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IN THE COMPETITION COMMISSION APPEALS TRIBUNAL

The Competition Commission

Room 309 New Court  
48 Carey Street  
London WC2

Monday 3 March 2003

Before:

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

**THE HONOURABLE ANTONY LEWIS  
and  
MS VINDELYN SMITH-HILLMAN**

B E T W E E N:

**HASBRO UK LIMITED**

**Applicant**

- and -

**THE DIRECTOR GENERAL OF FAIR TRADING      Respondent**

MR JONATHAN TATTON (instructed by Messrs Denton Wilde Sapte)  
appeared on behalf of the Applicant.

MR JON TURNER (instructed by the Director General of Fair  
Trading) appeared for the Respondent.

**P R O C E E D I N G S**

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1 MR TATTON: Madam, Sirs. This is an application on behalf  
2 of Hasbro UK Limited under Rule 10 of the Tribunal's  
3 Rules for the Tribunal's permission for Hasbro to  
4 withdraw its appeal application in this case.

5 Rule 10 provides that "An applicant can only withdraw  
6 his application with permission of the Tribunal and where  
7 the Tribunal does give permission it may do so on such  
8 terms as it sees fit".

9 When Hasbro notified the Tribunal of its intention to  
10 make this application last Thursday, the Director General  
11 of Fair Trading replied on the Friday expressing the then  
12 current view that the permission to withdraw should be  
13 given but on terms that Hasbro should make a contribution  
14 to the Director's costs and at least pay for the costs of  
15 a previous unsuccessful application that was made by  
16 Hasbro on 24 January to extend time for lodging its  
17 appeal and where costs were reserved. Hasbro, on the  
18 other hand, hope to prevail upon the Tribunal today, if  
19 minded to give its permission, to do so without any order  
20 as to costs.

21 The necessary factual background was aired fairly  
22 fully at its previous hearing for an extension of time  
23 before yourself, Sir, and it is very fairly and fully  
24 summarised in your judgment in that case. Nevertheless,  
25 as there is a contentious issue on the question of costs,  
26 I would, unless prevented by the Tribunal, rehearse those  
27 facts again, as I believe they are pertinent to the issue  
28 of where costs should lie.

29 This appeal relates to a decision by the Director  
30 General of Fair Trading following an investigation  
31 against Hasbro UK Limited and its agreement with some of  
32 its distributors. This is often referred to, and I will  
33 refer to it, as the Distributor decision. In its appeal  
34 in this case on the Distributor decision Hasbro is not  
35 disputing the infringement, it is merely appealing the  
36 quantum of the amount of the penalty against it.

37 In addition to the Distributor investigation the  
38 Director was also pursuing against Hasbro another

1 investigation in relation to agreements it had with some  
2 of its retailers, in particular Argos and Littlewoods,  
3 and this I will refer to as the Retail investigation or  
4 the Retail decision.

5 To all intents and purposes both of these  
6 investigations were, until November last year, running in  
7 parallel. When the Office of Fair Trading was taking its  
8 evidence from Hasbro employees there was a single  
9 interview with each employee which covered both  
10 investigations. The Rule 14 Notices were issued in both  
11 investigations at the same time.

12 THE CHAIRMAN: They were separate notices, were they?

13 MR TATTON: There were separate notices indeed, Sir, under  
14 the same cover and there was a single oral hearing in  
15 respect of both investigations.

16 It was always Hasbro's expectation and, I believe,  
17 also the Director's expectation, that the two decisions  
18 would in fact be issued simultaneously. These  
19 expectations were upset last November when, for reasons  
20 that I will come on to explain, it became apparent that  
21 the investigation in relation to the retail infringement  
22 was likely to be delayed.

23 On 19 November last year, as soon as Hasbro  
24 appreciated that this bifurcation of these two, what it  
25 considered to be related decisions, was about to occur,  
26 protested to the Director immediately. I would like to  
27 read out that letter in full. It was appended previously  
28 to Hasbro's application for an extension of time.

29 THE CHAIRMAN: I think we have got it, Mr Tatton. We have  
30 refreshed our memory as to what it contains, so I do not  
31 think you need to read it, but you may want to draw our  
32 attention to particular bits of it.

33 MR TATTON: Thank you.

34 The particular bit that I think would be worth  
35 drawing the Tribunal's attention to is the fact that as  
36 soon as Hasbro appreciated that this bifurcation was  
37 necessary, it had anticipated that it would be in  
38 difficulty in terms of framing and/or deciding whether to

1 pursue its appeal and the reasons why Hasbro considered  
2 there to be a relation between the two decisions was made  
3 known to the Director as early as November last year.  
4 The Director's response to that, which was also appended  
5 to the correspondence, essentially made two points. The  
6 first, the hope that the two decisions would be issued  
7 simultaneously, was an administrative matter but,  
8 secondly, the Director saw that the solution to Hasbro's  
9 dilemma, which it had expressed in its letter, lay in the  
10 application of this Tribunal's Rules.

11 What happened prior to making the application for an  
12 extension of time in January of this year was that Hasbro  
13 was on the horns of a dilemma. Its preferred course of  
14 action, as is apparent from the letter to the Director of  
15 19 November was, and always has been, to defer making its  
16 appeal in the Distributor decision until the Retailer  
17 decision was also published. The reasons for that are  
18 set out in this letter and the overlap of the likely  
19 arguments relevant to quantum are alluded to there. But  
20 this preferred course of action would have resulted in  
21 neither Hasbro nor the Director or his Office incurring  
22 any unnecessary costs in pursuing this appeal and that  
23 when Hasbro had decided that it would indeed like to  
24 pursue its appeal, being in a position to do so by  
25 putting its best foot forward, if I may use that  
26 colloquialism, having the completeness of all its  
27 arguments available to it at that time.

28 THE CHAIRMAN: Could I ask you, Mr Tatton, to enlighten us on  
29 one point which puzzles me slightly.

30 We have got but have not really absorbed, but we have  
31 glanced at the Retail decision and what I am not at all  
32 clear about is when Hasbro knew or had agreed with the  
33 Director about the question of immunity or leniency as  
34 far as the Retail decision was concerned.

35 MR TATTON: Allow me to help you in this way. Leniency was  
36 granted in September 2001 and Hasbro was in fact granted  
37 two sets of leniency. It was granted, in respect of the  
38 Retail decision, 100 per cent leniency but if the

1 Director came to the view that Hasbro was the instigator  
2 or the leader of the infringement then a second agreed  
3 leniency giving only 50 per cent immunity would be  
4 triggered.

