



Neutral citation: [2004] CAT 24

IN THE COMPETITION
APPEAL TRIBUNAL

Cases: 1014 and 1015/1/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB

14 December 2004

Before:

Sir Christopher Bellamy (President)
The Honourable Antony Lewis
Ms. Vindelyn Smith-Hillman

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ARGOS LIMITED
(2) LITTLEWOODS LIMITED

Appellants

-v.-

OFFICE OF FAIR TRADING
(formerly the Director General of Fair Trading)

Respondent

Mr. Mark Brealey QC and Mr. Mark Hoskins (instructed by Burges Salmon LLP) appeared for Argos.

Mr. Nicholas Green QC and Miss Marie Demetriou (instructed by DLA LLP) appeared for Littlewoods.

Mr. Brian Doctor QC and Miss Kassie Smith (instructed by Director of Legal Services, Office of Fair Trading) appeared for the respondent.

Heard at Victoria House on 10, 11, 12, 13, 14, 20 and 21 May 2004

JUDGMENT ON LIABILITY

APPROVED BY THE TRIBUNAL FOR HANDING DOWN
(SUBJECT TO EDITORIAL CORRECTIONS)

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I INTRODUCTION AND SUMMARY

1. This is the judgment of the Tribunal on the substantive appeals on liability by Argos Limited (“Argos”) and Littlewoods Limited (“Littlewoods”) against decision CA98/8/2003 (“the Decision”) of the Office of Fair Trading (“OFT”) adopted on 21 November 2003. The Decision replaced an earlier decision (“the first Argos/Littlewoods Decision”) CA98/2/2003 of the Director General of Fair Trading (“the Director”) to the same effect adopted on 19 February 2003.
2. In the Decision the OFT found that Argos and Littlewoods had, with Hasbro (UK) Limited (“Hasbro”), infringed the Chapter I prohibition contained in section 2 of the Competition Act 1998 (“the Act”) by entering into agreements and/or concerted practices which fixed the prices at which certain toys and games manufactured by Hasbro would be retailed by Argos and Littlewoods. According to the OFT the agreements and/or concerted practices found in the Decision were entered into in 1999, infringed the Chapter I prohibition from 1 March 2000 (the date on which the Act entered into force), and came to an end no earlier than 15 May 2001 and no later than 14 September 2001.
3. For the infringements found in the Decision the OFT required Argos to pay a penalty of £17.28 million, while Littlewoods was required to pay a penalty of £5.37 million. Hasbro’s penalty was assessed by the OFT at £15.59 million, but because Hasbro approached the OFT with information that led to the uncovering of the infringement Hasbro’s penalty was reduced to nil (paragraph 411 of the Decision). Hasbro has not appealed against the Decision. The OFT has relied in the Decision and in these proceedings on evidence provided by Hasbro and certain Hasbro employees.
4. For brevity and convenience the word “agreement” is used by the OFT in the Decision to include both an agreement and a concerted practice (paragraph 95).
5. According to the findings of the OFT, Hasbro, Argos and Littlewoods infringed the Chapter I prohibition from 1 March 2000 to at least 15 May 2001 by two bilateral agreements, between Hasbro and Argos, and Hasbro and Littlewoods respectively, to fix

prices for certain Hasbro products at Hasbro's RRP's, and by a trilateral agreement to the same effect between Hasbro, Argos and Littlewoods.

6. At this stage of these appeals, both Argos and Littlewoods have contested the OFT's findings that the relevant agreements or concerted practices ever existed. After considering all the evidence, including the evidence of the witnesses called by the various parties, we find on the facts, and for the reasons given in this judgment, that each of Argos and Littlewoods respectively were party to a bilateral agreement or concerted practice with Hasbro, and to a trilateral agreement or concerted practice with Hasbro and each other, to fix prices within the meaning of the Chapter I prohibition between 1 March 2000 and 15 May 2001. Our conclusions are summarised in sections XI to XIV below. In consequence, we dismiss both appeals on the issue of liability.

II THE STATUTORY FRAMEWORK

7. The Act came into force on 1 March 2000. This case concerns section 2 of the Act which provides, so far as material:

“2. – (1) ... agreements between undertakings, decisions by associations of undertakings or concerted practices which—

- (a) may affect trade within the United Kingdom, and
- (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited ...

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which—

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

...

(8) The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter I prohibition.”

8. Following an investigation under the powers contained in Chapter III of the Act, the OFT may, pursuant to section 31(1)(a), make a decision that the Chapter I prohibition has been infringed. Where it proposes to make such a decision the OFT must give notice under what

was at the material time rule 14 of the Competition Act 1998 (Director's Rules) Order 2000, S.I. 2000/293 ("the Director's Rules") to every person it considers is a party to the agreement ("the rule 14 notice"). The rule 14 notice must set out the facts and matters on which the OFT relies, the matters to which it has taken objection, the action it proposes and its reasons for it (rule 14(3) of the Director's Rules).

9. Section 36(1) of the Act provides that on making a decision that conduct has infringed the Chapter I prohibition, the OFT may require the undertaking concerned to pay it a penalty in respect of the infringement. Under section 36(3), such a penalty may be imposed only if the OFT is satisfied that the infringement has been committed intentionally or negligently. By virtue of section 36(8), no penalty fixed by the OFT may exceed 10 per cent of the turnover of the undertaking as determined in accordance with the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, S.I. 2000 No. 309. Any penalty so imposed is recoverable as a civil debt following the expiry of the period for appealing to the Tribunal, or the determination of any such appeal: section 37.
10. Section 38(1) of the Act requires the OFT to publish guidance as to the appropriate amount of any penalty. Under section 38(8) the OFT must have regard to that guidance when setting the amount of the penalty. The Director has published such guidance entitled *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty* (OFT 423, March 2000; "the Director's Guidance").
11. The foregoing provisions of the Act are closely modelled on Article 81 of the EC Treaty. So far as possible and appropriate, the Act is to be interpreted and applied in a manner consistent with the principles of European Community law in relation to competition: section 60.
12. Any party to an agreement in respect of which the OFT has made a decision may appeal to this Tribunal against, or with respect to, that decision: section 46(1).
13. The powers of the Tribunal to determine appeals under section 46 are set out in paragraph 3 of Schedule 8 of the Act, which provides:

"3.–(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.

- (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—
- (a) remit the matter to the OFT,
 - (b) impose or revoke, or vary the amount of, a penalty,
 - (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the OFT,
 - (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or
 - (e) make any other decision which the OFT could itself have made.
- (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.
- (4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.”

14. With effect from 20 June 2003 the procedure governing such appeals is set out in the Competition Appeal Tribunal Rules 2003, S.I. 2003/1372 (“the Tribunal’s Rules”). Appeals lodged before that date are governed by the Competition Commission Appeal Tribunal Rules 2000, S.I. 2000/261. As far as we are aware there is no material difference between these two sets of rules for the purpose of the present appeals.
15. Prior to 20 June 2003, the proceedings which form the subject matter of this appeal were undertaken by the Director, whose office was abolished by the entry into force on that date of the Enterprise Act 2002. In this judgment “the OFT” includes the Director, where relevant, and vice versa.
16. Earlier decisions of the Tribunal have previously dealt with various interlocutory and other matters which have arisen in the course of the proceedings: see [2003] CAT 10, [2003] CAT 16, [2003] CAT 24 and [2004] CAT 5.

III ARGOS, LITTLEWOODS AND HASBRO

Argos

17. Argos is part of Argos Retail Group, which in turn is part of Argos Group Limited, a multi-channel retailer. The Argos Group was acquired in April 1998 by GUS plc. Argos’ main

business comprises the Argos catalogue showroom chain. Argos has around 450 stores and is the United Kingdom's largest catalogue retailer. Argos produces approximately 17 million catalogues per season, the products from which are available in the Argos catalogue stores. In the twelve months up to the end of March 2002, it had a total United Kingdom turnover of £2.7 billion.

18. Another member of the GUS group was, at the relevant time, GUS Home Shopping, which operates as a home shopping catalogue business without high street showrooms. It is a separate business from Argos.
19. The Chief Executive Officer of Argos Retail Group, which includes Argos, is Mr. Terence Duddy. He was appointed in September 1998. The Argos Trading Director, whose responsibilities included toy products, was Mrs. Maria Thompson. Her duties included the management of product availability and the sourcing and quality of products. Additionally she made recommendations to the Argos Executive Board relating to pricing strategy, range content, catalogue size and pagination, and also in preparing sales and margin forecasts. Mrs. Thompson became Argos' Commercial Director in June 2000. Mrs. Sue Porritt was an Argos' Trading Manager who reported to Mrs. Thompson. Mr. Andrew Needham was the buyer responsible for boys' toys, games and construction toys during the relevant period. Ms. Vanessa Clarkson was the buyer responsible for girls' toys. Mrs. Jacqueline Wray was a merchandise assistant whose role was to assist the buyers. During the relevant period she reported to Mr. Needham.

Littlewoods

20. Littlewoods is also a multi-channel retailer. Its retailing operations include Littlewoods stores, Index catalogue stores and Littlewoods home shopping catalogue business. Index catalogue stores and Littlewoods home shopping are two separate retail channels. At the time of the Decision Littlewoods had around 250 stores including 135 Index catalogue stores. Index produces about 7 million catalogues per season, the products from which are available in Index catalogue stores. This case concerns the Index catalogue business. In the twelve months up to the end of April 2002, Littlewoods had a total United Kingdom turnover of £1.9 billion.

21. Mr. John McMahon was a Buying and Merchandise Director for Littlewoods until December 2000. From August 1998 his responsibilities included all toys purchased across Index, home shopping and Littlewoods stores. Mrs. Lesley Paisley is the Buying Manager for Littlewoods with responsibility for the purchase of toys. During the period to which the Decision relates, Littlewoods toy buyers reported to her. Mr. Alan Burgess was the Index catalogue and Littlewoods home shopping buyer responsible for boys' toys, electronics and construction toys. Mr. Alan Cowley was the buyer responsible for pre-school and musical toys. His dealings with Hasbro were principally in relation to a product range called "Tweenies". Mr. Phil Riley was a buyer of boxed games, junior sports and outdoor sports, having taken over part of the range previously dealt with by Ms. Andrea Gornall. From September 2000 Ms. Andrea Gornall was a buyer of creative and girls' toys. During parts of 2000 the buyer responsible for creative and girls' toys was Ms. Katharine Runciman.

Hasbro

22. Hasbro is a leading global manufacturer of toys and games. It is one of the largest toy and games suppliers in the United Kingdom. It is a subsidiary of Hasbro Inc, a US company. It supplies such well-known toys and games as 'Action Man', 'Monopoly' and 'Cluedo'. Hasbro's United Kingdom turnover in 2001 was £123.8 million. Hasbro has not appealed the Decision and has taken no active part in the proceedings.
23. At the time of the OFT's investigation Hasbro's senior management in the United Kingdom consisted of Mr. Alistair Richards, the Managing Director, Mr. Mike McCulloch, the Head of Sales and Marketing, Mr. Mike Brighty, Sales Director, and Mr. Jonathan Evans, Trade Marketing Director. From September 1998, Mr. David Bottomley was the Sales Director for the free on board (FOB) Division of Hasbro, and from December 1998 he worked as Sales Director responsible for accounts which included Littlewoods. Mr. Ian Thomson was Hasbro's Business Account Manager for Littlewoods from September 1997. Mr. Thomson reported to Mr. Brighty until approximately October/November 1998, after which he reported to Mr. Bottomley. From the end of January 1999 until October 2000 Mr. Neil Wilson was Hasbro's Business Account Manager with responsibility for Argos. After October 2000 Mr. Charles Cooper assumed responsibility for the Argos account.

IV THE PROCEDURE BEFORE THE OFT AND THE TRIBUNAL

The Distributors case

24. According to the Decision, the Director started an investigation into price-fixing by Hasbro in March 2001. At that stage the Director's investigation centred not on Hasbro's relations with retailers, but on possible price-fixing and/or resale price maintenance by Hasbro and a number of its distributors ("the Distributors case"). An infringement decision CA98/18/2002 ("the Distributors Decision") was subsequently taken on 28 November 2002. In the Distributors Decision, Hasbro was fined £4.95 million. An appeal by Hasbro in the Distributors case was subsequently withdrawn: see [2003] CAT 1 and [2003] CAT 2.
25. On 15 May 2001 the OFT visited Hasbro's premises at Uxbridge. On 10 August 2001 the Director sent notices under section 26 of the Act to Hasbro and a number of retailers seeking information.

Hasbro's leniency application

26. Hasbro applied on 14 September 2001 for total immunity from financial penalty under the Director's Guidance in respect of its dealings with retailers, or in the alternative, a reduction in the level of penalty. On 18 September 2001 Hasbro was granted total immunity, subject to the Director's "usual terms", and in particular on the condition that Hasbro co-operated fully with his investigation and that Hasbro had not "acted as the instigator or played the leading role in the cartel." The Director's original investigation was then expanded to look at possible price-fixing between Hasbro and retailers, in particular Argos and Littlewoods.

The Argos/Littlewoods investigation

27. On 26 and 27 September 2001 on-site investigations under the powers contained in section 27(3) of the Act were carried out by the Director at the headquarters of Argos and Littlewoods. A number of emails and other documents were obtained as part of those investigations.

28. Between 10 October 2001 and 15 October 2001, OFT officials interviewed 10 Hasbro employees. These interviews were given voluntarily and were arranged by Hasbro as part of its commitment to co-operate with the OFT investigation. Voluntary interviews were also given by three Littlewoods employees, on 16 October 2001 (although not as part of any leniency application).
29. On 21 December 2001, Littlewoods provided the OFT with a report of an internal investigation conducted by external legal advisers which found no evidence of an infringement.
30. On 1 May 2002 the Director issued notices (“the original rule 14 notices”) under rule 14 of the Director’s Rules to each of Argos, Littlewoods and Hasbro proposing to find that they had infringed the Chapter I prohibition by entering into price-fixing arrangements in respect of certain of Hasbro’s toys and games.
31. At the same time the Director informed Hasbro that he considered, in the light of the evidence now in his possession, that Hasbro was not entitled to total immunity since it appeared to be the instigator of, or to have played the leading role in, the cartel in question; but he gave Hasbro the opportunity to make representations on that issue. According to the Director, Hasbro would still be entitled to partial immunity, provided that the conditions for partial immunity set out in the Director’s Guidance were met.
32. Written representations were made by Argos, dated 17 June 2002, and by Littlewoods, dated 5 July 2002, in response to the original rule 14 notices. As part of their written representations, both companies submitted to the OFT a number of witness statements made by their employees. Argos submitted witness statements from Vanessa Clarkson, Andrew Needham, Sarah Silverwood, Maria Thompson and Jacqueline Wray. Littlewoods submitted statements from Alan Burgess, Alan Cowley, Peter Edmonds, Andrea Gornall, John McMahon, Lesley Paisley, Phil Riley and Katharine Runciman.
33. Hasbro also submitted oral and written representations to the OFT, including representations regarding the Director’s intention partially to revoke Hasbro’s immunity. Hasbro also submitted a statement by one of its in-house legal advisers, Emma Wilson.

34. An oral hearing with Argos took place on 27 June 2002. Mrs. Thompson, Mr. Needham and Ms. Clarkson gave oral evidence. An oral hearing with Littlewoods took place on 3 September 2002. Mrs. Paisley made a power-point presentation on behalf of Littlewoods. Both companies were represented by solicitors and counsel at their respective hearings.
35. On 27 November 2002 Hasbro made further representations on the issue of leniency.
36. On 10 December 2002 the OFT disclosed the representations made by Hasbro, Argos and Littlewoods respectively (other than Hasbro's representations in relation to leniency) to each of the other parties, subject to the excision of confidential business information. Argos and Littlewoods made further written representations on those redacted representations (Decision, paragraph 315).
37. Following the making of those further representations, in late January 2003 Littlewoods submitted a further four statements from non-toy buyers. The statements submitted were those of Messrs Steve Martin, Alistair McHarrie, Terry Overill, and Ian Gunn.
38. Hasbro was notified by the OFT on 5 February 2003 that the Director proposed to grant Hasbro total immunity from penalty.

The first Argos/Littlewoods Decision

39. On 19 February 2003 the Director adopted the first Argos/Littlewoods Decision, CA98/2/2003. That decision found that Hasbro, Argos and Littlewoods had infringed the Chapter I prohibition and required them to pay penalties respectively of £15.59 million, £17.28 million and £5.37 million. Hasbro's penalty was reduced to nil in accordance with the provisions of the Director's Guidance dealing with leniency.

The appeals to the Tribunal

40. Appeals against the first Argos/Littlewoods Decision were lodged with the Tribunal by Argos and Littlewoods respectively on 17 April 2003.

41. Annexed to Argos' notice of appeal was a further witness statement of Terence Duddy, Chief Executive Officer of Argos Retail Group, dated 15 April 2003, exhibiting various documents.
42. At the first case management conference on 21 May 2003 the OFT indicated its desire to rely on the evidence of three new witness statements from Hasbro employees. Following the filing of the defence on 3 June 2003, the OFT served the witnesses statements of Messrs David Bottomley of 17 June 2003, Ian Thomson of 13 June 2003, and Neil Wilson of 13 June 2003. Those statements contained evidence material to the question of infringement which was not set out in the first Argos/ Littlewoods Decision.
43. On 30 July 2003 the Tribunal ordered the first Argos/ Littlewoods Decision to be stayed in order to permit the OFT to carry out a supplementary procedure under rule 14 of the Director's Rules in respect of the three additional witness statements which the OFT sought to adduce in support of its defence to the appeal against that original decision: see *Argos and Littlewoods v OFT* [2003] CAT 16. The Tribunal's Order laid down a timetable to be followed: see [2003] CAT 24.

The supplemental rule 14 notice

44. Pursuant to the Tribunal's Order, a supplemental rule 14 notice was sent to Argos, Littlewoods and Hasbro on 12 September 2003.
45. Argos on 23 October 2003 and Littlewoods on 24 October 2003 made further written representations as part of the supplementary rule 14 procedure. Both declined the opportunity to make representations on each other's representations as well as an opportunity to make oral submissions. Hasbro made no representations.

The Decision under appeal

46. On 21 November 2003 the OFT adopted the Decision now challenged in these proceedings. In the Decision the OFT maintained the finding of infringement found in the first Argos/Littlewoods Decision and imposed penalties of the same amount. Hasbro's 100 per cent leniency was also maintained.

The subsequent procedure before the Tribunal

47. On 1 December 2003 the Tribunal held a further case management conference. Both Argos and Littlewoods indicated that they did not wish to modify their existing notices of appeal. Accordingly, this matter has proceeded with the original pleadings in respect of the first Argos/Littlewoods Decision being treated as the pleadings in the present appeal, as supplemented by further witness statements and the parties' skeleton arguments.
48. Argos served further witness statements from Vanessa Clarkson dated 29 January 2004, Terence Duddy dated 29 January 2004, Andrew Needham dated 5 February 2004, and Maria Thompson dated 28 January 2004. Littlewoods served further statements from John McMahon dated 29 January 2004 and Lesley Paisley dated 30 January 2004.
49. On 3 March 2004, following a further case management conference on 27 February 2004, the Tribunal gave judgment on a further interlocutory dispute relating to the disclosure to Argos and Littlewoods of correspondence between Hasbro and the OFT relating to Hasbro's application for leniency and certain redacted passages in Hasbro's written and oral representations: see *Argos and Littlewoods v OFT (Disclosure)* [2004] CAT 5. Following the Tribunal's judgment the material sought was disclosed to Argos and Littlewoods. Further material relating to Hasbro's leniency application was disclosed by the OFT by agreement with Hasbro on 29 March 2004 and 2 April 2004.
50. The OFT's skeleton argument was served on 29 April 2004, and Argos' and Littlewoods' skeleton arguments were served on 5 May 2004.
51. On 6 and 7 May 2004 the Tribunal issued witness summonses to attend the hearing in respect of Alan Cowley, Phil Riley and John McMahon.
52. The main hearing commenced on 10 May 2004 and continued on 11, 12, 13, 14, 20 and 21 May 2004. The transcripts are at www.catribunal.org.uk. The main arguments of the parties are set out in their closing written submissions.

The written and oral evidence

53. The written evidence before the Tribunal is set out in the table below. Witness statements are referred to as “w/s”. Notes of the OFT interviews with Hasbro witnesses in October 2001 are described as “OFT interview”. Notes of voluntary interviews given to the OFT by three Littlewoods witnesses also in October 2001 are described as “OFT discussion”. Where a witness has given more than one witness statement we refer to “Duddy I,” “Duddy II,” etc.

Table of written evidence		
Witness	Position at the material time	Witness Evidence
Argos		
Vanessa Clarkson	Buyer of girls’ toys, girls’ plush toys and creative toys.	w/s 17 June 2002 w/s 29 January 2004
Terence Duddy	Chief Executive Officer, Argos Retail Group	w/s 15 April 2003 w/s 29 January 2004
Andrew Needham	Buyer of boys’ toys, games and construction toys in charge of Action Man and Core Games. Reported to Sue Porritt	w/s 17 June 2002 w/s 5 February 2004
Sarah Silverwood	Buyer in the electricals area from June 1998 until April 2001; subsequently Trading Manager for toys and nursery products	w/s 17 June 2002
Maria Thompson	Trading Director for toys, leisure, jewellery, furniture and housewares from March 1999 to May 2000; then Commercial Director for toys and other products	w/s 17 June 2002 w/s 28 January 2004
Jacqueline Wray	Merchandise Assistant for boys’ toys and games	w/s 11 June 2002
Hasbro		
Roger Aldis	Field Sales Manager	OFT interview 15 October 2001
David Bottomley	Sales Director	OFT interview

		10 October 2001 w/s 17 June 2003
Carol Evans	Category Development Director for boys' toys and pre-school brands	OFT interview 12 October 2001
Mike McCulloch	Head of Sales and Marketing	OFT interview 10 October 2001
Alistair Richards	Managing Director	OFT interview 10 October 2001
David Snow	National Account Executive for Argos from June 2000 to October 2001	OFT interview 12 October 2001
Ian Thomson	Business Account Manager for Littlewoods	OFT interview 11 October 2001 w/s 12 June 2003
Alpana Virani	Brand Manager	OFT interview 12 October 2001
Emma Wilson	Legal Counsel, January 1995 to April 2000	w/s 17 May 2002
Neil Wilson	Business Account Manager for Argos.	OFT interview 11 October 2001 w/s 13 June 2003
Littlewoods		
Alan Burgess	Buyer of boys' toys, electronics, and construction toys. Responsible for Action Man and Core Games	OFT interview 16 October 2001 w/s 4 July 2002
Alan Cowley	Buyer of pre-school and musical toys	OFT interview 17 October 2001 w/s 4 July 2002
Richard Darling	Buying Controller/Manager	w/s 4 October 2002
Peter Edmonds	Buying Director for toys and other products (successor to John McMahon)	w/s 5 July 2002
Andrea Gornall	Buyer of boxed games and other products; later buyer of girls' and creative toys	w/s 3 July 2002 w/s 16 April 2003
Ian Gunn	Buyer of electronic equipment	w/s 30 January 2003

Steve Martin	Buyer of telephones and photography	w/s 28 January 2003
Alastair McHarrie	Buyer of electronic games and desktop technology	w/s 28 January 2003
John McMahon	Buying Director and Merchandise Director for toys (August 1998 until December 2000)	w/s 4 July 2002 w/s 29 January 2004
Terry Overill	Buyer of kitchen electrical products	w/s 28 January 2003
Lesley Paisley	Buying Manager for toys. Reported to John McMahon, then Peter Edmonds	OFT interview 16 October 2001 w/s 4 July 2002 w/s 30 January 2004
Phil Riley	Buyer of boxed games and other products (partly successor to Andrea Gornall)	w/s 4 July 2002
Katharine Runciman ¹	Buyer of girls' toys and creative toys (March 1999 to June 2000)	w/s 3 July 2002

¹Witness sought to be called for cross-examination by the OFT but unable to attend the hearing.

54. The following witnesses were cross-examined on their witness statements by the appellants or the OFT, as the case may be.

Table of oral witness evidence			
Name of Witness	Company	Hearing Day(s)	Transcript References
Ian Thomson	Hasbro	days 1 & 2	pp. 26-190; 1-11
Neil Wilson	Hasbro	day 2	pp. 12-49
David Bottomley	Hasbro	day 2	pp. 50-68
John McMahon	Littlewoods	day 2	pp. 75-108
Lesley Paisley	Littlewoods	days 2 & 3	pp. 108-162; pp. 1-30

Terence Duddy	Argos	day 3	pp. 31-80
Maria Thompson	Argos	day 3	pp. 80-134
Alan Cowley	Littlewoods	day 4	pp. 1-52
Phil Riley	Littlewoods	day 4	pp. 53-80
Alan Burgess	Littlewoods	day 4	pp. 81-145
Andrea Gornall	Littlewoods	day 4	pp. 146-161
Andrew Needham	Argos	day 5	pp. 4-89
Jacqueline Wray	Argos	day 5	pp. 89-97

55. Evidence as to prices charged by both Argos and Littlewoods from 1998 onwards was helpfully collated and annexed to Argos' submissions. That evidence, in the form submitted to the Tribunal, is attached as Appendix I to this judgment.

