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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1019/1/1/03
1020/1/1/03
1021/1/1/03
1022/1/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB.

18 January 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
BARRY COLGATE
RICHARD PROSSER OBE

BETWEEN:

UMBRO HOLDINGS LIMITED	<u>Applicant</u>
and	
THE DIRECTOR GENERAL OF FAIR TRADING	<u>Respondent</u>
MANCHESTER UNITED PLC	<u>Applicant</u>
and	
THE OFFICE OF FAIR TRADING	<u>Respondent</u>
ALLSPORTS LIMITED	<u>Applicant</u>
and	
THE OFFICE OF FAIR TRADING	<u>Respondent</u>
JJB SPORTS PLC	<u>Applicant</u>
and	
THE OFFICE OF FAIR TRADING	<u>Respondent</u>

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HEARING: PENALTY APPEAL
DAY TWO

APPEARANCES

Mr Nicholas Green QC and Miss Kelyn Bacon (instructed by Umbro Holdings Legal Department) appeared for Umbro Holdings Limited.

Mr Peter Roth QC and Paul Harris (instructed by James Chapman & Co) appeared for Manchester United PLC.

Mr George Peretz (instructed by Addleshaw Goddard) and Mr Adam Aldred (of Addleshaw Goddard) appeared for Allsports Limited.

Lord Grabiner QC and Mr Mark Hoskins (instructed by DLA Piper Rudnick Gray Cary UK LLP) appeared for JJB Sports PLC.

Mr Stephen Morris QC, Mr Jon Turner and Miss Anneli Howard (instructed by the Director of Legal Services, the Office of Fair Trading) appeared for the Respondent.

1 THE PRESIDENT: Mr Roth, good morning. Could I just explore a train of thought that occurred to
2 us overnight about infant kit?

3 MR ROTH: Yes.

4 THE PRESIDENT: We are on the various schedules to the Decision. Would the following line of
5 reasoning work or not? Infant kit, which is for children more junior than the juniors as it were,
6 does include a shirt, so it might be reasonable to suppose that the relationship of the price of
7 the infant kit was in some way related to the price of the junior shirt which is in turn in some
8 proportional relationship to the price of the adult shirt. In other words, from the adult shirt
9 down to the junior shirt down to at least the shirt part of the infant kit one would expect to find
10 some kind of price relationship. Since in relation to infant kit it is not disputed that infant kit is
11 actually sold as a kit, would it not follow that in deciding what products were affected by the
12 infringement one would, should, or could justifiably include infant kit, whatever the position in
13 relation to the shorts and socks sold to adults and juniors. That is the train of thought. If that
14 train of thought were right then as Manchester United very openly and commendably in our
15 view told us that there was some missing turnover in relation to infant kit that missing turnover
16 might go to some extent to counterbalance the turnover that you submit the OFT should have
17 excluded in relation to the shirts and the socks. That is the line of thought.

18 MR ROTH: Yes, thank you.

19 THE PRESIDENT: The second point, which I think arose yesterday, is that I do not know whether
20 we can have a bit more factual clarification about what we are talking about in relation to the
21 shorts and the socks, because I think you told us yesterday – and I am not sure that we had
22 completely appreciated it – that at the time of the launch of the new Manchester United home
23 shirt on 1st August 2000 that did not necessarily involve a new launch of the socks and the
24 shorts, but I may have misunderstood you.

25 MR ROTH: I think I did not make it clear, no, it did.

26 THE PRESIDENT: It did.

27 MR ROTH: But it involved a new launch of a whole range.

28 THE PRESIDENT: It was just the rest of the range – there was a range as well?

29 MR ROTH: But it was not just shirts, shorts and socks.

30 THE PRESIDENT: There were hats and scarves and things as well.

31 MR ROTH: Yes. So when one says it must be the same market, because they were launched
32 together at the same time we are saying that proves too much, because of course they were
33 launched at the same time, this was a general across the board all products' launch, so naturally

1 it included shorts and socks, and included other things such as hats and scarves which the OFT
2 has never suggested were part of the market, so this does not prove anything is the point we are
3 making.

4 THE PRESIDENT: What we have no particular mental picture of is what the shirts and the socks
5 look like – we know in general obviously – probably they have a stripe on them, but do they
6 carry the “Umbro” logo.

7 MR ROTH: Well why do I not hand up ----

8 THE PRESIDENT: Have you got a picture we can just look at? We had the shirts displayed to us in
9 the hearing.

10 MR ROTH: This is our client’s Megastore and direct catalogue at the time. [Document handed to
11 the Tribunal]

12 THE PRESIDENT: Thank you very much. Can we just have a quick glance – it just brings it alive a
13 little bit.

14 MR HARRIS: Unfortunately no player is available for modelling purposes today! [Laughter]

15 MR ROTH: We can arrange it.

16 THE PRESIDENT: We are looking at the shorts now it has the Umbro diamond and the Manchester
17 United crest, and the socks have the Umbro diamond, but not apparently the crest.

18 MR ROTH: I am told that at the actual time of the launch they open the Megastore at midnight for
19 the press launch, and they actually have a model body painted with the shirt, but you will not
20 be surprised to know they are not body painted with the shorts or the socks. It is the shirt that is
21 launched at midnight and it is the shirt that gets all the attention. Mr Harris has offered to
22 model **these** tomorrow morning.

23 MR COLGATE: When it was launched the shorts and the socks were also remodelled?

24 MR ROTH: Yes.

25 MR COLGATE: Are the socks and the shorts the same for home and away, and there is a third
26 category?

27 MR ROTH: It is called the “third”, yes.

28 THE PRESIDENT: The change.

29 MR COLGATE: So the socks and the shorts are different for each of the three categories?

30 MR ROTH: Yes. (After a pause) That is only a part of that category.

31 THE PRESIDENT: There is a bit more of it, is there not?

1 MR ROTH: Yes, there is more. We do not have that full one, we have got the full current one,
2 which is now a Nike sell, but it is still branded as “Merchandise direct”. There you see
3 everything.

4 THE PRESIDENT: This will have the infant kit.

5 MR HARRIS: Yes, p.9.

6 THE PRESIDENT: (Pause for reading) Do you know, Mr Roth, at what point the infant kit starts?

7 MR ROTH: I am told it starts, and indeed the catalogue says, I think, at age three months. Now how
8 a four month year old wears a pair of shorts is beyond me.

9 THE PRESIDENT: It goes up to what? This has “infants and little kids” but presumably ----

10 MR ROTH: They are counted together as infant kit, but I think the lower end of the infant kit is not
11 actually replica kit, because babies are obviously not wearing it and I think you can see that
12 from the pictures, and it is made in a different way and so on, so it does not actually replicate,
13 but it gives the sense to the two year old that he is wearing what Wayne Rooney is wearing.

14 THE PRESIDENT: (Pause for reading) Yes.

15 MR ROTH: If the Tribunal would like to keep that.

16 THE PRESIDENT: Thank you. We had better make it an exhibit, I think.

17 MR ROTH: I think understandably wants to have a look at it.

18 THE PRESIDENT: Would you like to look at it now?

19 MR MORRIS: No, Mr Harris will provide us with further copies later today.

20 THE PRESIDENT: Yes. It is exhibit 3.

21 MR ROTH: You asked me yesterday, and this might embrace a bit of the previous question as well,
22 about are there examples of the price of shirts being reduced without corresponding reductions
23 in the price of shorts and socks, and Mr Peretz helpfully mentioned that for his clients there
24 had been prepared in graph form the information that is in the annex to the Decision, and that
25 is a report which is important – it is not really a report it is really a presentation – done by
26 Lexicon for which I think he gave you the reference. It is in the Allsports’ pleading file 2, at
27 tab F, which is a yellow file.

28 As I understand it, this is simply, as I say, putting for the various kit over time, showing
29 the changes, and if you could turn to p.6 of the report, chart 3, this is the MU home adult shirt,
30 and shorts and socks, and you see that there the green line is the reduction in the price of shirts,
31 but that is seven months earlier, and the yellow and the read saying that then the price of shorts
32 and socks were reduced. There are many examples here. If you go to chart 8 on p.8 you see

1 there again the green line, price of shirts reduced, 8 months I think it is before any reduction
2 being made in the price of shorts or socks.

3 Chart 12 on p.10, this is away kit. The price of shirts comes down a month or so before
4 the price of shorts, no reduction in the price of socks.

5 THE PRESIDENT: If you look at chart 11 and chart 13 you get a slightly different picture.

6 MR ROTH: Oh, sometimes they go together, indeed, and sometimes no doubt there is a whole range
7 that is being reduced beyond shirts, shorts and socks, because the retailer decides we are going
8 to cut our prices, or it is the end of the season and everything starts getting reduced, but the
9 question is do these three products run together. Those were Sports Soccer. Chart 16 is
10 Allsports (p.12) and you see there the reduction in the price of shirts, this is the third kit, on
11 29th April, no reduction in the other two. They move in different proportions as well, even
12 when they go at the same time.

13 THE PRESIDENT: One question, and you may be submitting that there is no evidence about it, is
14 when you look at all these various charts you see that certainly on the charts here, there is
15 broadly a relationship at launch. The gap between the green line and the blue line, and the red
16 line is broadly the same through the charts. One question might be whether if at launch the
17 green line had been slightly lower, whether the blue line and the red line would have been in
18 exactly the same place or slightly lower too.

19 MR ROTH: We have not looked at that question, we can certainly do that. If I could just show you
20 one other matter, which is nothing to do with my client, chart 37, which is Celtic, where you
21 see Celtic home shirt being reduced quite significantly, no reduction in shorts and socks.

22 MR COLGATE: But if you go back, Mr Roth, to charts 23, 24, 25, 26 – all the 2001
23 launches – there is a very distinct correlation between price reduction. 24, 25, 26, 27 and 28 are
24 all relating to the centenary shirt and the England 2001.

25 MR ROTH: There you get contemporaneous reductions, yes. Sometimes, as I say, you do, and that
26 is kit my clients are not involved in any infringement about, but on occasions you do. I am not
27 saying it never happens. I am just saying looking across there is a variety of pictures that
28 emerge, it is not a consistent case. I say that is not surprising when you look at what the retailer
29 is really interested in which is turnover and his profits, and you see the volumes involved.
30 I think it is in the Tribunal's master bundle at tab 2. You find our amended Notice of Appeal
31 where we have put volume figures (para.15)

32 THE PRESIDENT: Yes.

1 MR ROTH: We have prepared a table, these are volumes, 1000 units, of replica shirts, shorts and
2 socks. Just to explain “Megastore” I think is self-explanatory. “Direct” were the other sales’
3 methods, it is explained in the footnote. “Website”, not as important then as I am sure it has
4 become, “Mail Order” and there is a television channel. If you look at those figures you will
5 see as between 2000 and 2001 the volume of shirts sold by megastore goes up in the megastore
6 substantially. I think that is about 22 per cent., the volume of shirts and socks does not go up at
7 all. There is no consistent relation. You can see there is no parallel on the direct sales either
8 between movements in shirt sales and short and sock sales. So demand pattern for the shirts, in
9 other words, is quite different. That is why we say for the retailer who is doing the pricing it is
10 a much higher value product, of course, it has much higher demand, and the demand pattern is
11 not mirrored by a demand pattern for shorts and socks.

12 MR COLGATE: But I think you are saying that so far as “Kids” – I think you call them – and
13 infants, or maybe they are children, that they can only buy those as a kit, in other words they
14 buy all three items – they cannot buy single items.

15 MR ROTH: Correct.

16 MR COLGATE: So you are saying that in relation to the junior parts of it, it has to be in kit form.

17 MR ROTH: Just to be clear, because these terms are so muddling, there is the adult and there is the
18 junior ----

19 MR COLGATE: And there is the infant.

20 MR ROTH: -- and the infant. The junior and the adult are sold in the same way, and this table you
21 have just been looking at puts adult and junior together, we are not distinguishing between
22 them, and we are not suggesting that there is a different pattern between adult and junior

23 THE PRESIDENT: And junior is just a smaller size of the adult shirts, presumably
24 – I imagine – I do not know whether there is any other difference.

25 MR ROTH: I think that is basically right.

26 MR COLGATE: It is just that the catalogue has four categories, just to confuse you, I am afraid. It
27 has “Infants – 3 to 24 months”, “Little Kids – 2 to 7 years”, and then “6 years to 15 years”.

28 MR ROTH: That is “Junior”.

29 MR COLGATE: And then you have “Adults”.

30 MR ROTH: Yes. Well 6 to 15 is what I have called “Junior”, and up to 6 or 7 – I thought it was 7
31 but maybe it is 6 – is what I have called “Infant”, and I appreciate there is a subdivision of
32 “Infant” between tiny tots, up to 24 months, babies, and 2 to 6, but I have put them together as

1 “Infant” and I think it is that infant that was left out from those figures – that is what I was
2 telling you yesterday.

3 THE PRESIDENT: If we look at the Manchester United Megastore Direct catalogue for August
4 2000, it simply says “New Manchester United Kit. Red short sleeve home kit shirt”, and then
5 it has sizes “122, 134, 146, 158, £29.99”, which is what the Decision calls “Junior”. Sizes “Y,
6 M, L, XL and XXL £39.99” which is what the Decision calls “Adult”.

7 MR ROTH: That is right.

8 THE PRESIDENT: So it is simply the same shirt but in different sizes. Then lower down, and not
9 actually in the thing you handed up, but a bit later on I think, pages 24 and 26 seem to have “8
10 to Y”, and “2 to 7”, so that is presumably “Babies” and “Kids”.

11 MR ROTH: I think that is exactly right, Sir. We accept, I think unlike perhaps some of the other
12 parties, that the pattern of the Junior shirt is the same as the adult shirt, we are not making that
13 distinction. What we are saying is the shorts and the socks, adult and junior, are different and
14 the infant, insofar as it is worth spending time on, we say it is really a different product, priced
15 differently because it is all three together. I have not seen a picture of the four month old baby
16 – I assume that is something rather different, a different product, it is differently packaged and
17 priced, and targeted.

18 MR COLGATE: Just before we move on, to be absolutely clear, these are showing current retail
19 prices. So if I am looking at the men’s home short sleeved shirt for 2045, £39.99 ----

20 MR ROTH: That is the price at which Nike are selling the Manchester United, because that is
21 produced by Nike, at the Megastore at the moment.

22 MR COLGATE: So if I went in there today that is the price I would have to pay?

23 MR ROTH: That is the price you would have to pay, at the moment. That is the catalogue price.

24 THE PRESIDENT: This is “United Direct”, so that is presumably the website price, or mail order
25 price.

26 MR ROTH: Yes, but the only point I am making it is now entirely run by a subsidiary of Nike.

27 THE PRESIDENT: Yes, quite.

28 MR ROTH: Yes, that is correct, except as Mr Harris rightly points out, if you are a member of the
29 club, you still get your 10 per cent. discount. So Nike has not found it commercially necessary
30 to reduce the price. I am sorry, I have probably made rather heavy weather of that.

31 THE PRESIDENT: It is our fault, Mr Roth. I am sorry we have taken you out of your stride.

32 MR ROTH: Not at all. I was looking at the justification given in the Decision, and the OFT’s
33 argument, not in any subsequent evidence, for including shorts and socks and this was all on

1 the issue that sales of shirts, as they put it, “drive sales of shorts and socks”, and they say that
2 is wrong. They then say there is a common distinguishing feature of shirts, shorts and socks
3 from other licensed merchandise. They put it successively in two ways. They first said it is
4 identical to the kit worn by the supported team of players when competing in tournaments
5 (Decision para.546) I do not ask you to turn it up. That is correct in that it is identical, but it is
6 wrong to say that is the uniquely distinguishing feature of these three products, because it
7 applies also to hats, track suits, gloves and the rain jacket. As you will know, as everyone who
8 has been to a match, or seen it on television knows, there is a squad of 16 to 18 players
9 produced for every game, and those not on the pitch are sitting on the substitutes’ bench
10 waiting to come on, or warming up by the side of the pitch, and they wear the hat or the
11 tracksuit. Indeed, I think so replica is the hat they wear they are given from the Megastore.

12 So the OFT then had a further go at refining the distinguishing feature, and this is in
13 their skeleton and they say these are uniquely the items worn by team players on the pitch.
14 That is not in the Decision, but it is para.11 of the OFT’s amended skeleton. That is correct,
15 but again it is wrong as the uniquely distinguishing feature, because it applies also to shin pads,
16 arm pads, goalkeeper gloves and, of course rather importantly, football boots.

17 THE PRESIDENT: But are the boots sponsored by Vodafone?

18 MR ROTH: By Vodafone, no.

19 THE PRESIDENT: I thought that the boots were different.

20 MR ROTH: The position is that the players can do their own sponsorship deals for boots and some
21 of the do, and the agreement that we then had with Umbro was that if the player has not then
22 he should wear Umbro boots.

23 THE PRESIDENT: We had quite a lot of evidence about a predator boot, I seem to remember, worn
24 by Mr Beckham but was not to do with the Umbro ----

25 MR ROTH: No, Mr Beckham, I am sure, had a very good sponsorship deal for his boots.

26 THE PRESIDENT: Not to do with Umbro.

27 MR ROTH: No, but for those not perhaps as prominent as Mr Beckham and who do not have their
28 own sponsorship deal we are supposed to ensure they wear Umbro boots, that is under our
29 agreement with Umbro.

30 THE PRESIDENT: Right.

31 MR ROTH: It is also said that these are worn as a symbol of allegiance – the shirts, the shorts and
32 the socks – and so they are together the relevant market. I say that is the question, because step
33 1, as you recall, is markets affected by the infringement, and the OFT has identified two. They

1 have said one replica kit as one market; and secondly (and especially Manchester United) the
2 sponsorship. They have not said there is another market, namely infant clothing, which is
3 a separate market, but also affected. They have said it is altogether. Clearly they are worn as
4 a symbol of allegiance, all of them, of course. But that applies to other items that are much
5 more popular than shorts or socks, notably scarves and hats. That, with the shirts, is what MU
6 supporters, and I have no reason to think supporters of other teams are different, go for. We
7 gave the figures in our reply which is in your master bundle at tab 4.

8 THE PRESIDENT: Something called “The Parties’ most recent replies”.

9 MR ROTH: That should be “Most recent reply skeletons”, and the replies are at tab 4.

10 THE PRESIDENT: Yes, p.4 para.9.

11 MR ROTH: I am very grateful, where we have set out both for the 2000 and 2001 years the volumes
12 of hats and scarves sold from the two outlets, and you can just compare that with the figures
13 I have just shown you for shorts and socks. So the badge of allegiance, as all the products are
14 badges of allegiance right across the catalogue, but the ones that people really go for, they no
15 doubt wear at matches is scarves hats and shirts.

16 The commercial reality, as I think has been pointed out by Lord Grabiner, is that shirts,
17 shorts and socks are not seen by consumers as an integrated item. We all know the shirts are
18 worn as a leisure item, whereas shorts and socks are generally not; and the vast difference in
19 sales’ volumes and the lack of any relationship between movements in sales’ volumes bears
20 that out conclusively. The position of the infant kit just serves to highlight how different the
21 situation is for infant kit as from the adult and the junior shirts.

22 THE PRESIDENT: The caps and scarves, and all the rest of it are supplied by Umbro as well, is that
23 right?

24 MR ROTH: Oh yes, they were at the time, it is now Nike.

25 THE PRESIDENT: Yes.

26 MR ROTH: Sir, the OFT now refer the following observations by the President to some US
27 Supreme Court cases from the 1960s, using the concept of cluster markets – a concept that
28 I think originates in the United States in merger control cases in the *Philadelphia National*
29 *Bank* case. The OFT have seized on that and we have addressed it in our skeleton in reply
30 – I hope I can take it very shortly – and also *Grinnell*, the Security Service case. The main
31 issue was whether one form of facility in the same market is in the same market as different
32 kinds of facilities. It was Accredited Central Station Alarm Systems, and the fact that
33 Accredited Central Station Alarm Systems could be used for anti-theft protection or anti-fire

1 protection, or I think anti-flood, and the suppliers did not necessarily offer both, did not alter
2 the nature of the facility as compared to other kinds of security facilities, that is to say audible
3 alarms, or provision of security guards, and so audible alarms and security guards were
4 separate markets but all the Central Station facility service was one market.

5 In just the same way with banking services, one can say that banking services to
6 a small business is a distinct market, although of course it clusters together different services
7 such as current account, provision of a loan, which are obviously not substitutable. We say that
8 is not what arises here on the facts.

9 The *Brown Shoe* case that we refer to in our skeleton argument in reply at para.12 was
10 a merger case. It is interesting because there the court identified three relevant markets, namely
11 men's shoes, women's shoes, and children's shoes – three separate markets. They rejected an
12 argument that it should be still narrower in terms of sizes. The argument was of course if you
13 need a large size shoe, a small size shoe is not substitutable for it. They said "no", that can be
14 grouped together, but different customers, men, women and children. We say that far closer,
15 and of direct relevance of course because of s.60 is the *Leclerc* case, the "perfumes" case, and
16 the Judgment there. I do not know if you want me to take you to it.

17 THE PRESIDENT: I would not mind just glancing at it.

18 MR ROTH: I know it is a Judgment you will be well familiar with, Sir.

19 THE PRESIDENT: Well I used to be at one time, but I do not know whether I am now.

20 MR ROTH: It is in your authorities' bundle 1 at tab 2.

21 THE PRESIDENT: Yes.

22 MR ROTH: This was an Appeal against a Commission Decision on a selective distribution system,
23 the system of Yves Saint Laurent for its luxury cosmetic products, and that Decision giving
24 exemption to the distribution system was challenged before the Court of First Instance by,
25 I think it is a chain of Groupement d'Achat Leclerc, so that is how this case arose. If we go to
26 para.110 in the Judgment just to see the structure of it, which is on p.1897, you see there the
27 findings of the court.

28 "The assessment of the validity of the Decision in so far as it applies Article 85(1) of
29 the Treaty raises four main questions: (A) whether selective distribution based on
30 qualitative criteria in the luxury cosmetics sector is compatible in principle with Article
31 85(1) of the Treaty; (B) whether Yves Saint Laurent's selection criteria referred to in
32 Paragraph II.A.5 of the Decision fulfil the conditions necessary for them to be regarded
33 as lawful under Article 85(1) of the Treaty; (C) whether Galec's pleas and arguments

1 relating to whether its members are excluded a priori from the Yves Saint Laurent
2 network and to consumer attitudes in that regard are well founded; and (D) whether
3 Article 85(1) of the Treaty applies because there are parallel networks in the relevant
4 sector.”

5 And then it starts with (A). The relevant discussion here for our purposes is under section (D)
6 which you find on p.1917, para.178:

7 “Galec also submits that, in any event, Article 85(1) of the Treaty has been infringed in
8 this case because networks similar to that of Yves Saint Laurent exist in the whole of
9 the sector at issue, so that there is no room left for other forms of distribution and there
10 is no workable competition in the relevant market - that is to say that of `luxury
11 perfumes' - within the meaning of paragraphs 40, 41 and 42 of the judgment in *Metro*
12 *II*. The Commission and the interveners[Yves Saint Laurent]take the view that,
13 although there are networks parallel to that of Yves Saint Laurent, there is workable
14 competition in the relevant market - that of `luxury cosmetics”

15 So they argued for a wider market definition, because “cosmetics” includes all kinds of beauty
16 care products as well as perfumes.

17 “As the Court of Justice held in paragraph 40 of its judgment in *Metro II*, although
18 `simple' selective distribution systems (that is to say systems based solely on qualitative
19 criteria) are capable of constituting an aspect of competition compatible with Article
20 85(1) of the Treaty, there may nevertheless be a restriction or elimination of
21 competition where the existence of a certain number of such systems does not leave
22 any room for other forms of distribution based on a different way of competing or
23 results in a rigidity in price structure which is not counterbalanced by other aspects of
24 competition between products of the same brand and by the existence of effective
25 competition between different brands. However, according to paragraphs 41 and 42 of
26 the same judgment, the existence of a large number of such selective distribution
27 systems for a particular product does not in itself permit the conclusion that
28 competition is restricted or distorted within the meaning of Article 85(1). Where there
29 is a proliferation of `simple' selective distribution systems, Article 85(1) applies only if
30 the relevant market is so rigid and structured that there is no longer any workable
31 competition as regards price.”

