be reviewed 60 days after launch. This did not
3 include..."

4 I think he has made a mistake here and it should be
5 "shorts and socks", but I am not the person to do that
6 one.

7 THE PRESIDENT: I think it does --

8 MR WEST-KNIGHTS: I think it just might be that I am right
9 about that.

10 THE PRESIDENT: We may have come full circle on that.

11 MR WEST-KNIGHTS: Yes, indeed, although, in fact, I have put
12 the word "shorts" where the word "shirt" appears in my
13 chronology as I shall show you shortly:

14 "... which were discounted immediately from launch.
15 At a meeting one week later, on 1st August, between Mike
16 Ashley, Sean Nevitt and Lee Attfield, Sports Soccer told
17 Lee Attfield that it wished to introduce the third shirt
18 also at £30 adults/£22 junior kit."

19 The reason why I have shown you those two sets of
20 headings is paragraph 77:

21 "As discussed in these meetings, Sports Soccer
22 launched the MUFC home shirt at £40/£30."

23 These meetings. Those of the 18th July and the
24 24th July, full stop. Apart from the obvious point that
25 there has to come a point where if you have six alleged

1 identical agreements one or more of them must be
2 regarded as inoperative -- which is an obvious point --
3 it is Mr Ronnie himself, as I say, passively as
4 a Freudian slip, but nonetheless an instructive and
5 illuminating one, he allies the final pricing with those
6 two meetings, which is, apart from anything else, deeply
7 logical given their proximity. He does not say this was
8 part of a continuum of understanding between us which
9 had subsisted since April 2000 or a continuum which had
10 subsisted since 8th June. It is those meetings.

11 It is not even as if the 18th July meeting is
12 referred to as being a confirmation of anything
13 antecedent and we have that because at 74 it is reached
14 and at 75 it is confirmed. Everything which I have said
15 is in fact -- not everything, the facts as I have
16 recited them are set out in the decision at
17 paragraphs 373-381 under the heading "July 2000
18 Agreement".

19 That is all I want to look at in that witness
20 statement.

21 THE PRESIDENT: Thank you very much.

22 MR WEST-KNIGHTS: Turning over then, if I may ask you to go
23 back to my chronology. We have left the meeting of
24 18th July. We have had the meeting of 24th July.

25 I will not trouble you again with the contemporaneous --

1 these things seem to go in fits and starts. On that
2 same day was the conversation between Mr Ronnie and
3 Mr Bown which, if you have a fallow moment and/or are
4 weary of this case is worth a read for the nature of the
5 capacity of Mr Ronnie to exert pressure on retailers,
6 a pressure which we say is always there to belie the
7 converse because replica is a must have.

8 We have on 1st August the implementation of the
9 agreements reached between Umbro and Sports Soccer on
10 18th and 24th July and a further meeting on 1st July
11 where there is discussion about Sports Soccer wanting to
12 reduce the third shirt from launch. It would appear
13 that it is some later and different launch date for the
14 third shirt, and there is reference to other stuff which
15 is pink and therefore prima facie to do with the
16 licensing arrangements and I have cited there the
17 reference to Mr Ronnie's paragraph 77.

18 On 3rd August on that same page of course
19 Sports Soccer complained to the Office about something
20 else: Kappa. It was that letter which included the
21 reference to "telephone conversations being on disks"
22 which were enclosed.

23 In September 2000, on the same page, we have the
24 payment by Sports Soccer of 6.6 million net under the
25 agreement, and a reference which I had forgotten is on

1 the 14th September a pair of documents being the Umbro
2 licensed agreement and notes of a meeting about it which
3 were two of the four documents which emerged, if I can
4 put it, on that Friday, on the final interlocutory
5 hearing before the commencement of these appeals. It,
6 as I say, permeates the entirety of this period. On
7 1st October Sports Soccer did discount the Manchester
8 United home shirt in accordance with its agreement with
9 Umbro. It having maintained that price for 60 days.

10 THE PRESIDENT: Yes.

11 MR WEST-KNIGHTS: One or two additions on this last page but
12 before I leave page 16, this is my admission: The
13 1st October, Sports Soccer reduce Man U home shirt
14 price.

15 Over the page, on the last page, where I say,
16 "Ronnie is back on the air", that is simply a reference
17 back to the fact that for the monthly management reports
18 for August and September there is no Ronnie report and,
19 indeed, there are no underlying reports from area
20 managers. The announcement about Umbro having lost the
21 Manchester United sponsorship contract has, by this
22 time, gone public and Mr Fellone describes the
23 atmosphere in the report as "suicidal". It was plainly
24 very, very bad news for Umbro indeed.

25 At the end of the year 2000 Umbro made a significant

1 loss, even with the advanced payments made by
2 Sports Soccer. Sports Soccer, on the other hand, made
3 a big profit. I do not think the numbers are material
4 but I think it was in the order of £35 million
5 Sports Soccer's profit at this time. That is net but
6 before corporation tax.

7 THE PRESIDENT: That is in a report and accounts somewhere?

8 MR WEST-KNIGHTS: Somewhere in our documents it is attached
9 to the latter end of the decision bundle documents.
10 There is an extract from the Sports Soccer accounts, not
11 least because it is the formal part of the decision to
12 determine the turnover, but they happen also to show the
13 profit figures.

14 THE PRESIDENT: Yes.

15 MR WEST-KNIGHTS: There was, as we know, sir, a further
16 meeting in March on the subject of other arrangements
17 between Sports Soccer and Umbro and that included
18 express discussion of retail price-fixing. You will
19 recall that in a number of these documents where these
20 people meet and discuss the arrangements between Umbro
21 and Sports Soccer, the pink arrangements, there is
22 frequent reference to the necessity for retail prices to
23 be agreed and, indeed, the final agreement which was
24 reached, we are told, you may remember that one of the
25 potential downsides for Umbro of this arrangement was

1 that so cheaply was Sports Soccer getting, as it were,
2 their kit, that is to say Umbro branded product which
3 they themselves Sports Soccer manufactured, that they
4 could undercut to a degree which might be disastrous for
5 Umbro itself and indeed would reveal the existence of
6 these arrangements. There is a clause in that agreement
7 which says that Sports Soccer may not charge less than
8 the lower of two numbers, one of which is 25 per cent of
9 Umbro's normal price. So even that arrangement is
10 premised upon price-fixing.

11 The only point of that is to say that Mr Ashley has
12 no, as it were, moral or religious conviction in respect
13 of price-fixing. He will do it when it suits. He will
14 do it when it is commercially expedient.

15 There was a further payment of 6.825 million net
16 under the licence agreement in June and, as we know, at
17 the end of that year Umbro made a loss of similar
18 proportions to the preceding year in spite of, again,
19 there having been made these advance payments. I can
20 tell you, but it is there in the documents, that the
21 pattern of other income in the accounts goes thus: 1999,
22 8 million odd; 2000, 26 million, give or take half
23 a million. Sorry to be slack but they are big numbers;
24 2001, 26 million, give or take half a million.

25 The actual royalty figure for the year 2000 is, it

1 would appear, from the December report from the overseas
2 division a shade over 8 million. That is the document
3 which is most easily to be found at page 33 of our
4 supplementary skeleton, 8.03 million. I remind you for
5 what it is worth that the explanation that we have had
6 for the balance of other income for 2000 is both
7 inconsistent with that but also mutually inconsistent in
8 as much as there is no explanation for the figure of
9 12.612 million which it is asserted was the relevant
10 proportion.

11 There was of course a further payment made or to be
12 made which I cannot mention in open court but which is
13 significantly larger than either of the two which I have
14 so far mentioned to be paid in the year 2000. At all
15 times --

16 THE PRESIDENT: 2002.

17 MR WEST-KNIGHTS: 2002, I am grateful to you. At all times
18 in respect of the fruits which were to come from such
19 payments, those payments were made in advance of the
20 fruits being taken.

21 THE PRESIDENT: Yes.

22 MR WEST-KNIGHTS: It is at this date that there should be
23 inserted, if I may, the February 2001 draft agreement,
24 to which I made reference, one of the four Friday
25 documents, that is the one that has the 7th May 2000,

1 7th April 2000 as its effective date.

2 THE PRESIDENT: Yes.

3 MR WEST-KNIGHTS: The final agreement, as it is called, has
4 the 1st May 2000 as its effective date. So even as
5 at August 2002 for some reason, which is not clear to
6 any of us, the 1st May 2000 is the trigger date for this
7 antecedent sorting out.

8 My last reference in connection with this chronology
9 is this: Mr Ronnie was asked about the trading between
10 Sports Soccer and Umbro, and he said on Day 5 at
11 page 26 -- let us hope it is the right reference. It is
12 a non in camera date.

13 THE PRESIDENT: We will find it, Mr West-Knights.

14 MR WEST-KNIGHTS: I am grateful. He described the trading
15 between Sports Soccer on the one hand and JJB on the
16 other, and he described the Sports Soccer/Umbro
17 relationship at the beginning of year 2000 as "stable
18 and going well". A good moment, as we have suggested
19 before, not to report a result with Mr Ashley as to
20 price-fixing, but perhaps to report a result with
21 Mr Ashley as to the payment of between £8 and
22 £10 million in late 1999 for some surplus stock which,
23 as I say, if I were a betting man, would have gone into
24 Umbro's books for 1999 but may not have resulted in the
25 passage of anything valuable until the year 2000.

1 THE PRESIDENT: Sorry, I did not catch that last remark.

2 MR WEST-KNIGHTS: It is the timing. An £8 to £10 million
3 deal struck in late 1999 is the kind of deal that
4 enables that to go into Umbro's books for 1999, as with
5 the advance payments, but not necessarily, as it were,
6 to cost Umbro anything at that time or until some time
7 later.

8 Whatever it did, that parcel of goods, it did not
9 depress Sports Soccer's turnover for 1999 otherwise,
10 because even if you take the 8 to 10 million away, there
11 appears to be real turnover of 28 to 26 million in other
12 product, real product.

13 That is all I want to say arising out of that, and
14 now if I may just do two or three headlines, I will stop
15 before lunch as you very much wanted me to do, as soon
16 as I find the relevant piece of paper.

17 All of the references in the chronology are to the
18 three stage of the evidence. I do not know if I
19 mentioned that yesterday unless otherwise stated.

