

This transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in conducting these appeals. It has been placed on the Tribunal website for readers to see how matters were conducted at the main oral hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record

1 Friday, 26th March 2004

2 (12.00 pm)

3 MR MORRIS: Sir, good morning.

4 MR PRESIDENT: Good morning.

5 MR MORRIS: I am in your hands as to how we proceed but

6 I should say there are one or two points I would like to

7 pick up on. You obviously or may well have questions

8 for me. Some of those points are housekeeping points.

9 Some of those points are corrections and a couple of the

10 points a bit more substantive. I am not sure they will

11 take very long but I am in your hands.

12 MR PRESIDENT: You better make your points first. We have

13 one or two things to go through with you.

14 Closing submissions by MR MORRIS (continued)

15 MR MORRIS: Very well. The first point is actually

16 a mechanical point about our closing submissions and the

17 references in transcripts.

18 Can I say this: we have been working on it pretty

19 hard but everybody is rather tired.

20 MR PRESIDENT: No criticism implied.

21 MR MORRIS: That is not the point. The point I was making

22 is this: we would hope and we would ask that we would be

23 putting that in some time during the course of next week

24 with the references but we can undertake that, of

25 course, it will contain no new propositions, it will

1 just be a matter of picking up references and that is
2 what we propose to do.

3 The second point I would like to deal with is
4 something which comes out at paragraph 74 of our closing
5 and Sports Soccer's trade terms.

6 There is a need for a correction to that
7 paragraph 74A and I am going to tell you what
8 I understand to be the position and I have do not have
9 my juniors here who have the chapter and verse, but if
10 I may, my understanding is as follows.

11 In their response to the section 26 notice
12 in October 2001, Sports Soccer gave the following
13 information about their trade terms. I will come to
14 transcript references in a moment, sir.

15 I do not have that notice with me at the moment, and
16 the reason I am not going to hand it up at the moment is
17 that I am waiting for instructions as to the degree as
18 to which --

19 MR PRESIDENT: Tell us what the point is.

20 MR MORRIS: It is this, sir, it was asked about yesterday.

21 From the 1st of January 2000 to
22 31st December 2000, Sports Soccer's trade terms were
23 20 per cent off wholesale. That is different from what
24 Umbro say in their written representations, which is the
25 reference I give you at 74A.

1 MR PRESIDENT: Yes.

2 MR MORRIS: On my calculation that gives, on a 39.99, a
3 figure which is 1704, roughly.

4 It is then stated in that section 26 notice that
5 from 1st January 2001 their trade terms for replica were
6 Umbro RRP divided by 2.5, and that gives £16.

7 MR WEST-KNIGHTS: And who says that?

8 MR MORRIS: Sports Soccer say that.

9 MR WEST-KNIGHTS: And these are terms for licensed product?

10 MR MORRIS: No. First of all, I would ask my learned
11 friend -- I am talking about replica kit only, I am not
12 talking about licensed product in the sense of replica
13 kit.

14 The best transcript reference I have to date on that
15 is what Mr Ashley said at Day 2, page 28, line 15 to 29,
16 where he confirms that the formula was 2.5 off RRP.
17 Now, I can take you to that sir.

18 MR PRESIDENT: No, we do not need to go to it now.

19 MR MORRIS: That is the reference. I may have a little more
20 to say on that in a moment, but those are the bare bones
21 of the position.

22 The second point I wish to draw to your attention is
23 that I understand that Sports Soccer, Sports World is in
24 the process of preparing a paper which I understand
25 responds to some of the points that were made in the

1 tribunal's Umbro request and some of the points made,
2 particularly in JJB's closing.

3 I understand, further, that subject to instructions
4 being obtained from Mr Forsey, to whom Mr Gunney is
5 going to be speaking, or somebody is going to be
6 speaking at lunchtime, they will be in a position to
7 present that paper at 2 o'clock.

8 So those are the sort of mechanical points.

9 The next point I would like to deal with is this,
10 and it is something we did not pick up on in the closing
11 and I do need to address it.

12 At Day 11, page 166 to 167, particularly 167, lines
13 1 to 8, in dealing with the 9th June memorandum,
14 Lord Grabiner suggested or floated the possibility that
15 Mr Hughes and Mr Ashley may have done a deal after
16 Mr Whelan left the meeting.

17 As to that suggestion, we say the following. There
18 is no evidence at all to support that suggestion, it is
19 speculation, and it was never put in cross-examination
20 to either Mr Ashley or Mr Hughes.

21 MR PRESIDENT: Yes.

22 MR MORRIS: The next observation I wish to make is in
23 relation to picking up paragraph 19 of our closing
24 submissions on page 8, and you will recall I made
25 a reference there to the correspondence at the time of

1 leniency. This is responding to Allsports' closing
2 submissions, page 7 just for your note.

3 The OFT submits in relation to this that the picture
4 cannot have been as simple or straightforward as
5 indicated by Allsports, and that the suggestion that
6 Umbro would gild the lily or make it up just to improve
7 their prospects of leniency or of a discount does not
8 make sense.

9 Against the nebulous hope of a reduction in fine, we
10 submit that Umbro would be necessarily fully conscious
11 of the effect on ongoing business relations with its
12 major customers, worth many millions of pounds' worth of
13 purchases.

14 For Umbro to drop major customers into the soup, so
15 to speak, without any foundation for so doing, in the
16 hope of a discount, does not add up, and we would invite
17 the tribunal to bear that in mind in considering the
18 question of Umbro's motivation and at the same time
19 taking fully into account what was said in those letters
20 written by Umbro in January 2002.

21 The next and final area I wished to address you on
22 briefly then may overlap with the questions I am
23 anticipating. I want to address a point which you
24 raised with Lord Grabiner in argument about the law.

25 Now, I do not know whether that will be helpful or

1 whether at this stage --

2 MR PRESIDENT: The law on converted practices, you mean?

3 MR MORRIS: Yes.

4 MR PRESIDENT: Tell me what you want to say and then I will

5 see whether we need to --

6 MR MORRIS: I will tell what you I am going to say and then

7 you can decide whether I should say it.

8 MR PRESIDENT: That is a good principle.

9 MR MORRIS: First of all, in response to Lord Grabiner's

10 response, this is nothing to do with offer and

11 acceptance. We are not talking about a common law

12 contract here, we are talking about concerted practice.

13 MR PRESIDENT: Yes.

14 MR MORRIS: And as I said already, this is not about

15 a meeting of minds. The key concept -- the first

16 proposition. The key concept is reduction in

17 uncertainty as to the intentions of others. That is the

18 first point. You then refer to a spectrum of events.

19 MR PRESIDENT: Yes.

20 MR MORRIS: You posed, the further end of the spectrum, the

21 bare fact of a meeting plus parallel prices at the

22 meeting. That was your starting point. We say that as

23 a matter of law there is ample authority for the

24 proposition that that alone would raise a presumption

25 that there had been a reduction in uncertainty at that

1 meeting.

2 That is not this case, because in fact we know a bit
3 more about what went on in that room. So we then look
4 at what was said at the meeting and we would suggest
5 that the evidence as to what happened at the meeting is
6 the evidence which could possibly rebut the presumption
7 that arises from meeting plus pricing.

8 MR PRESIDENT: If there was evidence that somebody had
9 stormed out of a meeting, saying "This is the most
10 disgraceful thing I have ever heard in my life", slammed
11 the door and walked down the street, that might rebut
12 the presumption.

13 MR MORRIS: Or if there is evidence the meeting had nothing
14 to do with pricing and they were talking about selling
15 a business, for example.

16 MR PRESIDENT: Yes.

17 MR MORRIS: We do further say that it is the participants at
18 the meeting who have to establish that what was said did
19 not reduce uncertainty, because of course this is where
20 the law of concerted practice comes in. To all outward
21 appearances, it looks fishy.

22 Now, let us then assume, and I should say this at
23 the outset, I will assume now there is no subjective
24 meetings of minds in the sense they all sit down and
25 shake hands and say yes, it is all agreed.

1 Let us assume Mr Whelan says, "I am going to price
2 at 39.99." But he says in respect of that that he had
3 no subjective intention of fixing prices or influencing
4 others as to what they should do, nor had no intention
5 that they should take account of what he said.

6 Let us further assume, however, that in fact this
7 information clearly does have an impact upon the
8 recipients and in our submission, in the present case,
9 we say that on the assumption that he said that, that
10 did have an influence on Mr Hughes and Mr Ashley.

11 The question that then arises, as a matter of law,
12 is: is that enough for a concerted practice? We submit
13 that it plainly is. It is no defence, we would say, for
14 the person who states his pricing intention to say,
15 "I had no intention of fixing prices or influencing
16 people".

17 The essence of the test for a concerted practice is
18 the practical reduction of uncertainty as a result of
19 what has been said and what has been done. Were the
20 case otherwise, it would always be a defence for every
21 participant at a price fixing meeting to say, "Well,
22 when I said what I was going to do I did not intend to
23 fix prices and I never intended them to act on it".

24 We say just telling a competitor what you are going
25 to do in those circumstances reduces uncertainty and

1 that is sufficient to establish a concerted practice.

2 Now, sir, there are passages, certainly in
3 British Sugar, passages we say in both in Cimenteries
4 and in British Sugar, which support that proposition,
5 even going as far back as Suiker Unie, I think
6 paragraph 173 or 174 establishes the proposition that
7 the mere -- and just bear with me a second -- well, I am
8 reading now from Suiker Unie, effectively.

9 MR PRESIDENT: Well, you better give us the reference.

10 MR MORRIS: It is authorities bundle 5. What we have done
11 is we have a note of relevant cases, but for present
12 purposes Tate & Lyle, tab 16 of bundle 5. In that case
13 there were meetings, if you go to paragraph 42 on
14 page 2054. I am taking you through the background.
15 Paragraph 42, at page 2054, at the bottom, starts off
16 by:

17 "It should be noted at the outset that British Sugar
18 does not deny having taken part, between 1986 and 1990,
19 bilateral meetings ..."

20 Then 43, the question:

21 "... only whether such meetings had an
22 anti-competitive purpose."

23 They then go on to deal with the oligopolistic
24 nature of the market and then if we can pick it up again
25 in 52 at 2057, it says:

1 "Finally, the argument that British Sugar had no
2 interest in co-ordinating its conduct with that of its
3 competitors because it could never increase its market
4 share cannot be accepted. British Sugar had, in any
5 event, an interest in selling all its production
6 quotas ..."

7 "53. The commission was therefore right to take the
8 view that the purpose of those meetings was to restrict
9 competition by the coordination of pricing policies.

10 "54. Moreover, the fact that only one of the
11 participants at the meetings in question reveals its
12 intentions is not sufficient to exclude the possibility
13 of an agreement or concerted practice."

14 That in itself sort of undermines the meetings of
15 minds point, if only one person says so:

16 "The criteria of coordination and cooperation laid
17 down by the case-law, on restrictive practices, far from
18 requiring the working out of an actual plan, must be
19 understood in the light of the concept inherent in the
20 provisions of the Treaty relating to competition that
21 each economic operator must determine independently the
22 policy which he intends to adopt on the common market.

23 "56. Although it is correct to say that the
24 requirement of independence does not deprive the
25 economic operators of the right to adapt intelligently

1 to the existing and anticipated conduct of their
2 competitors, it does, however, strictly preclude any
3 direct or indirect contact between such operators, the
4 object or effect whereof is either to influence the
5 conduct on the market of an actual or potential
6 competitor, or to disclose to such a competitor the
7 course of conduct which they themselves have decided to
8 adopt or contemplate adopting in the market."

9 That is the old Suiker Unie passage I was referring
10 you to, sir, at 174.

11 Then he goes on in 57:

12 "In the present case it is undisputed that there
13 were direct contacts between the three applicants
14 whereby British Sugar informed its competitors Tate
15 & Lyle and Napier Brown of the conduct which it intended
16 to adopt on the sugar market."

17 Then he goes to Rhone-Poulenc and if you pick it up
18 58, line 4:

19 "The Court of First Instance held that an
20 undertaking by its participation in a meeting with an
21 anti-competitive purpose, not only pursued the aim of
22 eliminating in advance uncertainty about the future
23 conduct of its competitors, but could not fail to take
24 into account, directly or indirectly, the information
25 obtained in the course of those meetings in order to

1 determine the policy which it intended to pursue on the
2 market."

3 Well, that goes effectively to the recipient of the
4 information:

5 "The court considers that that conclusion also
6 applies where, as in this case, the participation of one
7 or more undertakings in meetings with an
8 anti-competitive purpose is limited to the mere receipt
9 of information concerning the future conduct of their
10 market competitors."

11 That is receipt:

12 "59. British Sugar v Napier Brown maintain that
13 price information envisaged by British Sugar was known
14 by the latter's customers before it was notified to the
15 participants at the disputed meetings, and that
16 therefore British Sugar did not reveal to its
17 competitors during those meetings information which they
18 could not already gather ..."

19 That is the, "Oh well, everybody already knew it"
20 point, and they deal with that and that is a point that
21 is being made here:

22 "That fact, even if established, has no relevance in
23 the circumstances of this case. First, even if
24 British Sugar did first notify its customers
25 individually and on a regular basis of the prices which

1 it intended to charge, that fact does not imply that at
2 that time, those prices constituted objective market
3 data that were readily accessible.

4 "Moreover, it is undisputed that the meetings in
5 question preceded the release onto the market of the
6 information that was notified at those meetings.
7 Second, the organisation of the disputed meetings
8 allowed the participants to become aware of that
9 information more simply, rapidly and directly than they
10 would via the market."

11 Then at 61:

12 "In the light of the above, the arguments of British
13 Sugar and Napier Brown that their meetings constituted
14 neither an agreement nor a concerted practice under
15 Article 85(1) cannot be accepted."

16 If you go over the page to 67, the conclusion is:

17 "By participating at one of those meetings, each
18 participant knew that during the following meetings, its
19 most important competitive, the leader in the industry
20 would reveal its pricing intentions. Independently of
21 any other reason for participating in those meetings,
22 there was always one, at least, which was to eliminate
23 in advance the uncertainty concerning the future conduct
24 of competitors."

25 I am at 67:

1 "Moreover, [and I emphasise that word] by merely
2 participating in the meetings, each participant could
3 not fail to take into account directly or indirectly of
4 the information obtained during those meetings in order
5 to determine the market policy which it intended to
6 pursue."

7 The only other passage -- I think it is in the same
8 bundle and we have referred to this, but without having
9 actually taken you to it, is 1852 in the Cimenteries
10 case, which is at tab 14, sir. This is partly dealing
11 with the question of, effectively, unilateral
12 communication and mere receipt, but there is, in 1852,
13 a reiteration of the general propositions. It is at
14 page 958 of the report.

15 MR PRESIDENT: Paragraph 1852?

16 MR MORRIS: Just for your note, 1848 is the section of the
17 judgment where this starts which is dealing with the
18 argument by Buzzi, merely stating that Buzzi had
19 informed Lafarge; that did not show there was
20 a sufficient element of reciprocity. That is the
21 context in which this is being raised. The passage
22 I wanted to take you to is 1852:

23 "The Court points out in this regard that any direct
24 or indirect contact between economic operators of such
25 a nature as to disclose to a competitor, the course of

1 conduct which they themselves have decided to adopt or
2 contemplate adopting on the market where the object or
3 effect of such contact is to create conditions of
4 competition which do not correspond to the normal
5 conditions of the market in question, constitutes
6 a concerted practice prohibited by Article 85(1)."

7 Then refers to Anic and Huls. Then in the next
8 sentence:

9 "In order to prove there has been a concerted
10 practice it is not necessary to show the competitor in
11 question has formerly undertaken in respect of one or
12 several others, to adopt a particular course of conduct
13 or that the competitors have colluded over their future
14 conduct on the market."

15 That is the meeting of minds point. I would like to
16 read the next sentence because there is a wrinkle in the
17 translation.

18 "It is sufficient that by its statement of intention
19 the competitor should have eliminated, or at the very
20 least, substantially reduced uncertainty as to the
21 conduct to expect of the other on the market."

22 Now the words "to expect of the other on the
23 market", we suggest, is a wrong translation and it
24 should read:

25 "As to the conduct to be expected of him on the

1 market."

2 That point is in our defence. I have certainly
3 spoken to Mr Peretz about it. I have not spoken to
4 JJB's counsel about it, but the French and other
5 versions of that, I have the French version here, I am
6 sure it will assist. If I could perhaps hand that up.

7 MR PRESIDENT: I imagine that English is one of the official
8 languages of this --

9 MR MORRIS: Sir, you know better than I, and you know the
10 realities -- we have also checked a lot of the other
11 language versions, German, Spanish and Italian, but it
12 is the sentence in the middle of 1852 on page 3 of 6:

13 "Il suffit que, a travers sa declaration
14 d'intention, le concurrent est elimine ou, a tout le
15 moins substantiellement reduit l'incertitude [it is the
16 words] contre au comportement a attendre de sa part."

17 We would suggest that the words "a attendre de sa
18 part" mean "to be expected on his part".

19 MR PRESIDENT: Not to expect of the other? That would
20 appear to be right at first sight. We probably need to
21 look back to BASF and Hercules.

22 MR MORRIS: Do you want me to take you to that now?

23 MR PRESIDENT: Let us not take time now, I think we can
24 check it.

25 MR MORRIS: Those were the paragraphs I wanted to take you

1 to in particular. We have a note of other passages.
2 These are all passages I believe we have, in fact, cited
3 in our defences.

4 MR PRESIDENT: If they are in the pleadings, that satisfies.

5 MR MORRIS: They are in the pleading, but we have pulled out
6 the passages. I do not propose to take you to any more,
7 but the basic propositions I made at the outset, and we
8 say that it is the communication of information which
9 reduces uncertainty. It cannot be a defence for the
10 communicator to say, "Oh well, I never intended them to
11 act on it, or I never intended this to be in agreement."
12 It is the effect of that communication upon the
13 recipient which we say is at the heart of the concept of
14 a concerted practice.

15 Sir, I have two further points, if I may. The first
16 is for your note. We would like you to look at
17 paragraphs 60 and 85 of the judgment in Trefileurope,
18 which is authorities bundle 3, tab 8, and I was not
19 going to take you to it now, it is just for your note;
20 but I can if you wish me to take you to it.

21 MR PRESIDENT: No, that is all right.

22 MR MORRIS: We say that that goes, in particular, to the
23 Sportsetail case where a party does not distance himself
24 from an agreement which is said to have been made.

25 The second thing we have is we have a slightly more

1 comprehensive list of transcript references to what
2 Mr Ashley said about the 2.5 formula in relation to
3 branded goods and the relevance of the 2.54 million in
4 relation to replica. It is a one-sheet piece of paper
5 I am going to hand up for everybody's use, and I think,
6 subject to being pulled from my left, that those are all
7 the points I wish to raise and I am now available for
8 anything you want to raise with me.

9 MR PRESIDENT: If I may, I would just like to go over the
10 ground from my point of view on one or two points on the
11 England agreement.

12 At paragraph 29 of your very helpful closing
13 submissions you tell us that there are four principal
14 issues, of which the first two relate to the making of
15 complaints and pressure and Umbro's possible response to
16 those complaints.