32 THE PRESIDENT: Should you go to 184?

33 MR ROTH: It is 184 and 185 – I was just trying to set the context for that.

1 THE PRESIDENT: Thank you yes.

2 MR ROTH: Then:

3 “More generally, as to the question whether there is workable competition, it is
4 necessary first to establish the relevant market. Even though the Commission was
5 justified in dealing with the whole of the luxury cosmetics sector in the Decision, on
6 the ground that luxury perfumery, beauty and skin care products share the same luxury
7 image and are often sold together under the same brand name...”

8 Pausing there for a moment, that was on the question of whether the nature of these products
9 justifies a selective distribution system at all, if there is something qualitatively different.

10 “ ...the question whether there is workable competition can be judged only in the
11 context of the market comprising the totality of the products which, with respect to
12 their characteristics, are particularly suitable for satisfying constant needs and are only
13 to a limited extent interchangeable with other products (see L'Oréal, cited above,
14 paragraph 25).

15 185 It is not disputed in this case that a perfume is not interchangeable as regards its
16 characteristics or use with a beauty product (for example make-up) or a skin care
17 product (for example a night cream). Nor is it disputed that, at the time, luxury
18 perfumes represented more than 80% of Yves Saint Laurent's total sales. In the light of
19 the significance of that distinct sector, it is necessary to ascertain whether luxury
20 perfumes are subject to workable competition at the retail level despite the fact that
21 they are always marketed by means of selective distribution.”

22 As I say, Sir, you will be well familiar with the case, but the court did not accept Yves Saint
23 Laurent's argument that in determining the relevant market you should look at luxury
24 cosmetics, but said “no”, you must look as Leclerc or Galec argued, at luxury perfumes.

25 THE PRESIDENT: I seem to remember that the court simply left on one side night creams, and
26 make-up and all the rest of it, and concentrated on perfumes.

27 MR ROTH: That is because it was held to be a separate market and that was important because that
28 got Yves Saint Laurent to this 80 per cent. share. They then rejected Galec's argument, as one
29 sees in 191.

30 THE PRESIDENT: It is coming back to me now, the issue was whether luxury perfumes competed
31 with non-luxury perfumes and I seem to remember that we said they did not but that there was
32 enough competition within the Yves Saint Laurent system.

1 MR ROTH: I think you said first, they do not compete with non-luxury perfumes, and then – I think
2 it is para.191 actually.

3 THE PRESIDENT: Yes, thank you.

4 MR ROTH: You said therefore we look at luxury perfumes, and then you say Galec must produce
5 the evidence that that is so rigid.

6 THE PRESIDENT: And there was none.

7 MR ROTH: There was none. So they won the argument on market definition; they failed on
8 restriction of competition within that market.

9 THE PRESIDENT: Yes, okay.

10 MR ROTH: We say, with great respect, that shows the correct approach to market definition.
11 I now turn to the other affected market as regards Manchester United, which is the IP
12 sponsorship rights.

13 THE PRESIDENT: Just one moment.

14 (The Tribunal confer)

15 THE PRESIDENT: I do not know quite what point you were coming to, Mr Roth, but we are not
16 clear that you need to deal with this point at the moment if you are answering the OFT's
17 argument that they would be entitled to take a different view of the turnover in relation to the
18 licensed products – certainly at this stage of our analysis we do not need to call on you on that
19 point.

20 MR ROTH: I am very grateful, that is indeed what I was about to do. So the only other point in
21 answer to the OFT, I leave aside the IP rights, we say the product market definition is wrong, it
22 should be varied by the CAT to exclude shorts and socks and as for the OFT's argument that if
23 the relevant market had only been shirts and had excluded shorts and socks, then the
24 percentage they would have applied under step 1 would have been 10 and not 9. We say on
25 the OFT's reasoning set out in the Decision for taking the 9 per cent. that is simply an absurd
26 suggestion.

27 THE PRESIDENT: Can you just take us to the Decision?

28 MR ROTH: Yes, if I start with my clients. If I start with para.710.
29 "The OFT regards horizontal and vertical price-fixing as the most serious types of
30 infringements. However, although the market definition is relatively narrow, the
31 infringements did not include all products in the relevant markets. The percentage rate
32 applied is 9 per cent. of relevant turnover"

33 THE PRESIDENT: What do you take that sentence to mean?

1 MR ROTH: We take it to mean that the market they have defined is replica kit. The infringement
2 did not affect all replica kit, and therefore the percentage rate is reduced from what it would
3 have been to reflect that fact.

4 THE PRESIDENT: You mean there are other replica kits produced by other manufacturers that are
5 not affected by the infringement?

6 MR ROTH: Oh no, no. The infringement – this is Manchester United – was the adult home shirt
7 launched in August 2000. That was the subject of the agreement, if you recall.

8 THE PRESIDENT: I think the same remark is made in relation to other parties is it not?

9 MR ROTH: It is, for the same reason. Can I just step back for a moment and explain it? There are
10 a whole lot of other shirts that are launched. There is the “Away” shirt, there is the “Third”
11 shirt, as Mr Colgate pointed out, and shorts and socks. There is for the other clubs, which does
12 not affect Manchester United, exactly the same, they also have away kit, and they also have
13 third kit. The point about the third kit, as perhaps you appreciate, is when you play at home
14 you wear your home kit; when you are playing away ----

15 THE PRESIDENT: There may be a clash.

16 MR ROTH: There may be a clash of colours, or not a clash, there may be a similarity of colours and
17 so your away kit will not do and you will have to have an alternative. So this is common for
18 all clubs, but the agreement, which is summarised, I think, at para.532 of the Decision rather
19 conveniently it is listed.

20 THE PRESIDENT: Yes.

21 MR ROTH: As you see (a) is Sports Soccer and Umbro which does not affect us, and they in fact
22 had 8 per cent. in any event. But if one looks at (b) it does not affect my clients, but it is
23 England home and away Replica Shirts. So it is not the third kit, and specifically for MU it
24 says “MU home Replica Shirts”, but in fact I think for both (b) and (c), although not spelled
25 out here it is in fact only the adult shirt that was the subject of the Agreement as found. I will
26 be corrected if I am wrong, but the Agreement did not cover the junior shirt. It was affected,
27 we accept, but it was not the subject matter of the Agreement.

28 THE PRESIDENT: I am still not quite clear what you say we should make of 710.
29 “...although the market definition is relatively narrow the infringements did not include
30 all products in the relevant markets.”
31 and you say that that means they are there saying that it did not include the away shirts?

1 MR ROTH: And the previous years. The turnover here is based on the year 2000, that is what is
2 being used. If you look back in our amended Notice of Appeal in your master bundle, we set
3 out ----

4 THE PRESIDENT: Oh I see, it will include a pre-1st August turnover.

5 MR ROTH: Absolutely, oh yes, it does. We have set them all out, actually. If you look at the table
6 under para.23 of our Notice of Appeal, which is in your master bundle at tab 2. I do not know
7 if it helps or hinders, I am not going to make any reference – I do not think anyone is – to our
8 original Notice of Appeal. At para.23 we have set out the breakdown of the turnover and this
9 is shirts, shorts and socks, it leaves out the infant kit, and you see the 2000 turnover, and you
10 see there is a whole lot of other stuff, and these are value figures producing the 2.694 – sorry
11 this is all shirts, the point being that there are a lot of shirts that are not included and, in fact,
12 when one works out the percentages, which ever year one chooses – have I made myself clear?
13 We are following the logic of what the OFT has said in saying “Well if we had excluded shorts
14 and socks we would not have taken 9 per cent., we would have taken 10 per cent. But we are
15 saying “Let us look at the figures excluding shorts and socks, which is what we have done here
16 – only shirts – and then look at “What is the proportion of the home shirt, the 200 home shirt,
17 taking adults and kids (which means “Junior”)?

18 THE PRESIDENT: I am slightly lost, Mr Roth, and it is a wider point than the point you are making
19 at the moment. This is the first turnover identified at 699 of the Decision, it is the turnover for
20 the year ending 31st July 2000.

21 MR ROTH: Yes.

22 THE PRESIDENT: We are trying to identify the products “affected by the infringement” if we
23 follow the guidelines, but the turnover for the year ending 31st July 2000 does not wholly relate
24 to the products affected by the infringement because as you rightly say it includes a whole lot
25 of other things that were sold before the meeting of 8th June. Is that the point?

26 MR ROTH: That was not the point. I am sorry, I am sure it is my fault.

27 THE PRESIDENT: I do not think it is at all, it is mine probably.

28 MR ROTH: The first question is: what is the relevant market?

29 THE PRESIDENT: Yes.

30 MR ROTH: And we say it is shirts and not shorts and socks. The OFT say in answer to that, “well
31 if that were right, and if we had taken that as the relevant market, then when we got to step 1,
32 the next stage, of picking the percentage we would have picked 10 per cent. not 9 per cent., and
33 I am responding to that argument and we would have picked 10 per cent. not 9 per cent.

1 because if it had been only shirts and not shirts, shorts and socks, the reason for reducing it
2 from 10 to 9 per cent., namely that it did not cover the whole of the market, would have
3 dropped away. That, I take it, is their argument.

4 THE PRESIDENT: And you say, just to see if I have followed it, if they had taken 10 per cent. and
5 just applied it to shirts they would still have been including things that were not covered by the
6 infringement because they would have included the away shirts and other shirts.

7 MR ROTH: That is right, and it does not matter which year you look at, whether it is the 2000 year
8 or the 2001 year, it is under 50 per cent., considerably less than 50 per cent. of the total and
9 adding in the infant kit makes no difference at all. It is 21 per cent. in the 2000 year and 38 per
10 cent. in the 2001 year. Of course it is significant, but it is still the case that the logic for taking
11 the 9 per cent. very much applies, and shorts and socks are so small, that is not the reason that
12 it is a small part of our turnover. There has not been inclusion or exclusion of shorts and socks,
13 it is all the other shirts.

14 THE PRESIDENT: Where do shorts and socks show up in the table to para.23 of your Amended
15 Notice. Are they under "Other"?

16 MR ROTH: No, they are not included, that is the whole point. We have said if you exclude them ----

17 MR COLGATE: Can I ask the question a slightly different way? 699 says that the Replica Kit
18 turnover was 3069.

19 MR ROTH: Yes.

20 MR COLGATE: Table 23A for Shirts is 2693. Is the difference between 2693 and 3069 shorts and
21 socks?

22 MR ROTH: That puts it much clearer than I am doing. Yes, and if you turn back to the previous
23 page of our Amended Notice of Appeal and look at para.19 – perhaps I should have started
24 there – we have shown how it builds up. Home Shirts, this is in the 2000 year, this is the
25 breakdown of the 3.069 that Mr Colgate was asking about. All kit which is shirts, shorts and
26 socks 3069, All Shirts 2.694, Home Shirts 1.204 million, and then over the page we are given
27 the breakdown of that 2.694. Does that make it clearer?

28 MR COLGATE: And the Home shirts, the 1204 are for the home shirts including 1998, 1999, 2000.
29 Is that right?

30 MR ROTH: Yes, it looks like it.

31 THE PRESIDENT: I do not know where it gets us, but you have quite a chunk of shirts sold in the
32 2000 turnover – that would not appear to have anything whatever to do with the case, that is
33 the 1998 Home and the 1999 Away – I do not quite know what is in the other figure there,

1 which is dramatically different in 2001. I think probably it is a collective figure for the ones
2 that are in fact broken down for 2001.

3 MR ROTH: That may be. There is first of all, and I will come to this because it relates to your
4 question to Lord Grabiner about pre-ordering. There is a significant number of the 2000 shirt
5 in the 2000 turnover.

6 THE PRESIDENT: Yes, I see that.

7 MR ROTH: And that is pre-ordered.

8 THE PRESIDENT: That is the pre-ordering, yes.

9 MR ROTH: Jumping ahead, your question, if I may say so with respect, was quite right. But of
10 course it includes a lot of 1998 home shirts which were no longer in 2000, we are looking at
11 home shirts including 1998, total home shirts. That is how you get the 1.204.

12 MR COLGATE: I understand what you are saying, but I am still unclear about the pricing. So in
13 other words you, I think, are trying to move us towards – I am not even sure why the 1998
14 home and 1999 away shirts should be included in the figure. Or are you saying come what may
15 you are happy to live with those included? Because what I am not clear about is, is there a
16 price relationship between all those shirts?

17 MR ROTH: I think there is a price relationship between all those shirts and I was not – I am sorry –
18 dealing with the pricing at the moment. I was dealing with their argument that if you left out
19 shorts and socks they would have used 10 per cent., because the reason for reducing to 9 falls
20 away. I say “No”, the reason for reducing to 9 that is given is that it does not cover all the
21 products and that is every bit as much true if you leave out shorts and socks – I say every bit as
22 much, almost as much, because it is still well under 50 per cent. and it is 21 per cent. in 2000
23 and 38 per cent. in 2001. Step 1 turnover is, of course, the turnover in the last financial year,
24 and all the figures have been worked out.

25 THE PRESIDENT: It is not the point you are on, Mr Roth, and forgive me for raising it, it is
26 a different point, but as Mr Colgate is saying, it is striking that the table on para.3 of the
27 Amended Notice of Appeal shows that there is quite a significant amount of turnover included
28 for the 1998 home shirt, and the 1999 away shirt which are not concerned with the
29 infringement with which we are concerned, they pre-date it. When you go back to the
30 Guidance ----

31 MR ROTH: I am sorry, para.3 of the?

32 THE PRESIDENT: Paragraph 23. You have quite a chunk of turnover there that pre-dates the
33 infringement – have you not?

1 MR ROTH: The first question is what is the relevant market? Then, having defined the market, one
2 is looking at what is the turnover of Manchester United in that market in the year ending
3 preceding the infringement, that is how it is done for everyone, and for everything. It is
4 a different turnover, I think, from the step 5 turnover, which is the statutory ceiling.

5 MR MORRIS: Sir, if I may assist. The 1998 and the 1999 is identifying the shirt by reference to its
6 date of launch; these are sales in that year of the shirt launch, the 1998 shirts and the 1999
7 shirts, nevertheless they were shirts sold in the relevant year.

8 MR ROTH: Absolutely.

9 THE PRESIDENT: So I am just looking back at 2.3 of the Guidance, just to work out how this
10 works, because that says that the relevant turnover is the turnover of the undertaking in the
11 relevant product market and relevant geographic market affected by the infringement in the last
12 financial year.

13 MR ROTH: It is para. 699 in the Decision:

14 “MU’s participation in the relevant Replica Shirts Agreement ended at the end of
15 September 2000. MU’s relevant financial year is therefore the year ending 31 July
16 2000.”

17 THE PRESIDENT: So let us assume you are right, and it is shirts, and the product market is shirts.
18 To arrive at the relevant turnover it is correct, is it, to take the turnover in shirts even though
19 only a part of that turnover is affected by the infringement because it is only one shirt out of
20 several shirts?

21 MR ROTH: Correct.

22 THE PRESIDENT: That is a correct approach under the guidance.

23 MR ROTH: Yes, and what we are saying, if you look at our para.19 which perhaps puts it most
24 succinctly, the OFT took 3.069 million, we are saying it should be 2.694 million, and although
25 of that 2.694 million, in fact, only 1.204 million was home shirts.

26 THE PRESIDENT: Affected by the infringement.

27 MR ROTH: Well less than that would have been affected by the infringement, it is just that the
28 product is a small part of the market, but we are accepting that it should be 2.694 million. We
29 are not arguing that you narrow it down to the home shirt. That is the relevant turnover, 2.694
30 million, and we say then when you get to the next stage, which is determining the percentage,
31 it is every bit as correct to say of the 2.694 million, as it was of the 3.069 million, what the
32 OFT says as its reason for taking 9 per cent., namely the infringements did not include all
33 products in the relevant market, and so we say that logic continues to apply, and it is no answer

1 to our argument on product market. If we are right on that the OFT say “Well you do not get
2 anywhere with that because the 9 goes up to 10.”

3 THE PRESIDENT: Yes.

4 MR ROTH: Now, I move to my next main head.

5 MR COLGATE: Sorry – just to be absolutely clear, your argument is that you accept 2.694, I think
6 you are also thereby accepting under USA it is 1.462, so that the total starting point is 4.156.

7 MR ROTH: I think that is absolutely right, sir.

8 MR COLGATE: I just want to be absolutely clear that that is what you are saying.

9 MR ROTH: Yes, Mr Harris says it is right, so I am sure it is. Yes, 4.156 and I think we say that at
10 para.21 in the Notice – 2.694 plus 1.462, absolutely right, sir, yes.

11 So I turn to the next main topic, percentage duration multiplier for deterrent. I take
12 them together today because we made detailed submissions about each one in the pleadings
13 and in the skeleton; and secondly, this is a rather different area of argument from market
14 definition. Market definition I said was a purely neutral question, objective, that applies across
15 the board. This involves a value judgment about what each individual party has done. It is in
16 our submissions under this head that we rely on basic principles of law that we say apply by
17 reason of s.60 of the Act, if not otherwise, the principle of equality and non-discrimination and
18 the principle of proportionality. In other words – forgive me, Sir, perhaps it is right I should
19 spell it out – the principle that comparable cases should be treated alike, and cases which are
20 different should be treated to that extent differently, and we say that applies as between
21 different decisions adopted by the OFT and *a fortiori* as between different parties to the same
22 decision; and proportionality, that the amount of the penalty must be proportionate in relation
23 to the factors taken into account in assessment of the gravity of the infringement.

24 There is a convenient expression of the principles in the case I mentioned yesterday,
25 the *Graphite Electrodes* Judgment, which is in your authorities’ bundle 1 at tab 5. It is at
26 p.1532:

27 “218 The Commission did not therefore err in fact or in law in dividing the applicants
28 into categories when determining the gravity of the infringement.

29 “219 The fact none the less remains that such a division by categories must comply
30 with the principle of equal treatment according to which it is prohibited to treat similar
31 situations differently and different situations in the same way, unless such treatment is
32 objectively justified...”

33 Likewise the guidelines, and then the last sentence of the paragraph:

1 “Furthermore, according to the case law the amount of the fine must at least be
2 proportionate in relation to the factors taken into account in the assessment of the
3 gravity of the infringement.”

4 So that is the proportionality principle. Then, and I think I referred to it yesterday, but it comes
5 in here, para.232 on p.1535, and I think I read that to you, but that is the application of the
6 principles of equality to the use of forms of calculation – it must be correct, coherent and in
7 particular non-discriminatory.

8 **THE PRESIDENT:** Perhaps not in the domestic guidelines, I am just on 219. In the domestic
9 guidelines is there a guideline equivalent to the one referred to at .106 indent of the
10 Commission’s Guidelines, the disparity between the sizes of the undertakings may justify
11 differentiation, etc.

12 **MR ROTH:** I think the answer is “no”. They were focusing on how the Commission Guidelines
13 worked but I use it for the general principle which I say must apply to what is set out in the
14 guidelines here. I think we rather wish there were, because Manchester United was rather
15 smaller in turnover than all the big retailers, not just JJB, but even JD Sports is considerably
16 bigger than Manchester United.

17 **THE PRESIDENT:** The problem, or a problem, with all guidelines and formulae is that they may
18 throw up rather odd results in particular cases.

19 **MR ROTH:** Yes. As I said early on on the guidelines if, by reason of that, the Commission or the
20 OFT says we are not going to follow it for that reason ----

21 **THE PRESIDENT:** Yes, they must set out their reasons.

22 **MR ROTH:** They must set out the reason and it must be objectively justifiable, and it may well be.
23 On this point, first quickly the facts. Although we, Manchester United, faced much wider
24 accusations in the Rule 14 Notices, the finding after two oral hearings and extensive
25 submissions was the infringement concerned the adult home shirt launched in August 2000 and
26 that my client’s participation in the concerted practice lasted until late September 2000. I say
27 lasted until late September 2000, when did it start? On the findings, as they now are, the
28 position appears to be this: it seems in the Decision to be on the basis of an exchange in late
29 May/early June 2000, although I note the Decision itself says that the period is five months not
30 four months, and that is a discrepancy we point out at the outset in our Notice of Appeal, but
31 that is no big deal in a sense.

1 The Judgment indicates that the Agreement was made at the famous meeting of 8th
2 June, and implicitly that was the meeting to which Manchester United was a party, so perhaps
3 it was shorter still.

4 THE PRESIDENT: We were not really addressing that point, and we heard no submissions on it
5 from MU's point of view.

6 MR ROTH: We say that none of this fine-tuning matters. The point is that it is clearly less than half
7 a year. On the OFT's case, on your finding it may be slightly less than the five months. It is
8 less than half a year.

9 I refer to the point made by you, Sir, in a question to Lord Grabiner, that the duration is
10 not the whole story; there may be certain key selling periods. With respect we agree with that.
11 The OFT say, however, that this covered our infringement, the key selling period of this
12 product, they say that in their skeleton para.27A. We say that is simply wrong. It is half the
13 key selling period because on the clear findings, both of the Decision and of your Judgment,
14 the key selling period runs to Christmas. We accept that it starts before the launch in August,
15 because there is some heavy ordering the previous month, and that is shown in the figures. So
16 the key selling period for the 1st August launch is July to December.

17 THE PRESIDENT: Where do we deal with that in the Judgment?

18 MR ROTH: It is para.18.

19 THE PRESIDENT: We had better have a look at that. At this stage this is reciting what the Decision
20 says, I think, though there is a reference to the transcript on day 6.

21 MR ROTH: Indeed, it reflects the Decision, that is what the OFT say in the Decision. The reference
22 to the Decision is para.81.

23 "The pattern of demand also tends to be front loaded. Launch dates and the first half of
24 the football season are crucial periods for sales of Replica Kit ... The OFT estimates
25 that approximately 90 per cent. of total sales of a Replica Kit occur in the first year
26 following its launch, and in turn 90 per cent. of those sales occur between the date on
27 which the Replica Kit is launched and Christmas of the same year."

28 We have offered ourselves in our submissions the qualification that it goes back a month
29 before launch because of pre-ordering. So the short point is it is less than half a year and it is
30 half the key selling period.

31 There is no infringement by Manchester United as regards their away shirt unlike the
32 position under the England Agreement where all the parties agreed to maintain prices on both
33 home and away England shirts and, of course, there is no infringement by Manchester United

1 on the centenary shirt launched in July 2001, unlike JJB. Of course, as you know, Manchester
2 United are no longer involved in retailing shirts, shorts or socks, or anything else. It is all now
3 done by a subsidiary of Nike – even the Megastore at Old Trafford is run by that Nike
4 company.

5 Umbro, who had a much greater share of their products covered by the various
6 concerted practices, and party to all the agreements including those not at issue in the liability
7 Appeal you heard, and the extent of Umbro’s infringement covered, as regards the
8 England-direct period one and a half years, and as regard the Umbro/Sports Soccer Agreement
9 one year five months. The main Umbro/Sports Soccer Agreement came to an end in August
10 2001, only after, or at the time the OFT conducted its dawn raid, and yet Umbro received
11 a percentage of 8 per cent. x1.5 (for duration) x 2 (for deterrence). Then they get a 5 per cent.
12 uplift because they were engaged in six different agreements. I am ignoring other special
13 aggravation mitigation. It is in those circumstances we invite the Tribunal to ask “Does it
14 infringe the principles of equality and non-discrimination if, in contrast with Umbro,
15 Manchester United, again before all other special factors for aggravation and we are not
16 challenging, as you know, much of that uplift, but before one gets to that Manchester United
17 receive a percentage of 9 per cent x 1 for duration x 3 for deterrence. We say that clearly does
18 infringe that principle of equal treatment.