5 THE CHAIRMAN: That is all in an agreement somewhere?

6 MR TATTON: That is all in an agreement, yes Sir.

7 THE CHAIRMAN: So you were granted 100 per cent but if --

8 MR TATTON: If Hasbro was the instigator or the leader of  
9 the reported infringement, then another leniency  
10 agreement giving only 50 per cent immunity would be  
11 triggered. During the course of the investigation the  
12 Director wrote to Hasbro saying that it was his  
13 preliminary view, following his Rule 14 Notice, that  
14 Hasbro was the instigator and/or the leader of the  
15 infringement and was minded to make a decision that only  
16 50 per cent immunity would be granted. He invited Hasbro  
17 to make representations in that regard. Following those  
18 representations the Director maintained that view and  
19 following further representations on 6 February the  
20 Director finally notified Hasbro that in fact 100 per  
21 cent immunity would be granted.

22 THE CHAIRMAN: Are you able to give me a few dates to fill  
23 that in a bit? There was the original letter.

24 MR TATTON: The original letter would have been dated around  
25 about 15 September 2001, I think. Then the Director  
26 deciding that he was minded to withdraw the 100 per cent  
27 and replace it with 50 per cent was at the time he issued  
28 the Rule 14 Notice, which was 1 May 2002. Within the  
29 time frame of the submissions on the substantive issues  
30 of the Rule 14 Notice, Hasbro then made submissions as to  
31 why the Director should not withdraw the 100 per cent  
32 leniency, which was during the first week of July. My  
33 associate believes it was 9 July 2002.

34 Following that, the Director then wrote again saying  
35 he was minded to continue to maintain his position and  
36 that would have been - and here I am guessing - about two  
37 months after that.

38 THE CHAIRMAN: So query September 2002.

1 MR TATTON: Yes. Following which Hasbro made further  
2 representations. Again I am sorry I cannot help you on  
3 the precise date, but it would have been in the same  
4 month. Then the Director considered those  
5 representations and on 5 or 6 February notified Hasbro  
6 that he would not be seeking to withdraw the 100 per cent  
7 immunity.

8 THE CHAIRMAN: So if I have understood that correctly, we  
9 have got quite a short mismatch in time, if I may put it  
10 like that, in the sense that you made an application to  
11 the Tribunal for an extension on 23 January, which was  
12 dealt with on the 24th.

13 MR TATTON: Yes, Sir.

14 THE CHAIRMAN: You had to lodge your appeal on the 29th and  
15 it was on the 6th that you got notification that the 100  
16 per cent would be maintained.

17 MR TATTON: Indeed, Sir.

18 THE CHAIRMAN: I suppose you would say, or do you, that if  
19 you had had that notification a week earlier, you might  
20 not have put in the appeal at all?

21 MR TATTON: We may not have put in the appeal, although I  
22 would maintain that simply knowing that we had 100 per  
23 cent leniency was not necessarily the end of the  
24 considerations because there may still have been issues  
25 in the substantive decision that may have strengthened  
26 and/or added to the arguments on quantum that we  
27 submitted by 29 January in this case. But it is  
28 perfectly fair to say that if Hasbro had known that it  
29 had 100 per cent leniency prior to then, then that would  
30 have been a very weighty matter in their commercial  
31 consideration as to whether or not to appeal.

32 THE CHAIRMAN: Thank you.

33 MR TATTON: At the time it made its decision to apply to  
34 this Tribunal for an extension of time on 23 January,  
35 Hasbro had considered that its only other course, if it  
36 had not made that application, was to put in an  
37 incomplete appeal (I think I expressed it last time, Sir,  
38 as the equivalent of a protective writ) in the trust that

1 the Tribunal would, consequent upon the Retail decision  
2 being published, then be amenable to Hasbro amending, or  
3 indeed withdrawing, its appeal application at that stage.

4 Hasbro believed, in effect, that it really had little  
5 option other than to make that application, if only to  
6 avoid the risk, if it had not, of subsequently being  
7 possibly criticised by the Tribunal for not having  
8 instead sought the extension of time as a way out of its  
9 dilemma.

10 Further, Hasbro also believed that, in the absence of  
11 any indications as to the meaning of "exceptional  
12 circumstances" in Rule 6, such an application would not  
13 be considered frivolous, unreasonable or vexatious and  
14 that the bifurcation of related decisions may not  
15 unreasonably be argued to have constituted an exceptional  
16 circumstance.

17 THE CHAIRMAN: It was not a frivolous application, Mr Tatton.  
18 It was an unsuccessful one unfortunately.

19 MR TATTON: Thank you, Sir.

20 Having failed to succeed in its application for an  
21 extension of time, Hasbro lodged its appeal application  
22 in this matter by the deadline on 29 January.

23 The Retail decision was published by the Director  
24 General on 19 February, although, as I have explained,  
25 Hasbro on 6 February did know that it would be  
26 maintaining its 100 per cent leniency. But nevertheless  
27 Hasbro took the view that it still needed to see what was  
28 in the Retail decision before finally making a view as to  
29 whether to amend or withdraw, or just maintain its  
30 current appeal as submitted to the Tribunal.

31 That process took eight days, from 19 February until  
32 last Thursday, and I would submit to the Tribunal that  
33 given that decisions had to be made both in the UK and in  
34 America, we tried to do that within as expeditious a time  
35 frame as possible.

36 Sir, in the circumstances, I am asking for the  
37 Tribunal's permission for Hasbro UK to withdraw its  
38 appeal in this matter. This appeal is based on a full

1 consideration of the fact that it has been granted 100  
2 per cent leniency in the other matter and having read  
3 fully the Director's reasoning for, and the quantum of,  
4 his penalty in that other matter.

5 As to the question of costs, I would ask the Tribunal  
6 to make no order, for the following reasons. Hasbro  
7 would submit that, given the circumstances, it has acted  
8 sensibly and reasonably. Indeed Hasbro believes that the  
9 Director himself considered that the proper solution to  
10 Hasbro's dilemma lay within the application of the  
11 Tribunal's Rules.

12 THE CHAIRMAN: In what sense?

13 MR TATTON: In the sense that his reply to Hasbro, after its  
14 letter of 19 January, was to the effect, if I may read  
15 from it, that "We quite recognise that it is for Hasbro  
16 to decide if it wishes to take a different view on  
17 whether the decisions should be linked in any way ..."