Post-hearing submissions

56. Following the receipt of the parties' written closing submissions on 20 May 2004 (Argos) and 21 May 2004 (Littlewoods and OFT) the Tribunal indicated that, should it become relevant, it would be appropriate to postpone consideration of the penalty until after its determination of the question of infringement.
57. Further submissions were received from Littlewoods and the OFT in letters of 27 and 28 May 2004 concerning the judgments of the Court of First Instance and the Court of Justice in Cases T-41/96 *Bayer v Commission* [2000] ECR II-3383, on appeal Cases C-2/01P and C-3/01P, judgment of 6 January 2004. Littlewoods also supplied an index of transcript and witness statement references.
58. On 30 June 2004 the Registrar wrote to the parties to inform them that the case of *Re T* [2004] EWCA Civ 558 (judgment of 19 May 2004) had come to the Tribunal's attention and invited any observations the parties wished to make on that authority as regards the standard of proof. Written observations from the OFT and Argos were received by the Tribunal on 5 July 2004. Written observations were received from Littlewoods on 23 July

2004. In that letter Littlewoods submitted that the Tribunal should not reconsider the test it adopted in *Napp v Director General of Fair Trading* [2002] CAT 1 without first granting the parties the opportunity to make oral representations.

V THE DECISION

(1) INTRODUCTION

59. The Decision runs to some 140 pages, including annexes. In Part I of the Decision (paragraphs 1 to 21) the OFT sets out its findings as to the undertakings involved in the infringement, its findings as to the supply of toys and games, and the history of its investigation. In Part II of the Decision (paragraphs 22 to 133) the OFT sets out its legal and economic assessment of the relevant market (section A), the shares of supply of manufacturers and retailers of toys and games in the UK (section B) and the agreements involving Hasbro, Argos and Littlewoods said to infringe the Chapter I prohibition (section C). In Part III of the Decision (paragraphs 134 to 365) the OFT sets out a detailed analysis of the various representations received from Hasbro, Argos and Littlewoods during the administrative procedure. In Part IV of the Decision (paragraphs 366 to 368) the OFT sets out its formal Decision, finding an overall agreement between Hasbro, Argos and Littlewoods and two bilateral agreements between Hasbro and Argos and between Hasbro and Littlewoods respectively. Finally Part V of the Decision (paragraphs 369 to 435) deals with directions (none were made as the infringement had terminated) and the financial penalties imposed.
60. In the Decision, the OFT's conclusions on infringement are in these terms:

“A Agreement between Hasbro, Argos and Littlewoods

366 The evidence set out at part II of this Decision formed the basis of the various rule 14 Notices sent to Hasbro, Argos and Littlewoods. The OFT's assessment of the representations made in response to these rule 14 Notices is set out in part III of this Decision. Having reviewed the evidence and analysed the representations, the OFT finds that there was an agreement and/or concerted practice between Hasbro, Argos and Littlewoods to fix prices of certain Hasbro products between 1 March 2000 and some time between 15 May 2001 and 14 September 2001 which infringed the Chapter I prohibition.

B Agreement between Hasbro and Argos

367 On the basis of the evidence set out above, the OFT finds that there was an agreement and/or concerted practice between Hasbro and Argos to fix the prices of certain Hasbro products, which infringed the Chapter I prohibition from 1 March 2000 until some time between 15 May 2001 and 14 September 2001.

C Agreement between Hasbro and Littlewoods

368 On the basis of the evidence set out above, the OFT finds that there was an agreement and/or concerted practice between Hasbro and Littlewoods, to fix the prices of certain Hasbro products, which infringed the Chapter I prohibition from 1 March 2000 until some time between 15 May 2001 and 14 September 2001.”

Summary of the OFT's findings on infringement

61. Before setting out the findings in the Decision in greater detail it is convenient to outline the main conclusions on which the Decision is based. They are as follows:

- (a) In 1998 Argos was the market leader in sales of Hasbro's toys, regularly selling at prices below those of its competitors and Hasbro's RRPs. Retail margins for Hasbro's toys and games were low, a fact which retailers were unhappy about (paragraphs 43 and 47).
- (b) In response to this state of affairs, in 1998 and early 1999, Hasbro instituted a number of initiatives, most notably a pricing initiative whereby Hasbro sought to persuade retailers to sell its toys and games ranges at or around its RRPs (paragraphs 42 to 56).
- (c) Contact was made with both Argos and Littlewoods to attempt to ensure their support for the pricing initiative, notably by reassuring them that no undercutting would take place by the other retailer if they sold at Hasbro's RRPs (paragraphs 49 to 55).
- (d) By the time of publication of the "A/W" 1999 catalogues it was clear that Hasbro's pricing initiative had led directly to arrangements between Hasbro, Argos and Littlewoods whereby the prices at which Action Man and other Core Games were sold were fixed, usually at Hasbro's RRPs. The initiative continued in operation in relation to the "S/S" 2000 catalogues (paragraphs 57 to 61)
- (e) The pricing initiative was extended to cover a wider range of products in the A/W 2000 and S/S 2001 catalogues (paragraphs 62 to 75).

- (f) The extended initiative applied to the A/W 2000 catalogues (paragraphs 76 to 78), S/S 2001 catalogues (paragraph 79) and A/W 2001 catalogues (paragraphs 80 to 83).
- (g) Hasbro, Argos and Littlewoods monitored the arrangement and attempted to ensure that RRP's were adhered to and that Argos and Littlewoods were not undercut by their competitors (paragraphs 84 to 91).
- (h) Hasbro acted as an intermediary passing confidential information between Argos and Littlewoods (paragraph 96).
- (i) Hasbro's pricing initiative led directly to an overall infringing agreement and/or concerted practice between Hasbro, Argos and Littlewoods. This overall agreement included two bilateral infringing agreements and/or concerted practices, contingent on each other, between Hasbro and Argos and between Hasbro and Littlewoods, which formed part of a pattern of continuous conduct with a common objective. Those agreements and/or concerted practices may thus be read together as one agreement and/or concerted practice (paragraph 95).
- (j) The bilateral agreements were interlinked and each retailer specifically entered into and maintained the agreement on the understanding with Hasbro that the other would as well (paragraphs 49 to 52, 96)
- (k) The price-fixing initiative was in place by no later than July 1999 and terminated at the earliest on 15 May 2001, the date on which the OFT visited Hasbro's Uxbridge premises (paragraph 123).
- (l) The object of the agreements/concerted practices was to maintain prices at higher levels than might otherwise have been the case. It is therefore unnecessary for the OFT to show that the agreements produced anti-competitive effects on the market (paragraph 125).

(2) GENERAL BACKGROUND

The market for toys

62. According to the Decision, the toy industry is a global business with worldwide retail sales of around \$55 billion (about £34 billion) in 2000. Hasbro Inc, Hasbro's US parent company, is one of a number of leading global manufacturers of toys which also include Mattel of the United States, Interlego AG based in Switzerland, and Tomy of Japan. The United Kingdom toys and games market was estimated at £1.85 billion in 2001 (£1.76

billion in 2000). Hasbro is the leading toy manufacturer in the United Kingdom as measured by turnover, with a turnover in 2001 of £123.8 million.

63. According to the Decision, the toy market is reliant on branding, and many toy sales are driven by “tie-ins” to films such as Toy Story, Pokémon and Harry Potter (paragraph 6).
64. Toy sales are highly seasonal and the majority of sales are made in the months leading up to Christmas (paragraph 7).
65. At the retail level, toys and games are sold through a variety of outlets including specialist toy stores, mixed retailers and catalogue showrooms. In 2001, these three retail channels apparently each accounted for about a quarter of the total market (paragraph 8).
66. In the United Kingdom the leading retailers of toys and games are Argos and Woolworths plc (“Woolworths”). Other major retailers include the specialist US chain, Toys “R” Us, Early Learning Centre and Littlewoods with its Index catalogue stores (paragraph 9).

Catalogue retailing

67. Argos and Littlewoods are the major high street catalogue retailers in the United Kingdom. They compete more directly with conventional high street retailers than with home shopping catalogue retailers, because the latter offer other services such as home delivery. Each year Argos and Littlewoods publish two catalogues, one for the Spring/Summer season (“S/S”), and the other for the Autumn/Winter season (“A/W”). Prices for the products to be listed in the catalogues need to be established at a relatively early stage. Typically an A/W catalogue will be published in late July with final pricing in May. A similar process takes place six months later for the S/S catalogue (paragraph 10). The majority of toy sales are made from the A/W catalogue.
68. The Decision, at paragraph 10, records that, according to Littlewoods, the reason the catalogues are produced well in advance is that they reflect the propensity of customers to buy in advance for forthcoming seasons, and also to ensure the catalogue is available for the full potential sales period. Once set, the prices in the catalogue are essentially fixed for that particular catalogue’s season, although there are opportunities to vary certain prices

through the production of supplemental leaflets or brochures containing special offers. This situation means that catalogue retailers, particularly if they are also discounters, must go to the market with prices which are as keen as possible. Although high street retailers have an opportunity to undercut catalogue prices following publication, they may find it difficult to do so if the catalogue retailers have adopted competitive pricing in their catalogues.

Categories of toys and games

69. According to the Decision (paragraph 22) there is no need to define the market in the present case for the purpose of determining the issue of infringement, because the agreements in question were price-fixing arrangements which must be taken as having as their object the prevention, restriction or distortion of competition: see Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 230. Nevertheless the OFT considers that market definition remains necessary as the first step in the process of assessing penalties.
70. In the Decision (paragraph 24) the OFT finds that toys are highly differentiated products and that the market must be defined more narrowly than “all toys and games”. The decisions of other competition authorities and courts, certain independent market research as well as market research conducted by Hasbro, together with the views of Argos and other toy retailers, confirm the OFT’s conclusion that the relevant product market should be divided into narrower categories of toys and games. The intrinsic difference between different categories of toys and games suggests that there is little scope for either supply or demand-side substitution between categories.
71. Based on the material and analysis set out in the Decision (paragraphs 22 to 36) the OFT has identified the following categories of toys and games as separate product markets for the purposes of the Director’s Guidance:
- “1) **Infant and pre-school**
 - infant
 - pre-school
 - 2) **Boys’ Toys**
 - Action figures
 - Vehicles

- Outdoor action sport
- 3) **Girls' Toys**
 - Large dolls
 - Mini dolls
 - Collectables
- 4) **Games and puzzles**
 - Family games
 - Children's games
 - Adult games
 - Travel games
 - Puzzles
- 5) **Creative toys**
- 6) **Construction**
- 7) **Plush**
- 8) **Ride-ons**
- 9) **Electronic learning aids**
- 10) **Hand-held electronic games"**

72. The OFT considers that Hasbro's Action Man range falls into the category of boys' toys. The Action Man range itself comprises between 20 and 30 different products.

73. According to the OFT, Hasbro's so-called "Core Games" fall into the category of games and puzzles, comprising Monopoly, Battleships, Trivial Pursuit Genus, Trivial Pursuit Family, Jenga, Pictionary, Mousetrap, Monopoly Junior, Guess Who?, Hungry Hippos, Twister, Buckaroo, Kerplunk, Frustration, Operation and Connect 4.

Market shares

74. Hasbro's share of the supply of all traditional toys and games in the United Kingdom in 2000 was around 15 per cent. According to the OFT market share figures may vary from year to year, reflecting the volatility of fashion and taste in the market. Hasbro's Pikachu range of toys was extremely popular during 2000. Hasbro's position in certain categories is strongly influenced by the presence of strong brands such as Action Man – the best selling

boys' toy – in the boys' toys category and Monopoly in the games and puzzles category (Decision, paragraph 37). Table 1 of the Decision shows that in 2000 Hasbro's market share in boys' toys was around 25 per cent and over 40 per cent in games and puzzles.

75. According to the Decision (paragraph 38), among retailers Argos was at the time of the Decision the largest supplier of traditional toys and games in the United Kingdom with 17.6 per cent of the market, closely followed by Woolworths. Toys "R" Us was the next largest retailer of traditional toys and games, followed by the Early Learning Centre. These top four retailers accounted for over 50 per cent of the retail supply of all traditional toys and games. Littlewoods was the fifth largest with a share of 4.3 per cent with its Index catalogue stores.

(3) THE OFT'S DETAILED FINDINGS

The setting up of the initiative

76. According to the Decision, Hasbro sells some of the best known traditional toys and games. The status of some of these products is such that they are considered "must have" products by retailers (see e.g. paragraph 263). However, retail margins in toys tend to be relatively low. The Decision states that in 1998 retail margins on Hasbro's branded and highly promoted games and toys were particularly limited. Retailers apparently believed that the low margins available were mainly the result of aggressive pricing by Argos. The Hasbro management was aware that retailers were unhappy with the margins they were receiving: see paragraphs 42 and 43, and 265 of the Decision.
77. The Decision (paragraphs 43 and 44) finds that Hasbro responded to this situation by approaching Littlewoods and Argos to seek their adherence to what were known by Hasbro as a "pricing initiative" and a "listing initiative". The listing initiative offered rebates in return for the listing of certain Hasbro products which were threatened to be delisted. The pricing initiative involved maintaining retail margins on Hasbro's toys and games by persuading retailers to retail Hasbro products at Hasbro's RRP's. Senior employees of Hasbro, namely Mike McCulloch, Head of Marketing and Sales, David Bottomley and Mike Brighty, Sales Directors, were active participants in setting up the initiative.

78. The two initiatives were discussed internally at Hasbro at a meeting on 23 October 1998 at which Hasbro's 1999 trading terms strategy was presented by Jonathan Evans (Hasbro's Trade Marketing Director) and Mike Brighty. Account managers were briefed to undertake audits of toy retailers. If they found that prices were not at RRP's they were to attempt to persuade their accounts to retail Hasbro products at RRP's. This, according to David Bottomley, was "the start of the process that led to Hasbro's pricing initiative/strategy". The initiative was initially limited to the Core Games and Action Man ranges as these were the products in respect of which price-cutting had been most intense (Decision, paragraphs 45 and 46).
79. According to the Decision (paragraph 47), the participation of Argos and Littlewoods was necessary for the success of Hasbro's pricing initiative. Argos is generally accepted as the price-setter. According to the OFT, Argos would have been very unlikely to make a commitment to follow Hasbro's RRP's unless it was reassured that doing so would not result in its catalogue prices being undercut by those in the Index catalogue. Argos and Littlewoods monitor each other's prices very closely and produce regular analyses showing how often each undercuts and is undercut by the other. Since both companies offer a price-match guarantee, neither can afford to have prices that are seriously out of step with the other. According to the Decision, it was therefore necessary for Hasbro to reassure Argos that Littlewoods would also be committed to follow the same prices (see also paragraph 96 of the Decision).
80. According to David Bottomley, Hasbro considered that other retailers would follow the lead of Argos and Littlewoods on prices (Decision, paragraph 48).
81. According to the Decision (paragraphs 49 to 59), towards the end of 1998 and the beginning of 1999, discussions took place between Hasbro's sales team and buyers of Argos and Littlewoods, respectively, over Hasbro's initiative and adherence to RRP's to persuade them to adopt Hasbro's strategy.
82. One such meeting was held between representatives of Hasbro and Littlewoods, at Littlewoods' head office in Liverpool in late 1998 or early 1999. According to the Decision, Hasbro was represented by Mike McCulloch (Head of Marketing and Sales), David Bottomley (Sales Director) and Ian Thomson (Business Account Manager for

Littlewoods). Littlewoods was represented by John McMahon (Trading Director), Lesley Paisley (Buying Manager) and Alan Burgess (a buyer of boys' toys and games) of Littlewoods (paragraph 49).

83. In the Decision (paragraph 49) the OFT relies on the evidence of Ian Thomson of Hasbro as to what transpired at that meeting. Apparently Littlewoods doubted the feasibility of Hasbro's initiative as they were concerned at the risk of being undercut by Argos if they agreed to go out at Hasbro's RRPs. According to Ian Thomson, Mike McCulloch of Hasbro intimated to John McMahon of Littlewoods that Argos had similar concerns about being undercut by Littlewoods if they agreed to the initiative being proposed by Hasbro. Mike McCulloch intimated that if Littlewoods were prepared to go along with the initiative, he could persuade Argos to do the same. According to the evidence of Ian Thomson, relied on in paragraph 49 of the Decision, John McMahon said that Littlewoods would "play ball", but that if Argos reneged on the deal and Littlewoods was disadvantaged by adopting RRPs in the A/W 1999 catalogue, Littlewoods would respond with price cuts in the next catalogue. Ian Thomson's evidence is that he was informed in due course that Argos had agreed to adopt the initiative. He passed this information on to Alan Burgess of Littlewoods, and told Mr. Burgess that Hasbro had an agreement from Argos to adhere to RRPs on core brands.
84. In relation to Argos' involvement in the initiative, the OFT relies on the evidence of Neil Wilson (Hasbro's Business Account Manager for Argos) who gives evidence that discussions took place between Mike McCulloch and Maria Thompson (Argos' Commercial Director), Sue Porritt (Argos' Senior Buyer/Trading Manager) and buyers at Argos in late 1998 and early 1999. According to Mr. Wilson's evidence, the position was that Argos would go along with the Hasbro initiative in principle and price at RRPs, but would react if undercut and would never give any guarantees as to its prices (paragraph 50).
85. According to the Decision (paragraph 51) an example of Hasbro's discussions with Argos is a meeting which took place on 17 February 1999. This meeting was attended by Alistair Richards, (Hasbro's Northern European Regional Director), Simon Gardner (Head of Hasbro Europe) and Terence Duddy (Argos' Chief Executive) and Maria Thompson. Among the topics discussed at this meeting was Hasbro's pricing initiative (paragraph 51).

86. According to the Decision (paragraph 51) a number of documents shed light on the meeting of 17 February 1999:
- A document prepared by Hasbro for that meeting, which refers to “-Dialogue opened to stabilise RRP’s (initially Core Games, Action Man) -Build in additional rebate earning”.
 - An email from Sue Porritt, Argos’ Senior Buyer/Trading Manager, sent to Argos’ toy buyers on 19 February 1999 with the subject “Hasbro Debrief from Terry Duddy Meeting”.
 - A letter of 18 March 1999 sent by Alistair Richards of Hasbro to Terence Duddy of Argos which refers to the desire on the part of Mr. Duddy and Maria Thompson for “extra focus by Hasbro” on “product availability and particularly profitability”.
87. A further meeting referred to in the Decision between Hasbro and Argos apparently took place on 29 March 1999 between Neil Wilson and Sue Porritt. Neil Wilson’s note of the meeting states that Sue Porritt indicated she understood Hasbro’s strategy but “categorically stated that Argos will react to competitor pricing...” (paragraph 52).
88. According to paragraph 53 of the Decision, the Hasbro account managers for Argos and Littlewoods, Neil Wilson and Ian Thomson respectively, were asked to ensure that the two retailers supported the pricing initiative. According to Neil Wilson’s statement, he would consult Argos as regards the Hasbro RRP’s for the common products selected for inclusion by Argos and Littlewoods in their catalogues and ask Argos what its pricing intentions were. In general, according to the Decision, Argos were content with the RRP’s proposed by Hasbro but would let him know if it considered that a particular RRP was inappropriate. At the same time, other account managers would go through the same process with their retailers. Mr. Wilson would pass on Argos’ pricing intentions within Hasbro to the managers dealing with other retailers to “flag up” those products where the RRP was looking unlikely to be followed. Mr. Wilson then received information from account managers regarding the intention of other retailers to go out at RRP’s. It was then up to

those managers to tell their accounts. Mr. Wilson would then revert to Argos on the basis of what he was told and indicate to Argos whether he believed that a particular product would be at RRP or not.

89. When another retailer undercut the RRP or the price at which Argos and Littlewoods went out, Hasbro would speak to the retailer concerned to request that it raised its price (paragraphs 53, 90-91 of the Decision).
90. According to paragraph 54 of the Decision, contrary to the impression given by some of Mr. McCulloch's evidence, it is clear from the statements of Messrs. Bottomley, Wilson, and Thompson that Argos' initial concerns about undercutting did not prevent it from subsequently indicating that it could go along with Hasbro's pricing initiative on the understanding that Hasbro would get Littlewoods to do likewise (see also paragraph 96 of the Decision).
91. According to paragraph 55 of the Decision, initially there was some communication between Hasbro and other retailers. However, once the Argos and Littlewoods A/W 1999 catalogues were published, other retailers were able to see that the strategy was working. Other retailers were content to follow the lead of Argos and Littlewoods on prices, so there was no need for Hasbro to enter into further communications about prices with other retailers.

The Autumn/Winter 1999 catalogues

92. According to the Decision, the operation of the initiative can be seen by comparing the prices of products common to both the Argos and Littlewoods catalogues from S/S 1998 when the initiative was not yet in place to those in the A/W 1999 catalogues after the initiative was in place. Table 3 from paragraph 56 of the Decision, which also includes a similar price comparison for other catalogues, is reproduced below:

Catalogue	Core Games	Action Man	Additional Toys*
S/S 1998	9 common products, none at same price	16 common products, none at same price	1 common product, not at same price
A/W 1998	13 common products, 4 at same price	17 common products, 3 at same price	6 common products, none at same price
S/S 1999	9 common products, 5 at same price	12 common products, none at same price	2 common products, neither at same price
Initial arrangements regarding Action man and Core Games only			
A/W 1999	All 12 common products are at the same price	17 common products are at the same price, 1 (Walkie Talkie) is priced at £ 12.99 by Argos and £14.99 by Littlewoods	7 common products, only one of which is at the same price
S/S 2000	All 9 common products are at the same price	16 of 17 common products are at the same price	4 common products, only one of which is at the same price
Emails of May 2000 extending arrangements to products other than Action Man and Core Games			
A/W 2000	All 14 common products are at the same price	20 of the 21 common products are at the same price	17 common products, 14 of which are at the same price**
S/S 2001	All 8 common products are at the same price	13 of the 14 common products are at the same price	All 5 common products are at the same price ***

Source: paragraph 56 of the Decision. Information summarised by OFT from catalogues of Argos and Littlewoods.

* "Additional Toys" are the toys mentioned in the email of 18 May 2000 from Hasbro to Littlewoods.

** This includes Interactive Pikachu which was priced by both Argos and Littlewoods at £23.75.

*** This includes the two Tweenies dolls (Tweenies Pop Star Poseable Plush and Tweenies Doodles) that were the subject of discussions in the autumn of 2000 and which were according to the Decision subsequently priced by Argos and Littlewoods at the same price.

[Note by the Tribunal: Table 3 treats prices of .99 and .95 pence as different prices]

93. According to the Decision (paragraphs 57 and 58), the prices in the three catalogues preceding A/W 1999 had been very different as between Argos and Littlewoods. According to the Decision, the similarity of prices in relation to Hasbro products listed by both Argos and Littlewoods in their A/W 1999 catalogues was the result of the operation of Hasbro's pricing initiative, as described in Mr. Wilson's statement set out at paragraph 53 of the Decision. The similarity in prices had the effect of reassuring both Argos and Littlewoods that the prices of Hasbro products would be at or close to RRP's. Paragraph 58 of the Decision records Mr. Thomson's evidence that the A/W 1999 catalogues demonstrated that "the new strategy was working".

The Spring/Summer 2000 catalogues

94. According to the Decision (paragraph 59), there were fewer discussions between Hasbro and the retailers in relation to the S/S 2000 catalogues, partly because the S/S catalogues are less important for toy sales, and partly because there could not be total confidence on the part of Argos and Littlewoods that the initiative was working until after Christmas 1999, by which time the prices for the S/S 2000 catalogues had already been set.
95. Nonetheless according to the Decision, on one occasion in autumn 1999, during the preparation of the S/S catalogue 2000, Ian Thomson of Hasbro informed Alan Cowley (a Littlewoods buyer), who was proposing to go out at £12.99 for a Tweenies doll, that Argos was proposing to go out at £14.99 for the same doll in the S/S 2000 catalogue, and therefore it was safe for him to go out at that higher price. When Mr. Cowley was reluctant to accept this assurance, Mr. Thomson suggested he speak to John McMahon (Buying Director at Littlewoods) who had been speaking to Mike McCulloch of Argos about prices. Mr. McMahon told Mr. Cowley that he and Hasbro had discussed prices, and recommended Mr. Cowley go along with the higher price. Both retailers went out at the £14.99 price in their S/S 2000 catalogues (paragraph 60 of the Decision).
96. The continuation of the initiative for the S/S 2000 catalogues is also shown, according the OFT, by the internal email sent by Mr. Thomson on 18 May 2000 (see below) and by the largely identical prices shown by Argos and Littlewoods in those catalogues (paragraph 61 of the Decision).

Extending the initiative beyond Action Man products and Core Games

97. The Decision states (paragraphs 62 and 63) that following the publication of the S/S 2000 catalogues, the initiative was extended to other products. The evidence of Mr. Thomson and Mr. Wilson cited in the Decision is relied on to establish that the expansion of the initiative was foreshadowed at an internal meeting held at Hasbro at the end of 1999 where the trading strategy for 2000 was discussed. A document bearing the initials of Mike McCulloch featured as part of a presentation at that meeting. In that document the retail pricing initiative was noted to have worked, “maintaining Action Man and Games price points at suggested levels in Argos/Index Catalogues and across the rest of our Distribution base”. One strategy discussed in the document was to “Build significantly improved BIM [bought-in margin] across the portfolio, in line with the new segmentation ...”. According to the Decision (paragraphs 64) “the new segmentation” was a reference to other Hasbro brands which fell into three categories:

“ ‘Core Boys’, covering Action Man, Star Wars, Transformers, Micro Machines and Batman; ‘Games and Creative’, covering Core Games and creative play products; and ‘Growth Drivers’, covering Tweenie, Pokemon, PlaySkool. Mr. Potato Head, Barney, Nerf, Feature Dolls, Art Attack and Puzz 3D.”