19 Whether one looks at it in terms of the step 1 percentage multiplier or duration, or
20 deterrence, it is the combined effect that is discriminatory as compared to Umbro. Indeed we
21 get exactly the same treatment in this Decision as All Sports – as regards these three elements,
22 percentage, for gravity, duration and deterrence – although All Sports were also involved in
23 a quite separate agreement regarding the England home and away shirts, but they get no uplift
24 because they were involved in two separate distinct infringements. We say that really is
25 a gross distortion in the way Manchester United has been treated, particularly as regards
26 Umbro, and that should be corrected. Although we have sinned, and we admit we have sinned,
27 still the scope of our infringement of the Chapter I prohibition is not graver than Umbro’s – on
28 the contrary it was much more limited and came to an end long before the OFT dawn raids in
29 October 2001. Whether the equality of treatment is achieved by variation of the percentage or
30 the multiplier for duration or for deterrence, or all three and we say we are unfavourably
31 treated to Umbro on all counts, it is of course the end result that is important.

32 We note what the OFT says, by its counsel, in its skeleton argument at p.14. Could

1 I ask you, please to look at that. It is in your master bundle, tab 5. This is the OFT's amended
2 skeleton argument and within the skeleton at p.14, if you have there subparagraph (d):

3 "MU cannot seek to differentiate its position from other participants in the cartel by
4 relying on the argument that its reputation with its supporters has been affected by bad
5 publicity. This point is addressed further in section (d) below."

6 Then the next sentence:

7 "Nor can it rely on the limited duration of the infringement already reflected in the
8 adjustment for duration at step 2."

9 Well, Sir, no, the whole point, it is not reflected in the adjustment for duration at step 2,
10 because we are not reduced at step 2, we get a 4 x 1 multiplier as if our infringement had been
11 a whole year. That is exactly one of our complaints. If the principle of equality and non-
12 discrimination means that as to duration there here has to be a departure from the guidelines
13 then we say those principles must control.

14 THE PRESIDENT: Just on gravity generally, we did hear quite a lot of evidence in the course of the
15 liability hearing about quite how important this launch was. I think Mr Hughes told us it was
16 the most important thing that had ever happened, and the arrival of a new sponsor I think after
17 18 years, and the publicity surrounding the event made it a quite exceptional occurrence.
18 Although one can perhaps imagine some cases in which short agreements need to be treated
19 more leniently, and I think *Aberdeen Journals* was one, it does not necessarily follow that
20 every short agreement has to be treated as if it was an agreement less than one year if that
21 particular, admittedly short agreement, happens to be of particular importance.

22 MR ROTH: I accept that, Sir. It was an important occasion. I think one of MU's witnesses says, or
23 the explanation is I think that what happens is the pressure on MU because of what was
24 happening was so significant for the club. Whether it is the most important ----

25 THE PRESIDENT: That was Mr Hughes's view at the time.

26 MR ROTH: That is Mr Hughes's view, whether it is more important than England Euro 2000 I do
27 not know.

28 THE PRESIDENT: I suppose another aspect of it is that the evidence was, whether it was intended
29 by MU or not, we do not know, but the evidence was that Umbro certainly felt under very
30 great pressure, vis a vis MU, to do something in relation to this price, because of the then
31 situation regarding the renewal of the contract.

32 MR ROTH: Indeed, and we received an uplift under "Aggravation" specifically for that, and I am
33 not seeking to disturb that, so that has been covered and we have not appealed that. Even if it

1 were a key launch, the fact remains it was only half the period of that selling period – one can
2 see why it goes up to Christmas because, of course, it is a popular Christmas present for
3 supporters – that we were involved.

4 There was, in fact, a launch of an away shirt I think at the very end of September, and
5 the third shirt in October and there was no infringement for that, and one must bear in mind the
6 fact that we did stop the infringement, and others went on.

7 THE PRESIDENT: I think we had some evidence from Mr Russell, but I would need to check it, as
8 to what percentage of shirts are sold in the first – I think he thought it was the first six weeks.
9 I am sorry, Mr Morris ----

10 MR MORRIS: If you wish to be taken to it I think I can give it to you now – day 6 p.59.

11 THE PRESIDENT: That is the reference in the Judgment, is it not?

12 MR MORRIS: That is the reference you give in the Judgment, that is right. If you go there it says
13 that 60 per cent. is sold in the first four weeks, it is Mr Ronnie's evidence.

14 MR ROTH: Mr Ronnie, yes, well that has not been put to me before. It is not something we have
15 had a chance to meet as a point. We have had the figure in the Decision which is the 90 per
16 cent. in the key selling period, so it may be right, it may be not, I just cannot comment on that.

17 THE PRESIDENT: No, thank you. Anyway, you are unfairly treated vis a vis Umbro.

18 MR ROTH: Vis a vis Umbro for the reasons that I have said, and the principles of equality must
19 control the guidelines.

20 MR COLGATE: I would quite like at some point and it may be you would like to do it at the end,
21 but picking up this point about unfairness vis a vis Umbro, if you get to the end of the
22 argument, Umbro were fined £6.6 million and you were fined £1.6 million. So in terms of
23 value at the end of the day there is quite a considerable distance. If at some point you would
24 just like to comment on that?

25 MR ROTH: Yes. Just simply in response to that, the Umbro agreement, the turnover that was
26 affected in Umbro's relevant market was very much larger because it is all the other clients.

27 MR COLGATE: But it is also a much smaller company.

28 MR ROTH: Yes, it was a much bigger proportion of their business that was covered by this, because
29 it was all the football shirts of all the – well, it may not be all because I think there was
30 something about Nottingham Forest – only up to a certain point. It is the first agreement that
31 was not subject to the liability Appeal, the Umbro Sports Soccer agreement which I think
32 covered pretty much everything, and going through the guidelines process, you identify the
33 market and then you say “Well what is the turnover of the company in that market?” So

1 although Umbro are a smaller company than MU and a much smaller company than Allsports,
2 JB, JD – I am told not Allsports, but certainly Allsports are bigger than Manchester United. All
3 Sports is £140 million of turnover, Manchester United is 114, and JD 71, Sports Soccer 320.
4 So it is because their turnover in the markets concerned was so much higher that applying the
5 steps you come up with a much higher figure.

6 THE PRESIDENT: In terms of overall size of the companies concerned, Umbro, I think, is the
7 smallest player on the pitch, as it were.

8 MR ROTH: Turnover?

9 THE PRESIDENT: In turnover terms, yes.

10 MR ROTH: In turnover, save for the very small one.

11 THE PRESIDENT: You have £1 billion of turnover, have you not, in the overall ----

12 MR ROTH: 114 million in UK turnover, Umbro 84. We are closest in fact to the Football
13 Association at 110. Our major business, of course, was not selling products; it is a very small
14 element of what MU made its money from. MU and that is why it is like the FA, it was the sale
15 of media rights through the Premier League derived from that and it was the sponsorship deal
16 with Umbro that led to sponsorship, and media rights, and tickets, of course, for matches.

17 MR COLGATE: The only point I am getting at is if the end of the day when you get to the final
18 figure in relation to profit and turnover Umbro appear to have borne the largest fine, for the
19 reasons that we all are aware of, and I am only simply trying to relate that to your argument of
20 unfairness that you are putting forward quite strongly in relation to Umbro.

21 MR ROTH: Even though we may be a slightly larger company in turnover, 114 ---

22 MR COLGATE: And profit.

23 MR ROTH: Well profit I think because we may be better run, but that is a separate point, if I may
24 say so. We, in half a year, just one product, Umbro, in one and a half years, a whole range of
25 products, so that is what you would expect. It is quite right that they are fined significantly
26 more. There is no suggestion that Umbro's financial viability was threatened by the fines.
27 They have not advanced that. If we had infringed for a full year the principle being applied
28 there would be the same, because the fine would have been the same, it would have been
29 "times one". We say that there must be some recognition of the fact that you have brought it to
30 an end half way through your key selling period.

31 I turn to the fourth head "Compliance Programme". Here there are two distinct issues.
32 First, the imposition by the OFT of 10 per cent. as an aggravation because the infringements
33 were committed at the time that Manchester United was – and I think it is put this way now in

1 the Defence – rolling out its compliance programme. The second issue is whether there should
2 be any deduction by way of mitigation for the development of the compliance programme after
3 the period of infringement.

4 I deal first with the 10 per cent. aggravation. We say quite simply that that is
5 completely wrong. The situation is that Manchester United decided as a company, and it is in
6 the Decision at para.715, and that has been slightly corrected since from the facts, because
7 there was a misunderstanding on the facts which we do not criticise the OFT for, it was
8 through a muddle in the copying of documents – you may perhaps recall that.

9 THE PRESIDENT: Yes.

10 MR ROTH: But the situation is this, on the facts, Manchester United as a company decided at the
11 main Board meeting that a compliance programme should be introduced. The matter was
12 raised on 26th May at the main Board by the chairman, the late Sir Roland Smith, and on 30th
13 June 2000 the Board had a memorandum from the Company Secretary, Mr Bestwitherick, and
14 the decision was taken to approve a letter to all senior managers which was sent out shortly
15 afterwards with an attached explanation. So there is a mistake in 715 where it says:

16 “... the board of MU discussed its compliance policy under the Act the day after
17 Mr Draper’s fax of 25th May”

18 i.e on 26th May. The OFT thought, and I have to say understandably in the light of the way the
19 document was put in, that the meeting was on 26th May, in fact it was on 30th June. All that
20 happened on 26th May was that Sir Roland Smith raised the matter and said “We should do
21 something about this”. The one to one briefings – with our Notice of Appeal there was
22 a witness statement from Mr Bestwitherick explaining what happened and exhibiting the
23 correct documents, the Board Papers. I was not going to take you to that and take up time with
24 that, unless you would like me to, as to how that mistake arose.

25 What happened basically was the front page of a document was copied with following
26 pages of a document from a later date, and that was done by the then solicitors. The one-to-one
27 briefings with the senior managers and executives took place on 21st and 22nd August, that was
28 briefings by a partner from Manchester United solicitors. The finding in the Decision is that
29 the infringement was committed to the 27th September.

30 Of course, Sir, the OFT can say and point out that Mr Kenyon, Mr Richards and
31 Mr Draper were not adhering to this policy, although the faxes involving Mr Draper, as you
32 see from the passage you have just read, were the end of May and early June, before this policy
33 was introduced. He is not a main board director, and so he was not at the board meetings of

1 26th May or 30th June. He got his briefing after 30th and that the documents in his briefing on
2 21st/22nd August. We accept the fact that Mr Kenyon, Mr Richards and Mr Draper were not
3 adhering to the policy and were infringing the law, or causing Manchester United to infringe is
4 a strong point, and it is the subject of a separate head of aggravation to the extent of 20 per
5 cent., and that is para.714 of the Decision, and we are not challenging that before you. We say
6 that is a wholly different thing from saying that Manchester United as company is to be further
7 penalised because it as a company was introducing this policy at the time, unless it said, of
8 course, that the policy was a sham, or a façade, or designed to deceive. There was no such
9 suggestion being made, nor could it be.

10 THE PRESIDENT: Do we need to find any facts on this issue, Mr Roth?

11 MR ROTH: I do not think so, I think it is accepted.

12 THE PRESIDENT: And the OFT's case is really 56/57 of their Defence, plus 33 of the amended
13 skeleton argument?

14 MR ROTH: That is my understanding of it, I think. I am just checking those. The only fact that
15 arises, and there is a further witness statement from Mr Kenyon, I do not know whether it is
16 a fact, I think it is an inference, is that the OFT says "Mr Kenyon was given these press
17 cuttings about the Competition Act after 26th May meeting, he passed them on to
18 Mr Bestwitherick saying "Prepare a memorandum for the Board." They say one would have
19 expected him to have read them before he passed them on. His evidence is that he passed them
20 on and he looked at the memorandum that was then produced. Well, I do not know if really
21 much turns on that, but we certainly resist any finding that he must have read them before he
22 gave them – it is a typical thing for a chief executive, I would suggest to do. I am not sure that
23 slight factual point is terribly important. It is accepted that the main board meeting that
24 considered this was 30th June. I do not think that that is in any way challenged, and it is
25 accepted that the documents were mistakenly copied and all the board papers are now before
26 the Tribunal and have been passed to the OFT.

27 As I say, the basic point is if senior individuals do not adhere to policy and lead
28 a company to infringe, that is a grave matter, and it leads to aggravation and it did so here, and
29 that is the 20 per cent. that you have in 714. But then on top of that to penalise the company
30 further because it was introducing, we say responsibly, a compliance programme over that
31 period is quite wrong.

32 THE PRESIDENT: They are not being penalised for introducing the programme. On the OFT's
33 argument, as I understand it, they are being penalised for having been specifically made aware

1 of the existence of the Act and kept stum in circumstances when they should have known that
2 the exchanges that had by then gone on or were continuing to go on about the MU Agreement
3 should have involved some action on somebody's part.

4 MR ROTH: But the people who kept stum are Mr Kenyon and Mr Draper – it is those senior people.

5 THE PRESIDENT: Yes.

6 MR ROTH: The position is, none the less, that if we had not been introducing this programme at the
7 time we would not have had this 10 per cent. uplift. We say that cannot be right. This is not
8 some abstruse area of the Chapter II prohibition. We are dealing with resale price maintenance,
9 which indeed has been against the law before. Indeed, to treat the company in that way is
10 contrary to the express indication given by the OFT in its advice booklet on compliance that
11 we quote in our reply skeleton (and which is, of course, also in evidence) at para.29, which is
12 in your master bundle at tab 6. Why worry about compliance? It should be borne in mind that
13 an undertaking may receive, and it is not guaranteed but you may receive, and we are not
14 saying we should receive, we are saying we should not have the opposite.

15 “Occasional infringement of the Act may take place despite a compliance programme,
16 the fact that compliance is in place may be taken into account as a mitigating factor
17 when calculating the level of financial penalty. Care will be given as to the precise
18 circumstances of the infringement and so on.”

19 We say this really is quite wrong because the serious and grave infringement individually by
20 the senior people has already been penalised by the 20 per cent uplift.

21 MR COLGATE: Do we have any information in our papers as to what happened in respect of the
22 1999 assurance and how was that promulgated within the business?

23 MR ROTH: Sir, we do. May I come to that in a moment, is that all right?

24 MR COLGATE: Thank you.

25 MR ROTH: I will expressly deal with the point you have raised with me. I will come to that because
26 it is important and deal with it separately.

27 I will now move on to the second part of compliance programme, namely the
28 subsequent steps to ensure compliance, after the infringement. It is an entirely separate point,
29 and it arises from your question I think at the case management conference, what if, after an
30 infringement comes to an end, a company introduces a compliance programme? The answer
31 given by the OFT that this is relevant, and it may be a mitigating factor obviously depending
32 on the details of what was done. We agree with that approach. One looks at this Decision to
33 see well how is that reflected in the Decision? With Umbro, Umbro gave compliance training

1 in September 2001 and implemented a compliance programme in November 2001. So training
2 in September 2001, compliance programme implemented in November 2001. So it is all after
3 the start of the OFT investigation. They get a 5 per cent. deduction for the introduction of that
4 programme, and that is just the references. (Decision: para.595). Sports Connection, in June
5 2002 they wrote to suppliers reminding their suppliers that they are free to determine their own
6 prices, and the introduced compliance training, they get a 5 per cent. deduction. (Decision:
7 para.655)

8 Football Association (FA) compliance programme introduced “soon after the
9 investigation started”, they get 5 per cent. deduction. (Decision: para.783). One finds
10 deductions on this score also in other Decisions. In the *UOP Double Glazing* Decision – I am
11 not allowed to mention the figures in open court – but the Tribunal had, I think, a letter from
12 the OFT last Friday giving the figures. The Decision, for your reference, is in vol.4 tab 22.
13 *UOP* had a compliance programme at the time of the infringement, and so they infringed
14 notwithstanding their programme, not counted as aggravation. Afterwards they took steps to
15 improve their programme, they get a deduction of X per cent., and that is para.338.

16 *DQS* introduced a compliance programme after the start of the investigation,
17 a deduction of X per cent., para.368.

18 Here we have given details of our compliance programme in a very full answer to the
19 Tribunal’s questions, the questions that Lord Grabiner referred to that were sent to all the
20 parties. I am told you have that document as Tribunal Paper 93, in part 3 of Tribunal Paper
21 files. Sent under covering letter, that is our answer to the Tribunal’s questions. I am not going
22 to read it out, I just ask you to scan it. It attaches various presentations that were given. You
23 will note that we refer to the fact that all senior executives and managers can go direct to the
24 outside solicitors without authority. We have a compliance officer, Mr Bestwitherick, who
25 indeed is here today for this hearing. We refer to what happened in June/July/August, but then
26 after the infringement, December 2002 – this is, of course, long before the Decision –
27 presentation to the Board by Mr Bestwitherick (bottom of the second page). You see who
28 attended that.

29 February 2003, again before the Decision, a presentation to executive management by
30 Mr Bestwitherick, followed by a presentation by Mr Harris (of counsel) and the slides used are
31 attached so you can see what was said. Then came the Decision on 1st August. September 2003
32 whistle blowing policy, we have exhibited that as well, which expressly mentions any

1 competition law infringement as a ground that it applies to, anti-competitive practices, and
2 admittedly very recently the full manual and summary that has been sent of the manual.

3 In response to that the OFT have, we say rather churlishly, sought to say “That is not
4 adequate because the whistle blowing policy that is sent to all employees does not explain what
5 it means by exposing anti-competitive practices”. With great respect to the OFT, as far as
6 I can see none of the other parties that I have mentioned, who get 5 per cent. or X per cent.
7 discount, even have a whistle blowing policy at all. Then the OFT complained, well the
8 briefings and the manual are not sent to all staff, but only senior managers. That, with respect,
9 fails to appreciate how Manchester United as a company operate. We do not have, unlike other
10 companies, because of the nature of what we do, a whole lot of local branches or regional
11 sales’ managers, or anything of that kind. We have given up all retailing, that is done by Nike,
12 and so now it is more particularly centrally run, and much of the staff employed are either on
13 the football side – that is to say coaching, or youth coaching or physios, or groundsmen, or
14 indeed players – consuming much of the income, I think – or they are on the catering and
15 entertainment side because Old Trafford is a popular conference and entertainment venue,
16 dealing with the cooking and the serving of the meals, and all the rest of it, all the functions.
17 Any pricing decisions, including corporate function pricing is taken by a very small group of
18 central managers. So we, Manchester United, have tailored our compliance policy, which seeks
19 to cover I should say any Chapter II problem as well as Chapter I, which is much more difficult
20 - I do not have to say that to this Tribunal – and we have tailored it to the character of the
21 company and what the company does. Manchester United’s solicitors – James Chapman – put
22 a lot of effort in developing the manual to meet the actual activities of Manchester United, with
23 the compliance officer, Mr Bestwitherick. I know the manual went through several drafts to try
24 and get it right. All in all, by parity with all the other parties in this case we say we should
25 receive also a 5 per cent. deduction for these subsequent efforts, laudable efforts, at
26 compliance.

27 I am very conscious of time, Sir, but that takes me to my three short additional topics –
28 that concludes my main heads. The first: Co-operation in the OFT investigation. As you know,
29 Manchester United admitted during the administrative stage – but not at the outset – that we
30 were party to an unlawful information exchange agreement, the admission was made in
31 January 2003. For that we get 5 per cent. deduction by way of mitigation. That is para.718 of
32 the Decision. We ask you to contrast and compare that with two things. Compare it with
33 Allsports. Allsports get the same 5 per cent. deduction, but what for? For an admission that

1 Mr Hughes organised the 8th June meeting, which took place at his own home. (Decision
2 para.617). Of course, Allsports strenuously denied that any unlawful agreement was reached
3 there. Secondly compare it with Umbro, Umbro get 40 per cent. deduction for the admission
4 that they are party to various infringements, and the evidence that they provided, although that
5 evidence was incomplete (Decision: para.596). I am not suggesting for a moment that
6 Manchester United should receive the same mitigation on this basis as Umbro, clearly not. But
7 I do say that when you have regard to those two other parties that a mere 5 per cent. is a paltry
8 recognition of the fact that Manchester United as a PLC acknowledged that it broke the law
9 and inevitably was liable to financial penalty, and we say that is out of proportion in relation to
10 what happened to Allsports and Umbro in the Decision. I would add this; my clients did adopt
11 a wholly co-operative attitude in the investigation, never subject to a dawn raid, unlike the
12 other appellants, including Allsports, Umbro and JJB. Mr Kenyon, the chief executive officer,
13 whatever criticism may be made of him, he did attend both oral hearings with the OFT and
14 made himself available to answer the OFT's questions at the hearings, although the OFT had
15 no power to compel him to attend. So we say that 5 per cent. should be increased.

16 The second additional point is Mr Colgate's question of the 1999 non-statutory
17 assurances, and you ask where they are, which I will come to in a moment. First, just to put
18 them into context before looking at them. Evidently the OFT or technically the Director
19 General at that time, had suspicions that there might be widespread RPM as regards Replica
20 Football Kit, and so the Football Association and all the Premier League Clubs provided
21 assurances that they would insert into any new licence agreement with the manufacturer an
22 express term precluding the manufacturer from engaging in RPM and that as far as existing
23 licence agreements are concerned, the manufacturer would write to all dealers telling them that
24 they are free to sell at any price that the dealers want and they should get in touch with the
25 OFT if there was any concern that RPM is being imposed. Those letters went out and it seems
26 to me, so far as I can work out, that Umbro did not formally give an assurance to the Director
27 General it represented itself to the Industry as if it had done so. In the Decision, where the
28 assurances are referred to right at the beginning, paras.1 and 2. You see in para.2 the OFT
29 quote from the letter that Umbro wrote.

30 "Umbro wrote to all its dealers stating that 'UMBRO .. have assured the [OFT] ... that
31 we will not withhold supply of or take any action to prevent the display/advertising or
32 the sale of Licensed football kit at whatever price you, the retailer, may choose'."

1 I was not quite clear myself whether Umbro had given that assurance, but they say they did. So
2 the purpose of the assurances quite clearly was they were a means of communicating the
3 importance of avoiding RPM to the whole of the Industry through this means, that is how
4 I understand it, and it has been interpreted that that was what the Director General was doing.
5 The assurances apply as much to what Umbro did here and of course over a longer period as
6 they apply to the Football Association and to Manchester United and they brought the message
7 to the dealers as well in the way that you have just seen. I assume that Umbro wrote in the
8 terms that it said it did, to Allsports and JJB – if I am wrong I am sure their counsel will
9 correct me. So, while I of course accept that what Manchester United did was contrary to the
10 thrust of the assurances – clearly – so also was what Umbro did and the dealers’ conduct, the
11 subject of these infringements – everyone was put on notice at the time.

12 So we do not quarrel with the approach of the OFT in the Decision when it held that in
13 considering the factor of deterrence, the background of the non-statutory assurances is relevant
14 and to be taken into account (para.613). We say it would not be right then, having done that, to
15 single out uniquely our clients, Manchester United, as deserving a separate increase in penalty
16 because of those non-statutory assurances, when that is not done for the Football Association,
17 who also directly gave those assurances to the Director General. There is no mention, indeed
18 of the assurances, when setting out the aggravating factors regarding the FA (Decision:
19 paras.780-782). Nor has it separately had regard to as regards Umbro, who were certainly tied
20 up in the assurances, and represented itself at the time as having given the assurances, no
21 mention of this as an aggravating factor regarding Umbro (Decision: paras.589-593) and yet it
22 is only when considering aggravation regarding Manchester United that those assurances are
23 treated as a separate and additional aggravating factor; indeed, defended by the OFT on that
24 basis.

25 We say that it either applies to everyone as the distinct aggravating factor – but that
26 was not done – or to no one, it cannot be just Manchester United.