18 THE CHAIRMAN: Sorry. This is the Director's letter of what  
19 date?

20 MR TATTON: This is the Director's letter dated 22 November  
21 2002 in reply to Hasbro's letter of 19 November asking  
22 him not to bifurcate his decisions. In the penultimate  
23 paragraph of that letter he says:

24 "We quite understand that it is for Hasbro to decide  
25 if it wishes to take a different view on whether the  
26 decisions should be linked in any way but we believe  
27 that this would properly be dealt with by the  
28 Competition Commission Appeals Tribunal under its  
29 Rules."

30 We read that reference as simply meaning that Hasbro  
31 could sort out its dilemma without prejudice to its  
32 position within the context of the Tribunal's Rules,  
33 either by asking for an amendment, a variation, a  
34 withdrawal or an extension of time.

35 We do believe also that Hasbro's course of action and  
36 any prejudice or costs that may have been incurred by the  
37 Office of Fair Trading as a consequence of our action is  
38 in fact of the Director's making. We believe that it



1 would have been possible for the Director to have been  
2 more appreciative of Hasbro's dilemma at the time and  
3 sought not to bifurcate these decisions.

4 The last point I would like to make is that since the  
5 hearing for an extension of time, the Director has  
6 clearly been on notice that Hasbro was actively  
7 considering whether or not to pursue its appeal depending  
8 very much on the outcome of the Retail decision or the  
9 Retail investigation and/or that it would be seeking to  
10 amend that appeal, and consequently one would have hoped  
11 that it would have been reasonable for the Director not  
12 to have incurred costs of any great magnitude in the  
13 interim.

14 The Tribunal has a wide and unfettered discretion  
15 under section 26 of its Rules to consider the question of  
16 costs and to do so on a case by case basis. I would ask  
17 the Tribunal to consider that in the particular  
18 circumstances of this case it would be appropriate in the  
19 exercise of that discretion to make no order as to costs.

20 I would therefore ask the Tribunal for its permission  
21 for Hasbro to withdraw this appeal and to do so on that  
22 basis. Thank you.

23 THE CHAIRMAN: Thank you, Mr Tatton. Can I just ask you  
24 about one point that is indirectly relevant, which I ask  
25 partly to help the Tribunal's understanding of how the  
26 system works and partly to satisfy ourselves that aspects  
27 that might affect the public interest have been properly  
28 taken into account.

29 I am on paragraph 9.6 of the Director's guidance as  
30 to the appropriate amount of a penalty. In the book,  
31 which I think you have probably got, it is at page 3121,  
32 if you are working off the latest Butterworths  
33 Competition Law Handbook. It is 9.6.1 and 9.6.2. 9.6.1  
34 says:

35 "An undertaking cooperating with an investigation by  
36 the Director under the Act in relation to cartel  
37 activities in one market (the first market) may also  
38 be involved in a separate cartel in another market

1 (the second market) which also infringes the Chapter  
2 1 prohibition. If the undertaking obtains total  
3 immunity from financial penalties under either  
4 paragraph 9.3.2 or 9.3.4 in relation to its  
5 activities in the second market, it will also receive  
6 a reduction in the financial penalties imposed on it  
7 which is additional to the reduction it would have  
8 received for its cooperation in the first market  
9 alone."

10 My question is, how does that work in a case like the  
11 present? I am not necessarily compelling you to make any  
12 comment, but any comment you do have to make would  
13 perhaps be of some interest. It would appear that Hasbro  
14 has received total immunity under the relevant paragraphs  
15 in relation to its activities in what one could call the  
16 'second market', ie the retail sector, which would seem  
17 to trigger the possibility of a further reduction in  
18 financial penalties beyond those that it has already  
19 received in relation to the distribution agreement.

20 MR TATTON: Indeed, Sir. I think the way that that is  
21 intended to work is a question of which cartel activity  
22 comes first and which immunity comes first.

23 What happened in this case was that Hasbro received  
24 both its immunities at the same time, on the basis that  
25 the infringements themselves were separate infringements.  
26 The interrelation that we would have sought to draw to  
27 the Tribunal's attention in this case would have been in  
28 terms of assessing the impact of those separate  
29 infringements on the same market but at different levels  
30 within that market in order to assess that there was not  
31 double accounting or double jeopardy, or anything like  
32 that. Consequently we did consider that in the  
33 circumstances of this case, the granting of 100 per cent  
34 immunity in the retail infringement would, if the  
35 connection had been achieved, have resulted in 100 per  
36 cent immunity in the current case.

37 THE CHAIRMAN: I think what was puzzling us was whether it  
38 was arguable that, having in the result received total

1 immunity in the Retail case, which could be, for the  
2 purposes of this notice, regarded as another market, ie  
3 the second market, a retail market as distinct from the  
4 wholesale market effectively in the Distributor case, it  
5 could have been arguable that Hasbro was entitled to say  
6 that the 45 per cent reduction that it had received in  
7 the Distribution decision should be increased, because  
8 this paragraph expresses in apparently definite terms  
9 that it will receive a reduction in the financial  
10 penalties imposed on it which is additional to the  
11 reduction which it would have received, ie in this case  
12 has received, for its cooperation in the first market  
13 alone. It is not, I admit, wholly clear whether this  
14 paragraph is dealing with the original letters or whether  
15 it is dealing with what actually happens in the final  
16 decision, but one of the consequences of the order of  
17 events in this case is that that particular point has  
18 been somewhat, if not obscured, it does not present  
19 itself with quite the clarity that it might have  
20 presented itself had the two decisions been taken  
21 together.

22 MR TATTON: Indeed, Sir, and it may well have been flushed  
23 out during the course of any full hearing of the appeal.

24 THE CHAIRMAN: But it is not a point you want to pursue?

25 MR TATTON: No, it is not, Sir.

26 THE CHAIRMAN: Very well. Thank you.

27 Yes, Mr Turner?

28 MR TURNER: Sir, first, on that last point as to leniency,  
29 this is not a point that has arisen and Mr Tatton has  
30 also confirmed that he is not pressing it upon the  
31 Tribunal now. For what it is worth, my understanding in  
32 the time that it has been possible to take instructions,  
33 is that that is not meant to operate as a kind of  
34 windfall provision, or anything of that kind. What has  
35 been drawn to my attention is that in this particular  
36 case there were two leniency agreements, one for each of  
37 the infringements separately and the Tribunal may care to  
38 refresh its memory in relation to the one that was

1 entered into in relation to this case, which is the first  
2 document in Annex B, a letter of 20 September 2001. That  
3 is Annex B to the Notice of Appeal: an agreement co-  
4 signed by the relevant official of the Office of Fair  
5 Trading on the one hand and a Hasbro director on the  
6 other and, under that agreement, partial immunity was  
7 granted in return for an agreement as to the conditions  
8 that follow from paragraph 3 on the second page onwards,  
9 which related in particular to continuous and complete  
10 cooperation throughout the investigation. That having  
11 been the basis of the arrangement, in my submission, it  
12 could not have been intended that subsequently a further  
13 windfall was intended to be given in relation to this as  
14 a result of those aspects of the guidance. Indeed one  
15 way of reading that aspect of the guidance, although I  
16 have not, as I say, been able to take final instructions  
17 on this, is that it is simply making clear what the  
18 position would be in relation to two quite separate  
19 arrangements where a total immunity is granted in  
20 relation to one and a statement that in that case a  
21 further discount is available in the other, all other  
22 things, as it were, being equal, but that was not the  
23 case under this arrangement where two separate leniency  
24 agreements had already been finalised and confirmed.