17 MR MORRIS: Sorry, page 29?

18 MR PRESIDENT: Page 29, paragraph 78. Those are said to be
19 the first two issues and a little later on you, at
20 page 36, paragraph 100, advance the alternative case, on
21 the basis that phone calls are not established.

22 I would just like, for good order's sake, to try and
23 relate that way of putting the case to what was in the
24 original decision and what is in the pleadings.

25 If we start with the decision, I think the England

1 agreement is at paragraphs 412 to 437, but especially at
2 paragraphs 415.

3 MR MORRIS: Yes.

4 MR PRESIDENT: Just noting at this moment, in passing, those
5 passages of the decision do not seem to me at first
6 sight to rely particularly on complaints and pressure.
7 They seem to rely on direct, what is said to be direct
8 evidence, as it were.

9 Do not comment yet, because I want to go through the
10 situation, to just see where we are.

11 So that is the situation as regards the decision.
12 Then if we look at the pleadings, in relation to JJB,
13 the amended defence, which is at tab B of the JJB
14 pleadings file -- I am sure you have it all off by
15 heart --

16 MR MORRIS: No, I was looking at the Allsports pleading.

17 MR PRESIDENT: No, that comes in a moment. As far as the
18 JJB pleading is concerned, summarising it very broadly,
19 it is true there are references to pressure from
20 retailers upon Umbro at paragraphs 47 through to 50.
21 The substantial case made in the amended defence against
22 JJB seems to be the case made in the decision.

23 I am going to ask for your comments in a moment.
24 There does not seem to be, in this pleading, an
25 alternative case against JJB based on the absence of

1 phone calls, unlike the situation as regards Allsports,
2 which we are about to come to. That is just a comment,
3 but I would be glad to be corrected on it, if I have it
4 wrong, because the Tribunal is fallible like everybody
5 else.

6 But it rather looks to me at first sight as if the
7 OFT as regards JJB have more or less hung their hat on
8 the case as put out, as stated in the decision.

9 Leaving JJB there, as regards Allsports, there is,
10 however, an alternative case, but only on the basis that
11 the phone calls are not established, which is, I think,
12 at paragraph 21(e)(ii), of which there are some further
13 particulars pursuant to the Tribunal's order that were
14 given and the particulars under paragraph (e)(ii) are at
15 tab 2 of the Allsports pleading bundle.

16 MR MORRIS: I am there, sir.

17 MR PRESIDENT: You will know exactly where they are. In
18 relation specifically to Allsports, I was wondering how
19 the particulars, given there, now relate in particular
20 to the matters that are set out in the alternative case,
21 at pages 36 to 38, of the closing submission.

22 So I think in summary the questions are: how do the
23 first two points that you described as the principal
24 issues fit in with the case that is made in the decision
25 on the pleadings as against (a), JJB and (b), Allsports.

1 MR MORRIS: Can I deal with Allsports first, whilst I have
2 it here? The position in relation to Allsports is that
3 the case is 21(e)(ii), which rather oddly refers to
4 9(a)(iii) to (vi) above, and I cannot find the (vii) in
5 the 9(a). It looks like the two paragraphs are missing
6 or something. I am slightly confused by that.

7 If you go back to page 4, I am in the Allsports
8 pleading file at the moment.

9 MR PRESIDENT: Yes.

10 MR MORRIS: We there set out a number of matters that are
11 relied on. Mr Fellone's fax, Hughes's night phone call
12 in the presence of Ronnie, the quality of pricing and
13 the monthly management reports.

14 We then expand upon that case, effectively the
15 absence of phone call in paragraph 4, on page 3 of the
16 particulars in relation to Allsports, which takes you
17 back to the previous page, to 3.1 and 3.3, and we list
18 there the matters that are relied upon in 1, which is
19 the sequence of events, which is an expansion of what
20 was in 9(a)(iii) to (vii).

21 I entirely accept, and I know the point is going to
22 be made, that we do not mention the monthly management
23 report there in that list, but we do --

24 MR PRESIDENT: It is sort of mentioned obliquely at the top
25 of page 3, under paragraph 2.

1 MR MORRIS: Yes, but strictly and I am against myself --

2 MR PRESIDENT: But I do want to get to where the monthly
3 management reports is --

4 MR MORRIS: We are going to say the monthly management
5 report is relevant even absent phone calls, and we do
6 rely upon it, and to the extent that any suggestion --
7 and I am not going to accept that it is a correct
8 suggestion, it is a suggestion not formally pleaded,
9 I would formally apply to amend --

10 MR PRESIDENT: I am trying to understand the way the
11 pleadings work at the moment. That is all I am trying
12 to do.

13 MR MORRIS: That is our case, and I believe if you go to
14 paragraphs 36 to 37 of our closing submissions we are
15 not saying that that is the comprehensive list and to be
16 perfect -- those are the particular matters at 101 and
17 102 that we rely upon, but we also rely on the materials
18 that are pleaded, and we are really drawing out there,
19 we would suggest, some key points which go to lead to
20 the two propositions, really.

21 The main one is that the agreement which concluded
22 on 24th May was concluded as a result of Allsports and
23 I will use the word "pressure", but I use it in a very
24 general wrap-up way --

25 MR PRESIDENT: I want to come to pressure in a moment.

1 MR MORRIS: Okay. But we also go on to say -- that is
2 events effectively prior to the 24th. Can I make this
3 further point?

4 To the extent that material post-dates the 24th May,
5 we say that is relevant because of its own account, for
6 example the phone call between Mr Knight and Mr Hughes
7 we say that in itself is actually evidence of an
8 agreement.

9 But we also say, in so far as the criticism that is
10 made, "Oh well, that is after the 24th, so it cannot be
11 relevant", we also say this: that is indicative of what
12 must have been a pre-existing concern and a pre-existing
13 concern having been communicated about the pricing of
14 the England shirt.

15 Then at 103 we deal with the separate point about
16 Mr Hughes's and Mr Knight's conversation. We have that
17 point. So that is what we say about Allsports and the
18 case in relation to Allsports.

19 As far as JJB is concerned, and I am going to be at
20 this stage -- but in terms of their pleading, it is
21 certainly the case that in their pleading we make clear
22 and make the same point that was made in respect of
23 Allsports -- and we are now looking at page 26 of their
24 pleading. If we go to 47 onwards, at page 24 is
25 pressure.

1 MR PRESIDENT: But it is not actually linked --

2 MR MORRIS: It is not linked, but it is pleaded and one of
3 the reasons I should say -- I think this is correct, and
4 I will be corrected if I am wrong -- is that we made no
5 application to amend in respect of JJB because, as
6 I understand it, the decision itself did include the
7 proposition that JJB were putting pressure on Umbro and
8 relevant pressure was put on in the context of the
9 England agreement.

10 MR PRESIDENT: It does not seem to emerge very clearly from
11 the way it is put at paragraph 415 of the decision.

12 MR MORRIS: I am just about to take you to another --

13 MR PRESIDENT: Obviously, Mr Morris, the tribunal would not
14 want this case to turn on a arid pleading point, but
15 there is a certain degree of discipline that we have to
16 try to enforce.

17 MR MORRIS: If we go to 416:

18 "The OFT also notes Umbro's written representations.
19 This is all in the context of the England agreement
20 which state that JJB generally only communicated its
21 retail prices to Umbro in the context of complaints
22 about other retailers and that retailers, including JJB,
23 would have known and often intended that Umbro would use
24 the information in its discussions with other
25 retailers."

1 I will be pointing to other paragraphs of the
2 decision in a moment.

3 There are then the passages in the defence which do
4 refer to pressure. Then you get to page 26, and there
5 you do get the modification, the change of case arising
6 out of Mr Ronnie's change of evidence and the same point
7 is made about -- that is at 53C, which is the change,
8 but I accept, at its face, it does refer to the phone
9 call still and I think it is correct that we do not
10 expressly say in the pleading here -- and I may be
11 wrong -- what would be the position if there were no
12 phone call. That is correct, sir. Obviously it is a
13 matter for the tribunal.

14 We would suggest that the issue has plainly been
15 canvassed. I would envisage, although I have not looked
16 at our opening skeleton, that we certainly make the
17 point in the opening skeleton. If you will just bear
18 with me for a moment, I would just like to turn that up.

19 Again, I might be catching myself out, but we better
20 look at it. If you go to page 8, this is where we got
21 the issues from, sir. I have my opening skeleton in the
22 pleadings file. JJB pleading, D1. I have to say I am
23 not sure we actually spell out the alternative case
24 there, but we certainly say that the OFT contends that
25 the evidence establishes the following 27A JJB and

1 Allsports pressure; paragraph 50 of the defence, JJB
2 complaints and pressure; Allsports complaints and
3 pressure. And then --

4 MR PRESIDENT: I am not sure you really opened the
5 alternative case at all in the skeleton.

6 MR MORRIS: Well, I think in terms of pleadings, unless
7 somebody -- I am looking back at 53 -- I think in terms
8 of pleadings, that is as far as we can go. In 53B and
9 53D of our defence in JJB, we certainly do rely upon JJB
10 complaints and pressure. What we do not go on to say in
11 that pleading is: if you find that the phone call is not
12 established, you should find in any event there is
13 sufficient material to find them parties on the third
14 basis.

15 Now we would suggest that the matter has been fairly
16 canvassed. It would be rather odd if you were to accede
17 to that case because you thought it was well founded in
18 relation to Allsports because it was pleaded, but not in
19 respect of JJB because it was not.

20 Obviously it is a matter for you, sir, as to how you
21 would like to us proceed and obviously you will take
22 your own view, but we would suggest it is not exactly
23 a surprising or new point.

24 I should also mention this, sir: during the course
25 of the strike out application, the third basis was

1 fairly floated generally. I accept --

2 MR PRESIDENT: Not against JJB.

3 MR MORRIS: Not against --

4 MR PRESIDENT: They were not present at strike out. Well,
5 they may have been present, but they were not
6 participating.

7 MR MORRIS: Other than to the extent that Lord Grabiner
8 stood up and said that he had adopted everything that
9 they said --

10 MR PRESIDENT: Perhaps they did participate.

11 MR MORRIS: And said, we will have something to say about it
12 in due course and if you strike out, then you should
13 strike out us as well. I just remind you of that.

14 Sir, I am not sure I can take it any further at the
15 moment.

16 MR PRESIDENT: If we just park that problem there for
17 a moment.

18 Can we just look together at this idea of pressure
19 and a certain amount in the pleadings as to what is
20 lawful pressure or understandable pressure and whether
21 it matters or not and just try to clarify it.

22 One could imagine -- and this is now completely
23 hypothetical -- a situation in which a retailer A finds
24 that his sales are being affected by the discounting of
25 another retailer. His rate of sale has slowed down and

1 all the rest of it and he rings up manufacturer B and
2 says, "I am awfully sorry, but the sales are much slower
3 than anticipated. I am not going to be able to take up
4 that order that is due at the end of the month and I am
5 going to have to reduce our orders for the next six
6 months. I am just not making the sales because of this
7 discounting that is around". If in those circumstances
8 the manufacturer B goes to the discounter C and puts
9 pressure on the discounter C to stop the discounting,
10 and the discounter C does stop the discounting, has the
11 original complaining retailer A been guilty or party to
12 a concerted practice, or is he simply complaining about
13 something that is happening?

14 MR MORRIS: Yes, well, that is where we get to the line, is
15 it not, or which side of the line.

16 MR PRESIDENT: Well, I want to try to pin everybody down on
17 where the line is, if there is one.

18 If I park that example there, an example at perhaps
19 another extreme is if there is evidence that the
20 retailer A said to manufacturer B, "I am not prepared to
21 tolerate this discounting any longer and unless you make
22 C stop discounting, as far as I am concerned all your
23 products are going back into the storeroom. I am going
24 to put nothing on display and do not expect any orders
25 from us in the next 12 months."

1 Faced with that, retailer and manufacturer B goes
2 back to C and stops the discounting.

3 That may be a stronger example. In either example
4 is it relevant to the analysis as to whether or not
5 manufacturer B actually went back to retailer A and
6 said, "Actually, I have sorted it out, because you will
7 not get anymore discounting from C, I do not think".

8 Now, is that a necessary or essential or merely
9 supplementary ingredient?

10 How does one analyse these different situations and
11 however one analyses it, where precisely in the evidence
12 in this case do we have evidence that someone has
13 crossed whatever line, wherever it happens to be?

14 That is quite a big series of questions, but --

15 MR MORRIS: I have 10 minutes.

16 MR PRESIDENT: You may want to have a first shot then think
17 about it a little more, but since this has assumed such
18 an important part of the OFT case, apparently it is
19 quite important, you have to be clear as to what your
20 case is on that.

21 MR MORRIS: Can I hazard an answer to as many of those
22 questions as I can now? The first point I would say is
23 that assuming that whatever has gone on between A, B and
24 whoever has happened, in other words the retailer has
25 gone to the manufacturer, the manufacturer has gone to

1 the other retailer and the other retailer has agreed,
2 and leaving aside the causation points, I would say that
3 if one were otherwise satisfied, there is no need for
4 the manufacturer to go back to the original complaining
5 retailer to say, "Look, I have done it".

6 I come back to it in a moment, but I am assuming for
7 the moment what has happened before is sufficient,
8 because that is the phone call back and that is the
9 receipt of information back, the position, effectively.
10 That is coming back, reporting back, "We have the
11 agreement."

12 MR PRESIDENT: If we just take that hypothesis -- no need to
13 go back and look at the two examples -- are you saying
14 that somebody who says, "I am sorry, but my rate of sale
15 has become slow, as a result of which I cannot take up
16 an order", as a result of which the manufacturer, off
17 his own bat, as it were, goes back to the retailer, puts
18 on pressure. The prices go up, the manufacturer does
19 not revert to the retailer A; are you saying on these
20 facts that retailer A is --

21 MR MORRIS: That deals with your first point I will come to
22 in a moment. What I am saying is assuming both, all the
23 other examples were sufficient -- the reporting back,
24 I would suggest, would be relevant in the first case,
25 but what I am trying to deal with is the reporting back

1 of itself and then I am going to work backwards through
2 your examples.

3 The second example of what the retailer says to the
4 manufacturer, says, effectively, "Stop it", we say that
5 is sufficient, plainly sufficient, and there is no need
6 for reporting back there.

7 The first example which you gave, which is, "My
8 sales are going back, going downhill", and nothing more,
9 that is the difficult question as to where the line is
10 to be drawn and that goes, if you go to page 30 of my
11 closing submissions, it is really -- this is why I tried
12 to break it down in this way.

13 MR PRESIDENT: Quite.

14 MR MORRIS: It is really the question of 3, 4, 5 and 6. It
15 is what the purpose of the communication is in the first
16 place. It is Umbro's understanding, both of the purpose
17 and of the commercial consequences of not seeking to
18 stop the discounting. It is the complaining retailer's
19 knowledge of Umbro's understanding.

20 Now, if the purpose of the chap communicating, "My
21 orders have gone down" is merely to say, "Well, my
22 orders have gone down and I am not going to be able to
23 take any more stock, sorry old boy, sorry I am not
24 making the rest of this order", and he says "Why not?"
25 and the retailer says, "Well, it is Joe Bloggs down the

1 road retailer it is doing my business in", then that
2 alone might not be sufficient.

3 But you have to look beyond the actual words used,
4 you have to look at what everybody knows about the
5 market position and what everybody reads about it.

6 MR PRESIDENT: Hang on. Actual words used, that is market
7 position.

8 MR MORRIS: And knowledge.

9 MR PRESIDENT: Supposing the conversation between the
10 retailer A and the manufacturer B is a little more
11 precise, where the retailer simply says -- he does not
12 say, "I am afraid I cannot take up the orders next
13 month", but he also says, "Well, if I am going to remain
14 in this market against this discounting, I really need
15 better terms from you, old friend, so can you please
16 give me another 10 per cent off the wholesale price".

17 MR MORRIS: Well, that is a different point, and I think we
18 would suggest if that is not only what he is saying but
19 that is actually all that can be read into what he is
20 saying, then I think the answer to that is that that
21 does not carry the implication with it, or the request
22 to go and stop the discounting.

23 I think the critical question, and again I am
24 thinking on my feet, but I think the critical question
25 is whether you can divine out of what is said and

1 parties' knowledge that there is a request to stop the
2 discounting. I have to go that far, at least. I am not
3 saying that is the end of the story, but I think I have
4 to get out of it --

5 MR PRESIDENT: A request to manufacturer B to do something
6 about the discount.

7 MR MORRIS: Can I give you some examples --

8 MR PRESIDENT: At least a request. Yes.

9 MR MORRIS: When I say "Do something", I do not mean do
10 something to make my commercial position better, I mean
11 do something to stop him.

12 MR PRESIDENT: I.e, not just do something to make retailer A
13 more able to compete with retailer C, but actually to
14 make retailer C stop damaging retailer A.

15 MR MORRIS: Yes, and I think I have to go so far and I do
16 say that there is a request to stop the other retailer
17 discounting and Mr Turner has just pointed out to me
18 paragraph 19 of Mr Fellone's third witness statement,
19 which was a point put in cross-examination, that he
20 says, talking about Allsports:

21 "They have cancelled orders on the grounds that rate
22 of sale of these products had decreased due to
23 Sports Soccer's discounting ..."

24 Which is your point about rate of sale:

25 "... and that they therefore no longer want the

1 product unless Sports Soccer increase the price."

2 And it is those added words, "unless Sports Soccer
3 increase the price", if that is either said or implicit,
4 that contains the request, "We will take the goods if
5 they increase the price."

6 We then get to this question of request, and of
7 course we would say --

8 MR PRESIDENT: Quite a fine line, is it not?

9 MR MORRIS: I accept that, sir, but if you have the position
10 and somebody rings up and they are in the position to do
11 it, and says "This discounting is crippling the market,
12 you just have to sort it out, by which we mean you have
13 to get them to come back up", we would say that is
14 absolutely a plain case of -- I do not know, whatever,
15 how you characterise it, "participation".

16 MR PRESIDENT: It may depend on what the market position of
17 the retailer is too.

18 MR MORRIS: It may, and I am sure it will be said that it
19 does. We would say in response to that that certainly
20 in terms of Sports Soccer and replica kit Umbro were
21 able to pass that through.

22 If you look at a lot of the evidence in the case,
23 actually the evidence has been all around this point,
24 because people are saying, "Oh well, when I am
25 complaining, I am only complaining because I want better

1 terms." But if you look at the evidence, you do see the
2 words "Sort it out". You do see the words "Sort it
3 out", take "Sort it out", or "What are you going to do
4 about it?" "Sort it out", we suggest, does not mean,
5 "Give us a better margin to compete." We suggest that
6 it means, "Go back to the other retailer and do
7 something to stop it."

8 Now if for example you consider the Guest/Gourlay
9 letter the Guest/Gourlay letter as an example, a sort of
10 written example, is said by Allsports to be all about
11 getting a better margin.

12 Now we suggest there is reference obviously to
13 a better margin there, but I put that to Mr Guest in
14 cross-examination -- actually it did not add up, because
15 they were not discounters anyway, but we say it is
16 pretty close to an express request and it is certainly
17 a clear implied request to go and stop the others
18 discounting.

