

IN THE COMPETITION APPEAL TRIBUNAL

New Court
48 Carey Street
London WC2

Thursday, 29th January 2004

Before:

**THE PRESIDENT
SIR CHRISTOPHER BELLAMY QC
(CHAIRMAN)**

**MR. BARRY COLGATE
and
MR. RICHARD PROSSER OBE**

B E T W E E N :

1021/1/1/03

ALLSPORTS LIMITED

Appellant

- and -

THE OFFICE OF FAIR TRADING

Respondent

MR. LAWRIE WEST-KNIGHTS and MR. GEORGE PERETZ appeared on behalf of the Appellant.

MR. JON TURNER and MS. ANNELI HOWARD appeared on behalf of the Respondent.

HANDING DOWN JUDGMENT

Transcribed from the Shorthand Notes of
Harry Counsell & Co.
Cliffords Inn, Fetter Lane, London EC4A 1LD
Telephone: 0207 269 0370

1 THE CHAIRMAN: Subject to any typographical corrections there
2 may be, I give judgment in terms of the judgment we have
3 already handed down in this case on Allsports' application
4 for summary judgment, which, for the reasons we give, we
5 dismiss.

6 MR. TURNER: Sir, the only correction is that Ms. Howard's
7 name should be added to the list of counsel.

8 THE CHAIRMAN: I am sorry, yes.

9 MR. TURNER: Sir, in the light of the light of the Tribunal's
10 judgment, the Office does ask for its costs in any event
11 of this application. There was an application for summary
12 judgment now, and that was misconceived and robustly
13 rejected. We have, of course, gone to considerable effort
14 in meeting the application and we say that it is right to
15 reflect that in an order for costs. We do not ask for
16 costs forthwith.

17 MR. WEST-KNIGHTS: Sir, that is an application which should be
18 refused, as you recognised yourselves in your decision,
19 however much we may disagree with it or dislike it. This
20 is an emerging jurisdiction where it is important that
21 matters such as this get raised and are raised as things
22 develop. There is no question of this application having
23 been misconceived: it has aired a highly important issue
24 of principle where you have had to strike a balancing
25 exercise and you have struck it in a way with which we do
26 not concur, but it would be quite wrong to, in effect,
27 punish Allsports for having raised this issue, even though
28 they have lost. I have nothing further to add.

29 THE CHAIRMAN: We will reserve costs on this application and
30 deal with it at the stage of final judgment.

31 MR. WEST-KNIGHTS: Sir, I am conscious that both the Office in
32 their skeleton and I orally raised the question of appeal.
33 I think it would be discourteous to the Tribunal, if
34 nothing else, if I were to make an application immediately
35 for permission to appeal. I have had the opportunity of
36 reading this at speed, once. I am bound to say that my
37 current instinct is that we would wish your permission to
38 appeal, but I think it may be appropriate if we were

1 either to address you orally, if that was convenient, or
2 to put in a written application. The slightly more
3 complex part would be the question of the ramifications of
4 such an appeal in terms of stay.

5 THE CHAIRMAN: Yes, we have obviously given some thought to
6 that, though we have not heard your arguments yet. If
7 there is any question of an application for permission to
8 appeal, the sooner you make it the better. I am just
9 reminding myself of the time limit for an application.

10 MR. WEST-KNIGHTS: It is a month, unless you choose to abridge
11 it under 19(2)(i).

12 THE CHAIRMAN: Mr. Colgate raises the question of abridging
13 time. We have a practical difficulty that Mr. Prosser is
14 going to be away now until shortly before the next pre-
15 hearing review we have fixed.

16 MR. WEST-KNIGHTS: Which is Thursday the week after next.

17 THE CHAIRMAN: I think we do have power to deal with things
18 like that as a tribunal of two.

19 MR. WEST-KNIGHTS: It is one of the things that you have power
20 to do personally.

21 THE CHAIRMAN: I am sorry, Mr. West-Knights, I ought to be on
22 top of all this.

23 MR. WEST-KNIGHTS: No, it is quite all right, I should be on
24 top of it too, but here I am proudly with the 9th edition
25 of the purple book. It is 62. You can do anything which
26 is not one of the following.

27 THE CHAIRMAN: Which is the reference?

28 MR. WEST-KNIGHTS: As far as you are concerned, it is 1(f).
29 You cannot do that, you, yourself, sir, because it is Rule
30 58, Permission to Appeal.

31 THE CHAIRMAN: It is in the Enterprise Act, is it not, Mr.
32 Turner, the power to sit as a tribunal of two.

33 MR. TURNER: I will have to find it myself, sir. I do
34 apologise.

35 MR. WEST-KNIGHTS: Have you got the new one, sir?

36 THE CHAIRMAN: I have the 9th edition.

37 MR. TURNER: Page [471] appears to be Schedule 4, Part 2,
38 Article 18(i). That is not quite it, but we are jolly

1 nearly there. These are all things that say the Tribunal
2 can make rules about stuff, so it should be in the rules
3 as a first blush response.