25 Sir, that is about as far as I can take it at the  
26 moment.

27 THE CHAIRMAN: In what circumstances is 9.6.2 supposed to  
28 operate?

29 MR TURNER: I am sorry, Sir. The first thing is, my  
30 numbering is different from yours. Is that the  
31 paragraph which begins: "If the undertaking obtains  
32 total immunity ..."?

33 THE CHAIRMAN: Yes.

34 MR TURNER: I am sorry. In the leaflet version the  
35 numbering is completely different.

36 THE CHAIRMAN: We were just puzzled by it.

37 MR TURNER: It may be a declaratory statement to the effect  
38 that if the undertaking obtains a total immunity in one

1 market, that being the second market, it is stating that  
2 it will be receiving a reduction in the final penalties  
3 imposed, which is additional to the reduction which it  
4 would have received in relation to its cooperation in the  
5 other market as a statement of fact, and that is one of  
6 the possibilities.

7 THE CHAIRMAN: I cannot read it like that. It reads perhaps  
8 to the uninitiated, and I accept at once that we are  
9 totally uninitiated in this matter and need re-listening  
10 to the explanations, but it looks as if, if you get total  
11 immunity in one market, then in relation to the first  
12 market you can receive more than you otherwise would have  
13 done, ie if you have only got 25 per cent for your  
14 cooperation in the first market, if you have got total  
15 immunity in another market then that is not only total  
16 immunity in that market but it might bump you up to 35 or  
17 40 per cent in the first market. Is that supposed to be  
18 what it means, or does it mean something quite different?

19 MR TURNER: Sir, may I take further instructions on that?

20 THE CHAIRMAN: Yes, we might as well sort it out while we are  
21 here.

22 MR TURNER: (After taking instructions) Sir, as far as we  
23 can take it today, there is a feeling that it must depend  
24 upon the circumstances. There may be circumstances in  
25 which for one to receive automatically a further  
26 reduction in relation to the penalty in one market,  
27 because one has cooperated completely in another, would  
28 not be warranted. In this particular case, as Mr Tatton  
29 says, one has linked facts, although separate  
30 infringements and separate proceedings and, in relation  
31 to both, the Director entered into separate leniency  
32 arrangements on separate tracks. Those were concluded  
33 and there was no complaint about those.

34 THE CHAIRMAN: Well Mr Tatton is not pursuing it, so it may  
35 be that we leave it there, but it is a bit obscure to the  
36 Tribunal at the moment as to what this is all about.

37 MR TURNER: It is obscure to me as well, Sir, but it may be  
38 something that we will consider further.

1 Sir, in relation to this application, the Director's  
2 position is that we consent to the withdrawal of the  
3 application but we do wish to raise the issue of costs.

4 Mr Tatton has drawn attention to Rule 10. The other  
5 relevant provision, though it is perhaps not necessary to  
6 go there, is Rule 26, which provides, in short, that the  
7 Tribunal may at its discretion make an order for costs in  
8 whole or in part at any stage of the proceedings and in  
9 determining how much a person is required to pay the  
10 Tribunal may take account of the conduct of all parties  
11 in relation to the proceedings.

12 Here there are two distinct aspects, in my  
13 submission, in considering an application for costs. The  
14 first is the costs of and occasioned by Hasbro's  
15 unsuccessful application on 24 January to extend the time  
16 for filing the appeal. The second relates to the costs  
17 of dealing with the issues raised by the appeal itself.  
18 If I may, I will touch on those separately.

19 Dealing first with the costs of the application to  
20 extend time, I would refer to the transcript of your  
21 judgment, Sir. I do not know whether the Tribunal has  
22 copies to hand?

23 THE CHAIRMAN: We have copies here? I am not sure whether  
24 you have a corrected transcript or an uncorrected  
25 transcript?

26 MR TURNER: We have a copy of what I assume to be the  
27 corrected transcript. Well, no. It is entitled  
28 "Judgment for approval".

29 THE CHAIRMAN: So it is the uncorrected transcript. We have  
30 got that.

31 MR TURNER: At page 4, Sir, you recited the arguments that  
32 had been advanced by Hasbro beginning at line 5, and in  
33 that paragraph, which I invite the Tribunal briefly to  
34 read for itself, you had recorded that the first  
35 submission was that Hasbro had "found it impossible to  
36 frame arguments on how Hasbro believes the seriousness of  
37 its infringement should be assessed without understanding  
38 how the Director has assessed the seriousness of Hasbro's

1 Retail infringement". Then it was further submitted that  
2 Hasbro couldn't know in the absence of the Retail  
3 decision whether it had any arguments, for example, that  
4 it had in effect been fined twice in respect of any  
5 possible overlapping effects of the two infringements;  
6 whether there should be any proportionality between the  
7 respective penalties or whether the fines taken together  
8 in the round could be considered fair and just in respect  
9 of the overall impact of the two infringements or,  
10 finally; and whether it would be wrong for the two  
11 penalties together to exceed a single overall cap. Then  
12 there was the point about commercial judgment.

13 In relation to those arguments, Sir, your judgment  
14 was at page 6 and specifically at lines 3 to 20 you  
15 summarised your reasons for rejecting the application.  
16 In particular at line 6, towards the end, you said that  
17 on the material that you had you were "unable to find  
18 that Hasbro faces an insuperable difficulty, or even a  
19 major difficulty, in framing its appeal or its arguments  
20 as to the seriousness of the offence which has already  
21 been found to be proved in the existing Distributor  
22 decision. It seems to me that there is scope for  
23 addressing arguments on the existing Distributor  
24 decision, even in the absence of the Retail decision. If  
25 one argument is that the Director should not have arrived  
26 at his penalty in the Distributor case without waiting  
27 for the retail case or should have decided both cases  
28 together that is an argument that Hasbro is entitled to  
29 put forward on the appeal".