27 THE PRESIDENT: It is an aspect of the case that the Tribunal regards as very serious.

28 MR ROTH: Sir, I fully accept that, but it is not serious only for Manchester United.

29 THE PRESIDENT: No.

30 MR ROTH: And there is a serious discrepancy in the way that it was treated. I might add, serious
31 though it is as the background and one can see why therefore it comes into the deterrent being
32 put at times 3, although not for Umbro – it was times 2 for Umbro. There may be slight

1 problems taking a non-statutory assurance as a basis for increasing a penalty because that
2 effectively creates a sanction for breach of it, when being non-statutory it did not attract
3 a sanction. So there may be some conceptual problem there, but my main point is that it is not
4 just MU.

5 That takes me to the last short point, and I am sorry I have been longer than I thought,
6 which is the iconic status of MU. That may be just MU – certainly it is not JJB, Allsports or
7 Umbro, though I have to say if my clients do not win tomorrow evening at Exeter City we may
8 not be much of an icon anymore and redeem ourselves. We submit that that is irrelevant to this
9 penalty for this reason. If a very well known, prominent public figure breaches the criminal
10 law it is a fundamental principle and it is very important that he or she does not get any more
11 favourable treatment. When Jeffrey Archer was sentenced for attempting to pervert the course
12 of justice it would have been quite wrong if he would have received a lighter sentence because
13 he was a member of the House of Lords, former Chairman of the Conservative Party, a very
14 popular novelist. Equally, it would be quite wrong if, for those reasons, he had received
15 a longer sentence than he otherwise would have done. The only exception, I suggest, to that
16 important and fundamental principle is when someone who is himself involved in law
17 enforcement, or the machinery of justice, breaks the law that it is his job to enforce, so if
18 a policeman was sentenced for attempting to pervert the course of justice one can see his career
19 is at an end. Or, to think the unthinkable, if a judge were convicted of attempting to pervert the
20 course of justice then it might be taken into account because of their responsibility to the
21 public to restrain the very act they have done themselves. We say the approach of the OFT in
22 this Decision with respect was correct. They took into account the position of the FA as the
23 regulatory body of English football (Decision: para. 779) I think it did not actually lead to an
24 increase in the penalty but they said they had regard to it – “... the regulator of English
25 football”.

26 THE PRESIDENT: Yes, it is seen to set high standards.

27 MR ROTH: Yes. But the OFT in the Decision did not see MU’s prominent position as a separate
28 relevant factor, and while of course we can quite understand why you raised this at the Case
29 Management Conference as a question for the parties I have to say I am rather sorry and
30 disappointed that the OFT as a public authority has now seen fit to change its position and
31 argue in the amended skeleton argument for the first time that the prominent position of
32 Manchester United that the Tribunal could now take into account against my clients. That
33 would be quite wrong.

1 Sir, as I say, I am sorry I have gone on ----

2 THE PRESIDENT: No, I think it is partly our fault, Mr Roth, we have taken you out of your stride.

3 MR ROTH: I am conscious that I will give you tomorrow those infant kit figures that I promised.

4 Unless there is anything else, Sir?

5 THE PRESIDENT: Thank you very much.

6 (The Tribunal confer)

7 THE PRESIDENT: How long do you anticipate being, Mr Peretz, so we can get an idea of where
8 we are?

9 MR PERETZ: It somewhat depends on how Socratic the dialogue is.

10 THE PRESIDENT: Assume we ask no questions.

11 MR PERETZ: I can safely say I am going to be longer than 20 minutes. A lot of the ground that
12 I would otherwise need to have dealt with has been covered very eloquently by Mr Roth and
13 Lord Grabiner and so a certain amount of time has been saved. There are a number of points
14 that I will need to make, and I am certainly going to go over the lunch hour if we start at
15 1 o'clock. I am in the Tribunal's hands, I will be perfectly happy to break now and come back
16 at 20 to 2, or to get started now.

17 THE PRESIDENT: What we propose is just to take a very short break now – I mean two or three
18 minutes – and then let you bat for 20 minutes or so before lunch, if that is all right.

19 MR PERETZ: That is fine.

20 THE PRESIDENT: We will just rise for a moment.

21 (The hearing adjourned at 12.38 p.m. and resumed at 12.43 p.m.)

22 MR PERETZ: As I said, I do not intend to take very much of the Tribunal's time, partly as I said
23 because much of the ground has been trodden over, and partly because as we have always done
24 in this case our points are fully pleaded out in our Notice of Appeal and the various skeleton
25 arguments. Indeed, the fact that we have always pleaded matters out very fully in writing and
26 complied with the spirit and the letter of the Tribunal's guidance and rules does, we say, reflect
27 positively on Allsports generally.

28 I can start by simply adopting, with a few wrinkles that I shall come on to, Lord
29 Grabiner's and Mr Roth's submissions on the following topics. The first is the approach that
30 this Tribunal should adopt to these penalty Appeals, and to the application of the OFT's
31 Guidance. The second, in general terms, is their submissions on market definition and starting
32 point; and thirdly, on the correct approach to duration.

1 The points I want to make are these. First, Allsports pretty prominent role in these
2 proceedings to date as a vigorous Appellant on the liability question may well have obscured
3 the fact that of the four Appellants it is, on any view, the least influential on the market; and in
4 particular the least responsible, although we accept that we were materially responsible, for
5 causing Sports Soccer to stop discounting during the periods in question, which is the problem
6 that lies at the very heart of the infringement found by the Tribunal.

7 THE PRESIDENT: Can you really, with a straight face, make that point in relation to the MU
8 agreement where Mr Hughes was very much the driving force?

9 MR PERETZ: Indeed, he was the instigator of that agreement and that fact is taken fully into
10 account in a 15 per cent. uplift in the penalty imposed by the OFT, a point on which we are not
11 appealing. What we can however say, and it is in the Tribunal's own findings which I will
12 come on to at paras. 499-500, is that that agreement, the events of that day, simply buttressed
13 what was already the position which was that Sports Soccer had agreed with Umbro that it
14 would price the MU shirt at £39.99. It was a material factor in causing Sports Soccer to
15 continue that agreement, but that is how the Tribunal puts it and that is how we put it.

16 We say against that background the 9 per cent. figure for seriousness, taken together
17 with a multiplier of 3, or effectively a 300 per cent. uplift is excessive bearing in mind
18 Allsports' position compared to the other subjects of the Decision, and in particular compared
19 to those companies that had admitted resale price maintenance in the past and promised the
20 OFT not to do it again while in fact continuing to practise it. The OFT does not suggest that
21 Allsports has been accused of, let alone admitted or been convicted of, any past misconduct
22 under this competition regime or its predecessors.

23 The second set of points I want to make relates to duration and they are essentially
24 Allsports' specific points.

25 The third issue I need to deal with is to apply, essentially, Mr Roth's submissions on
26 market definition to the specific issue of junior shirts which we say have to be treated as not
27 being part of the relevant product market for the purposes of this Appeal – a point that Mr Roth
28 expressly stopped short of.

29 The fourth point I wish to make is that taking the proceedings at both administrative
30 and the judicial stage in the round, Allsports remains entitled to at least a modest discount for
31 co-operation.

32 The final set of points I want to make relate to the impact of the liability Judgment, and
33 I will be submitting that the Tribunal's findings as to Allsports' participation in these

1 agreements adds effectively nothing in terms of seriousness to the conduct found in the
2 Decision; and in essence we say in respect of both the England and the MU agreements the
3 Tribunal's findings lie – to use the phrase adopted by the Tribunal at paras. 737-738 of the
4 liability Judgment “within the four corners of the OFT's Decision.”

5 Let me start off with the first of those points, which is essentially Allsports relative lack
6 of importance on the markets at issue in this case. It is probably helpful at this point to go
7 straight to the OFT's Guidance which is at tab 28 of the authorities' file, vol.4. This point has
8 been made in different ways before by Mr Roth and Lord Grabiner, but we say that to ensure
9 that the penalty system is fair and does justice as between the parties in a multi-handed case
10 such as this or between different infringements you have to apply a uniform and consistent
11 framework in all cases, and essentially that framework is objective although there is some
12 room at certain points for what one might call a subjective element. We say that the OFT has
13 not applied its guidelines properly to Allsports' position in this case with that basic proposition
14 in mind.

15 Let us start by looking at para.2.3 of the OFT's guidance – the Tribunal is probably
16 familiar with it, but just to go through 2.3 ----

17 THE PRESIDENT: Yes, we have read it several times now, Mr Peretz.

18 MR PERETZ: What I want to concentrate on is 2.6, which reads:

19 “Where an infringement involves several undertakings an assessment of the appropriate
20 starting point will be carried out for each of the undertakings concerned in order to take
21 account of the real impact of the infringing activity of each undertaking on
22 competition.”

23 That is the task that the OFT sets itself. One of the things it will look at in assessing the real
24 impact of the infringing activity is some of the matters set out in para.2.5 which essentially all
25 deal with the conditions of competition in the market effective – the nature of the product,
26 structure of the market, market shares, entry conditions, effect on competitors and third parties.

27 THE PRESIDENT: That is under step 1.

28 MR PERETZ: That is under step 1. We say that, judged against that background, the 9 per cent.
29 applied to Allsports is too high, and indeed the multiplier of 3, but that does not arise as such at
30 para.2.6. The Tribunal found that pressure from Allsports on Umbro was less important
31 influencing Umbro or through Umbro Sports Soccer than pressure from either of JJB and MU,
32 and that is set out at paras.499-500 of the liability Judgment which I think is worth turning up,
33 on my print it is p.150 of the liability Judgment. Rather than read them out, I am happy for the

1 Tribunal simply to read them. The sentence which sums it all up is at the end of 500, where the
2 Tribunal, to take matters up about half way through the sentence, concludes that Allsports’
3 conduct was:

4 “... material to Umbro’s decision to put pressure on Sports Soccer to maintain High
5 Street prices on replica kit, albeit not as important as the pressure from JJB and MU
6 already referred to.”

7 THE PRESIDENT: That is dealing with the general complaints of pressure.

8 MR PERETZ: That is dealing with the general complaints of pressure, yes.

9 THE PRESIDENT: Then you have the further specific incidents about the golf day and the JD cap
10 promotion and, in some ways I think, Mr Peretz, the JD cap promotion vis a vis Allsports is
11 one of the quite serious aspects of this affair. I know one tends to concentrate on Sports Soccer,
12 but JD had a very professional and well organised promotion which Allsports complained
13 about extremely vociferously and eventually brought to an end.

14 MR PERETZ: That point was recognised in the Decision and was again taken account of in the 15
15 per cent. uplift in Allsports’ fine. If I can take you to para.614 of the Decision, p.199. As we
16 pointed out in our Reply there is a particular paragraph of the OFT’s skeleton that appears
17 simply to have forgotten this paragraph. The OFT in its skeleton asserts that the findings of
18 the Tribunal as to the contacts relating to JD and indeed Mr Hughes’ role as an instigator of the
19 MU agreement was not taken account of in the Decision. I assume in the OFT’s favour that
20 that was the product of late night drafting by exhausted counsel, but the fact is that 614 does
21 exactly that, and we get a 15 per cent. uplift for it.

22 THE PRESIDENT: What para.614 refers to is that Allsports:

23 “... rang Blacks to inform it of the outcome of the meeting having earlier contacted it
24 about it, [i.e. Blacks] about JD’s ‘hat trick’ promotion.”

25 What emerged before the Tribunal, and I am speaking in general terms because I would need
26 to find chapter and verse, was that Allsports made a tremendous fuss vis a vis Umbro about the
27 JD hat trick promotion and partly as a result of that Umbro acted to put a stop to that
28 promotion and to cut off JD.

29 MR PERETZ: That whole issue also figured in the Decision. You will remember there is a long
30 discussion in the Decision itself about what happened about the meeting with Mr Ronnie on 2nd
31 June.

32 THE PRESIDENT: Yes.

1 MR PERETZ: I can probably come back with the references after lunch; I do not have them
2 immediately at hand.

3 THE PRESIDENT: That would be useful.

4 MR PERETZ: But that point is very much in the Decision, it is not a new matter that emerged, with
5 respect, during the Tribunal hearing. Like many other of the OFT's findings it emerged in
6 greater detail, one can write a much longer story about it as a result of the Tribunal's
7 Judgment, but the essential heart of the facts is there in the OFT's Decision.

8 THE PRESIDENT: You can take us to it after lunch.

9 MR PERETZ: Yes. The Tribunal will recollect that the relevant witnesses frequently failed to recall
10 pressure from Allsports at all, or did so fairly plainly only as an afterthought the pressure from
11 Manchester United and/or JJB. I do not need to take the Tribunal there, but both Ronne3,
12 Ronnie4, and Mr Fellone's witness statements all bear that out. The point perhaps emerges
13 particularly vividly from a point given in evidence by Mr Ashley who said in evidence that he
14 did not find Mr Hughes at all intimidating at 8th June meeting, on contrast to Mr Whelan of JJB
15 whom he regarded, in contrast to Mr Hughes, as having power within the industry (transcript:
16 10 March, day 3, p73-74).

17 In the context of Umbro the OFT understandably emphasises in the Umbro Appeal the
18 fact that Umbro's role in the infringements was, in the OFT's words, which it emphasises,
19 "extensive and pivotal" (para.4 OFT's Umbro skeleton) The Tribunal itself observes in the
20 passage that you have just read (para.499) that Umbro did not want to see discounts on its
21 "statements products" – a phrase of course used by Mr Ronnie in the notorious May monthly
22 management report. The Tribunal may also remember the following passage from the
23 PriceWaterhouse Coopers' Report about Umbro in 1998 with which Mr Ronnie agreed in
24 cross-examination, and PriceWaterhouse Cooper said that a reduction in the average retail
25 price of Replica Shirts in the UK market could have a negative impact upon the financial
26 performance of Umbro. Mr Ronnie agreed with that (Day6, p.60).

27 The Tribunal may also remember Mr Ashley's evidence (Day 3, March 10, p.77-79),
28 that the pressure from Umbro actually increased in 2001 when Allsports was on any view out
29 of the picture. That pressure led to the conclusion of agreements between Sports Soccer and
30 Umbro, relating not just to MU, shirts but also to Chelsea and Celtic Shirts in which there is no
31 suggestion that Allsports was ever involved.

32 It is true that Umbro is a smaller company in terms of turnover than Allsports. But of
33 course its influence within this particular market is derived from its position as a monopoly

1 supplier of replica football kit of clubs and national teams in great popular demand –
2 essentially ‘must have’ items. So Umbro’s influence within the industry is, on any view, we
3 would say, far greater than Allsports’.

4 It should also be taken into account that one reason why Allsports, according to the
5 Tribunal’s Judgment had any influence at all over Umbro, was that Umbro wrongly believed
6 that Allsports had some influence over, or some ability to speak for, Manchester United. Now,
7 the Tribunal accepts at para.486 of the liability Judgment that Mr Ronnie was in fact wrong
8 about the extent of the Allsports store-within-store arrangement, which is one of the reasons
9 why he says he believed that. The store-within-store arrangement in fact only applied to 20
10 Allsports’ stores in the North West.

11 The Tribunal also accepted at the same paragraph that the title of the ‘Official Retailer
12 of Manchester United’ which we held at that time – we no longer do – was less grand than it
13 sounds. There is no finding by the Tribunal, and in fact we would say no evidence, that
14 Allsports either knew about, or was responsible for, that mistaken impression. We submit it is
15 simply not fair to take any account, as the OFT does at para.609 of the Decision of a mistaken
16 impression that we did not know existed and had not helped create. Rather, we would say ----

17 THE PRESIDENT: Hang on - just looking at para.609.

18 MR PERETZ: It is not entirely clear what weight the OFT gave to this consideration but the fact that
19 it mentions just some weight was given to it, final sentence:

20 “The OFT notes that Umbro may have interpreted Allsports’ participation in the
21 Replica Shirts Agreements as more significant than it actually was in terms of the
22 commercial pressure that Allsports could bring to bear on Umbro.”

23 That is consistent with the Tribunal’s finding. What we say is no fair is to attach any weight to
24 that given that it was not a matter for which we were in any way responsible.

25 We accept, of course, that the Tribunal has found that Allsports’ pressure was material
26 and that the 8th June meeting at which, as I have already mentioned, Mr Ashley says he was not
27 intimidated by Mr Hughes, but was intimidated by Mr Whelan was also material. It might be
28 helpful to go to para.880 of the liability Judgment where that is dealt with.

29 “In our judgment the agreement reached on 8 June reconfirmed and consolidated the
30 efforts of Umbro, and indeed JJB and Allsports, to avoid discounting on the MU shirt
31 [essentially the pressure point] and was material in preventing such discounting from
32 occurring when the MU shirt was launched on 1 August.”

1 “Material” of course means that it mattered and we do not contest that it mattered. The
2 question is whether Allsports’ role in this was whether Allsports was primarily responsible, or
3 in a major way responsible for this infringement, compared as the paragraph from the OFT
4 guidance requires the OFT to do, compared to the other participants fined in the Decision.

5 Sir, that might be a good moment to stop.

6 THE PRESIDENT: Is that a convenient moment?

7 MR PERETZ: Yes.

8 THE PRESIDENT: Very well. 2 o’clock.

9 (The hearing adjourned at 1.04 p.m. and resumed at 2 p.m.)

10 MR PERETZ: I said I would come back after the break on the question of the meeting of 2nd June
11 and, in particular, the discussion between Mr Hughes and Mr Ronnie as to the JB cap
12 promotion. Perhaps the starting point, if I can take you there first, is para.487 of the liability
13 Judgment. The Tribunal says there:

14 “We accept Mr. Ronnie’s evidence – which is not materially challenged by Mr. Hughes
15 – that during the meeting Mr. Hughes asked Mr. Ronnie what Umbro was going to do
16 about the JD cap promotion on the England shirt. We also accept that Mr. Ronnie saw
17 Mr. Hughes’ remarks as pressure from Allsports to take steps vis-à-vis JD, in order to
18 safeguard Umbro’s relationship with Allsports, and potentially MU. We have no reason
19 to doubt that, in response, Mr. Ronnie said to Mr. Hughes that he would have to tell JD
20 that they were no longer a priority account and that they might not be getting product. “

21 That is the essence of the Tribunal’s findings on that. If one then turns to the OFT’s Decision,
22 the key paragraph is para.175 at p.66. This is one of the paragraphs in the OFT’s Decision that
23 the Tribunal will recall effectively cuts out and pastes large chunks from the witness statement
24 that came to be known as Ronnie 3, but with certain filleting marked with triple dots. It is
25 important, I think, to go to Mr Ronnie’s actual witness statement because the triple dots
26 between the second and third paragraphs are actually quite important. This is material, of
27 course, that was plainly before the OFT at the time it took the decision.

28 If I can take the Tribunal to the relevant paragraph in Ronnie3 in witness bundle 3 at
29 p.228; witness bundle 3 J-Q, p.228.

30 THE PRESIDENT: Remind us what is in it, Mr Peretz.

31 MR PERETZ: Yes, this is the discussion in Ronnie3 of that same meeting and this is the paragraph
32 represented by three dots in the OFT Decision, para.45:

1 “David Hughes asked me what Umbro were doing about the issue of the England
2 promotion being run by JD Sports. He did not explicitly threaten that if I did not try to
3 stop the promotion that Allsports would take action against Umbro. However, I did
4 believe that if I did not do something then it would present a problem regarding
5 Umbro’s relationship with Allsports and potentially Manchester United. I said that we
6 would have to tell JB Sports that they were no longer a priority account, that they might
7 not be getting product. Umbro’s actions taken in respect of JD Sports are discussed
8 further below.”

9 THE PRESIDENT: Yes.

10 MR PERETZ: We would submit that what is in that paragraph is, in all essential respects, exactly
11 what the Tribunal found in the paragraph I have just referred to in the liability Judgment. This
12 was material squarely in front of the OFT at the time of its Decision although not expressly
13 pulled out and put in the Decision itself. In general terms, of course, the OFT did deal, as we
14 have seen in that paragraph I have identified, with that meeting and in particular with, as we
15 have seen in para.614 of the OFT Decision, the contacts between Mr Hughes and Blacks that
16 are referred to in the paragraphs around 45.

17 I make three points. First, since para.45 of Mr Ronnie’s witness statement was squarely
18 in front of the OFT at the time, it simply does not lie in the mouth of the OFT to say now that it
19 was an important point going to penalty. In any event, and this is perhaps more general, the
20 absence in the Decision of a pressure case against Allsports did not result in any reduction of
21 Allsports’ fine – one can see that by comparing Allsports’ position vis a vis the position of JJB
22 which in the Decision was expressly found to have been placing pressure on Umbro during the
23 relevant period. JJB, for the purposes of the multiplier and for the purposes of the percentage at
24 the starting point, was treated in exactly the same way as Allsports. Conversely, the restoration
25 of the pressure case cannot, we submit, result in an increase in Allsports’ penalty.

26 The third point, and a fundamental point involving the restoration of the OFT’s
27 pressure case is that that pressure case lies within, as the Tribunal put it, all four corners of the
28 OFT’s Decision. Or, put another way, the pressure case reinforces and strengthens the OFT’s
29 findings of an agreement, puts it in greater detail and does not produce an agreement or
30 concerted practice of a substantially different and more serious kind than that found in fact by
31 the OFT against Allsports. That logic, we say, must have been accepted by the OFT because
32 that is why it did not reduce Allsports’ penalty for not, unlike JJB, having been found to have
33 placed pressure on Umbro, in the Decision.

1 If I could take up where I left off just before lunch, which is considering the extent to
2 which Allsports involvement in this agreement had an effect, which is essentially the question
3 that the OFT asked itself, and tells itself to ask in para.2.6 of the Guidance. There are two
4 aspects to this. First, as far as Allsports own pricing is concerned the Tribunal has we would
5 submit rightly found (para.76) that Allsports did not see discounting as part of its retail
6 philosophy. The Tribunal asked for and received from Allsports a history of Allsports' pricing
7 over the period in question and for some years beforehand, but showed an absolutely consistent
8 policy of not discounting adult Replica Shirts from the £39.99 price point until right towards
9 the end of their life. What the Tribunal has found, and we accept that that is the Tribunal's
10 findings, is that Umbro could not be certain about Allsports' intentions, with reference back to
11 para.684.

12 In relation to the MU agreement, although the Tribunal has found that Messrs Patrick
13 and Guest who, it will be remembered, were the officials within Allsports who took the
14 decision concerning Manchester United pricing, Mr Hughes being in hospital at the time,
15 although the Tribunal had found that they took Mr Hughes' memoranda of 9th June into
16 account, that is again far from a finding that their decision would have been any different had
17 the 8th June meeting never happened. Mr Patrick's unchallenged evidence was that he would
18 have priced the £39.99, even if both Sports Soccer and JJB had cut prices. The reference to
19 that is Mr Patrick's witness statement, witness bundle 2, p.263-4, para.38. I do not need to take
20 the Tribunal through it. He also says there that Mr Hughes' memos did not influence him.

21 Mr Guest, at para.19 of his first witness statement (witness bundle 1, p283) again
22 unchallenged, says that the pricing decision would have been the same whether or not the
23 meeting had taken place and the memos been sent. That was different from saying that they
24 did not take them into account – the question is whether they actually, at the end of the day,
25 had any effect. That is one aspect. The other aspect, which I have also covered, which one has
26 to look at is the effect Allsports' involvement had on Sports Soccer's pricing, and I have
27 covered that. Against that background we say that the OFT erred first in applying a 9
28 percentage to Allsports' relevant turnover. It should be remembered that that figure of 9 per
29 cent. was 9 rather than 10 per cent. which is the highest permitted by the guidelines. Again, it
30 might be worth quickly glancing at that, para.2.3 of the Guidance. It says in terms that there is
31 a maximum of 10 per cent.

32 THE PRESIDENT: Yes.

1 MR PERETZ: The only reason why the OFT applied 9 rather than 10 was the point that Mr Roth has
2 already discussed in some detail, that the OFT says that it took into account the fact that not all
3 products in the relevant market were covered. So essentially what the OFT was doing, leaving
4 that point aside, was applying the highest percentage that it could on the OFT's case. We say
5 that that was inconsistent with the requirement at para.2.6 to take real account of the infringing
6 activity of each undertaking on competition. In particular it is frankly bizarre that Allsports
7 received 9 per cent. on that basis when Umbro, whose role to use the OFT's own emphasised
8 word in its skeleton argument before the Tribunal today, was pivotal and extensive, and it
9 received only 8 per cent.