4 MR. TURNER: Rule 52, sir.

5 MR. WEST-KNIGHTS: Quorum is dealt with at page [2071] CF,
6 actual page 444.

7 THE CHAIRMAN: Yes, 52(iv), I think.

8 MR. WEST-KNIGHTS: I am not sure, because we do not want to
9 cut Mr. Prosser out for the rest of the proceedings.

10 THE CHAIRMAN: That is all to do with the hearing, is it not?

11 MR. TURNER: Sir, I hesitate to say that Rule 68, the general
12 power, suffices in these circumstances. I think that
13 would probably be going too far.

14 THE CHAIRMAN: The applicants or the parties could always
15 agree, I suppose, or waive an objection or you could,
16 formally speaking, Mr. West-Knights, now, this minute,
17 apply for permission to appeal before the hearing begins,
18 but we cannot conclude it today.

19 MR. WEST-KNIGHTS: I could not continue that process in
20 writing. Well, I suppose I could if I chose to.

21 THE CHAIRMAN: We will do our best to find a way round this.

22 MR. WEST-KNIGHTS: As my learned friend Mr. Peretz says
23 wisely, provided that we had an unfettered right to
24 withdrawn any such fledgling application. Only having
25 read this once, I think it would be discourteous of me
26 just to shout at you about wanting permission to appeal
27 without having absorbed the contents of it and, indeed,
28 taking instructions.

29 THE CHAIRMAN: Do you want us to rise for a few minutes, Mr.
30 West-Knights?

31 MR. WEST-KNIGHTS: It would perhaps be better if you could
32 give us five minutes.

33 THE CHAIRMAN: We do not want to rush this. Give yourselves
34 plenty of time. We will rise for a few minutes.

35 (A short adjournment)

36 MR. WEST-KNIGHTS: I think it is currently, if I can put it in
37 that way, common ground that there is a lacuna in the
38 rules, because, although Rule 52 deals with quora, the

1 relevant rule, if it be such, is only Rule 52(iv), which
2 provides that: "If after the commencement of any hearing
3 a member of the Tribunal other than its chairman" - the
4 absence of the chairman is dealt with above - "is unable
5 to continue, the President may decide that the Tribunal
6 shall consist of the remaining two members for the rest of
7 the proceedings." It is the difference between "hearing"
8 and "proceedings" which would give us the problem, because
9 if you were to take that step that would take Mr. Prosser
10 out of this for the rest of the appeal.

11 THE CHAIRMAN: It depends what you mean by "the proceedings",
12 because, going back to the Act, which talks about
13 "proceedings or any part of the proceedings", it says that
14 this application and the consequences of it were the
15 relevant proceedings. We have commenced hearing the
16 strike out application and we have dealt with that, but
17 there are still outstanding matters. One is the question
18 of costs and the other is the question of permission to
19 appeal. "The rest of the proceedings" can be construed as
20 meaning "until all the proceedings on the strike out
21 application are concluded", i.e. not the main proceedings
22 but this sub-set within the main proceedings.

23 MR. WEST-KNIGHTS: That is a construction which it would not
24 embarrass me to argue before the Court of Appeal, but I
25 would not be surprised to lose it.

26 THE CHAIRMAN: It seems to me at the moment that that is a
27 construction that, provisionally, the Tribunal would be
28 prepared to adopt in order to arrive at a sensible
29 solution to this particular problem.

30 MR. WEST-KNIGHTS: I have had a helpful discussion with Mr.
31 Turner. I have a practical difficulty. I am engaged in a
32 public duty all next week. That is a fixture and I know
33 that I am trying a particular case, a civil case. So the
34 time limit that you might otherwise be minded to abridge
35 it to (if I can use that inelegant expression) would not
36 in fact be appropriate. If I may submit that 14 days
37 takes us over to February 12th.

38 THE CHAIRMAN: Our next hearing anyway.

1 MR. WEST-KNIGHTS: Yes. It may be that if it can be done
2 before then the Tribunal, all three of you, will be in a
3 position to reach a decision on that. There would be
4 nothing inappropriate, providing the mechanics are worked
5 out between yourself and Mr. Colgate, having seen any
6 written submission prior to those having been seen by Mr.
7 Prosser and providing the decision is one that he caught
8 up with and then the three of you made it.

9 The question of the two man tribunal is something on
10 which I have no instructions and, currently, no firm view.
11 It may not arise.

12 The decision to which we have come in the time which
13 you very kindly afforded us is that I will, if I may,
14 without committing myself to anything at all, formally
15 open an application for permission to appeal and to stay
16 and say no more.

17 THE CHAIRMAN: Let us treat that matter as having been
18 formally opened but not proceeded with at the moment.

19 MR. WEST-KNIGHTS: That does not pre-judge any instructions I
20 may have not to consent to a two man tribunal.

21 THE CHAIRMAN: Our basic reflection, Mr. West-Knights, if it
22 helps you, was that we were not completely sure that it
23 would be right to abridge your time anyway. We have
24 another hearing day set aside and, for various reasons, if
25 you did want to proceed with your appeal, as to which we
26 would not encourage you at all but if you did, you would
27 need time to work out what the points of law were, if
28 there were any, and to formulate an argument and all that
29 sort of thing, which would not be a process which should
30 be unnecessarily hurried in any event.