30 Then, Sir, you moved on to what you understood to be  
31 the principal argument, that Hasbro could not put forward  
32 its appeal completely in the absence of the Retail  
33 decision and you gave two answers to that difficulty.

34 In the first place, if in due course there was a  
35 second decision, any new matters could be advanced on  
36 appeal against that one. Alternatively that an  
37 application could be made to amend or amplify the appeal  
38 already lodged. And you refer to the relevant rules.

1           At the end of your judgment, Sir, costs were  
2 expressly reserved.

3           What has happened since then, of course, is that  
4 Hasbro has lodged its Notice of Appeal and it is  
5 appropriate to see what it contained.

6           What is immediately striking, in my submission, on  
7 reading it, is the extent to which it confirms the  
8 correctness of your judgment at the time, that there was  
9 no difficulty in framing arguments about the seriousness  
10 of Hasbro's infringement, let alone the strong submission  
11 that Hasbro had found that to be impossible. The  
12 arguments were (and there were five of them essentially)  
13 self-contained and they were not relevant to the Retail  
14 decision. In short, therefore, it became absolutely  
15 clear that the application was manifestly unsustainable,  
16 if not frivolous, and the Director General, for his part,  
17 was put to plainly unnecessary costs and effort in having  
18 to deal with the application to resist it. I am told  
19 that the efforts of the Director General resulted in him  
20 being derailed from other work for the best part of at  
21 least a day.

22           Although the sum at stake may in the grand scheme of  
23 things be relatively modest in this case, there is a  
24 principle at stake and that is that parties should not  
25 feel free to make unmeritorious applications,  
26 particularly interim applications of this kind.

27 THE CHAIRMAN: I do not think we could call it a frivolous  
28 application.

29 MR TURNER: And I accept that immediately.

30 THE CHAIRMAN: There was not any guidance as to what  
31 "exceptional circumstances" means. It may have been a  
32 weak application but it was not frivolous, I think.

33 MR TURNER: I entirely accept that, Sir. Nevertheless there  
34 are degrees of strength of arguments and in my  
35 submission, as was confirmed by the application when it  
36 arrived, this was at one end of the scale.

37           The point of principle, to which I return, is that  
38 the Tribunal's costs' jurisdiction should be exercised so



1 as to send out appropriate messages or signals about what  
2 happens when unmeritorious interim applications are made  
3 of this kind, which will also appropriately recognise  
4 that the other party will have been harmed, will have  
5 incurred unnecessary cost and expense. Certainly that  
6 was the case here.

7 Finally, picking up on one or two of Mr Tatton's  
8 points, there was no element of reasoning in the eventual  
9 Retail decision, which was made on 19 February, which is  
10 now relied on in support of the decision to withdraw the  
11 Distributors' decision. In my submission, what one has  
12 is a plainly commercial judgment that was made without  
13 regard to the actual reasoning of the Retail decision.  
14 Sir, what I mean by that is that one does not see from  
15 the Retail decision any particular element of reasoning  
16 which would justify the decision that has now been taken  
17 to withdraw the appeal in the Distributors' case.

18 THE CHAIRMAN: So the Retail decision in itself is not  
19 something that would have led them to withdraw? It may  
20 be the case that there is nothing in the Retail decision  
21 that would strengthen the Distributor case.

22 MR TURNER: Yes, absolutely. The content of the Retail  
23 decision contains nothing that could have led to the  
24 withdrawal of the Distributors' decision, as opposed to  
25 its outcome, namely that there was no penalty, 100 per  
26 cent leniency. Nor has any specific factor been drawn to  
27 your attention.

28 So far as the Tribunal's Rules are concerned, it was  
29 suggested that the Director or the Tribunal might have  
30 had in mind that the course of action might have been to  
31 withdraw this appeal, but in my submission, certainly  
32 what the Director had in mind, as came through from the  
33 judgment, was that depending upon the content of the  
34 Retail decision, had there been anything to strengthen  
35 the points in the Distributors' decision the appropriate  
36 order would have been for amendment of the notice of  
37 appeal or, as you said in the judgment, as to the linking  
38 of cases perhaps as a procedural matter.

1 Third, and finally, it was suggested, although  
2 faintly, that the Director General may have been himself  
3 at fault in the bifurcation proceedings and that was not  
4 of Hasbro's making. As to that, I would confirm that it  
5 was not the Director General's fault that the bifurcation  
6 took place. The different timing between the Retail and  
7 the Distributors' decision was as a result of the  
8 administrative pressures in relation to each case and  
9 therefore to factors beyond the Director's control.

10 THE CHAIRMAN: Well is that completely right, Mr Turner? Why  
11 couldn't he have held up the Distributor decision until  
12 the Retail decision was ready?

13 MR TURNER: Well one of the reasons for that is that it was  
14 not certain at that time when the Retail decision  
15 precisely would have been ready and there is every  
16 justification, as a matter of good administration, when a  
17 decision is ready to be made and published, for that to  
18 occur. I am instructed that in relation to the Retail  
19 decision there were moreover threats of judicial review  
20 and other such applications which may have delayed the  
21 Retail decision for an indefinite period.

22 Sir, those are the points, in short, which I make  
23 about the interim application.

24 So far as the costs in relation to the main appeal  
25 are concerned, I tread plainly with greater caution and  
26 with a greater degree of diffidence. But as the Tribunal  
27 is aware, our defence was due to be served quite shortly  
28 as a result of the Tribunal's Rules I believe on about  
29 March 12 and therefore, as a result of the Tribunal's  
30 procedures, it will be no surprise to anyone to learn  
31 that a significant amount of work has actually been done  
32 on the case by the Director General.

33 We, of course, accept that the Tribunal at this stage  
34 will not wish to go into the substance of this appeal in  
35 any detail at this stage, but our submission is that the  
36 appeal on the points that have been raised in the  
37 Distributor's decision was always gossamer thin and that  
38 on certain points, such as, in particular, an important

1 issue about the role of compliance programmes, it was  
2 plainly misconceived.

3 With the Tribunal's permission I can briefly  
4 elaborate that in a matter of sentences for each point so  
5 as to make good my submission.

6 THE CHAIRMAN: I do not think the merits of the appeal and  
7 what you might have said in your defence really bear upon  
8 this, Mr Turner.

9 MR TURNER: Well save only to the extent that if the appeal  
10 was plainly thin on its own terms, that ought perhaps to  
11 have influenced the Tribunal.