98. The Decision notes Mr. Thomson’s evidence that the initiative was extended to include only 3 POKeMON products, 2 Micro Machines products, 2 Hand Held Electronic Games products, 1 Girls product, 4 Get Set products, 2 Design and Draw products, and 3 Tweenies products. According to Mr. Thomson, those products were chosen because they had been subject to extensive price cutting in the past. The products mentioned by Mr. Thomson are those listed in his emails of 18 May 2000 (see paragraphs 64, 67 and 69 of the Decision).

99. According to the Decision, both Argos and Littlewoods responded favourably to Hasbro’s proposal to extend the range of products covered by the pricing initiative. The Decision refers to a “contact report” of a meeting between Neil Wilson and Mike Brighty of Hasbro and Sue Porritt of Argos on 9 December 1999 at which Hasbro’s trading strategy for 2000 was presented. According to Neil Wilson’s evidence relied on in the Decision (paragraph 65), Sue Porritt’s reaction to Hasbro’s proposal was “very positive”, although she nevertheless remained worried about being undercut and stated that Argos would respond if this occurred. The Decision (paragraph 66) refers to Ian Thomson’s evidence as

establishing that the extension of the initiative received a similarly favourable reaction from Littlewoods.

100. For the A/W 2000 and S/S 2001 catalogues the OFT relies on evidence of Messrs Bottomley, Thomson and Wilson (Decision, paragraph 67).

The emails of 18 May 2000

101. The Decision notes (at paragraph 71) that prior to sending his email of 18 May 2000, on 4 May 2000 Mr. Thomson had sent an email to Karen Sobers and Katherine Runciman of Littlewoods about Gardens Galore:

“I would like to confirm that Gardens Galore has been reduced in [list] price to £13.67 and will retail at £19.99. The product has not been selected by your major opposition so it will be an excellent margin opportunity.”

102. According to the Decision, evidence of the way in which the initiative was coordinated by Hasbro is provided by two Hasbro emails sent on 18 May 2000. The first email of that date referred to in the Decision (paragraphs 67 and 68) was sent jointly by Ian Thomson and Neil Wilson, Hasbro’s Business Account Managers for Littlewoods and Argos respectively, to other members of the Hasbro sales team. The opening part of the email (actually drafted by Ian Thomson) states as follows:

“Neil and I have spoken to our respective contacts at Argos and Index and put together a proposal regarding the maintenance of certain retails within our portfolio. This is a step in the right direction and it is fair to say that both Accounts are keen to improve margins but at the same time are taking a cautious approach in case either party reneges on a price agreement. ... It goes without saying that Action Man and Games prices will be maintained as per earlier agreements.”

A list of Hasbro products and prices to which the initiative was being extended to is then set out in the email. The email continued:

“Both accounts have agreed to the above price points so this information should be translated to other accounts.

The proof in the pudding will be when both Catalogues are published, but Neil and I are confident that they will play ball.”

103. Later that day, 18 May 2000, an email entitled “Urgent – Pricing Initiative” was sent by Ian Thomson to the Littlewoods buying team (Lesley Paisley, Alan Burgess, Alan Cowley, Katharine Runciman and Phil Riley). The email included most of the product and price information contained in the first email that had been circulated internally within Hasbro earlier in the day. The following extract from the email to Littlewoods is set out in the Decision (paragraph 69) and states as follows:

“Following on from various conversations regarding Price Points and opportunities to make more margin I am able to confirm a list of products and prices that Argos have committed to. **Games and Action Man** prices will continue to be adhered to and the retails are on your range sheets provided by me as part of the selection proposal process.

Listed below are the products and prices.

POKeMON

Battle Figures 2 Pk 4.99

Pokeball Blaster 3 Pk 6.99

Interactive Pikachu 23.99

Micro Machines

Transforming Team Truck 29.99

Rally Race Track 19.99

Hand Held Electronic

Monopoly 29.99

Bop It 19.99

Girls

Baby all Gone

Get Set

Chocolate Factory 19.99

Egyptian Mystery 29.99

Mastering Mosaics 19.99

Gardens Galore 19.99 (Not listed in Argos)

Design & Draw

Spirograph 14.99

Super Sticker Factory 17.99

Tweenies

All Standard Plush 14.99

All Story Time Product 24.99

Cuddle and Squeeze Doodles 24.99

If you have any questions regarding the above please come back to me and I will do my best to answer them.”

104. In the Decision (paragraph 69) the OFT finds that the products listed in the email were the additional products to which the initiative was extended in the A/W 2000 catalogues. The

Decision records that a copy of the email printed out by Alan Burgess was discovered by the OFT at Littlewoods' premises. A number of the prices contained in the email had been ticked. According to the evidence referred to in the Decision those ticks were made either by Mr. Burgess or his assistant, "presumably checking it against our own prices." Apparently receipt of the email although not its significance was also confirmed to the OFT by Lesley Paisley and Alan Cowley.

105. According to the evidence of Ian Thomson, the email was designed to confirm to the Littlewoods buying team that agreement had been reached with Argos and to give them confidence to set those prices for the A/W 2000 catalogues. The email was marked "urgent" because of the impending final date for the pricing of items in the A/W 2000 catalogue. The operation of the initiative was the reason for the alignment in prices of the relevant products in the A/W 2000 catalogue (Decision, paragraph 70).
106. The evidence of Mr. Bottomley and Mr. Wilson is relied on by the OFT as showing that although Argos did not guarantee those prices, Hasbro was confident that Argos would adopt them. In fact, according to the OFT, Argos charged those prices for 13 of the 17 listed products, and one of the remaining four (Interactive Pikachu) at a price later communicated to Hasbro. Littlewoods charged those prices for 15 out of the 17 products, and one of the remaining two (Interactive Pikachu) at the price later communicated to Hasbro by Argos. The other Littlewoods product (Gardens Galore) was not listed by Argos (Decision, paragraph 72).
107. On 19 May 2000 Mike Brighty (Hasbro's Sales Director) sent an email in response to Ian Thomson's internal email of 18 May 2000, in the following terms:
- "Ian ... This is a great initiative that you and Neil have instigated!!!!!!!!!! However, a word to the wise, never put anything in writing, its highly illegal and it could bite you right in the arse!!!! suggest you phone Lesley and tell her to trash? Talk to Dave. Mike."
- (Decision, paragraph 73)
108. According to paragraph 74 of the Decision, Mr. Brighty told Mr. Thomson to contact Lesley Paisley immediately and tell her to destroy the email. According to Mr. Thomson, Lesley Paisley said she had been surprised that he had sent the email and would destroy it.

Mr. Thomson believes her surprise was due to the fact that he had referred to the agreement in writing, as she already knew about the pricing initiative and its extension to other products because Mr. Thomson had told her at one of the meetings with Index.

Interactive Pikachu

109. A few days later, on 25 May 2000, Mr. Wilson emailed Ian Thomson and Mike Brighty to inform them that “Argos have confirmed that Interactive Pikachu will be at 23.75 not 23.99 for A/W. Please advise Index accordingly.” In his witness statement, Mr. Wilson describes this email as:

“...an example of how information was passed to me by Argos and then passed on internally within Hasbro to be disseminated to other accounts”

110. According to Mr. Wilson, he had been contacted by Andrew Needham, Argos’ buyer of boys’ toys, who had “indicated that they were no longer proposing to go out at” the price of £23.99. The email of 25 May 2000 was meant to inform Mr. Thomson, whom Mr. Wilson “expected... to contact Index to inform them that the prevailing market price for this product was likely to be below the Hasbro RRP, without mentioning Argos specifically.” According to Mr. Thomson he “phoned Alan Burgess to make him aware of the issue and that he could change his price if he wanted to. He [Burgess] thanked me [Thomson] for passing on the information but did not commit on how he was going to act. He was going to think about it.” The Interactive Pikachu toy was priced at £23.75 in the A/W 2000 catalogues of both Argos and Littlewoods. According to the Decision (paragraph 75), this is significant because it is neither the original RRP nor a natural price point (such as £23.99), but the price which both Argos and Littlewoods arrived at by communication through Hasbro.

The Autumn/Winter 2000 catalogues

111. In the Decision (paragraphs 76 to 78) the OFT finds that the initiative was applied to the extended range of products in the A/W 2000 catalogue, which is confirmed by the similarity of prices of those products (see Table 3 to the Decision cited above). In relation to Littlewoods, of the 17 products listed in Mr. Thomson’s email of 18 May 2000, only two

products, Interactive Pikachu and Gardens Galore, went out at prices different from Mr. Thomson's email of 18 May 2000. Gardens Galore was priced by Littlewoods at £24.99, not £19.99, as they had been informed by Mr. Thomson in his emails of 4 May 2000 and 18 May 2000 that this product was not being stocked by Argos. Interactive Pickachu was priced at £23.75 not £23.99 following Mr. Wilson's email of 25 May 2000. Gardens Galore, Interactive Pikachu and Super Sticker Factory were the only products not priced at Hasbro's RRP. However, in the case of Super Sticker Factory both Argos and Littlewoods went out at the same price of £17.99, rather than the RRP of £19.99. According to the Decision, this was not coincidence but reflected the price set out in the email of 18 May 2000.

112. Of the 17 products listed in the email of 18 May 2000, Argos went out at different prices from Littlewoods in respect of three products – Pokeball Blaster (£6.95 not £6.99), Transforming Team Truck (£28.99 not £29.99) and Rally Race Track (£18.99 not £19.99). The only other product which was priced differently from the price set out in the email of 18 May 2000 (Interactive Pikachu at £23.75 not £23.99) was subject to Mr. Wilson's later email of 25 May 2000.

113. According to the Decision, the differences in price on three products is not significant as the OFT does not contend that the agreement was 100 per cent effective. More significant is the fact that 14 products went out at the same price. According to the Decision (paragraph 78):

“The object of the agreement or understanding was to agree prices, and in the overwhelming majority of cases, it succeeded.”

The Spring/Summer 2001 catalogues

114. According to the Decision (paragraph 79) the extended arrangement continued in respect of the S/S 2001 catalogues which came out in January 2001. The prices of Core Games, the Action Man range and the additional toys listed in the emails of 18 May 2000 were again identical in the Argos and Littlewoods S/S 2001 catalogues in respect of all but one product (see paragraph 84 and Table 3 from the Decision cited above).

The Tweenies doll 2000

115. In support of the continuation of the agreements for the S/S 2001 catalogue, the OFT also relies on certain emails about a last minute reduction in the RRP for Tweenies at the time when Littlewoods was finalising its S/S 2001 catalogue. An email from Mr. Thomson of 30 November 2000 to Mr. Foulds of Hasbro's marketing department states:

“The whole point of making Argos and Index toe the line on Retails was to set precedent that the rest of the trade would follow.”

A reply from Mr. Bottomley the same day states:

“...given the huge amount of work we have put into retail pricing in the last 2 years, the last thing we need is for 2 major customers to be out of line.”

(Decision, paragraph 107)

116. Mr. Cowley of Littlewoods stated in an email to Mr. Thomson of 28 December 2000, cited at paragraph 84 of the Decision:

“Reference our conversation pre Christmas regarding Hasbro's late decision to reduce price of the Tweenies soft toys featured in the Index SS01 catalogue.

Fortunately for both of us we were in fact able to amend the selling prices at the last minute due to an unexpected delay in catalogue production. This however literally meant 'holding up the presses', entailing an additional cost of £4000 which will be debited to your account shortly.

I will not elaborate on the consequences if we had been unable to do so, resulting in our being undercut by Argos and other High St outlets, especially when you had earlier been so insistent that we went out at the same price.”

The Autumn/Winter 2001 catalogues

117. According to the Decision, the extended arrangements continued at least until the time prices for the A/W 2001 catalogues were being finalised when the OFT visited Hasbro's premises on 15 May 2001. Paragraph 80 of the Decision refers to an email that David Snow, Hasbro's National Account Executive for Argos from June 2000, sent to Charles Cooper, who had replaced Neil Wilson as Hasbro Business Account Manager for Argos, on 23 February 2001 which mentions “the Argos/Index agreement for A/W2001” (see also paragraph 105 of the Decision).

118. The Decision also cites (at paragraph 81) an email that Ian Thomson sent to Charles Cooper on 3 April 2001. The email states:

“Index are keen to price the Ferris Wheel at the Argos S/S price of £49.99 in their A/W 2001 catalogue.

Can you ensure that Argos will match the price and if you know of any retail price difference will you try and get them to comply.”

According to the Decision, Charles Cooper replied on 4 April 2001 that there was “no change planned” by Argos.

119. The Decision further cites (paragraph 82) an email of 24 April 2001 from David Bottomley to Charles Cooper in which he stated:

“Re: ARGOS ACCOUNT UPDATE

Charles,

please follow this up urgently, as we can not allow a £14.99 price on the dinghy.

thanks

DB”

120. The explanation for this email, according to the Decision (paragraph 82), lies in David Bottomley’s witness statement where he states that designers contracted by Hasbro had incorrectly priced the dinghy at £14.99 in the Argos catalogue for Action Man. The Decision cites an extract from Mr. Bottomley’s witness statement to the effect that:

“... As a result of this email, the error was corrected and the dinghy was priced at the RRP. I was the person who spotted that potentially we could have had a retailer undercutting RRP, which we could not allow given the arrangements which were then in place and working well.”

121. According to the Decision, the fact that the agreement was still in operation up to 15 May 2001, when Hasbro’s premises were visited by the OFT and its management issued instructions to its staff to cease any discussions relating to resale price maintenance, is also demonstrated by the following email of 22 May 2001, cited in the Decision (paragraph 83) from David Snow to Charles Cooper, which states:

“I had a call today from Jacqui Wray at Argos stating that the following items are on sale in the trade at prices lower than

recommended retail prices ... I stated that Hasbro cannot control retail prices due to it being illegal.”

Monitoring the arrangement

122. In the Decision (paragraphs 84 to 91) the OFT finds that all parties were astute to monitor the conduct of the other parties and competing retailers to ensure that the arrangements were successful. Reference is made to Mr. Cowley’s email of 28 December 2000, cited above, and to the witness statement of Mr. Thomson.
123. In the Decision (paragraph 86) the OFT also cites the evidence of Mr. Wilson to establish that Argos monitored the retail prices of Hasbro products carried by other retailers. Where prices were out of line, Argos contacted him to see whether Hasbro could do anything to restore the position. If he was unable to restore the price Argos would then decide what further steps to take. Usually this would involve them matching the lower price. According to Mr. Wilson, Andrew Needham and Vanessa Clarkson of Argos were both persons who contacted him about undercutting. Extracts from his witness statement on approaches made to him are set out in the Decision (paragraph 87).
124. Also cited in support of the monitoring of the agreement by Argos is the approach by Mrs. Wray to Mr. Snow of Hasbro in respect of retail prices which did not conform to the agreement mentioned in Mr. Snow’s email of 22 May 2001 to Charles Cooper. According to the Decision (paragraph 88), the reason for Ms. Wray’s calls are explained by Mr. Bottomley, namely she expected Hasbro to persuade the retailer in question to adopt RRPs in relation to the prices she was complaining about.
125. According to the Decision, if Hasbro became aware of possible undercutting, Hasbro’s Account Managers would speak to their respective contacts in the different retailers to persuade the retailer to go back to RRP. Hasbro would then revert to Argos and tell them if Hasbro was able to do anything about it. Mr. Wilson’s description in his witness statement is relied on in the Decision (paragraph 90).

The OFT’s conclusions

126. On the basis of the foregoing, and in particular the detailed witness statements of Messrs. Bottomley, Wilson and Thomson, and the documents referred to above, the OFT found, at paragraphs 92 to 108 of the Decision, that:

“It is the OFT’s view that Hasbro’s pricing initiative led directly to an overall infringing agreement and/or concerted practice between Hasbro, Argos and Littlewoods. This overall agreement included two bilateral infringing agreements and/or concerted practices, contingent on each other, between Hasbro and Argos and between Hasbro and Littlewoods, which formed part of a pattern of continuous conduct with a common objective. These agreements and/ or concerted practices may thus be read together as one agreement and/ or concerted practice”. (paragraph 95)

127. More particularly, the OFT found at paragraph 96 of the Decision:

“The agreements between Hasbro and Argos and between Hasbro and Littlewoods were inter-linked and each retailer specifically entered into and maintained the agreement on the understanding with Hasbro that the other would as well... Both Argos and Littlewoods were concerned about undercutting by any retailer, but each had a special concern about undercutting by the other. This was because they were the largest catalogue retailers, directly competing with each other, and because their retailing formats meant that they both had to commit themselves to a price for a forthcoming season without knowledge of the other’s intention except for the previous catalogue which was, by definition, out of date. Further, unlike with ordinary retailers where an agreement to price at X could be given public effect on the next day or within a very short space of time, any “agreement” or “understanding” that the other catalogue retailer would price at an agreed price (say RRP) would not be seen to be implemented until much later when it would be too late to change one’s own catalogue”.

128. A number of the key findings made by the OFT are as follows:

“The witness statements of David Bottomley, Neil Wilson and Ian Thomson clearly show that Argos and Littlewoods took part in the pricing initiative (to price agreed products at or near Hasbro’s RRP) on the understanding with Hasbro that Hasbro would get the other retailer to do the same.” (paragraph 97)

“Although the OFT has no evidence that Argos and Littlewoods spoke directly, confidential information was exchanged between them with Hasbro acting as the fixer or middleman”. (paragraph 99)

“Hasbro’s, Argos’s and Littlewoods’s direct and close involvement is clearly shown by the series of emails sent around 18 May 2000 and in particular the two emails sent by Ian Thomson”. (paragraph 100)

“The witness statements of Ian Thomson, Neil Wilson and David Bottomley show that Argos and Littlewoods did not “commit” themselves to price at or near Hasbro’s RRP’s in the sense that they formally bound themselves or guaranteed to adhere to them. In particular, they reserved the option to react to undercutting by another retailer. However as is demonstrated by the evidence above, Argos and Littlewoods did inform Hasbro of their pricing intentions and Hasbro felt confident that they would price accordingly and in line with its RRP’s.” (paragraph 101)

“As well as being evidence of Argos’s and Littlewoods’s commitment to Hasbro’s prices (in the sense indicated in paragraph 101 above), the information about Argos’s pricing intentions in the e-mail from Hasbro to Littlewoods of 18 May 2000 also had the effect, at the very least, of substantially reducing in advance any uncertainty that Littlewoods would have had to Argos’s pricing policy for the products in question”. (paragraph 102)

“Once it was seen (in the A/W 1999 Catalogue) that both parties had in fact carried out their part of the arrangement, this built trust, so that they could go forward with the same arrangement in connection with the next catalogue, with more confidence. Once confidence built up, they felt able to extend the arrangement to other products (as happened), secure in the knowledge that the arrangement was working well and would be just as successful in relation to the new products as it had in relation to the initial products”. (paragraph 104)

“It is also clear that without both Argos’s and Littlewoods’s involvement the move towards recommended prices would not have succeeded, since they were in a special position as catalogue retailers to provide a signal to the market that margins would not be eroded”. (paragraph 107)

129. The OFT concludes at paragraph 108:

“On the basis of the evidence taken as a whole, it is the OFT’s view that there was collusion between Hasbro, Argos and Littlewoods which pursued a common objective regarding the price of certain Hasbro toys and games. Each was aware of the others’ involvement and the nature of its intentions regarding its conduct in the relevant markets. The OFT concludes that this conduct constituted an overall agreement and/or concerted practice between these three undertakings.”

130. On the basis of essentially the same evidence the OFT also finds that the overall agreement identified above also included two bilateral price-fixing agreement, respectively between Hasbro and Argos (paragraphs 110 to 114 of the Decision) and Hasbro and Littlewoods (paragraphs 115 to 121 of the Decision).

(4) THE REPRESENTATIONS MADE TO THE OFT

131. Part III of the Decision, which runs to over 60 pages, contains a detailed analysis by the OFT of the representations made to it by the parties before the Decision was taken, and the OFT's reasons for rejecting those representations.
132. Both Argos and Littlewoods denied their involvement in an agreement or concerted practice. They submitted, essentially, that the OFT had not proved its case. They relied in particular on their written representations, witness evidence and supporting documents.
133. The OFT's response, in the Decision, was, essentially, that its case was established by the documents and the witness statements of Messrs Bottomley, Thomson and Wilson. There was no documentary support for the arguments of Argos or Littlewoods. According to the documents, where there was a conflict between the witness statements produced by Argos and Littlewoods, or the OFT's record of interview of Mike McCulloch of Hasbro, the statements of Messrs Bottomley, Thomson and Wilson were to be preferred. The evidence of Messrs Bottomley, Thomson and Wilson was consistent with the documents (see paragraphs 135 to 143 of the Decision).

Littlewoods' representations to the OFT

134. Littlewoods' representations are dealt with at paragraphs 144 to 257, 337 to 345 and 359 to 365 of the Decision.
135. As appears in paragraphs 144 to 171 of the Decision, Littlewoods argued that there was insufficient evidence of an agreement or concerted practice; that the OFT's allegations lacked clarity; that Hasbro's activities did not go beyond lawful conduct; that it was not shown that Littlewoods adhered to RRP; that the exchange of information between supplier and a customer about pricing intentions is not illegal; and that the various statements made by Littlewoods employees are to be accepted, particularly their statements to the effect they did not ask Hasbro for information about Argos' pricing intentions, and could not have trusted any such information anyway.
136. Littlewoods further submitted to the OFT that there were six main reasons for the move to RRP in the period 1999 to 2001: (1) Argos' change of policy following the GUS takeover

in April 1998; (2) the low margins in Hasbro toys and games; (3) the price points chosen by Hasbro for its RRPs; (4) the fact that Hasbro's RRPs were at price points which were natural for retailers to adopt independently; (5) television advertising tended to show RRPs; and (6) there was a general move to RRPs from 2000 which was self-perpetuating (paragraphs 172 to 193 of the Decision).

137. Littlewoods further argued that none of its buyers had authority to set prices or make commitments; that the evidence of Alan Cowley and John McMahon does not support the OFT's case as regards the pricing of Tweenies dolls in 1999 and 2000; that the e-mail to Littlewoods of 18 May 2000 does not support the OFT's case, given the evidence as to the reactions of the relevant Littlewoods employees, and the fact that 4 out of the 17 products mentioned were priced differently by Argos; that the e-mail of 28 December 2000 was a "one-off" that did not support the existence of an agreement; that the OFT had not taken account of the statements given by Littlewoods' employees in October 2001; that the interview notes of Hasbro employees taken by the OFT in October 2001 were unsatisfactory and proper procedures were not followed; that the OFT has been selective in its evidence, much of which does not support the existence of an agreement; that the OFT has not shown that an alleged agreement had any appreciable effect; and that in its representations on the original rule 14 notice, Hasbro had denied any breach of the Chapter I prohibition (paragraphs 194 to 257 of the Decision).

138. In the Decision, the OFT rejected each of these submissions in turn, dealing with each request individually at the relevant paragraphs of the Decision. The OFT specifically addresses Littlewoods' arguments as to the GUS takeover of Argos at paragraphs 179 to 193 of the Decision. That, according to the OFT, does not explain away the agreement alleged in this case (see also paragraphs 285 to 286 of the Decision).

Argos' representations to the OFT

139. As to background matters, Argos argued before the OFT first that the OFT had not correctly described or defined the market in this case. Argos further argued that the margins on its products were low, but that it was unconcerned about this. Although it faced delisting on some products, others are "must have" items (paragraphs 259 to 264 of the Decision).

140. More particularly, Argos argued that it was unaware of any Hasbro pricing initiative. Although Maria Thompson recalls Mike McCulloch saying that Hasbro wanted all retailers to go out at RRP, she knew that Hasbro had no means of ensuring this, and had never offered any inducement to Argos to do so. Moreover, Mr. McCulloch's statement that there was no agreement, and the statements of Mr. Snow and Mr. Wilson of Hasbro confirm that Hasbro had little prospect of implementing any initiative to ensure that retailers went out at RRP. No one at Argos was aware that Hasbro was rolling out an initiative on RRP, nor was anyone aware that Hasbro had discussed any such initiative with Littlewoods. That applies particularly to Andrew Needham. Hasbro gave no commitment to follow RRP only if Index did. Argos did not recall any discussions with Hasbro with regard to a pricing initiative in 1999, and the OFT's evidence does not support a binding commitment between Hasbro and Argos. Argos personnel, and in particular Andrew Needham, deny any price-fixing agreement (paragraphs 266 to 283 of the Decision).
141. According to Argos, its move towards RRP on Action Man and Core Games was not due to an agreement, but took place as a result of a general move to implement a new policy of improving margins and move to market pricing following the GUS takeover in 1998. That, according to Argos, is now supported by the witness statements of Mr. Bottomley and Mr. Wilson. Argos' move to market pricing was probably discussed at the meeting of 17 February 1999 (paragraphs 284 to 287 and 353 to 356 of the Decision).
142. Argos, not having been party to any pricing initiative, could not have been party to any alleged extension of that initiative to the products in 2000. Argos relies on the statements of Andrew Needham and Vanessa Clarkson and the divergence between Argos' prices and those mentioned in Ian Thomson's email of 18 May 2000. There is no evidence of monitoring by Argos. Hasbro could not enforce RRP: see Mr. Snow's email of 22 May 2001 (paragraphs 288 to 291 of the Decision).
143. In the light of all the evidence, Argos submitted that the OFT has not proved an agreement or concerted practice. Nothing was agreed between Mr. McCulloch, Maria Thompson and Sue Porritt. The evidence relied on by the OFT did not establish the existence of any agreement. There was no corroborative evidence from Argos and little from Littlewoods. Certain Hasbro personnel such as Mr. Bottomley and Mr. Thomson may have believed that

Argos was party to some sort of price-fixing agreement with Hasbro and Littlewoods, but they were mistaken. There was no evidence that Argos and Littlewoods knowingly exchanged information through Hasbro, and the emails of 18 May 2000 did not establish that. Argos had no knowledge that its prices were being passed to other account managers within Hasbro or were being passed to Littlewoods (paragraphs 292 to 299 of the Decision). Argos also relied on the fact that in its representations on the original rule 14 notice Hasbro itself denied an infringement of the Chapter I prohibition (paragraph 318). Argos emphasised that there were many instances where it did not follow Hasbro's RRP's and competed vigorously in the market (paragraph 324).