19 Paragraph 1 is not about them being opposed to
20 discounting by themselves, and if you read paragraph 1
21 in the light of the response, we suggest that that
22 contains a request by Allsports for Umbro to do
23 something to stop other retailers discounting, and we
24 say that document itself is an extremely good example of
25 the case we make and we say that that does carry the

1 request and that that is sufficient.

2 Sir, can I just, for your note, and I am talking
3 about the question of the nature of the complaints,
4 direct you to the fifth page of the annex to our
5 submissions. Unfortunately the version you have of this
6 document is not paginated, but it is paragraph 16. It
7 is paragraph 16C and F. You see the references there to
8 the sorting out and E is quite good, because it refers
9 to, "No need for him to discount, as it flies out of the
10 store. This is getting out of hand. Get it sorted".

11 Then it says:

12 "Although Mr Whelan denied making such comments to
13 Chris Ronnie, he accepted he may of used similar words
14 when speaking to Peter McGuigan when commenting that
15 there was no need for Sports Soccer to discount."

16 I am not, at the moment, proposing to take you to
17 the transcript, but if he said there is no need for them
18 to discount, that is something different, we say, than
19 saying, "Give us better terms". It is really suggesting
20 the view that we do not like prices being dragged down
21 and we would say that that, in conjunction with the
22 other evidence, does carry with it the suggestion,
23 putting it at its most neutral, passing from JJB to
24 Umbro, that Umbro do something about it, namely stop the
25 discounting.

1 Of course I accept that this is --

2 MR PRESIDENT: In circumstances where JJB is their largest
3 customer for this particular line of product?

4 MR MORRIS: Yes, and, it is not just for this line of
5 product, it is also the power in relation to --

6 MR PRESIDENT: Have power, so you submit, in relation -- in
7 branded apparel generally.

8 MR MORRIS: -- in circumstances where Umbro want to switch
9 to branded.

10 For your note again, in paragraph 17, a couple of
11 pages on, there is a similar analysis of Allsports. It
12 is pressure by Allsports, and again we go through the
13 evidence there in subparagraphs about the nature of the
14 communications.

15 You might want to just note sub-paragraph D, where
16 Mr Guest admitted, three pages on -- I think what we
17 will try and do, sir, is to give you a paginated version
18 of this document at some stage. It might be helpful.

19 There is the reference to Mr Guest's evidence about
20 he did raise the possibility of Mr Fellone of Umbro
21 stopping supplies, even though it was tongue in cheek.
22 But there you have a communication, annex 17,
23 sub-paragraph D, and indeed in his witness statement
24 itself.

25 That was me cross-examining him on, I think,

1 paragraph 11, where it suggests that he raised it with
2 Mr Fellone but did not raise it with Mr Ronnie. That is
3 obviously a more direct communication.

4 MR PRESIDENT: Could we leave that point for a moment.

5 Pages 34 to 36, you deal with the phone calls. Is there
6 anything in the evidence that enables us to be, or you
7 to be rather, any more precise as to when these phone
8 calls were made? Quite a lot is happening between the
9 24th May and 2nd June. There is the golf day, there is
10 Mr Ronnie having lunch with Mr Guest. There are the
11 other phone calls on 2nd June from Mr Ashley's
12 assistants. There is Mr Hughes calling Mr Ashley.

13 How sure can we be about the making of these phone
14 calls in the time period that you allege?

15 MR MORRIS: Well, we would say that you can be sure that he
16 made the phone calls. We would say further that you do
17 not need to know the exact date and time of that phone
18 call. We can all be sure that something happened,
19 a certain --

20 MR PRESIDENT: Supposing phone calls took place before
21 24th May; would it be a relevant phone call in the case
22 that is being made? Does it have to be some time in
23 this week?

24 MR MORRIS: If in a way the phone call post 24th May is the
25 "going back to" point.

1 MR PRESIDENT: Yes.

2 MR MORRIS: Now, if you are against me insofar as you
3 conclude that anything that happened prior to 24th May
4 did not constitute relevant procurement because it was
5 not strong enough -- I have said that I suggest what
6 happened before is sufficient, but let us say you take
7 the view that what JJB and Allsports, whatever chatter
8 was happening, it was not enough to constitute
9 procurement to go and get the agreement.

10 MR PRESIDENT: Well, it is a question of whether the
11 evidence is sufficiently precise, put it that way.

12 MR MORRIS: If the phone call happens before the 24th, then
13 we are almost into the case 3, because it is more
14 pressure. It is more pressure or it is more background
15 to the procurement of the agreement. What I think I am
16 addressing here, and the phone call that we are talking
17 about addresses case 1 or 2, bringing back home of the
18 news that Sports Soccer and Umbro have agreed on the
19 24th.

20 I think if we are in that sort of ballpark, or that
21 is the issue we are considering, I have to accept that
22 phone call has to happen after the 24th and we then go
23 on to say that that would, itself, assuming you find
24 that phone call, that is reporting back in all the
25 circumstances of everything that is going on is

1 sufficient to constitute -- that is the willing receipt
2 point.

3 Now, your question is, well, when between the 24th
4 and the 2nd could that have happened? And our answer
5 is, you need to be satisfied that it happened between
6 those dates, but you do not need to be satisfied
7 precisely which day of those, however many days it was,
8 that that phone call happened.

9 We would suggest it did not happen towards the end
10 on the 2nd, because on the 2nd we have the area
11 manager's phone calls. We can be very precise about
12 what phone calls happened on the 2nd.

13 MR PRESIDENT: Would it have been likely to happen before
14 Mr Ronnie knew that Mr Ashley was actually going to go
15 up in price?

16 MR MORRIS: Before he knew he was going to?

17 MR PRESIDENT: Yes, ie he finally, apparently with a certain
18 amount of pressure and aggravation, gets Mr Ashley to
19 put the prices up on 2nd June and Mr Ashley is
20 sufficiently concerned to get all his area managers to
21 torture Mr Ronnie with their phone calls; is Mr Ronnie
22 like to have told Mr Sharp or someone from Allsports
23 about it until he was sure that Ashley was going to go
24 up?

25 MR MORRIS: Our answer is yes, because he had the agreement,

1 he had been to the meeting.

2 He knew also, I suggest, from previous examples
3 I think in April, that he might actually take a bit of
4 time to put it up. But our case is that he had been to
5 the meeting, he had the agreement in the bag. He was
6 being pestered by everybody about this. Euro 2000 was
7 approaching and we would suggest, yes, he would have
8 been likely to have reported the result --

9 MR PRESIDENT: So why would he not have told Mr Hughes at
10 the golf day or Mr Guest at lunch a couple of days
11 later?

12 MR MORRIS: I do not know the answer to that question. In
13 his evidence it was put to him he could have said "Yes,
14 I told them that", but he gave his answer as to why he
15 did not at the golf day. The golf day is quite a good
16 example. He did not think it was the right venue for
17 discussing the right sort of thing and it was not the
18 time to discuss that. The sequence of events seems to
19 be fairly clear, that after the meeting on the 24th,
20 Mr Fellone and Mr Ronnie did sort of decide that they
21 were going to make phone calls. Mr Fellone then did go
22 and make phone calls. I would suggest that happened
23 early on in that span and they both then went on and
24 made their phone calls.

25 MR PRESIDENT: Well, maybe we have to make what we can on

1 the evidence.

2 Lastly on phone calls, and this is really a request
3 for some information. We know at least from Mr Ashley
4 that it was possible to identify the date upon which
5 certain phone calls were made because he went, or
6 somebody went back to the telephone records.

7 Has anybody gone back to try to see whether there
8 are any telephone records in relation to Mr Ronnie's
9 phone call?

10 MR MORRIS: I cannot immediately give the answer to that
11 question. I do know that the phone records that we have
12 were mobile phone records, presumably printed off bills,
13 mobile phone bills.

14 MR PRESIDENT: There would be two questions. Has anybody
15 gone back, is the first question? Is it that no-one has
16 gone back or that somebody has gone back and tried and
17 there is not anything?

18 MR MORRIS: I am instructed enquiries were made in respect
19 of Mr Ronnie's mobile, but the mobile phone company does
20 not store the information that far back, I think is what
21 we ascertained.

22 MR PRESIDENT: How is it possible for Mr Ashley to get the
23 information from --

24 MR MORRIS: Presumably from the mobile phone company, but I
25 do not know the answer to that, I can take instructions

1 over the luncheon adjournment.

2 MR PRESIDENT: I think that we would be quite glad to know
3 what steps, if any, have been taken in this regard.

4 I think, for my part, I had one last question on a
5 different topic, which is the Sportsetail agreement.

6 If, as appears to be the case, following Alison Eaves's
7 request, JJB did not supply its prices to Sports e-tail,
8 how do you say it is that Sports e-tail managed to peg
9 its prices to JJB's prices?

10 MR MORRIS: I think we say because they received the
11 information from Umbro or from other stores, from --

12 MR PRESIDENT: Where is the evidence of that?

13 MR MORRIS: Alison Eaves's witness statement.

14 MR PRESIDENT: Thank you. Can I make one general
15 observation, which perhaps all parties might want to
16 touch on after lunch. It seems to us in this particular
17 case that -- and it is not the only case in which it
18 happens -- pricing in general, certainly at the relevant
19 time as between manufacturers and retailers, seems at
20 least to some extent to have worked back from either the
21 actual retail selling price or the RRP, that is to say
22 there seems to have been a sort of assumption that what
23 was important was the price point at which these
24 products were to be sold, from which the manufacturer
25 derived an RRP, or somebody derived an actual selling

1 price, and from that, by applying a formula, you then
2 arrived at a wholesale price plus a negotiated discount.

3 The question is: does a situation like that lend
4 itself to a climate in which there are frequent
5 discussions between manufacturers and retailers about
6 retail prices, and what if any implications does that
7 have for our assessment in this case?

8 I think we will rise until 2.15.

9 MR WEST-KNIGHTS: Sir, I have something to say that is
10 wholly unforensic. Firstly, sorry for interrupting your
11 flow of thought. It is partly because, for our own
12 part, we find these questions bang on point, hence the
13 excitement.

14 Can I add two things into the -- simply the known
15 factual matrix about the phone calls that may have been
16 overlooked.

17 MR PRESIDENT: Do you need to do it now, or do you want to
18 do it in reply?

19 MR WEST-KNIGHTS: It is only a 30-second point, and if you
20 are thinking about these things now, it would be helpful
21 to plug it in. It is not, at any time, between 24th May
22 and 2nd June, because that was the original case and the
23 Office asked for F&BPs and back came there none. Their
24 currently pleaded case is that that phone call took
25 place in the week commencing the bank holiday

1 Monday 29th, but that it would not have been on that
2 day, says Mr Ronnie, because it was a bank holiday, so
3 you are now left with only the 30th May, the 31st May
4 and the 1st June.

5 I am grateful.

6 MR PRESIDENT: 2.15.

7 (1.15 pm)

8 (The short adjournment)

9 (2.15 pm)

10 MR MORRIS: Sir, one or two matters. I would like to pick
11 up not necessarily now but I want to pick up on your
12 last point and there are a couple of other points
13 I would like to, in light of your questions, go back
14 over briefly. So there are three areas I want to talk
15 about as well. I will not be very long. Sports Soccer
16 have provided a paper. Mr Gunney is here, and might
17 wish to say something in relation to that paper.

18 THE PRESIDENT: I do not think it has reached us yet.

19 LORD GRABINER: No, it has not reached you, because I have
20 asked your clerk not to give it to you, because I want
21 to object to it going to you.

22 MR MORRIS: I do not know whether Mr Gunney would like to
23 explain.

24 THE PRESIDENT: Let us finish one train of thought at
25 a time, then we will hear from Mr Gunney.

1 MR MORRIS: I know Mr Gunney has other commitments. But
2 I will be very quick. Can I deal with your last point
3 about a market in which prices are set?

4 The first proposition is this: it is not entirely
5 clear which way the calculation goes, whether it is up
6 from wholesale or down from RRP. I think it is the case
7 that in the decision we say it goes down. I think just
8 for your note, Russell's first, paragraphs 8 and 16.

9
10 THE PRESIDENT: When you say it goes down, which way do you
11 mean?

12 MR MORRIS: Down. In other words, you start with an RRP and
13 then you calculate off RRP to get to this wholesale
14 price. You divide by 1.88 or whatever the calculation
15 is, or do you in fact start with a wholesale price then
16 add a mark-up? I think you were suggesting it was the
17 former, and I think Mr Russell's evidence at
18 paragraphs 8 and 16 is that it is in fact the latter; in
19 other words, you start with the wholesale price and you
20 go upwards from it.

21 I am not sure at the end of the day it makes that
22 much difference, but I point you to that.

23 Really these first points are preliminary to my main
24 point. We would suggest in any event the wholesaler and
25 the manufacturing retailer do not strictly need to talk

1 about the retail price, because the way it worked was
2 that the standard wholesale price was the price that was
3 linked to the RRP, but in fact, in the period we are
4 talking about, and certainly in the case of JJB and
5 Allsports and initially Sports Soccer, real trade terms
6 were all negotiated downwards off the standard wholesale
7 price.

8 In other words, you recall 20 per cent off,
9 15 per cent off -- whatever percentage off, so the debit
10 actually between them only necessarily focused on the
11 position off wholesale.

12 Of course I should add that in the light of the
13 information I gave you earlier from 2001 onwards, it
14 appears that Sports Soccer's actual trade terms were off
15 a retail price, recommended retail price.

16 But the third and more important point, which is the
17 point you are really raising, sir, is this: even if it
18 is the case that there is a climate in this market in
19 which retail prices may or might necessarily be
20 discussed in the context of setting a wholesale price,
21 that does not allow businessmen to escape the chapter-1
22 prohibition.

23 Indeed, we would suggest that actually because of
24 that mechanism, if there is that mechanism, it makes it
25 more likely that there is going to be a greater

1 temptation to transgress the line, so to speak, and
2 there is therefore a greater reason for those involved
3 to guard against conduct which is unlawful. It is
4 certainly not a reason for this Tribunal not to find
5 infringement.

6 Can I just illustrate how that might arise. You can
7 envisage a conversation, telephone or otherwise, between
8 the manufacturer and the retailer, and they might say,
9 "Well, look at what is going on in the market at retail
10 prices, that is going to have an impact on wholesale."
11 What is permissible, and this arose this morning, and
12 what they should be saying in that context is, "We want
13 to have better terms, ourselves."

14 But the other thing they might say, or might be
15 tempted to say, and we say in this case they did say, is
16 not, "Give us better terms" but, rather, "Do not let the
17 retail price drop". That is the temptation, and we say
18 that is in fact what has happened.

19 So our submission is such market conditions make the
20 temptation greater and make it more likely that what is
21 impermissible, namely talking about other retail prices,
22 retail price maintenance, make it more likely that would
23 happen.

24 That is all I had to say on that, sir. I just want
25 to revisit very briefly the relationship between the

1 procurement type -- this is the debate about what was
2 being said -- what constitutes pressure, and your two
3 examples between procurement on the one hand and the
4 telephone calls and willing receipt on the other.

5 We say as follows: if you find that JJB and
6 Allsports conduct caused or procured Umbro to obtain
7 agreement with Sports Soccer, we submit that that is
8 enough to find JJB and Allsports to be parties to an
9 agreement and that is the sort of Hasselblad Pioneer
10 case, which is referred to in our pleadings. That is A
11 procuring B to fix with C.

12 There is at that stage, if you are satisfied that
13 the nature of their conduct, the express or implicit
14 request plus the ability to influence, whatever you
15 find, but you find that it was causative, there is no
16 need to go on to consider the phone call back, so to
17 speak.

18 Where the phone call back comes in is this: if you
19 find that their conduct, whatever it was, was not
20 sufficient to be causative of the 24th May agreement on
21 the particular facts of this case, then the phone call
22 does arise and the focus shifts to willing receipt.

23 In the context of deciding whether or not the
24 receipt of the information back is willing, that does
25 involve you taking into account the entire context,

1 which will include background stuff about the
2 relationship between JJB and Allsports and Umbro, to
3 determine whether the receipt of the information was of
4 interest to them and whether they were pleased to hear
5 it. That is the willingness of the receipt.

6 But that phone call back only arises if you were to
7 conclude what had happened before the 24th May in the
8 particular instance was not causative or in any way
9 positive.

10 That is what I wanted to say on that.

11 THE PRESIDENT: When you say "causative" or "in any way
12 causative", what do you mean, exactly, by that? Do you
13 mean preponderant cause, partial cause, a cause? In
14 situations like this people may have a mixture of
15 motives, a picture of objectives.

16 MR MORRIS: Well, he would say --

17 THE PRESIDENT: For example, Umbro might, as a motive,
18 itself, for its own commercial reasons, want to be
19 trying to move its brand upmarket.

20 MR MORRIS: I understand that. I think we have to say that
21 you have to find that it is operative upon a cause, at
22 least. But I do not go so far as you to say because
23 Umbro also thought that actually they had independent
24 reasons to keep their brand up, because they had another
25 reason, that that means that whatever JJB and Allsports

1 were doing was not sufficient to find liability. So

2 I think we would say operative on the mind of --

3 THE PRESIDENT: An operative cause.

4 MR MORRIS: -- on the question of the JJB pleading.

5 Obviously Lord Grabiner will have something to say on
6 this. We would suggest that if it went to the point we
7 would apply to amend, if need be. We will, although we
8 have not yet, we will produce a draft as soon as we
9 possibly can, if that is needed.

10 The basic proposition is this: the case that JJB
11 exerted pressure and that that pressure was operative on
12 Umbro in concluding the England agreement on the
13 24th May is pleaded by us in the JJB defence, because it
14 is pleaded as part of the case with the phone call.

15 The facts are pleaded. The JJB pressure allegation
16 has been fully explored in this hearing. It is the only
17 objection and the only difficulty that could be taken is
18 that if there is no phone call, there is no expressly
19 pleaded case that the legal conclusion of infringement
20 can still stand. We are saying that the only thing that
21 is effectively missing is a legal conclusion and that on
22 that basis there is no possible reason for not allowing
23 a technical amendment to be made, because there is no
24 prejudice in evidential terms.

25 We would add this: that the continuation agreement

1 itself is not just about the centenary kit, it is about
2 the continued agreement, participation of JJB along with
3 Umbro and Sports Soccer in price fixing from April 2000
4 onwards. It is recognised both that that is -- for your
5 note, paragraphs 481 and 482 of the decision, which in
6 turn refer back to paragraphs 157 and 158 of the
7 decision. I am not going to take you to it, just for
8 your note, sir.

9 That case has also been plainly responded to by JJB
10 in its closing submissions at page 43 and so the
11 allegation of pressure by JJB in the period in April
12 and May 2000 has been canvassed by all parties in these
13 proceedings.

14 I think those conclude the three points I wanted to
15 make and then I think we have the position of Mr Gunney.
16 I am grateful.

17 THE PRESIDENT: Mr Gunney, I gather you have produced a
18 document and I gather Lord Grabiner objects to whatever
19 it is that is in the document, so I am not quite sure
20 how we should proceed in these circumstances. Are you
21 able to describe in general terms what the purpose of
22 the document is?