10 To repeat what Mr Roth said in reply to a question I think put by Mr Colgate, we
11 accept of course that Umbro were fined a lot more than we were, but as Mr Roth rightly
12 pointed out that follows from the fact that Umbro's turnover was rather larger, the fact that its
13 involvement in this infringement lasted for a very long time, and was involved in substantially
14 more infringements.

15 MR COLGATE: Its turnover was smaller than Allsports.

16 MR PERETZ: Yes, its turnover was slightly smaller than Allsports, yes.

17 MR COLGATE: £83 million compared to £139 million – quite a lot smaller.

18 MR PERETZ: Yes, we accept that. The short point is simply that Umbro was found guilty of an
19 awful lot more over a longer period than we were, and its turnover in the relevant market was
20 much greater. We make the point in our skeleton, one of the reasons why that may be an
21 appropriate way of proceeding is that, other things being equal – this is obviously a somewhat
22 imprecise point – the gain that an undertaking might expect to achieve from an infringement
23 bore some relationship to its turnover in the market. That is obviously a broad brush point, but
24 it may be the explanation for why turnover is chosen at the starting point. If you do that the
25 result is that undertakings with a much higher turnover will end up getting "times more".

26 The question we need to consider is whether, compared to Umbro, Allsports was
27 treated inappropriately by being given a higher percentage applied at the starting point and
28 a higher multiplier.

29 THE PRESIDENT: As I have understood it the OFT is saying that the problem with applying this
30 sort of formula to Umbro, if you had applied the 9 per cent. and the multiplier of 3 to Umbro as
31 well that would have had the effect of penalising Umbro because it happened that a very high
32 proportion of Umbro's turnover was in the infringing product, so that relative to their total
33 turnover you arrive at a very high penalty, whereas for companies for which this is only a

1 small proportion of their turnover, even if you are planning the same multipliers, you still get
2 to a fine relative to total turnover is not so serious as it would be for Umbro.

3 MR PERETZ: Yes. Let me take that point a bit further, if I may. The same point also applies in
4 relation to a comparison between us and JJB. As it happens our relevant turnover, in the
5 relevant market is about one-fifth of JJB's. It also happens that our overall UK turnover is also
6 about one-fifth of JJB's – I can take you to the figures if you want to, but that is broadly the
7 position. Our case is simply that bearing in mind the fact that JJB had far more influence in
8 the market, and far more actual effect on the core problem with Sports Soccer being required to
9 abandon its discounting, if you like the “hit” that we should have received is less than the “hit”
10 that JJB should have received.

11 THE PRESIDENT: Although your fine is less than one-fifth of the present fine of JJB.

12 MR PERETZ: Yes, well they are a much bigger company and, of course, in JJB's case their fine has
13 increased, as matters currently stand, by the fact that the original finding in the Decision
14 involved agreements going over a much longer period.

15 THE PRESIDENT: Yes.

16 MR PERETZ: Another point made by the OFT in dealing with the different starting point applied to
17 Umbro is that there is a general presumption that horizontal price fixing is *per se* worse than
18 vertical price fixing. There is quite a helpful table in the MU skeleton that sets out in helpful
19 tabular form, but in the Decision itself the OFT's statements on this point were not exactly
20 consistent with each other. Page 9 of MU's first skeleton, tab 5, para. 21 simply illustrates the
21 various statements made in the Decision itself and Mr Roth referred you, as indeed we do, in
22 our original argument to the contrasting treatment of this point, the relative seriousness of
23 vertical and horizontal price fixing in the *UOP* decision.

24 Whatever one might think of the general proposition that horizontal price fixing is
25 more serious than vertical price fixing, and as we have seen the OFT is not entirely consistent
26 on the point. Whatever one thinks of it in the circumstances of this case it is simply bizarre.
27 The key damage here was that Sports Soccer, the discounter, was made by Umbro to stop
28 discounting for reasons, as Umbro itself frankly admitted, very much in its own commercial
29 interest, and Umbro was plainly more to blame for that, given in particular that it carried on
30 price fixing with Sports Soccer with greater intensity, as Mr Ashley said in evidence, in 2001
31 long after Allsports had fallen out of the picture.

32 Also as a general point, it being appreciated that Allsports was fined the maximum
33 possible percentage of the starting point, we would also submit that that maximum percentage

1 should be reserved for organised, structured and persistent cartels of the sort that were, for
2 example, and Mr Colgate will know about this, a feature of the ready mixed concrete industry
3 for many years.

4 THE PRESIDENT: That would be the 10 per cent.

5 MR PERETZ: Well it is a slightly peculiar position because the 9 per cent., for reasons I have
6 explained, and Mr Roth dealt with in some detail, is effectively the maximum because the OFT
7 says it was taking account. It would have been 10 says the OFT but for this point that the
8 relevant product market included some products that were not actually affected by the cartel.
9 So effectively the OFT are applying 10, that is what they say. We say that that percentage
10 should be reserved for organised structured cartels of the ready mixed concrete type or, indeed,
11 the vitamin cartels in respect of which there is now a damages action before the Tribunal. In
12 each case those cartels involve recidivist offenders – I think I am right about vitamins,
13 Mr Hoskins may be able to confirm – and that of course is, in itself, a factor increasing
14 seriousness.

15 As far as Allsports is concerned, that is not an agreement of that type. The key element
16 of the infringement as far as Allsports is concerned essentially relates to two weeks of
17 Mr Hughes' life running from about golf day on 24th May to the meeting on 8th June, and his
18 going into hospital on 9th June. Nobody has suggested that Mr Hughes was involved in any
19 cartel activity either before or since that date.

20 As far as the multiplier of 3 is concerned, we make the following five points. First, it is
21 extraordinary that given their relative degree of responsibility for damage to consumers
22 Umbro's multiplier is only 2 when Allsports is 3. The peculiarity of that result is accentuated
23 by the fact that Umbro was caught price fixing under the previous regime and gave assurances
24 to the OFT, or was tied up in assurances to the OFT. The Tribunal may remember that Mr
25 Ronnie admitted in evidence, and the reference is p.56, day 6 that those companies including
26 Umbro, who were caught up in those assurances and then carried on price fixing, were all
27 hypocrites together. That disregard for promises given to the OFT should on any view, justify a
28 higher multiplier than that applied to Allsports which has no previous convictions and had
29 given no assurances. Indeed, there is no evidence at all that Allsports had any involvement or
30 any real knowledge of those assurances.

31 The third point, the decision to apply a higher multiplier to Allsports, and this is a point
32 that the President has already raised, is based on the relative degree of "hit" – if I could put it
33 shortly – and that is actually unrelated to the only consideration specifically mentioned the

1 relevant point of the Guidance at para.2.8. That consideration is the gain from the
2 infringement, and I have made this point already – other things being equal one would expect
3 the gain from the infringement to be in broad terms related to the amount of turnover and the
4 product concerned.

5 In particular, I would remind the Tribunal that Mr Patrick observes at para.38 in
6 unchallenged evidence that Allsports Stores, and it may be remembered that Allsports goes in
7 for many small shops rather than giant shops of the Sports Soccer type, are often in areas
8 where JJB and Sports Soccer are not present, and anyway it is aiming at an entirely different
9 market. Even when the price promise was removed, Allsports had not felt obliged to follow the
10 market downwards in order to compensate for lack of sales because, according to Mr Patrick, it
11 could sell all that it was getting at full price. Be that as it may, there is no reason to suppose
12 that Allsports expected gain as a percentage of its turnover was any greater than Umbro's.

13 The fourth point – Allsports, on any view, stopped the infringement off its own bat at
14 the beginning of October 2000 without, unlike either JJB or Umbro, any intervention by the
15 OFT. They stopped when the OFT turned up armed with a warrant at their front door. We
16 stopped much earlier than that. There is no suggestion of any repeat infringement.

17 The fifth point – I would submit that the Tribunal should bear in mind that the terms of
18 its own Judgment in clarifying the law itself operates as a substantial deterrent to operators in
19 the retail sector, the purpose of the multiplier at this stage being a matter of deterrent. The
20 Tribunal will be aware, and this was discussed towards the closing of the hearing last March,
21 that there have not been any – or at least the parties could not find – any cases at EC level
22 involving complaints by retailers to suppliers, or exchanges of price information between
23 them, outside a particular and in some ways rather specialised context of selective distribution
24 cases involving essentially grey imports, like the *Hasselblad* case. One can argue – and I am
25 not going to argue here – about the extent to which the Tribunal's Judgment at around para.666
26 – I find that an easy paragraph number to remember – I think it is para.637-670, breaks any
27 new ground. But it is beyond doubt that, together with the Tribunal's recent Judgment in the
28 *Argos Littlewoods* case it sends a very clear message to the retail sector that discussions of the
29 type that led to the England Agreement are unacceptable. Indeed, if I can speak personally,
30 I found that reading bits of the Tribunal's Judgment out to audiences, including retail industry
31 representatives or lawyers, causes something of a stir and a large number of anxious questions.
32 I am not going to tell the OFT who those questions were from. That of itself sends a very clear
33 deterrent message to the industry without, we would say, the need to multiply the amount of

1 the penalty unduly. With all due respect to the OFT, and without unduly flattering the
2 Tribunal, its analysis of the relevant case law is much more detailed and therefore much more
3 helpful, than the analysis of the case law one finds in the Decision which is, frankly, fairly thin.

4 THE PRESIDENT: One should not be surprised that there are few Decisions at EC level on retailing
5 because it is intrinsically a domestic activity.

6 MR PERETZ: Indeed.

7 THE PRESIDENT: So the fact that the EC cases do not really go into much detail on this sort of
8 thing is not particularly surprising.

9 MR PERETZ: There may well have been retailers and their advisers who simply had not appreciated
10 the extent to which EC law would bite at retail level once the Competition Act came into force.
11 They cannot plausibly claim to be in any doubt now.

12 THE PRESIDENT: The concepts of EC law, as introduced domestically and applied in a domestic
13 context, yes.

14 MR PERETZ: The next overall heading I am going to come on to is the heading of duration, and
15 I can take this quite shortly because Mr Roth has done a lot of my work.

16 THE PRESIDENT: I think we have got the essential point that everyone is making about duration.

17 MR PERETZ: Indeed, I just want to add a couple of wrinkles. The first I have essentially just made.
18 It needs to be borne in mind in relation to Allsports that we actually stopped the infringement
19 on any view without any intervention by the OFT, unlike certain other parties.

20 THE PRESIDENT: When you say you “stopped the infringement”, please remind me if I have
21 forgotten it, but I am not aware of any actual, positive steps to reduce price or anything of that
22 kind, you simply carried on, basically.

23 MR PERETZ: Well what happened was that on 1st October 2000 Sports Soccer started discounting,
24 but there is no suggestion that Allsports did anything after that date.

25 THE PRESIDENT: They did not do anything positive.

26 MR PERETZ: They did not do anything positive. There is no suggestion of any pressure, or any of
27 the other infringements found by the Tribunal after that date. Again in the context of duration
28 I would also make the point that Mr Hughes’ price fixing activities were concentrated – and
29 that is the core of Allsports’ problem – over those couple of weeks. There is no suggestion of
30 involvement before or since. Mr Hughes is a proud man, and did not say this, but as Allsports’
31 representative I think I can invite the Tribunal to draw this inference. He was, of course, as the
32 Tribunal knows, during the relevant period gravely ill and in severe pain. Indeed, he says at
33 one point that when he went into hospital on 9th June he did not know that he was going to

1 come out alive. I think the Tribunal was entitled to draw an inference and it goes to mitigation
2 although not of course to liability, that his illness adversely affected his judgment. That is
3 mitigation we would submit on any view, and it also goes to the question of whether Allsports
4 needs to be deterred any further. It was effectively a one-off aberration on his part.

5 MR COLGATE: Yes, you say that, but the entries in his diary do not quite bear that out, do they?

6 MR PERETZ: Which entry are you referring to?

7 MR COLGATE: Well the subsequent entries that were taken out about Manchester United and
8 Mr. Ashley.

9 MR PERETZ: Yes, I am not sure that there was any evidence about when those – you will have to
10 remember that Mr Hughes’ diary is written, as it were, in anticipation. It is essentially a “to do”
11 list rather than a record of what he actually did – I think that is uncontested. Whatever view
12 one takes about what he wrote he wanted to do in early August 2000 he did not do it. Indeed,
13 there is no evidence that he did anything after he went into hospital on 9th June, no suggestion
14 he did anything after he went into hospital on 9th June.

15 MR COLGATE: Nevertheless, the point is that there were entries in his diary and therefore the
16 period potentially could have been longer. I am not suggesting it was, but I do not think there
17 was evidence either way on the matter.

18 MR PERETZ: The important point is there is no evidence that he actually did anything after he went
19 into hospital on 9th June. That is the key. Nobody has suggested that he ever did ring
20 Mr Ashley. Mr Ashley certainly never suggested that.

21 Market definition. Again, I can deal with this pretty shortly. I have a couple of
22 footnotes and a wrinkle to what Mr Roth has so eloquently already said. I just want to bring
23 the figures out, we made this point at para.2.6.3 of our Reply skeleton, in relation to the OFT’s
24 table and the Lexicon presentation in relation to that table, which you have been through with
25 Mr Roth this morning, the OFT on its own case can only find 15 out of 52 cases where the
26 shirts move together with the shorts and socks and, as Mr Roth pointed out, even where they
27 do so they often do so in different proportions. Of course, we have no evidence at all of what
28 the position is in relation to retailers outside the OFT’s table.

29 THE PRESIDENT: I am still finding it slightly hard to imagine that if, as it were, the ceiling price
30 for the shirt had been lower, that that would have had no effect at all on the retail price for the
31 shorts and the socks. For example, and I just do not know whether there is any evidence about
32 it, we are told that at least to some extent prices of shirts have fallen quite considerably
33 following the OFT investigation. Whether there has been any similar pattern or effect in

1 relation to the shorts and the socks I do not know, but one would expect some kind of
2 relationship.

3 MR PERETZ: There are a number of explanations why the price of replica kit may have fallen since
4 the relevant period.

5 THE PRESIDENT: Well whatever the explanation ----

6 MR PERETZ: There may be a general trend.

7 THE PRESIDENT: -- you would have thought that if the price of the shirt falls that the price of the
8 shorts and the socks would fall as well as a general proposition.

9 MR PERETZ: As you said, Sir, the problem is we have no evidence relating to that whatsoever –
10 that was actually going to be my second footnote. There simply is no evidence. I shall come on
11 to in due course – and it will apply here as well – a point raised by the OFT itself, based on
12 what Mr Russell and Mr Bryan say, but that applies equally to socks and shorts as it does,
13 I will say, to the junior shirt.

14 THE PRESIDENT: It is difficult to collect it all up in one's head, but we had a lot of evidence about
15 it indirectly during the liability hearing. For example, I am thinking of the occasion when
16 Mr Ashley had started to discount the shorts – it may have been the shorts and the socks – and
17 then was told by Umbro that he needed to put the prices up and two days the prices of the
18 socks and the shorts went back to the price of the shirt, suggesting that there is some kind of
19 perceived relationship between all these three products, for example.

20 MR PERETZ: Well I cannot, off the top of my head, remember that.

21 THE PRESIDENT: I suspect if we plodded through Mr Atfield's meeting notes we would find quite
22 a lot of stuff about shorts and shirts as well as socks.

23 MR PERETZ: It may well be that Umbro were equally concerned about price fixing socks and
24 shorts, as they were about pricing shirts. That does not, of itself, suggest that they are in the
25 same market.

26 The third footnote, I just want to direct the Tribunal to this point, is Miss Charnock's
27 unchallenged evidence in her first witness statement (para.27). I know there were certain
28 difficulties in securing Miss Charnock's attendance, but in relation to her first witness
29 statement I think I am right in saying that the OFT's original decision is they did not want to
30 cross-examine her on that, unlike her second statement which, as I recollect, made them feel
31 they might like to see her.

32 THE PRESIDENT: What did she say at 27?

1 MR PERETZ: What she says in her first witness statement is that when shorts and socks are bought
2 they are often bought without the shirt, for example, she says for athletic wear or for team
3 sports or just general leisure wear. In relation to team sports, of course when one plays for
4 a Sunday League team or whatever the choice of shirt is often dictated by the colour that one
5 needs to wear for the team, but one often has a pretty freehand in deciding what socks and
6 shorts to wear, and if one wants to demonstrate one's loyalty to the team that way, or just likes
7 the colours or fashion then one will buy them. What that actually means is that it cannot be
8 assumed that one-fifth of all shirts are bought together with socks and shorts. In fact, the true
9 percentage of shirts bought along with other parts of the kit will be well under a fifth. The
10 Tribunal will remember that there is a 5:1:1 ratio of shirts, socks and shorts by volume. Those
11 are my footnotes.

12 THE PRESIDENT: The shorts seem to bear the MU crest as well as the Umbro diamond. The socks,
13 so far as we can see, simply bear the MU diamond, and do not seem to have any other
14 distinguishing marks.

15 MR PERETZ: I am afraid I do not have the benefit of this material culled from Paul Harris's
16 Manchester United Fan Club file!

17 THE PRESIDENT: Is somebody telling me that the socks have a crest on them?

18 MR HARRIS: I am sorry, Sir, I thought you said they did not bear an Umbro mark, but they did bear
19 a MU ----

20 THE PRESIDENT: No, the socks, according to these pictures, have an Umbro diamond ----

21 MR HARRIS: Yes.

22 THE PRESIDENT: -- but they do not seem to have an MU crest.

23 MR COLGATE: They just have the initials "MU"?

24 MR HARRIS: Some of them have the initials "MU" and of course they all bear the team colours.

25 THE PRESIDENT: That is true of the socks, is it – they have the initials "MU"?

26 MR HARRIS: Some of them do, yes.

27 MR PERETZ: One point one can perhaps make in relation to shorts is that one might well buy the
28 MU shorts, as I think white shorts ----

29 THE PRESIDENT: Some of them are white, some of them are black.

30 MR PERETZ: Whatever, because one wants a pair of white shorts and therefore they compete with
31 other white shorts. Perhaps if you were a Manchester City supporter, you would not want to
32 buy Manchester United shorts, but many people will be indifferent on that point.

1 The wrinkle, as Mr Roth flagged up is that the OFT has not demonstrated that junior
2 shirts form part of the same market as adult shirts. Mr Roth said yesterday that he was not
3 minded to press that point. I do press it. To start with, in a sense, the obvious, it is obvious that
4 junior shirts are not substitute for adult shirts and indeed unlike, for example, different sizes of
5 adult shirt they are priced at a different price point, and that is leaving aside the fact that junior
6 shirts and children's clothing are zero rated for VAT purposes, and whereas adult shirts, of
7 course are at standard rating.

8 THE PRESIDENT: That may explain the different price point.

9 MR PERETZ: Leaving aside there is a different price. As Miss Charnock points out in her witness
10 statement as well, junior shirts tend to be bought, as she puts it "by mothers for their sons" or
11 perhaps to avoid stereo typing, we might say "by parents for their children". These are
12 essentially commonsense points. They will often be presents, so again one can only speculate
13 in the absence of any real evidence on this point. They might well be more prone than adult
14 shirts to peak in the pre-Christmas period. It is also again likely to be the case, and again in the
15 absence of any evidence I cannot put it any higher than this, that the children wear replica
16 shirts on more occasions than adults do. To take a homely example of the sort that JJB has
17 made in relation to shorts and socks, a grandparent might be rather less surprised to see their
18 grandchildren wearing replica kit when turning up for tea than they would be to see their adult
19 children wearing a replica shirt on such an occasion. The fact that replica shirts are tough and
20 easy to wash no doubt also figures in parents' thinking.

21 In general, and again one can only make this point in a fairly general way, it is likely
22 that children and teenagers' leisure wear is affected by different fashion trends than adult wear.
23 Children are generally allowed a greater degree of informality and, as any of us who are
24 parents know only too well, they are affected by different views of what is fashionable than
25 grown ups. As part of the children's leisure wear market a replica junior shirt, one might have
26 thought, will be affected by such trends. I do not claim that any of this is any very rigorous
27 analysis. If I were acting in a merger case I would not dream of turning up to the OFT, let
28 alone the Competition Commission with thoughts of that degree of generality. However, what
29 I do submit is that that thought would put any competition lawyer on notice that adult and
30 junior shirts might well need to be looked at separately when it came to market definition. The
31 problem with the OFT's decision is that it simply fails to look at the point at all. It is only now,
32 a point which is not in the Decision, that there is some form of spill over effect from the

1 pricing of adult shirts to the pricing of junior shirts. The difficulty with that assertion is simply
2 that it is made without any sufficient evidence that that is actually the case.

3 The specific point that came out in evidence before the Tribunal that the OFT does
4 draw attention to was the point that in their evidence Messrs Russell and Bryan, both record
5 that they wondered, when they learned of a price fixing agreement involving replica adult
6 shirts, why that agreement did not extend to junior shirts or other kit items, and that point
7 actually fails to help the OFT at all, for two reasons. First, the fact that competitors both supply
8 product X and product Y does not mean that X and Y are in the same market. So when they
9 meet and agree prices for product X, the question “Why X and not Y?” can always arise.

10 Secondly, the fact that Mr Russell and Mr Bryan both thought that a further agreement
11 might be necessary or called for, if anything tends to suggest that they did not see there being
12 any automatic spill over comprising replica shirts ----

13 THE PRESIDENT: As I remember the exchange the evidence was that I think it was Mr Bryan who
14 had said you can tell that these more senior people are no longer hands on in the business
15 because they did not make the agreement extend to these other items, from which one might
16 infer that if they were hands on in the business it would be a natural thing to have done, i.e. it
17 would be quite natural to treat these products as closely interrelated such that you should make
18 the agreement cover them all.

19 MR PERETZ: Or it might be quite natural because the agreement reached in relation to adult shirts
20 did not spill over to junior shirts so you needed expressly to bring them in. In essence our
21 submission on this point is that the OFT have simply failed to discharge its burden of showing
22 that junior shirts are in the same market, and we adopt Mr Roth’s representation regarding in
23 particular what the OFT says about what is the right thing to do in those circumstances, and the
24 *UOP* case, that doubt on the point is to be resolved in favour of the parties subject to the
25 Decision.

26 The next matter I want to go on to is the question of co-operation.

27 MR COLGATE: Before you do that, are you going to take us to figures that you suggest should be
28 substituted in the Decision.

29 MR PERETZ: Yes perhaps I should have done this at the outset.

30 MR COLGATE: I just make the point because the start point is 3.846, and if your argument is
31 sustained then it would obviously be helpful to know what the start figure would be.

32 MR PERETZ: I should have referred you to that. As it happens with the Notice of Appeal we
33 attached a table showing the various figures of turnover so that one can apply various

1 permutations to it, and it is at I think tab 2 of Allsports' pleading file 1, p.221 and we tried to
2 cover the various permutations that there might be.

3 THE PRESIDENT: You at least are not worrying about the goalkeepers, as far as we can make out.

4 MR PERETZ: Like Mr Roth there is a point at which it becomes too trivial to be worth arguing
5 about. It may matter to JJB because the overall size of their penalty is larger, so I do not
6 criticise them for taking the point. We set out the turnover in respect of each of the products.
7 One thing we noticed today that we had not actually done, and I was reminded of the point by
8 Mr Roth's distinction between Manchester United home and away, we have not drawn that
9 distinction, if it would assist the Tribunal we can simply ----

10 THE PRESIDENT: No, it would not assist I do not think at this stage, Mr Peretz, thank you.

11 MR MORRIS: Sir it would help me at least and perhaps help the Tribunal, if Mr Peretz could
12 identify which figure on this table is the figure he now says is the comparator to the figure
13 which is in the Decision.