144. The OFT refuted these submissions, essentially on the basis of the witness statements of Messrs Bottomley, Wilson and Thomson, and the documents in its possession. In particular, the OFT did not accept that the GUS takeover of Argos in 1998 contradicted its findings that Argos infringed the Chapter I prohibition (see paragraphs 270-271, 284 to 287, 324 to 326, and 353 to 356 of the Decision).

VI THE LAW ON AGREEMENT AND CONCERTED PRACTICES

145. The issue in the present appeals is whether Argos and Littlewoods, or either of them, participated in agreements or concerted practices as alleged by the OFT contrary to the Chapter I prohibition imposed by section 2(1) of the Act. In accordance with section 60 of the Act, the meaning of "agreements" and "concerted practices" is to be determined in a manner consistent with decisions of the European Court of Justice, the Court of First Instance, or the Commission of the European Communities under Article 81(1) of the EC Treaty, the wording of which is in all material respects followed in section 2(1) of the Act. It is trite law that an "agreement" is not limited to a legally binding agreement but includes a "gentlemen's agreement". As in the Tribunal's recent judgment in *JJB Sports and Allsports v OFT* [2004] CAT 17, we set out some of the leading cases.

- *Dyestuffs*

146. The classic definition of a concerted practice was set out by the Court of Justice in Case 48/69 *ICI v Commission* [1972] ECR 619 ("*Dyestuffs*") which concerned a series of parallel price increases in the dyestuffs market. The Court of Justice said at paragraphs 64 to 66:

- “64. Article [81] draws a distinction between the concept of ‘concerted practices’ and that of ‘agreements between undertakings’ or of ‘decisions by associations of undertakings’; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.
65. By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.
66. Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.”

- *Suiker Unie*

147. In Case 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663 (“*Suiker Unie*”), which involved a number of collusive arrangements among sugar manufacturers, the Court of Justice said:

- “173. The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.
174. Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.
175. The documents quoted show that the applicants contacted each other and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors.”

148. Those general principles set out in *Dyestuffs* and *Suiker Unie* have been followed in numerous subsequent cases. The jurisprudence on a “concerted practice” is conveniently summarised in Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125 (“*Anic*”) at paragraphs 115 to 118. At paragraph 108 of *Anic* the Court of Justice said Article 81 is intended:

“ ... to apply to all collusion between undertakings, whatever the form it takes. ... The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion”.

149. The Court also said at paragraphs 130 and 131:

“130. ... it is clear from the settled case-law of the Court of Justice... that an agreement within the meaning of Article 81(1) of the Treaty arises from an expression, by the participating undertakings, of their joint intention to conduct themselves on the market in a specific way.”

131. A comparison between that definition of agreement and the definition of a concerted practice... shows that, from the subjective point of view, they are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves.”

- *Bayer*

150. In Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, on appeal Cases C-2/01P and C-3/01P *Bundesverband der Arzneimittel – Importeure v Commission*, judgment of 6 January 2004, not yet reported, (“*Bayer*”) the issue was whether measures taken by a manufacturer to restrict exports by wholesalers gave rise to an “agreement,” or whether the conduct in question was merely unilateral conduct by the manufacturer concerned.

151. The Court of First Instance said at paragraphs 66 to 72:

“66. The case-law shows that, where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 81(1) of the Treaty (Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 38; Joined Cases 25/84 and 26/84 *Ford and Ford Europe v Commission* [1985] ECR 2725, paragraph 21; Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 56).

67. It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article 81(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 86; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 256).
68. As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, *ACF Chemiefarma*, paragraph 112, and *Van Landewyck*, paragraph 86), without its having to constitute a valid and binding contract under national law (*Sandoz*, paragraph 13).
69. It follows that the concept of an agreement within the meaning of Article 81(1) of the Treaty as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.
70. In certain circumstances, measures adopted or imposed in an apparently unilateral manner by a manufacturer in the context of his continuing relations with his distributors have been regarded as constituting an agreement within the meaning of Article 85(1) of the Treaty (Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium and Others vs Commission* [1979] ECR 2435, paragraphs 72 and 73; *Sandoz*, paragraphs 7 to 12; Case C-70/93 *BMW v ALD* [1995] ECR I-3439, paragraphs 16 and 17).
71. That case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.
72. It is also clear from that case-law that the Commission cannot hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which he maintains with his dealers, in reality forms

the basis of an agreement between undertakings within the meaning of Article 85(1) of the Treaty if it does not establish the existence of an acquiescence by the manufacturer (*BMW Belgium*, paragraphs 28 to 30; *AEG*, paragraph 38; *Ford and Ford Europe*, paragraph 21; *Metro II*, paragraphs 72 and 73; *Sandoz*, paragraphs 7 to 12; *BMW v ALD*, paragraphs 16 and 17).”

152. The judgment of the Court of First Instance in *Bayer* was upheld on appeal by the Court of Justice in its judgment in Cases C-2/01P and C-3/01P of 6 January 2004. The Court of Justice said in particular:

“100. Concerning the appellants’ arguments that the Court of First Instance should have acknowledged that the manifestation of Bayer’s intention to restrict parallel imports could constitute the basis of an agreement prohibited by Article 85(1) of the Treaty, it is true that the existence of an agreement within the meaning of that provision can be deduced from the conduct of the parties concerned.

101. However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by Article 85(1) of the Treaty may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of Article 86 of the Treaty.

102. For an agreement within the meaning of Article 85(1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers.”

153. At paragraph 118 of *Bayer* the Court of Justice upheld the finding of the Court of First Instance that “for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (paragraph 67 of the judgment under appeal).” The Court of Justice also accepted that the necessary “joint intention” may be inferred from conduct, or from tacit acceptance (paragraphs 118 to 124, and 142).

- *Cimenteries*

154. In Cases T-25/95 etc. *Cimenteries v Commission* [2000] ECR II-491, the Court of First Instance considered numerous allegations of infringement made against European cement producers. At paragraphs 1848 to 1852 the Court considered a submission by Buzzi to the effect that merely letting Lafarge, a competitor, know of its intentions, could not have amounted to a concerted practice. The Court said:

“1849. In that connection, the Court points out that the concept of concerted practice does in fact imply the existence of reciprocal contacts (Opinion of Advocate General Darmon in *Woodpulp II*, cited at paragraph 697 above, points 170 to 175). That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it...

...

1852. ... In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market (Opinion of Advocate General Darmon in *Woodpulp II*, cited at paragraph 697 above, point 172). It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct [on the market to be expected on his part]* (Case T-4/89 *BASF v Commission* [1991] ECR II-1523, paragraph 242, and *Hercules Chemicals v Commission*, cited at paragraph 140 above, paragraph 260).”

- *Tate & Lyle*

155. Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc v Commission* [2001] ECR II-2035 (“*Tate & Lyle*”) (upheld by the Court of Justice in its judgment of 29 April 2004 in Case C-359/01P *British Sugar plc v Commission*, not yet reported) concerned a series of meetings between British Sugar, Tate & Lyle, and sugar merchants. The Court held at paragraphs 54 to 61:

* We set out the correct rendering of the French, Italian, Spanish and German versions of the judgment which is translated slightly differently in the English version.

- “54. Moreover, the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice
...
57. In the present case, it is undisputed that there were direct contacts between the three applicants, whereby British Sugar informed its competitors, Tate & Lyle and Napier Brown, of the conduct which it intended to adopt on the sugar market in Great Britain.
58. In Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, in which the applicant had been accused of taking part in meetings at which information was exchanged amongst competitors concerning, inter alia, the prices which they intended to adopt on the market, the Court of First Instance held that an undertaking, by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market (*Rhône-Poulenc*, paragraphs 122 and 123). This Court considers that that conclusion also applies where, as in this case, the participation of one or more undertakings in meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors.”

- *Responding to complaints*

156. One of the allegations in *Suiker Unie*, cited above, was that certain producers of sugar had concerted their actions so as to restrict exports of sugar from Belgium to Germany. In its judgment the Court held at paragraphs 282 to 283:

- “282 However the before mentioned letter shows clearly that the German producers to which it referred ... never at any time kept their dissatisfaction to themselves but told RT about it.
283 If an economic operator accepts the complaints made to him by another operator in connexion with the competition to which the products manufactured by the former operator expose the latter, the conduct of the operators concerned amounts to a concerted practice.”

VII THE BURDEN AND STANDARD OF PROOF

157. It is common ground that the burden of proof rests on the OFT to prove the infringements in question.

The Napp judgment

158. The issue of the standard of proof was dealt with by the Tribunal in *Napp v Director General of Fair Trading* [2002] CAT 1 (“*Napp*”) at [98] to [109]:

- “98. As we have already stated in our interim judgment of 8 August 2001, we agree that the Director’s concession that these proceedings are “criminal”, for the purposes of Article 6 of the European Convention on Human Rights, is properly made: see Case C-235/92P *Montecatini v Commission* [1999] ECR I-4539, paragraphs 175 and 176. That is particularly so since penalties under the Act are intended to be severe and to have a deterrent effect: see the Director’s statutory Guidance as to the appropriate amount of the penalty, (OFT 423, March 2000) issued under section 38(1) of the Act.
99. The fact that these proceedings may be classified as “criminal” for the purposes of the ECHR gives Napp the protection of Article 6, and in particular the right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (Article 6(1)), to the presumption of innocence (Article 6(2)), and to the minimum rights envisaged by Article 6(3) including the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him” (Article 6(3)(d)).
100. In our view it follows from Article 6(2) that the burden of proof rests throughout on the Director to prove the infringements alleged.
101. However, as the Court of Appeal held in *Han*, cited above, to which we referred in our judgment of 8 August 2001, the fact that Article 6 applies does not of itself lead to the conclusion that these proceedings must be subject to the procedures and rules that apply to the investigation and trial of offences classified as criminal offences for the purposes of domestic law: see *Potter LJ* at paragraph 84, and *Mance LJ* at paragraph 88 of that judgment.
102. Neither the ECHR itself nor the European Court of Human Rights has laid down a particular standard of proof that must be applied in proceedings to which Articles 6(2) or (3) apply, and still less that the standard should be that of “proof beyond

reasonable doubt”, which is not a concept to be found in the domestic systems of many of the signatory States (see Sir Richard Buxton, cited above, at pp. 338 and 339).

103. In our view it follows that neither Article 6, nor the Human Rights Act 1998, in themselves oblige us to apply the criminal standard of proof as established in domestic law in cases where the Director seeks to impose a financial penalty in respect of alleged infringements of the Chapter I or Chapter II prohibitions under the Act.
104. In our view the standard of proof to be applied under the Act is to be decided in accordance with the normal rules of the United Kingdom domestic legal systems. Neither party has cited to us any decided domestic cases which suggest that, in circumstances such as these, the criminal standard should be applied, nor invited us to apply by analogy certain civil situations where traditionally the criminal standard of proof is required (e.g. committal proceedings).
105. Infringements of the Chapter I and Chapter II prohibitions imposed by sections 2 and 18 of the Act are not classified as criminal offences in domestic law, in contrast, for example, to the criminal offences created under sections 42 to 44. Under section 38(8), penalties are recoverable by the Director as a civil debt. Directions are enforceable by civil proceedings under section 34. In our view the structure of the Act points to the conclusion that under domestic law the standard of proof we must apply in deciding whether infringements of the Chapter I or Chapter II prohibitions are proved is the civil standard, commonly known as the preponderance or balance of probabilities, notwithstanding that the civil penalties imposed may be intended by the Director to have a deterrent effect.
106. We add that in many cases under the Act the factual issues before this Tribunal will often relate to such matters as determining the relevant market, whether dominance exists, and assessing whether conduct characterised as an “abuse” is economically justified. Issues of that kind involve a more or less complex assessment of mainly economic data and perhaps conflicting expert evidence. It seems to us more likely that Parliament would have intended us to apply the civil standard of proof to issues of this kind, rather than the time-honoured criminal standard of “proof beyond reasonable doubt”.
107. In our view it follows from the speech of Lord Nicholls (with whom Lord Goff and Lord Mustill agreed) in *Re H*, cited above, at pp. 586 to 587, that under the law of England and Wales there are only two standards of proof, the criminal standard and the civil standard; there is no ‘intermediate’ standard. The position is the same in the law of Scotland and Northern Ireland. Within the civil standard, however, the more serious the allegation, the more cogent should be the evidence

before the court concludes that the allegation is established on the preponderance of probability: see Lord Nicholls' speech in *Re H*, citing notably *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455 and *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, 266.

108. Since cases under the Act involving penalties are serious matters, it follows from *Re H* that strong and convincing evidence will be required before infringements of the Chapter I and Chapter II prohibitions can be found to be proved, even to the civil standard. Indeed, whether we are, in technical terms, applying a civil standard on the basis of strong and convincing evidence, or a criminal standard of beyond reasonable doubt, we think in practice the result is likely to be the same. We find it difficult to imagine, for example, this Tribunal upholding a penalty if there were a reasonable doubt in our minds, or if we were anything less than sure that the Decision was soundly based.
109. In those circumstances the conclusion we reach is that, formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.”

The parties' submissions

159. During the hearing before the Tribunal, no party challenged the Tribunal's approach in *Napp*.
160. In the light of certain developments in the domestic case law, by letter of 30 June 2004 the Tribunal invited the parties to submit any further observations they wished on the standard of proof.
161. The OFT, in a letter of 5 July 2004, submitted that *Re H*, cited in *Napp*, remained the controlling authority. According to the OFT, in so far as the Tribunal's dicta in [108] and [109] of *Napp* suggested that the civil and criminal standard were the same, or that the difference was largely illusory, that was not correct. The Tribunal did not have to be satisfied “beyond a reasonable doubt”.

162. Argos submitted by letter of 5 July 2004 that *Re T* [2004] EWCA Civ 558 [2004] ALL ER (D) 277 confirmed the correctness of *Re H*. Consequently, the approach set out by the Tribunal at [107] to [109] of *Napp* was correct. Argos accepts that the standard is the civil standard, as applied in the light of *Re H*.
163. Littlewoods, in a letter of 23 July 2004, submitted that the Tribunal's decision in *Napp* was entirely unaffected by the decision of the Court of Appeal in *Re T*, cited above. The OFT should not resale, as it appears to do in its letter of 5 July 2004, from the correctness of [109] of *Napp*, which is relied on in its skeleton argument. The Tribunal should not reconsider the *Napp* test without hearing oral representations.

Analysis

164. The Tribunal's recent judgment in *JJB and Allsports v OFT*, cited above, sets out recent case law on the standard of proof arising in other contexts and certain other legal developments since the *Napp* judgment: see *JJB and Allsports* at paragraphs 175 to 186. At paragraph 188 to 204 of *JJB and Allsports* the Tribunal sets out its analysis of the position under the Act:

“188. In non-criminal proceedings facts are required to be proved on the balance of probability, that is to say that the court must be satisfied on the evidence, that the occurrence of the event is more likely than not. However, the principle is that the more serious the allegation, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities. Hence the civil standard provides for flexibility as to the cogency of the evidence required to satisfy the court of the facts. Thus in *Re H* Lord Nicholls said:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.”
[1996] AC 563, at p. 586.

...

190. In the context of proceedings before the Tribunal “a degree of probability which is commensurate with the occasion” means that the evidence needed to satisfy the Tribunal on the balance of probabilities must be commensurate with the seriousness of the infringement alleged.

...

195. In our view, the same balance of probabilities standard should apply to all issues arising under the Chapter I prohibition, or for that matter the Chapter II prohibition, whether the issue is in some sense one of “primary” fact, or otherwise. The Tribunal has to evolve a standard of proof that can be reasonably and pragmatically applied across the whole range of issues likely to arise under the Act. We have already said, in *Aberdeen Journals (No. 2) v. OFT* [2003] CAT 11 [2003] CompAR at [125] that in Chapter II cases the Tribunal should ask itself the question “is the Tribunal satisfied that the [OFT’s] analysis... is robust and soundly based?”

196. In our view, neither the post-*Napp* decisions referred to above, nor the other developments to which we have referred, lead us to modify the Tribunal’s basic approach in *Napp*. We are dealing with the particular context of the Act, and decisions under other Acts do not seem to us to be necessarily in point.

...

199. ...in our judgment it is important to distinguish between two different things: what the test is, on the one hand, and what is the nature of the evidence necessary to satisfy the test, on the other. As regards the test, the civil standard is the balance of probabilities. As regards the nature of the evidence, the authorities cited above show that where serious matters are in issue, for example conduct akin to dishonesty, the quality and weight of the evidence needs to be stronger than it would need to be if the allegations were less serious. As we understand *Re H*, the law in effect presumes that conduct akin to dishonesty, or capable of attracting penalties, is less likely than honest conduct. In addition, in a case such as the present, the presumption of innocence applies.

200. In these circumstances, in applying the balance of probabilities in a case involving penalties, the Tribunal must be satisfied that the quality and weight of the evidence is sufficiently strong to overcome the presumption that the party in question has not engaged in unlawful conduct. For example, if in a borderline case the decision is finely balanced and the Tribunal finds itself to-ing and fro-ing, the correct analysis is that the evidence is not sufficiently strong to satisfy the Tribunal on the balance of probabilities that the infringement occurred.

201. In other words, the Tribunal will not apply what Lord Bingham described in *B v Chief Constable* at [31] as a “bare balance of probabilities” but will direct itself in accordance with the speech of Lord Nicholls in *Re H* at p. 586, that “...even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters”. Among many examples in the civil courts, we note in particular that this approach applies in cases involving the disqualification of directors, which is now one of the possible consequences of a finding of infringement under the Act, as mentioned above: see notably the judgment of Neuberger J as he then was in *Re Verby Print* [1998] 2 BCLC 23 [1998] BCC 652 under the heading “The burden and standard of proof.”
202. The Tribunal in *Napp* at [108] expressed the view that whether the Tribunal applied a civil standard based on strong and convincing evidence, or the criminal standard of beyond reasonable doubt “in practice the result is likely to be the same. We find it difficult to imagine, for example, this Tribunal upholding a penalty if there were a reasonable doubt in our minds, or if we were anything less than sure that the Decision was soundly based”.
203. This passage in *Napp* should not be interpreted as introducing the criminal standard through the back door. Adopting the approach of Lady Butler-Sloss in *Re T*, cited above, in our view it would not, in this Tribunal, be appropriate to “leap across” the distinction between a criminal prosecution and the wholly different and essentially administrative system established under the Act to prevent restrictions on competition. The authorities cited above in relation to football banning orders, anti-social behaviour orders and sex offender orders refer to matters which come before the criminal courts and affect the freedom of the individual. In our respectful view, those authorities concern different legislation and do not warrant the introduction of the law and psychology of the criminal process into proceedings before the Tribunal. Nor do we think that that was the intention.
204. It also follows that the reference by the Tribunal to “strong and compelling” evidence at [109] of *Napp* should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.”

165. We apply the same principles in this case. In the present case, all parties are agreed that the controlling authority on the standard of proof is *Re H*, cited by the Tribunal in *Napp*. In

other words, it is accepted that the standard is the civil standard, applied as explained by Lord Nicholls in *Re H*.

166. Whether, in the present case, applying that standard, the quality and weight of the evidence is sufficient to convince the Tribunal that the infringement is established, and to overcome the presumption of innocence to which Argos and Littlewoods are entitled (see *JJB and Allsports v OFT*, cited above, at [204]), depends on the Tribunal's assessment of the evidence before it.

VIII THE ARGUMENTS OF THE PARTIES

(1) ARGOS' SUBMISSIONS

167. Since the original notices of appeal introduced against the first Argos/ Littlewoods Decision, the Tribunal has had the benefit of a great deal of additional evidence and cross-examination. It is convenient to summarise the parties' arguments as put forward in their closing submissions, after the evidence had been heard.

A. Action Man and Core Games

The effect of the GUS takeover

168. Argos submits that it is necessary to set out the industry background before dealing specifically with the lack of evidence of any price-fixing agreement. The takeover of Argos by GUS, which led to a sea change in the industry, explains the timing of the move to RRP's on Action Man and Core Games. The industry innocently gravitated towards RRP's so as to stop losing money. In essence, the OFT misjudged both the mood of the industry in 1998 before the takeover of Argos and the change that took place thereafter.

169. Prior to the S/S 1999 catalogue Argos' policy was, it submits, to pre-empt the market, i.e. to undercut the other retailers when its catalogue was published. This policy led to little or no profit on Hasbro toys with the result that the whole industry was suffering.

170. In late 1998 the newly arrived CEO of Argos, Mr. Duddy, found Argos to be highly bureaucratic with multiple layers of management. He wished to drive profit and put pace

back into the business. The main goal was to regenerate profit growth. One of the ways to achieve this was to improve margin by increasing the retail prices of some of Argos' products, particularly in low margin areas. A market pricing strategy would be adopted. Market pricing did not necessarily mean pricing at RRPs, but RRPs did tend to be established in the market. Argos submits that there was no exact science in the change of policy. The selling price would depend on the actual product and the price that Argos' competitors were charging.

171. In Argos' submission, when the situation changed in 1998 and Argos stopped pre-empting the market, the industry breathed a sigh of relief. The industry's reaction was natural: it priced at a price point – at RRPs – which led it to stop losing so much money.

S/S 1999 catalogue

172. Argos submits that the move to market pricing on the Action Man range and Core Games is reflected in the S/S 1999 catalogue, something the OFT failed to take into account in the Decision. Action Man was priced by Argos at or around RRP. The reason for this is not that there was an agreement or concerted practice with Littlewoods; nor is that alleged by the OFT. The policy was in Argos' submission a unilateral one. The real reason was the appalling margins hitherto enjoyed by Argos. Indeed, the move to market pricing led to a greater number of price increases in the S/S 1999 catalogue when compared to previous years.

173. Argos submits that the sea change in the industry was well known to others, including Littlewoods and Hasbro. Littlewoods anticipated, correctly, Argos' change of pricing. This led to parity of pricing at or very close to RRPs in Argos' and Littlewoods' S/S 1999 catalogues. It was simply the market reacting intelligently to the takeover of Argos by GUS.

A/W 1999 catalogue

174. Argos submits that this parity of pricing continued into the A/W 1999 catalogue. The experience gleaned from the S/S 1999 catalogue allowed Argos to continue its new policy of not pre-empting the market on the Action Man range and Core Games. Littlewoods,

having correctly anticipated the move to RRPs, moved fully to RRPs itself, entailing a 4p price rise from 95p to 99p price points.

175. Argos submits that contrary to the OFT's suggestion that the A/W 1999 catalogue represented a "golden opportunity" for Littlewoods to undercut Argos, it was in fact an opportunity to stop losing money. Littlewoods knew GUS' philosophy. GUS was a margin-driven company. A business risk was taken, based on market information and personal knowledge, to price at RRP in the A/W 1999 catalogue.

S/S 2000 catalogues and thereafter

176. Argos submits that Littlewoods felt it was fairly likely that Argos would continue with RRPs on games. There would have been little incentive to undercut the RRPs, even if Littlewoods would not have lost money in doing so, because that would have invited a response by Argos.
177. Argos submits that its own policy did not change. An internal email dated 28 January 2000 (after the S/S 2000 catalogue) is evidence of this, stating that the then current policy was "to be on the market...not aiming to drive down market prices aggressively."

The OFT's case on the Action Man range and Core Games

178. Argos observes that the OFT's case is that the Argos, Littlewoods and Hasbro entered into agreements, comprising two bilateral agreements and one trilateral agreement, to fix the price of Action Man and Core Games around the time that Argos and Littlewoods were preparing their A/W 1999 catalogues.
179. Argos submits that the OFT must demonstrate to a strong and compelling standard that:
- (a) there was a bilateral arrangement between Argos and Hasbro to fix the retail prices of Action Man and Core Games normally at RRP for the A/W 1999 catalogue; and
 - (b) Argos specifically entered into and maintained the agreement with Hasbro on the understanding that Littlewoods would enter into a similar arrangement with Hasbro.