23 MR GUNNEY: Yes, I am.

24 THE PRESIDENT: Would you like to do so, then?

25 MR GUNNEY: In short, we have submitted a short paper on

1 behalf of Sports World which is intended to assist the
2 Tribunal. As a paper, it is intended to do two things:
3 one, correct certain factual misconceptions that we
4 consider arisen in relation to the Umbro Sports Soccer
5 relationship; two, to respond to some very strong and
6 unrestrained allegations about the integrity of
7 Sports Soccer and in particular Mike Ashley, as we
8 believe the Tribunal invited us to do yesterday, this in
9 our view being one of those occasions where matters have
10 arisen on which, in fairness, the Tribunal ought to
11 allow Sports Soccer to make representations.

12 That, of course, is a decision for the Tribunal,
13 ultimately, but the Tribunal may be able to take a view
14 on that if it has had an opportunity to read that paper.

15 THE PRESIDENT: How long is this paper?

16 MR GUNNEY: Four and a half pages.

17 THE PRESIDENT: What do you say, Lord Grabiner?

18 LORD GRABINER: Well, first of all, it is impossible to see
19 what the status of all this is in the context of these
20 proceedings. Mr Ashley gave his evidence and was
21 cross-examined now a couple of weeks ago, more than
22 a couple of weeks ago.

23 Insofar as challenges were made to him -- I mean
24 I do not think I have, so to speak, called Mr Ashley
25 a liar --

1 THE PRESIDENT: You may not have done, but others have --

2 LORD GRABINER: It may be that the position is different
3 with others, I do not know.

4 THE PRESIDENT: -- although things were later withdrawn.

5 LORD GRABINER: But I do not think I have said that. I do
6 not think I need to demonstrate that in order to achieve
7 what I want to achieve here, but leave that aside.

8 If it is correct that the Tribunal needs assistance
9 on the factual matters, then that is what the OFT are
10 here for. That is certainly one of the reasons the OFT
11 are here, and my recollection is that that was the
12 reason why Sports Soccer was refused an application to
13 intervene when it made it before we commenced these
14 proceedings at one of the CMCs, you will remember.

15 Also, the suggestion is that I have literally been
16 handed this just a few minutes before we came in this
17 afternoon for the resumption of this hearing this
18 a afternoon. It contains factual assertions, evidential
19 points. Our friend Mr Sean Nevitt, you remember Mr Sean
20 Nevitt's day book, that was going to contain the secret
21 of the source of information for Mr Ronnie and so on;
22 never produced. Mr Sean Nevitt; never produced. But
23 Mr Sean Nevitt's evidence about what was or was not the
24 position in 1999 is averted to, for example, in this
25 document.

1 In my submission, it has no status at all. Insofar
2 as there are passages in it that we would want to
3 challenge, as there undoubtedly are from a brief glance
4 at it, it would be, in my submission, entirely
5 inappropriate that we should conduct that exercise now.
6 We have reached closing submissions. Evidence has
7 finished.

8 Insofar as there are points in here which must have
9 been pretty plain and obvious in the course of the
10 hearing, that they were going to be arising, there is no
11 reason why instructions could not have been taken in the
12 usual way by the OFT to deal with them or even to have
13 consulted with Sports Soccer and asked them if they were
14 points they wanted put forward.

15 What has happened, I gather, is that our closing
16 written submissions have been provided to
17 Sports Soccer's solicitors and that has generated this
18 result.

19 Well, I have no objection to our document being
20 provided to them, and I have, if you like, a degree of
21 sympathy, in the sense that if things were being said
22 about me in proceedings I was not party to there might
23 be things I would want to say. I respect that.
24 I understand it.

25 But in my submission, insofar as it is said that it

1 should have some sort of impact upon your thinking, or
2 the decision to be arrived at in this case, then
3 I certainly object to your even looking at the document.
4 It is quite irrelevant, wholly irrelevant and
5 inadmissible for that reason. It is four and a half
6 pages long. It seems to be carefully reasoned. It is
7 hotly contested on matters which you will readily
8 appreciate. In my submission, it is quite inappropriate
9 that it should be provided to you.

10 THE PRESIDENT: Yes.

11 MR WEST-KNIGHTS: May it please you, sir. Briefly, this
12 document is almost in two halves, rather like,
13 apparently, a game of football. It contains in the
14 first two-odd pages factual statements as to the
15 situation on the ground in relation to real training or
16 what we call pursuant to the licence agreement training,
17 as to which I have far less of any objection.

18 THE PRESIDENT: Yes.

19 MR WEST-KNIGHTS: However, having looked at it again, it
20 would not simply be a question of our taking a pair of
21 scissors a third of the way down page 2 or 3 and
22 excising the rest because there is advocacy built-in at
23 places in the rest of it where Sports Soccer purport to
24 join forces with the OFT in respect of certain
25 submissions.

1 Now that, plainly, is inappropriate. The second
2 half of this document is pure advocacy.

3 Now, I have already withdrawn and apologised for
4 both the width but perhaps more particularly the
5 ambiguity of the statement which I made the day before
6 yesterday and our position on the inferences to be drawn
7 from this stuff, which this material in this note
8 purports to cover, is plainly and accurately set out in
9 an entirely neutral and forensic note which is with the
10 Tribunal.

11 If it assists my learned friend Mr Gunney, I repeat
12 the apology in his presence.

13 THE PRESIDENT: So you are not suggesting you should draw
14 any adverse inference as to the integrity or honesty of
15 Sports Soccer from any of the information of a financial
16 nature in relation to licensing arrangements that we
17 have been hearing about.

18 MR WEST-KNIGHTS: Exactly. If we knew more, there would be
19 a reason that would emerge for the dichotomy between the
20 various positions and then more would emerge. But at
21 this stage there is, as my learned friend Mr Morris
22 pointed out -- I am happy to agree with him on this one
23 and only occasion -- a range of reasons as to why that
24 may have occurred, and none of them is necessarily
25 adverse to Sports Soccer. It is therefore wrong of me

1 to suggest that that inference is to be drawn. It is as
2 simple as that.

3 So far as this actual document is concerned, I ally
4 myself with everything that Lord Grabiner has said,
5 except there are one or two primarily alleged facts in
6 this that I would be happy for the Tribunal to know.

7 THE PRESIDENT: Yes, thank you.

8 Have you had a chance to look at this document?

9 MR MORRIS: I have. Let me start off by inviting you to
10 look at JJB's closing submissions, or just read you
11 a passage from JJB's closing submissions at
12 paragraph 25.

13 THE PRESIDENT: The "shenanigans".

14 MR MORRIS: "... the shenanigans we have had throughout the
15 hearing as to the consequence in financial terms of the
16 dealings in 2000 and 2001 between Umbro and
17 Sports Soccer. It is impossible to understand why these
18 parties or either of them has been able to provide
19 simple explanations to simple questions."

20 Three or four lines down:

21 "There is however an absolute determination on the
22 part of both these parties to maintain a shroud of
23 mystery over their dealings."

24 This is Sports World responding. You have to bear
25 in mind that this is against the background of questions

1 from the Tribunal to Umbro, 19th March 2004. This has
2 arisen because the Tribunal has expressed a concern that
3 it has not got to the bottom of some basic factual
4 stuff.

5 As I understand it, leaving to one side all the
6 allegations of impropriety and the like for the moment,
7 this document provides Sports Soccer's answers to some
8 of those questions. I have not read it in detail, to be
9 perfectly honest, because I have not looked at it, but
10 it is responsive to some of those outstanding points.

11 If it is being urged upon you that this is
12 a central, vital issue and all these facts are vitally
13 important, it is impossible, we would submit, for this
14 Tribunal not to see what Sports World says about it, in
15 circumstances when JJB and Allsports themselves have
16 been complaining bitterly (a) that Sports World are not
17 giving them the answers and (b) that there is something
18 fishy going on.

19 This is the counterpart of the Tribunal's request to
20 Umbro. So we do submit very strongly that this is
21 material you must look at and we further submit, just
22 for your reference, sir, Allsports also did a further
23 note yesterday morning about the inference and you will
24 see there that there are statements made in that
25 document which is a two-and-a-bit page document from

1 Mr West-Knights, and I do not propose to take you to it
2 in detail, unless you want me to, but there are
3 assertions made.

4 For example:

5 "There was a very close and secret relationship at
6 all material times. There are inferences to be drawn.
7 There is something about or connected with these
8 arrangements which is as yet unknown to the rest of us
9 which Sports Soccer and Umbro are unwilling to reveal,
10 [et cetera]. That unwillingness cannot sensibly have
11 anything to do with commercial confidence. The CAT has
12 been astute to go into camera. The reason for the
13 unwillingness is immaterial. Umbro and Sports Soccer
14 have chosen not to displace these conclusions so they
15 must at least be correct."

16 This, we would suggest, is Sports Soccer's answer.
17 You heard what Mr Gunney said yesterday about this
18 material. It must be taken into account if you are
19 troubled by any of this, and secondly, the suggestion
20 you cannot even look at this material before you decide
21 whether or not you can take it into account is, in our
22 respectful submission, quite ludicrous.

23 If there is material that is said to be submission
24 or prejudicial this Tribunal can put it to one side, but
25 you certainly should look at it before you decide

1 whether or not you think it contains material which may
2 assist you, the Tribunal, in getting to the bottom of
3 the relationship between Umbro and Sports Soccer,
4 assuming that you decide that this is a relevant matter.

5 LORD GRABINER: Sir, you will forgive me, and I will
6 apologise, because I am conscious this time is eating
7 into our time. I must confess that I am entirely
8 baffled by the fact that my learned friend thinks it is
9 appropriate to support this debate. The person who
10 seeks to put in this document is Sports Soccer, not the
11 OFT, as I understand it. This is a Sports Soccer
12 document. Their complaint is that their position may be
13 misunderstood or mischaracterised and in my submission
14 it is entirely inappropriate for the OFT, who should be
15 standing in a neutral position on these matters, to be
16 making that argument.

17 My learned friend even said, if I heard him right a
18 few minutes ago, notwithstanding his concern that you
19 should see it and that it was ridiculous that I suggest
20 you should not see it, that he had not even read it
21 himself. That is pretty fantastic stuff; in my
22 submission, entirely inappropriate.

23 The point about this debate is that it is concerned
24 with an extraneous issue. It is concerned with
25 Sports Soccer's concerns about its own reputation. It

1 is not concerned with the matters that you are here to
2 decide. If it does affect the matters that you are here
3 to decide, it may lead to the need for further
4 cross-examination, which, for the reasons I have already
5 mentioned in our submission, would be entirely
6 inappropriate.

7 (The Tribunal confer)

8 THE PRESIDENT: Mr Gunney, I think the position on this part
9 of the case is as follows: the Tribunal at the moment
10 feels that there are one or two factual issues regarding
11 Umbro and Sports Soccer that we have not got quite as
12 near to the bottom of as we would like to have. Those
13 are factual matters.

14 The Tribunal had it in mind anyway this afternoon to
15 send a further letter to Umbro asking for specific
16 responses on certain factual issues. Our feeling at
17 this stage is that we should probably include
18 Sports Soccer in that request for further information,
19 since some of it applies to Sports Soccer.

20 We are, however, only seeking factual information on
21 a certain limited number of points. We do not, at this
22 stage, wish to go back over issues of credibility or
23 other matters that may have arisen in the evidence and
24 we certainly do not wish the eliciting of further
25 answers to factual questions to be an opportunity for

1 further advocacy in the case.

2 If we were to invite Sports Soccer to give us some
3 factual questions, we would expect those to be answered
4 in a dry and factual way.

5 As far as Sports Soccer's concern about what was
6 said earlier about its general integrity in this case,
7 Mr West-Knights has made it perfectly clear that that is
8 withdrawn as far as any inferences may be sought to be
9 derived from the financial information that we have or
10 have not received so far.

11 As far as any inference that may be drawn from the
12 evidence that has been given in the witness box, at this
13 stage that is a matter for the Tribunal and that is not
14 a matter that we need further submissions on from beyond
15 those that we have heard already.

16 So I think where we would prefer to leave it, this
17 afternoon, is like that. That implies that we will give
18 Sports Soccer the opportunity to supply us with facts on
19 matters that we think might be relevant but, as it were,
20 not more than that at this stage.

21 We will in due course, when we have reflected over
22 it and seen whatever it is that turns up, of course we
23 will circulate what we get to everybody else and they
24 can comment and see whether it is relevant to the case
25 or not. If they wish to tell us, "Completely

1 irrelevant, put it out of our collective minds", then of
2 course we will listen to submissions when we get them,
3 but that is the approach we propose to take.

4 LORD GRABINER: I am very content with that for my part, my
5 Lord.

6 MR MORRIS: May I make an observation on that? The first
7 observation is this, and I am sure it will arise in any
8 event. It may be appropriate. Included within the
9 information requested are effectively the questions that
10 were asked by you of Umbro before, about those specific
11 figures.

12 THE PRESIDENT: Absolutely, yes.

13 MR MORRIS: So that in fact what is in here can be put in
14 there.

15 The second point is this. Going back to page 25 of
16 JJB's submissions, and I did not take you to the end of
17 it, but I would like to draw your attention to the
18 submission that is made by JJB, that it says that the
19 Tribunal is invited to conclude that the relationship
20 between them was not at arm's length, that there was
21 a special relationship which favoured them in a way that
22 gave them advantages, but they sought to keep it secret
23 and the dominant personality was Mr Ashley.

24 Insofar as they remain live issues, in the light of
25 such information that comes back, it may be that we may

1 wish to make submissions in response to that
2 proposition.

3 THE PRESIDENT: I have just said that people will get
4 another shot if they want to.

5 MR MORRIS: I wanted to draw that aspect to your attention
6 sir.

7 THE PRESIDENT: At the moment what we want to try to do is
8 get as far to the bottom of these facts as we can, with
9 a view to being in a sensible position to assess some of
10 these arguments. I understood Lord Grabiner to be
11 content and Mr West-Knights to hint a moment ago he was
12 not actually opposing certain factual information.

13 MR WEST-KNIGHTS: When and if Mr Morris reads this piece of
14 paper from Sports Soccer he will see that it does not
15 displace any of the primary facts in respect to the
16 relationships, but he can rest assured when he reads it
17 that it is very unlikely to cause any further
18 submissions.

19 THE PRESIDENT: Mr Gunney, that is where we are.

20 MR GUNNEY: I wish to add one point. There is essentially
21 a section in the note, one page, which deals with the
22 sort of Sports World comments really on the questions
23 asked of Umbro by the Tribunal which we consider to be
24 factual and would invite the Tribunal, if it saw fit, to
25 review that section and --

1 THE PRESIDENT: Well, when you get a copy of the questions
2 that we are going to ask Umbro, I think you will have
3 the opportunity then to supply us with factual
4 information in that regard and you will be able to
5 probably incorporate what you have just referred to in
6 that answer to the Tribunal.

7 MR GUNNEY: We will be happy to do that.

8 THE PRESIDENT: Thank you very much indeed for your help.

9 Reply submissions by LORD GRABINER

10 LORD GRABINER: That exchange reminded me of Albert Haddock
11 making a submission to the magistrate in some driving
12 offence where he persistently calls the magistrate "my
13 Lord", until eventually the magistrate, embarrassed but
14 chuffed, corrects him and he responds, "It is only
15 a matter of time, my Lord, it is only a matter of time",
16 and I think that he got off the charge as well.

17 Just so to speak as a postscript to the point made
18 by the solicitor for Sports Soccer, and I am sure you
19 have the point well in mind, you will get answers to the
20 questions you raise, so I say no more.

21 So could I make some reply submissions.

22 First of all, on behalf of the OFT, Mr Morris
23 submitted that these were all what he called "very plain
24 cases", taking each of these grounds of appeal as, so to
25 speak, a separate case.

1 He went so far as to suggest that if JJB's appeals
2 succeeded, particularly in relation to the Manchester
3 United charge, then it was difficult to imagine that any
4 conviction could ever stick and that was a concern he
5 was expressing and no doubt trying to signal or alert
6 the Tribunal about the possible impact in the future on
7 the exercise of this jurisdiction.

8 Now, in our submission you should not take that
9 submission too seriously. In truth, it amounts, we
10 suggest, to a complete distortion of much of what you
11 have heard over the last three weeks. We would, if
12 necessary, make precisely the opposite contention, which
13 is that if JJB's appeals are rejected, especially in
14 relation to the three charges, leaving aside the
15 Manchester United charge for the moment, but it is
16 impossible, we would suggest, to imagine a case where an
17 appeal could ever succeed, and I do put my case that
18 high.

19 The reason we make that submission is that if the
20 words of the Tribunal in the Napp case, to the effect
21 that the appellants are entitled to the presumption of
22 innocence and the benefit of all reasonable doubt. If
23 those words are to have any meaning at all, and they are
24 not simply doing an exercise in paying lip service or
25 uttering a mantra and then going on doing some other

1 exercise, if those words have meaning -- as they do have
2 and they really do have a meaning, I cannot press upon
3 you more strongly than is within my power to do, that
4 they do have real meaning and force -- then the OFT must
5 prove its case on the basis of strong and compelling
6 evidence, and nothing less will do.

7 Mr Morris complains about the difficulties which are
8 associated with proving cartel cases, and I dealt with
9 that point in our earlier submissions. All that I would
10 say about that now is that you must not be hoodwinked by
11 this argument. The standard of proof is driven not by
12 the difficulties of proving the case but by the
13 seriousness of the charges, and it is because the
14 charges are so serious, with serious consequences, that
15 you, as a Tribunal, must be genuinely satisfied on
16 a strong and compelling basis of guilt before reaching
17 that conclusion.

18 The reason why we say these charges are in tatters
19 is because the findings in the decision have not been
20 borne out by the evidence heard by the Tribunal, in
21 particular, the evidence called by the OFT itself.

22 The key witness against JJB, for example, on the
23 England Euro 2000 charge and the continuation agreement,
24 was Mr Ronnie. His evidence was so unreliable that even
25 the OFT, in its closing submissions, in paragraph 18,

1 acknowledged the fact in terms, and in these
2 circumstances we say that it would be unsafe and unfair
3 for the Tribunal to rely on his evidence as a basis for
4 rejecting these appeals.

5 It is a very simple point. What we say is this: it
6 is not possible to convict JJB if you are in fact
7 applying the presumption of innocence and taking
8 seriously the proposition that JJB is entitled to the
9 benefit of the doubt, of reasonable doubt.

10 Can I give you a simple example, and I apologise in
11 a sense for its repetition, but it is so fundamental and
12 it brings the point home very plainly. I will do it, if
13 I may, without going back to the documents, because
14 I know that you have them well in mind.

15 I just want to look not at the marginal issue but at
16 the crux of the England Euro 2000 charge, just to bring
17 home the point that I am seeking to get across. I will
18 give you the references and they will be on the
19 transcript. At paragraphs 83 to 88 of Mr Ronnie's
20 second witness statement, witness file 3, page 106,
21 Mr Ronnie describes the price fixing agreement he made
22 with Mr Ashley on 24th May and what occurred thereafter.

23 There is no mention whatsoever of any agreement with
24 JJB or even of any telephone call to JJB to inform them
25 of the agreement with Sports Soccer.