31 MR. WEST-KNIGHTS: It may be appropriate, if it were to be an
32 oral application, that it be made at some convenient
33 moment during the course of February 12th. It has been
34 our experience that quite a lot of material that was
35 otherwise to have been dealt with during a case management
36 conference has evaporated.

37 THE CHAIRMAN: An oral application on the basis of a pre-
38 prepared skeleton is another way of doing it.

1 MR. WEST-KNIGHTS: With due deference to the rule which
2 required the Tribunal not to engage in undue familiarity,
3 I might use the expression - in the end, although it will
4 be carefully formulated, it is not actually rocket
5 science, the application for permission. It has plainly a
6 central point which we were proceeding on the basis that
7 we were free to comment on the decision as it stood.
8 There it was.

9 In those circumstances, without binding ourselves to
10 a two-man tribunal - but that may be irrelevant in any
11 event - I proceed as I have indicated.

12 THE CHAIRMAN: If you are not - and we completely understand
13 that - comfortably in a position to prepare a written
14 application or skeleton in the course of next week, the
15 practical situation we are in is that it is most unlikely
16 that we are going to be able to deal with it before we are
17 due to meet again.

18 MR. WEST-KNIGHTS: The other wrinkle, of course, is that it
19 will fall to Mr. Peretz, notwithstanding the significance
20 of the application, for him to make it, because, as I have
21 told you before, I am, regrettably, in Leeds, although
22 there is some prospect that may go - there is always a
23 prospect every hearing will go, but currently I am not
24 available on that day.

25 There it is, sir. I am very grateful to you. I
26 think there is nothing else that currently needs to be
27 said.

28 THE CHAIRMAN: The only other comment we would make is that,
29 for fairly obvious reasons, we are going to be extremely
30 reluctant to stay the proceedings in a way that might
31 jeopardise the hearing date.

32 MR. WEST-KNIGHTS: It crossed my mind - and I have not yet
33 made a firm decision on it - I have discussed it with Mr.
34 Peretz and, without undue waiver of privilege, he is not
35 quite of the same mind as I am - one course to take is to
36 invite you to refuse permission to appeal, if you see what
37 I mean.

38 There is a possibility that you would regard as so

1 overwhelming the interlocutory nature of the ruling and
2 the overwhelming distaste for a stay - and if there were
3 an overwhelming distaste for a stay then the grant of
4 permission to appeal might be thought to be otiose at this
5 stage, since the appeal is highly unlikely to be dealt
6 with prior to 8th March. It is a practical difficulty, as
7 somebody remarked at the conference at which many of us
8 were present on Friday. There is a real necessity for a
9 rapid interlocutory appeal procedure for tribunals such as
10 this and, I regret to say, my perception is that there is
11 not one. This might take two days in the Court of Appeal,
12 because they do not come with the background.

13 THE CHAIRMAN: The factual matrix is not particularly
14 straightforward and the background will be unfamiliar to
15 them.

16 MR. WEST-KNIGHTS: It would entirely depend who we drew,
17 bluntly, but the vast majority of members of the Court of
18 Appeal would be the first to say that they were not
19 steeped in either of the two Acts in question.

20 THE CHAIRMAN: You have of course got your appeal at the end
21 of the proceedings if you need it. You may never need it.

22 MR. WEST-KNIGHTS: It is easier to do orally than otherwise,
23 but I am not in a position to ask you ----

24 THE CHAIRMAN: I would not encourage you to do, except on
25 mature reflection and having taken instructions.

26 MR. WEST-KNIGHTS: That is a course that we may take, that is
27 to say, acknowledging that the Tribunal is highly unlikely
28 to grant permission to appeal, make a formal application
29 in the expectation of its being refused and then it can be
30 refused all the more quickly, which means that if there is
31 to be an appellate process in the meantime it can be
32 started that much more quickly.

33 If, through the channels, it appears that such an
34 appeal could be heard prior to the hearing, then so much
35 the better. I personally doubt it, but one never knows.

36 THE CHAIRMAN: We leave it to your good sense, Mr. West-
37 Knights.

38 MR. WEST-KNIGHTS: I just thought I would air the fact that we

1 have thought about - I hear what you say, as they say. I
2 do not mean that rudely. I do receive the message, which
3 is that currently the Tribunal would require a great deal
4 of persuasion to grant either permission or a stay. That
5 is a fair observation for the Tribunal to make.

6 THE CHAIRMAN: We take the view that you are protected by any
7 final appeal you may have at the end of the day, even if
8 we have gone wrong.

9 MR. WEST-KNIGHTS: That is plainly a powerful factor for the
10 Tribunal to consider and it is one which we will bear in
11 mind.

12 THE CHAIRMAN: Probably an important consideration of that
13 sort, I venture to imagine, will also be in the mind of
14 the Court of Appeal were we to refuse permission on any
15 application you were to make.