20 The Office seems to have three cases on the England
21 Agreement.

22 THE PRESIDENT: This is the England Agreement?

23 MR WEST-KNIGHTS: I am going to do England in less than
24 a minute.

25 THE PRESIDENT: Yes.

1 MR WEST-KNIGHTS: Three cases. Pressure procuring the
2 agreement of the 24th May. Answer, "no, none".

3 THE PRESIDENT: Pressure procuring --

4 MR WEST-KNIGHTS: Pressure by us on Umbro.

5 THE PRESIDENT: Pressure by A procuring agreement of
6 24th May --

7 MR WEST-KNIGHTS: Between B and C.

8 THE PRESIDENT: -- answer, "no".

9 MR WEST-KNIGHTS: Answer B says, "no such pressure". C
10 says, "no mention of any such pressure". A also says,
11 "Have a look at the particulars of pressure given by the
12 OFT, they are all out of sync."

13 The only one which might conceivably have pre-dated
14 24th May was if we had been amazingly quick off the mark
15 about the JD cap promotion and if you bought that that
16 was pressure and if you bought that that had anything to
17 do with the meeting of 24th May, but all of the evidence
18 is that that meeting of 24th May was a follow on from
19 a meeting of 10th April, part of the overall
20 arrangements between Umbro and Sports Soccer and nothing
21 to do with us.

22 THE PRESIDENT: Yes.

23 MR WEST-KNIGHTS: Insofar as anybody has tried to put a date
24 on the moan about the JD cap, it is Michael Guest and
25 that is 31st May. Anyway, all that goes.

1 The next case appears to be either -- their first
2 case is a no phone call case. The other two cases are
3 phone call cases -- either that pressure led to our
4 being reassured about Sports Soccer's pricing
5 intentions, or that that phone call was in the context
6 of what had gone before, willing receipt of that
7 information. If I have that wrong, I ain't going to be
8 able to do any better. That is the best shot I can do
9 of what their case is. The first point is: plainly on
10 the evidence you cannot be satisfied on any basis of
11 compelling or otherwise that that phone call was ever
12 made.

13 THE PRESIDENT: No phone call.

14 MR WEST-KNIGHTS: No phone call. Second, what pressure
15 prior to the phone call? The answer is first, it is not
16 suggested by Ronnie or anybody else that the phone call
17 was to be made as the result of any pressure by anyone
18 except possibly Ashley. His motive for making the phone
19 call is Umbro's own motive vis à vis Sports Soccer if he
20 made it which he did not.

21 But looking at the pressure, the only relevant
22 pressure could be that between 24th May and the supposed
23 making of the phone call. It all disappears. Golf day
24 pressure plainly did not cause the phone call to be made
25 because it would have resulted in Mr Hughes being told

1 on the day.

2 The next item of pressure, I think, is the 31st May,
3 lunch with Mr Guest. You have all the evidence about
4 how innocent that was, but it did not result in
5 Mr Ronnie passing on the information.

6 The next event of pressure allegedly is 2nd June
7 meeting between Mr Ronnie and Mr Hughes. I only need to
8 say yet again that whatever else happened at that
9 meeting it did not result in Ronnie, as it were, feeling
10 suborned, or giving rise to any context where he passed
11 on the information, because he says he did not. There
12 is plainly no nexus between anything that happened, even
13 if you do not completely -- all the allegations of
14 pressure which we invite you to do so, we regard them as
15 sequentially destroyed or evaporated, or to be viewed in
16 the light of the absurd definition of pressure which
17 plainly Mr Ronnie had, even if you were against any
18 aspect of that, there is plainly no nexus, none
19 whatsoever.

20 What Mr Ronnie wanted to do after 24th May was to
21 report a result, but he did not, and there was not any
22 pressure on him to do so and whenever there was any
23 event which is alleged to be pressure, it did not result
24 in the passing on of that information. So that is all
25 stone dead.

1 Manchester United.

2 THE PRESIDENT: That is England?

3 MR WEST-KNIGHTS: That is the end of England. Of course,
4 let me remind you that we say that it should have been
5 the end of England before all this started.

6 The monthly management report -- just quick
7 headlines for four minutes -- the May monthly management
8 report is no evidence of its having been made for the
9 reasons which I have explained, you are unable to the
10 find --

11 THE PRESIDENT: Sorry, can I just be clear? As far as the
12 May -- what bearing if any, before we do MU --

13 MR WEST-KNIGHTS: This is MU.

14 THE PRESIDENT: This is MU, but before we go onto MU we just
15 finish on England, what bearing, if any, do you say
16 the May monthly management report has on England?

17 MR WEST-KNIGHTS: I try not to repeat myself unduly.

18 THE PRESIDENT: I think you were submitting yesterday it has
19 no bearing because it is not relied on.

20 MR WEST-KNIGHTS: It is much better than that. First, it is
21 not relied on. The monthly management report for May
22 purports to express an express agreement between
23 a number of parties and Umbro. The Office abjures and
24 withdraws from any suggestion that there was such an
25 agreement between Umbro and Allsports, period. Further,

1 you could do a complicated disposition and say: we have
2 nailed down Sports Soccer. We think we may have
3 JD Sports in the bag, and if we do not, we are leaning
4 on them hard. We have been in ongoing conversation with
5 Debenhams and we are confident. JJB and Allsports, of
6 course, are continuing to do their own thing. Well, it
7 is much easier and nicer to say they have all agreed to
8 go out full price, simple as that.

9 That is part of the, as I say, the blows on back of
10 knuckles and rubs own lapel, whatever the thing is, bit
11 of Ronnie giving himself a bit of a chuck up in front of
12 the troops, antecedently to giving them the rousing --

13 THE PRESIDENT: So it is not evidence anyway?

14 MR WEST-KNIGHTS: Plainly not.

15 THE PRESIDENT: Yes.

16 MR WEST-KNIGHTS: Manchester United. On a balance of
17 probabilities that report was written before anything
18 was said about the 8th June meeting by Ashley to Ronnie
19 on 8th June. The reference to Manchester United is
20 sensibly explained by the notional forward stroke. It
21 is clear on the evidence that any propensity of Ashley
22 to discount a premium product is worrying Manchester
23 United in particular and Umbro in respect of the MU
24 launch and any upping of price by Ashley in respect of
25 premium product is good news for that prospective

1 launch. It all goes well.

2 I do not need to remind you, but I have it down
3 here, that there were two further agreements in July
4 which Mr Ronnie himself ascribes as being the causative
5 element in the actual decision to go out or the actual
6 fact that he went out with full price on 1st August.
7 Why not in respect of the supposed Manchester United
8 Agreement tell either Mr Prothero or Mr Marsh
9 straightaway? They did not. That is clear from their
10 evidence. Mr Marsh does not seem to have known about it
11 until some time very much later and Mr Prothero was
12 unable to fix a date on it, but his own witness
13 statement makes it look as if it was much closer to the
14 date of his letter of 13th July than the supposed event
15 of 8th June.

16 Manchester United's interest in that supposed result
17 is obvious and primary. It is their shirt. They were
18 not told. And if they were going to be told by
19 somebody, the principal person who would have told them
20 would have been Marsh. Why not tell the OFT.
21 3rd August, plainly it is right to say that he did not
22 tell them about any part of the Manchester United shirt
23 price-fixing.

24 Just a quick look at the meeting itself. Was Ashley
25 bullied, effectively, by Mr Ronnie? Answer, no. What

1 Mr Ronnie's evidence now is, is of course, supporting
2 the Ashley line. He may no longer be supporting the
3 Umbro line. I was disturbed to hear my learned friend
4 yesterday say with such confidence that he did not think
5 that Umbro would be liaising with Ronnie now about the
6 licensing arrangements, when Ronnie's evidence was that
7 he left ultimately amicably.

8 Was Mr Ashley bullied by Mr Whelan? Why should
9 Mr Ashley fear Mr Whelan, and perhaps more important,
10 why would Whelan weigh in at that meeting suddenly? It
11 was not his idea, it is reported that Mr Whelan became,
12 as it were, direct, but not that Mr Ashley felt, until
13 he went into the witness box, in fear of him.

14 I should say in passing you may, if you wonder about
15 whether Mr Whelan is wrong in respect of the creation of
16 his witness statements and yet he was certain about
17 that, oh, is he wrong about anything else that he is
18 certain about, the answer is that is a judgment you must
19 make. There is no warrant for scrapping the whole of
20 the witness for one error.

21 Was Ashley bullied by Mr Hughes? No. It is quite
22 plain that he had no regard for Mr Hughes and did not
23 regard him as being anybody with any form of power to
24 harm him.

25 I remind you, if I may, that there are no clear

1 dynamics as to how that meeting might have ended up with
2 Ashley agreeing. It is just impossible to picture on
3 any aspect of the evidence which you have heard.

4 So far as the 9th June memoranda is concerned, as
5 I say, I will say a little bit more about those when I
6 know precisely what the Office is going to say about
7 them, but I have said, and I repeat, if you look hard at
8 that first one it makes no sense in either context.

9 THE PRESIDENT: Yes.

10 MR WEST-KNIGHTS: And plainly there is a flavour of it that
11 he is trying to set up some form of platform to persuade
12 Guest and Patrick to do this dual pricing thing. You
13 remember that what Hughes wanted was 44.99. He was not
14 interested in 39.99. If you look at that with the idea
15 this is somehow a last ditch attempt to get them somehow
16 a dual price, if not 44.99 everywhere, it makes a little
17 more sense.

18 I do invite you all to re-read that supposedly
19 damning memorandum on two bases: assume that he did
20 a deal with Ashley, why not say, "Whelan and I have done
21 Ashley in. I think he will perform this time because
22 David gave him a real seeing to", or words to that
23 effect? Why not?

24 I said I would finish before lunch but only just.
25 I thank you again for your patience and I urge you to

1 allow Allsports' appeals in both respects, at least on
2 a minimum ground that there is not the sufficiently
3 compelling and clear evidence to enable you to find
4 either of the infringements proved to the requisite
5 standard, although you may anticipate that we go
6 a little further than that.

7 THE PRESIDENT: Yes.

8 MR WEST-KNIGHTS: Thank you all very much.

9 THE PRESIDENT: Thank you very much. Very well. We will
10 resume at 2 o'clock.

11 (1.00 pm)

12 (Luncheon Adjournment)

13 (2.00 pm)

14 Submissions by MR GUNNY

15 THE PRESIDENT: I was told you would like to address us,
16 Mr Gunny.

17 MR GUNNY: Yes, if I may, I would like to make a few points
18 on behalf of Sports World.

19 THE PRESIDENT: Yes, of course.

20 MR GUNNY: Principally in relation to the inferences that
21 are being drawn by Allsports as to the relationship
22 between Umbro and Sports Soccer and one additional point
23 I would like to come to at the end.