1 Then in Mr Ronnie's third witness statement,
2 paragraphs 32 to 33, Mr Ronnie says that following his
3 agreement with Mr Ashley on 24th May he telephoned
4 someone from JJB, who agreed that JJB would maintain its
5 prices at £39.99.

6 Then chronologically comes the decision and the
7 decision is premised on the basis of an agreement having
8 been reached with JJB as to its retail prices, and we
9 have had reference to the paragraphs earlier today,
10 paragraphs 414 and 415.

11 THE PRESIDENT: Yes.

12 LORD GRABINER: Paragraph 415 begins with the words:

13 "There is clear evidence that such an agreement was
14 reached ..."

15 That is what the decision says.

16 THE PRESIDENT: I think somewhere in the decision there is
17 a sort of definitions paragraph that says "Whenever we
18 say 'agreement' we also encompass 'certain practice.'"

19 LORD GRABINER: My Lord, that may be and I have something to
20 say about that when I come to concerted practice in
21 a moment.

22 In a nutshell, what we do say is that -- I think it
23 is to be found in section 2 of the Act, as you know --
24 the notion that the concerted practice is something
25 significantly different from an agreement is a bit of

1 a fanciful one. I would submit that it may not have all
2 the elements of an agreement, but it has to be something
3 in the nature of an agreement. I would certainly submit
4 it may not have consideration. The consideration, if
5 any, may be inadequate. There may not be a formal offer
6 and acceptance, and so on. But it has to be something
7 in the nature of an agreement in order to qualify under
8 that definition.

9 THE PRESIDENT: The OFT submits reduction in uncertainty.

10 LORD GRABINER: I will come, if I may, to deal with the
11 point. Just coming back to the sequence of events.

12 Paragraph 27 of Mr Ronnie's fourth witness statement
13 expressly disavows the allegation that there was any
14 agreement with JJB as to its prices.

15 Then paragraph 53 again, that we looked at a little
16 earlier, of the amended defence, specifically disavows
17 any case based on assurances given by JJB as to its
18 prices and in particular that is in paragraph 53(c), so
19 that the case before the Tribunal is based solely upon
20 receipt of a phone call from Mr Ronnie about
21 Sports Soccer's price agreement with Umbro, coupled with
22 pressure from JJB.

23 Then in cross-examination Mr Ronnie came up with
24 a wholly new version of events; namely, that he had
25 obtained an agreement from JJB prior to his meeting with

1 Mr Ashley on 24th May, that JJB would price the England
2 shirt at £39.99. That is transcript Day 3, pages 141 to
3 144 and transcript Day 4, pages 17 to 19.

4 I apologise for taking you through that process. It
5 is rather tedious and I know you all have the points
6 well in mind. But what we say about that process is,
7 frankly, that you would not hang a cat on that material.
8 The evidence is all over the place. There is absolutely
9 no justification for lighting upon any of these versions
10 in favour of any other, except possibly for the one in
11 second Ronnie, which Mr Ronnie himself said was likely
12 to be the best record of his true recollection,
13 transcript Day 4, page 138. The point about that version
14 is that it does not implicate JJB in any wrongdoing.

15 My learned friend Mr Morris, before we adjourned for
16 lunch, struggled, he struggled manfully, with respect to
17 him, with the questions that you were putting to him,
18 but he could not cope with dealing with this debate.

19 In particular, he kept looking at it on alternative
20 hypothetical bases, by reference to the different ways
21 in which the law might work. But what he was not
22 prepared to address was a comparison of the examples
23 against the case as it now stands. The reason is that
24 he cannot, because it is in such a shambles, for the
25 reasons I have been trying to develop.

1 In our submission, it is not a debate about
2 difficulties of proof. The point is that the evidence
3 against JJB is useless and cannot properly be relied
4 upon as a justification for confirming the OFT's
5 decision.

6 Can I just make one or two other points about that
7 perhaps in this context, actually, just a point that has
8 occurred to us today. I suppose it is rather a basic
9 point, but it is an observation on the evidence. If
10 there was such an agreement -- let us just make the
11 hypothesis that whatever the agreement was and whenever
12 it was made, before or after, or with whom, or whenever
13 and so on, let us assume it was in place in relation to
14 England Euro shirts.

15 It is very interesting that no-one has ever
16 suggested that there was any reference to this supposed
17 agreement at the 8th June meeting which took place just
18 a few days later. It is odd that somebody would have
19 gone to the 8th June meeting and somebody would not have
20 said, "Well, you know, let us do for this deal, the
21 Man United shirts, what we have just agreed to do in
22 relation to the England Euro 2000 shirts". It is
23 exactly the same deal but in respect of a different
24 shirt.

25 No-one has ever suggested that there was any such

1 conversation at the 8th June meeting. The inference
2 that you may draw from that is that no-one imagined that
3 there was such a deal in place, certainly not as far as
4 JJB was concerned.

5 The other point I want to turn to next is what we
6 call the consensus point. I want to say something about
7 that and the legal test for a concerted practice. First
8 of all, and I am not going to invite your attention to
9 it but just to remind you that on pages 1 to 3 of our
10 skeleton argument we did say something in the opening
11 skeleton about that and you have the relevant extracts
12 there in front of you.

13 Our submission is that on the facts of this
14 particular case the legal test is not in issue. That is
15 what we say. In other words, if you accept -- and I put
16 it at its lowest -- as plausible or reasonably plausible
17 our contention as to what the facts were, the legal
18 debate does not arise and that is an important point.

19 You can have a theoretical, legal debate but it does
20 not impact upon those facts, because the facts are
21 clearly on the proper side of the line.

22 The reason that my learned friend wants to make it
23 an issue, and he makes it an issue in order to make it
24 an issue, he seeks to water down, as I would
25 respectfully suggest, the relevant legal requirement of

1 what is necessary in order to make good this charge.

2 The reason he has to try to get it watered down is
3 because he recognises implicitly -- but of course he
4 does not state a premise -- that the facts do not add up
5 as far as the OFT are concerned. The facts are very
6 weak from their point of view and that is why he has to
7 cling to the lowest possible common denominator he can
8 point to, in order to give a rather convoluted
9 construction to the meaning of the expression that you
10 are concerned with here, in order to try and make it fit
11 the facts.

12 That is a very dangerous exercise, first of all
13 because it runs the risk that you end up with the wrong
14 legal test. Secondly, because it involves perverting
15 the facts, and I am sure that you are conscious of the
16 problem.

17 I do suggest, and I repeat the point but only just
18 once more, you say it three times to a magistrate
19 I think, but only once is necessary to a High Court
20 Judge and a Tribunal like this and I apologise for
21 saying it twice.

22 THE PRESIDENT: How are we to take that exactly?

23 LORD GRABINER: It just shows you how honest my advocacy is.

24 The point is that the legal analysis is the last
25 point, it is not the first point. The first point is

1 the facts.

2 You know what our argument is on all this. You know
3 that our version of the story is that Mr Hughes's
4 proposal of the £45, rejected by Mr Whelan, and the
5 meeting ends with Mr Whelan leaving the meeting in
6 a huff saying, as part of his rejection, "Everyone knows
7 that I do not sell above £40."

8 In our submission, if that is the correct
9 characterisation of the facts, you do not get near the
10 legal problem and I would also suggest this. It is
11 difficult to imagine that it is possible to commit this
12 wrongdoing by accident. That seems to be the import of
13 my friend's argument. I am not sure if he has thought
14 through the consequence of his argument in that sense.

15 At paragraph 48 of the closing submissions, the OFT
16 suggests that the essential element of a concerted
17 practice is the communication and receipt of competitive
18 information by A to B, which has the object or effect of
19 eliminating or reducing uncertainty on the part of B as
20 to A's future conduct in the market.

21 That is the essence of it. They say in terms that
22 there is no need for any consensus and our submission is
23 that simply cannot be right. If mere communication were
24 enough to constitute a concerted practice, any public
25 statement of policy by a company would be an

1 infringement of the competition rules.

2 A unilateral declaration of what your policy was
3 could end you up on the wrong end of that test, if that
4 test is right, which is why that test is obviously
5 wrong.

6 Notably, the OFT does not, and nor could it, allege
7 that JJB's announcement to the City that it would not
8 price replica shirts above £40 constituted a concerted
9 practice. We say that a unilateral statement made as
10 part of the rejection of an offer to price fix cannot on
11 any sensible basis amount to co-operation, sufficient to
12 found a concerted practice.

13 I do not suggest that in order to found a concerted
14 practice it is necessary to have an offer and acceptance
15 type analysis. That would be a very simple case, but
16 I certainly do not suggest that that common law approach
17 is exclusive and is the only way in which you can
18 achieve the result that a concerted practice has been
19 committed.

20 THE PRESIDENT: Would you say that the Tate & Lyle decision
21 represents a fair summary of what the law is?

22 LORD GRABINER: I would, actually, and I wanted to go to
23 Tate & Lyle. I can do it very, very quickly. If you
24 would look at tab 14. I would, with great respect,
25 adopt the analysis of Professor Wish(?) as being an

1 accurate summary of the legal position.

2 If you look at tab 16, I wanted to show you the
3 context of one of the great dangers of lifting odd
4 little snippets out of judgments like this is that one
5 loses sight of what have the underlying context was. It
6 is very important in these cases.

7 If you look at paragraph 9 of the judgment on
8 page 2044, at the foot:

9 "Meanwhile on 20th June 1986 a meeting had taken
10 place between representatives of British Sugar and
11 Tate & Lyle in which British Sugar announced the end of
12 the price war in the United Kingdom industrial retail
13 sugar markets. The meeting was followed up to and
14 including 13th June 1990 by 18 other meetings concerning
15 the price of industrial sugar at which representatives
16 from Napier Brown, James Budget Sugars, the leading
17 sugar merchants in the UK, were also present. At those
18 meetings British Sugar gave information to all the
19 participants concerning its future prices. At one of
20 those meetings British Sugar also distributed to the
21 other participants a table of its prices for industrial
22 sugar in relation to purchase volumes.

23 "11. In addition, up to and including the 9th May,
24 Tate & Lyle and British Sugar met on eight occasions to
25 discuss retail sugar prices. British Sugar gave its

1 price tables to Tate & Lyle on three occasions, once
2 five days before and once two days before their official
3 release into circulation."

4 That is a very different case, very, very different.
5 When you have that kind of material, even if you did not
6 know what passed at the meeting orally, it would not be
7 difficult to come to a view as to whether or not the
8 behaviour that is there described was offensive.

9 But that is not this case. This is a very, very
10 unusual case and quite a lot is being sought to be put
11 on people's recollections of donkeys' years ago as to
12 precise words that may have passed; the subtlety, for
13 example, of the words you were putting to my Lord before
14 lunch, as to the precise way in which the question was
15 phrased or the words that were used. These are
16 important questions, and that is why it takes you back
17 to the fact findings.

18 Now Mr Morris next said that JJB did not
19 consistently go out at under £40. He said there were
20 some exceptions and he thereby sought to belittle the
21 £39.99 point. But the examples he gave were de minimis
22 and perhaps the court can recall Mr Guest being very
23 rude about West Ham shirts and there might have been
24 a few West Ham shirts sold, but nobody wanted West Ham
25 shirts except those down at Upton Park who were singing

1 "pretty bubbles" and all the rest of it. But it was not
2 something that the world wanted.

3 These were trivial examples which in our submission
4 did not undermine the strength of our point. The
5 evidence is in Mr Russell's fourth witness statement.
6 It is not controversial and our point, in our
7 submission, is not susceptible of serious contradiction.

8 Moreover and more importantly, the market perception
9 was that JJB did not go out at £40 or more and that
10 market perception evidence was given by Mr Hughes and by
11 Mr Ashley. Mr Hughes, in transcript 9, page 208,
12 Mr Ashley in transcript 1, page 106 and page 107.

13 Then a separate point. My learned friend said on
14 a number of occasion that is Mr Ashley was a virtuous
15 fellow. He was a serial discounter. That is put
16 forward as a virtuous feature of Mr Ashley. In our
17 submission that proposition needs to be heavily
18 qualified. The evidence shows that there was a big
19 distinction between Sports Soccer's behaviour at launch
20 when compared with Sports Soccer's behaviour post launch
21 and there is actually a number of examples in the papers
22 that we have pulled together and I just want to explain
23 to you.

24 There are a number of examples, first of all, in the
25 decision itself. I will give you a reference, but I am

1 going to give you a summary piece of paper in a second
2 which draws on the material before the Tribunal, so you
3 have it all in one place.

4 But in annex 3, tables 1 to 8 of the decision, there
5 are some examples there and there is also a schedule of
6 examples in the papers that we submitted in response to
7 the rule 14 notice, C3, tab 25, page 945. What the data
8 shows is that in the relevant period -- and by that
9 I mean April 1999 to August 2001 -- Sports Soccer, with
10 limited expectations, launched replica shirts at £39.99.

11 What we have done, as I say, we have put all this
12 into a tabular form for you. As I say, it is based on
13 material which is in front of the Tribunal and if copies
14 can be provided to the other side, could I just show you
15 this document? It is drawn, as you can see, from the
16 OFT decision and insofar as these are drawn from the OFT
17 decision you will see the letter D shown under the first
18 column, for example, the very first one, England, when
19 it says D, that means it is in the decision.

20 It is also drawn from the Lexicon report on the
21 pricing of replica football kits, which is in the bundle
22 C3, tab 25. What it shows is that, far from being
23 a serial discounter at launch, Sports Soccer priced 30
24 out of the 36 shirts listed at £39.99 at launch.

25 And if you just cast an eye down, you will see six

1 exceptions, but the vast majority of these shirts went
2 out on a launch basis at £39.99. Then there is a price
3 change thereafter and this is where Sports Soccer did
4 its discounting thereafter. Not, on the whole, at the
5 launch date. I do not need to take you through the
6 detail, but you will find that what we have done is
7 simply to reproduce the material that is there.

8 At the forefront of my learned friend's submissions
9 he posed a series of rhetorical questions which were
10 designed to make Mr Ashley look good and to support the
11 OFT's complaints against JJB. I would not pretend to be
12 able to answer -- you are still interested in that
13 document, I am sorry.

14 THE PRESIDENT: Sorry, I was just wondering to myself what
15 reliance or even motives we can take of launches
16 affecting other brands, because we do not know anything
17 about Mr Ashley's relationships with those other brands.

18 LORD GRABINER: I thought his complaint was against them
19 just as much as the others.

20 THE PRESIDENT: That is exactly the point, I think. If he
21 is finding himself under similar pressures from Nike and
22 Reebok and Adidas as he is from Umbro, that is a ready
23 explanation for why he is going out at £39.99.

24 LORD GRABINER: I do not think he has gone so far against
25 them --

1 THE PRESIDENT: He may may or may not have done, but how can
2 we deduce much from --

3 LORD GRABINER: All I am saying is on that material there is
4 fairly consistent behaviour that he is not price cutting
5 at launch. That appears not to be his regular practice.
6 On the contrary, his practice of price cutting appears
7 to come in at a later stage; probably, one suspects,
8 earlier than the competition, but it comes in after the
9 event and it is no doubt a nice calculation for him if
10 there is a very popular product that he expects to sell
11 a lot of, then he will sell at the full price at launch
12 and then after the sort of excitement of the new launch
13 begins to drop away, then he perceives that the best way
14 he can achieve sales is by price cutting and that is
15 what he does.

16 But he is not a universal price cutter, so to speak,
17 from the OFT.

18 My learned friend, as I was saying, posed some
19 rhetorical questions and he said that we were not
20 answering these questions and that we could not provide
21 answers to these questions. Can I just try to at least
22 make a stab at answers to some of these questions, if
23 I can just identify them.

24 Why would Mr Ashley, a committed discounter, agree
25 to fix prices? In our submission, he was not averse to

1 pricing at £39.99 when it suited his commercial
2 purposes.

3 Why would Mr Ashley go to the 8th June meeting and
4 not agree £39.99? Well, one reason for going to the
5 meeting was that he wanted to glean intelligence about
6 the competition; perfectly good reason for going, in any
7 event.

8 Why would Mr Ashley persistently blow the whistle on
9 price fixing to which he was a party? The answer is for
10 the same reason that all whistle blowers who are
11 wrongdoers come forward. Mr Ashley was a serial price
12 fixer and by coming forward he expected to be given
13 leniency.

14 Could I caution the Tribunal as well against going
15 too far down this line. It is not your role to fathom
16 the intricacies of the mind of Mr Ashley, that would be
17 to take your eye off the ball. In any event, may
18 I respectfully suggest that you would never get to the
19 bottom of it. Mr Ashley is an exceedingly smart
20 operator, otherwise he would not have made such
21 a fabulous success of his business life at such a young
22 age. He is a very sophisticated trader.

23 The probability is that his state of mind and his
24 commercial purposes changed several times during the
25 period that you are concerned with in this investigation

1 and the reason that it would have changed would have
2 been in response to changing circumstances and his
3 perceptions of where the business was going and what he
4 wanted to do with it.

5 The Tribunal has to decide whether or not on the
6 material it has seen JJB should be acquitted or
7 convicted of these serious charges and that is the ball
8 to keep your eye on, if I may say so, and I have no
9 doubt that you will do so.

10 Could I turn, in conclusion, just deal with a number
11 of points that are raised in my learned friend's written
12 closing submissions? If I could just invite your
13 attention to the document, perhaps just to have it
14 handy.

15 First of all paragraph 29, where they charge
16 Mr Whelan with having given his evidence as being, as
17 they say, "littered with inconsistency and changes in
18 story".

19 In our submission, that misses the point. What is
20 undeniable is Mr Whelan's conviction as to the
21 fundamental issue has not wavered at all. He always
22 maintained that Mr Hughes suggested the £45 price and he
23 responded by saying that he would not participate in
24 a price fixing arrangement. That has always been his
25 case. He had a policy through JJB of not selling above

1 £40. He made the point and he left. That has always
2 been his position.

3 Contrast that with the position of Mr Ashley, the
4 OFT's main witness on the point. When he first told the
5 OFT about the 8th June meeting, he said that it
6 concerned England not Man United shirts, and we have
7 been through all that.

8 He made this statement on 30th March, only about
9 nine months after the meeting. The notion that
10 Mr Ashley's evidence on this issue is strong and
11 compelling and that Mr Whelan's is littered with
12 inconsistency is nonsense. It is just a statement. But
13 when you analyse it, it is nonsense. You must not,
14 therefore, take at face value some of the more
15 extravagant propositions you find in this submission.

16 Could I invite your attention to paragraph 31? The
17 OFT here makes a lot of play of the fact that in our
18 closing submissions we did not deal with the fact that
19 DLA had previously said that Mr Whelan did not recall
20 Mr Hughes holding up the MU shirt at the 8th June
21 meeting. I think you will remember that bit of evidence
22 as well, in the cross-examination on the point, of
23 Mr Whelan.