16 MR. WEST-KNIGHTS: Very little to gain and nothing to lose
17 might be the answer, but there it is.

18 THE CHAIRMAN: We have taken that as far as we can.

19 MR. WEST-KNIGHTS: Yes, that is very helpful. I am very
20 grateful to you, sir.

21 MR. TURNER: Sir, I have got one other thing to deal with.
22 This was along the same lines. Insofar as it is necessary
23 to have an order, we would stress what I am sure the
24 Tribunal has got well in mind. This is a multi-party
25 appeal and it is desirable that there should be some
26 decision taken, if at all possible, on the time within
27 which Allsports makes any application for permission to
28 appeal. In the light of the argument just now, our
29 suggestion would be that the time should be abridged for
30 an application to be made no later than the oral hearing
31 which is due to take place on the 12th. That sets a time
32 limit which, on the basis of what I have heard, does not
33 cause unfairness and strikes the correct balance, given
34 the other pressing obligations of the Tribunal.

35 THE CHAIRMAN: That sounds to me to be a reasonable
36 suggestion.

37 MR. WEST-KNIGHTS: It sounds to me to be precisely in line
38 with what I was proposing.

1 THE CHAIRMAN: You have that in mind anyway.

2 MR. WEST-KNIGHTS: Indeed. There is one further matter. I
3 will try and say this neutrally. The result of the
4 alterations to the case made by the Office is that we now
5 have against us a case which includes both pressure and
6 what is loosely - or perhaps carefully - called context.
7 Context in the sense of the receipt of information under
8 the Cimenteries principle.

9 The difficulty which we face may in part be
10 ameliorated if the Office were to be directed to identify
11 on one piece of paper - when I add the words "and
12 evidence", it is entirely, as it were, not accepting that
13 they are entitled to do this in the long run, but from
14 where we are - on one piece of paper those findings in the
15 decision and those passages in the evidence upon which
16 they will rely against us as constituting pressure for the
17 purposes of their pressure case, with the best
18 particularity they can give. I do not expect them to go
19 asking other people for more evidence, let me make that
20 absolutely plain.

21 Second, what it is that they rely upon for context.

22 That is to say, the request for or the acceptance of (or
23 both in the Cimenteries sense) in respect of the pressure-
24 free case but which nonetheless necessarily arise on
25 context. It is the obverse of the submission which I made
26 before that we would, in a better world, have seen a
27 decision which identified the pressure and then made
28 findings in respect of it and then said, "Therefore ..."
29 and, in the alternative, identified the context, i.e.
30 either the request for or the acceptance of (or both) the
31 receipt of the information.

32 If that could be ordered now, that might go a long
33 way to clarifying what it is exactly - "scoping" I think
34 the word is - what work we will need to be doing.

35 THE CHAIRMAN: There is a word called "scoping", yes.

36 MR. WEST-KNIGHTS: I am sorry, it is used by the Court
37 Service; I try not to.

38 THE CHAIRMAN: Yes, Mr. Turner?

1 MR. TURNER: Sir, we do resist that and we say that that is
2 misconceived and unnecessary. The course of argument in
3 the application drew out in very specific terms what was
4 relied upon as pressure and, indeed, it was picked over in
5 great detail. The idea of now having to formalise it in
6 this way and divorce pressure from context is an exercise
7 which ignores the thrust of the reasoning in the judgment,
8 moreover, which is that, to some extent, we are talking
9 about a tangled ball of wool and it is not possible to
10 chop things up in this way.

11 THE CHAIRMAN: Mr. Turner, just taking this in stages, if we
12 go to paragraph 21(b) of the defence, where there is a
13 reference in the response to Allsports and JJB pressure
14 and complaints, effectively Mr. West-Knights is asking for
15 particulars of that pleading and particulars of any
16 specific matters of context which go particularly to the
17 issue of whether or not the England agreement was, in
18 fact, made.

19 As I understand it, the particulars are, in effect,
20 the matters referred to by Mr. Ronnie in his statement,
21 plus the individual instances - I think about six in
22 number - that have been the subject of argument on this
23 application. Those are effectively what you rely on.

24 MR. TURNER: Sir, that is right. It was listed and each
25 particular point was picked over in the application.
26 Moreover, I believe Mr. Morris drew attention to
27 paragraphs 55 to 59 in the course of the application.
28 Those are the paragraphs which, as has been pointed out,
29 contain those allegations of pressure.

30 THE CHAIRMAN: Speaking for myself, without having discussed
31 it with my colleagues, it is a question, Mr. West-Knights,
32 with which we have a certain amount of sympathy and we
33 just need to tie down exactly what it is. It may be we
34 have already got what it is, but let us be clear what it
35 is.

36 MR. TURNER: In my submission, you have got it.

37 MR. WEST-KNIGHTS: The simpler this is, the more the
38 application should be allowed, if I may say so. We are

1 entitled not to have to roll through skeleton arguments or
2 observations made by Mr. Morris in transcripts.

3 THE CHAIRMAN: You need a list or a letter.

4 MR. WEST-KNIGHTS: If he says it is all in paragraphs 58 to
5 59, plus 89, then we can have a piece of paper that says,
6 "That's it", then we will know where we are.

7 THE CHAIRMAN: Let me get the defence and see if we can tie
8 this down. Mr. Turner, you were going to take us to
9 paragraphs --?