24 THE PRESIDENT: Yes.

25 MR GUNNY: As to the inferences being drawn, we were on 9th

1 March asked by the tribunal to clarify the extent of the
2 trading arrangements in 2000 and 2001. On 10th March we
3 submitted a paper responding to that request and therein
4 we provided details of the business we conducted there
5 with Umbro in 2000 and 2001. Frankly, there is nothing
6 sinister in those, there is certainly nothing fraudulent
7 in those. There were no further requests made of
8 Sports World and we assume from that that we had
9 provided what had been asked for. There have been, as I
10 understand, further requests of Umbro, principally in
11 relation to Umbro documents and Umbro accounting and
12 reporting, but not addressed to us.

13 Sports World has had legitimate concerns about the
14 disclosure of confidential and commercial information.
15 The tribunal has ruled on that and Sports World has
16 provided the information. In doing so, it has disclosed
17 confidential information in front of competitors which
18 in the ordinary course it would not disclose.

19 Sports World, also, as you know, applied to
20 intervene and this was resisted by Allsports and indeed
21 turned down by the tribunal. As a result Sports World
22 is not entitled to make representations responding to
23 those made by the parties to the appeal. Sports World
24 has however committed substantial resources in time to
25 assist in these proceedings, and when not represented at

1 the tribunal itself has observed consistent with its
2 status from behind the scenes.

3 We do not feel that it can be inferred from these
4 facts that Sports World have been in any way evasive.
5 Frankly Allsports cannot have it both ways: to resist
6 our application to intervene and then draw adverse
7 inferences from the fact that we have not been here
8 every day of these very lengthy proceedings.

9 THE PRESIDENT: Yes.

10 MR GUNNY: We would urge the tribunal to approach such
11 suggestions or inferences with extreme caution.

12 Consistent with Sports World's commitment throughout
13 Sports World endeavours to assist the tribunal in any
14 way it can and if there are specific questions in
15 relation to its trading arrangements with Umbro and they
16 are addressed to us we will do our best to answer them.

17 Just one final point I would like to make, JJB and
18 Allsports are obviously pulling out all the stops now,
19 in particular Allsports, seeking to discredit Mike
20 Ashley and Chris Ronnie. As I mentioned earlier, we are
21 not entitled to make representations on representations
22 of others. The OFT has this power but as a regulator
23 with public functions, and I do not make any criticism
24 of it, it is in a somewhat different position, and it is
25 not necessarily within its public role to attack with

1 the same vigour the credibility of the appellants'
2 witnesses. It would seem to us that there is an
3 inherent imbalance in the process of which we would urge
4 the tribunal to be mindful.

5 That is all I have to say, thank you very much.

6 THE PRESIDENT: Thank you, Mr Gunny. I think to recall that
7 when we were ruling on Sports Soccer's application to be
8 an intervener, we made it clear that Sports Soccer was
9 entitled to be an observer and I think we said, from
10 memory, that if matters did arise which in fairness we
11 thought we ought to allow Sports Soccer to make
12 representations to us about, then we would certainly
13 consider that situation.

14 I think we will ourselves consider the situation and
15 if you want to consider the situation as well then you
16 are free to do so. As far as the tribunal is concerned,
17 you may feel you have made your position sufficiently
18 clear now but the tribunal is always open to
19 applications from interested parties. I think that is
20 all I need to say at the moment.

21 MR GUNNY: Thank you.

22 THE PRESIDENT: Thank you very much.

23 Closing submissions by MR MORRIS

24 MR MORRIS: Sir, members of the tribunal, it now falls for
25 me to close the case on behalf of the Office.

1 THE PRESIDENT: Yes.

2 MR MORRIS: Can I just tell you what we have. We have
3 a written document. We have them in a file and we will
4 hand that up now before we start. (Handed) I will just
5 wait whilst everybody has a copy and then I can begin.
6 Just to explain the document, essentially, and I do
7 not have your file so I hope it is the same, essentially
8 we have the closing submissions document which runs to
9 some 70-odd pages.

10 THE PRESIDENT: Yes.

11 MR MORRIS: 76.

12 THE PRESIDENT: And an annexe.

13 MR MORRIS: And an annexe, and I think the annexe may or may
14 not be paginated but it has paragraphed numbers and the
15 annexe is detailed material on the England agreement,
16 details drawn together of the evidence.

17 This is obviously a long document. What I propose
18 to do is this: I propose to start by making some
19 overriding points that are not effectively in the
20 document. That might take me 10, 15 minutes.

21 THE PRESIDENT: Yes.

22 MR MORRIS: I then am again, like Lord Grabiner to some
23 extent, in your hands. I do not propose to take you
24 through this document from start to finish. I am happy
25 to take you to some of the points and go through it and

1 pick them out and it may be that in terms of the opening
2 section I would like to do that, but then when we get to
3 the detail of the full agreement an alternative to me
4 going through the points and pointing to particular
5 paragraphs is for you to go away and read and then for
6 you to come back if you have any questions, possibly
7 tomorrow morning or even this afternoon. To some extent
8 I am in your hands and perhaps I might suggest at this
9 stage shall we see how we go.

10 Can I start with my first overriding proposition and
11 it is this: in our respectful submission the evidence in
12 this case establishes quite clearly that JJB and
13 Allsports were party to each of the price-fixing
14 agreements in question.

15 THE PRESIDENT: Yes.

16 MR MORRIS: When you, the tribunal, sit back and consider in
17 the cool light of the day, of a day, not today, all of
18 the evidence, the witness evidence, both oral and
19 written, the contemporaneous documentary evidence and
20 the evidence of context and surrounding circumstances,
21 we submit that on any standard you can reach only one
22 conclusion: JJB and Allsports were party to price-fixing
23 of replica kit as alleged. In fact, the Office goes so
24 far as to say that particularly in the case of the
25 Manchester United Agreement this tribunal is unlikely

1 ever to have before it a clearer case of horizontal
2 price-fixing. The evidence, particularly on that case,
3 points clearly and inexorably to that conclusion.

4 My second headline point is about assessing the
5 evidence and I am not going to use eggs and sucking, but
6 if you will allow me a few moments just to make a few
7 points about assessing the evidence.

8 The tribunal must consider all the evidence. The
9 oral evidence is undoubtedly important, but it should
10 resist the temptation to give undue prominence to that
11 oral evidence by its nature and by the events which have
12 happened over the last two or three weeks. It is
13 natural for all of us to have most firmly fixed in our
14 mind the memorable events of what has gone on in the
15 witness box, but we say that contemporaneous documentary
16 evidence is equally important; indeed, we would suggest
17 that in certain circumstances it should be given more
18 weight.

19 THE PRESIDENT: Yes.

20 MR MORRIS: This is evidence which speaks directly from the
21 time in question. It is not subject to the vagaries of
22 memory and the fading of or imperfections of
23 recollection.

24 Further, witness evidence contained in witness
25 statements which has not been challenged in

1 cross-examination is also very important and that falls
2 into two categories: evidence in witness statements from
3 witnesses who did not give oral evidence at all and
4 evidence in witness statements from those who did give
5 oral evidence but in respect of which there was no
6 cross-examination. As indeed I think my learned friend
7 Mr West-Knights pointed out, in our modern procedures
8 absence of examination-in-chief does deprive the
9 tribunal of the opportunity to hear the witness speak to
10 the evidence in his witness statement, so, for example,
11 the tribunal never actually heard a full account from
12 Mr Ashley in the witness box of the meeting of the
13 8th June. You heard bits, the bits upon which he was
14 cross-examined, but you did not hear other bits upon
15 which he was not cross-examined.

16 You may have got a fuller picture orally from
17 Mr Whelan or Mr Hughes but you must bear in mind the
18 evidence, the unchallenged evidence in witness
19 statements which was not challenged on
20 cross-examination.

21 We have had a little bit of debate, sir, about the
22 standard of proof. There is some material in our
23 closing on that but I just want to make one or two
24 points. First of all, as you pointed out, it is the
25 civil standard balance of probabilities. Of course I am

1 aware of the added elements. I will come to that in
2 a moment.

3 We do say that this tribunal must take account of
4 the fact that in a case of a cartel evidence may often
5 be less than complete. It may be circumstantial, it may
6 be piecemeal, and those are observations which you, sir,
7 made in the course of argument before and in that regard
8 we would refer you to your observations in the Claymore
9 case which I think are in volume 6 of the authorities
10 bundles at tab 6 and the references are certainly in our
11 skeletons. But there, sir, you will be familiar with:
12 how do you square strong and compelling with the fact
13 that a cartel is likely to be hidden? And I think that
14 in a way ultimately is a matter of your judgment but
15 you, sir, are well aware of that perhaps tension.

16 We accept that the nature of the evidence must be
17 strong and compelling but we submit that the sensible
18 approach is for the tribunal to assess all the evidence,
19 and then when it has seen that evidence not to shirk
20 from the responsibility of deciding what on the basis of
21 that, all that evidence, is to be found to have
22 happened.

23 My third heading in opening is this: we suggest that
24 there are some key questions in this case which the
25 appellants have not and cannot answer. Some of them

1 I posed in opening and I will just run through one or
2 two.

3 Why would Mr Ashley, a committed discounter, agree
4 to fix prices? In our respectful submission there is
5 only one plausible explanation for that and that is that
6 he was forced to do so because at crucial times he
7 needed replica kit. It was a statement product. As
8 everyone recognises on all sides of this case,
9 Mr Ashley's entire business philosophy is "pile them
10 high, sell them cheap." The arcane theories about the
11 games that Sports Soccer were playing suggested by my
12 learned friends in fixing prices and then blowing the
13 whistle, they neither add up themselves nor bear any
14 resemblance, we would submit, to the man or to his
15 business conduct.

16 Why would Mr Ashley go to a meeting with his
17 competitors on 8th June and not agree to price at 39.99?
18 Mr Hughes' explanation of some element of merely going
19 to poke fun just makes no sense, and you will recall
20 Mr Ashley's evidence which is referred to in our closing
21 about what he felt about meeting Mr Whelan at that time
22 and what his status in the game and the business was at
23 that time. He felt intimidated by meeting Mr Whelan.

24 The next question we would ask rhetorically is this:
25 why would Mr Ashley persistently and from an early date

1 go to the Office of Fair Trading to blow the whistle on
2 price-fixing to which he was a party? Why would he tell
3 the Office of Fair Trading that he had fixed prices at
4 the June meeting if he had not done so?