12 THE CHAIRMAN: I see. You say if it was always a hopeless  
13 appeal, then that is an additional reason for giving the  
14 Director his costs.

15 MR TURNER: On this limb of my application today, I do not  
16 ask for all of the costs. Indeed I think that that would  
17 be inappropriate. But on this limb I would say that a  
18 contribution to costs would be appropriate.

19 THE CHAIRMAN: What do you mean by a contribution to costs?

20 MR TURNER: A contribution would be in the order of one  
21 third.

22 THE CHAIRMAN: I do not know whether the Director or his  
23 advisers have had a chance to prepare a statement of  
24 costs?

25 MR TURNER: I am afraid not, Sir. That can be done  
26 expeditiously.

27 May I briefly raise, at least in a few sentences,  
28 because it may also be relevant to the point that I was  
29 making on the first limb of the application, the discrete  
30 nature of the points that were raised in the  
31 Distributors' case.

32 THE CHAIRMAN: Yes.

33 MR TURNER: I am taking these in no particular order. I  
34 believe there are five.

35 The first point that was raised by way of appeal is  
36 that the Director failed to give credit for the corporate  
37 compliance programme that Hasbro had and should have done  
38 so. That is at paragraph 72 of the Notice of Appeal.

1           The second point that was raised is that the Director  
2 wrongly increased the penalty because of the senior  
3 position of Mr David Bottomley, who was the UK Sales  
4 Director. Again that is at paragraph 72.

5           The third point is that the Director failed to give  
6 credit for the subsequent disciplining by Hasbro of Mr  
7 Bottomley.

8           The fourth point is that the Director failed to give  
9 appropriate credit to Hasbro for its cooperation.

10          Lastly - and a significant point in the case - the  
11 Director failed adequately to take into account the  
12 limited impact on competition that resulted from the  
13 infringement, and that is essentially paragraphs 60 - 64  
14 of the Notice of Appeal.

15          As I say, the first point, even in enumerating the  
16 points, is the discrete nature of these issues and the  
17 difficulty in seeing how the content of the Retail  
18 decision would have impacted on the logic of those  
19 arguments.

20          But taking them very briefly one by one, on the issue  
21 of the failure to give credit for cooperation, the brief  
22 answer is that that was covered by the leniency  
23 arrangement, the contractual arrangement which the  
24 Tribunal has just seen.

25          On the failure to give credit for subsequently  
26 disciplining Mr Bottomley, the short answer is that it  
27 cannot be right that a company which has been penalised  
28 for infringement can benefit by a reduction in the fine  
29 if it takes, as it were, retrospective action against an  
30 individual who was involved in the infringement: 'we  
31 have now punished that individual; you should reduce our  
32 fine'. What matters is the toughness of the prospective  
33 measures to prevent infringement, which would be a  
34 compliance programme.

35 THE CHAIRMAN: Just jogging back on the points you make about  
36 cooperation, it is not wholly clear from the Director's  
37 guidelines what the relationship is between step 4,  
38 mitigating factors, cooperation, which is the last of the

1 mitigating factors, and the second part of the sentence  
2 dealing with lenient treatment. It is not clear whether  
3 the one is supposed to wholly absorb the other, or what.

4 MR TURNER: Sir, it may perhaps be sensible if you would  
5 give me the reference again in the book.

6 THE CHAIRMAN: It is 3120. Paragraph 7 is headed "Step 4.  
7 Adjustment for further aggravating and mitigating  
8 factors".

9 MR TURNER: Yes.

10 THE CHAIRMAN: Then the last of the mitigating factors is  
11 cooperation which enables the enforcement process to be  
12 concluded more effectively and will speed another case  
13 over and above that in respect of any undertaking.

14 Then there is a note that says "cooperates fully it  
15 may have been total immunity or significant facts that  
16 meets the requirements of Part 3 of the Guidance". Then  
17 over the page you have got the leniency provisions.

18 But it is not completely clear in terms of all the  
19 Director's steps, step 1, step 2, step 3 and step 4, that  
20 when he gets to step 4 does he say 'I am not taking this  
21 step now because of the leniency programme', or whether  
22 he takes that step but it somehow gets absorbed in the  
23 later leniency, or what.

24 MR TURNER: My understanding, but I will take instructions,  
25 is that one gets absorbed in the other.

26 THE CHAIRMAN: I do not think the decision is particularly  
27 clear on that point. Well he says it at 93. That is  
28 true. He says at 93 "because you have got leniency we  
29 are not going to give you any further amount under this  
30 head".

31 MR TURNER: That is in the Decision itself?

32 THE CHAIRMAN: In the Decision itself. That is his view on  
33 that.

34 MR TURNER: Mr Brindley has impressed on me that they are  
35 separate and that that is how they are intended to  
36 operate.

37 THE CHAIRMAN: Yes, I see.

38 MR TURNER: The third point was the argument that the

1 Director General had wrongly increased the penalty  
2 because of the senior position of Mr Bottomley and it was  
3 pointed out that he was not on the board.

4 The brief answer to that, again, is that this is the  
5 UK Sales Director. There cannot be a definitive strict  
6 line between someone who is on the board and someone who  
7 is not on the board and it is appropriate to recognise  
8 the senior position of an individual involved in the  
9 company in any event.

10 So far as compliance programmes are concerned, this  
11 is an important issue generally, so far as the Director  
12 General is concerned because corporate compliance  
13 programmes can be a major instrument in achieving  
14 compliance with the aims of the Act. So this was a topic  
15 of some interest more generally in the case, but it was,  
16 in the Director General's view, quite plain, looking at  
17 Hasbro's compliance programme, which was in the Appeals  
18 Bundle, that it was essentially paper based, static, and  
19 ineffective and that that being the case there cannot  
20 sensibly be any argument that it should be taken into  
21 account as a ground for mitigation.

22 In order to make that point good, I would need to  
23 show the Tribunal the relevant parts of the programme.

24 THE CHAIRMAN: We are not going into the merits of the case  
25 at the moment, Mr Turner. I think we are, not without  
26 reluctance, allowing you to tell us the points you would  
27 have made had the appeal been effective.

28 MR TURNER: Well the final point is simply this, impact on  
29 competition.

30 Hasbro says that the impact was minimal. At  
31 paragraph 61 of the Notice of Appeal, it pointed out  
32 there was no evidence that any distributor was using its  
33 margin to provide lower wholesale prices to Hasbro's  
34 direct accounts with small retailers.