10 MR. TURNER: Paragraphs 55 to 59 is the section concerning
11 Allsports' pressure upon Umbro. In that section are each
12 of the points that Mr. West-Knights himself picked out for
13 the purpose of his application and to which we
14 individually responded. The first paragraph is concerned
15 with this letter.

16 THE CHAIRMAN: Yes, thank you for reminding me. In other
17 words, the matters set out in paragraphs 55 to 59 can
18 stand as particulars under paragraph 21(b) of the defence.
19 Is that the position? And the matters set out in Mr.
20 Ronnie's witness statement plus ----

21 MR. TURNER: Yes, and there is a footnote also to 21(b), which
22 is what Mr. Ronnie said during the leniency meeting in
23 February 2002. The answer to that is yes.

24 THE CHAIRMAN: What amendments are we talking about? Is that
25 amendment 59?

26 MR. TURNER: No, at 21(b) Mr. Ronnie has now clarified that he
27 made the calls in order to confirm. What has been added
28 in in footnote 8 is that what he now says is consistent
29 with what he told the OFT in February 2002 in the course
30 of Umbro's leniency meeting, so I suppose that is not an
31 allegation of pressure, that is just an observation.

32 THE CHAIRMAN: Just an evidential matter.

33 MR. TURNER: Yes.

34 MR. WEST-KNIGHTS: It is a comment about the nature of the
35 phone call.

36 MR. TURNER: Yes, it is a comment. I apologise.

37 THE CHAIRMAN: I think, Mr. West-Knights, our understanding is
38 that what has to be met is what is in Ronnie IV.

1 MR. WEST-KNIGHTS: I do not see a reference to Ronnie IV, but
2 that is in addition to all this, is it?

3 MR. TURNER: Ronnie IV is Mr. Ronnie's first statement,
4 referred to on the third line of paragraph 57 and
5 footnoted at footnote 55.

6 THE CHAIRMAN: That is also what is referred to in footnote 8
7 of 21(b), is it not?

8 MR. TURNER: Footnote 8 of 21(b) is referring to what he said
9 in the phone call. Footnote 55 is about him talking about
10 pressure.

11 THE CHAIRMAN: Which footnote?

12 MR. WEST-KNIGHTS: It is in paragraph 57. I am sorry, I was
13 misled by the use of this expression "first statement of
14 Ronnie".

15 THE CHAIRMAN: We are all struggling a little bit with that.

16 MR. WEST-KNIGHTS: That is witness statements 10 to 12. Am I
17 to take it that the sub-sets of these footnotes - that is
18 it?

19 THE CHAIRMAN: Let us see if we can tie it down, Mr. West-
20 Knights, if you will just bear with us. What about 8 and
21 9 of Ronnie IV, Mr. Turner?

22 MR. TURNER: Sir, you are right, those do relate to pressure.

23 THE CHAIRMAN: I think the best course, probably, rather than
24 trying to discuss this over the table, is if the OFT would
25 be kind enough to write formally to Allsports with a
26 formal statement of particulars of pressure and complaints
27 relied on.

28 MR. WEST-KNIGHTS: And context, if I may. They may say that
29 the context equals the complaints.

30 THE CHAIRMAN: And any specific items of evidence as regards
31 context that they wish the Tribunal to take account of, so
32 that we can all be clear what the target is that Mr. West-
33 Knights is expected to shoot at and what we are expected
34 to take into account. I am not saying we have not already
35 got it: we may have it. However, I think it would be
36 convenient and helpful for us and Allsports if there was
37 absolutely no doubt at all about what it was, which
38 paragraphs and where they are to be found.

1 MR. TURNER: Sir, I can see the sense in that with one
2 qualification. "Context" is a word that is going to cause
3 problems, because it is so vague.

4 THE CHAIRMAN: What we are looking for is any specific matters
5 that at this stage you want us to bear in mind, collected
6 up, so far as possible, in one place, on one piece of
7 paper so that we do not have to hunt in different places
8 for different pieces of paper, even if there are cross-
9 references to other bits of paper. We will then know very
10 clearly what it is that is relied on. I hope that will
11 not go any further than the matters which we have already
12 discussed: I do not want any new matters.

13 MR. TURNER: There will not be new matters at this stage.

14 THE CHAIRMAN: I think that will help Mr. West-Knights.

15 MR. WEST-KNIGHTS: It will help my clients to know what it is
16 they have to rebut.

17 THE CHAIRMAN: It will obviously help everybody and it might
18 even help towards the decision on the question of whether
19 they want to appeal or not.

20 MR. WEST-KNIGHTS: Indeed. "Context" may sound vague, but the
21 fact is, it is a misnomer or at least it is a slack
22 summary of a request for or acceptance of the otherwise
23 passive telephone call in the Cimenteries sense. It
24 suffers from just simply being a rather loose expression,
25 but what is required is in no doubt at all on the
26 Cimenteries footing, which, as I have said - and I hope it
27 is common ground - is the high spot of liability for the
28 receipt of ----

29 THE CHAIRMAN: On that particular point, Mr. Turner, if we go
30 back now, if we may, to 21(e)(ii) in the defence, which is
31 your "Supposing we cannot prove the telephone call", the
32 last sentence of that paragraph as pleaded is a bit vague
33 at the moment. I think we do need to tie down any
34 specific matters that are being relied on. I take it that
35 you are going to tell me that that is what is in fact
36 relied on at paragraphs 55 onwards.