The evidence relied on

180. Argos observes that the OFT originally found as follows:

- (a) there was a sudden parity of pricing in the A/W 1999 catalogues that can only be explained by a price-fixing agreement;
- (b) Argos and Hasbro had meetings where Hasbro's pricing initiative was discussed;
- (c) Hasbro obtained Argos' pricing intentions;
- (d) Ian Thomson and his email of 18 May 2000 refer to an agreement on Action Man and Core Games; and
- (e) there was monitoring of the agreement.

- parity of prices in the A/W 1999 catalogue

181. Argos submits that despite its original position that there had been no change in policy as a result of the takeover of Argos by GUS, the OFT did not challenge at the hearing the fact that the takeover did in fact lead to a change in policy within Argos away from pre-empting the market. At a very late stage the OFT also accepted that Argos had moved to RRP in the S/S 1999 catalogue.

182. In Argos' submission once it is accepted that there had been a unilateral change in policy not to pre-empt the market, that that policy led to Argos pricing the Action Man range and Core Games at RRP's in S/S 1999, that the market reacted intelligently to the change in policy, and that the Argos and Littlewoods prices for Action Man and Core Games were parallel, the reason for continued pricing parity is clear. Argos' policy continued and the market reacted intelligently to that. Argos submits that the Decision cannot stand if the Tribunal accepts Argos' case on the effect of the GUS policy.

183. Argos submits moreover that the OFT failed to consider the impact on the market of Hasbro raising its cost price and thus trying to force retailers to price at RRP's.

The two meetings at which Hasbro's pricing initiative was discussed

184. Argos notes that the OFT seeks to draw inferences from two meetings Argos had with Hasbro in early 1999. In addition, Argos submits, the OFT is seeking to read into notes of meetings nuances which cannot be established.
185. In October 1998 Hasbro held an internal meeting at which the “1999 Trading Terms” Strategy was presented to the sales team. The most important element of the new terms was said to be the so-called “core brand listings rebate.” This initiative is said by the OFT in the Decision to have offered rebates in return for a listing of certain Hasbro products which were threatened with being de-listed, and to have involved trying to persuade retailers to keep to RRPs.
186. Following this meeting a proposal was drawn up by Hasbro for each retailer. A presentation was made by Neil Wilson to Argos on 19 February 1999 entitled “Cat 52 Listings Proposal”. Argos submits that the lawful aim of Hasbro was to try to persuade retailers of the commercial sense of the core brand listing rebate. Despite the OFT’s acceptance that attempts to encourage retailers to price at RRPs is lawful, the OFT confuses the lawful discussion of the 1999 Trading Terms with an unlawful price-fixing agreement.
187. Moreover, in Argos’ submission, the fact that both Argos’ and Littlewoods’ buyers felt they had been deceived by Hasbro during these discussions, in that Hasbro did not mention the rise in the cost price that would be charged to the retailers, must be factored into those discussions.
188. The first meeting relied on by the OFT is that of 17 February 1999 between Mr. Duddy and Mrs. Thompson of Argos and Mr. Richards and Mr. Gardner of Hasbro. Argos notes that the OFT relied in the Decision on this meeting as strong evidence of a price-fixing agreement, and yet later in the Decision asserted that it did not make or break the OFT’s case and that it formed part of a chain of evidence.
189. In Argos’ submission, the evidence shows that Argos indicated its intention to move to market pricing, but that neither RRPs nor Hasbro’s pricing initiative were discussed. Argos indicated that it would react if undercut by competitors and would look to Hasbro for support in maintaining its profit margin.

190. The OFT did not obtain evidence from Mr. Gardner or call Mr. Richards as a witness. The only evidence of that meeting adduced by the OFT before the Tribunal is that of David Bottomley, who was not present. His evidence is hearsay evidence, referring inaccurately to more than one meeting and to discussion of Hasbro's pricing initiative. The evidence of those present is, Argos submits, overwhelming: there was no agreement as to Argos' retail pricing.
191. The second meeting relied upon by the OFT is that of 29 March 1999 between Neil Wilson of Hasbro and Sue Porritt of Argos. Whilst that meeting is described by the OFT as "strong evidence that Hasbro agreed to fix prices with Argos", Argos submits that in fact it is clear that Argos, far from agreeing to abide by any Hasbro strategy, would react to competitor pricing. Moreover, the fact that Neil Wilson does not deal specifically with this meeting in his witness statement gives some indication of its innocence and insignificance.
192. Finally, Argos refers to the interview given to the OFT by Mike McCulloch of Hasbro, who had had various meetings with Argos. In that interview, Mr. McCulloch stated that Hasbro could not have had an agreement with Argos, and that Argos price how they want. This is in Argos' submission entirely consistent with the short shrift given to him when he suggested to Mrs. Thompson that he could make all retailers go out at RRP's.

The allegation that Hasbro obtained Argos' pricing intentions

193. The Decision alleges that it was in relation to the A/W 1999 catalogue that Hasbro first applied the process of seeking to ascertain whether Argos was content with the RRP's for the Action Man range and Core Games. The OFT relies on Mr. Wilson's evidence in this respect.
194. Argos' first observation is that Hasbro's evidence was that it sought to elicit such indications from all retailers, not merely Argos and Littlewoods. Furthermore, in Argos' submission, Mr. Wilson's belief was based largely on assumption; discussions relating to the RRP's of particular products only took place "by exception". That assumption is unsurprising in light of Argos' change of policy of no longer pre-empting the market. Mr. Wilson's evidence further shows that the discussions about RRP's concerned whether they were set at the correct level, and that Argos never formally guaranteed to go out at RRP's.

They were always subject to change for a number of reasons. Argos submits that Mr. Needham, Argos' representative in this respect, was totally unaware that he might be part of an arrangement whereby he was committing to pricing at RRP's.

195. Argos submits that any information exchanged was of a general nature; it was never part of Mr. Wilson's plan that he intended to pass on to Index the specific price that Argos was indicating. Neither is there any evidence that Mr. Needham knew that information was being passed on by Hasbro to Littlewoods. Finally, Argos submits that Mr. Wilson does not suggest that Argos implicitly or explicitly stated that it would only price at RRP's if it were given an assurance by Hasbro that other retailers would not undercut it. Without such a request by Argos, it is in Argos' submission difficult to see how the trilateral arrangement contended for by the OFT can get off the ground.

The evidence of Ian Thomson and his email of 18 May 2000 as to an agreement on the Action Man range and Core Games

196. Argos submits that it is an important part of the OFT's case that there was mutual assurance by both Argos and Littlewoods in relation to RRP pricing on Action Man and Core Games in the A/W 1999 catalogue. In Argos' submission, however, the evidence relied on does not support such a finding.
197. First, Argos submits that the evidence of Ian Thomson, relied upon by the OFT, has been qualified by him. Having referred in his first witness statement to a meeting between Mr. McCulloch of Hasbro and Mr. McMahon of Littlewoods at which, Mr. Thomson alleged, Mr. McCulloch said Argos could not agree to Hasbro's pricing structure for fear of being undercut, Mr. Thomson's oral evidence shows that that meeting may have taken place after 13 November 1998. The suggestion that Argos had said they could not commit to Hasbro's new pricing structure for fear of being undercut cannot be correct because Argos had already committed to moving to market pricing in its S/S 1999 catalogue, final pricing for which took place on 6 November 1998. Mr. Thomson has admitted that the statement he attributed to Mr. McCulloch was inaccurate.
198. Secondly, Argos submits that Mr. Thomson's internal email of 18 May 2000 suggesting that Action Man and Core Games prices would be maintained as per earlier agreements, on

which the OFT relies, is inaccurate. The reference in it to earlier “agreements” cannot in Argos’ submission be read literally in the light of Mr. Wilson’s evidence (in whose name the email was also sent out) as to the nature of the discussions he actually had with Argos employees prior to the issue of the A/W 1999 catalogue. Moreover, Mr. Wilson accepted that the use of the word “agreed” later in that email in relation to the S/S 2000 catalogue was inaccurate.

199. Neither, in Argos’ submission, can the reference to earlier “agreements” be read literally in the light of Mr. Thomson’s evidence because (a) he also agreed that Index never committed to RRP; (b) the word “agreement” refers back to the agreement he says Hasbro mentioned to Littlewoods when providing it with Hasbro’s 1999 Trading Terms plan. Mr. Thomson now accepts that the factual basis for that agreement is unsustainable because Argos priced at his price points in its S/S 1999 catalogue; and (c) Mr. Thomson had no direct dealings with Argos. He only communicated what he was told by Mr. Wilson, who clearly states that there was no agreement.

200. Finally, Argos submits that if there was a fear of being undercut, it did not deter Argos from unilaterally raising its prices in its S/S 1999 catalogue. Moreover any fear it did have would have been primarily in relation to Woolworths and Toys “R” Us. The OFT overplays Argos’ fear of Index. For Hasbro’s plan to work (on the OFT’s version of the evidence), Argos would have wanted assurance from its major competitors. The fact that Hasbro gave no such assurance militates against any agreement or understanding solely with Littlewoods.

Monitoring of the agreement

201. Whilst the OFT relies on the fact that Argos sought to make Hasbro aware of undercutting by other retailers as evidence of monitoring, Argos submits that in fact drawing attention to the prices of other retailers was standard practice in the industry, not evidence of unlawful activity. Such contact happened, and continues to happen, all the time.

B. Extension of the pricing initiative to other toys

202. Argos notes that the Decision alleges an extension of the price-fixing arrangements to other products around the time of the preparation of the A/W 2000 catalogue.

Mr. Wilson's evidence

203. First, Argos notes Mr. Wilson's evidence that the extension of Hasbro's strategy was carried out in line with the process that had been followed in respect of the A/W 1999 catalogue. As submitted above, in line with this process:

- (i) There was no systematic discussion of RRP's with Argos;
- (ii) Mr. Wilson's belief that Argos was content to follow Hasbro's RRP's was based largely on assumption;
- (iii) discussion of the RRP's of particular products took place only by exception;
- (iv) such discussions concerned merely whether they had been set at the right level;
- (v) Argos never formally guaranteed that it would go out at RRP's.

Hasbro's trading terms 2000

204. Argos submits that whilst the internal paper seemingly prepared by Mr. McCulloch relating to Hasbro's 2000 Trading Strategy indicates that the listings rebate that had been introduced in 1999 in relation to Action Man and Core Games would be extended to other toys in 2000, Mr. McCulloch in interview with the OFT stated that nothing was really agreed with Argos in 1999 and that he was unaware of any arrangement in 2000. The OFT has not called Mr. McCulloch to give evidence. Likewise, Mr. Richards in interview with the OFT said that that internal paper did not strike him as referring to a price-fixing agreement.

Meeting of 9 December 1999

205. Argos submits that the contact report of the meeting of 9 December 1999 between Sue Porritt of Argos and Neil Wilson and Mike Brighty of Hasbro to open 2000 Trading Terms negotiations suggests that the focus of discussion was on rebates rather than retail pricing. Neither the contact report nor Mr. Wilson's first witness statement refer to the existence of an unlawful price-fixing agreement. Mr. Wilson's statement that "Sue Porritt felt it was

great that Hasbro could help maintain retail price stability” is in Argos’ submission consistent with a lawful strategy whereby Hasbro sought to persuade retailers to go out at RRP. Mr. Wilson’s recollection of Sue Porritt’s statement that Argos would react if it was undercut in order to remain competitive is not consistent with any price-fixing arrangement. It was in fact maintaining freedom to price as it saw fit.

The emails of 18 May 2000

206. Argos notes that the OFT relies heavily on two emails dated 18 May 2000. The first is an internal Hasbro email sent by Ian Thomson in the names of Mr. Wilson and himself. The second was sent by Mr. Thomson to various Littlewoods employees.
207. The first email referred to a number of products and prices and stated that “Both accounts [i.e. Argos and Index] have agreed to the above price points so this information should be translated to other accounts”. Argos notes that Mr. Thomson in his oral evidence stated that this information was given to him by Mr. Wilson and he passed it on. However, Mr. Wilson in his evidence accepted that the word “agreed” used by Mr. Thomson in that email did not reflect the true position. Argos submits that this underlines the need to focus on Mr. Wilson’s evidence rather than Mr. Thomson’s hearsay evidence.
208. Argos submits that Mr. Wilson’s evidence is supported by Mr. McCulloch’s interview with the OFT. Moreover, the fact that Mr. Thomson could not guarantee to Littlewoods Argos’ prices was repeatedly emphasised in Littlewoods’ oral evidence.
209. That Mr. Thomson was going out on a limb is in Argos’ submission further supported by the facts that (a) the list of prices sent out in those emails was simply the Hasbro RRP for the relevant products; and (b) of the 17 products on the internal email stocked by Argos, and significantly of the 6 products for which Mr. Needham was responsible, 4 were wrong. Argos submits that it is inconceivable in the circumstances to suggest that Mr. Needham passed on detailed pricing information to Mr. Wilson; nor is this suggested by Mr. Wilson.

Interactive Pikachu

210. As to the assertions that Argos had engaged in price-fixing in relation to the price of Interactive Pikachu, Argos submits that information passed on by Mr. Needham as to Argos' price for that product in the A/W 2000 catalogue was given in response to attempts by Mr. Wilson to price it at RRP. Moreover, this is the only specific example in relation to the A/W 2000 catalogue of Argos providing specific pricing information to Hasbro. There was in Argos' submission no systematic exchange of pricing information. Finally, Argos submits that Mr. Needham did not expect that information to be passed on to Index. It was provided quite innocently.

Pricing in the A/W 2000 catalogue

211. Argos makes the following general submissions in relation to pricing in the A/W 2000 catalogue:

- (a) The pattern of pricing evident from an analysis of the relevant toys in Argos' and Littlewoods' S/S 2000 and A/W 2000 catalogues is indicative of competition rather than price-fixing.
- (b) The move to RRPs was a general one rather than limited to specific "other toys" identified in the Decision.
- (c) The pressure on margins was such that Argos had no option but to move to RRPs.

The S/S 2001 catalogue

212. As to the alleged price-fixing arrangements in relation to the S/S 2001 catalogue, Argos first observes that the OFT failed to call Charles Cooper of Hasbro, who had replaced Neil Wilson as the employee responsible for the Argos account. It therefore failed to adduce any direct evidence of any discussions with Argos. Secondly, the evidence is consistent with there being competition in relation to the pricing of other toys, not price-fixing. In relation to two of the "other toys", Littlewoods altered its prices downwards so as to match those of Argos' A/W 2000 catalogue.

The A/W 2001 catalogue

213. Argos notes that three documents are relied upon by the OFT in finding that the price-fixing arrangement was still in place at the time of the A/W 2001 catalogue.

214. The first such document is an internal Hasbro email of 23 February 2001 from David Snow to Charles Cooper stating “if we cannot ensure level pricing between GUS and Littlewoods for A/W I would suggest there will be cause for concern on the Argos/Index agreement for A/W 2001.” Argos submits no weight should be attached to this email. Mr. Snow earlier in the email referred to Hasbro having in the past “tried” to ensure that GUS and Littlewoods were going out at the right price. This is in Argos’ submission inconsistent with a firm price-fixing arrangement suggested by the OFT. Further, in his interview with the OFT Mr. Cooper said that when he took over the Argos account in October 2000, dialogue had “closed down”.
215. The second such document is an email sent by Ian Thomson to Charles Cooper on 3 April 2001 regarding the price of a Ferris Wheel. That email asks Mr. Cooper to “try to get them [Argos] to comply” with matching Index’s price. Argos submits that the words “try to get them to comply” are inconsistent with an ongoing commitment to price at RRP in accordance with Hasbro’s price initiative. Mr. Cooper’s reply to that email on 4 April 2001 contained the phrase “no change planned”. It was clarified by Mr. Needham, in Argos’ submission candidly, that Mr. Cooper had asked Mr. Needham a one-off question, the answer to which formed the basis of Mr. Cooper’s reply of 4 April 2001. Such an isolated incident of Argos providing specific pricing information does not in Argos’ submission establish the existence of a systematic price-fixing arrangement of the sort alleged by the OFT.
216. The third such document is an internal Hasbro email dated 24 April 2001 from David Bottomley to Mr. Cooper regarding an Action Man product called “the dinghy”. It referred to the Argos account and continued “please follow this up urgently, as we can not allow a £14.99 price on the dinghy.”
217. Argos submits that there is an innocent explanation. The background to that email was that Hasbro had mistakenly informed Argos that the RRP was £14.99 but in fact it should have been £19.99. The issue therefore had nothing to do with price-fixing but was rather the correction of an administrative mistake.

(2) LITTLEWOODS’ SUBMISSIONS

218. In summary, Littlewoods' submissions are as follows:

- (i) the OFT has failed to adduce strong and compelling evidence to prove that the communications between Littlewoods and Hasbro and between Argos and Hasbro amounted to an agreement or concerted practice;
- (ii) The inferences drawn by the OFT as to the existence of an agreement or concerted practice from the prices contained in the catalogues do not stack up;
- (iii) Littlewoods' pricing policy was determined by factors unrelated to Hasbro. It was influenced by advice given to it by external consultants; by the need to obtain more margin; by the GUS takeover of Argos; by the success of its gamble to price at RRP's in its S/S 1999 catalogue; and by the absence of margin for manoeuvre on the pricing of Hasbro products;
- (iv) Littlewoods' pricing was not affected by any information that Hasbro purported to pass on about Argos' intentions. Littlewoods simply did not believe that Argos would commit to Hasbro on price or that Hasbro was in a position to give them accurate information as to Argos' intentions.

Credibility of the evidence

219. Littlewoods makes various submissions as to the credibility of Littlewoods' and the OFT's witnesses. Littlewoods' witnesses gave the OFT witness statements voluntarily and at an early stage so as to cooperate fully with the OFT during the investigation. These statements were not produced for the purposes of this appeal. They volunteered information not covered by the OFT in its interviews with those witnesses which is helpful to the OFT's case. Their evidence has been consistent over three years dating from the dawn raids at Littlewoods' offices. Littlewoods' witnesses displayed openness and honesty throughout the oral evidence they gave to the Tribunal under cross-examination. That evidence was measured and considered. There was no attempt, in Littlewoods' submission, to support Littlewoods' case at the expense of accuracy.

220. Littlewoods submits that, by contrast, it is striking that the OFT has decided not to call any evidence from members of Hasbro's senior management that the OFT alleges were responsible for setting up and implementing the alleged agreement: the roles of Messrs McCulloch, Richards, Gardner, Brighty and Evans were to a greater or lesser extent central to setting up and implementing the alleged agreement.

221. In particular, the meeting in late 1998 or early 1999 between Mr. McCulloch and Mr. McMahon of Littlewoods is in Littlewoods' submission fundamental to the OFT's case. It is alleged that Mr. McCulloch intimated to Mr. McMahon that he had been having discussions with Argos and that they were also of the opinion that they could not agree to Hasbro's pricing structure for fear of being undercut and that, if Littlewoods would go along with the plan, then Mr. McCulloch was confident that he could persuade Argos to do the same. It is alleged that this meeting, and that of 17 February 1999, led to Messrs Thomson and Wilson being asked to enter into dialogue with the retailers to ensure that they supported the pricing initiative.
222. Littlewoods submits that public litigation requires the public body to conduct its case with all cards face upwards on the table: *R v Lancashire County Council ex p Huddleston* [1986] 2 All ER 941 at 945G. This is particularly important where proceedings are quasi-criminal in nature. The prosecution ought normally to call or offer to call all of the witnesses who give direct evidence of the primary facts of the case. Yet the OFT deliberately chose not to call the only witnesses able to give primary evidence of the circumstances in which the agreements were allegedly entered into. In particular, the decision not to call Mr. McCulloch is because it directly contradicts the OFT's case. The selective use of evidence by the OFT and reliance on unsatisfactory hearsay evidence in preference to direct evidence of the protagonists undermines the credibility of its case.
223. Littlewoods submits that the evidence of Mr. Thomson, which is critical to the OFT's case against Littlewoods, should be assessed very carefully given that it is contradicted in numerous important respects by Mr. McCulloch's evidence to the OFT. Indeed, his evidence has been shown to be flawed in some instances. An important example of this is seen in relation to the price of the Ferris Wheel in the A/W 2001 catalogue. Moreover, Mr. Thomson has admitted that his memory of certain key events and conversations is imprecise and incomplete. The same can in Littlewoods' submission be said of much of his evidence before the Tribunal.

Littlewoods' narrative of events

- Pre-GUS takeover of Argos

224. Littlewoods submits that prior to the GUS takeover of Argos there had been a considerable problem with the very low margins existing in the toy market as a result of high cost prices and Argos' policy of driving down prices. Indeed, on some Hasbro lines the margin was so slim that Littlewoods was making a loss. Given the low margins there was, even prior to the GUS takeover of Argos, a lack of manoeuvre on price which led to a high degree of common pricing.

- *The GUS takeover of Argos*

225. Littlewoods notes that at the time of the takeover of Argos by GUS there was public recognition of the fact that GUS would seek to change the very low margins caused by Argos' then policy of competing on price. Littlewoods recognised this immediately. It was also generally known in the industry.

226. Littlewoods further observes that in their A/W 1998 catalogues Argos and Littlewoods went out at the same price in 7 of the 12 Core Games that they both stocked. Mr. Thomson accepted that, for many of the Core Games, these products had been sold by both Argos and Littlewoods for some considerable time and had established themselves at price points because of natural evolution.

- *Management Horizons report*

227. Littlewoods points to the report commissioned by Littlewoods which was drawn up by external consultants known as Management Horizons. That report, which was confidential to Littlewoods and whose contents were never made known to third parties, advised Index that GUS was unlikely to initiate a price war but would not allow Index to undercut Argos. That report rejected deep discounting on the basis that competitors would respond aggressively. Index was advised to pursue fewer price points and higher prices. That report, in Littlewoods' submission, materially helped to form policy. John McMahon, charged with implementing the report, was not cross-examined by the OFT on the report. Littlewoods submits that this is because the OFT recognised that it reinforced Littlewoods' repeated explanation that it took its own advice and acted independently.

- *Setting of pricing for S/S 1999 catalogue*

228. Littlewoods submits that a combination of the perceived effect of the GUS takeover and the advice it had received from Management Horizons gave senior management confidence to seek more margin. Littlewoods therefore decided, based on a calculated risk, to go out at RRP on a larger number of products in the S/S 1999 catalogue. Of the nine Core Games for which RRP's were provided to Littlewoods by Hasbro and which Littlewoods stocked, Littlewoods and Argos both priced at or around RRP on all of them. In Littlewoods' submission, therefore, it is nonsense to suggest that Littlewoods suddenly changed its policy to RRP pricing for the A/W 1999 catalogue. It had already done so for the S/S 1999 catalogue, long before the date when the OFT asserts the alleged agreement came into effect. Moreover, Argos' post-takeover policy is very evident. This accords with Mr. Duddy's evidence to the Tribunal. A comparison between the A/W 1998 and S/S 1999 catalogue prices charged by both Argos and Littlewoods shows that both retailers significantly raised prices. There was a high correlation between the price increases. Those increases demonstrate that both retailers had abandoned their earlier practice of undercutting. There was therefore, in Littlewoods' submission, no dramatic change in policy at the time of the respective A/W 1999 catalogues.

229. Littlewoods submits that this analysis is supported by Littlewoods' pricing of Action Man products in the S/S 1999 catalogue. A comparison of Littlewoods' and Argos' pricing of 12 Action Man products common to both retailers shows that Argos was cheaper in relation to three. In relation to the other nine products Littlewoods was cheaper by a negligible amount, namely 4 pence.

230. Significantly, in Littlewoods' submission, Littlewoods priced at RRP for the S/S 1999 catalogue in relation to all twelve common Action Man products. This was prior to the date on which the OFT alleges the price-fixing agreement came into force. Littlewoods submits that it is clear that the GUS takeover and other market considerations had already prompted Littlewoods' move to RRP pricing. Moreover, Littlewoods emphasises that there was already identical pricing in relation to nine of the twelve common Action Man products even prior to the date on which the alleged price-fixing agreement came into effect.

The Hasbro pricing initiative – October/November 1998

- Hasbro seeking legal advice

231. As to the Hasbro pricing initiative, Littlewoods first submits that it is clear from the evidence that Mr. McCulloch went to considerable lengths to obtain legal advice on the competition law implications of his proposed pricing initiative. External and internal advice was given. Mr. McCulloch was, in Littlewoods' submission, clearly sensitive to the legal implications of speaking to retailers about retail prices and anxious to comply with the law.

- Stockley Park presentation

232. Littlewoods observes that Hasbro's internal presentation of the 1999 Trading Terms on 23 October 1998 noted that the 1998 Trading Terms had increased profitability compared with 1997 but had not fully addressed the "bought-in" margin decline. The aim of the 1999 Trading Terms was therefore to increase bought-in margin and in particular to increase the profitability of core brands. To this end there would be a two-prong strategy. First, Hasbro would push up its list prices to squeeze margin, forcing retailers to sell at RRP's. Secondly, Hasbro would provide margin by offering both a rebate on Core Brands conditional on pricing at RRP's and a listing rebate conditional upon the retailer listing a minimum number of products from a range.

233. The core brands rebate was dropped by Hasbro following legal advice before being implemented. In Littlewoods' submission this shows that Mr. McCulloch and his team were anxious to ensure they acted lawfully.