5 We respectfully submit that the only possible reason
6 for him going to the OFT was to rid himself of the
7 price-fixing which he perceived as being endemic in the
8 industry and to allow him to pursue what he does best,
9 namely selling cheap.

10 The next rhetorical question is: why would he want
11 to shock Umbro if, as is alleged, his interests are so
12 intimately wrapped up with those of Umbro?

13 If he was motivated, as was suggested by some form
14 of clever strategy as regards Umbro in particular, why
15 would he go to the OFT and seek to blow the whistle, not
16 just in respect of Umbro but in respect of everyone in
17 the industry? You will recall, sir, that his initial
18 complaint was about another manufacturer, Kappa, and
19 that in his evidence he made it quite plain that he was
20 complaining about what he perceived to be price-fixing
21 by all the other major manufacturers. It is nowhere
22 suggested, for example, that he had an equally special
23 relationship with Adidas or with Nike such that it
24 caused him to go and shop them for some ulterior
25 purpose.

1 Can I just take you to one transcript. I do not
2 know if you have the transcripts to hand and I can read
3 it if you have not. In cross-examination on Day 3
4 Mr West-Knights suggested to Mr Ashley --

5 THE PRESIDENT: If it is just a short passage.

6 MR MORRIS: It is a very short passage. I will read it. It
7 is 3/84, line 20. Mr West-Knights suggested to him that
8 he, Mr Ashley, had tactically shocked Umbro at
9 a particular point in time so that somehow he could
10 retain the rights to the licensing deal. His response
11 to that suggestion was to say the least vivid. He said:

12 "You are absolutely barking mad. I have never heard
13 such crap in all my life. I apologise to the tribunal
14 but honestly, where are we going now?"

15 You, sir, will obviously draw your own conclusions
16 from the manner in which he said what he said. We would
17 suggest that that has all the hallmarks of a man who
18 just thought such a suggestion was beyond belief, beyond
19 possibility.

20 My fourth and final opening point is this: that we
21 suggest that the appellants' approach to the evidence
22 and to the material before the tribunal has been highly
23 selective. JJB, for example, failed to answer the
24 question posed by the Office of Fair Trading long ago as
25 to why Mr Whelan did not ask Mr Hughes about the purpose

1 of the meeting on 8th June when he allegedly spoke to
2 him beforehand. The OFT has maintained throughout that
3 if such a conversation took place it is not and was not
4 credible that Mr Whelan did not ask Mr Hughes about the
5 purpose of the meeting.

6 The second example: JJB ignore inconvenient
7 evidence. In their closing they rely upon a sentence
8 from Mr Hughes' cross-examination, a single line, and
9 again this is flagged up in our closing, in which
10 Mr Hughes said that only he knew of the purpose of the
11 meeting in advance.

12 What JJB did not do and what we have in fact pointed
13 out in the relevant part of our closing, and I can take
14 you to that in a moment, is that if you read the full
15 exchange of that portion of Mr Hughes' cross-examination
16 by Lord Grabiner Mr Hughes made it plain that he did
17 tell both Mr Sharpe and Mr Ashley the purpose of the
18 meeting, but the only bit that he left out in telling
19 them was the fact that the meeting was about
20 specifically the Manchester United shirt. But his
21 evidence was plain that the purpose to which he referred
22 was to put a stop to the price war. The reference is
23 paragraph 134 and following of our closing. 134-136.

24 As far as Allsports are concerned we would make the
25 following observations: first, Allsports conveniently

1 ignore the strength of Mr Guest's evidence about the
2 relationship between on the one hand discounting of
3 replica kit and on the other hand the support,
4 Allsports' support for moving the Umbro brand up-market
5 in the context of branded goods.

6 Secondly, we would suggest and submit that Allsports
7 completely ignore the essential content of the
8 Guest/Gourlay letter. In our submission it is plain
9 that that is a letter which is complaining about the
10 discounting of others and which is asking Umbro to take
11 action to stop that discounting.

12 I would make one further observation on that letter
13 at this stage to suggest that that letter happened
14 a year before we respond, as follows: first, it is
15 plainly indicative of an Allsports attitude towards
16 discounting and it is plain evidence of that concern
17 being communicated across the line. Secondly, we would
18 invite you to bear this in mind: that letter was written
19 in respect of the very England shirt which is the
20 subject matter of the Euro 2000 agreement and it is
21 written in respect of the immediately prior, key selling
22 period for that shirt. In other words, you have the key
23 selling period of the launch in April 1999 and you then
24 have the key selling period effectively in relation to
25 the lead up to the Euro 2000 tournament.

1 A third observation on Allsports is this: we submit
2 that they do not deal with or address the telephone
3 conversation between Mr Knight and Mr Hughes on the
4 2nd June made in the presence of Mr Ronnie. Where, let
5 us make no bones about it, Allsports and First Sport
6 exchange clear information that each will price at 39.99
7 for England and will not adopt a promotion.

8 The Office's self-standing submission in respect of
9 that conversation alone is that in itself amounted to an
10 agreement and/or concerted practice in relation to the
11 England shirt as between Allsports and First Sport.

12 We also make the separate proposition that of course
13 that is evidence that goes to participation in the wider
14 England Agreement, but we would submit that that is
15 a very important telephone conversation and a very
16 important event.

17 So those are my opening remarks.

18 THE PRESIDENT: Yes.

19 MR MORRIS: What I will just do, if I may, for the next few
20 minutes is run through the document to see its structure
21 and to pick up some points.

22 THE PRESIDENT: Yes.

23 MR MORRIS: You will see at the outset we say where we are
24 going in paragraph 2 and then we have observations on
25 the burden and standard of proof in paragraphs 3-5. We

1 do make the additional point in paragraph 3, however one
2 characterises it, that in certain circumstances
3 certainly as a matter of community authority and now
4 that there is an evidential burden upon the appellants
5 if and to the extent that we establish certain facts,
6 and we have referred there to the fact that Allsports
7 took part in a meeting which had an anti-competitive
8 purpose.

9 We also contend that the same applies to JJB
10 although of course that depends on you finding that JJB
11 did know of the purpose before the meeting, which of
12 course we urge you so to do.

13 We also refer to the terms of the 9th June
14 memoranda. We say that those facts effectively place
15 upon the appellants a burden to produce cogent evidence
16 to displace the inferences that can be drawn from those
17 facts, and we say that, certainly in the case of
18 Allsports, they have singularly failed to discharge that
19 burden.

20 Then we go over and deal with the nature of an
21 approach to evidence and you will see there that I make
22 some of the points I have already made, but in
23 paragraph 8, sir, I pick up on what we say the vital
24 contemporaneous documentation is and you will see that,
25 and I think you have probably got those points from my

1 opening.

2 THE PRESIDENT: Yes.

3 MR MORRIS: Then in paragraph 10 we deal with the issue of
4 oral evidence and how the tribunal should assess it. We
5 make the point that I think my learned friends have made
6 that of course you should look for consistency with
7 context and documentary evidence. I am about line five
8 or six of paragraph 10 at the moment.

9 Then we make the further point, and I would draw
10 this to your attention, we invite the tribunal to
11 identify evidence which bears the ring of truth, by
12 which I mean where a particular witness recalls specific
13 details which would of their nature be bound to stick in
14 the mind, and we there give some examples of that sort
15 of evidence, and we would suggest that there will be
16 others throughout the course of the evidence. But we
17 refer first of all to Mr Fellone's evidence where he
18 said in re-examination that he remembered the meeting of
19 8th June 2001 and the topic of Sports Soccer's
20 discounting being raised because he had remembered that
21 that very issue had been raised with Mr Ashley by
22 Mr Ronnie, and that at the meeting with JJB, and I am
23 quoting him now, "he knew that answer to the question
24 very very quickly because we talked about it
25 previously".

1 I then refer to the second example which is
2 Mr Ashley's evidence at the oral hearing about why he
3 specifically remembered the two specific instances of
4 England and Manchester United.

5 We then have the third example which is the
6 recollection of the lorry being turned away. The fourth
7 example is Mr Hughes' evidence about the difficulties he
8 was having getting hold of Duncan Sharpe, and I think he
9 said, "God rest his soul" or "bless him" or something,
10 "Duncan was not very good at returning calls".

11 Then we have the reference to Mr Ashley's
12 recollection which was confirmed by Mr Hughes in
13 cross-examination that Mr Whelan remarked along the
14 lines, when they were doing the walk round the house,
15 "It must have cost a bob or two", and my suggestion
16 there, sir, is that you heard Mr Whelan in the witness
17 box and we would suggest that is the sort of thing he
18 might well have said.

19 Then we go on to make the point that I think
20 everybody probably makes in paragraph 11 that of course
21 it is not all or nothing with any witness and we make
22 some observations about the different witnesses.

23 Then in paragraph 13 we invite the tribunal to look
24 at reasons for inconsistency or lack of completeness in
25 evidence and we contrast the position of Mr Whelan where

1 we say his inconsistency is so great that his evidence
2 on the 8th June meeting should not be accepted, and
3 there is no reason for that inconsistency other than
4 unreliability.

5 Then we contrast Mr Ronnie's account with his
6 undoubted inconsistencies and changes in story and we
7 invite the tribunal, however, to consider that the
8 essential elements of his account remained constant and
9 that there is other evidence for inconsistency.

10 We then do the pen portraits of the witnesses and
11 I am just going to pick up one or two points there if
12 I may.

13 Mr Ashley, we submit, was a very impressive witness
14 indeed. I am not going to elaborate on that save to
15 invite your attention to paragraph 16. We actually do
16 suggest that you go back and you read the transcript,
17 I am sure you would have done, read the transcript of
18 his cross-examination. He was a lively character. We
19 suggest that his credibility leaps out of the page when
20 you read it. His exasperation, his ability to say
21 "Well, yes, fair cop. That point is right/not right."
22 If you read it it comes alive and we would invite the
23 tribunal to do that.

24 We then make observations about Mr Ronnie and we
25 accept that his recollection was at times inconsistent

1 on matters of detail, and indeed sometimes so
2 inconsistent that it is difficult to rely upon those
3 aspects of his evidence. We submit, however, that he is
4 not a dishonest witness. We do suggest in paragraph 19
5 that the tribunal should bear in mind the circumstances
6 surrounding the drafting of the leniency statements and
7 his OFT statements, both his personal circumstances and
8 the position of Umbro, and you will see there we draw
9 attention to the letters that were exchanged between
10 Umbro and the Office of Fair Trading in the leniency
11 period and we invite your specific attention to pages
12 8-25 and 30 of the Umbro pleadings bundle which were
13 passages of those letters which refer to Umbro's concern
14 to maintain confidentiality for fear that effectively
15 them going to the OFT would have an effect upon them in
16 their continuing future relations with what were and are
17 their principal customers.