37 MR. WEST-KNIGHTS: That cannot be right, sir, because, apart
38 from anything else, there are his various diary entries.

1 We have, without success so far, asked for further and
2 better particulars of which bits of the diary are being
3 relied upon for what. That is a good example of what the
4 particulars should be given.

5 Sir, if I can say so, we have dealt with 21 ----

6 THE CHAIRMAN: We are at 21(b) and 21(e)(ii).

7 MR. WEST-KNIGHTS: Paragraph 21(b) is the change of phone
8 call, which is not strictly an allegation of pressure.

9 THE CHAIRMAN: It is an allegation of a response to pressure
10 and complaints. "Please particularise any specific
11 instances of pressure and complaints relied on under
12 paragraph 21(b)."

13 MR. WEST-KNIGHTS: Quite so. I do beg your pardon. That is
14 the pressure and complaints case. The third case that
15 they make is (e)(ii), which you have identified and which
16 you are currently minded also to require particulars of.

17 THE CHAIRMAN: Yes.

18 MR. WEST-KNIGHTS: But there is the third case, which is
19 21(d), which is the bare phone call. Paragraph (e)(ii) is
20 pressure only: "Never mind a phone call; there doesn't
21 need to be one."

22 THE CHAIRMAN: Yes.

23 MR. WEST-KNIGHTS: And (d) is "mere phone call, never mind the
24 pressure". That is where context comes in. If context
25 and pressure are said to be co-evil, then (d) adds nothing
26 to this case.

27 THE CHAIRMAN: I think it is a bit difficult to particularise
28 (d) any further at the moment in addition to whatever
29 particulars are given under (b) and (e)(ii). As we see it
30 at the moment, there are a number of various combinations
31 which I think are going to depend on how the evidence
32 comes out in the end.

33 MR. WEST-KNIGHTS: I can entirely understand that, except
34 that, insofar as the word "context" has been mentioned, we
35 have the pressure leading to the agreement at 21(b), we
36 have got pressure only at (e)(ii). Context is (d). That
37 is the Cimenteries case which is made at (d). It is there
38 where we would like to know - and are entitled to know, I

1 would submit - what else ----

2 THE CHAIRMAN: My understanding is that there is no real
3 difference or not much real difference in this respect
4 between 21(b) and (d).

5 MR. WEST-KNIGHTS: If (d) is not a separate case, perhaps that
6 can be stated clearly and then all we are focusing on is
7 pressure resulting in the England agreement or, the other
8 case, no phone call but pressure alone is enough.

9 THE CHAIRMAN: It probably boils down to - but we need to get
10 it sorted out - the phone call considered in the light of
11 the surrounding circumstances.

12 MR. TURNER: Yes.

13 THE CHAIRMAN: And, on the other hand, surrounding
14 circumstances considered in the absence of a phone call.

15 MR. WEST-KNIGHTS: There may be a difference in the
16 surrounding circumstances which are relied upon under each
17 sub-set.

18 THE CHAIRMAN: Let us see what he says.

19 MR. TURNER: What you have said, sir, is exactly right, save
20 for one addition, which is that willing receipt can also
21 comprise the attitude of Mr. Hughes and Allsports
22 following receipt of the information.

23 THE CHAIRMAN: That is the third question, which is no
24 surrounding circumstances.

25 MR. TURNER: Willing receipt.

26 MR. WEST-KNIGHTS: "Willing" is not a word used by anybody.
27 "Willing" is the Cimenteries case, which requires either
28 circumstances which show that the information was
29 requested or that the information was accepted, adopted,
30 employed in some way. That is the remaining shady case
31 which it appears is being run independently of pressure
32 here and a phone call or just pressure - the allegation
33 that the mere receipt of a phone call brings us in. That
34 plainly cannot be context free altogether and it is
35 whether there are any circumstances which are relied upon
36 other than the pressure allegations, which are going to be
37 particularised under (b) and (e)(ii). Is there anything
38 else they rely upon in respect of the context for what

1 they call the mere receipt? If the answer to that is no,
2 it is not a separate case. Or they may make the case, "We
3 only need to establish the tiniest bit of" - whatever - in
4 which case, we would like to see that set out as to where
5 they pitch their stall on that - what is now clarified as
6 being a separate case.

7 MR. TURNER: Sir, paragraph 78. Do you have the defence?

8 THE CHAIRMAN: Yes.

9 MR. TURNER: These are points that were referred to at the
10 application and I believe that in our skeletons we did
11 actually clarify where the different references are.
12 Paragraph 75 sets out the narrative in relation to the
13 telephone call. If you look four lines up from the
14 bottom: "Further there is no evidence that, having been
15 told of Sports Soccer's intended pricing, Allsports sought
16 to distance itself from the practice (for example, by
17 stating that what Sports Soccer intended to do was of no
18 interest to Allsports). Absent such contrary evidence,
19 the mere communication of the pricing intentions makes the
20 recipient a party to a concerted practice: see paragraph
21 38(1)(b) above." That is the legal proposition: willing
22 receipt includes requesting the provision of the
23 information or accepting the information when provided,
24 including failing to express any reservation or objection
25 upon receipt.