24 The reason we did not deal with it is because it is
25 such a trivial, irrelevant point. There is no dispute

1 that the meeting began with Mr Hughes holding up the
2 Man United shirt. That was the evidence of Mr Hughes,
3 of Mr Ashley and of Mr Whelan in cross-examination.
4 When evaluating the witness's oral testimony, the
5 Tribunal must concentrate on the quality of the evidence
6 on the fundamental issues in the charge. That is not a
7 fundamental issue in the charge. All it tells you is
8 that on some marginal point Mr Whelan's recollection was
9 not great. But when the shirt was held up to him in
10 cross-examination he said, "You are absolutely right,
11 that is exactly what happened." So what? What does
12 that tell you about the quality of his evidence?

13 Answer: nothing.

14 At paragraph 60 onwards, the OFT deals with the
15 relationship between Umbro and Sports Soccer. The OFT
16 case is based on the premise that Umbro was in
17 a position to put overweening pressure on Sports Soccer.
18 That is a fundamental plank of the argument I have to
19 meet. In our submission, given the existence and the
20 nature of the special relationship, that argument is
21 simply not tenable.

22 The truth of the position is that Umbro and
23 Sports Soccer had an unusually close commercial
24 relationship. It was not a question of which party
25 pressurised the other. The reality is that they had an

1 ongoing and mutually beneficial commercial relationship.
2 Sports Soccer got the licence agreement that Mr Ashley
3 acknowledged in terms was highly beneficial to him.
4 Umbro got funds up front.

5 As part of this relationship Umbro, which was
6 desperate to protect the image of its statement products
7 and thus, as Mr Ronnie said, the perception of it as
8 a brand, made agreements with Sports Soccer as to the
9 prices at which it would sell the replica kits that it
10 was acquiring from Umbro. This was part of the overall
11 deal.

12 Then at paragraph 68(4), which is on page 24, the
13 second bullet on page 24. Could I invite your attention
14 to that passage? That is bit of a howler, in our
15 submission, and again it is an indication of why you
16 must look rather carefully at this material.

17 The OFT says that Mr Ashley went to the OFT without
18 legal advice and had to be advised by the OFT that he
19 could apply for leniency. The suggestion is that he did
20 not go to the OFT because he was looking for leniency
21 off his own bat, so to speak, but he went because that
22 was the legal advice that was given, or the advice,
23 forgive me, that was given to him by the OFT.

24 Reliance is placed on Mr Ashley's first statement,
25 paragraph 7. I apologise for doing so, but could

1 I invite your attention just to that? It is page 6 of
2 file 1, and I am sorry for taking you back to a
3 document. It is paragraph 7. You can read the whole
4 paragraph, but I am content with the first sentence:

5 "Mike Ashley said that his latest complaint to the
6 Office had been prompted by a speech made by
7 Margaret Bloom that referred to whistle blowers being
8 granted leniency ..."

9 So he discovered this himself. In that knowledge,
10 he then goes to the OFT. That was his evidence, nothing
11 about OFT and legal advice and so on and so forth. What
12 you have in the passage in the OFT closing written
13 submission is, with respect, inaccurate.

14 THE PRESIDENT: I am not sure I have quite followed it,
15 Lord Grabiner.

16 LORD GRABINER: What he he said is he went without legal
17 advice and had to be advised by the OFT that he could
18 apply for leniency.

19 THE PRESIDENT: What I take that to mean is, and perhaps it
20 does draw on your paragraph 7, to which you have just
21 referred to --

22 LORD GRABINER: It does in terms, actually.

23 THE PRESIDENT: -- that he read in the newspaper a speech by
24 Mrs Bloom. He thought, "Oh well, if I go to the OFT,
25 whistle blowers can get leniency." He did not ask

1 whether any lawyer should go to the OFT, he just went to
2 the OFT and the OFT told him, in the form of Mr --

3 LORD GRABINER: But what he sought to convey in the second
4 bullet of that page is that he had been told by the OFT
5 that he could apply for leniency, in other words that he
6 had gone to the OFT in the first place to, so to speak,
7 reveal all, and then they had said to him, "Oh well, we
8 have this leniency arrangement," and so on.

9 THE PRESIDENT: That is what I take the inference from the
10 next sentence to be:

11 "Kevin Barton advised that Sports Soccer could
12 consider applying for leniency."

13 Kevin Barton being the OFT man.

14 LORD GRABINER: But the point I am trying get across and the
15 point that is being made in paragraph 7 is that in
16 advance of going to the OFT he was aware that leniency
17 was available to him.

18 THE PRESIDENT: Apparently, yes.

19 LORD GRABINER: That is the point, and I would not want you
20 to imagine from the second bullet that he only
21 discovered that after he had gone to see the OFT.

22 THE PRESIDENT: Had to be advised by the OFT. I see.

23 LORD GRABINER: In other words, it sought to make him look
24 as if he had gone to the OFT and only discovered the
25 leniency position afterwards. The truth is that he

1 learnt about the leniency position first and that is
2 what led him to go to the OFT. Sorry for being a bit --

3 THE PRESIDENT: No, I am slow.

4 LORD GRABINER: -- unclear about that. It is an important
5 point, because it would, of course, provide perfectly
6 good motivation for going along to the OFT. If he knows
7 he is going to be treated in a lenient fashion, that is
8 going to be a factor that will affect his judgment. It
9 may also be a factor that may affect the things he said
10 to them.

11 If you look at paragraph 74(a), which is the next
12 point I wanted to say something about. This is a point
13 that we have had some discussion about today, but such
14 discussion as there has been about the point today does
15 not actually address the important point. What is said
16 there by my friends is that the divide selling price by
17 2.5 formula applied between Umbro and Sports Soccer and
18 it did not apply to replica kit. That is what is being
19 said there. This is simply inaccurate. The Tribunal
20 will remember the credit note of 7th September 2000,
21 which clearly indicated Sports Soccer claiming a credit
22 for the Nottingham Forest shirts based on £39.99 which
23 incidentally was a sale price we discovered, not an RRP
24 being divided by the 2.5.

25 You will also remember Mr Ashley complaining

1 vociferously during cross-examination about the fact
2 Sports Soccer's special deal had been revealed in open
3 court and we dealt with this point at page 24 of our
4 closing submissions and again, I do not think I need to
5 invite your attention to the passage but for
6 a cross-reference we have already dealt with the point
7 there. Again, with respect, we say that certainly this
8 is a passage in the closing written submissions of OFT
9 that you must approach with some caution.

10 Then if I can draw your attention paragraphs 80 to
11 84. Here the OFT deals with its allegation that JJB put
12 pressure on Umbro. In our submission, all these
13 submissions are entirely disingenuous. The fact is that
14 both the OFT's main witnesses on this issue, Mr Ronnie
15 and Mr Fellone -- this is an important point -- have now
16 said in their cross-examination -- and you will have the
17 points in mind, but I will draw your attention to the
18 references in a moment -- that nothing was explicitly
19 stated that any commercial pressure was the result of
20 Umbro's own perception.

21 Now, the way my friend sought to deal with this when
22 he was making his submissions to you earlier today was
23 to take expressions like "sort it out". That was the
24 expression he picked on. But that is not the way that
25 the witnesses put it when they were cross-examined.

1 Could I invite your attention just to our closing
2 written submissions in the last paragraph on page 18:

3 "Ronnie states there was only an underlying threat
4 because nothing was explicitly stated. This was
5 confirmed in cross-examination. Any action taken by
6 a retailer, for whatever legitimate purpose, however
7 lawful, amounted to pressure on Umbro. The only
8 specific instance of alleged pressure that Mr Ronnie has
9 referred to is the MU centenary kit."

10 This was borne out by his oral evidence and so on
11 and so forth and I will not read it all out to you but
12 that is actually the thrust of the case. It is not
13 "sort it out". The only threat that is actually
14 identified is in relation to the centenary shirt and
15 that takes you to another debate I know you are familiar
16 with and I need not repeat.

17 To suggest this could amount to unlawful conduct on
18 the part of JJB, in our submission, is not real.

19 A related point that is made is the OFT say we did
20 not seek to cross-examine Mr Attfield. The reason we
21 did not is simple; he was responsible for dealing with
22 Sports Soccer. He did not have any dealings with JJB.
23 If Mr Ronnie's and Mr Fellone's evidence does not
24 indicate the existence of unlawful pressure, then
25 hearsay evidence from Mr Attfield is hardly going to

1 advance the debate.

2 Can I go to the next point, which --

3 THE PRESIDENT: What about Mr McGuigan?

4 LORD GRABINER: Mr McGuigan makes no allegation of any
5 threats and we dealt with that in our written
6 submissions. We specifically rely upon Mr McGuigan's
7 evidence, actually. It is the passage at the foot of
8 page 253, in paragraph 8 in particular, file 2. This
9 is, I would respectfully suggest, entirely innocuous
10 material:

11 "I have received telephone calls from David Whelan
12 to discuss business in general, discuss Mike Ashley..."

13 THE PRESIDENT: "... about supplying our store."

14 LORD GRABINER: Exactly, and that expression derives from
15 Umbro, actually. It has an Umbro origin.

16 MR COLGATE: On that point, if you look at McGuigan 2, 233,
17 paragraph 36.

18 LORD GRABINER: I would make the same observation. It is
19 a generalised conversation. There is certainly no
20 specific threat in that passage.

21 Could I invite the Tribunal's attention to
22 paragraphs 100 and 101 of my learned friend's closing
23 submissions? This is the point that you, sir, took
24 against my learned friend. You invited his comments,
25 because you drew to his attention the key point that

1 actually what was going on here was that there was an
2 attempt by the OFT to put forward a new case.

3 You did not put it as crudely as that, but that is
4 the way I put it and we respectfully agree with the
5 observations that were made coming from the bench.

6 The position here is that this is an alternative
7 case put forward for the first time and what he said is
8 that even if specific phone calls are not established
9 there is direct evidence of participation by Allsports
10 and/or JJB in an agreement or concerted practice.

11 In our submission, the OFT cannot now make that
12 charge against JJB. The case put forward against JJB in
13 the OFT's amended defence is based solely on the making
14 of a telephone call by Mr Ronnie to someone at JJB,
15 which is the way it is put in paragraph 53.

16 The alternative case, which assumes that there was
17 no such telephone call, has not been advanced and cannot
18 be put forward now. It is not just an arid pleading
19 point, it is a real point.

20 The decision itself in paragraph 415 is exclusively
21 based on the existence of an agreement, you will
22 remember, and 415 opens with the preparatory words,
23 talks about "an agreement".

24 The approach sought now to be adopted is not in the
25 decision, nor is it in the amended defence, and of

1 course we did not pursue any argument through
2 cross-examination which we may have done that is now
3 sought to be put forward. Now we are told the latest
4 development of the story is that my learned friend wants
5 it prepare an amendment to produce to you and that is
6 fairly astonishing and in our submission it is something
7 which you should certainly not accede to.

8 Also, the approach adopted here is inconsistent with
9 Aberdeen journals. I say no more about that.

10 Could I invite your attention next to
11 paragraph 155(b) of the closing submissions, which is at
12 the foot of page 59. This concerns the
13 Manchester United agreement. The OFT says that
14 Mr Hughes agreed that Mr Whelan said something along the
15 lines of "£39.99 is the right price for replica shirts".

16 In our submission, that is a distortion of the
17 evidence. When he was cross-examined by me, I think
18 Mr Hughes said that following the meeting he believed
19 that JJB would sell at £39.99 because he knew that that
20 was what JJB always did. His belief, and I quote from
21 evidence, was he used the words "absolutely not" because
22 of anything that Mr Whelan said at the meeting. I will
23 give you a cross-reference.

24 I do not invite your attention to it now, because it
25 would be merely repetitious and I am sure you have

1 looked at it, or will do so. It is page 40 of our
2 closing submissions. That is simply
3 a mischaracterisation of the evidence in this case.

4 Could I next invite your attention to
5 paragraph 175-179. This is in relation to the centenary
6 kit. In these paragraphs the OFT says that JJB appears
7 wholly to have ignored Mr Fellone's evidence, that JJB
8 asked for and were given an assurance that Sports Soccer
9 would not discount the centenary kit at launch.

10 It is also suggested that Mr Fellone was not
11 cross-examined on the subject and this is simply not
12 right. He was cross-examined specifically on the point
13 and we deal with it in our closing submissions at
14 page 44 and I do not propose to develop the argument
15 orally, but if you look across at page 44 of our closing
16 submissions and at the matters there referred to, you
17 will find the points set out.

18 I have gone a little bit at a gallop because I am
19 concerned (a) we should finish at some stage today and
20 (b) I know from my learned friend he is not anticipating
21 being very long. If there is anything more I can assist
22 you with this is an appropriate moment for me to do so,
23 because I have said everything that I wanted to say.

24 THE PRESIDENT: You do not feel you need more time? We have
25 not hurried you?

1 LORD GRABINER: Not in the slightest.

2 THE PRESIDENT: Thank you very much. I think we will take
3 a short break at that point for the shorthand writers.

4 Perhaps if we keep it down to five minutes.

5 (3.42 pm)

6 (A short break)

7 (3.47 pm)

8 Reply submissions by MR WEST-KNIGHTS

9 MR WEST-KNIGHTS: May I pick up a small point of yesterday's
10 transcript, it is the last occasion we will have of
11 doing it. It is at page 36, at the top. It is matter
12 of some significance. I was submitting in respect of
13 the monthly management report that the fact that the
14 England price had been struck "augured well" for
15 Manchester United, and I used the words "it augurs
16 well", and it has come out as "it all goes well", so it
17 entirely has lost the flavour of what have I was trying
18 to convey.

19 In front of you, and I hope now everybody else, is a
20 document that looks a good deal more daunting than it
21 is. What we have done is to take the OFT's submissions
22 and the OFT's annex and sequentially put in our own
23 observations.

24 It does not contain everything that we wish to say
25 and we would not invite you, as it were, to discard our

1 closing submissions for that annex, but we hope it is
2 helpful to have a direct statement in respect of each
3 proposition made which we regard as significant, what it
4 is that we say about it, sometimes in summary form and
5 sometimes not.

6 I will have more to say about that document before
7 I sit down. I am not going to be referring to it except
8 in one instance, and I may as well do it now. At
9 page 38 of the primary document there is a mistake,
10 indeed there may be two, in the same sentence. It says
11 at the top and, if it is in a different font, and
12 underlined it is us:

13 "The dispute as to replica kit was only as to who
14 fixed the price from which the formula operated."

15 If my learned friend Mr Lord Gribner was right, and
16 he usually is, the credit note has there been misdated,
17 but I think we all know the one we mean, the sideways on
18 document that includes Sandals and Nottingham Forest.

19 May I first echo what my Lord Gribner has said in
20 terms of the witnesses. We ask you to consider, in the
21 round on the one hand, the witnesses who were called for
22 the appellants and compare them with Messrs Ronnie and
23 Ashley in terms of --

24 THE PRESIDENT: You have already made that point.

25 MR WEST-KNIGHTS: In terms of content and demeanour. My

1 learned friend, Mr Morris, opened by saying the
2 Manchester United case could not be clearer. My friend
3 Lord Grabiner has dealt with that. But his next
4 observation was a startling one, which was that the
5 Tribunal should not place undue reliance on the oral
6 evidence.

7 Documents have their place and they need to be
8 construed and understood in their context, but I venture
9 to suggest that the real thought behind "do not place
10 undue reliance on the oral evidence" was that the
11 majority of the evidence which purported finally to
12 support the Office's case fell over.

13 He drew your attention, as do we, to those witnesses
14 whose evidence was not challenged and in respect of
15 those witnesses who were called, those parts which were,
16 as it were, not put. You will find in our submissions
17 a number of occasions on which the Office says, "Oh
18 well, that was never put to Mr Fellone", for instance.
19 The reason is stated in each case. That is because
20 Mr Fellone volunteered no evidence on the subject at
21 all.

22 Let me take a simple example. Mr Prothero says,
23 "I was told that by Ronnie or Fellone". If Ronnie and
24 Fellone have said nothing about it in their witness
25 statements, then there is no direct evidence that that

1 occurred.

2 In fact, to pick up that particular point, the
3 Office has -- again you will see when you come to the
4 specific submissions which they make -- been unfair,
5 because it was not merely that Mr Fellone was unable to
6 identify finally who it was who might have told him --
7 this is in respect of the complaint about the Sky Open
8 channel -- but that he could not put his hand on his
9 heart as to who it was they said, whoever it was, who
10 had in fact made the complaint.

11 But to say that point was not put to X or Y is to
12 misunderstand the purpose of cross-examination.

13 It has been suggested that we have been selective
14 about the evidence which has been quoted. We venture to
15 suggest not, but I invite you all, as you go through the
16 Office's submissions, to see how frequently they rely
17 upon the written testimony of their witnesses as if the
18 cross-examination had not occurred.

19 You asked this morning questions which indicate that
20 the Tribunal has very much got the point on these
21 agreements, if I may say so, with respect.

22 There is one troubling matter which arises out of
23 the submissions now made by the Office, and it centres,
24 so far as we are concerned, on a telephone call made
25 during the course of the meeting of the 2nd June between

1 Mr Hughes and Mr Knight. No doubt because that
2 telephone call, as to its occurring or the nuances, are
3 not the same is not challenged, it is suddenly the
4 all-important telephone call and you will see in the
5 submissions that the Office invites you to treat that
6 telephone call as a freestanding, bilateral
7 infringement.

8 That is so far away from being any case which has
9 been in the decision, in the defence, in the amended
10 defence, in the skeletons, in the opening, but that is
11 a proposition that reflects only, we say, the
12 desperation of the Office in trying to salvage the case
13 on the England agreement.

14 We have taken it as read and we take it to be as
15 read that the pricing process as between Umbro and its
16 customers was indeed the one that you yourselves have
17 clearly understood. It is plain and obvious from the
18 totality of the evidence that there is no way of
19 expressing the formula, although my learned friend
20 Mr Morris had a brave attempt at it, which does not
21 involve starting at £39.99. Because you cannot bring
22 yourself to say, "Well, you start with 21, 30 and
23 multiply it by 1.88", because we know that is not how it
24 works.

25 We also know that the £42.99 price point, which of

1 course was in many cases in fact the recommended retail
2 price, a difference we have now all understood.

3 THE PRESIDENT: It was not the effective starting point.

4 MR WEST-KNIGHTS: It was in our case, in respect of
5 Manchester United, £22.90, subject of course to the
6 subsequent discount, which was available to all buyers,
7 no doubt, and, depending on their importance, the size
8 of the discount.

9 Mr Ashley was unhappy to reveal the size of the
10 discount that he gets when trading of that kind is
11 taking place, which was contained in the September 2002
12 agreement. You will recall two numbers, each of them --
13 I am not sure if I can say the word.

14 THE PRESIDENT: I would rather you did not.

15 MR WEST-KNIGHTS: You can look it up. There are two
16 numbers, one which is a trade discount and the other was
17 described as a settlement discount and he accepted,
18 indeed said that the actual discount which he obtained
19 was the simple aggregation of those two figures.

20 So if the figures had been 5 and 7 respectively,
21 which they were not, then the discount he gets is 12.

22 You posed the question this morning --

23 THE PRESIDENT: Just on that point, Mr West-Knights, if, as
24 you accept, it is all done by working back in some way
25 or other from the retail price or the recommended retail

1 price, one might observe that that is a very dangerous
2 system of working out prices once the 2000 Act has come
3 into force, and it was quite dangerous while the Retail
4 Price Act was in force.