14 MR PERETZ: What we have attempted to do is to set out in the second column headed "Fine" – we
15 have turnover in the first column of figures, that is the turnover in the relevant year of the
16 relevant product, and then in the next hand column we simply set out the amount of fine as it
17 were based on those figures, or rather the starting point on which the turnover is based, the
18 percentage being applied to that figure. So, for example, Manchester United adult shirts, that
19 meant if, for example, we had been convicted only of the Manchester United infringement, and
20 the Tribunal agreed with our submission that the starting point ought to have been based on
21 turnover and adult shirts, then that is the relevant figure. Then you can see down "All MU
22 replica kit", and the figure in bold is the actual figure relied on by the OFT, first of all in
23 relation to MU, secondly in relation to England, and thirdly both combined. Of course, the
24 context of this table was that at the time we contemplated it as a possibility, that we might be
25 convicted of one agreement and not the other, that is why it is broken up that way. That is now
26 of slightly academic interest.

27 THE PRESIDENT: So what you say is if the right basis is adult shirts, the relevant turnover is
28 £870,515.

29 MR PERETZ: The relevant turnover is £2.48 million.

30 THE PRESIDENT: Sorry, the fine is £870,515.

31 MR PERETZ: Yes. Sorry, am being reminded how to read it. The second column related to fine. It
32 is the fine on the assumption that everything else remains constant.

33 THE PRESIDENT: Quite.

1 MR PERETZ: The key point is that you have the turnover figures in the left hand column, and one
2 can play about with those figures in various permutations to achieve a result. So we say the
3 correct approach is to take out everything but the adult shirts, the correct figure is £2.48
4 million.

5 MR COLGATE: And you are not taking the point about different years of shirts. We had a
6 discussion before lunch about the 1999 shirt, and the 1998 shirt, and the 1647 shirt, you are
7 just saying it is shirts?

8 MR PERETZ: Of course to be accurate it is England shirts and Manchester United shirts which the
9 OFT found to be separate.

10 MR COLGATE: But there will be different years.

11 MR PERETZ: I did advert to the point that one thing we have not done in that table is separate home
12 and away. So that really is a point relating to Manchester United, what I do not have in front of
13 me, I am afraid, is the turnover figures relating to the Manchester United away shirt, as
14 opposed to the Manchester United home shirt. So if the Tribunal accepts the submission that
15 Mr Roth was making in that regard, which would apply equally we would say to us, an
16 adjustment would have to be made. I am afraid I will simply have to supply details of that to
17 the Tribunal as soon as I can.

18 THE PRESIDENT: I think Mr Colgate's question is this, if you look at the details given for
19 England, "adult shirts" etc., that will include not only the England home shirt that was
20 launched at the time, or sold at the time of Euro 2000 but sales of that shirt on these items
21 before that period.

22 MR PERETZ: Indeed, it is a whole year.

23 THE PRESIDENT: Yes.

24 MR PERETZ: On that particular point we accept the nub of Mr Roth's submissions and would
25 repeat the nub of Mr Roth's submissions, but some account has to be taken of the limited
26 duration of his agreements without perhaps bothering too much about the details for a very
27 limited period.

28 THE PRESIDENT: Forgive me for interrupting you a moment, Mr Peretz. Can I just say for the
29 avoidance of doubt, for JJB's benefit, that this is the sort of table we are looking for in order to
30 translate the various JJB figures into some kind of concrete examples.

31 MR PERETZ: Yes, well I am delighted again that we have prepared helpful tables which JJB has
32 not yet quite managed ----

33 THE PRESIDENT: That is worth yet further discount, Mr Peretz!

1 MR PERETZ: Co-operation. The starting point on co-operation, we say, is that an undertaking
2 faced with an OFT investigation is entitled, essentially, to remain silent – to make no oral or
3 written representation, to confine itself to answering properly and accurately s.26 notices, and
4 complying fully and properly with s.27 and 28 and these days 28(a) investigations. An
5 undertaking that does that does not co-operate in any meaningful sense, but its conduct is not
6 aggravating either, it simply stood on its rights.

7 The OFT in the *Argos/Littlewoods case*, and I have handed up a note of the paragraph
8 we were referring to. I do not think I need to take the Tribunal to it, but it recognised that the
9 provision of witness statements – presumably in that case helpful ones, although others here
10 may be able to assist me on that – and documentation not asked for is not to be expected in the
11 usual course of things, and they gave a 10 per cent. discount to Argos/Littlewoods on the basis
12 that they did that. As far as witness statements are concerned, in our submission nothing turns
13 on whether undertakings refuse to respond to the OFT by means of witness statements, or
14 lawyers’ submissions, so that criticism of Allsports for taking, as we did the lawyers’
15 submission approach, is misplaced – other things being equal – of course it depends what is in
16 the witness statements, and what is in the lawyers’ submissions. I invite the Tribunal to
17 remember that this case offers a number of examples of witness statements given to the OFT
18 which have, to put it gently, not perhaps been of great assistance to the OFT. As I said, it all
19 depends on what is in them, and not the form in which they are made.

20 The OFT’s point about witness statements might, I suppose, have been slightly stronger
21 if it had actually asked Allsports to produce witness statements informally, which it could have
22 done.

23 The key point I want to emphasise, and I do not think the OFT actually seriously
24 disputes this, but I need to go through it to show to the Tribunal what an important point it is,
25 is that Allsports made right at the outset in response to the first Rule 14 notice, a very
26 important and damaging admission. I say “damaging” because it resulted, along with the
27 Hughes/Black conversations, in a 15 per cent. increase in the fine (para.614). That is, of
28 course, the admission that Mr Hughes was responsible for instigating the 8th June meeting.
29 I need to take the Tribunal through that admission to demonstrate actually how important it
30 was. The starting point was the first Rule 14 Notice, which is in the blue bundles, C1, tab2,
31 p.33. If one starts, perhaps at p.32 one can see the overall heading “Agreements between
32 Umbro and major retailers April and May 2000”.

33 THE PRESIDENT: Yes.

1 MR PERETZ: Then if I can take matters up at para.84 and invite the Tribunal to read from there
2 down to the bottom of the page.

3 THE PRESIDENT: Yes.

4 MR PERETZ: It is p.22 of the internal numbering, if that helps.

5 THE PRESIDENT: (After a pause) Yes, well we have not got on to 8th June meeting at this stage.

6 MR PERETZ: What we have, if you go over the page, para.90 ----

7 THE PRESIDENT: It is right at the bottom of 89, yes.

8 MR PERETZ: Right at the bottom of 89 and then on to 90, we are going on to the 8th June meeting.

9 If I can take it up at the bottom of 89:

10 “Umbro has also confirmed that a meeting took place between Allsports, JJB and
11 Sports Soccer on 8th June to discuss retail prices.

12 “90. Sports Soccer, Blacks and JD Sports have confirmed that they increased the
13 price...”

14 Then the key extract from the document that the Tribunal no doubt recollects, the letter from
15 Mr Prothero of Umbro to Manchester United, stating:

16 “As you know Umbro have worked very hard in agreeing a consensus to the price of
17 a new MU jersey. At one stage we even managed to get Messrs Hughes, Ashley and
18 Whelan in the same room to agree this issue.”

19 That was the documentary evidence as it stood. Then para.91 records Sports Soccer’s position
20 in March 2001:

21 “... that it informed OFT officials that it had attended a meeting with several other
22 retailers organised by Umbro to agree the price of England replica football kits at the
23 time of Euro 2000 in June-July 2000.”

24 You will remember that there was a problem because Mr Ashley said actually he meant
25 Manchester United. So that is the way in which matters stood in the OFT’s Rule 14 Notice.
26 Documentary evidence clearly pointed to Umbro as the organiser of the meeting. Sports
27 Soccer’s evidence pointed to Umbro as the organiser of the meeting. If Allsports had remained
28 silent on this point, as it was entitled to do, the OFT would have had to have decided on the
29 basis of the documents whether Mr Ronnie, as he goes on to say in his witness statement, was
30 right to point the blame at Mr Hughes, as he doubtless would have done and indeed did.
31 Neither Mr Ashley, nor Mr Whelan could have dealt, or in fact did deal, with whether
32 Mr Hughes acted off his own bat or as a result of some initiative by Umbro, and it is worth in
33 particular turning up Mr Ashley’s witness statement in the witness statement bundle. I can

1 confidently say file 1. If I can take you first to p.31. As you will remember Mr Ashley's first
2 witness statement simply exhibited a whole lot of material supplied by Sports Soccer t the OFT
3 and confirmed that it was accurate.

4 THE PRESIDENT: These are double numbered.

5 MR PERETZ: I am looking at the bottom of 31, para.3.2.8. If I just invite the Tribunal to look at
6 that. The essential point that I want to make is that there is no reference anywhere in this
7 passage to Mr Hughes as being the instigator. Indeed, the implication of these paragraphs is
8 that Umbro is responsible for getting Sports Soccer to attend the meeting. We can proceed,
9 even to the second round of representations by Sports Soccer, at which point I do not need to
10 take the Tribunal to it, but the second Rule 14 Notice, which was based on the admission I am
11 going to show the Tribunal in a moment, of course gets it right, when its says that David
12 Hughes was the instigator. Even in response to that, if I take the Tribunal to p.108 in the same
13 bundle – we are back in the same witness statement bundle. This is if you remember the series
14 of columns applied by Messrs Cameron McKenna on behalf of Sports Soccer. The left hand
15 column is the paragraph number, then a quick summary of what it is and then the right hand
16 side Sports Soccer's representations. If I just invite the Tribunal to read that and then over the
17 page.

18 THE PRESIDENT: Yes, "Meeting chaired by David Hughes".

19 MR PERETZ: Yes, it does say it was chaired by David Hughes, but if you read the paragraph
20 immediately above that it says that he only attended the meeting because of the intense
21 pressure placed on Sports Soccer by Umbro.

22 THE PRESIDENT: Yes. (After a pause) Yes.

23 MR PERETZ: So even in response to an express OFT allegation – correct allegation – that David
24 Hughes was the instigator of the meeting, Sports Soccer still cannot confirm that. I could take
25 you to Mr Whelan's witness statement, but essentially he cannot contribute to the debate at all
26 because, as far as he knows, he was just contacted by Mr Hughes, and the Tribunal will
27 remember the account he gives of that. Again, it would not have taken matters any further
28 forward.

29 We say that unless Allsports had made the admission it did the OFT would have been
30 in a somewhat tricky position in trying to sort out what had actually happened. Essentially it
31 would have had to have decided whether to believe Mr Ronnie over Umbro's own documents,
32 and to some extent the evidence of Sports Soccer. But I can take you to the admission itself.

1 That is at bundle C2, tab 11. First of all, p.459, para.6. There you will see that Allsports accept
2 that:

3 "... before going into hospital for surgery Mr David Hughes, Chairman of Allsports,
4 sought a meeting with JJB and Sports Soccer. He wanted at that meeting to discuss the
5 then state of the market for replica kit and in particular the crippling price war that was
6 then raging."

7 Then we go on to say that this is a matter on which the Tribunal of course made a finding that
8 there was in fact an agreement resulting from the meeting.

9 THE PRESIDENT: So that is the admission, is it?

10 MR PERETZ: But the admission is that David Hughes instigated it. It is referred to again on p.472,
11 starting at p.471, at the bottom of the page, next to paras.84, 89 and 90, and it makes the same
12 point in slightly more detail.

13 THE PRESIDENT: "No decisions were made or agreements reached at that meeting".

14 MR PERETZ: That of course was Allsports' case throughout. But the admission is that David
15 Hughes instigated it, not just organised it but instigated it. If the OFT were to make any point
16 that it is not sufficiently detailed I would simply note that the OFT never sought at all to clarify
17 this admission.

18 MR COLGATE: But how is that helpful in relation to co-operation?

19 MR PERETZ: Well it does, for the simple reason that it was because Mr Hughes instigated the
20 meeting that we received a 15 per cent. uplift in the fine – that taken together with the Black's
21 conversations. Indeed, if I can remind you, as my learned friend has just helpfully pointed out,
22 to para.212 of the first OFT guidelines, the ones in force at the time. The OFT itself refers to
23 "... co-operation which enables the enforcement process to be concluded more
24 effectively and/or speedily than would otherwise be the case over and above that
25 expected of any undertaking."

26 MR COLGATE: I obviously know the guidelines, but the point at issue is does what you have just
27 drawn our attention to not put the OFT off the scent? Because it actually says that no decisions
28 were made.

29 MR PERETZ: The Tribunal knows what our case was on that right up to in front of you, and the
30 Tribunal has rejected our position on that. It was however our position throughout those
31 proceedings that no agreement was reached. The key point, and it was a point that resulted as
32 I said in a significant uplift in our penalty way dwarfing the 5 per cent. discount for co-
33 operation that we actually received, was that Mr Hughes was the instigator of the meeting. As

1 I have explained, that was not an admission on any view that we were required by the force of
2 the evidence being put to us to make. In fact, the evidence being put to us pointed in another
3 direction. If we had taken a different stance the OFT would have been left in the position of
4 deciding whether Mr Ronnie, on the basis of what would have been essentially unsupported
5 witness evidence, was right to deny the documentary evidence which the Rule 14 Notice itself
6 refers to.

7 THE PRESIDENT: At this stage, you would have known that the chances of both Umbro and JJB,
8 and even possibly Sports Soccer saying “I was responding to an invitation from Mr Hughes”
9 were quite strong. I think Mr Whelan does say that he got a call from Mr Hughes.

10 MR PERETZ: He does indeed, but what neither Sports Soccer nor JJB, Mr Whelan, could say is
11 who was responsible for that. The documentation says, Umbro’s own documentation says that
12 Umbro got these people into the room together, and what could quite well have been said is
13 that Umbro, in a sense put David Hughes up to it, but it was its idea. Neither Mr Ashley, nor
14 Mr Whelan would have been in any position to comment on that. Indeed, as I have shown you,
15 Mr Ashley drew an inference that it was Umbro that put Mr Hughes up to it.

16 THE PRESIDENT: Let us not beat about the bush, Mr Peretz, this could be interpreted as a tactical
17 pre-emptive concession knowing that other witnesses are likely to be saying something along
18 these lines.

19 MR PERETZ: Well, if I may respectfully say so, if it were to be interpreted that way the
20 interpretation would be wrong for the reasons I have just said. Mr Hughes, of course, knew
21 what the position was in terms of what Mr Ashley and Mr Whelan were likely to say.

22 THE PRESIDENT: What would his alternative have been – just to say nothing?

23 MR PERETZ: He could indeed have said nothing. Mr Ashley would then presumably have said
24 exactly what he did say, which is that as far as he was concerned the motivation ----

25 THE PRESIDENT: “I was at a meeting chaired by Mr Hughes”.

26 MR PERETZ: He said it was chaired by Mr Hughes, but he also says that it was as a result of
27 pressure from Umbro, and Umbro’s own documentation says that Umbro ----

28 THE PRESIDENT: But then the OFT would have said to Allsports “Mr Ashley says that he went for
29 a meeting that was chaired by Mr Hughes. Mr Hughes has said nothing about this meeting in
30 his Reply, what are we to make of it?”

31 MR PERETZ: Yes, indeed, but what they might have had difficulty saying is that Mr Hughes was
32 responsible for organising it. Umbro’s own documentation would have pointed them towards
33 the conclusion that it was Umbro that was responsible for organising it, or as I said,

1 colloquially, putting Mr Hughes up to it. In any event, our case is that this admission – and I do
2 not want to exaggerate its importance but in our view it does deserve a pretty modest 5 per
3 cent. discount for co-operation balanced, as I have said, by a pretty substantial uplift in our
4 penalty which we are not contesting for acting as the instigator of the meeting. We say that
5 particularly in the light of the equivalent percentage discount given for Manchester United for
6 what the OFT described as a very belated admission that it was party to an information
7 exchange.

8 THE PRESIDENT: Well it was at least an admission that it was party to something. This is
9 a comment on fact, followed by an indignant denial that anything illegal actually occurred.

10 MR PERETZ: But it was a highly damaging admission in that it took the OFT quite a lot of the way
11 towards a finding that there was a meeting and an agreement to which Mr David Hughes was
12 the instigator. Frankly, on the basis of Mr Ashley's evidence, the OFT has – we will accept
13 this – a basis for concluding that there was an agreement quite apart from what Mr Hughes ha
14 said. The key admission by Mr Hughes was that he had organised the meeting. The OFT itself
15 thought that it helped them which is why they gave a discount.

16 As to Mr Hughes' diaries, we have set the position out in some detail ----

17 MR COLGATE: I am sorry, I do not want to labour it too much, but it is admitted in the Rule 14
18 Notice that David Hughes organised the meeting, but are you saying in relation to the
19 Decision, where the OFT say that Allsports organised that meeting with an anti-competitive
20 intent ----

21 MR PERETZ: Yes.

22 MR COLGATE: -- if that is the interpretation that was drawn at that time it surely is a correct
23 interpretation and therefore justifies the 15 per cent. increase.

24 MR PERETZ: I am not contesting the 15 per cent. increase. We entirely accept that. Indeed, it is
25 because a 15 per cent. increase was imposed that the admission is of significance. As I say, to
26 be frank, given the evidence of Mr Ashley in particular, the OFT clearly had a substantial
27 evidential basis, I am prepared to concede that –one view is that one takes the rights and
28 wrongs of the Tribunal's findings – they clearly had a basis for drawing an inference that
29 agreement was reached at that meeting, it chose to believe Mr Ashley. That was not the
30 difficulty as far as the OFT was concerned in relation to that uplift. The difficulty that the OFT
31 would otherwise have been faced with was identifying Mr Hughes as the instigator, because as
32 I said neither Mr Ashley nor Mr Whelan could have contributed effectively to that point.

1 Mr Ashley's views, for what they were worth, were that Umbro was behind it and Umbro's
2 documentation itself suggested that. The Tribunal itself in its Judgment emphasises the
3 importance of contemporaneous documentation. The OFT would doubtless have taken
4 a similar like had Mr Hughes not made his admission.

5 The only point I wanted to make about the diaries, and I am happy if the Tribunal has
6 preference to take them, we have dealt with the point pretty fully in our written submissions.
7 I just wanted to take up a point mentioned by the President yesterday which is that it may be
8 difficult to see that a mere fact that a witness has been found by the Tribunal not to have given
9 correct evidence is itself an aggravating factor. It is essentially the concomitant of losing a case
10 where the facts are contested. On this point the Tribunal did not accept Mr Hughes' account of
11 why it was that he came to delete certain of the entries in his diary. Mr Hughes provided an
12 explanation and the Tribunal did not accept it. I simply repeat the points made in the written
13 submissions that of course Mr Hughes did proffer to the Tribunal right at the outset of the
14 Appeal – highly damaging entries directly indicating anti-competitive intent. Bearing all that in
15 mind we say that Allsports continues overall to be entitled to at least 5 per cent. discount for
16 co-operation.

17 The next point ----

18 THE PRESIDENT: Just before we leave this, Mr Peretz, I just need to understand what it is the OFT
19 is saying and what your answer is because they are essentially saying, I think, that we should
20 cancel this 5 per cent.

21 MR PERETZ: Yes, Mr Morris has confirmed that is what they are saying. They pull a lot of points
22 together. They make the point that I have already addressed, to the effect that Allsports did not
23 provide witness evidence to the Tribunal.

24 MR MORRIS: If it would help, it is in our skeleton, that was the starting point.

25 THE PRESIDENT: It is 57.

26 MR MORRIS: Paragraph 34 and following and that will cross-refer back to the Pleadings.

27 THE PRESIDENT: That is the amended skeleton. 34?

28 MR MORRIS: Yes, 34 and following.

29 THE PRESIDENT: Let us just see what it says.

30 MR PERETZ: I can go through them very briefly in detail. You will note that the OFT does not
31 there address the point I have just been debating with the Tribunal about the value of the
32 admission that was made. Essentially, what they say is it is cancelled out by some other
33 factors. At 36 they refer to the provision of the diary in the witness statements at the Tribunal

1 stage. We say the starting point is that Allsports is not accused of infringing any provision of
2 s.26, 27 or 28, it was perfectly entitled not to volunteer witness statements, not to volunteer the
3 diaries, the OFT never asked for them. Doubtless if it had done it would have been entitled to
4 a substantial discount for co-operation, as indeed Argos/Littlewoods were given a substantial
5 discount for co-operation of 10 per cent. for providing presumably helpful witness statements.

6 THE PRESIDENT: What I would like to go to, just so I have it in my head, are the documents
7 referred to in para.313 of the Tribunal's Judgment on liability, that is to say Allsports'
8 representations of 8th January 2002 and the page in the Response at 40.46.

9 MR PERETZ: I just need to find them. They may be in C2. I may not have the relevant blue file
10 with me.

11 THE PRESIDENT: I think it may be 8th July, actually.

12 MR PERETZ: I think it is 2003 is the problem.

13 THE PRESIDENT: 8th January 2003.

14 MR PERETZ: In response to the second Rule 14 Notice. I confess to having a difficulty – I do not
15 know if anyone can assist me, but I did not bring all the blue bundles with me.

16 THE PRESIDENT: Do not worry, Mr Peretz, we will get there. C5 tab 60. It is 2003, although it is
17 listed in the index as 2002, which is why 2002 has crept into the Tribunal's Judgment, that is
18 a typo.

19 MR PERETZ: Well it is nice to know even Homer nods!

20 THE PRESIDENT: Point 46, yes. I am just seeing what was said, it is the bottom of p.19 and top of
21 p.20.

22 MR PERETZ: Yes, 1750 on my overall numbering. There is a passing reference to Mr Hughes's
23 diary.

24 THE PRESIDENT: Yes.

25 "Any such meeting would have been recorded in Mr Hughes's diary and he is a man
26 who lives by his diary and there is no such record."

27 MR PERETZ: To make the point entirely clear, I am not in any way contesting that that is an
28 instance of co-operation we have voluntarily mentioned the diary, that is true, but I am not
29 seeking to rely on that point as an instance of co-operation. One notes in passing that the OFT
30 never took that up or ever asked to see a copy of the diary. If they had served a s.26 notice
31 asking for it I have no doubt that we would have provided it as we would have been bound to
32 have done – or, indeed, if they had asked for it informally.

1 THE PRESIDENT: I am not quite sure what point is being made, but one could perhaps say that this
2 was a somewhat disingenuous passage. It might have been so construed to say “Well, there is
3 no such meeting referred to in my diary, and I am a man who lives by my diary”, whereas
4 reference to the diary would have admittedly shown no such meeting, but a number of other
5 possibly incriminating entries.

6 MR PERETZ: Indeed, I am not as I say making a positive point about co-operation in respect of that
7 reference. I simply make the point that the OFT cannot complain it did not know about the
8 diary because it was told and could have asked for it.

9 THE PRESIDENT: Yes.

10 MR PERETZ: I also make the point that if we had actually provided the diary voluntarily as it
11 would have been at that stage, we would be standing before you arguing for a very substantial
12 discount. I am not in that position.

13 THE PRESIDENT: But, as far as we know, Mr Hughes had not actually produced to his lawyers his
14 diary at that point.

15 MR PERETZ: Well I do not particularly want to comment on that.

16 MR COLGATE: But surely is not the point ----

17 MR PERETZ: I am told I am allowed to say that that is correct, yes.

18 MR COLGATE: But surely the point is if that diary had been produced at the very early stages the
19 responses to the Rule 14 Notices would have taken a different form?

20 MR PERETZ: Essentially the entries in the diary reveal that the most important point was that
21 David Hughes organised that meeting with anti-competitive intent.

22 MR COLGATE: And made file notes for subsequent further conversations?

23 MR PERETZ: I am reminded the OFT of course had memos relating to that meeting already which
24 they picked up on the search.

25 MR COLGATE: Yes, but the point I am making is – I am dealing with the Rule 14 Notice responses
26 – they would not have been written in the way they were had that diary been produced at the
27 first opportunity?