26 THE CHAIRMAN: This passage in 75 still refers to "as a result
27 of complaints and pressure", so it has still got a nuance
28 of complaints and pressure about it. These things do not
29 happen in a vacuum and what Mr. West-Knights is saying is
30 that "willing", in this context, is not just something
31 that comes out of the blue, it is something that can be
32 inferred from the surrounding circumstances; and if you
33 want to refer to the surrounding circumstances, from what
34 precise circumstances do you want to draw that inference?

35 No-one is making any criticism of anybody, it is just
36 that we need now to know very clearly, have drawn together
37 the things that I have the impression are found now in
38 various bits of this defence but which might not have

1 leapt to the eye had we not had the argument that we have
2 had on the interlocutory application. Having considered
3 that interlocutory application, we now need to formalise
4 what is in fact relied on and not have to search for it in
5 skeleton arguments and paragraphs scattered about the
6 document.

7 MR. TURNER: Sir, we will do what you ask in relation to the
8 ways in which the Office puts its case. May I just
9 conclude by drawing your attention finally to paragraphs
10 77 and 78 on this last point?

11 THE CHAIRMAN: Yes.

12 MR. TURNER: That is where we actually said: "In the present
13 case, the relevant context includes ..." and there you
14 have the list.

15 MR. WEST-KNIGHTS: "Includes" is one of those words which make
16 my spine tingle.

17 MR. TURNER: If he is wanting precise clarification, we can
18 give it.

19 THE CHAIRMAN: We do have sympathy with the points made by
20 Allsports on this and we will make an order that the OFT
21 serve particulars under paragraph 21(b), paragraph 21(d)
22 and paragraph (e)(ii) of any specific complaints, pressure
23 or other facts relied on to establish the allegations made
24 in those paragraphs.

25 MR. WEST-KNIGHTS: I wonder if I could just ask you to re-word
26 that slightly, sir. Rather than "any specific", "of all",
27 because we know that there is a background here of
28 unspecific complaints and I would like to know whether the
29 Office relies upon those and, if so, where they are to be
30 found

31 MR. TURNER: There is no problem with that, sir. There is
32 then a point which I ought to make in response to this
33 discussion, which is that a feature of the judgment - and
34 indeed the application - was that Allsports were saying it
35 would need to get evidence to respond to the way in which
36 the OFT puts its case in the appeal. You have dealt with
37 that in the judgment and pointed out that the need for
38 evidence is limited, where indeed it arises at all. If

1 there is to be further evidence and if we are to keep this
2 case on track, that ought to be provided for with a time
3 limit for the provision of such evidence as well, because
4 we do not want that evidence in reply cropping up at a
5 late and inconvenient stage.

6 Sir, our proposal would be that if they are to
7 respond to any of the points - because there were specific
8 elements identified in the application and dealt with in
9 the judgment - that can be dealt with within seven days as
10 well. That would be of assistance because, of course, we
11 have the hearing in two weeks. So if any problem has
12 arisen it will be possible to absorb it at that hearing.

13 THE CHAIRMAN: The next hearing is when?

14 MR. TURNER: The 12th. Two weeks today.

15 MR. WEST-KNIGHTS: I do not know what your preliminary view is
16 about the timing for the particulars.

17 THE CHAIRMAN: The timing for the particulars one has
18 provisionally in mind is seven days.

19 MR. WEST-KNIGHTS: That is the sort of timescale I am minded
20 to propose.

21 THE CHAIRMAN: And I would have thought a bit longer for the
22 witness statements, frankly.

23 MR. WEST-KNIGHTS: I was going to say two weeks from the
24 receipt of the particulars. The reason is this. Although
25 you have observed in your judgment that you consider that,
26 prima facie, the only further evidence that would be
27 required would be from Messrs. Guest and Hughes, that
28 plainly shows that I did not get one point across, which
29 is this. I cannot tell you what evidence we might adduce
30 from other persons as part of a positive case to displace
31 this new case on pressure. Second, although you have
32 rightly observed that we appear to have roved through all
33 of Umbro's documents, it may be there are simply no more,
34 but the fact is, I have yet to take instructions and those
35 instructing me have yet to take instructions from Mr.
36 Hughes and Mr. Guest (who, I remind you, is no longer our
37 employee), but particularly from Mr. Hughes as to what
38 evidence he could make available to us in order to

1 displace this case.

2 There may be people we have not yet heard of in
3 these proceedings who would make a brief statement to say,
4 "No, that's not their style" or "I traded with them for
5 donkey's years, selling this, that and the other and there
6 was never a suggestion of pressure by them." I simply do
7 not know, so I would hope that we would not be limited to
8 Guest and Hughes.