18 We then point out a number of points upon which
19 Mr Ronnie remained fully consistent and these are key
20 points. His recollection of the phone calls after
21 24th May, the fact that these phone calls were not
22 mentioned at a late stage but were in fact mentioned at
23 the leniency meeting of 26th February, and also the fact
24 that at that leniency meeting he clearly mentioned that
25 it was Duncan Sharpe whom he had called at the time.

1 THE PRESIDENT: Sorry?

2 MR MORRIS: I am in the second indent.

3 THE PRESIDENT: That is Umbro's pleading bundle.

4 MR MORRIS: Yes, sir. The reason there is a gap, I have to
5 say that we have been endeavouring to make this document
6 as absolutely complete as we can but there are one or
7 two references that are not finalised. I can tell you
8 in particular the reference that I have in mind there,
9 and this is Umbro pleading file 2, tab C, and I think
10 you have numbered yours as well.

11 THE PRESIDENT: Tab C is the reply.

12 MR MORRIS: Yes, and it is at the back of the reply. Sir,
13 you will recall there are the notes of the leniency
14 meetings. It is page 76 I have it marked at.

15 THE PRESIDENT: Can you just remind us when these notes
16 first figured in these proceedings, as it were?

17 MR MORRIS: It was, I would imagine, some time after January
18 this year in terms of -- 15th January.

19 THE PRESIDENT: Can you just remind me, what is the
20 provenance?

21 MR MORRIS: The provenance of that is as follows: there was
22 a leniency meeting to which Umbro came to the OFT on
23 26th February. There is some debate between -- Umbro
24 suggested that it was agreed that a formal minute would
25 be taken. The Office says it would not. What has in

1 fact subsequently been found, as a result of exchanges
2 between Umbro and the Office, are three sets of notes of
3 that meeting. The first set, I believe in this bundle,
4 are notes --

5 THE PRESIDENT: Three sets of notes have been found, yes.

6 You will have to remember we have not necessarily fully
7 prepared the documents that essentially relate to the
8 penalty appeals.

9 MR MORRIS: I understand that, sir. I think we did amend
10 our pleading to refer to these leniency notes.

11 THE PRESIDENT: Yes, I see.

12 MR MORRIS: If you go to page 13 of this document.

13 THE PRESIDENT: Of the reply?

14 MR MORRIS: No, if you go to the reply, sir, the reply is --

15 THE PRESIDENT: It is something called "Meeting with OFT".

16 MR MORRIS: It is ten pages long and then there is annexe 1,
17 and what I have done, and I hope everyone else has done,
18 is I have actually paginated in manuscript through this,
19 so I have "Umbro meeting with OFT" on Tuesday
20 26th February 2002 with "Privileged and Confidential" on
21 the top right.

22 THE PRESIDENT: Yes, at a page numbered in manuscript 13.

23 MR MORRIS: That is exactly it, sir. Those are Umbro's
24 notes, as I understand, of that meeting. It is Lovells
25 at that stage acting for Umbro.

1 THE PRESIDENT: Yes.

2 MR MORRIS: And they run to page 23.

3 THE PRESIDENT: Yes.

4 MR MORRIS: We then have some manuscript notes starting at
5 24 which run through to 55 and they were notes taken by
6 a gentleman called Padraig Sheerin. There has been some
7 confusion but that is his name. He is a member of the
8 OFT and these are his manuscript notes of that meeting.

9 THE PRESIDENT: Yes.

10 MR MORRIS: And at page 50 --

11 THE PRESIDENT: That has come from OFT files, has it?

12 MR MORRIS: It has come from OFT files.

13 THE PRESIDENT: Yes.

14 MR MORRIS: And at page 56 to page 64, that is a typed
15 transcription of those manuscript notes.

16 THE PRESIDENT: Yes.

17 MR MORRIS: And to the extent there are bits which need
18 expanding I think you will find that they are in square
19 brackets.

20 THE PRESIDENT: Yes.

21 MR MORRIS: And just whilst you are there, at page 57 there
22 is a passage which deals with, we suggest, the England
23 Agreement.

24 THE PRESIDENT: Someone went to this at an earlier point.

25 MR MORRIS: I think I did, and near the bottom where it says

1 "page 7 of notes" you will see the passage "Went back to
2 JJB and Allsports at buyer and board level to explain
3 this".

4 THE PRESIDENT: Yes.

5 MR MORRIS: We submit that that effectively supports the
6 first of those propositions in paragraph 20 of our
7 closing.

8 If you then carry on, sir, and go to page 65 you
9 will find some more manuscript notes and these are
10 manuscript notes taken by Frances Barr who is also at
11 the Office of Fair Trading and she was also at the
12 meeting.

13 If you go to page 73 that is the typed transcription
14 of those notes, and at page 74 you will see halfway down
15 about "see our number of conversations" and you will see
16 a reference to paragraph 80, of February leniency. I do
17 not know whether you are with me, sir.

18 THE PRESIDENT: Yes.

19 MR MORRIS: And you will see there in told buying level JJB
20 and Allsports, then senior level in both businesses. We
21 would suggest that that matches the previous reference
22 in Mr Sheerin's notes to which I have just taken you.

23 If you go further, however, over to page 76, and
24 whilst you have your finger in page 76 you might wish to
25 turn back and go to page 68.

1 THE PRESIDENT: Yes, "JJB spoke to chief executive".

2 MR MORRIS: "JJB spoke to chief executive", and you will see
3 on page 76 the gap: "JJB spoke to chief executive" and
4 we had some arguments about that, previously, sir, you
5 will recall.

6 Just to complete the picture, there is on page 80
7 a further note which is manuscript and it is a note
8 taken by Christiane Kent who was the case officer, and
9 81 is a typed up version of her note.

10 THE PRESIDENT: And that apparently includes the line "went
11 back to JJB and Allsports to inform them of the
12 agreement with SS".

13 MR MORRIS: Yes. Just for your information, sir, I should
14 add that Frances Barr was the lawyer on the case and
15 Christiane Kent and Pdraig Sheerin were in fact the
16 case officers.

17 THE PRESIDENT: Yes.

18 MR MORRIS: So what we say we get out of this is two things:
19 one is that the calls were mentioned back
20 in February 2002 by Mr Ronnie and the going back to, and
21 secondly, the proposition that it is recorded that the
22 person to whom Chris Ronnie spoke to at JJB was
23 Duncan Sharpe.

24 Then we run through some other points, sir, in
25 page 9 about where he has been consistent. We refer to

1 the references about "boss finding out" and "sort it
2 out". We also refer to the memory of the "inundated
3 with telephone calls from Sports Soccer's area
4 managers", and you will be familiar with that, sir.

5 Then we have, we would submit, an important point,
6 which is the last indent, that in his witness statement
7 evidence he has given a detailed account of his meeting
8 with Mr Hughes on 2nd June including the all important
9 phone call from Mr Hughes to Mr Knight.

10 That evidence is not now seriously challenged by
11 Mr Hughes himself despite the fact that in the
12 administrative stage Allsports denied much of what he
13 was then saying, and there is a reference there to what
14 Allsports were saying in their written reps on the
15 supplementary rule 14 about that meeting. And
16 similarly, his account of the golf day, whilst
17 previously not accepted, is, we would submit, confirmed
18 by Mr Draper's account and indeed by Mr Hughes' account,
19 certainly to the extent that he says he cannot disagree
20 with Mr Draper.

21 Then we deal with the point that of course he is
22 attacked for the four different versions of the story
23 and, sir, you have that point well on board but we
24 suggest that all these different versions do contain the
25 same basic elements and there we set out what we submit

1 are the basic elements of the account in relation to the
2 England agreement.

3 We also make some observations in paragraphs 23-24
4 about the circumstances of his leaving Umbro, and in
5 that connection I would just add that in the light of
6 Mr West-Knights's additional submissions which I saw
7 briefly before I came in on the point about Mr Ronnie's
8 involvement in the provision of information by Umbro, we
9 would suggest that you will bear in mind what he said
10 about how he felt about leaving Umbro and that evidence
11 he gave in re-examination, and on that basis we would
12 suggest it would be highly unlikely that Mr Ronnie was
13 having any continued contact with Umbro or was in any
14 way party to the current debate between the tribunal and
15 Umbro.

16 We there set out what we say about the circumstances
17 of his leaving. We say the actual reasons are not an
18 issue which the tribunal needs to decide, but we do
19 submit that insofar as Mr Whelan asserted in response
20 that he and Mr McGuigan had a rule never to talk about
21 the OFT investigation and that they did not talk about
22 it we would suggest that is to be treated with a degree
23 of scepticism in the light of further material we have
24 later on in the document which deals with the extent to
25 which Mr McGuigan and Mr Whelan were talking about the

1 case generally.

2 I will not take you to Mr May and Mr Fellone.

3 Mr Whelan I will make some observations on or draw your
4 attention to our main observations. We do say that
5 JJB's case is nailed to the flag of the consistency and
6 accuracy of Mr Whelan's evidence and to the proposition
7 that his version of the events leading up to and at the
8 meeting of 8th June is entirely accurate. We submit
9 that nothing could be further from the truth. We do
10 submit that Mr Whelan's evidence, and in particular his
11 account of that meeting, is littered with inconsistency
12 and changes in story and for that reason his
13 recollection is not to be relied upon, and where it
14 differs from that of Mr Ashley and Mr Hughes their
15 evidence is to be preferred.

16 We then address a number of points and we point out
17 in paragraph 30 that JJB in their closing have set out
18 a detailed analysis, this is paragraph 31 -- they put
19 forward a detailed rebuttal of points which might be
20 said to weigh against Mr Whelan and we draw to your
21 attention right at the outset what we suggest is
22 a startling omission from that analysis, and that is the
23 fact that there was no reference at all to what we
24 suggest was a memorable moment in his cross-examination
25 which was, and it is set out there, which was the

1 passage where I held up the red shirt, suggested to him
2 that that is what Mr Hughes had done, and his response
3 was that he did, and I said, "He did?" and he said he
4 did and so on.

5 It was then put to him that that was something he
6 had never said before and then what was put to him was
7 his solicitor's earlier letter dated 13th March, which
8 is in the Whelan cross-examination bundle, and in that
9 letter DLA recorded expressly that Mr Whelan had told
10 DLA that he had had no memory of that happening and when
11 that was put to Mr Whelan in cross-examination he sought
12 to distance himself from what his solicitor had said and
13 sought effectively to say that he had not told his
14 solicitor what his solicitor was telling the OFT had
15 told him.