The meeting at Littlewoods' office in late 1998 or early 1999

234. Littlewoods submits that the meeting between Littlewoods and Hasbro held in late 1998 or early 1999 is crucial to the OFT's case. This is the meeting at which senior managers of Littlewoods and Hasbro allegedly set up the cartel. The only evidence adduced by the OFT is that contained in Mr. Thomson's witness statement. Mr. Thomson does not purport to recollect clearly the alleged conversation between Mr. McMahon and Mr. McCulloch. The OFT have chosen not to call Mr. McCulloch, whose evidence in interview with the OFT

was that he rejected the suggestion that he had entered into any agreement on pricing with Mr. McMahon or anyone else at Littlewoods.

235. That meeting is likely in Littlewoods' submission to have taken place after 12 or 13 November 1998, on which date it was presented internally within Hasbro. In any event, the meeting with Littlewoods took place well after Littlewoods' prices for its S/S 1999 catalogue were finalised. The events of that meeting could not therefore have affected the content of the S/S 1999 catalogue; the OFT does not suggest otherwise.
236. As to the meeting itself, discussion focused on Hasbro's new listing rebates. There was, according to Littlewoods, no discussion of RRP pricing. The slides of the presentation at the meeting, by contrast with the internal Stockley Park presentation in October 1998, contain no reference to any increase in list prices. This was unsurprising given that Hasbro wished to present an attractive package of terms to Index.
237. Ian Thomson suggested in his evidence that Hasbro's plan to push its list prices up, forcing retailers to price at RRP, surfaced towards the end of the meeting when considering spreadsheets. According to Mr. Thomson, Mr. McMahon and Lesley Paisley expressed concern as to whether Action Man and Core Games could be priced at a certain price point so as to maintain profit margin. Their concern, according to Mr. Thomson, was as to how Hasbro could make other retailers do the same thing. Littlewoods submits that Mr. Thomson's evidence should be rejected as being manifestly inaccurate. In summary:
- (a) It conflicts with Mr. Burgess' convincing evidence that Littlewoods was not told that Hasbro was putting its list prices up;
 - (b) It is inconceivable that Mr. McMahon or Mrs. Paisley would have noticed by looking at the spreadsheets that the list prices had gone up. They did not operate at that level of detail;
 - (c) Meetings with Mr. McMahon focused on general issues of strategy;
 - (d) Hasbro substantially downplayed the list prices on the spreadsheets by stating, for example, "prices to be confirmed";
 - (e) List prices did not change dramatically. It was a matter of pence. The changes would not have leapt off the page;
 - (f) It conflicts with the direct evidence of Mr. McMahon to the Tribunal and Mr. McCulloch to the OFT;
 - (g) Mr. Thomson's recollection is extremely hazy.

238. Littlewoods submits that, even on Mr. Thomson's version of events, the conclusion of the agreement was dependent upon Argos buying into the plan, which was then to be communicated to Mr. McMahon. Mr. Thomson is unable to give any evidence that Mr. McCulloch spoke to Mr. McMahon to give the go-ahead for the alleged agreement. At its highest, therefore, Mr. Thomson's evidence shows no more than that the idea of an agreement on retail prices had been raised.

A/W 1999 catalogue

239. Littlewoods submits that the OFT's case is based upon inferences drawn from a comparison of Index's and Argos' S/S 1999 and A/W 1999 catalogues. The OFT claims that there was a dramatic difference in pricing of Action Man products and Core Games. In Littlewoods' submission, there was in fact no dramatic change in Index's pricing. Any differences are immaterial, being in each case an increase of four pence from 95p price points to 99p price points. In any event, there were reasons for Index's move to 99p price points, namely Littlewoods' policy, the industry trend of pricing at RRP's, and the GUS takeover of Argos. Contrary to the OFT's suggestion at the hearing that the A/W 1999 catalogue represented "an opportunity of a lifetime" to undercut Argos, given that Argos had priced at RRP's in its S/S 1999 catalogue, undercutting Argos would have meant sustaining greater losses than it already was on Action Man products and Core Games. Moreover, undercutting Argos would have been inconsistent with the advice Littlewoods had received from Management Horizons.

Late 1999/2000: The extension to other toys

240. Littlewoods notes that the OFT's case in this respect is as follows:

- (a) at the end of 1999 Hasbro decided to try to extend the agreement to other Hasbro toys;
- (b) a proposal to this effect was put to Littlewoods and Argos;
- (c) the reactions were positive, save for concern about undercutting;
- (d) the same process of discussions coordinated by Hasbro was then used on a wider range of products in Littlewoods' and Argos' A/W 2000 and S/S 2001 catalogues;

- (e) the agreement was thereby extended to the list of products contained in Mr. Thomson's email of 18 May 2000 to the Littlewoods buying team.

- Hasbro internal meeting in late 1999

241. Littlewoods submits that the Hasbro presentation document for the internal meeting in late 1999 is fully consistent with Hasbro's pre-A/W 1999 pricing initiative, namely raising list prices so as to force retailers to price at RRP and offering rebates based on retailers listing a minimum number of products within particular ranges. The aim was simply to extend the initiative to other products. There is no evidence in that document of a price-fixing agreement. This explains, in Littlewoods' submission, why retailers' prices on the products covered moved together in the A/W 2000 catalogues.

- Hasbro's proposal and Littlewoods' reaction

242. Littlewoods submits that the only evidence relied upon by the OFT is the statement of Mr. Thomson comprising unspecific recollections of conversations he had with Littlewoods buyers. He mentions just one conversation with one of Littlewoods' management team (Mrs. Paisley), but his allegation does not amount to evidence of an agreement or concerted practice. His allegation that he spoke to Mr. Burgess about the proposal is refuted by Mr. Burgess, who stated convincingly that he had no specific discussions with Mr. Thomson about extending product ranges towards RRPs. Mr. Thomson's evidence of conversations with Katherine Runciman is thin. He certainly does not allege that an understanding was reached. Likewise, he admits that conversations with Phil Riley were unspecific. Mr. Riley's evidence is that he gave no assurance that he would price at RRPs. Nor did he believe suppliers' assurances that other retailers would do so.

243. As for Mr. Thomson's reference to discussions he had with Alan Cowley, Littlewoods submits that Mr. Thomson accepts that nothing was agreed and that Mr. Cowley was not part of any agreement to fix prices.

244. It follows, in Littlewoods' submission, that the OFT's allegations in this regard are unproven and should be rejected.

- Ian Thomson's email of 18 May 2000

245. According to Littlewoods, Mr. Thomson's email of 18 May 2000 to Littlewoods buyers is relied upon heavily by the OFT as evidence of a price-fixing agreement. Littlewoods first submits that in Mr. Thomson's earlier internal email of that date he had asserted that both Argos and Littlewoods had agreed to move to certain price points in relation to various products. That was false: three of the items are products dealt with by Mr. Cowley who, on Mr. Thomson's own evidence, never made any commitment on price. This, and the fact that Mr. Thomson's later email to Littlewoods' buyers does not suggest that Littlewoods had already agreed to the prices shown in the email (although he stated that Argos had), shows that Mr. Thomson's representations to his colleagues in that email were disingenuous.

246. In Littlewoods' submission, the later email to Littlewoods in fact represented Mr. Thomson's unilateral attempts to persuade Littlewoods to go out at RRP's on the products contained in that email. This is supported by the facts that:

- (a) contrary to Mr. Thomson's claim to Littlewoods in the later email of 18 May 2000 that Argos had agreed to go out at RRP on all of the listed products, Argos in fact went out at cheaper prices on three of them. This supports the statements of Littlewoods' employees that they could not trust Hasbro's assurances as to Argos' prices;
- (b) the evidence of Neil Wilson was that there was no guarantee or formal agreement from Argos that it would go out at the prices suggested by Hasbro;
- (c) Mr. McCulloch saw Mr. Thomson's actions as unilateral;
- (d) As Mr. Thomson accepts, none of the Littlewoods buyers asked for, or (save for Lesley Paisley) responded to, the email sent by Mr. Thomson. None came back to complain that Argos had not stuck to the prices shown in that email. Littlewoods buyers were either surprised to receive it (Mrs. Paisley) or simply cannot even remember receiving it.

247. Littlewoods submits that, in any event, its buyers did not act on that email. As at 18 May 2000 pricing for the A/W 2000 catalogue was close to being finalised. There is no evidence that it changed its prices in light of it.

- The A/W 2000 catalogue

248. Littlewoods submits that despite the OFT's attempts to present the A/W 2000 catalogue in relation to 13 further products commonly stocked by Littlewoods and Argos as signalling a dramatic change in policy only explicable by the existence of an price-fixing agreement, there was no such dramatic change. This can be seen from an analysis of the pricing history of some of the products concerned. In relation to certain of these, Littlewoods had not stocked the product prior to A/W 2000; in relation to certain others, the price increased from a 95p price point to a 99p price point; and in relation to yet another, the price increased to match Argos' S/S 2000 catalogue price (in line with Littlewoods' policy not to undercut). Moreover, in Littlewoods' submission, Argos undercut RRP's on three of the products, showing that Mr. Thomson was wrong to have represented that Argos had committed to the prices mentioned in his email of 18 May 2000.

Generally: alleged discussions between Hasbro and Littlewoods

249. Littlewoods submits that discussions between supplier and buyer are common. Most suppliers try to persuade their customers to price at RRP, often by stating that competitors are likely to do so too. This information is often inaccurate. Littlewoods submits that the OFT must show that discussions went beyond this type of normal conversation and constituted an agreement to fix prices. It is striking that the OFT's evidence of communications between Hasbro and Littlewoods is unspecific, poorly recollected and to a significant degree hearsay.

- Discussions at management level

250. Littlewoods observes that it has already addressed the OFT's case concerning the alleged setting up of the arrangement in late 1998 or early 1999 between Mr. McMahon and Mr. McCulloch. The OFT has failed to prove its case.

251. In Littlewoods' submission, Mr. McMahon focussed in his strategic meetings with Mr. McCulloch on seeking more margin. Mr. McCulloch, in common with most retailers, suggested that Index went out at RRP's. Hasbro would, however, never actually know at what prices Index would go out.

252. The counterpart at Littlewoods of David Bottomley at Hasbro was Lesley Paisley. Littlewoods submits that there is no evidence that they had any discussions on retail prices. The furthest Mr. Bottomley's evidence goes is that he would suggest to retailers to price at RRPs. That is not unlawful. Significantly, Mr. Bottomley crossed out the sentence in his witness statement that said "I would ask them 'what do you think about maintaining retail prices?'" on the ground that he did not use, and would not have used, such wording.

253. This, in Littlewoods' submission, explains why all of Littlewoods' witnesses are adamant that neither Mr. McMahon nor Mrs. Paisley gave them any instruction to price at RRPs.

- Ian Thomson's discussions with Index buyers

254. Littlewoods submits that the OFT's allegations regarding discussions between Mr. Thomson and Index buyers are very vague. Mr. Thomson's recollection of discussions is very hazy and inconsistent. The OFT has failed to prove either that discussions went beyond lawfully persuading retailers to go out at RRP or that the buyers acted on the basis of Mr. Thomson's representations.

255. Littlewoods submits that Mr. Thomson accepts the following:

- (a) he never coerced buyers to go out at RRPs;
- (b) he never knew what Index's prices would be until the catalogue was published;
- (c) he cannot remember an Index buyer complaining about Argos not pricing at RRP;
- (d) Hasbro's policy was to select strong price points which were difficult for retailers to break;
- (e) retailers had little room for manoeuvre on price;
- (f) it would be difficult to price toys differently from the price shown on TV advertisements;
- (g) for certain products a market price would have been established well before the time of the alleged agreement;
- (h) Index buyers did not have authority to set prices themselves; and
- (i) Index and Argos would have gained confidence from each other's previous pricing strategies.

256. Turning to individual relationships, Littlewoods submits that the relationship between Mr. Thomson and Mr. Cowley is an important one for this case. Mr. Cowley would have known about any arrangement such as that alleged, not least because Mr. McMahon or Mrs. Paisley would have instructed him to cooperate with Mr. Thomson. Yet (a) Mrs. Paisley denies she instructed Mr. Cowley to do anything; and (b) Mr. Cowley dismissed the suggestion that he knew of a price-fixing agreement between Index and Argos as absolute rubbish.
257. For any arrangement to have worked Mr. Thomson would, in Littlewoods' submission, have needed Mr. Cowley's support, given his seniority in the Index buying team and his involvement with the Tweenies brand, which was an important part of the extension to the alleged agreement. He was also an uncompromising negotiator who, even on Mr. Thomson's evidence, did not take kindly to Hasbro's attempts to insist on Index going out at a certain price. It is therefore, according to Littlewoods, utterly improbable that the rest of the buyers would have been complicit in a price-fixing agreement with Mr. Thomson when it was obvious to them that Mr. Cowley was not.
258. As to Mr. Thomson's relationship with Alan Burgess, Littlewoods submits that Mr. Burgess did not give any credence to Mr. Thomson's assurance that Argos would go out at RRP's on Core Games and Action Man products in relation to the S/S 2000 catalogue. He simply did not believe that suppliers could offer any information as to the intentions of a competitor. Mr. Burgess is in any event clear that (i) he was never coerced by Mr. Thomson to go out at RRP's; and (ii) he never gave any commitment to Mr. Thomson that he would price at RRP's.
259. As to Mr. Thomson's relationship with Phil Riley, Littlewoods submits that the two had very limited discussions. Mr. Thomson's evidence was vague and speculative. Mr. Riley's evidence was clear. He would not have taken much notice of attempts to persuade him to price at RRP's. He would complain to the supplier if he had been told that a competitor would go out at RRP's and it transpired that the competitor did not do so, but this was only as a tactic to obtain more discount from that supplier rather than because the supplier had breached a commitment.

260. As to conversations Mr. Thomson says he had with Andrea Gornall as to the extension to the alleged agreement, Littlewoods submits that they simply did not happen – Ms. Gornall was away on maternity leave at the relevant time.

(3) THE OFT'S SUBMISSIONS

Nature of the evidence before the Tribunal

261. The OFT first draws attention to the fact that in cartel cases there is likely to be little documentary evidence. The evidence may be fragmentary or circumstantial. Such contemporaneous evidence as exists should in the OFT's submission be regarded as particularly strong and compelling.

262. The OFT relies on direct evidence of three Hasbro employees; documents taken from Hasbro, Littlewoods and Argos; admissions made by the appellants' witnesses; and the evidence of movement of prices from a situation of intense competition to one of almost complete parity of pricing. The denials by the appellants' witnesses that they were involved in any arrangements are in the OFT's submission unconvincing. Each had a strong motive for denying any involvement.

The evidence of Hasbro witnesses

263. The OFT submits that none of the three Hasbro witnesses had any motive to misrepresent the situation or were otherwise beholden to the OFT. In the case of Messrs Bottomley and Wilson virtually no challenge was made to their evidence, which ought therefore to be accepted in full. Mr. Thomson, whilst challenged, was in the OFT's submission obviously a truthful witness who carefully and in some detail was able to recollect and recount events.

- 1998 Hasbro pricing initiative

264. The OFT submits that all witnesses testified to the fact that the retailers had for some years been complaining about the level of margin on Hasbro products. As a result, in 1998 Hasbro devised a “pricing initiative” in respect of the Action Man range and Core Games. This involved increasing the list price to retailers, who were then given RRP’s on those products at 99p price points. There was also a “listings initiative.” Rebates were available if a certain percentage of the products were carried.

- Presentation to Littlewoods

265. According to the OFT, at the meeting at Littlewoods’ offices in late 1998, at which the 1999 business plan was presented, Hasbro pointed out the importance of adhering to the price points in the plan in order to make the same profit as the previous year. Mr. McMahon admits he expressed concern as to whether others (especially Argos) would do likewise. Others did so too. Littlewoods feared losing market share. Mr. McCulloch (who Mr. McMahon admitted would have discussed RRP’s at the meeting) intimated to Mr. McMahon that he had discussed or had been having discussions with Littlewoods’ major opposition, who had expressed similar concerns. The new initiative needed the support of both parties for it to work. If Index would go along with it, Mr. McCulloch was confident Argos would too. Mr. McMahon said he would play ball but warned of the consequences of Argos reneging. Mr. Burgess, who was also present, could not confirm or deny the substance of the conversation.

266. The OFT submits that Mr. Thomson was informed shortly after that meeting that Argos had agreed to adhere to RRP’s in respect of Action Man products and Core Games. He passed on that information to Mr. Burgess, who acknowledged it. Mr. Burgess admits that Mr. Thomson had advised him that Argos would be pricing at Hasbro’s RRP’s in relation to Action Man and Core Games.

- Presentation to Argos

267. The OFT submits that the evidence as regards the presentation made by Hasbro to Argos is less specific but that it is clear that Argos knew what was going on and intended to derive advantage from the situation. Hasbro was in contact with Argos at the same time as the

meeting Hasbro representatives attended at Littlewoods' offices. Argos agreed to Hasbro's pricing initiative. Maria Thompson's evidence refers to a meeting held at Argos' offices with Hasbro. It appears that the same pricing initiative was presented. Sue Porritt reported back to Mrs. Thompson that Mr. McCulloch had proposed that Hasbro would pay rebates if Argos agreed to price at RRPs.

268. In the OFT's submission, Mr. Bottomley's unchallenged evidence is that he came to understand, as a result of conversations between Mike Brighty and Sue Porritt, that Argos had indicated that they too would go out at Hasbro's RRPs. Mr. Wilson passed on that information to Mr. Thomson, with whom he had internal meetings to discuss Argos' and Index's pricing intentions. There was an understanding between Hasbro and Argos, and Hasbro and Littlewoods, that pricing would be at or around RRPs due to the obvious benefit to everyone in the industry. Argos was sympathetic to Hasbro's pricing and listings initiative and was actively involved in pricing discussions.

269. In the OFT's submission, Mr. Wilson's almost wholly unchallenged evidence is that Argos was fully aware of the involvement of other retailers in Hasbro's pricing initiative. Argos would, furthermore, contact him if another retailer appeared to be retailing at a lower price to see if Hasbro could get that retailer to go back to RRPs. Mr. Needham of Argos did not deny that such conversations took place.

The appellants' case

270. The OFT submits that whilst the appellants' case is that they made their own decisions as to the price of items in their catalogues and did not take seriously Hasbro's stories about competitors pricing at RRPs, the evidence makes clear that the contacts and arrangements between the parties went much further than this.

- Discussion about retail prices

271. The importance of retailers, especially catalogue retailers, never discussing pricing with their suppliers cannot in the OFT's submission be overestimated. Such discussion is highly unusual and therefore suspicious, given both that the contents of the catalogue (including prices) are top secret – accepted by Index witnesses – and that it is very difficult for

catalogue retailers to adjust prices after publication. Some 15 million households have the Argos catalogue and 7 million the Index catalogue. Direct price comparisons can be made. The prices in the catalogue are therefore, in the OFT's submission, crucial to both Argos and Index. That information is invaluable to Hasbro.

272. According to the OFT, it was conceded that Hasbro had in the past met complaints about low margins with the suggestion that the retailer should raise its prices. The 1999 pricing initiative actually involved raising cost prices to force the retailer to price at RRP's to make a margin. Mr. Burgess' complaint that he was deceived by Hasbro in this regard is in the OFT's submission untrue: the prices were attached to the written business report, together with the prices for 1997 and 1998. He claims Index would have broken off discussions had it known, and yet – despite the fact that it must have been aware – it did not break off any discussions. The OFT submits that Hasbro's pricing initiative placed Index in a dilemma: if it wanted to continue to list these must-have items Index would have to raise its retail prices or face increased losses. It obviously occurred to Index what was involved, and instead of dropping these items (which Index admits had advantages even if sold at a loss) Index decided to go along with the plan. This decision was in the OFT's submission clearly the subject of discussion with Hasbro.

273. According to the OFT, this version of events is supported by the documentary evidence. An internal Hasbro paper prepared for the meeting with Argos on 17 February 1999 refers to dialogue having been opened to stabilise RRP's. The OFT submits that whilst Mr. Duddy denies that RRP's were discussed at that meeting, it is highly probable that the new Hasbro initiatives – including the new retail price structure for the Action Man range and Core Games, the crux of which was RRP's – were discussed. Sue Porritt's internal debriefing email to buyers of 19 February 1999 mentioned that Argos had indicated at that meeting that it would react heavily to undercutting. This is consistent with the evidence of other witnesses. Argos' and Littlewoods' witnesses say that by this they meant they would look to Hasbro for support by way of a cost price reduction. Yet, in the OFT's submission, the concept of "undercutting" implies some price under discussion that could be undercut by another retailer. Furthermore, Hasbro had never given Argos or Littlewoods a retrospective cost price reduction. Given its past experience of never having been paid "support" of any kind by Hasbro, the importance of the discussion was not the support, which it may have only vaguely expected, but rather that Argos would react heavily, i.e. cut

prices, if its catalogue prices were undercut. In effect, Hasbro was warned that Argos would depend on Hasbro's efforts to ensure Argos did not have to cut its prices during the season.

274. The OFT submits that it is irrelevant that Argos' employees never believed Hasbro could get retailers to go out at fixed prices. Price-fixing may not be enforceable through the courts but that does not stop companies trying to make such agreements stick.

275. According to the OFT, there is much other evidence supporting its submissions above relating to the meeting of 17 February 1999. In summary:

- (a) Maria Thompson spoke to Mr. McCulloch about poor margin even after 17 February 1999;
- (b) Neil Wilson's contact report, following another meeting with Argos to discuss Hasbro's pricing initiative on 28 March 1999 again suggests that Argos would react to undercutting;
- (c) The Core Brand rebate was agreed at about the same time;
- (d) Both Mrs. Thompson and Mr. Duddy confirm in their witness statements that Argos informed Hasbro that it would stick to its catalogue prices unless it was undercut;
- (e) Mr. Needham of Argos in his evidence explained that he was concerned Hasbro would use information from Argos that it was raising its prices to its (Hasbro's), or competitors', advantage. He could only have had such concerns if he had imparted to Hasbro the actual prices that were to be charged by Argos and/or that Argos would price at RRP's; any other information would not have been confidential or of concern. Moreover, only specific prices could be undercut.

276. According to the OFT, Mr. Thomson says that Littlewoods responded in the same way to Hasbro's suggestions that it price at Hasbro's RRP's. Mr. Thomson was clear that Mr. McMahon had agreed to go along with Hasbro's plan.

Publication of the A/W 1999 catalogues

277. The OFT submits that the similarity of prices on Action Man products and Core Games is striking, given the extended list of common products and the exact equivalence of prices except for one product. Moreover, this stands in contrast to the complete dissimilarity of pricing on the other range of toys (which became equal one year later) and the total

divergence from RRP's on those items. The appellants' explanation for parity of pricing is inherently implausible, especially in light of the situation of other toys. If there was anything to the appellants' argument, they would have shown the Tribunal that Argos' new policy of market pricing applied across the board, not just to Hasbro toys.

Argos' so-called change of policy

278. The OFT submits that the nature of catalogue retailing is that prices must be established at a relatively early stage. Pricing must be as keen as possible given the opportunity for high street retailers to undercut if catalogue retailers have not adopted keenly competitive pricing. As to Hasbro's importance, it is one of the leading toy and games suppliers. Many of their products are "must-have" items. No retailer can afford to drop them. Low margins have compensating advantages, bringing customers into the store. There has been fierce price competition in relation to these products.
279. Argos and Index are, in the OFT's submission, price cutters. In the field of catalogue retailing price is everything; loyalty is nothing. Even a difference of 10 pence would make a difference. Prior to 1999 Argos was usually the winner. Its prices were generally lower. Its policy was to be seen as having the lowest prices, despite Hasbro's frequent complaints. The result of this policy was that Argos established itself as the number one toy retailer in the UK. It was the market leader and price setter.
280. The OFT notes Argos' claim that the takeover was the start of a new policy. It is, however, in the OFT's submission also important to consider the outsider's impression of the new policy. Mr. Duddy said that one of the new strategies for improving new margins was market pricing, which meant pricing competitively bearing in mind the prices charged by major competitors. He conceded, contrary to Argos' earlier case, that market pricing involved both increasing and decreasing prices rather than a general policy of increasing prices. The aim was to remain competitive rather than price at RRP. This was confirmed by Mrs. Thompson and Mr. Needham. The significance, in the OFT's submission, is that Argos does not now consider that the change of policy by itself could have produced the effect on prices of Action Man products, Core Games and the other toys which the OFT found to be produced by agreement or concerted practice.

- Index's perception

281. The OFT submits that contrary to Index's claims that they had read in, or deduced from, the press that Argos' new policy was to price at RRP, there could not have been any such newspaper report, and none was produced. In fact, buyers of products other than toys say

Littlewoods had decided to price aggressively for the A/W 2000 catalogue in order to undercut Argos. Furthermore, on cross-examination Littlewoods' witnesses accepted that they did not perceive Argos' change in policy to be a move to RRP pricing. Mr. McMahon made clear that all he saw was Argos' desire to improve margins, which could be achieved in different ways.