5 MR WEST-KNIGHTS: I proffer an answer to the question which
6 you raised, which was what are the implications in this
7 case for that fact? Let us assume for these purposes --

8 THE PRESIDENT: That was put it in a neutral way.

9 MR WEST-KNIGHTS: The question was posed in a neutral way,
10 and you have come up with one facet of it from which we
11 find difficult to dissent. But the point about it is
12 first that this is not something which is of the
13 retailer's doing at all. This is the way that Umbro
14 operates. Umbro -- and it shines through each and every
15 document, even those included in the licensing
16 arrangements -- starts from an end price premise.

17 Even the complex arrangements as to the sourcing
18 between them and Sports Soccer and the 2.5 start from
19 the hypothetical £10 selling price, divide by 2.5, get
20 back to £4 and it is on that that a profit commission is
21 paid.

22 So it is completely endemic in the way of their
23 thinking, even if it leads, in that instance
24 particularly, to what looks like a very convoluted way
25 of doing it.

1 It is not simply the price, of course. It is
2 focused first on -- we could either say the high street
3 or the expected, anticipated price, mutually
4 anticipated, but at their behest.

5 Second, of course, it focuses the mind on the
6 margin. It runs back from the assumption of price,
7 builds in an equally assumed or high street margin to
8 arrive at the price.

9 When you couple that with the undoubted pattern in
10 this case as regards the material products, namely
11 replica shirts in particular, that there are very long
12 lead times in ordering, then it is not difficult to see
13 how price and volume discussions are likely to take
14 place, both at the negotiation/buying stage and in
15 addition, at the stage when the goods are landed and in
16 the shops.

17 But Umbro's interest in the retail price does not
18 stop there. It plainly measures the retail market and
19 its potential in the retail market, by the most
20 systematic recording in the monthly management reports
21 of at what prices their and other people's goods are
22 being sold.

23 They are intensely retail price-ocentric -- no such
24 word -- for a number of reasons. If Slazenger are doing
25 a boot at X pounds, we might do a boot at X plus 3, or

1 if Nike are doing a boot at X pounds, we might only get
2 away with a boot at X minus 5. But also, of course, it
3 relates to the health of the brand. If in principle
4 Umbro product is selling through, to use their
5 expression, at what they call full price, or the clean
6 price, as they put it in their reports, that is
7 undoubtedly good news for them.

8 They are entirely retail price focused and they are,
9 as we know, and it may be no coincidence -- indeed, it
10 almost certainly is not -- like Mr Ashley, serial price
11 fixers.

12 The price fixing is not something to which Mr Ashley
13 has, as you know, an aversion in principle, because it
14 is an essential part of the licensing arrangements. He
15 cannot go below a certain price under those
16 arrangements, expressly, (a) so as not to undercut Umbro
17 themselves and (b) so as not to reveal, as you were
18 told, to the market, that arrangements were in place
19 that could only be explained by special sourcing
20 arrangements.

21 So in that sense it is wrong to characterise it as
22 an inference, that the relationship is both close and
23 secret, because it is expressly both.

24 So the consequence for this case in terms of that
25 focus by Umbro and the process of working back from the

1 £39.99, to use a neutral expression, is that from the
2 retailer's point of view you should not look at
3 discussion of retail price in the vertical channel and
4 think, "Oh my goodness, this should not be taking
5 place." Perhaps it should not, but it is necessarily
6 endemic in any commercial discussion, practically, that
7 they have with Umbro.

8 In other words, there is an explanation for it which
9 does not have about it any flavour of any
10 anti-competitive motive on the part of the retailers.

11 That is my submission as to where it fits.

12 THE PRESIDENT: All parties are engaging in a way of
13 arriving at their respective slices of the cake that
14 carries, inherently, certain risks in relation to at
15 what point you cross the line from legality to
16 illegality. I am not sure you can quite just blame the
17 manufacturers. It is just the way this industry works,
18 retail and manufacturing.

19 MR WEST-KNIGHTS: We understand that, sir. I am addressing
20 this because it is plainly asking that which you have,
21 as a panel, been considering. First, to clear it out
22 the way, it is not the case against us.

23 The case against us is that either on 30th or
24 31st May there was a phone call and the other case
25 against us is that on the 8th June there was an

1 agreement.

2 What I do say is plainly it would appear to be
3 fraught with probable -- to use the expression used in
4 the decision in one or two places, it plainly
5 facilitates, in one sense, anti-competitive behaviour,
6 but the facilitation is not conducted by retailers. It
7 may be fraud, but we do not have a choice.

8 That is why I say if there is discussion which in
9 a vacuum might be regarded as dodgy, unhappily, then,
10 Lord knows what the position is now, endemic in Umbro's
11 system.

12 Again, we have in closing from my learned friend
13 this suggestion that it is inherently unlikely that the
14 Umbro witnesses would have -- and he misquotes the Bible
15 here -- that there is no question of the lily being
16 painted, he says, because of the -- he said the nebulous
17 hope of reduction in the fine against the possible
18 effect on the relationships with the customers.

19 At the risk of wearying the panel, may I say again
20 that there is no evidence that that was in their minds.
21 Let us start with Ronnie four. Ronnie four is written
22 at a time when he has read -- although he will not tell
23 you which bits -- our notice of appeal. He has read
24 Hughes's witness statement, or bits of it. He will not
25 tell you which bits. The allegation as to Umbro's

1 so-called fears in that respect are met square on in our
2 notice of appeal and Mr Ronnie chose to tell you nothing
3 of that in chief at all.

4 Indeed the Office, again privilege, may have asked
5 him. We do not know what the answer was. What we do
6 know is that my learned friend asked one of those
7 questions in re-examination, which, I am bound to say,
8 the flavour that we submit it had, the answer which was
9 dragged out with him, but with some reluctance, and no
10 weight, that, "Well, yes we did in the process weigh up
11 the risks of (a) leniency and (b) upsetting the
12 customers."

13 That is a mile away from there being any positive
14 evidence that Umbro were in fact considering themselves
15 requiring to be restrained because of a fear of
16 reprisal.

17 I do not propose to say anything more about the law,
18 because it is beginning to emerge that we have all in
19 fact been speaking the same language. It is procurement
20 or pressure leading to information in or information in
21 and then used in an appropriate fashion.

22 So far as the Manchester United agreement is
23 concerned, there is now and has never been any back end
24 case levelled against Allsports, that is to say there
25 has never been any issue or case sought to be made that

1 whatever the circumstances, we having received whatever
2 information there was on the 8th June, it was
3 subsequently deployed. That is not the case.

4 The sole purpose to which the Office seeks to use
5 the memoranda of the 9th June is as evidence of the
6 existence of an actual oral agreement on the 8th June.

7 It is exactly the same as the England agreement was
8 in the decision. It is an agreement, they have said.

9 There is, however, built-in, an inchoate and new
10 case, purportedly, in the closing submissions, namely
11 that if Umbro perceived the pressure or perceived
12 whatever was going on as pressure, and the Office does
13 list --

14 THE PRESIDENT: Are we back on England now?

15 MR WEST-KNIGHTS: I suppose we are. No, that might not be
16 helpful. Where had I got to?

17 THE PRESIDENT: You were telling us about Manchester United.

18 MR WEST-KNIGHTS: I am doing this in the order in which my
19 learned friend did it, which is perhaps not the ideal.

20 I will come back to Manchester United. I have taken
21 myself back to it and I am going to stick there; I am
22 sorry if that is not helpful.

23 There is a new pressure case, in effect, and it is
24 this -- and the Office does list, in its purported
25 particulars of pressure in respect of Allsports, some of

1 the absurdities, that is to say, sports -- we not buying
2 shin guards because of the Sports Soccer's pricing.

3 I venture to suggest the obvious meaning of that --
4 this is obviously their note, not ours -- is that we
5 cannot sell their shin guards as cheaply as Ashley does.
6 Nothing to do with shirts. That is slithered in, in the
7 course of cross-examination or submission, but it was
8 not made good.

9 You posed the question this morning which is
10 directly germane to that. That is sensibly explained on
11 the footing that the retailer says, "I cannot compete
12 with that. Unless you knock the price down, I cannot
13 sell them", or just "I am not supporting you".

14 What does that translate to in reality? The seller
15 goes along to see the buyer. Mr May, whoever, goes
16 along to see I think it was Mr Wilson at that stage,
17 because there was a changeover, you may recall,
18 in March, according to his report, and says he is going
19 through the list of stuff and he has sold us a certain
20 number of this, that or the others, or rather booked in
21 with Michelle Charnock and he says, "What about these
22 shin guards?" "No, not my partnership", so perhaps
23 somebody talks to Mr Guest, "What about the shin
24 guards?" "How much are they going to cost us?" Mental
25 process. Either way, but in any event we have a margin

1 expectation, because after all we have a very expensive
2 business to make.

3 Plainly the margin is not just profit, and our
4 overheads are a good deal higher than Sports Soccer.
5 That is just common ground. So we think we will have to
6 retail those at £12. We know, say, that Sports Soccer
7 are knocking out an identical -- it may not be the
8 same -- a shin guard at £10. We are retailers, it is
9 our business to know that. We say "No, sorry." "Well,
10 why?" "They are selling them down the road for 10 quid,
11 I cannot make a profit on these at 10 quid, I can only
12 sell them at 12; the answer is no."

13 It is a perfectly ordinary conversation. What Umbro
14 has to do is go away and source itself better, in the
15 long run, which, of course, is what it did, with
16 Mr Ashley, although Mr Ashley was, where he was selling
17 his sourcing stuff to Umbro in part of that
18 relationship, because he said Umbro will come along
19 and say, 'Can do you this for \$10?' and he, knowing he
20 could do it for \$6, would charge them for \$9.99. He is
21 a very capable businessman.

22 If you just think about the reality of that kind of
23 conversation, it is so far away from being sinister it
24 is not true.

25 Then we get this overlay, this assertion by way of

1 submission that we somehow knew of the astonishingly
2 distorted perception of the Ronnies of this world and
3 that they would or might perceive that as pressure
4 relating to discounting and that consequently that turns
5 it into a sin.

6 The rules of both the CPR and the former rules of
7 the Supreme Court as regards particularity are every bit
8 as strict if you are pleading a state of mind or
9 knowledge on the part of a third party as they are in
10 respect of fraud. You will not find anywhere in the
11 documents -- obviously not in the decision, because
12 there is no pressure case against us at all in the
13 decision, so this is edifice upon edifice. You will
14 find no properly pleaded case which says, "These are the
15 things you did, you had the following knowledge", and
16 you would expect to see pages: who knew what about what,
17 when, from whom, how.

18 With the pleaded conclusion that in the premises,
19 the combination of paragraph 61.3 and the knowledge set
20 out at 73.4 make that little transaction a knowing or
21 a relevantly motivated breach. You just do not find it.

22 Where we say in our submissions "vague" or
23 "unparticularised" or "hopeless", these are not just
24 phrases, they are not just throwaways. You will recall
25 that much of the submissions made below were to the

1 effect that the pressure case against Allsports was
2 vague and unparticularised, and so it remains, but in
3 spates, because where those witnesses whom we have
4 pinned down have -- in some cases unwillingly and in
5 some cases honestly -- i.e. as it were coming forward
6 with information to assist the Tribunal -- where the
7 blanket assertion has evaporated or turned out to be
8 something else, or turned out to be not sinister, the
9 Office is now, surprisingly, trying to mount yet a new
10 case.

11 The Celtic shirt. I just do not need to say any
12 more. That is pressure. Celtic comes second in the
13 Scottish division, or whatever it is called, and we are
14 guilty of price fixing.

15 Mr Guest's letter was cited expressly as being an
16 example of an implied threat. I remind you that that
17 letter was written in April 1999 and whatever you make
18 of it, and you have Mr Guest's evidence on it, and
19 I venture to suggest that he was a candid and sensible
20 witness, he got back an answer a few days later, saying,
21 "We only recommend prices but we are, for the future,
22 reducing the WSP [the wholesale selling price] across
23 the board in respect of products such as this."

24 He told you what he was about. He was negotiating,
25 and the result was he won. Not as much as he would have

1 done, and I dare say Umbro would regard -- or Ashley
2 would say that was intolerable pressure, because what
3 had happened to Umbro is that it had met us halfway, as
4 an ordinary part of commercial negotiation. We did not
5 get everything we wanted. They did something they
6 probably did not want to do. That is commerce.

7 I am not going to say much about the phone calls,
8 for the simple reason that we did canvass them en
9 passant this morning, thanks to your helpful questions.

10 It is the 30th, or the 31st or the 1st. At no time
11 during those three days is there the slightest excuse
12 for Mr Ronnie not to have told somebody before, except,
13 of course, that he has nothing to say, because the price
14 of the shirt in the Sports Soccer shops is whatever it
15 was, £32.

16 Of course Mr Fellone is doing his bit, because he
17 has actually got some discounters to knock into shape.
18 That makes perfect sense.

19 It is suggested we should have cross-examined
20 Mr Fellone about the fact that he said it was agreed
21 between him and Mr Ronnie to split up the phone calls,
22 to which we say no point, because the logical sense of
23 this is that shortly after the price fixing meeting on
24 the 24th, they did indeed have a chat about it and
25 decided they were going to do their respective

1 functions.

2 But of course the following day there was not
3 anything for the Ronnie side of it to do, because his
4 principal function was to ring up and congratulate
5 himself on the result. Which there was not one. You
6 asked hypothetically what about if his phone call had
7 been before the 24th May; of course the answer is, there
8 would be nothing to say. This phone call has always
9 been fixed upon the actual, no doubt, upturn of the
10 24th May, namely that a deal was struck, that Ashley
11 would go out at full price.

12 My learned friend said this morning, he tried to
13 cast doubt on that and he does again in his closing
14 submissions, somehow suggesting that Mr Ronnie's answer
15 that the deal was struck, i.e. that the price would go
16 up the following day, was somehow wrong or inconsistent
17 with other evidence he gave.

18 All I can say is have a look at the references which
19 he cites, and it is plain that for a number of questions
20 Mr Ronnie's answers proceed upon the footing that there
21 had been made, and broken, an agreement.

22 This was no misspeaking by Mr Ronnie. We unearthed
23 a little nugget of what had happened on the 24th.

24 There was even a suggestion in the Office's closing,
25 which I am bound to say I regard as reprehensible,

1 because there is a phone call in the records of, and
2 I think it is Sean Nevitt's telephone on the 2nd June,
3 that somehow that might have been an occasion of not
4 Mr Ronnie, of course, but Mr Ashley telling Hughes of
5 the price increase.

6 All I can ask you to do about that is to have a look
7 at Mr Ashley's witness statement on the subject, where
8 he goes specifically -- not now --

9 THE PRESIDENT: I want you to take us to the place where
10 that is alleged, Mr West-Knights. You did it in your
11 bundle. We have both, where it is alleged and your
12 comment on it.

13 MR WEST-KNIGHTS: Do you think we can park that for a bit?

14 It is not a reference I can find immediately.

15 THE PRESIDENT: The phone calls are 91 through to 99,
16 I think. I had not picked up anything about Mr Nevitt,
17 I must say.

18 MR WEST-KNIGHTS: You will not have picked up anything of
19 Mr Nevitt. It would have been a huge Ashley reference,
20 for reasons which will become clear when I find it. It
21 is the Office's submissions. Perhaps they can identify
22 where this is said.

23 Let me give you the background submission. What
24 Ashley's statement says is this. I see from the records
25 there was a very brief phone call on that number, either

1 to or from Hughes, I think from Hughes, lasting 49
2 seconds. He goes out of his way to say, "That appears
3 to me to accord with the evidence Mr Hughes gave that
4 when he telephoned me, in an attempt to get hold of me
5 for the purposes of setting up the meeting, another
6 person picked up the telephone and said that Mr Ashley
7 was abroad."

8 I think it may have been Hughes's phone, but the
9 evidence was, about the "wind up Mr Ronnie" session in
10 the train station, was that one person was holding the
11 other person's phone. I think it was Nevitt holding
12 Hughes's phone --

13 THE PRESIDENT: Nevitt's holding Ashley's phone. Hughes
14 rings Ashley's phone and Nevitt says, "I think Ashley's
15 abroad", or he is not available to comment.

16 MR WEST-KNIGHTS: He did say he was abroad. That was
17 Hughes's evidence and that may have been the "not now"
18 sort of thing. I am told it is the bottom of page 52 of
19 our, as it were, counter document.

20 THE PRESIDENT: Oh yes.

21 MR WEST-KNIGHTS: "Alternative case", it says boldly at
22 subparagraph 6, on page 51:

23 "Even if ... phone call is not established, the
24 direct evidence of participation by Allsports and/or JJB
25 in an agreement or concerted practice. Paragraph 102,

1 the Office refers in particular to ..."

2 Then the last bullet point on page 52:

3 "Mr Hughes called up Mr Ashley on 2nd June."

4 That is completely improper. That is improper.

5 There are things that have been said which are improper.

6 That is just plain wrong and it is surprising. There

7 was a bit of blurt from Ashley, I think in

8 re-examination, "Well, of course, I don't know what it

9 was. Maybe I said to Mr Hughes on 2nd June I was told
10 to ring the retailers."

11 That was just a bit of blather. His witness
12 statement specifically affirms that his recollection
13 fits the Hughes recollection, i.e. that that was a call
14 Hughes/Ashley to attempt to set up a meeting and it was
15 diverted (a) because they were busy and (b) because some
16 other person was holding the phone.

17 That is a basic point, but I make it nonetheless.
18 The Office has maintained with great vigor throughout
19 this case that the England case is a good case. It has
20 maintained with great vigor that the Manchester United
21 case is a good case. It makes, seemingly, no
22 distinction between the strength of the cases. If you
23 come to the conclusion it is wrong about the England
24 case, then it may shed some light upon the accuracy of
25 its certainty as to its position in respect of

1 Manchester United.

2 Price information exchange is new, but it is not in
3 the decision a secondary case made about the
4 Manchester United 8th June day. It is said that the
5 statement, if it was made, as opposed to "not more
6 than", by JJB, to the effect that it was not going to go
7 above £39.99 -- and you have yet to make a finding about
8 what was said there -- the Office puts this on the
9 footing that if that reduced uncertainty by however
10 small a margin, then Allsports at least, as an
11 undoubtedly willing recipient in the circumstances, this
12 meeting having been set up with anti-competitive
13 intent -- I do not think I could, as it were, sensibly
14 shy away from that -- but they say however marginal,
15 that is an occasion of infringement.

16 We say two things about that, and it depends on what
17 view of the law you take. Although these cases are
18 quite fact-specific, each and every one of them we have
19 looked at -- and that is an important point to bear in
20 mind, the Cimenteries case is -- it is easy to take it
21 as a global proposition for all sorts of things until
22 you bear in mind the antecedent practices and what was
23 in fact done by Lafarge with the information in
24 question. So all of these cases have to be looked at in
25 their context. But they do contain some relatively

1 broad propositions, even when you can get out the yellow
2 pen and highlight the sentence or three that anybody
3 regards as being the kernel of the decision.