16 We suggest that was an important moment in the
17 cross-examination and an important indication of the
18 accuracy of Mr Whelan's recollection and the fact that
19 earlier on he had not been telling the truth to his
20 solicitors.

21 The next point we deal with is his account of where
22 and when he was first aware that Mr Ashley was at the
23 meeting of 8th June, and we point out that he said
24 initially he did not know that Mr Ashley was there at
25 all until they got into the study, and then when it was

1 pointed out to him that in his witness statement it said
2 he had been made aware of his presence on arrival he
3 back-tracked and said he would stick with what was in
4 his witness statement.

5 We then deal with matters relating to the centenary
6 kit and although I am not going to read it to you now,
7 sir, we would specifically invite your attention to
8 paragraphs 35 and 36 where it is plain that his evidence
9 given on Day 8, page 137, which is set out there, that
10 he had found out the information from Mr McGuigan is
11 directly contradictory to his own evidence in
12 paragraph 6 of his second witness statement where he
13 said he only remembered ringing Mr McGuigan twice in the
14 last two years and I do not take you to that in any more
15 detail.

16 We then further point out that actually his further
17 evidence about the extent of his conversations with
18 Mr McGuigan was so inconsistent, we submit, as to be
19 incredible and we there point again -- you might
20 remember in the cross-examination when I referred him
21 back to his third witness statement in which he said he
22 had been discussing the case, certain particular events
23 relating to the centenary kit with Mr McGuigan since the
24 decision, when that was put to him he just would not
25 recognise what in fact was said in the witness statement

1 about what he had been talking to Mr McGuigan about and
2 when.

3 We then make some observations on Mr Russell and
4 I am not going to take you to those. Mr Hughes, I am
5 just going to make some points. We say that different
6 aspects of his evidence must be considered distinctly.
7 We say on the one hand that his description of the
8 events leading up to and at the 8th June meeting is
9 consistent with that of Mr Ashley and inconsistent with
10 that of Mr Whelan, and we do submit that in that respect
11 his evidence does have the ring of truth about it and we
12 point out that he could have no ulterior motive not to
13 be telling the truth on those aspects since he had quite
14 frankly admitted and accepted that he was arranging
15 a meeting for the express purpose of fixing prices.

16 THE PRESIDENT: Excuse me for interrupting, but when you say
17 in paragraph 42 that Mr Hughes started work on his first
18 witness statement within six months of the dawn raid ie
19 February of 2002 at the latest ...

20 MR MORRIS: There is a transcript reference to that effect,
21 sir.

22 THE PRESIDENT: Nonetheless, if I remember rightly Allsports
23 did not actually submit any witness statements.

24 MR MORRIS: Correct. The position seems to be this: that
25 the witness statements were not signed nor submitted

1 until after the decision and in fact they were signed
2 and submitted virtually at the point of the time of the
3 notice of appeal being filed just before 30th September,
4 something like that.

5 MR WEST-KNIGHTS: What is the reference to paragraph 42?

6 MR MORRIS: I will get the reference in a moment.

7 Nevertheless, in the course of cross-examination both of
8 Mr Hughes and Mr Guest they both answered that work on
9 the witness statements started before then, and that
10 there was -- we do not know exactly but plainly there
11 was material in existence before the decision and in the
12 case of Mr Hughes he said that he would have started
13 work on that within about six months of the dawn raid,
14 and you will remember that with Mr Guest I pointed out
15 the difference in wording between him having left the
16 firm and him referring to Allsports as "we", and I think
17 he also accepted that he would have been doing work on
18 those witness statements substantially earlier than the
19 date on which they were signed.

20 The reference for everybody's note in relation to
21 the six months is Day 10, page 117, lines 4-14. And it
22 is dealt with at paragraph 126 of this skeleton which is
23 somewhat later on within the Manchester United section.

24 THE PRESIDENT: We get more specific transcript references
25 later on, do we?

1 MR MORRIS: Yes, you do, sir. I should say there is
2 a slight overlap because on the one hand we are dealing
3 with credibility issues up front, but then of course in
4 the course of the narrative of the facts that you have
5 to find we explained why certain evidence is to be
6 preferred to others and we do that by reference to
7 inconsistencies and matters of credibility.

8 THE PRESIDENT: Yes.

9 MR MORRIS: We do go on to say, however, in paragraph 44
10 that there are other aspects of Mr evidence [sic] which
11 are far fetched and fanciful. We say that his
12 explanation of the terms of the 9th June memoranda makes
13 no sense at all. It is not to be believed. We do
14 submit, and this is a headline point, that those
15 memoranda do record what happened and we do submit they
16 are crucial evidence, central evidence in this case in
17 relation to the Manchester United Agreement.

18 Once you accept his explanation for how he came to
19 write those memoranda and his explanation that they
20 were, I think in his own words, a deliberate lie to his
21 own executives, once you accept our submission that that
22 is not credible we suggest that you are left with the
23 sole conclusion that those memoranda record the fact
24 that Sports Soccer did agree on 8th June, and also
25 record the fact that JJB did agree on 8th June.

1 So that explanation and the credibility of that
2 explanation is a very central issue in this case.

3 Then we also draw attention to the explanation for
4 the diary entry of 14th August, his suggestion that the
5 words "Review MU launch" was a private code referring to
6 him selling his own business and it was a private code
7 that he was putting in a diary which was for his own
8 consumption, and you will recall Mr Colgate's questions
9 about where he kept his diary and the fact he kept it in
10 a drawer I think he said at home or certainly in his
11 office.

12 Then we have other examples, explanations which we
13 suggest are equally incomprehensible. The explanation
14 for crossing out the words "sports trade cartel" in his
15 diary, he said, I think, that he did it a few days after
16 he had put it in in the first place and he could not
17 really explain why he would have put it in and then
18 decided to cross it out three days later.

19 Then we refer to the fact that his claim that he
20 knew nothing of the Pro-Trainer and Choice of Champions
21 project in circumstances where Mr Guest when asked about
22 whether he would have known said he did and he said he
23 remembers being at a conference where he made a
24 presentation in relation to those projects. Then other
25 examples.

1 We go on to suggest that in this case there is
2 a good reason why Mr Hughes' recollection here might be
3 not accurate or indeed less than frank, and that is
4 because most of these items, if not all of them, are
5 items of evidence which on their face provide strong
6 evidence that Allsports was in fact party to an
7 agreement relating to the MU replica shirt or was
8 involved in putting pressure on Umbro about discounting
9 by others.

10 I am not going to take you to Michael Guest at this
11 stage. I am going to move on very briefly to a bit
12 about the law, sir.

13 THE PRESIDENT: Yes.

14 MR MORRIS: In a way this arises out of your questions about
15 agreement and concerted practice. We make a number of
16 short points here and in the light of time I was not
17 proposing to take you to authority. We think we have
18 most of the references in our defence. We say first of
19 all that there is a distinction between an agreement and
20 a concerted practice. We say the essential element of
21 an agreement is a meeting of minds and that that is
22 really no more and no less than knowing consensus and
23 that is the knowing consensus that JJB refer to.

24 We go on to say that a concerted practice covers
25 cooperation or coordination which falls short of an

1 agreement or knowing consensus. We respectfully submit
2 that it is not really sufficient to rely upon a one
3 sentence summary of the principles set out in Wish,
4 however eminent Professor Wish is, which of course he
5 is. We make a footnote reference to the relevant
6 edition. But we do say that the true nature of
7 a concerted practice is to be found in the court's
8 jurisprudence starting with Dye Stuffs and really
9 culminating most recently in the CFI's judgment in
10 Cimenteries at paragraph 18.52. You will find that
11 paragraph referred to in fact in Allsports notice of
12 appeal and we also comment on it in paragraph 38 of our
13 amended, Allsports amended defence.

14 We say that the essential element is the
15 communication and receipt of competitive information,
16 communicated by A to B, which has the object or effect
17 of eliminating or reducing uncertainty on the part of B
18 as to A's future conduct in the market. We say there is
19 no need for consensus in the sense of meeting of minds.

20 We make one further point which arose I think from
21 my learned friend Mr West-Knights's submissions, that we
22 suggest that once that communication has taken place
23 with the requisite effect or object it is not necessary
24 to go on to establish that a particular party acted upon
25 that information. There is a reference, the proposition

1 there is to be found in our pleading again, I think this
2 is paragraph -- I will just actually find the reference
3 for you, sir. It is in our amended defence and we make
4 this point at paragraph 38.3, which is on page 20 of our
5 defence, where we refer to a number of authorities which
6 establish that it is not necessary for us to establish
7 in addition to the exchange of information or the
8 communication conduct on the market pursuant to the
9 communication.

10 Then we make a submission in relation to pressure
11 and complaints which in a way, sir, goes to our
12 alternative case on the England Agreement, namely that
13 we say that if you have complaints and those are
14 communicated by A to B as a result of which B agrees
15 with C, A is party to the agreement with B and C where
16 those complaints are apt and are intended to act upon
17 the mind of B, and that, sir, goes to the point that if
18 you are not satisfied that there were the telephone
19 calls back or the communication back --

20 THE PRESIDENT: Your primary case is still the telephone
21 calls.

22 MR MORRIS: It is our primary case, sir, but we do also make
23 the alternative case.

24 THE PRESIDENT: Yes.

25 MR MORRIS: Then we make some observations on JJB's pricing

1 and discounting. First of all, we observe that their
2 case as to what their policy and practice was or has
3 been has itself been rather, well "rather" is an
4 understatement, has been confused, inconsistent and at
5 times less than frank.

6 We then make some observations about the difficulty
7 in getting the full picture but we then make six
8 propositions in paragraphs 51 and following on the
9 position in relation to JJB's pricing policy and of
10 course we say that is very important to the question of
11 whether or not it was publicly known at the relevant
12 time that they would always go out at or in general go
13 out at 39.99.

14 We submit and suggest that that is not the case. We
15 first of all make the observation that the publicly
16 stated policy of not pricing above £40 was not in fact
17 announced until June 1998 and the second point we say is
18 that policy was not implemented fully and there were
19 a number of cases where until May 1999 they were pricing
20 above 39.99. And also in paragraph 53 they continued
21 pricing above 39.99 in 2000.