28 MR PERETZ: I am not so sure about that. First of all, Allsports’ representations were consistent that
29 David Hughes organised the meeting with anti-competitive intent, and that is what the diaries,
30 perhaps rather vividly, demonstrate. Mr Hughes wanted to organise in his words a sports’
31 cartel. But the essence of that admission was made voluntarily. In relation to the notes relating
32 to the subsequent meeting with Mr Ashley, of course the subsequent telephone call that

1 Mr Hughes at one stage thought he might make to Mr Ashley, of course no such call was ever
2 made.

3 THE PRESIDENT: An entry like the entry for 5th June 2000: “Agree Manchester United and
4 England prices with everyone including Mike Ashley, Sports Trade cartel, arrange a meeting
5 regularly, visit Dave Whelan” would be potential evidence of not only an intention to reach
6 the agreements there mentioned but in support of the fact that they could even say they had
7 been reached because that is the admitted intention which is a bit more concrete than the
8 admission made that he requested a meeting to discuss the price war. It is hard to dispute,
9 I would have thought, the fact that this is relevant evidence that was not disclosed, and maybe
10 there was no obligation to disclose it, but unfortunately for whatever reason this submission
11 went a bit further and invoked the diary as being exculpatory evidence, whereas in fact the
12 diary was inculpatory, I would have thought.

13 MR PERETZ: To be frank, I do not think the OFT would have hesitated much in relation to an
14 admission that you intended to hold a meeting to discuss a price war, to infer an intent to fix
15 prices – it is a fairly natural inference to draw.

16 THE PRESIDENT: Let us go back to C2, p.9.

17 MR COLGATE: While we are doing that, the information that you have taken us to on this
18 supplemental Rule 14 Notice, does not make any reference to organising a cartel meeting. It
19 talks about a loose general reference to a meeting.

20 MR PERETZ: I have not found the reference but this is the second set of representations by which
21 Allsports had already made its admission. Perhaps Mr Aldred can find it. There must be a
22 reference in that second set of representations to the admission already made and indeed, by
23 that stage, figuring in the second Rule 14 Notice

24 MR COLGATE: Well if that can be found, let us have a look at it.

25 MR PERETZ: Yes.

26 THE PRESIDENT: To say that:

27 “...you sought a meeting to discuss the then state of the market for replica kits and in
28 particular the crippling price war that was then raging. The meeting took place and no
29 unlawful conversation was reached.”

30 is a different spin I would have thought from

31 “... agree MU and England prices with everyone including Mike Ashley, Sports Trade
32 cartel, arrange a meeting regularly, visit David Whelan.”

1 The first one – maybe it is an admission, but it is not a complete admission of what the diary
2 actually says.

3 MR PERETZ: Well the admission was that Mr Hughes intended – I do not have the words
4 immediately in front of me, but intended to discuss the crippling price war.

5 THE PRESIDENT: The admission was that he sought a meeting.

6 MR PERETZ: He sought a meeting, indeed, that is the key. To discuss the crippling price war and,
7 as I have said, the OFT would have had no difficulty – had no difficulty – in reading into that
8 an intention to fix prices. To be frank, when somebody says “I intend to end a price war” what
9 they are effectively saying is that “I intend ----”

10 THE PRESIDENT: He does not say that he intended to end the price war. He wanted to discuss the
11 state of the market ----

12 MR PERETZ: And to discuss the crippling price war.

13 THE PRESIDENT: -- and the crippling price war.

14 MR PERETZ: Yes, when people discuss a crippling price war what they usually intend to do, the
15 natural inference to draw is to bring it to an end, and that means fixing prices.

16 THE PRESIDENT: Well that is not what the answer to the Rule 14 Notice says.

17 MR COLGATE: And the supplemental Rule 14 Notice says that the content and outcome of that
18 meeting was as set out in Allsports’ paragraphs of it is original Reponse.” So they have not
19 changed their position.

20 MR PERETZ: No, and we did not change our position in front of this Tribunal. Our position was
21 that despite Mr Hughes’ intentions agreement was not reached, and the Tribunal has rejected
22 that.

23 MR COLGATE: Forget the agreement, the intent of calling the meeting was, as per the diary, to set
24 up a cartel.

25 MR PERETZ: Well let us take this in stages. The intent in calling the meeting was relevantly to
26 reach agreement at that meeting. Mr Hughes’ intentions, which he admitted, to set up a more
27 general sports’ cartel – there is no suggestion that that was ever remotely realised.

28 THE PRESIDENT: Mr Peretz, I am sorry to press you on this. Going back to the supplemental
29 answer, this is the evidence, I think, from Mr Whelan about meeting more regularly:
30 “David Hughes believes that a loose general reference to meeting more often would at
31 most have been an initial exchange of pleasantries and was not a serious comment.”

32 MR PERETZ: Yes.

1 THE PRESIDENT: That has to be contrasted with what Mr Hughes wrote in his diary two days
2 before:

3 “Agree MU and England prices with everyone including Mike Ashley, Sports Trade
4 cartel, arrange a meeting regularly, visit David Whelan.”

5 which shows that it was not at all an exchange of pleasantries and not a serious comment – it
6 was a deadly serious comment.

7 MR PERETZ: There are two elements here. First of all there is what David Hughes intends, and
8 secondly there is what he actually said at the meeting.

9 THE PRESIDENT: He states a belief at p.19 of the supplemental answer, which is not supported by
10 his contemporaneous diary entry, which suggests that his belief was much more concrete than
11 he now says and then he goes on to invoke that very same diary in support of the allegation
12 that it was not a serious comment, whereas that diary, had it been produced, would have shown
13 that it was a very serious comment.

14 MR PERETZ: No, with respect. What David Hughes is saying at p.1749 is discussing what was
15 actually said at the meeting, and what he says there – and it is consistent with what he said to
16 this Tribunal – he said any discussion of a general sports cartel simply failed to get off the
17 ground.

18 THE PRESIDENT: Well can we go back to the supplemental Rule 14 Notice – where do we find
19 that?

20 MR PERETZ: If I can finish the point? That is a distinct question, what was actually said at the
21 meeting, to what Mr Hughes planned to achieve at the meeting, and essentially Mr Hughes’s
22 point was that it became pretty obvious to him very quickly that he had no hope of achieving
23 what he wanted. Indeed there is no suggestion that he achieved what he wanted in terms of
24 a general sports’ cartel.

25 THE PRESIDENT: The Supplemental Rule 14 Notice is at tab 50 in file C4. This is a comment on
26 the allegation in para.46, p.1633. This is Allsports’ answer.

27 MR PERETZ: Yes.

28 THE PRESIDENT: The allegation is that:

29 “JJB has stated that after exchanges of pleasantries, Mr Hughes suggested it would be
30 helpful for all parties to meet on a more regular basis to discuss business. Mr Hughes
31 wanted to specifically discuss retail pricing for the forthcoming launch of the
32 Manchester United home kit.”

33 Then we get on to the 45. Mr Hughes’s answer to that is that

1 “... the loose general reference to meeting more often would be at most part of an
2 initial exchange of pleasantries and was not serious.”

3 The diary entry suggests that it was more serious than that implies, but Mr Hughes then goes
4 on to say that “my diary does not suggest that it was serious”.

5 MR PERETZ: I am not sure that is right.

6 THE PRESIDENT: That is the effect of what he says broadly speaking. So it is a pretty elliptical,
7 incomplete response, having regard to the then contents of the diary.

8 MR PERETZ: But what needs to be distinguished is first of all Mr Hughes’ statement as to what he
9 hopes to achieve, was one thing; secondly, what actually ----

10 THE PRESIDENT: Which was a Sports Trade cartel according to that.

11 MR PERETZ: That is uncontested – and what actually happened at the meeting, which was a point
12 that Mr Hughes and Allsports were trying to address in their supplemental representations, and
13 on that point that there was no real discussion of a further meeting. That point is essentially
14 correct.

15 THE PRESIDENT: Yes.

16 MR PERETZ: Indeed, Mr Hughes’ own diary does not provide, when properly understood – once
17 one understands how it operates – again any evidence that there was a subsequent meeting.

18 THE PRESIDENT: That there was, in fact, a meeting, no.

19 MR PERETZ: But one needs to stand back a bit, and this is why I started with the general
20 proposition, the starting point is an undertaking that says nothing at all in response to Rule 14
21 Notices.

22 MR COLGATE: I am sorry, I am still unclear in my mind. Are you arguing that, had the OFT seen
23 the diary on day 1 as part of the dawn raid, that the responses that were given in the Rule 14
24 Notices would have gone forward on exactly the same basis?

25 MR PERETZ: I am perfectly happy to accept that if the diaries had been provided to the OFT at an
26 early stage they would doubtless have proved useful to the OFT and we would have been up
27 here arguing for a very substantial discount for co-operation, given that the OFT did not find
28 the diaries and had no idea that they existed. If we had provided them it would have been
29 voluntary, beyond doubt. That is the position. Obviously we did not do that, but that is a
30 neutral factor so far as co-operation is concerned, it is not an aggravating factor. It simply
31 means we are not entitled to a discount that we would otherwise be very much claiming.

32 THE PRESIDENT: Yes.

1 MR PERETZ: Essentially what one has is a limited admission. I am not claiming that it was any
2 more. I just want to go on and tidy up – I am afraid, as a result of Socratic dialogue I have to
3 apologise to Mr Green for being rather longer than I indicated I was going to be.

4 THE PRESIDENT: Yes.

5 MR PERETZ: Just two further broad headings both of which I think I can deal with quite shortly.
6 One is the impact of the liability Judgment in so far as not otherwise covered. We have dealt
7 with that pretty fully in our written submissions and I do not need to add much. Essentially our
8 case is that what the Tribunal does in the liability Judgment is to find in more detail -----

9 THE PRESIDENT: Yes, you have said that.

10 MR PERETZ: -- the OFT's case. It is buttress, support, fine tuning, one gets a much clearer and
11 more detailed picture, but the essential – what it is a picture of – essentially remains the same.

12 The OFT makes a particular point about the findings in relation to Blacks and JD and
13 I have already drawn the Tribunal's attention to 614, which showed that the OFT in fact took
14 that into account.

15 As far as para.758 of the liability Judgment is concerned – that is a reference in the
16 Tribunal's Judgment to a "more general cartel". I do not need to take the Tribunal to it. Lord
17 Grabiner referred yesterday to the equivalent paragraph relating to JJB, and we repeat *mutatis*
18 *mutandis* that his questions in that regard. Whatever the position may be, if a new cartel is
19 fully pleaded out on Appeal, the basic point here is we say that no allegations for wider cartel
20 were made by the OFT, raised in our grounds of Appeal, or put to us by the Tribunal.
21 Moreover the Tribunal simply has no information about what other kit launches, shirts might
22 have been at issue at the time. Therefore that point simply cannot, in fairness affect our
23 penalty.

24 The President referred to the Chelsea and Celtic shirts. My understanding, although
25 I have never focused on this part of the case in any detail, is that those shirts were launched in
26 2001, a year later, and so are not at issue. That point should be checked.

27 THE PRESIDENT: There are, I think, a couple of launches in May 2000 for those shirts, but we
28 have little or no evidence of that.

29 MR PERETZ: Indeed, that is my point. Finally, may I conclude on this note? In our reply we drew
30 the Tribunal's attention to the point that the costs of this Appeal have fallen particularly hard
31 on Allsports. Our penalty was less than one-fifth of JJB's but we have had to deal to exactly
32 the same extent as they have with a very large number of new points relating to examples of

1 disclosure, new material relied on by the OFT and a number of other issues raised at various
2 case management conferences.

3 THE PRESIDENT: Could it not be said that to a large extent you had brought that upon yourselves
4 by deciding to launch an all out attack on the OFT's findings?

5 MR PERETZ: It is not just that, it is that because this is the very first such case to reach a hearing at
6 the Tribunal we have spent a lot of time, and perhaps more than will need to be spent by any
7 other party adopting a similar course again, in sorting out issues such as disclosure, what the
8 position is in respect of new material, and the other issues – I refer to conduct of the hearing.
9 I have referred to them in the Reply as “trail blazing” costs. I am not making any submission
10 about costs more generally, what I want to focus on is the trail blazing costs, which we face
11 uniquely as the first. That has fallen particularly hard, as I said, on Allsports because we are
12 the smaller of the appellants who go through that course. That is not to criticise anybody,
13 either the Tribunal or any of the other parties, although I cannot to some extent resist pointing
14 that the disclosure issue might have been somewhat easier to resolve if Umbro had taken a
15 slightly different stance. It is simply an inherent feature of fighting the first such case to be
16 brought before the Tribunal. For what it is worth, and I do not put this point too highly but
17 I think it is still nonetheless worth making the point, we invite the Tribunal to take account of
18 those trail blazing costs in setting the penalty.

19 As I said when opening – this brings me back to where I started – we have fought this
20 Appeal very much in the spirit and the letter in the Tribunal's Rules and Guidance, while
21 fighting our case vigorously as we were entitled to do. In the end that approach secures justice
22 by making sure that the OFT's case, a very important case, was properly and rigorously tested,
23 which is what Parliament intended to happen by setting up this Appeal Tribunal in the first
24 place. And the rigorous testing of the OFT's evidence in a case of this importance is, we would
25 submit, to the benefit of everybody.

26 Those are my submissions.

27 THE PRESIDENT: Thank you, Mr Peretz. We will rise for five minutes.

28 (The hearing adjourned at 3.40 p.m and resumed at 3.50 p.m.)

29 THE PRESIDENT: Good afternoon, Mr Green.

30 MR GREEN: Good afternoon. Umbro's Appeal, as you will know, is entirely different in nature and
31 extent to the Appeals of anybody else here today. As you have seen from our skeleton and our
32 pleadings we have focused upon a very small number of points, and one point in particular
33 which is what is now an admitted error on the part of the OFT contained in para.596 of its

1 Decision. It is **that** issue that I will be spending three quarters of my submissions on. The other
2 matter that I propose to address is what I describe as the *Aberdeen Journals'* point. It is not
3 a matter which the Tribunal has addressed in any other case, save very briefly in *Aberdeen*
4 *Journals*, and which is the question of co-operation in the course of an Appeal.

5 The third area that we have dealt with in writing and which I propose in effect to leave
6 in writing is a duration point, and it is in essence that, insofar as the Tribunal concludes that
7 my learned friend's submission on duration warrant any reduction then it benefits us as well,
8 but I do not propose to say anything about that, that question of duration and scope has been
9 canvassed at considerable length today and yesterday.

10 THE PRESIDENT: Yes.

11 MR GREEN: I am happy to go on today until such time as you would wish.

12 THE PRESIDENT: We normally rise about half past four.

13 MR GREEN: Fine. I would like to start by taking you to the central issue, which is first of all
14 para.596 of the Decision, so that you can see what we say has gone wrong in relation to us.
15 Under the section heading "Mitigation" the OFT says:

16 "Umbro has co-operated with the OFT's investigation principally in its responses to
17 section 26 Notices and in its written and oral representations on the Rule 14 Notice and
18 Supplemental Rule 14 Notice. No significant admissions or co-operation were given
19 until Umbro submitted its written representations on the Rule 14 Notice."

20 **That** statement **there** is now admitted to be incorrect. The Rule 14 Notice was issued by the
21 OFT in May 2002 and Umbro's Reply was in July. It is our case, and the evidence
22 demonstrates, that Umbro co-operated very substantially from the previous November – in
23 other words, nearly nine months prior to that.

24 The OFT go on to say: "The admission at this stage", that is the Reply to the Rule 14 in
25 July 2002:

26 "... did assist the OFT by enabling the enforcement process to be concluded more
27 effectively in respect of the Replica Shirts Agreements. It gave the OFT a more
28 complete picture of events and this led partly to the issue of the Supplemental Rule 4
29 Notice as a result. The OFT relies on the admissions made as set out in detail in Part
30 III above particularly in relation to the Replica Shirts Agreements. This is a
31 mitigating factor and the OFT therefore decreases the basic amount of penalty by 40
32 per cent."

1 Umbro therefore obtained a 40 per cent. reduction upon the factual basis that it only gave
2 material co-operation as of the date of the Reply to the Rule 14 Notice. It is Umbro's case, and
3 indeed we believe that it is clearly correct, that Umbro provided material co-operation
4 including evidence as to the elements of the Agreements which the Tribunal ultimately
5 concluded were the central elements of the Agreements as from the previous November when
6 an application for leniency was first made.

7 The OFT's position in its Defence is to be found primarily in para.16 – if I could take
8 you to the OFT's Defence. There are two yellow bundles which contain the entirety of
9 Umbro's documents and I will be limiting ----

10 THE PRESIDENT: You are going to the yellow bundles?

11 MR GREEN: It is a matter for you, but you may find it more convenient to deal with our case from
12 the yellow bundle. I think they are on the left hand side. Paragraph 16 of the OFT Defence is
13 in a section in which they summarise our ground of Appeal, make one or two comments about
14 the procedure prior to their Reply to the Rule 14 and then say:

15 “It is accepted that a number of those documents *did* assist the OFT to conduct the rest
16 of its investigation more effectively (although their importance should not be
17 exaggerated). Accordingly, it is further accepted that para. 596 of the Decision is
18 incorrect insofar as it states that Umbro gave *no* significant co-operation ----”

19 THE PRESIDENT: They accept it in relation to the documents?

20 MR GREEN: They accept it in relation to the documents as being an error. They do not accept it in
21 relation to anything else. They then go on, as you have seen, to say oh well, it does not matter,
22 and that is the question: does it matter?

23 THE PRESIDENT: As regards the documents?

24 MR GREEN: Well as regards the documents, as regards the other evidence given by Umbro,
25 including evidence given orally and in draft witness statements, and then in resubmitted
26 witness statements provided in February, because a very substantial part of the evidence which
27 Umbro later reiterated was provided to the OFT some 6 to 8 months prior to the response to the
28 Rule 14.

29 What I propose to do is first of all show to the Tribunal what happened between
30 November 01 and July 02, in other words during this 8-plus month period. Secondly, to
31 demonstrate that what Umbro actually provided to the OFT was information which turned out
32 to be pivotal. Thirdly, to show you that the OFT's approach during this period towards Umbro

1 was not just plain wrong, but was seriously unfair and it was, indeed, illogical and contrary to
2 good policy.

3 The fourth matter that I will deal with is what I have described as the *Aberdeen*
4 *Journals'* point, and the other matters as I have said I am going to leave in effect in writing in
5 the written submissions. I think probably the most fruitful way to spend half an hour is to take
6 you to the relevant documents and start unravelling the chronology. In order to assist, and
7 make my submissions briefer I have produced a tabulated short chronology with the main
8 points, and references to the pleadings and the various paragraphs in the Judgment, and
9 hopefully that will mean that I can go a bit more quickly.

10 Most of the documents that I am going to be referring to are in the Umbro file 2, and if
11 I can I am going to identify the document, ask you to skim through it, but make my points on it
12 by way of submission rather than just reading through the document.

13 THE PRESIDENT: Yes.

14 MR GREEN: The starting point is the oral application for leniency of 23rd November 01, which is in
15 pleadings bundle 2, annex 2, p.1. This was a note of a telephone conversation between Miss
16 Roseveare, the in-house lawyer for Umbro and Mr Adrian Walker-Smith, Director of Cartel
17 Investigations, and it is dated 23rd November, and there are two time references. What this
18 document demonstrates is first that Umbro was first in the queue in its application for leniency.
19 It is also explained that Umbro had instigated an internal investigation that was ongoing and
20 that Miss Roseveare was in the process of preparing some draft witness statements. It was
21 explained by Mr Walker-Smith that even if Umbro was, as it was put, an instigator or a ring
22 leader it could still get up to 50 per cent. by way of reduction. So that was the starting point.
23 There was then a meeting with the Office of Fair Trading on 4th December, which is pages 3 to
24 5 of this bundle. This is an important document which we will invite the Tribunal at leisure to
25 read thoroughly, but the main points that arise out of it are: first, the OFT did not think that
26 what they were confronting at the time was a cartel case. Mr Walker-Smith explained that. It is
27 explained in para.2.

28 "He explained that, as he understood it, the case did not involve a cartel as that term
29 was usually employed by the OFT."

30 That is important, because it is clear from the documents that when Umbro first made contact,
31 the OFT had no notion of the fact that there was any horizontal element to the case at all. That
32 is plain, not just from the documents and the evidence submitted by Umbro over the next few

1 months, but even by the time the first Rule 14 Notice came to be served, the only evidence
2 that the OFT had of the horizontal nature of the arrangements was that provided by Umbro.

3 THE PRESIDENT: Can I be clear on one point, Mr Green? The various draft and subsequently
4 completed witness statements that were served, I think, at the end of January/beginning of
5 February 2002 were not, in fact, used by the OFT for the purposes of the first Rule 14?

6 MR GREEN: They were not, and I will explain to you the reasons for that – we say they are utterly
7 illogical reasons because Miss Roseveare had explicitly stated in writing that it was open to the
8 OFT to use those statements, and that is stated in a letter, but I will come to that and deal with
9 it.

10 So the OFT did not at this point think that there was a cartel. Mr Walker-Smith makes
11 the point about leniency information in para.2. He says that he was in charge of the leniency
12 programme, and he had been asked to deal with leniency issues in this case.

13 “He explained that Umbro was under no compulsion to say anything and could decide
14 to the meeting at any time it wished. He said that the OFT would treat any information
15 provided in the course of the meeting as confidential, and it would not be disclosed to
16 the case officer if Umbro decided not to proceed with leniency. However, he could not
17 forget what he had heard and, as a result, if the case officer asked him for advice on
18 whether to pursue a particular line at a later stage in the investigation, he would have to
19 indicate whether he thought that this would be a good idea.”

20 Let me make two points at this stage. First, he was saying that the case officers would not be
21 involved in leniency, in fact, all of the case officers were to become involved in leniency, so
22 there was no separation between a leniency team, and a case officer team. Secondly,
23 Mr Walker-Smith made it quite plain at the outset that even if he had information which arose
24 through the leniency programme, he would use that to give advice to the case team if they
25 asked for it. That was part of the basis upon which my client was seeking leniency. There was
26 no difficulty with that we understood the position. We understood the OFT’s guidelines which
27 do not promise that information provided by way of leniency will not be used. It simply says
28 that if possible the OFT will try and maintain the confidentiality of the identity of the
29 applicant, but we will come to that in the fullness of time.

30 THE PRESIDENT: What does this mean: “... would not be disclosed to the case officer” but “...if
31 the case officer asked him for advice... he would have to indicate whether he thought that this
32 would be a good idea”?

1 MR GREEN: Yes, there is plainly no Chinese wall between the case officers' team and the leniency
2 team, and indeed the famous meeting with Umbro on 26th February was attended by all three of
3 the case officers. That was not a problem for Umbro, but that was the position as it was being
4 explained to Umbro, and it is relevant background in relation to the OFT saying "We could not
5 use the information you provided because there was" as they put it "some agreement with us"
6 that they would not use it. Well that is nonsense. It was clear from the outset that there was no
7 clear distinction between the case officers and the leniency team, and Miss Roseveare was
8 quite explicit in correspondence in I think it was either late February or early March – we will
9 come to that later.

10 THE PRESIDENT: I think probably tomorrow you need to take us to the leniency programme itself.

11 MR GREEN: I will take you to that and indeed, to the leniency agreement in draft which was
12 offered to us.

13 Mr Walker-Smith also made the point (para.3) that leniency had never been refused
14 before. He also made the point that if Umbro had compelled others that 100 per cent. leniency
15 would not be available, but he made the important point in para.5 to the effect that uncertainty
16 over the facts would not prevent the OFT entering a company into the leniency programme –
17 he was referring here to a previous case in which a company approached the OFT for leniency,
18 had been unsure as to whether it had acted as an instigator.

19 "In view of this the OFT had agreed to enter into an agreement for full leniency, but
20 with a proviso that this would be reduced to 50 per cent. if the company turned out to
21 be an instigator. In the end the OFT concluded that the company had been an instigator
22 and so the proviso was triggered."