9 THE CHAIRMAN: No, no.

10 MR. WEST-KNIGHTS: So far as the timing is concerned, plainly
11 work will start of making enquiries. First we have got to
12 get Mr. Hughes; he is going to have to read and absorb
13 this judgment. It is a substantial document. He is a
14 highly competent entrepreneur, but he is not a lawyer and
15 he is going to have to consider the way to proceed. We
16 are going to have to make such enquiries as we can
17 resulting from those instructions and try to get hold of
18 people.

19 Plainly, the work will be focused on the materials
20 that we get in the particulars. We can foresee, to a
21 degree, what they will contain, but if we get the
22 particulars in seven days to have two weeks after that
23 would not, in my submission, be unreasonable. It is not
24 as if the Office is going to be in a position to want to
25 put in rebuttal evidence on this. They have made their
26 new case, and they have been allowed to make their new
27 case, and we are now going to oppose it.

28 We are tight before the hearing, but that is a fact
29 of life. I bid for a total of three weeks from today with
30 some hesitation, but with some fairness.

31 THE CHAIRMAN: My feeling, Mr. West-Knights, is that one
32 already has a reasonably good idea of what these
33 particulars are going to contain and there is quite a lot
34 of work that can be done and has already been done or
35 could have been done. I would have thought that the
36 witness statements, at least in the first instance - one
37 should use best endeavours to get any further evidence in
38 by the next hearing, which is in two weeks' time.

1 MR. WEST-KNIGHTS: But liberty to apply on that day.
2 THE CHAIRMAN: But liberty to apply on that day. I know that
3 you are not going to be happy with that, Mr. Turner, but
4 quite a lot of ground has already been covered on your own
5 argument.
6 MR. TURNER: Sir, I will not go into the points in detail,
7 only to say that best endeavours before the next hearing
8 is undesirably loose. If, say, we were to produce a set
9 of particulars by Tuesday, which at the moment I do not
10 conceive to be at all unlikely, then to allow Mr. West-
11 Knights a full week after that, thereby taking us to the
12 10th, is no hardship at all in view of the fact that these
13 are all points - the main points - that have been well
14 covered and have been there for a long time: we are not
15 starting from scratch at all.
16 THE CHAIRMAN: No, I think we will say best endeavours by the
17 next hearing.
18 MR. WEST-KNIGHTS: Just to make that clear, sir, you expect
19 service, presumably, by, say, 10.00 a.m. on 12th February.
20 THE CHAIRMAN: I think it had better be - for our benefit as
21 well as everybody else's benefit - the afternoon before.
22 MR. WEST-KNIGHTS: Whatever close of play is on the 11th.
23 THE CHAIRMAN: Close of play on the 11th.
24 MR. WEST-KNIGHTS: That is on a best endeavours footing.
25 THE CHAIRMAN: On a best endeavours basis. Then we can see
26 where we are on the 12th.
27 MR. WEST-KNIGHTS: I am assured that there is nothing further,
28 so I think you all.
29 MR. TURNER: Ms. Howard reminds me, I would just put down a
30 marker - it is of some significance - there is the
31 structure of the hearing, which is difficult. If any
32 attempt is made to introduce entirely new material now,
33 which would be contrary to the tenor of the judgment, that
34 could cause real problems.
35 THE CHAIRMAN: Let us cross that bridge when we get to it.
36 MR. WEST-KNIGHTS: Of course, it is not contrary to the tenor
37 of the judgment, merely that you have formed a view on the
38 basis ----

1 THE CHAIRMAN: We have formed no view at all as to what
2 evidence now may be necessary, except the view that, as at
3 present advised, we do not think it is particularly
4 significant, but you may in due course persuade us
5 otherwise, Mr. West-Knights.

6 MR. WEST-KNIGHTS: I give my friend clear notice that if we do
7 adduce the evidence of a witness who has not so far given
8 a witness statement, there is no question of its being an
9 attempt to adduce new evidence: it will be as a
10 consequence of the Office having changed its case.

11 THE CHAIRMAN: You will run the case as responsibly and wisely
12 as you have up to now, I am sure.

13 MR. WEST-KNIGHTS: I am not about to try to wreck the hearing
14 on 8th March. Our timetable, if I may say so, was
15 responsible inasmuch as it built in two days' slack for
16 just this kind of possible eventuality. Plainly, we will
17 not be calling Uncle Tom Cobley and all.

18 THE CHAIRMAN: No. Thank your very much. Before we formally
19 rise, may I address myself to Mr. Turner for a moment? I
20 think we have a representative of JJB here. We have one
21 outstanding point that affects JJB and this KPMG report.
22 We had a letter this morning, asking for a one day
23 extension of time to deal with the information you have
24 requested from JJB about KPMG. I was simply going to say
25 that, as far as we are concerned, we are prepared to
26 extend the time limit by the one day that is being sought.

27 MR. TURNER: Sir, may I simply mention formally in the
28 presence of the representative that the information that
29 we have requested, to avoid any doubt, covers the
30 discounting information that plainly appears in the KPMG
31 report, because there is some doubt about that on the
32 correspondence.

33 THE CHAIRMAN: We had the impression that it was being sorted
34 out and that only one more day was needed to sort it out.
35 If that is the case, we just simply extend the order by a
36 day in response to the letter we received today.

37