- Reason for original mischaracterisation of policy

282. The OFT submits that the coincidence of RRP pricing cannot be explained by the existence of a new policy to remain competitive at all times. The only other explanation is that there was the agreement or concerted practice found to exist by the OFT. The OFT submits that contrary to Argos' claim that it implemented its new policy in time for the S/S 1999 catalogue (i.e. that RRP pricing began before A/W 1999):

- (a) there is no parity of pricing in the Argos and Littlewoods S/S 1999 catalogues unless (contrary to Argos' earlier submissions) one treats 95p and 99p price points as the same;
- (b) the contention that 95p and 99p price points are the same sits uneasily with the evidence that 99p price points were strong natural price points;
- (c) even if 95p and 99p price points are treated as the same, there were still differences between Argos' prices and RRPs in its S/S 1999 catalogue: only seven of the twelve Action Man products are priced at RRPs. Argos is cheaper than Littlewoods on three of these products. Of the three "other" toys, all are priced by Argos at RRPs exactly while two are priced considerably more cheaply by Littlewoods. It therefore, in the OFT's submission, requires a leap of imagination to understand why a market pricing policy should have led straight to pricing at RRPs;
- (d) Even if the outcome for S/S 1999 was simply the result of Argos following a new policy of market pricing, that does not explain what happened in the A/W 1999 catalogues. One would expect to see in that catalogue across the board RRPs from Argos and price-cutting by Littlewoods to take advantage of this Argos trend and create a dramatic impact in the all-important A/W catalogue. Instead one sees complete parity on 31 of 32 products in the Action Man and Core Games range, Argos abandoning years of competitiveness and its reputation as the lowest in the market, at least in relation to those products, but inexplicably not doing likewise in relation to the additional toys which that later became part of the collusion;
- (e) The policy towards the additional toys of not pricing at RRPs continued in its S/S 2000 catalogue – it undercut RRPs by more than 4p on three out of the five additional toys listed (two out of four in

common with Littlewoods) whilst maintaining RRP's in respect of 25 out of the 26 commonly listed Action Man products and Core Games;

- (f) Following implementation of the new arrangements for A/W 2000 there was suddenly a marked similarity of pricing on both Action Man/Core Games and additional toys – of 16 common additional toy products, 14 were priced identically by Argos and Littlewoods.

283. The OFT submits that it has always said it does not know precisely when the agreements or concerted practices came into existence. If 95p and 99p price points are the same, it may well be that the parties were starting to move in the direction of knowing collusion earlier than previously thought. In any event, something occurred in late 1998 or early 1999 which led to a dramatic change in the 1999 pricing patterns of the relevant toys in the respective Index and Argos catalogues, as demonstrated by the table at paragraph 56 of the Decision. The only explanation the appellants' witnesses could give for complete parity of pricing on the Action Man range and Core Games in the A/W 1999 catalogues was that it was coincidence or a calculated risk – despite Mr. Cowley's confirmation that his natural instinct would have been to undercut Argos on price without an assurance that Argos would go out at RRP's and Mr. Riley's confirmation along similar lines.

Further contact between the parties

284. The OFT submits that there is further evidence of contacts that could not have taken place unless they were part of an ongoing relationship of price collusion, especially bearing in mind the unique features of catalogue retailing. One example is Mr. Thomson's evidence that after the A/W 1999 catalogues had appeared and showed the plan to be working, the emphasis in discussions between Hasbro and each of the appellants on price monitoring thereafter was to ensure that other customers of Hasbro would fall into line.

Exchange over Tweenies doll in autumn 1999

285. An exchange between Mr. Thomson and Mr. Cowley concerning the price of a Tweenies doll for the S/S 2000 catalogue shows, in the OFT's submission, a high degree of cooperation and concerted action between Littlewoods and Hasbro. Mr. Cowley was considering going out at £12.99. Mr. Thomson assured him it was safe to price at £14.99 in light of Argos' intentions. Mr. Cowley was unconvinced. Mr. Thomson told him to speak

to Mr. McMahon. The latter told Mr. Cowley that he had discussed prices with Hasbro. Mr. McMahon recommended going along with the £14.99 price point. In cross-examination Mr. Cowley confirmed his discussions with Mr. McMahon and (indirectly) with Hasbro. Ultimately, both Argos and Littlewoods priced the Tweenies doll at £14.99 in their S/S 2000 catalogues.

Extending the pricing initiative beyond Action Man and Core Games

286. The OFT submits that after the pricing initiative's initial success, it was extended to other products. Mr. Thomson and Mr. Burgess began discussing ways of expanding the range of products covered by the initiative. Indeed, Mr. Burgess confirmed that Mr. Thomson had encouraged him to go out at RRP's on more products. Mr. Wilson and Mr. Thomson came up with a range of products and then went to speak to their respective accounts about it. This would involve speaking to the various buyers responsible for the products concerned. Mr. Burgess was worried about being undermined by Argos but Mr. Thomson explained that Mr. Wilson was similarly speaking to Argos to gain agreement on the same proposal. The OFT submits that Mr. Burgess no doubt knew that Mr. Thomson was talking to Mr. Wilson and would relay to Mr. Burgess the outcome of Mr. Wilson's conversations with Argos. Mr. Burgess said he would discuss the proposal with the other buyers at Index to give them the background.

287. According to the OFT, Mr. Thomson spoke to Ms. Runciman, who at that stage was responsible at Index for buying the Girls, Get Set and Designs and Draw products. She appeared to have been briefed by Mr. Burgess or Mrs. Paisley but was sceptical of extracting agreement from Argos. Mr. Thomson also spoke to Mr. Cowley, who was aggressive when discussing margin issues. He would give no commitments as to the pricing of Tweenies, for which he was responsible, although Mr. Thomson had hoped that Mr. Cowley would speak to Mr. Burgess for confirmation of the success of the previous arrangements. Discussions between Mr. Thomson and Mr. Riley were limited to Mr. Thomson confirming that the pricing initiative was working and seeking Mr. Riley's agreement that he (Mr. Riley) would continue with the strategy. Mr. Thomson assured Mr. Riley that Hasbro still had agreement with Argos.

288. The OFT submits that an internal meeting was held at Hasbro towards the end of 1999 at which the trading strategy for 2000 was discussed. A presentation document initialled by Mike McCulloch noted both the success of the arrangements to date and Hasbro's desire to increase profitability on its products. One of the strategies set out in that presentation was to build improved bought-in margin across Hasbro's portfolio. This involved extending the pricing initiative to other key Hasbro brands, which fell into three broad categories: "core boys", "games and creative" and "growth drivers". Mr. Wilson wished to give retailers more incentive to stock the additional brands. This would be done through extending the pricing initiative to those brands.
289. According to the OFT, Argos and Littlewoods agreed to the proposal to extend the pricing initiative to the additional brands, although they were both concerned about undercutting. As to Argos, a meeting was held with Hasbro on 9 December 1999. Mr. Wilson, whose evidence was not seriously challenged, recalls Sue Porritt being very positive about the extension of the pricing initiative to additional products. Price stability (i.e. retailers going out at Hasbro's RRP) across key brands was seen to be crucial to the success of the initiative. Mr. Wilson says he then put together a proposal for Argos with incentives to stock key products. By March 2000 Argos had chosen which of the key products it was going to list in the A/W 2000 catalogue. Mr. Wilson received an indication from Argos that, all things being equal, it would adopt RRP for certain of the products it was listing. Such information was exchanged by Mr. Wilson with other account managers at Hasbro, who had received similar information from their clients. Mr. Wilson states that he then informed Argos that the price for a particular product was likely or unlikely to be at RRP.
290. As to Littlewoods, its reaction was, in the OFT's submission, similar to that of Argos: positive but concerned about undercutting. The same process of discussions coordinated by Hasbro was used on the wider range of products in the A/W 2000 and S/S 2001 catalogues. The OFT points to an email sent on 4 May 2000 by Mr. Thomson to Karen Sobers and Ms. Runciman of Littlewoods stating that the Gardens Galore product had not been selected by the "major opposition", by which (they knew) he meant Argos, and so it would be an excellent margin opportunity. That Argos had not selected it for A/W 2000 was confirmed in a further email that same month. Littlewoods' A/W 2000 catalogue duly took advantage, listing the item at £5 above RRP.

The emails of May 2000

291. The OFT highlights the emails sent within Hasbro and to Littlewoods at the time that Argos and Littlewoods were finalising their A/W 2000 catalogues. On 18 May 2000 a joint email was sent by Messrs Thomson and Wilson to other members of the Hasbro sales team explaining the then current position and setting out the price points for other products which Argos and Littlewoods had indicated they would follow. Included in that email were the words “It goes without saying that Action Man and Games prices will be maintained as per earlier agreements”. The email indicated that “this information should be translated to other accounts”. Messrs. Wilson and Thomson stated in that email that they were confident that Argos and Littlewoods would “play ball”.
292. The OFT notes that in his witness statement, Mr. Wilson stated that he and Mr. Thomson had received indications from Argos and Littlewoods respectively that they were likely to adopt the RRP’s for the products referred to in that email. The purpose of that email was to gauge the reaction of managers of other accounts.
293. The OFT then notes that, later the same day, Mr. Thomson sent an email to the buying team at Littlewoods – Mrs. Paisley, Messrs Burgess, Cowley and Riley, and Ms. Runciman – with almost the same list of products and prices. That email referred to Argos having committed to the prices shown on the list. It also mentioned that “Games and Action Man” prices would continue to be adhered to.
294. The OFT notes that the later email was marked “Re: Urgent – Pricing Initiative”. The OFT submits that the reason for this urgency must have been the impending final dates for pricing the products in the A/W 2000 catalogue. The OFT further submits that it is clear from these two emails that the agreement or understanding to adhere to RRP’s was extended in the respective A/W 2000 catalogues to cover at least the toys and games referred to in the latter email. A copy of the email from Mr. Thomson to buyers at Littlewoods was found at Littlewoods’ offices during the course of the OFT’s investigation. Mr. Burgess had printed the email. Some of the prices had been ticked. Mr. Burgess in evidence said he did not remember the email but that it looked as if it had been ticked by himself or his assistant, presumably checking it against Littlewoods’ own prices. In the OFT’s

submission, the only reason for that would have been to check that Argos and Littlewoods were going out at the same prices in line with the arrangements between them.

295. The OFT also notes that Mrs. Paisley remembered being surprised to have received the email, and yet did not speak about it to any of her colleagues. The OFT submits that such a lack of response to her colleagues or Hasbro could only be explained by the fact that they were not surprised by the contents of the email – which was consistent with arrangements already in place between Index, Hasbro and Argos – but only by the fact that it had been reduced to writing. In any event, Mrs. Paisley’s version of events had changed since the interview she had originally given to the OFT, in which she stated that the email sent to her and other Littlewoods buyers on 18 May 2000 by Mr. Thomson was not improper. The OFT submits that her evidence was unreliable in that she sought to embellish events and create a misleading impression.

296. As to Mr. Cowley, the OFT notes that he said in his witness statement that he did not attach importance to the email, but in cross-examination said that provision of such information was surprising and most unusual. However, he did not discuss it with his colleagues or raise it with Hasbro. The OFT submits that such a lack of response could only be explained by the fact that he was not surprised by the contents of the email – which was consistent with arrangements already in place between Index, Hasbro and Argos – but only by the fact that it had been reduced to writing. Mr. Cowley also confirmed in cross-examination that he understood the email to contain the prices Hasbro understood Argos to be going out at and that Hasbro had told him and colleagues these prices so as to persuade Littlewoods to follow suit. The OFT submits that Littlewoods did, in fact, go out in respect of 15 of the 17 listed products at the prices indicated in the email (and one of the remaining two products at the price later communicated by Argos to Hasbro). Argos did in fact charge the prices indicated in the email sent to Littlewoods for 13 of the 17 listed products (and one of the remaining products at a price later separately communicated by Argos to Hasbro).

297. As to Ms. Runciman and Mr. Riley, the OFT notes that they do not remember receiving the email at all.

298. The email sent to buyers at Littlewoods was copied to Mr. Brighty, a Sales Director at Hasbro, who replied that it was a great initiative but that it was highly illegal. He advised Mr. Thomson to contact Mrs. Paisley and tell her to “trash” the email. When Mr. Thomson contacted Mrs. Paisley, she said she would destroy it. No email to her was found at Littlewoods, although one to Mr. Burgess was found (see above). In the OFT’s submission, the other recipients of that email presumably destroyed their copies.
299. The OFT further notes that following an indication from Mr. Needham of Argos that Argos would not be pricing one particular product listed in that email, Interactive Pikachu, at the RRP, Mr. Wilson emailed Messrs Thomson and Brighty on 25 May 2000 to inform them of the price at which Argos would in fact price that product in its A/W 2000 catalogue. In cross-examination Mr. Needham accepted that he had indeed communicated that information to Mr. Wilson and that he could have expected that Hasbro would pass on that information to other retailers. Mr. Wilson in his evidence explained that he expected Mr. Thomson to contact Index to inform them that the market price for that product was likely to be less than RRP. Mr. Thomson then contacted Mr. Burgess to inform him of the issue. The OFT submits that the price at which both Argos and Littlewoods arrived, namely £23.75, could only have been arrived at by communication through Hasbro: this was a non-natural price point below the RRP.

A/W 2000 catalogues

300. The OFT submits that the respective A/W 2000 catalogues, published in July 2000, show the effects of the arrangements referred to above. Littlewoods priced just three out of the seventeen additional products at a price different from RRP: Interactive Pikachu, Gardens Galore (both referred to above) and Super Sticker Factory, the last of which was priced below the RRP but at exactly the same price as Argos. This was either a complete coincidence or, in the OFT’s submission more likely, an indication that Argos and Littlewoods both followed the agreement recorded in Mr. Thomson’s email of 18 May 2000 to Littlewoods. Argos, for its part, charged the prices listed in that email in relation to thirteen of the seventeen products. The four exceptions were Interactive Pikachu (referred to above); Pokeball Blaster (where Argos priced just four pence below its RRP, i.e. for practical purposes at its RRP), Transforming Team Truck and Rally Race Track (where in both cases the price was £1 below RRP). In other words, there were just two genuine

exceptions out of seventeen products. The OFT submits that it has never contended that the arrangements were 100% effective. In the overwhelming majority of cases the object of the agreement – to agree prices – succeeded.

S/S 2001 catalogues

301. The OFT submits that the extended arrangements continued in relation to the S/S 2001 catalogues; as the arrangements were seen to be working, there was less discussion on prices.

- The emails of November 2000 and December 2000

302. The OFT points to an urgent email exchange in November and early December 2000 in relation to the Tweenies plush doll. Mr. Thomson contacted Mr. Cowley at Littlewoods on 16 November 2000 to inform him of a reduction in the RRP of Tweenie plush dolls. Mr. Cowley was very angry at this news. Mr. Thomson was then informed on 29 November 2000 by Henry Foulds, Hasbro's Brand Manager in the marketing department, that the RRP would in fact be reduced again. Mr. Thomson replied in an internal email the following day, indicating his concern that Argos and Littlewoods had already gone to print on their S/S 2001 catalogues and that, if so, it was not possible to reduce the price. It transpired, however, that Argos had managed to re-price that product. Mr. Thomson contacted Mr. Cowley later on 30 November 2000 about this further reduction. The reaction was explosive, principally because Mr. Cowley was under the impression Littlewoods had already gone to print. It in fact transpired that the change could be effected, but Mr. Cowley charged the cost of the delay - £4,000 – to Hasbro. The OFT submits that this exchange is a clear example of the parties' cooperation on price.

- Prices

303. The OFT points out that, in Argos' and Littlewoods' S/S 2001 catalogues, all eight common Core Games and thirteen out of fourteen common Action Man products were priced identically. Of the additional toys to which Hasbro's pricing initiative was extended, three common products were listed, all at the same price. The two Tweenies doll products discussed in the emails of November and December 2000 were priced identically.

A/W 2001 catalogues

304. The OFT submits that discussions concerning the Ferris Wheel and Action Man dinghy constitute further examples of communication of confidential price information between Hasbro on the one hand and each of Argos and Littlewoods on the other.
305. The OFT points out that on 15 May 2001, at which time the prices of Argos' and Littlewoods' A/W 2001 catalogues were being finalised, the OFT visited Hasbro's premises. After that visit, Hasbro's account managers were told by their management to cease discussing any form of retail price maintenance with their respective accounts. Hasbro did cease to discuss such pricing matters despite Argos' continued complaints about undercutting by other retailers.

Monitoring of the arrangements

306. The OFT submits that each of the parties to the arrangements were careful to monitor the conduct of the other parties and competing retailers to ensure that the arrangements were successful in fixing prices. The consequences of Littlewoods' pricing being out of line were spelt out by Mr. Cowley in his email to Mr. Thomson on 28 December 2000 in relation to the Tweenies plush dolls incident, referred to above. As Mr. Thomson states in his evidence, Hasbro, for its part, conducted its own monitoring to detect undercutting by retailers. Mr. Wilson's witness statement notes that Argos, in particular through Mr. Needham and Vanessa Clarkson, similarly monitored the arrangements by seeking to make Hasbro aware of undercutting by other retailers. Further evidence of Argos' monitoring can in the OFT's submission be found in an internal email of 22 May 2001 sent by David Snow of Hasbro shortly after the OFT's first visit to Hasbro. That email reported to Charles Cooper a conversation Mr. Snow had had with Jacqui Wray of Argos.
307. The OFT points out Hasbro would speak to its respective contacts at the different retailers if it became aware of possible undercutting, citing statements made by both of Messrs Wilson and Thomson. It also notes that Argos and Littlewoods would often inform Hasbro if they intended to reduce the price of a Hasbro product during a catalogue season.

Conclusion

308. The OFT submits, in conclusion, that the evidence of the Hasbro employees clearly establishes the OFT's case. The documents provide contemporaneous corroboration for the witnesses' version of events. There is clear evidence that by their various statements of intention, Argos and Littlewoods eliminated or at the very least substantially reduced uncertainty as to the conduct on the market to be expected on their parts.

VIII OVERVIEW OF THE EVIDENCE

309. As stated at the outset of this judgment, we consider that the OFT has duly proved the agreements or concerted practices set out in the Decision. In this section we set out certain general observations on the evidence and on our findings. In the next sections we set out our findings on background matters, followed by a chronological survey of the relevant evidence. In the final part of this judgment we set out our findings against Argos and Littlewoods respectively, and deal with their remaining submissions.

The evidence

310. As pointed out in the Tribunal's recent judgment in *JJB and Allsports v OFT* [2004] CAT 17, at paragraphs 284 to 285, the evidence on an appeal to the Tribunal is likely to be more detailed and extensive than the evidence that was before the OFT at the time of the adoption of the Decision. Since this is an appeal "on the merits" under Schedule 8, paragraph 3 (1) of the Act, the Tribunal's approach is to determine the appeal on the basis of all the material now before us.

311. The evidence in the present case comprises (i) contemporary documents; (ii) witness evidence; and (iii) the surrounding economic and market context, including the pattern of pricing in the relevant catalogues both before and during the alleged infringements. We think that it is essential to look at the evidence as a whole. Even if, for example, particular documents or particular pricing patterns may appear inconclusive standing alone, nonetheless in our judgment the overall picture convincingly establishes the OFT's case.

Documents

312. We give weight to contemporaneous documents unless there is a good reason not to do so. In the present case what is essentially alleged is a series of verbal agreements or concerted practices. There is evidence that Hasbro employees, at least, thought it better not to put anything in writing (e.g. Mr. Brighty's email of 19 May 2000, Mr. Wilson's interview with the OFT). In those circumstances one would not expect to find comprehensive documentary proof of what is alleged. In cases such as the present the documentary evidence is likely to be sparse, incomplete and perhaps elliptically expressed.
313. However, in the present case, for the reasons we give below, the Hasbro emails of 18 and 19 May 2000, particularly the email to Littlewoods of 18 May 2000, provide solid corroboration of the conclusion reached by the OFT in the Decision. The same is true, to a greater or lesser extent, of Sue Porritt's email to the Argos toys team of 19 February 1999, Mr. Wilson's contact reports of 29 March 1999 and 9 December 1999, Mr. Thomson's email to Littlewoods of 4 May 2000, Mr. Wilson's email about Interactive Pikachu of 25 May 2000, Mr. Cowley's email to Mr. Thomson about Tweenies of 28 December 2000 and Mr. Snow's email to Mr. Cooper of 23 February 2001.
314. In general, we did not find the explanations put forward by Argos or Littlewoods sufficiently convincing to rebut the inferences which the OFT have sought to draw from the documents in question. Even if certain of the OFT's documents are in our judgment inconclusive, such as Mr. Richards' letter to Mr. Duddy of 18 March 1999, we have seen no document which is, on its face, inconsistent with the OFT's case.
315. Argos produced certain general policy documents dating from late 1998 and early 1999 about "market pricing". Littlewoods produced, without any supporting evidence to explain its relevance, a copy of a Strategic Review prepared by outside consultants called Management Horizons in 1998 which had apparently been found after the Decision had been taken. None of those documents appeared to us to deal with the particular pricing decisions with which this case is concerned. As shown below, we do not consider that either Argos' documents on market pricing, or Littlewoods' Strategic Review, throw in doubt the OFT's conclusions. Neither appellant produced any other internal document throwing light on how they reached the pricing decisions with which this case is concerned.

The Hasbro witnesses

316. As to the witness evidence, we heard first the evidence of three employees or former employees of Hasbro, Mr. Bottomley (Sales Director) Mr. Wilson (Argos Account Manager) and Mr. Thomson (Littlewoods Account Manger). The evidence of Mr. Bottomley and Mr. Wilson was not challenged to a material extent. Neither witness works any longer for Hasbro, and we can see no reason why their evidence should not reflect, truthfully and accurately, the facts as they saw them. We accept the evidence of Mr. Bottomley and Mr. Wilson.
317. Mr. Thomson prepared his witness statement in consultation with his own advisors without OFT involvement. He was cross examined at length by Littlewoods and, as to whether price increases occurred in S/S 1999 or A/W 1999, by Argos. Littlewoods submits that Mr. Thomson's evidence was in various respects flawed and inaccurate, and that his recollection of key events was incomplete and hazy. We were invited, in particular, to reject Mr. Thomson's evidence as to what was said at the Liverpool meeting with Littlewoods; to treat Mr. Thomson's email to Littlewoods of 18 May 2000 as nothing more than an attempt on his part to persuade Littlewoods to charge RRP's for the products in question; and to treat Mr. Thomson's evidence of his discussions with Littlewoods' buyers such as Alan Burgess as vague and inconclusive. Argos similarly submitted that Mr. Thomson's evidence was inaccurate, or highly qualified, and did not support the OFT's case.
318. We have had the advantage of seeing Mr. Thomson in the witness box. We accept, on the documents before us, that Mr. Thomson apparently overlooked the fact that on the Action Man and Core Games ranges the first move by both Argos and Littlewoods to RRP's was in the S/S 1999 catalogues, rather than the A/W 1999 catalogues. A number of the Littlewoods' witnesses with whom Mr. Thomson dealt did not pick this up either, since it is not mentioned in the statements of Mrs. Paisley, Mr. Burgess, Mr. Cowley, Mr. Riley and Mrs. Runciman prepared in July 2002. Mr. McMahon's statement of 4 July 2002 placed the relevant pricing decision in "Autumn 1999", and it was not until after the present Decision was taken, and some eighteen months after the first rule 14 notice, that he corrected that to "Autumn 1998" in his second witness statement of 29 January 2004.

319. We deal in detail below with the fact that the first move to RRPs was apparently made in S/S 1999, and we conclude that that does not undermine the OFT's case that relevant agreements or concerted practices were in place from A/W 1999 onwards. As to the fact that Mr. Thomson had overlooked a move to RRPs in the S/S 1999 catalogue, one explanation for that may lie in the fact that the S/S catalogue is comparatively unimportant for toys, since 70-80% of sales are made from the A/W catalogue in the period leading up to Christmas. In any event, we do not accept that the factual error in relation to the S/S 1999 catalogue undermines the credibility of Mr. Thomson's evidence as a whole.
320. In our judgment, Mr. Thomson was a truthful witness, who gave evidence honestly as to the facts as he saw them. Where his recollection was imprecise, he told us so, but on the essential elements we find that Mr. Thomson's recollection was reliable. In addition, his evidence is broadly corroborated by the unchallenged evidence of Mr. Bottomley and Mr. Wilson and is, in our view, consistent with the documents. In our judgment most of the Littlewoods' evidence was not directly contrary to Mr. Thomson's evidence, albeit that there were some differences of emphasis. On the one issue where there was a direct conflict, as to what Mr. McCulloch and Mr. McMahon said at the Liverpool meeting, we prefer Mr. Thomson's evidence to Mr. McMahon's evidence, for the reasons we give later in this judgment.
321. In our judgment, each of the three Hasbro witnesses, Mr. Bottomley, Mr. Wilson and Mr. Thomson, genuinely and honestly believed that there had come into being, with each of Argos and Littlewoods, verbal agreements to the effect that each of those companies would charge retail prices at Hasbro's RRPs, albeit that there was no guarantee, and that Hasbro could not be certain that the verbal agreement would hold until they saw the prices in the following catalogue. In addition, each of those witnesses has given detailed and to a large extent unchallenged explanations as to why they consider that such agreements existed. We see no reason why any of the Hasbro witnesses should have given that evidence to us if they did not genuinely or honestly believe it to be so.
322. Against that evidence, which we accept, the case for the appellants largely depends on showing that what the three Hasbro witnesses each consider to be an agreement was not in fact, or did not go so far as, an agreement or a concerted practice for the purposes of the Chapter I prohibition, or at least throwing doubt on the evidence of the Hasbro witnesses or

the inferences to be drawn from it. Since we accept the honesty of the Hasbro witnesses, one question that arises is whether those witnesses could have been mistaken, or have persuaded themselves that there was a relevant agreement when no such agreement had, in fact, come into existence. Looking at the evidence as a whole, we do not regard those alternatives as plausible. In our view, the case against each appellant is largely proved by the witness evidence of Messrs Bottomley, Wilson and Thomson as supported by the documents and surrounding circumstances.