22 The fourth point in paragraph 54 is, we submit,
23 a very important point and it is one that came most
24 vividly out of the cross-examination of Mr Whelan. JJB
25 did not take its final decision as to the price at which

1 it would sell at launch until a few days before the date
2 of launch and knowledge of that pricing decision was
3 confined to Mr Whelan and Mr Sharpe, and we have the
4 reference there. We know that replica kits -- Mr
5 Russell's view is that it is very price sensitive, and
6 the decision as to launch price was necessarily
7 important competitive information which JJB wished to
8 the keep close to its chest until the last moment.

9 We then make the point that JJB did in fact
10 consistently sell replica shirts in key selling periods
11 at less than 39.99, and there we refer to the
12 discounting campaigns which ran and you will recall,
13 sir, you were taken to board papers which indicated or
14 established a series of three discounting campaigns.
15 They were across the board discounting campaigns in the
16 sense that they operated in respect of all goods in the
17 shops but nevertheless they were discounting campaigns.

18 THE PRESIDENT: And the cross-references to all that are
19 found somewhere in this document are they?

20 MR MORRIS: I think --

21 THE PRESIDENT: I know you have not had very much time and
22 I am not being at all critical but it is a bit weak on
23 cross-references at the moment.

24 MR MORRIS: There are a lot in there, sir, but there may be
25 a few missing and we apologise for that and we have been

1 working reasonably hard.

2 THE PRESIDENT: Yes, I realise that and I am not being
3 critical, Mr Morris.

4 MR MORRIS: Can I suggest this: I can give it you now
5 because I know certainly the board papers are in Mr
6 Whelan's cross-examination bundle and somebody will give
7 me the tab number. But I can also suggest, although
8 whether those behind me will like me suggesting this,
9 that we might be able to provide you with a slightly
10 updated version of this with all the cross-references
11 hunted down.

12 THE PRESIDENT: That might be helpful.

13 MR MORRIS: We suggest and submit that in the light of those
14 discounting campaigns the assertion that JJB in general
15 sold at 39.99 is meaningless as far as what was actually
16 happening on the ground. It may be that the records
17 showed or the computer showed that they were a 39.99
18 price product but if you are running a 20 per cent
19 discount campaign in every shop across all products you
20 are selling at 31.99 I think is the figure.

21 Then we point out that after April 2000 there was
22 a change in the policy in JJB's discounting and that
23 again, there is a cross-reference to a transcript but
24 that again is something which we say is recorded in the
25 board papers and you will remember that goes from --

1 there is the change from the across the board to the
2 targeted selected promotions.

3 We then make some observations in relation to what
4 has happened to pricing since August 2001 and in
5 particular we refer to Mr Russell's evidence about what
6 had happened in relation to the next England launch,
7 England home launch, which was April 2003 and the fact
8 that JJB launched at £25 and Sports Soccer responded
9 immediately overnight by going to £24, and you will
10 recall also that Allsports were at that stage offering a
11 goods with purchase promotion.

12 We say that effectively, although we say that its
13 retail was price was £20, in general the market price or
14 the lowest actual price was £25 or £24, JJB and
15 Sports Soccer were competing around that price in
16 circumstances where two years earlier the prices had
17 been £40. We then add in an observation as to what will
18 happen in relation to the new England away kit which is
19 going to be launched next Wednesday. Allsports are
20 advertising at £35. The OFT understands, and I am
21 effectively giving this to you, sir, and no doubt JJB,
22 I stand to be corrected, but understands that JJB is
23 currently offering that shirt at about £30 or at £30.

24 We then deal with the question of the relationship
25 between Umbro and Sports Soccer and we have some fairly

1 detailed points that we make in here, and I am going to
2 take you through some of those points now if I may, sir,
3 just to headline them.

4 THE PRESIDENT: Yes.

5 MR MORRIS: We say that they seek to make much of the
6 relationship. I think that is an understatement. What
7 is more, they seek to rely on apparent lack of clarity
8 as to detailed aspects of that relationship and, more
9 particularly, Umbro's accounting treatment of aspects of
10 that relationship. We do invite the tribunal to step
11 back a moment and think about this and consider what if
12 any relevance it has to the issues in question. We say
13 much of it is a side show and it is important to
14 separate out certain strands.

15 The first strand is that there is the fact of a
16 licensing arrangement between Sports Soccer and Umbro in
17 respect of branded goods and they are referred to as
18 source products. This gives rise to an allegation by
19 JJB and Sports Soccer, or a contention, that these
20 licensing arrangements gave rise to or in fact tilted
21 the balance of power heavily in favour of Sports Soccer
22 with the follow on consequence that Umbro was not able
23 to impose any commercial pressure upon Sports Soccer so
24 as to require Sports Soccer not to discount replica kit.

25 In the light of, first of all, my learned friend --

1 or both JJB's closing submissions and my learned friend
2 Mr Hoskins' observations yesterday that was how
3 I understood to be JJB's essential proposition. I now
4 understand, and you will bear in mind that some of this
5 was drafted before I saw what Mr West-Knights said this
6 morning, but I now understand that essentially the same
7 submission is being made by Allsports and that is the
8 essential submission being made by Allsports that the
9 balance of power was so much in favour of Sports Soccer
10 that Umbro could not possibly impose its view on
11 Sports Soccer in relation to price-fixing.

12 Paragraph 64, we then identify what we think is
13 a second strand, which is that there is a detailed
14 debate as to the terms of the licensing arrangements,
15 what the terms were and when, what drafts are exchanged
16 when, when agreement was entered into, what advance
17 royalty payment was made, et cetera.

18 We do suggest that the picture there is relatively
19 clear although there may remain some unresolved points
20 of detail. We believe that there is no issue that
21 Sports Soccer did pay an advance royalty of at least
22 £12 million, and did so before any such goods were
23 produced.

24 We then identify a third strand which is this
25 extended debate about Umbro's own accounting treatment

1 of its overall turnover, and in particular its business
2 with Sports Soccer, and we accept that we can see that
3 Umbro has not explained certain anomalies in its
4 accounts and other documents. We do submit, however,
5 that Umbro's accounting treatment is not the issue here.

6 Fourthly, we then identify the issue that it goes to
7 and you will see at the bottom that we refer to the
8 serious allegation which we now understand not to be
9 pursued by Allsports.

10 We then deal with this topic in three parts. We
11 first deal with what we say is actually the only real
12 issue, or the real possible issue, which is the argument
13 that Umbro was unable to put pressure on Sports Soccer
14 and we say that that analysis is fanciful and indeed not
15 logical and we set out a number of reasons why we say
16 that is the case and why we say that there is
17 effectively no link between the licensing agreements and
18 the price-fixing on replica kit. And unless you want me
19 to take you through all those points, sir, I would
20 propose leaving them there for you to read and I was
21 proposing moving forward a little bit on this and just
22 drawing your attention to two particular points.

23 First, subparagraph 6 on page 24, we refer to the
24 incident of the lorries being turned away. We say that
25 that is a vivid and real illustration of the nature of

1 the power of Umbro over Sports Soccer in replica kit.
2 We do submit that there can be no doubt that such an
3 incident did take place. Mr Ashley mentions it at
4 Sports Soccer's oral hearing in July 2002. We say that
5 the detail of whether it was MU shirts or England shirts
6 or whether it was June or August is irrelevant. What is
7 entirely and completely credible is that there was at
8 least one incident of Umbro turning a lorry away and
9 that that incident was recalled by both witnesses
10 independently at a separate stage.

11 It is equally credible that their precise
12 recollection of which shirt it was and at what time
13 differs.

14 We then deal with what we perceive to be the high
15 watermark of the case on this relationship between the
16 two elements, the licensing and the price-fixing, and
17 indeed we submit that it was the very fact that the two
18 things appeared in the same file note of the meeting of
19 24th May that put them on to this.

20 The argument is that at the meeting of 24th May the
21 price-fixing agreement made at that meeting was the quid
22 for the quo of the licensing agreement also made at that
23 meeting. We submit that makes no sense at all. First,
24 if the quid is the benefit to Umbro, and detriment to
25 Sports Soccer of Sports Soccer not discounting, then the

1 quo of the licensing agreement did not provide benefits
2 only for Sports Soccer. Indeed, we would go so far as
3 to say it could be said that the real and immediate
4 beneficiary of those licensing agreements was Umbro
5 since it was Umbro who were receiving an up front
6 royalty payment of about £12 million in respect of
7 source products which would not come on stream for some
8 time and indeed which as far as we can see were never
9 fully burned.

10 Indeed, Mr Ashley, you recall, was cross-examined up
11 hill and down dale about this, and at Day 2, page 68, in
12 response to a question from you, sir, Mr Ashley accepted
13 that in fact the licensing agreement gave Umbro a little
14 more power in the balance. I believe when you go to
15 that passage you will see that that arose out of
16 a question which was being put by Mr West-Knights which
17 you supplemented to invite Mr Ashley's observation on
18 that proposition that in fact it gave Umbro more power
19 rather than less.

20 We submit that the reality is that the licensing
21 arrangements had their own quid and their own quo. It
22 was a self standing deal between Umbro and Sports Soccer
23 with mutual benefits and costs, and we do invite you to
24 read very carefully the evidence given by Mr Ashley on
25 this topic both in response to questions from

1 Lord Grabiner at Day 2, 15 and 16, and I think it may be
2 Day 2, 58 as well. Day 2, 140, is Mr West-Knights's and
3 Day 2, 166, 168 are questions from you, sir.

4 There is also one additional reference which I may
5 take you to in a moment but which I would invite you to
6 write in there: Day 3, page 81, lines 10-17.

7 I will actually just tell you what that passage is
8 about that. That is a section where I think it is my
9 learned friend Mr West-Knights is suggesting to
10 Mr Ashley that as the growth of his business and the
11 amount of business that he did with Umbro increased that
12 gave him a stronger bargaining position which enabled
13 him to increasingly go his own way, and his answer was:

14 "I have told you on dozens of occasions replica is
15 like a separate business."

16 Then he was asked:

17 "So the business about you having an increasing part
18 of the balance of power with Umbro is completely
19 irrelevant to replica, is it?"

20 Then he says, and this is the reason

21 I refer this to you because of the frankness of
22 his answer. He says:

23 "It is not completely irrelevant but replica is
24 regarded as a separate business. There must come
25 a point in time where we would be strong enough

1 hopefully to be able to resist them", by which he means
2 resist them in the context of replica, "we were not at
3 that point then. We are certainly at that point now."

4 So what we are suggesting is that it is a candid
5 explanation there that at that point regardless of what
6 was happening in branded and in the licensing agreement
7 they were not able to resist Umbro as far as replica was
8 concerned because they were not strong enough. He now
9 frankly admitted that they probably are strong enough to
10 resist. We would suggest that that response again goes
11 to show that at the time there was no link between the
12 two sides of the quid and the quo.