35 For that, I simply refer to what the Decision itself  
36 had culled from the evidence at paragraphs 39 to 40.  
37 Those paragraphs, if the Tribunal does briefly turn those  
38 up, make clear that the aim of the agreement was

1 precisely to shield Hasbro's direct accounts from being  
2 offered lower prices, which would have had a  
3 destabilizing effect on price levels.

4 THE CHAIRMAN: The direct accounts being, among others, Argos  
5 and Littlewoods?

6 MR TURNER: Direct accounts being, among others, Argos and  
7 Littlewoods. That is so.

8 But certainly the submission that the effect of the  
9 infringement must be taken to be extremely limited  
10 because it was confined to a narrow corner of the market  
11 and that direct accounts, other people to whom the  
12 distributors did not ordinarily supply, were outside the  
13 impact of this anti-competitive activity simply cannot be  
14 sustained on the direct evidence of the Hasbro people  
15 involved and the documents which are referred to in the  
16 Decision.

17 I take that no further, other than to draw the  
18 strands together and say that on the Notice of Appeal one  
19 has quite plainly a number of discrete arguments  
20 unaffected by the subsequent retail decision and that all  
21 of them, in the Director General's view, were at a  
22 minimum, in our submission, weak.

23 Sir, those are my submissions.

24 THE CHAIRMAN: Why are you asking only for a third of the  
25 costs of the appeal, Mr Turner?

26 MR TURNER: It is in recognition of the point that in a  
27 situation of this kind, there is a public policy  
28 travelling in the other direction which we feel is only  
29 fair to take into account and that is that it is  
30 desirable that parties should feel able to withdraw  
31 appeals and that there is a balance to be struck. We  
32 must accept, and do accept, that. Therefore, to ask for  
33 all of our costs would seem inappropriate. We also take  
34 into account the point as, Sir, you have impressed on me,  
35 that the Tribunal has not had a full opportunity to go  
36 into the detail of these arguments. For that reason as  
37 well, it would not seem right for me to say that we  
38 should have all of our costs in relation to withdrawal of

1 the main appeal.

2 However, taking into account the unusual procedures  
3 of this Tribunal, whereby a substantial amount of this  
4 work has already been done, and what I hoped to  
5 demonstrate in relation to the *prima facie*, at least,  
6 strength of these discrete arguments, it is, in my  
7 submission, correct that we should have a contribution on  
8 that issue as to the costs.

9 Sir, that is a separate matter from the costs in  
10 relation to the interim application.

11 THE CHAIRMAN: Can you help us, Mr Turner, for a moment on  
12 the Director's letter of 22 November 2002? The Director  
13 received quite a polite and well argued letter of 19  
14 November pointing out possible difficulties if the cases  
15 become bifurcated. In the letter of 22 November 2002 the  
16 Director says, "We believe the two cases to be entirely  
17 separate infringements, based on a separate set of facts.

18 There can therefore be no reason, other than  
19 administrative convenience, for the Director to deal with  
20 the Distributors' decision differently from the way in  
21 which he would deal with it if the Retailers case did not  
22 exist." He goes on to say that Hasbro might take a  
23 different view and that is to be sorted out under the  
24 rules.

25 I was just wondering if there is a bit more to it  
26 than pure "administrative convenience", as the Director  
27 states in that paragraph? We have got two cases that are  
28 indeed separate infringements and they are based on  
29 separate facts, but there are certain links, are there  
30 not?

31 MR TURNER: Yes.

32 THE CHAIRMAN: It is the same product. It is the same  
33 market. It is the same party. We have just looked at  
34 paragraph 40 of the contested decision where the  
35 distributor agreements are said to be aimed at dealing  
36 with possible discounting towards the direct accounts, ie  
37 the retailers.

38 Can one, up to a point, see Hasbro's point of view



1 that it is a little bit difficult to evaluate the penalty  
2 in the round without having the whole picture. It is  
3 certainly something that the Tribunal would be a bit  
4 uncomfortable about doing without really knowing the  
5 whole circumstances, especially if the administrative  
6 procedure has run in parallel and the documents have been  
7 put in at the same time, the interviews have taken place  
8 at the same time, and so on and so forth.

9 MR TURNER: It is probably best on this if I speak to Mr  
10 Brindley briefly, if the Tribunal will allow me to do so.

11 THE CHAIRMAN: Yes.

12 MR TURNER: (After conferring with Mr Brindley) Sir, I am  
13 in a position to give you the reason for why that was  
14 written in the Director's view, which was essentially  
15 that the relevant facts of the two infringements were  
16 regarded as separate. These were separate activities,  
17 the restrictions placed on the distributors on the one  
18 hand and the restrictions in relation to the retail  
19 decision on the other hand. They were separate anti-  
20 competitive acts.

21 The further point is that in the event the two  
22 decisions can be seen to have worked out to be completely  
23 separate. Although one says now that there may  
24 theoretically have been some links between the two, which  
25 could have led to it being desirable that the matter  
26 should be decided at the same time, in the event that has  
27 not proved to be the case, and indeed in this appeal. As  
28 I say, no factor has been pointed to which establishes  
29 some logical link between the two decisions.

30 I am instructed that in relation to the point about  
31 the possibility of direct accounts being contacted by the  
32 distributors, the Office's view at the time, contrary to  
33 what I may have suggested before, was that Argos and  
34 Littlewood, at any rate, were not thought to be at the  
35 forefront of that concern, that other direct accounts  
36 were more in the frame for the purpose of the  
37 Distributors' decision, although it is accepted that that  
38 is not entirely clear from paragraphs 39 and 40 of the

1 Director's Decision. Thus paragraph 39 of the Decision  
2 begins with, "The infringements were proceeded by  
3 complaints to Hasbro from some of its direct customers  
4 who felt that they could get a better deal from the  
5 distributors than directly from Hasbro." As I understand  
6 it, that does not mean that the people concerned were not  
7 Argos or Littlewood. Therefore, in a nutshell, from the  
8 Director's perspective, one had two separate anti-  
9 competitive activities and they were regarded as separate  
10 infringements. Looking at it from where the Tribunal  
11 sits now, that remains the case.

12 Sir, those are my submissions.

13 THE CHAIRMAN: Thank you. I have one other question, Mr  
14 Turner, which is on a different point. It is on the  
15 issue of costs. Have we yet had occasion to go into the  
16 question - I appreciate the delicacy and I am not taking  
17 any position on it at the moment - of how far the costs  
18 of the Director's own legal service are recoverable in  
19 these proceedings in front of the Tribunal?

20 MR TURNER: I am not aware that that issue has arisen yet.  
21 (Pause for taking instructions) Mr Brindley tells me  
22 that in relation to other Government departments in other  
23 litigation contexts, internal costs or internal legal  
24 departments' bills are rendered, but that issue has not  
25 arisen yet.