23 Now, an important point arises from this – I do not know what case that was, it cannot be
24 *Hasbro* because they got 100 per cent. not 50 per cent. – the OFT does not take the view that
25 some level of uncertainty about the facts is a bar to entering a leniency agreement and the
26 status of a company as an instigator or otherwise was here in this example not treated by the
27 OFT as a reason for refusing entry into the programme. It is made clear in para.6 that Mr
28 Walker-Smith, at least at that stage, felt confident that the OFT would be able to offer Umbro
29 some reduction, but the extent of the reduction would depend upon the extent to which Umbro
30 could provide information which was not already in the possession of the OFT.

31 I will make the points at this juncture that I am going to make later in greater detail. It
32 is, we submit, absolutely clear from the documents that in at least two material respects, that
33 evidence provided by Umbro was not in the possession of the OFT at that stage or indeed at a

1 later stage. First, the evidence of 8th June meeting and the horizontal arrangements between the
2 retailers, that was something which Umbro brought to the table and which the OFT did not
3 have in its stock at that stage; and secondly, evidence of pressure both in relation to Umbro's
4 position but also as evidence of an agreement. Of course, the Tribunal made findings to the
5 effect that the pressure was probative of the agreements. Those were two areas where the OFT
6 did not have information, and about which Umbro provided a great deal of information.

7 In para.9 the issue being made by Miss Roseveare was that Umbro had acted swiftly in
8 the circumstances, and there was then a discussion in the ensuing paragraphs about what that
9 meant, and how swift was "swift", and that goes on for a number of paragraphs. Emphasis to
10 the effect that this was a vertical case not a horizontal case, at least at this stage is not only
11 found in para.2 but also in paras. 4 and 8. For example in para.8:

12 "PRS [Paul Stone, Lovells] asked how the OFT would assess whether a participant in
13 a vertical arrangement (as opposed to a horizontal arrangement) had been a prime
14 mover or instigator. AWS said this would depend on the circumstances. For example,
15 if it was clear that a supplier had been forced to engage in resale price maintenance as a
16 result of a number of powerful retailers collectively threatening to withdraw orders;
17 this would suggest that the supplier was not an instigator. However, if the supplier was
18 put under general pressure from different retailers to take action in relation to resale
19 prices and the supplier decided to pursue a policy of resale price maintenance, it would
20 then be difficult to argue that the supplier was not the instigator."

21 It would appear, and of course Mr Walker-Smith is not here to give evidence and so one does
22 not want to read too much into it, but it would appear that the OFT was drawing a distinction
23 between a purely vertical case where retailers vertically impose pressure which was then
24 responded to, and something which had a collective element in it as between the retailers. That
25 is consistent with para.2 where the OFT say they did not believe there was any cartel involved
26 in the case at the time.

27 In paras.14 and 15 Miss Roseveare explained that it was Umbro which broke the cartel
28 by actively supplying retailers but there was considerable pressure from retailers and
29 Manchester United. It is explained that the pressure was of an informal nature, and you find
30 those matters in paras.14, 15 and 17. So this was the earliest contact between the OFT and
31 Umbro.

32 THE PRESIDENT: There is a curious reference in para. 18 of this note, where Miss Roseveare says:

1 “Umbro had notes of telephone discussions after the meeting but did not have any
2 documents setting out what was discussed at the meeting.”

3 MR GREEN: Yes, and there is also a reference to the 8th June meeting in para.13. Another point to
4 make is that there was a reference to 8th June meeting here at this first communication with the
5 OFT on 4th December, something that the OFT plainly were unaware of until this point in time.
6 Miss Roseveare referred to notes, and you will have seen from the OFT’s skeleton that they
7 say these notes were never produced, and they ask you to draw an adverse inference from that.
8 In fact, as we have explained in our skeleton no notes ever existed, this was a simple error –
9 notes ever played a part in any of the ensuing investigation over the next two years, and the
10 first time the OFT ever raised it with us was in the skeleton – they did not raise it in the course
11 of the procedure. We have checked and re-checked, there are no notes, there never were any
12 notes. It was simply something which was stated in the course of this meeting which turned out
13 to be incorrect. The OFT was under no doubt whatsoever about it, it just never played a part
14 ever again. If there were any notes they would have surfaced one way or another.

15 Importantly, therefore, the 8th June meeting cropped up which, as we know, was of
16 fundamental importance to the case, and evidence of pressure from retailers, including from
17 Manchester United. So this was in November.

18 The next document is dated 5th December, and it starts on p.7. The letter simply
19 confirms certain points arising from the meeting and Umbro’s understanding that at that stage
20 detailed information would be provided if Umbro proceeded with the leniency programme. It
21 is pointed out in the second paragraph under the heading “Application” that Umbro had
22 declined to co-ordinate or discuss with any third party its position in relation to these
23 proceedings. It was pointed out that the matter was complex, not straight forward, and not all
24 of the information is readily available or documented, that is the third paragraph. It was
25 pointed out that the senior management were in Kuala Lumpur attending the Umbro world
26 conference at the time of the s.28 visit. Miss Roseveare started employment on 1st October.
27 She explains that she conducted an extensive internal audit to collate documents, prepare
28 statements, that it took time, that they also took legal advice. She explains that she introduced
29 the compliance programme, and that training had been given. She was responding to a s.26
30 request, and then:

31 “ Umbro has had to assess very carefully the impact that our application for leniency
32 will have on Umbro’s future business with retailers, in particular JJB and Allsports.
33 These are two of Umbro’s biggest customers who we feared may have an adverse

1 reaction to our application even to the extent of refusing to deal with Umbro in the
2 future. Of course, we are aware of the confidentiality obligations placed on the OFT
3 as part of the leniency programme, but we did not feel that this was without risk.

4 Umbro decided, however, to take the risk.”

5 She then give a summary of some of the information and you will see under the heading:

6 “1. Cartel” crucial elements of 8th June meeting are introduced. She gives the date. She states
7 who Umbro believes were the four attendees – Mr Hughes, Mr Whelan, Mr Sharpe and
8 Mr Ashley. She identifies the price and the product - £39.99 and Manchester United home
9 shirt, and that it was proposed to be launched on 1st August. In the second part of that
10 paragraph she states:

11 “As we understand it, the retailers agreed that the shirts would be priced at £39.99 and
12 the shirts were so priced thereafter by the retailers.”

13 So she gives evidence of the post-meeting effect.

14 “Umbro were not a participant at the meeting nor were they an instigator in setting up
15 the meeting. However, we are aware how and by whom the meeting was set up.”

16 So evidence was then given in some detail as to the cartel, and so the OFT now had it within
17 their possession. An important point arising is at the bottom of p.9, the paragraph before
18 “Turnover”:

19 “After having reviewed the documents which the OFT took away, Umbro believes that
20 these documents present an incomplete picture. Umbro believes that the information
21 that would be provided as a result of Umbro’s participation in the leniency programme
22 would be of significant use to the OFT in respect of the investigation and would also
23 provide a fuller explanation of the situation, rather than relying on the documents
24 disclosed to date. Accordingly, I hope that this will allow you to take a more
25 sympathetic view of our application for leniency.”

26 So that was the letter confirming the discussion with Mr Walker-Smith the day after.

27 MR COLGATE: Mr Green, I am sorry to interrupt your flow, but just to get a question on the table
28 while I think about it. Is there any recognised position about information that is disclosed
29 before a leniency programme is agreed? In other words, is it the situation that when you apply
30 for leniency any information at that point is treated as confidential? Or is it only information
31 that is disclosed after the leniency has been agreed and accepted?

32 MR GREEN: There is something about confidentiality in 3.12 of the OFT guideline 428. Perhaps to
33 save time if I just read you 3.12:

1 “An undertaking coming forward with evidence of a cartel may be concerned about the
2 disclosure of its identity as an undertaking which has volunteered information. The
3 Director will therefore endeavour where possible to keep the identity of such
4 undertakings confidential throughout the course of the investigation.”

5 That is a qualified promise that they will keep the identity of the informant confidential but
6 nothing is said about the information itself, and the promise is only qualified because the OFT
7 say that they will endeavour where possible to keep the identity of such undertaking
8 confidential. There is no absolute guarantee. What is undoubtedly true in this case is that
9 Umbro was aware that any confidentiality the OFT might offer was not least because
10 Mr Walker-Smith explained the position – somewhat qualified in any event – but that in the
11 fullness of time the fact of its co-operation would inevitably become known, even if it was not
12 during a leniency programme. If Umbro was going to co-operate it would be producing
13 statements which would then be relied upon by the OFT in a Rule 14 and the fact that that had
14 occurred would become common knowledge. So Umbro plainly was aware that any protection
15 was of limited duration. But from the outset Mr Walker-Smith had made it clear that there was
16 no absolute guarantee of confidentiality, because he also made it clear that whatever he learned
17 he would advise the case team about. So that is as far as the OFT’s publicly stated position
18 goes. Umbro was aware of the horns of the dilemma that it rested upon and that there was
19 never any guarantee that it was going to be able to maintain confidentiality.

20 MR COLGATE: But that is in relation to the identity, my question is more directed to the
21 information disclosed, in relation particularly to the point you have drawn our attention to,
22 which is the meeting of 8th June. Are you arguing that that was not at that point disclosed as
23 confidential information, or are you saying it is disclosed as confidential information?

24 MR GREEN: I do not think that was confidential. This can be proven – for example, let me take
25 you to p.53 of this bundle. I am jumping ahead but it makes sense, I think, to deal with it now.

26 THE PRESIDENT: Before we jump ahead, let us jump back to 4th December 2001, para.2:

27 “[Mr Walker-Smith] said that the OFT would treat any information provided in the
28 course of the meeting as confidential and it would not be disclosed to the case officer if
29 Umbro decided not to proceed with leniency.”

30 On that basis, if that is right, it would not have been open to the OFT, for example, following
31 Miss Roseveare’s letter of 5th December to send JJB and the others a Rule 14 Notice saying
32 “Where were you on 8th June 2000?” “Did you meet in Mr Hughes’s house?” “Was any
33 agreement reached?”

1 MR GREEN: It might have been if Umbro had decided not to proceed, which did not happen.

2 THE PRESIDENT: It never happened actually.

3 MR GREEN: It never happened, but of course even that is qualified because for example if the case

4 team had said “Should we be pursuing evidence of a horizontal cartel in this case?” he would

5 say “Yes”.

6 THE PRESIDENT: They said “Why?”

7 MR GREEN: We have no idea what was in Mr Walker-Smith’s mind, but on something of that

8 pivotal importance it is hard to see that he would not have said in broad terms “This is

9 what ----”

10 THE PRESIDENT: Well, I do not know, we will see what Mr Morris says tomorrow, but there is an

11 ambiguity about para.2 of the note of 4th December, in which the OFT seems to be saying on

12 one hand it is confidential, on the other hand if somebody asks me where the bodies are buried

13 I might well give directions to the churchyard!

14 MR GREEN: In a sense it is academic because of what happened on p.53.

15 THE PRESIDENT: Yes.

16 MR GREEN: Once, as you know, Umbro’s application for leniency was rejected ----

17 THE PRESIDENT: So you want to go to 53 now?

18 MR GREEN: Just to make this point, 53 is a letter of 14th March, and this is after the OFT have

19 rejected Umbro’s application for leniency. Umbro write to Miss Kent, and in the fourth

20 paragraph:

21 “Accordingly, I should be grateful if you would treat the witness statements that were

22 submitted during the leniency application as still having been submitted as part of the

23 ongoing investigation.”

24 So she is saying, “All right, you have rejected my application for leniency, but you should still

25 use the witness statements as part of the ongoing investigation because I want credit for them”.

26 She is co-operating with the OFT because she wants her company to get maximum mitigation.

27 THE PRESIDENT: We have to read the next paragraph as well, because this harks back also

28 perhaps somewhat ambiguously to the issue of confidentiality.

29 MR GREEN: Oh yes, but ----

30 THE PRESIDENT: She is saying “Well I want you to treat this all as ...” what is going on there?

31 MR GREEN: What happens is that there is a considerable volume of correspondence in which

32 particular words, paragraphs, sentences here and there become the focus of attention for

1 confidentiality. That, as we say, would normally happen if there is confidential information
2 then you will redact it and you will deal with it on that basis.

3 THE PRESIDENT: So this is confidential business secrets, not things like the events leading up to
4 the meeting of 8th June, or Golf Day, or whatever?

5 MR GREEN: The witness statements, as you know Ronnie 1 and 2 for example, contained
6 information about that meeting and she is saying “Use those statements as part of the ongoing
7 investigation.”

8 THE PRESIDENT: Yes.

9 MR GREEN: So 5th December is the reiteration, and then one comes to 17th December, which is on
10 p.13 – a letter from the Office of Fair Trading. Here the OFT say our prima facie offer is 20
11 per cent, and that is because you participated in the cartel, but also we are only giving you 20
12 per cent. because the information you provided “does not advance the case”.

13 We take issue with this because it is plain, absolutely plain, that the OFT did not have
14 information at this stage of 8th June meeting at the very least, nor as to the full detail of the
15 pressure which was set out and described in draft witness statements. We know this not least
16 because the first Rule 14 Notice relied upon Umbro material predominantly for these facts, in
17 particular the 8th June meeting, and we know these facts, as described fully in your Judgment
18 were pivotal to the OFT’s case, and your endorsement of that Decision.

19 So an assumption underlying the OFT’s position here was that information provided
20 did not advance its case. We were a participant and therefore 20 per cent. was at least at that
21 stage being considered. But then at the end of the letter there is the following:

22 “However, I should stress that any offer of leniency is subject to Umbro satisfying and
23 continuing to satisfy the conditions for leniency as set out in the Director General’s
24 Guidance. In particular, Umbro must provide all information, documents and evidence
25 available to it regarding the existence and activities of the cartel, and must maintain
26 continuous and complete co-operation throughout the investigation in addition to
27 refraining from all further participation in the cartel.”

28 A copy of the leniency agreement is attached to the letter from the OFT of 7th January 2002.
29 This was not an offer of leniency because it stated half way through that page (first page of the
30 letter) third para:

31 “I am not however yet in a position to make a formal offer of leniency.”

32 This is Mr Walker-Smith.

1 “I am still awaiting full details of the information which you promised in your letter of
2 5 December and at our meeting with you the previous day. In particular, in your letter
3 you state:

4 “Umbro believes that these documents [taken away by the Office] present an
5 incomplete picture. Umbro believes that the information which would be
6 provided as a result of Umbros’s participation in the leniency programme
7 would be of significant use to the OFT in respect of the investigation and would
8 also provide a fuller explanation of the situation, rather than the documents
9 disclosed to date.”

10 “In order to proceed with the leniency application we would need” and then there are
11 a number of matters identified:

12 “... a full list of those documents and details of their contents, as well as all the other
13 information available to Umbro regarding price fixing or replica football kit to which
14 I understand that Umbro’s application for leniency would relate. We would expect
15 such information to be provided in the form of witness statements with the supporting
16 documentation. For example, in your letter and at the meeting of 4th December, you
17 refer to a meeting between the three main sports’ retailers which took place on 8th June
18 2000. Although you have explained that Umbro was not present at the meeting, we
19 would expect the witness statements to set out full details of the nature of the meeting,
20 who was present, what was discussed and the outcome and follow up from the meeting
21 to the extent to which such information is available to Umbro.”

22 Now, if you just stand back for a minute and ask what the OFT wanted as the price of getting
23 into leniency, it wanted 100 per cent. disgorgement. It wanted lists of every document. It
24 wanted detail of their content and all other information, and it wanted witness statements. One
25 of the criticisms that we make is that the OFT put the cart before the horse, and it is actually
26 clear from the leniency agreement itself – and indeed it is clear from the OFT’s practice – that
27 you do not set the bar so high that it is impossible to get over to jump into the agreement. What
28 the OFT was asking from Umbro here was effectively a perfect explanation of everything as
29 a price of getting into the agreement, whereas it is clear when you look at the terms of the
30 agreement, which was offered, that the process of leniency involves an iterative process
31 whereby the OFT work with employees and a company to acquire the truth. It is not something
32 which can happen overnight. It may take a year or 18 months. Indeed, it was another 18 months
33 to 2 years before this came to a decision.

1 It was really because the OFT imposed upon Umbro a wholly unreasonable set of
2 conditions in a fantastically short timescale, a point the Tribunal commented upon Judgment,
3 that there were inaccuracies in some parts of the Umbro witness statements – Mr Ronnie 1 and
4 2 in particular, which were then ironed out over the course of time thereafter, including before
5 the Tribunal.

6 I do not know if that is an appropriate moment?

7 THE PRESIDENT: Shall we just look at the leniency letter?

8 MR GREEN: Yes, that is sensible to finish with that.

9 THE PRESIDENT: To finish off that point.

10 MR GREEN: Yes, why do we not do that? I think the important things about the leniency letter is
11 the leniency draft which is attached to it, starting at p.18. The important thing is to think what
12 is sensibly to be meant by conditions (a) and (b). Condition (a):

13 “The Applicant must have provided the Director General with all the information,
14 documents and evidence available to it regarding the existence and activities of the
15 cartel to which the reported possible infringement relates.”

16 So to get into the agreement you must have provided – past tense – this information. But
17 compare and contrast that with (b), because it helps you understand what (a) sensibly ought to
18 be about.

19 “(b) The applicant will maintain continuous and complete co-operation throughout
20 the investigation. This includes but is not limited to:

21 (i) voluntarily and without prompting providing the DG with all the facts
22 that become known to the Applicant and all the information, documents
23 and evidence that become available to it relating to the reported
24 possible infringement in addition to any such information etc already
25 provided.”

26 So it is contemplated that information will be provided on a supplementary basis, including
27 additions, corrections modifications, etc. in the course of the leniency programme. Then:

28 “(ii) promptly providing, and without the Director General using his powers
29 ... all the information documents, evidence, or other items in its
30 possession, custody or control, wherever located, requested by the DG
31 to the extent not already provided.”

32 So it is implicit that you do not have to provide everything which the DG may ultimately want,
33 you must just co-operate and meet his requests.

1 “(iii) use its best endeavours to secure the complete and truthful co-operation
2 of its current and former directors, officers, employees and agents and
3 encouraging such persons voluntarily to provide the DG with any
4 information relevant to the reported possible infringement.

5 Again it is implicit in (b)(iii) that the undertaking concerned will make its employees available
6 in the course of the leniency programme, and equally, item (iv):

7 “(iv) facilitating the ability of current and former directors, officers,
8 employees and agents to appear for such interviews as the DG may
9 reasonably require at times and places reasonably designated.”

10 It pre-supposes that the DG will questions arising which he wishes to put to the employees
11 which they have not yet satisfied and the company will make those employees available.

12 “(v) using its best efforts to ensure that current and former directors,
13 officers, employees and agents who provide information to the DG
14 respond completely and truthfully to all questions asked in interviews.”

15 “(vi) using its best efforts to ensure that current and former directors,
16 officers, employees and agents who provide information to the DG
17 make no attempt either falsely to protect or falsely to implicate any
18 undertaking in any infringement of the Act.”

19 Now those are reasonable requests to make in respect of an ongoing leniency investigation but
20 when you ask yourself what is the relationship between the pre-entry obligation and the post-
21 entry obligation, the “pre” is to establish your credentials but to agree to work with the OFT in
22 a process which may take up a great deal of corporate resources over a very lengthy period of
23 time. It is not, and this is where we really take issue with the OFT, it is not to provide 100 per
24 cent. perfect information as the price of getting into the programme, which is what ultimately
25 the OFT demanded of my client. It is important also that in the agreement the OFT reserved to
26 themselves additional rights. It is clear from para.5, for example, that if the OFT thinks there
27 has been a breach of the programme, it does not just kick someone out instantly, it has
28 a discretion whether to terminate the agreement, but it may just simply write to the company
29 and say “repair the breach, please”, “remedy the breach within a reasonable period of time”.

30 So the OFT accepts that there may be circumstances where you get an employee who is
31 reluctant, or who needs to correct his evidence, or the OFT accepts that in the course of
32 leniency all sorts of things might arise. Again, commonsense dictates this in a complex
33 multipartite, oral cartel, that the OFT will learn information over a period of time that one

1 company simply does not know about. One company will have a particular vision of life, the
2 others will know a great deal. Information will come to the OFT which they will then wish to
3 put to the leniency applicant, as the Tribunal itself pointed out in Judgment, memories can be
4 both defective backwards but can be improved going forwards. That is a sensible role for the
5 leniency programme to play. It enables employees to operate as a sounding board and to
6 respond to OFT queries.

7 I do not know if that is an appropriate moment?

8 THE PRESIDENT: I am sure it is, Mr Green. Can I just leave you with a couple of points?

9 MR GREEN: Yes.

10 THE PRESIDENT: Does this draft letter correspond in effect to what is said in para.3.8 of OFT 423,
11 which is the guidance on lenient treatment? That is the first question. The second question is:
12 in the first Rule 14 Notice, at para.89 there is a statement to the effect that:

13 “Umbro has confirmed that a meeting took place between Allsports, JJB and Sports
14 Soccer on 8 June 2000 to discuss retail prices.”

15 That is said to be document 7/551.

16 MR GREEN: Yes, I know exactly what the document is.

17 THE PRESIDENT: If somebody could just draw our attention to the document.

18 MR GREEN: Yes, I can do that immediately, just to give you the reference. It was a chronology
19 attached to the back of a letter in March or April.

20 THE PRESIDENT: I think it went in with the documents that you sent.

21 MR GREEN: It is annex 1, p.13 of this same file.

22 MR MORRIS: It is the whole document, not just a chronology, the whole of that annex, starting at
23 page 1, annex 1, that page is 7/551, not just the chronology.

24 THE PRESIDENT: Okay.

25 MR GREEN: That is right, **that** is the document and the evidence of the 8th June meeting came from
26 **this** letter, and you will see it is in the chronology of events. It is the fourth item down, the
27 reference to the 8th June on p.13.

28 THE PRESIDENT: Although perhaps in the first Rule 14 Notice that is not particularly clear
29 without plodding through it. Yes, the first Rule 14 Notice was about Umbro licensed replica
30 football kits, we have not actually yet homed in on the England shirt and the Manchester
31 United shirt specifically, or at least they were regarded as parties to – oh no, 216 – yes. What
32 I am trying to get at is how much of the stuff that you put in was actually useful to the OFT in
33 its first Rule 14 Notice?

1 MR GREEN: A certain amount. What happened was that the second Rule 14 Notice contained
2 a very great deal of Umbro material, and then the Decision contained a huge amount of Umbro
3 material, but not that much in the first. There was some. We have annexed to our Notice of
4 Appeal a document which identifies main points, which was information provided prior to the
5 first Rule 14, which found its way into the Rule 14, and there are some tables annexed to our
6 Notice of Application.

7 THE PRESIDENT: Yes.

8 MR GREEN: One of the points we make is that although the OFT did get material benefit, they
9 hindered themselves, they shot themselves in the foot by refusing us entry into the leniency
10 agreement, and/or taking a frankly ridiculous position in relation to confidentiality in light of
11 our explanation that they could use the statements, and they would have been able to have
12 brought forward a much more complete Rule 14 at a much earlier stage, if they had acted we
13 say properly towards us.

14 THE PRESIDENT: They do allege, for example, in the first Rule 14 Notice at 235, which is all
15 about MU replica kits, that there was a meeting on 8th June "... to discuss retail prices for the
16 Manchester United FC replica kits to be launched in 2000". Notwithstanding that in your annex
17 1 you talk specifically about the launch of the Manchester United home shirt on 1st August.

18 MR GREEN: They took a fairly skewed view of what they could and could not use, but that was not
19 our problem because we had never said they could not use the witness statements. On the
20 contrary, we said we could.

21 THE PRESIDENT: Yes. Very well, 10.30 tomorrow. Thank you.

22 (The hearing adjourned at 5.15 p.m. until 10.30 a.m. on Wednesday, 19th January 2005)