4 Two things. First, if any price information of
5 however marginal a kind was transmitted, then there are
6 two ways around that. For the Tribunal I say "around
7 it"; there are two ways of dealing with it. One, is to
8 say if de minimis no infringement.

9 Two, if, as it were, strict liability applies as a
10 matter of the European based jurisprudence, then fine
11 £5. I am not being flippant. If it is absolutely
12 de minimis but you were obliged to convict, then the
13 fine should be commensurate with the margin of
14 uncertainty which is thereby diminished.

15 That is not an invitation, you understand, but those
16 are necessarily, in our submission, the logical choices
17 to be made. We say that the jurisprudence would be
18 hampered by a decision that this was necessarily strict,
19 because that would give rise to the consideration of all
20 sorts of statements that might be made at meetings, or
21 indeed in any other forum where it is not simply
22 a question, as it was in the case we looked at this
23 morning, of information being passed which could have
24 been culled, but which would have taken longer and been
25 more expensive to acquire, but information which is

1 absolutely common knowledge but you hear it from the
2 horse's mouth.

3 There must come a time when the information is so
4 certain, in any event in the public domain, that the
5 horse's mouth adds nothing.

6 THE PRESIDENT: The alternative view is that the only way to
7 see that this legislation is respected is for everybody
8 to get into the habit of saying absolutely nothing and
9 having no discussions or meetings that involve prices of
10 products that are yet to reach the market.

11 MR WEST-KNIGHTS: That is a point of view which, in the
12 circumstances of this case, would be a hard one to apply
13 because of the whole mealier(?) of price-referential
14 selling by Umbro.

15 Of course there comes a point perhaps where, as it
16 were -- well, I am not sure if that is right. Plainly
17 the safest course, if you like, if you were going to
18 write a Noddy's Guide to not getting in trouble with the
19 Act, then somewhere very near the top of the list is:
20 "Do not meet with your competitors otherwise than
21 socially. Do not discuss your intentions commercially
22 at all." Period.

23 People will always, as it were, fall short of the
24 ideal, not because that is of itself an infringement but
25 because they have not taken the safest course. The

1 safest way to cross the road is always to do so at a red
2 pelican where the little green man is on. We are, none
3 of us, doing anything wrong by crossing the road
4 otherwise, but a risk arises, and how big that risk is
5 depends upon the circumstances. So it is not a rule
6 that you can only cross the road -- unlike in the United
7 States where I understand in some states it is actually
8 an offence to cross against --

9 THE PRESIDENT: Yes, and in some continental countries they
10 put a ticket on you straight away.

11 MR WEST-KNIGHTS: Is that so. Jay walking!

12 I am moving off that topic, sir, if I may. I have
13 one or two thoughts, but our submissions will not have
14 finished.

15 The May monthly management report. You asked me
16 yesterday "This is not evidence then" and I was not
17 quite sure where the question was coming from, if I can
18 be blunt, but nonetheless, stupidly, I said "yes".

19 All I was going to do was to modify the submission
20 and make sure we are both on the same wavelength.
21 Plainly it is evidence, in the sense that it is part of
22 the matrix, it has stuff in it. I am not suggesting you
23 cannot read it or that you should read it with one eye
24 closed or cover up some of the words.

25 But (a) looking at it in all of the circumstances in

1 chronological order, we say it is not evidence of the
2 Manchester United agreement because it is as plain as
3 a pike staff that if, as is obvious, it was finished and
4 done and dusted by 8th June, it does not leave any time
5 for Ronnie to have received any information about JD and
6 First Sports having been involved, as simple as that.
7 And the Office has picked up this point itself in the
8 investigative process and quizzed Umbro on this and got
9 a sequence of unsatisfactory answers, ending in one that
10 Ashley says is bosh.

11 (b) looking at the context, it is not evidence that
12 has any weight of our having agreed the price of the
13 England shirt.

14 Plus the conundrum, just to remind you, that to the
15 extent that it is evidence, it is evidence of a case
16 which the Office has abandoned.

17 Does that better answer the question?

18 THE PRESIDENT: Yes. Just on that, one should not speculate
19 unduly. It would be wrong to do so. But the way that
20 that document reads, with the word missing or the stroke
21 missing or whatever it is, might suggest that Mr Ronnie
22 had indeed prepared it a bit earlier on the morning or
23 whenever and had at a late stage added in
24 Manchester United later that day, the following day or
25 some day, some time shortly after, with nobody bothering

1 to change the date upon which it had been circulated.

2 That has no direct evidence of quite how it came to be
3 put together.

4 MR WEST-KNIGHTS: Is that not odd, because Mr Ronnie was in
5 the witness box and we did ask him questions about it
6 and we are still speculating. Of course, whatever it
7 was he said in the witness box was version 4, if not
8 version 3 again, because we had all this other rubbish
9 in --

10 THE PRESIDENT: Well, there are some earlier versions in
11 Ronnie 2, I think it is.

12 MR WEST-KNIGHTS: Where he was (a) very uncertain about the
13 date because somehow the pages on his diary did not say
14 then what they say now. He did not look at the front
15 sheet, he says, of the document itself, and he was firm
16 then that this was only Manchester United. Because the
17 whole point being that Manchester United was someone
18 they could blame on the other retailers. Nothing to do
19 with them. The England agreement of course, they were
20 right in the middle of, because they had of course
21 procured Sports Soccer to go up to full price.

22 But that is speculation. I personally prefer my
23 own, as it were, slot, i.e. it was written some time
24 earlier, but it augured well for MU, because the England
25 price, they did the business with Ashley.

1 The Manchester United agreement. I am going to
2 invite you to look at those two memoranda again and
3 again and again, and when you read them just think about
4 what Mr Hughes said about them, and compare Hughes and
5 Whelan on the one side with Ashley and Ronnie on the
6 other. None of these people is a perfect witness; there
7 is no such thing, but in the end you will have formed
8 already, because you will have been forming a view as to
9 these people as they spoke. We will not know what that
10 view is for some time yet but it will be there and
11 I submit that it should be that just in the round Hughes
12 and Whelan, whatever their alleged imperfections in
13 terms of evidence, stack up a great deal better than
14 Messrs Ronnie and Ashley. Plus, of course, the obvious
15 point -- that, again, the Office does not appear to
16 grip -- all Ashley had to do was to say that he had done
17 it.

18 Ashley of course already knew that he had promised
19 Ronnie that he would go up on Man U because he did so
20 in April and he did so in May. It would just be typical
21 Ashley to turn up there and just do a bit of
22 destabilising. "No, I am not going to tell them. Sod
23 them." After all, it was not a pleasant occasion, it is
24 said, which is not consonant with an agreement being
25 reached, and I will not repeat my submission that you

1 cannot visualise that turning into suddenly Mr Ashley as
2 if he had been struck in the neck with a tranquiliser
3 dart saying "Okay, I give up".

4 And of course he made two further agreements,
5 further, I say, to the April and May ones. They were
6 the operative agreements. That is what Mr Ronnie tells
7 you.

8 There are some nasty incidences in the Office's
9 document of the disapprobation of their own witnesses,
10 and that is not permitted in any form of litigation.
11 That is to say, you call a person but when it gives
12 answers you do not like you put up reasons adverse to
13 that witness to suggest that the answers you do not like
14 were not true. It is done in respect of Messrs Fellone
15 and May.

16 There is the slur thrown at Mr Fellone that he has
17 changed his evidence on the centenary shirt because he
18 has been spoken to by Mr Whelan. There is a slur in
19 respect to Mr May he will need in future to have
20 commercial relations with some of the parties to this
21 case and, consequently, he came my way. That is quite
22 impermissible, apart from its having no foundation. Far
23 from being put to any of our witnesses, who, of course,
24 were called after both of those gentlemen.

25 By contrast, the Office says that the taped bits of

1 Mr Hughes's evidence must be accurate. But they assume,
2 without knowing, that the taped bits are the run up to
3 the 8th June and that somehow the bit that was more
4 recently extracted from his memory were later --

5 THE PRESIDENT: By "the taped bits", you mean what?

6 MR WEST-KNIGHTS: The Office puts in in its submissions --
7 recites that Mr Hughes's witness statement was derived
8 in part from tape recordings made by his solicitors
9 in June 2002, whereas the statement itself was not
10 published until very much later and they infer, or
11 perhaps they extract from Mr Hughes, that they did; that
12 the statement was made over a period of time. Because
13 what they do not know is which bits went. So what they
14 do is they find the bits that they like and say, "Well
15 they must be the true bits that were tape-recorded" and
16 find the bits that they do not like and say, "Ah-huh,
17 less reliable".

18 Much worse, they continually assert that Ashley's
19 account agrees with Hughes's account in many ways and
20 that somehow either bolsters their case or makes
21 Mr Ashley a truthful man.

22 What we know about Mr Ashley's statement, if nothing
23 else, is that it was made after he had read
24 David Hughes's account in detail of the
25 Manchester United day.

1 So what does a man do? There is no previous
2 detailed statement from Ashley about that day at all.
3 In his oral representations it lasts for about three
4 lines: "Well ... I'll agree £40".

5 THE PRESIDENT: There is no previous detailed statement from
6 Mr Hughes either.

7 MR WEST-KNIGHTS: No, but who comes first? Mr Hughes
8 statement was -- Ashley says "I have made this statement
9 having read the statement of David Hughes". So it is
10 not very surprising, whatever he is up to, whether he
11 has a clear recollection or not, and whatever he is
12 doing, adopt those bits of Mr Hughes which makes sense
13 to him or which fit the tale he is going tell. Then of
14 course the Office can wave Ashley around and say "Oh
15 look, he says the same as Mr Hughes, it must be true."

16 The schedule that JJB put in. You make a fair point
17 about it. I am not sure how far that point goes but it
18 is an observation which was not wholly out of place, if
19 I may say so. What it does provide assistance for is
20 the submission which I made yesterday as to the general
21 market perception as to what Ashley might do. If you
22 are not privy to whatever is going on between Umbro and
23 Sports Soccer and you have, as it were, the mental
24 equivalent of that piece of paper, then what it shows is
25 that with the exception of West Ham, as to which enough

1 is said, the Manchester United away and third shirts and
2 Blackburn Rovers, whom I should not which to traduce in
3 their absence, every other shirt went out at full price,
4 for whatever reason. That is the practice. He is
5 a serial discounter after launch, but not, it would
6 appear, at launch.

7 I am going to detain you for five further minutes.
8 This document we have put in is plainly a joint effort,
9 and if it contains errors the responsibility for those
10 errors is mine and mine alone, but I wish it to be put
11 on the record that it exists, for the most part, only
12 because my learned friend George Peretz did not sleep
13 last night, and that I should wish to record my
14 gratitude to him for going so far beyond the call of
15 duty in this matter.

16 As a matter of symmetry, I would like to tell the
17 Tribunal that on 3rd March 2003 the first words which
18 were spoken on behalf of Allsports in this matter was
19 spoken by my learned friend Mr George Peretz. He spoke
20 the first words, and I should wish him to speak the
21 last.

22 THE PRESIDENT: Yes, Mr Peretz.

23 MR PERETZ: I shall take that point up from where it was
24 left because a couple of days ago I thought I might just
25 have a flick through the oral representations that

1 I made over a year ago, last season I should properly
2 say.

3 It is interesting how apposite a lot of what I said
4 still is. Quite contrary to the usual experience one
5 has when reading transcripts of what one said a year ago
6 which is "Oh my God, did I really say that?" On this
7 occasion, there are some points which remain very live.

8 I am not going to invite the Tribunal to look at it
9 at any rate now, but the oral representations are in
10 file C5, tab 70.

11 One of the points that I made on behalf of Allsports
12 at that stage was to focus on the vagueness of the
13 pressure allegation which was then at that stage being
14 run against us in the Rule 14 notice. I particularly
15 fastened on a passage in Mr Fellone's witness statement
16 in which he claims to have "interpreted" various
17 comments as putting pressure on us to resolve retail
18 pricing issues. He referred to Allsports as having
19 cancelled orders on the forward order book on the
20 grounds that the rate of sale of these products had
21 decreased and noted that one was hardly surprised by
22 a statement such as that.

23 I then gave the Office what I called a somewhat
24 friendly warning which, with respect, I would say has
25 been amply justified by events as they have turned out;

1 and that is that it is always very dangerous to rely on
2 witness statements drafted by somebody else of whom you
3 have no knowledge, who has interests of their own in the
4 outcome of the case and without, it appears-- well, at
5 that stage I thought -- having actually spoken to the
6 witnesses themselves. Of course, it now turns out the
7 position was even worse than that, because they had
8 actually spoken to the key witness in the case,
9 Mr Ronnie, and had found him -- and you can turn to
10 Miss Kent's witness statement in the bundle -- to be
11 unreliable and vague. I think everything we have heard
12 over the last three weeks rather confirms the
13 correctness of Miss Kent's initial assessment.

14 The other point I made about the problem with
15 pressure, the pressure case, was the difficulty of
16 distinguishing between conversations such as: "Our sales
17 are going very slowly. It is very difficult for us at
18 the moment. There is heavy discounting going on. We
19 are going to have to reduce orders a bit"; and what one
20 might plainly call guilty conversations: "Unless do you
21 something about the discounting going on, we are going
22 to do some horrible things to you".

23 That difficulty is still very much live and I would
24 venture to suggest that part of the problem, part of the
25 reason this difficulty is still live and still arisen is

1 that of course the pressure case against us which was
2 there in the Rule 14 notice -- not very well articulated
3 but there in the Rule 14 notice -- was abandoned in the
4 decision, so there is no articulated pressure case
5 there, and since then effectively the OFT has been
6 trying to catch up with itself by trying to resuscitate
7 an abandoned case. That is a somewhat unfortunate
8 position for this Tribunal to find itself in because
9 there is, clearly, a difficulty here. There is not much
10 in the way of case law. The cases cited by the Office
11 and referred to in a passage of a certain book of with
12 which you have some connection under the heading "Making
13 Of A Complaint" all deal with somewhat different factual
14 circumstances. They deal with cases where you have
15 a manufacturer with a series of exclusive distributors,
16 and the usual factual scenario is that one exclusive
17 distributor dares to sell into another exclusive
18 distributor's territory and some actions taken to stop
19 that happening.

20 Of course the relationships between those parties
21 are very different to the relationships we have in this
22 case, and when one reads those cases one finds really
23 very little assistance.

24 There clearly is a need for an articulated account
25 of where precisely the line is. It would have been good

1 if that line had been thoroughly explored in a fully
2 reasoned decision. Unfortunately, it was not, and this
3 Tribunal is going to have to do the best it can, which
4 of course is to a very high standard indeed, but it
5 could have had some better assistance.

6 I think I was flagged as taking five minutes and
7 that is my five minutes.

8 THE PRESIDENT: May I make it clear, I do not think I have
9 had anything myself to do with the passage that you
10 recited. It is 15 years -- perhaps you should all be on
11 your feet at the same time! (Laughter).

12 MR PERETZ: There are at least two of us in this room who
13 have had some connection with the book, as well as
14 yourself. I said, at least two.

15 THE PRESIDENT: Anyway, we decide these cases by what is in
16 the case law, not what is in the text books.

17 MR MORRIS: Sir, I hesitate to rise. Obviously anything
18 I say my learned friends can respond. There are two
19 points I would like to make, if I may.

20 THE PRESIDENT: It is a bit late now. What is it?

21 MR MORRIS: One point is a point Mr Turner would like to
22 draw to the tribunal's attention. The other point is
23 that the question of the 7th September credit note was
24 raised in reply --

25 MR WEST-KNIGHTS: No, we have the last word.

1 MR MORRIS: You can have the last word in a moment. It will
2 take 30 seconds. If you insist on playing the forensic
3 games at this stage after three weeks --

4 THE PRESIDENT: Just tell me very quickly in 30 seconds what
5 the point is.

6 MR MORRIS: The first point is this. We would suggest that
7 the Tribunal includes within its questions to
8 Sports World a question about the 7th September credit
9 note. That credit note was not Mr Ashley's document, it
10 was somebody else's document -- I think Mr Nevitt's
11 document.

12 MR WEST-KNIGHTS: It is Mr Forsey actually.

13 MR MORRIS: If the Tribunal is further interested in that
14 document, we would suggest there would be a question
15 about it.

16 The second point is a point that arises due to late
17 nights. In the course of the preparation of our closing
18 submissions we drafted three paragraphs about the code
19 point about the entry in the diary, the Man United.
20 Unfortunately, in the course -- it was probably at 4.00
21 in the morning or 5.00 in the morning -- those
22 paragraphs got missed out. We have them here. We would
23 like to present them to everybody. We would suggest
24 they be looked at and dealt with now but I am conscious
25 of the time. We would like those three paragraphs to go

1 in. They are cross-referred to already and you will see
2 that in fact we left the paragraphs out. It is a matter
3 for the Tribunal how you deal with it. Whether somebody
4 wishes to reply in writing afterwards that may be the
5 best way but we would like those paragraphs to be --

6 THE PRESIDENT: If something got left out in the middle of
7 the night, I am inclined to let it in.

8 MR MORRIS: We have copies here. (Handed). Just for your
9 note, the paragraphs effectively carry on from 162 of
10 our closing submissions. Paragraph 1 in that is
11 actually -- it is renumbered because it has been taken
12 off the machine. Paragraph 1 is paragraph 162.
13 Paragraphs 2, 3 and 4 are the paragraphs that got missed
14 off. I am grateful, sir.

15 LORD GRABINER: The only point I wish to make is on my
16 learned friend's first point, the debate about the
17 7th September invoice or credit note. What you are
18 interested in is fact, not evidence.

19 MR WEST-KNIGHTS: I agree. But to clarify -- I think
20 Mr Morris mentioned this, but if not -- plainly one
21 thing you probably have in mind is to re-ask, apart from
22 any new questions, is to re-ask of Sports World those
23 questions which you posed of Umbro insofar as they are
24 questions that Sports World can answer.

25 THE PRESIDENT: That is our intention.

1 MR WEST-KNIGHTS: But we do say that if you start going into
2 a document like that, you are going to get a ream of
3 disposition.

4 THE PRESIDENT: I think we perhaps have finally come to the
5 end of this hearing. I think, unless there are any
6 questions from my colleagues, we have, for our part have
7 a number of expressions of thanks to make.

8 I think first and foremost we would like to thank
9 our shorthand writers and the LiveNote team for having
10 produced these magnificent transcripts.

11 We would like to reiterate our thanks to all those
12 who have been concerned particularly with the production
13 of the documents and the bundles, which despite the fact
14 we have not referred to a great number of documents,
15 that has all worked extremely well.

16 We would also like to express our particular thanks
17 to all the supporting teams who have worked, as it were,
18 in support of the front row, and to all those who have
19 burnt, in this case what I imagine is, an extraordinary
20 amount of midnight oil in order to get this case through
21 in the time that we have taken and, of course, in
22 particular the weight has fallen on leading and junior
23 counsel, instructing solicitors, and the whole team and
24 we are very conscious of the weight that cases like this
25 impose on everybody.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

PAGE

Closing submissions by MR MORRIS	1
(continued)	
Reply submissions by LORD GRABINER	66
Reply submissions by MR WEST-KNIGHTS	98