26 THE CHAIRMAN: That may well be right. I would not want to  
27 take any decision today as to precisely what costs are  
28 going to be covered, because that is an issue where the  
29 Tribunal would like to be satisfied that we are in line  
30 with practice in the High Court and other Tribunals.

31 MR TURNER: Yes, I understand that.

32 THE CHAIRMAN: That is not the practice in the court of first  
33 instance, where the Commission's legal service does not  
34 recover its internal costs and because of that difference  
35 I want to be satisfied that we are following well  
36 established principles in that regard. I do not in any  
37 way under-value the services provided by the Director's  
38 in house team, which are extremely useful to the

1 Tribunal. I just want to be sure that we are following  
2 general principles in allowing that part of the costs.

3 MR TURNER: Yes. Indeed it may be sensible if the Office of  
4 Fair Trading were to investigate that and to confirm the  
5 position in a letter to the Tribunal.

6 THE CHAIRMAN: I think, depending on what we decide about  
7 costs, this is the sort of case where the costs would in  
8 any event lend itself to some kind of summary assessment,  
9 which could presumably be done by an exchange of letters,  
10 in the course of which we could be satisfied about the  
11 point I have just raised.

12 MR TURNER: Yes. Sir, that is a sensible suggestion.

13 THE CHAIRMAN: But we have not got to that point yet. We  
14 have not heard Mr Tatton yet and we have not considered  
15 it amongst ourselves.

16 Yes, Mr Tatton?

17 MR TATTON: If I could make three points fairly shortly.

18 The first point is that Mr Turner mentioned that at  
19 the hearing for an extension of time it was Hasbro's case  
20 that it was impossible for it to frame any argument.  
21 Whilst that may have been the wording in the written  
22 application, in the event at the hearing itself the  
23 application turned on Hasbro's reluctance not to put its  
24 best foot forward and it felt that in the absence of the  
25 other Retail decision it could not fully and properly  
26 frame its legal arguments and did not want to be in a  
27 position of putting forward a thin, or indeed a gossamer  
28 thin appeal at that stage.

29 THE CHAIRMAN: Yes.

30 MR TATTON: The second point I would like to make is that it  
31 was also made clear at the application for an extension  
32 of time that Hasbro was entitled to make a commercial  
33 decision as to whether or not to pursue the appeal,  
34 irrespective of the strength, or otherwise, of its legal  
35 arguments.

36 The point it made at the hearing was that it was not  
37 then in a position to make such a decision in the absence  
38 of knowing what, if anything, it was going to be fined in

1 the Retail decision, and indeed the decision that Hasbro  
2 has made is a commercial decision. It is a decision  
3 taking all factors into account, including the extent to  
4 which the Retail decision has been able to add to, or  
5 strengthen, its existing arguments in this appeal.

6 But there have been other factors as well. There is  
7 the weighty factor that I have mentioned, which is that  
8 it no longer has to pay a fine in the other decision and  
9 it has decided that, taken in the round, it will take its  
10 medicine in this decision.

11 The third point that I would like to make is that  
12 whilst Hasbro does not believe it put its best potential  
13 case forward in the appeal that was lodged on 29 January,  
14 its case is that it had no option other than to do that  
15 and, secondly, that the arguments that it did put forward  
16 were not gossamer thin.

17 I can take the Tribunal through the detail and reply  
18 to each of the points that Mr Turner has raised and I am  
19 very happy to do so, but my overriding point is that this  
20 Tribunal's judgment in the decision in *Knapp* made very  
21 clear (and I quote from our appeal application) "that an  
22 undertaking penalised by the Director is entitled to have  
23 that penalty reviewed *ab initio* by an impartial and  
24 independent Tribunal able to take its own decision  
25 unconstrained by the guidance". There may have been all  
26 manner of factors that we have perhaps started to discuss  
27 today that could have been aired at such a hearing. I do  
28 not think the fact that Hasbro put its appeal on the  
29 basis that it did, means that when it subsequently was  
30 able to make a commercial decision whether to appeal and  
31 decided not to, it should therefore be penalised in the  
32 payment of any part of the Director's costs.

33 As regards the five particular issues, the  
34 disciplining of Mr Bottomley, I notice that in the Retail  
35 decision the Director has in fact given credit to Hasbro  
36 for disciplining the directors in that, but he did not  
37 give any such clear credit for Hasbro in the Distributor  
38 decision.

1           In terms of the double accounting and double reward  
2 for cooperation, the point that we would have sought to  
3 air at the hearing of this case is that the Distributor  
4 investigation started in May. Leniency was granted in  
5 September. There would have been an arguable point that  
6 some credit should have been given for the cooperation  
7 Hasbro afforded the Director during that period when it  
8 did not have the benefit of the leniency agreement.

9           Thirdly, in terms of the impact on competition, there  
10 are two immediate points that come to mind.

11           The first is that it appeared that it would be an  
12 inevitable consequence of the Director's decision in the  
13 retail infringement that retailers during the same time  
14 frame as the Distributor decision were, in effect, being  
15 prevented from selling below the recommended retail  
16 prices. In the Distributor decision, one of the impacts  
17 assessed by the Director was the fact that in stopping  
18 Hasbro's distributors lowering the list price, it took  
19 away from retailers the possibility of passing that on to  
20 consumers. The effect cannot be the same in both. If  
21 there was a cartel working at one level, its effect  
22 cannot exist at another. That was an argument that we  
23 may have sought, should we have proceeded to have taken.

24           Another possible argument is that in terms of Rule 14  
25 in the Retail case, it was part of the Director's case  
26 that Hasbro's monitoring of the market was part of the  
27 infringement. We did not know how that would develop in  
28 the decision. It is entirely arguable that what Hasbro  
29 did with its distributors was part of monitoring the  
30 market and, if so, questions of double jeopardy and  
31 double accounting, or indeed proportionality, would all  
32 have arisen.

33           These are issues which Hasbro was entitled to reserve  
34 its position on. It may not have been able to fully  
35 amplify them and argue them in the absence of the Retail  
36 decision. Nevertheless in a protective way, given that  
37 an extension of time was not permitted by the Tribunal,  
38 it had little option other than to put its appeal in the

1 terms that it did.

2 That is all I have to say.

3 THE CHAIRMAN: Thank you, Mr Tatton.

4 I think we will rise for a short while to consider  
5 what we are going to do.

6 **(A short adjournment)**

7 (See separate transcript for judgment)