13 So that is really the extent of what we say on the
14 substance of the case that is made. We would add some
15 observations which really echo what Mr Gunny says as
16 follows:

17 "The characterisation of this deal as secret almost
18 to the point of being in some way improper or fraudulent
19 is in our submission quite unfounded. It was a deal in
20 respect of branded goods. There is nothing sinister
21 about the deal, certainly as far as Sports Soccer' point
22 of view is concerned. Questions in relation to Umbro's
23 accounting treatment are wholly distinct and matters to
24 which Sports Soccer have no knowledge or input, and we
25 would suggest that this is really a storm in a teacup.

1 If you go back to paragraph 74 on page 26 we make
2 some points about the details of the arrangements, and
3 here I have a reference for you where there is one
4 missing, sir, you will be pleased to know. 74A,
5 page 26, the reference to the Umbro written reps is
6 C2/24/742 at paragraph 47C.

7 THE PRESIDENT: Yes.

8 MR MORRIS: We make some observations. We do submit
9 strongly and forcefully that the divide by 2.54 million
10 did not apply to replica kit, and that that --

11 THE PRESIDENT: Do we not have some evidence that it did not
12 originally but there was some negotiation and then it
13 was agreed that it would?

14 MR MORRIS: I will have to check that.

15 THE PRESIDENT: That is only from memory.

16 MR MORRIS: I will have to come back on that, but certainly
17 it is not accepted either by Sports Soccer or by the
18 Office. The general sweeping proposition at the time
19 that the 2.5 off selling price applied to replica kit
20 and we can come back to that in due course. These are
21 points of detail about the arrangements.

22 The third heading is the question on accounting
23 treatment and credibility. As you see in paragraph 75,
24 by this stage my draft had caught up with events of the
25 morning and I set out there that it is now understood

1 that the suggestion about the inference has been
2 withdrawn but we would like to make observations, and we
3 make two observations.

4 One is in relation to the Ashley and Sports World
5 and really that is echoing what Mr Gunny has told you in
6 more detail. There is no question of reluctance or
7 willingness on the part of Mr Ashley or Sports World to
8 provide information and there is no possible basis, no
9 possible basis, for this tribunal to draw any adverse
10 inference from Umbro's responses to the questions
11 insofar as the credibility and honesty of Mr Ashley as
12 a witness is concerned or indeed the conduct of his
13 company. That is the first point.

14 The second point was one I made yesterday, nor can
15 you draw any adverse inference against Mr Ronnie because
16 basically Mr Ronnie is not involved in any of this.

17 Sir, that concludes the opening sections and I am
18 slightly in your hands because there is some now
19 detailed stuff about each of the agreements. I think my
20 slight preference would be for you to go away and read
21 those but I can, if you would prefer, run through what
22 we say. It is quite detailed.

23 What we have in respect of England is we have about
24 9 pages which is a sort of summary and then we have at
25 the back the annexe. Then we have the Manchester United

1 Agreement which runs from page 39 to page 62, I believe,
2 something along those lines, and then we have 63. Then
3 we have continuation at 64 and you will see we have
4 separate heads there under continuation, not just the
5 centenary kit, and then we have Sportsetail at the end,
6 England Direct at page 72 and following.

7 Of course I am happy to guide you through it if you
8 prefer. I am equally happy if we were to rise now for
9 you to read and for me to field questions tomorrow
10 morning if you should have any. To some extent I am in
11 your hands. I will also, if I may, just confer with my
12 juniors. (Pause).

13 THE PRESIDENT: Yes, I think, Mr Morris, our preference is
14 to rise now and really for the rest of the afternoon and
15 go away and read this stuff.

16 MR MORRIS: And I will be prepared for my quiz tomorrow
17 morning.

18 THE PRESIDENT: I do not know, I cannot promise a quiz, but
19 there may be points we want to explore.

20 LORD GRABINER: Sir, might I suggest that -- I do not know
21 if it would be more or less convenient -- but might
22 I suggest that if my friend were to do the quiz, so to
23 speak, at 12 o'clock, then we would deal with what we
24 have to deal with if at all at 2 o'clock. My
25 expectation is that we will obviously have to read this

1 document.

2 THE PRESIDENT: Yes, of course.

3 LORD GRABINER: I certainly would not expect to be more than
4 an hour, absolutely maximum, and probably within that
5 period, in making any submissions by way of response.

6 THE PRESIDENT: I would not want to put it back until
7 12 o'clock if there was any risk either of not finishing
8 on Friday --

9 LORD GRABINER: Absolutely.

10 THE PRESIDENT: -- or of anybody feeling they were under
11 undue pressure to finish on Friday.

12 LORD GRABINER: Absolutely. I just think we might need,
13 I do not know how much time we are going to need.

14 THE PRESIDENT: You need to read it.

15 LORD GRABINER: Yes.

16 THE PRESIDENT: You might want to give us a short document
17 with some bullet points on it or you might not, or you
18 might have had quite enough and have decided you have
19 made your submissions and that was it.

20 LORD GRABINER: Yes, but we are in your hands and there is
21 just one other point I want to deal with. It is
22 a distinct point, I do not know if you want to deal with
23 that first.

24 THE PRESIDENT: Let us just see what Mr West-Knights feels
25 about timing tomorrow.

1 MR WEST-KNIGHTS: If I were given the opportunity to address
2 the tribunal for an hour in reply I warrant that I would
3 not regard that as oppressive in terms of its brevity.

4 LORD GRABINER: What does that mean?

5 MR WEST-KNIGHTS: Let me try again. Lord Grabiner thinks he
6 might be an hour. I think I might be an hour. I cannot
7 envisage currently any situation in which I am going to
8 feel badly done by.

9 THE PRESIDENT: I think what we would say and I am sure it
10 would suit us, because at this stage there is a law of
11 diminishing returns the longer one goes on, if we were
12 to say 12 o'clock tomorrow that might leave more than
13 ample time for any quiz there might be. There may not
14 even be a quiz, I do not know, but if we say that JJB
15 and Allsports each have a maximum of one hour for any
16 reply they wish to make that is a timetable we can all
17 stick to I think.

18 MR WEST-KNIGHTS: I am bound to say that some of my
19 observations are bound to be, as it were, shorthand.
20 I occasionally do shorthand. I might simply direct you
21 to a passage on a page and say "nonsense, see X".

22 THE PRESIDENT: Shorthand is perfectly acceptable at this
23 stage. We all know what we are talking about.

24 On that basis we will rise until tomorrow at
25 12 o'clock.

1 LORD GRABINER: There is just one other point for which
2 I apologise and that is this: I do not know at the
3 moment what my friend's position is in relation to that
4 little point of law we talked about the other day.

5 THE PRESIDENT: About not drawing any inferences from the
6 fact of privileges claimed.

7 LORD GRABINER: Yes. So far in what I have looked at I have
8 not found any reference to it but I will not claim to
9 have read all of it. I have the point and I have the
10 law with me, and I have copies for everybody, and it
11 will take me three seconds to present it to you.

12 THE PRESIDENT: At the moment --

13 LORD GRABINER: I do not know if it is a live issue.

14 THE PRESIDENT: -- we have not had a chance to discuss it as
15 a tribunal but quite provisionally, without having
16 refreshed my own mind as to authorities, I rather
17 thought I was with you on the point.

18 LORD GRABINER: Absolutely, but the position very shortly is
19 this: if my friend is not inviting you to draw any
20 inference from the tribunal and himself not having seen
21 any of these documents, the draft statements and so on,
22 then there is no need to debate the issue. If he is
23 going to make any such submission or hint at it then
24 I would want to show it to you.

25 MR MORRIS: Sir, can I deal with that tomorrow morning?

1 I am not going to hint at it. I am either going to make
2 it or not make it. I also know we have some law on it
3 as well but to be perfectly honest I am not at this
4 moment on top of the law on it.

5 THE PRESIDENT: If you are going to raise it you have to
6 raise it tomorrow at the latest.

7 MR MORRIS: I will raise it.

8 THE PRESIDENT: If it is only going to take you three
9 minutes to deal with it, Lord Grabiner, you can deal
10 with it tomorrow if necessary, perhaps.

11 LORD GRABINER: I do not want to waste my time with it
12 tomorrow. I can do it now. That might convince my
13 friend that such authorities he may have may not be the
14 right authority. It would only take literally a moment,
15 I promise.

16 THE PRESIDENT: Why do you not do it and then it is done.

17 LORD GRABINER: That is very kind.

18 Can I hand up to you one copy of the decision of the
19 House of Lords which was not 1904, I am afraid, it was
20 1864, and also extracts from the textbook. (Handed)

21 One is an extract from Phipson and the other is the
22 case itself. The piece from Phipson puts the point very
23 shortly. If you look at the antepenultimate paragraph
24 in the paragraph numbered 20-3; do you have that?

25 THE PRESIDENT: Yes.

1 LORD GRABINER: "No adverse inference can be drawn from the
2 fact that a party has made a claim for privilege over
3 a document."

4 The footnote reference is to *Wentworth v Lloyd*,
5 which is the case, and the case, if I just take you to
6 the passage. If you go to Lord Westbury on the second
7 page of the extract, if you go to the first break on
8 page 591 as Lord Brougham says when speaking in *Bolton v*
9 *The Corporation of Liverpool*:

10 "The supposed right to compel the disclosures [that
11 is communications]: it is plain that the course of
12 justice must stop if such a right exists. No man will
13 dare to consult a professional adviser with a view to
14 his defence or the enforcement of his rights. The
15 exclusion of such evidence is for the general interest
16 of the community and therefore to say that when a party
17 refuses to permit professional confidence to be broken
18 everything must be taken most strongly against him.
19 What is it but to deny him the protection which for
20 public purposes the law affords him and utterly to take
21 away a privilege which can thus only be asserted to his
22 prejudice. I have been drawn aside from considering the
23 facts of the case through an apprehension that the
24 authority of the Master of the Rolls might be hereafter
25 asserted as establishing what appears to me to be a most

1 serious departure from the principles of the law of
2 evidence applicable to professional confidence."

3 What had happened was the Master of the Rolls had
4 given a ruling the other way. He had said that
5 inferences could be drawn and the House of Lords said
6 that the inference must not be drawn.

7 It is an old authority but it is still the current
8 state of English law.

9 THE PRESIDENT: Yes, thank you. We will say 12 o'clock
10 tomorrow.

11 (3.23 pm)

12 (The court adjourned until the following day at 12.00 pm)

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