The Argos witnesses

323. The three main Argos witnesses who gave evidence were Mr. Terence Duddy, Chief Executive Officer, Mrs. Maria Thompson, now Commercial Director of the Argos Retail Group and at the time Associate Director responsible for all merchandise in the Argos catalogue, and Mr. Andrew Needham, the principal Argos buyer in question. Ms. Jacqueline Wray, who reported to Mr. Needham, also gave evidence.
324. We have no reason to doubt Mr. Duddy's account of the strategy of "market pricing" and the other strategies which he progressively put in place in order to restore profitability to Argos after his arrival in the Autumn of 1998. However, for the reasons we give below, we have difficulty in accepting that the strategy of market pricing, as he explained it to us, provides a sufficient or plausible explanation for the pricing that has occurred in this case, particularly in light of the evidence of the three Hasbro witnesses.
325. Mr. Duddy was only present at one relevant meeting, on 17 February 1999. The only contemporary record of that meeting, an email from Sue Porritt to the Hasbro toys team of 19 February 1999 does in our view tend to support the OFT's case, but we are not in a position to make definite findings about what Mr. Duddy said during the meeting of 17 February 1999.
326. Mrs. Thompson at the material time had responsibility for a vast range of merchandise in the Argos catalogue, so it is unsurprising that some of her evidence was somewhat general in character. At management level it appears that Sue Porritt, who reported to her, dealt more closely with Hasbro than Mrs. Thompson, but Sue Porritt did not give evidence.

327. Mrs. Thompson's evidence about market pricing largely corresponded to Mr. Duddy's, but in our view that evidence, when analysed more closely, does not sufficiently explain the events of this case. Mrs. Thompson also gave evidence about three meetings: (i) a meeting between Sue Porritt and Mr. McCulloch probably in late 1998; (ii) the meeting on 17 February 1999; and (iii) a later meeting between Mrs. Thompson and Mr. McCulloch at Milton Keynes, probably in March 1999. As set out in more detail below, it seems to us clear that in both the first and third of those meetings Mr. McCulloch spoke of Hasbro's plan to get everyone to go to RRPs. Although Mrs. Thompson was initially dismissive, it is material to our findings that Argos through Mrs. Thompson knew that Hasbro was seeking to implement a plan whereby all the major retailers including Argos would sell at Hasbro's RRPs. As catalogue succeeded catalogue, and retail prices in fact stabilised at RRPs, it is difficult to resist the conclusion that Mrs. Thompson must have realised that Hasbro's plan was not so absurd as she first thought. More importantly, we did not find anything in Mrs. Thompson's evidence which materially contradicted the evidence of Mr. Bottomley, Mr. Wilson or Mr. Thomson.

328. Mr. Needham gave two full witness statements and was cross-examined at some length. The difference between his evidence and the evidence of Mr. Wilson seemed to us to be a difference of emphasis, rather than a fundamental divergence of facts. We do not think that Mr. Needham sought to mislead us, but in our view his evidence tended to downplay his contact with Mr. Wilson. Although Mr. Needham told us that he was "appalled" by the extent to which information as to Argos' pricing intentions was passed by Mr. Wilson to Mr. Thomson, it does not appear to be disputed that Mr. Needham knew that Hasbro was in discussions with other retailers about pricing at RRPs, and that he received "feedback" from Mr. Wilson as to other retailers' pricing intentions. That in our view assisted Argos in avoiding the undercutting which it feared.

329. We do not think that Mr. Needham's evidence materially contradicted the evidence of the three Hasbro witnesses and the documents.

330. Ms. Wray, who also gave evidence, confirmed that she would report other retailers' prices to Hasbro, and ask why those prices were lower than Argos' prices. The role of Ms. Clarkson in relation to girls' toys was somewhat peripheral, and the OFT did not seek to cross-examine her. We do not think her written statement carries matters very far.

331. Our overall conclusion is that the evidence of the Argos witnesses did not materially undermine or cast doubt on the evidence of the Hasbro witnesses or the documents, or the inferences to be drawn from that evidence.

The Littlewoods witnesses

332. Those that gave evidence for Littlewoods were Mr. John McMahon, at the time Littlewoods Buying and Merchandising Director, but no longer with the company, Mrs. Lesley Paisley, Buying Manager, Mr. Alan Burgess, the principal buyer for boys' toys and games, Mr. Alan Cowley, responsible for pre-school and musical toys, Mr. Phil Riley, responsible for, among other things, boxed games from the end of 1999 and Mrs. Andrea Gornall, responsible for among other things girls' toys from September 2000.

333. It did not seem to us that the evidence of Phil Riley and Andrea Gornall carried matters much further or materially undermined the OFT's case. Katherine Runciman, buyer of girls' toys in 2000, did not give evidence, although called for cross-examination, for family reasons. Given that we have heard evidence of a number of Littlewoods' witnesses, we do not attach much weight to Ms. Runciman's written statement. In the result, the Littlewoods evidence that we regard as mainly relevant is that of Mr. McMahon, Mrs. Paisley, Mr. Burgess and Mr. Cowley.

334. Mr. McMahon told us that, at the time, he had overall responsibility for the products in the Littlewoods catalogue of some 7,000 lines. In the circumstances it would be surprising if he had a detailed recollection of events affecting the products here in question. His evidence was relevant principally to the Liverpool meeting; to a conversation he had about the Tweenies doll with Mr. Cowley at the end of 1999; and to whether Littlewoods' decision to charge RRP's was, as he maintained, a "calculated risk" unaffected by any conversations Mr. McMahon had with Mr. McCulloch about pricing.

335. In relation to both what was said at the Liverpool meeting and the conversation regarding the Tweenies doll in 1999, Mr. McMahon denied that he had referred to any conversations with Mr. McCulloch about pricing. The evidence of Mr. Thomson contradicted Mr. McMahon as to the conversation at the Liverpool meeting. The evidence of Mr. Cowley contradicted Mr. McMahon as to the conversation regarding the Tweenies doll. On both

points we prefer the evidence of Mr. Thomson and of Mr. Cowley, respectively, as more fully explained below. Accordingly we find that Mr. McMahon did have conversations with Mr. McCulloch in which the latter had reassured the former that Littlewoods would not be undercut if it sold at RRP.

336. At the material time Mrs. Paisley had responsibility for a wide range of merchandise and it is understandable that her recollection on points of detail was not strong. We are, however, concerned by the fact that in her voluntary interview with the OFT in October 2001 she said, in answer to a question, that she did not see Mr. Thomson's email of 18 May 2000 as improper. She also said that she saw that email as a list of retail prices that Hasbro was recommending to Littlewoods. She explained in cross-examination that at the time she had felt like a "rabbit in the headlights", and now considered that the email was improper. We note that Mrs. Paisley's interview with the OFT took place voluntarily more than two weeks after the OFT's visit, at a date and time of Littlewoods' choosing, and in the presence of a Littlewoods lawyer. We have difficulty in accepting that Mrs. Paisley's statement to the OFT that Mr. Thomson's email was not improper was a mistake, or that that was not a considered answer. We also have difficulty in accepting that a person of Mrs. Paisley's experience could have thought, as she told the OFT, that the prices shown in the email were merely Hasbro's RRP's rather than a statement of Argos' intended prices. Those matters weakened the credibility of Mrs. Paisley's evidence.

337. Mr. Burgess at the material time was dealing with more than 60 suppliers. He too told the OFT in his interview in October 2001 that the prices shown on the email of 18 May 2000 seemed to him "like Hasbro giving us their RRP's". In cross-examination he agreed that that "might have been a mistake" and that he could not remember seeing the email (Day 4, pp. 133-136). Again, in our view the fact that Mr. Burgess told the OFT, having had time to consider the matter, that the email merely reflected Hasbro's RRP's when on its face the documents reflects Argos' intended selling prices, weakened Mr. Burgess' credibility. More generally, when pressed in cross-examination on specific points Mr. Burgess often said he had no recollection. We accept those answers as genuine, but the consequence is that on a number of issues (such as what was said at the Liverpool meeting, the circumstances surrounding the email of 18 May 2000, and how that email came to be found marked-up in Mr. Burgess' files) Mr. Burgess was not in a position to give convincing evidence.

338. Mr. Cowley's evidence is relevant to the pricing of the Tweenies dolls. Mr. Cowley appeared to us to be a forthright witness who did not take kindly to the idea that anyone might be trying to influence his pricing decisions. His natural instinct was to compete on price. Nonetheless, on at least two occasions, at the end of 1999 and the end of 2000, his prices were affected by conversations with Mr. Thomson. Mr. Cowley's email of 28 December 2000 which refers to Mr. Thomson "being so insistent that we all went out at the same price" seems to us to be credible evidence that Mr. Thomson had prevailed upon Mr. Cowley to price at the same price as Argos and possibly other High Street retailers.

339. Our overall conclusion is that none of the evidence of the Littlewoods' witnesses was such as to cast doubt on, or materially undermine, the correctness of the evidence given by the Hasbro witnesses or documents, or the inferences to be drawn from that evidence.

Witnesses who did not give evidence

340. Both Argos and Littlewoods rely on the statement Mr. McCulloch gave to the OFT in October 2001 in which he appears to have denied the existence of any relevant agreement. Littlewoods further criticised the failure of the OFT to call Mr. McCulloch, arguing that this was a breach of the duty of a public authority to put its cards "face up" on the table.

341. We have taken into account in this judgment Mr. McCulloch's view in his OFT statement that there was no relevant agreement although the words "no not really" are somewhat equivocal. Mr. McCulloch's written statement is, however, contradicted by the evidence of Messrs Bottomley, Wilson and Thomson whom we have seen and heard in the witness box and whom the appellants have been able to cross-examine. We prefer that oral or written evidence to the written evidence of Mr. McCulloch. In any event it also seems to us that elements of Mr. McCulloch's statement in fact support the OFT's case, as shown below.

342. As to the fact that Mr. McCulloch did not give evidence, the OFT made the record of his OFT interview available to the appellants. The appellants did not, as they could have done, ask for directions from the Tribunal seeking to compel the OFT to call Mr. McCulloch, or to assist in establishing his whereabouts, and the appellants did not ask for a witness summons to be issued. In the circumstances we do not accept that the OFT is in breach of any duty owed to the appellants, either under the Act or at common law.

343. Mr. Charles Cooper, who took over the Argos account from Mr. Wilson in October 2000, also did not give evidence. His evidence is relevant particularly to the S/S 2001 catalogue. The record of his interview with the OFT seems to us to tend to support the OFT's case. However, we prefer to decide this case principally on the basis of the evidence of the witnesses who gave oral evidence, the underlying documents, and the surrounding circumstances.
344. Mr. Brighty of Hasbro gave no statement at any stage but no party sought a witness statement in respect of him. Similarly the appellants did not seek witness summonses in respect of Mr. Richards, Mr. Gardner and Mr. Evans, of Hasbro.
345. Argos did not call or seek a witness statement in respect of Sue Porritt, to whom Mr. Needham reported, who appears to have had relevant conversations with both Mr. Brighty and Mr. Wilson.

The market context and prices

346. In addition to witness evidence and documents, the OFT seeks to support its case by drawing attention to the difference in prices in the relevant catalogues before the alleged agreements or concerted practices, and the high degree of similarity in the relevant prices thereafter. This aspect of the OFT's case was, however, affected by the facts that (a) it is in our view established that the first move to RRPs on the Action Man and Core Games ranges took place in S/S 1999, in respect of which the Decision does not find an agreement or concerted practice; and (b) there is considerable evidence that the 95p and 99p price points are viewed as equivalent by many customers. The latter point, once accepted, in our view weakened the basis for part of the OFT's cross-examination.
347. As the appellants point out, a degree of similarity in prices may, to some extent, also be expected, given such factors as the long-established nature of some of the products in question, the limited number of obvious "price points", the relatively limited room for manoeuvre between Hasbro's cost prices and Hasbro's RRPs, and the natural tendency for one catalogue retailer to align some prices in the next catalogue on the prices offered by the other catalogue retailer in the preceding catalogue. We also accept that by 1999 the margins on toys, taken alone, were low.

348. However, bearing all those facts in mind, there is nonetheless a striking difference between the diversity of prices in the catalogues for S/S 1998 and A/W 1998, when it is common ground that competitive forces were at work, and the subsequent catalogues from S/S 1999 onwards, which exhibit an increasing lack of price competition. Even leaving aside the catalogue for S/S 1999, for the successive seasons A/W 1999, S/S 2000, A/W 2000, S/S 2001 and A/W 2001 the picture is of both Argos and Littlewoods consistently maintaining common prices at Hasbro's RRP's for each of those seasons on the vast majority of the products in question: see Appendix I attached to this judgment. To give one illustrative example, whereas in the A/W 1998 catalogue Argos and Littlewoods sold 36 common products of which only 7 were at the same price, by the A/W 2000 catalogue Argos and Littlewoods were selling some 53 common products, of which 49 were at the same price, assuming the 95p and 99p price points are the same.
349. Making all allowance for the factors which the appellants have drawn to our attention, that pattern of pricing does not, in our view, obviously correspond to normal competitive conditions, nor does it correspond to Argos' "market pricing" policy as explained to us.
350. Quite apart from the striking difference as between 1998 and later years, the evidence is that toys have traditionally been seen by both catalogue retailers as an important competitive weapon in attracting other customers into the stores. Competitive pricing on toys is in our view to be expected in normal competitive conditions, not least as a means of increasing "footfall" and bringing in customers who could then buy other products. That, in our view, is a particularly likely scenario given the high profile and "must have" nature of many of the products here in question.
351. In those circumstances the appellants' argument that the low margins on toys were no longer tolerable does not seem to us to be an adequate explanation for the prolonged similarity of prices which the evidence suggests. We do not suppose that either Argos or Littlewoods would have wished to engage in what the Management Horizons report calls "deep discounting". Nonetheless it does not seem that to us low margins in themselves would plausibly have led both companies virtually to abandon price competition altogether on the products in question for a period of some two years.

352. Moreover, as the OFT points out, Argos and Littlewoods have traditionally been discounters. In catalogue retailing, price is an essential competitive weapon. On toys, the evidence is that even small differences in price can have a substantial impact, not only on toy sales but on the perception of the catalogue as a whole. That is also recognised in Argos' policy of market pricing which emphasises, in particular, selective price cutting and entry point price products, i.e. products priced at the lowest level on the high street so as to attract customers into the store. Littlewoods' written evidence in relation to non-toy products similarly highlighted the advantages and opportunities of attacking Argos on price during the period in question.
353. However, the evidence in this case in relation to Hasbro toys shows little or no selective price cutting, no identifiable entry point price products, and an absence of price competition for a period of at least two years. That general picture in our view supports the case made by the OFT that agreements or concerted practices were in operation.
354. Indeed, in our judgment the emphasis placed by the appellants on the effect of the GUS takeover, and on the low margins on toys, also tends to support the OFT's case. The appellants' arguments convincingly show that, at the material time, each of Argos, Littlewoods and Hasbro had a motive for raising prices on toys to RRP's and then maintaining those prices at RRP's for as long as possible, in order to improve margins.
355. But for each of the three companies, that situation in our view gave rise to the problem of how prices could be raised and maintained at RRP's without risking undercutting. The problem of undercutting is acute in the case of a catalogue retailer, where products have to be set in the catalogue which is valid for six months and cannot easily be changed. In those circumstances it would not be surprising if, when Hasbro came with a plan for how prices could be established at RRP's without the risk of undercutting, Argos and Littlewoods were not averse to Hasbro's initiative.
356. Neither company in our view advanced a convincing explanation as to how it was that they maintained prices at Hasbro's RRP's over a two-year period with hardly any undercutting, even by small amounts, taking place.

357. However, the OFT does not in our judgment need to rely on the similarity of prices to prove its case if other evidence shows that relevant agreements or concerted practices came into existence. It is trite law that once it is shown that such agreements or practices had the object of preventing restricting, or distorting competition, there is no need for the OFT to show what the actual effect was: see Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342 and many subsequent cases.

Overall conclusion on the evidence

358. Looking at the matter overall, we find the case to be established on the basis of the Hasbro witnesses, supported by the documents. Several documents support the OFT's case, and no document is inconsistent with it. Neither the Argos witnesses nor the Littlewoods witnesses seriously contradicted the witness evidence and documents relied on by the OFT. The market circumstances and the pattern of pricing seen during the period of the alleged infringement add further support to the OFT's case.

IX FINDINGS ON BACKGROUND MATTERS

(1) GENERAL

359. Argos and Littlewoods are the principal catalogue retailers in the United Kingdom. At the time Argos carried some 8-9,000 lines, while Littlewoods carried 7,000 lines. Both companies publish two catalogues a year, the Spring/ Summer (S/S) catalogue and the Autumn/ Winter (A/W) catalogue. Of these two catalogues, the A/W is by far the most important. In relation to toys, it appears that some 80% of sales are made from the A/W catalogue. It appears that the S/S catalogue is published in January of each year and the A/W catalogue is published in July. The catalogues come out within a few days of each other. It is not entirely clear from the evidence what is the final cut-off date for material to be included in those catalogues. That date appears normally to be around November and May respectively (Duddy, Day 3, p. 32). Mrs. Paisley told us that prices were fixed about one month before the catalogue launch date (Paisley I, paragraph 9).

360. The essence of catalogue retailing is that the customer reads the catalogue, either at home or in the store, selects an item by number from the catalogue by filling in a form, hands the

form in to the counter at the store and then waits while the item is retrieved from the store's stock and handed to the customer. In this kind of retail operation, it is common ground that price is a very important parameter.

361. The fact that the catalogues are published only twice a year means that the prices of Argos and Littlewoods become known in advance of the season in question and can, therefore, be undercut by other retailers. Similarly either Argos or Littlewoods may find, when the catalogue is published, that it has been undercut by the other catalogue retailer.

362. Although it is possible for catalogue retailers to respond to competition by printing flyers, or by offering a "price match promise" to customers, it may be difficult for a catalogue retailer to respond effectively to price competition, whether from another catalogue retailer or other retailers, during the life of a catalogue. In particular, both the flyer and the price match promise are largely dependent upon the customer coming into the store, but if the catalogue is uncompetitive the customer may not get as far as the store in the first place. It is essential that when a catalogue is published, it can be seen by consumers to be competitively priced.

363. Both Argos and Littlewoods have historically seen themselves as discounters as compared to more traditional retail outlets. Argos publishes 17 million catalogues, and Index approximately 7 million. Many households have both catalogues and compare the prices. Argos is the market leader in toys. Although for toys Toys "R" Us and Woolworths have larger market shares than Littlewoods, it is clear that each catalogue retailer sees the other as a major competitive threat. After the publication of each catalogue, both companies conduct a win/lose/draw analysis to determine on which lines they are cheaper/ more expensive than the other.

364. This particular market structure gives rise to a particular problem when a catalogue retailer wishes to raise prices. If a catalogue retailer unilaterally raises prices on particular products in a particular catalogue, there is an obvious risk of being undercut on those products in the corresponding catalogue of the other catalogue retailer published at the same time. In that situation, unless for some reason the second retailer has spontaneously decided also to raise prices in that catalogue on the same products and by the same amount, the catalogue retailer who has raised its prices may find itself at a serious competitive

disadvantage. Despite the price match promise or the possibility of flyers, that disadvantage may be difficult to correct until the publication of the next catalogue. In a period such as the weeks before Christmas, when most toy sales are made, the consequences for either Argos and Littlewoods of being uncompetitive on price can be serious.

365. Moreover, the competitive risk of being undercut if one catalogue retailer raises prices without correctly anticipating what the other catalogue retailer will do, is particularly acute in the case of high profile items which play an important part in the success of the catalogue overall. The evidence in this case is that the toys in question are high profile items, consisting of well-known branded toys. The evidence further is that, in relation in particular to the A/W catalogue, the toy offerings of Argos and Littlewoods play an important role in bringing customers into the stores, thereby encouraging customers to buy other items as well.

366. Furthermore, the evidence with respect to toys is that a relatively small difference between catalogue prices can make an important difference to customers' perceptions. The evidence is that on a particular toy a difference of 10p, 15p or 25p between catalogue prices can have an important competitive impact (see Paisley I, paragraphs 9 and 12; Needham, Day 5, p.26; Martin, paragraphs 4 and 5). A catalogue retailer interested in gaining market share or attracting "footfall" might well want to try to pitch its prices below that of a rival, sometimes by quite small amounts, in order to achieve a competitive advantage – not only from the point of view of sales of the toys in question, but also from the point of view of bringing customers into the store and selling other, often higher margin, products.

367. These particular circumstances – and notably the risk of being undercut on toys even by quite small amounts – in our view accentuates the difficulty that a catalogue retailer faces when deciding to raise prices without being in a position to predict what his principal rival's reaction is likely to be. A catalogue retailer cannot adjust a price overnight in the same way as other retailers. In the present case, the difficulty for both Argos and Littlewoods was, in our view, that if either of them raised their toy prices in one catalogue and the other did not do so in the same catalogue, there was a substantial risk of being undercut, with the risk of an adverse knock-on effect for the customer's perception of the competitiveness of the catalogue as a whole. In our judgment, Hasbro's pricing initiative

went a long way to solving that problem for both Argos and Littlewoods, as set out in detail below.

(2) THE GUS TAKEOVER OF ARGOS

The situation up to 1998

368. It is common ground that up to its takeover by GUS in April 1998, Argos had pursued an aggressive price policy of “pre-empting the market”, that is to say that Argos aimed to be the lowest priced retailer on the market.
369. According to Mrs. Thompson, Argos saw price as its main competitive weapon vis-à-vis other retailers. As we understand it, Argos used to reduce its prices from catalogue to catalogue, sometimes including up to 2,000 reductions in a single catalogue.
370. By 1997, Argos had overtaken Woolworths as the leading retailer of toys and had become, in effect, the price setter. None of the larger retailers could afford to set prices above Argos. Argos’ selling prices for toys were significantly below RRP’s until at least the end of 1998. This was the result of Argos’ aggressive selling policy, coupled with the fact that Argos used toys and games as “volume drivers” for its business, that is to say, as a means of encouraging customers to come into the store where they would purchase not only toys but other products.
371. It is common ground that, as a result of Argos’ policy of seeking to be “absolutely the lowest price retailer on the High Street” (Duddy II, paragraph 9) retail margins on toys were low: see e.g. Thompson I, paragraph 8, Needham I, paragraph 14, Day 5, pp. 6-9, McMahon I, paragraph 3, Paisley I, paragraph 3, Burgess, paragraph 3. This presented a problem for Hasbro, since retailers were less keen to stock products on which they earned low margins. Hasbro itself came under pressure to “inject margin back into the industry” (Bottomley, paragraph 6, Thomson, paragraphs 14, 16 and 17; Wilson, paragraphs 5 and 6).
372. On the other hand, although margins on toys in general and many Hasbro products in particular were low, Hasbro’s Action Man and Core Games ranges were viewed by retailers as “must have” items. Competitive pricing of such products, and of toys in

general, was an important means of bringing customers into the store. As Mr. Duddy told us, “toys were an attractive part of bringing people in, and we made money overall on toys” (Day 3, p. 62). Mrs. Paisley confirmed the “knock-on psychological effect of selling a high profile product at a low price” (Paisley I, paragraph 9).

The GUS takeover

373. GUS took over Argos in April 1998. GUS, as we understand it, was a company orientated towards earning higher margins than Argos was earning at the time. We accept that there was a widespread perception in the retail trade at the time that the GUS takeover would result in Argos competing less aggressively on price and seeking higher margins.
374. After the GUS takeover in April 1998 Argos had three chief executives in quick succession, until the arrival of Mr. Duddy as CEO in September 1998. Mrs. Thompson told us that prior to Mr. Duddy’s arrival she had had conversations with Lord Wolfson, then chairman of GUS, and Mr. Frost, acting Managing Director of Argos, that resulted in a decision to implement a new policy of moving towards “market pricing” for the S/ S catalogue 1999. When Mr. Duddy arrived, the policy of moving to “market pricing” and taking other actions to improve Argos’ margins was further developed, as shown by Mr. Duddy’s evidence and the documents dating from late 1998 and 1999 which Mr. Duddy and Mrs. Thompson have produced.
375. Argos and Littlewoods submit that the facts that in 1999 both companies simultaneously raised their retail prices to Hasbro’s RRP’s on Action Man and Core Games, and did so again on certain other toys in 2000, are the natural result of that new policy of market pricing adopted by Argos following the GUS takeover. To assess that submission it is necessary first to establish what the policy of “market pricing” was and, secondly, to determine how that policy would or might account for the particular circumstances arising in this case.

Argos’ policy of market pricing

376. Argos’ original case was that its move to RRP’s in 1999 was “dictated by the takeover by GUS” (notice of appeal, paragraph 24). Thus Mrs. Thompson told us that the discussions

she had had with Lord Wolfson and others in 1999 “meant that Argos would go out close to recommended retail prices, or at least would not reduce the last catalogue’s prices unnecessarily” (Thompson I, paragraph 9). Mr. Needham said that the move to market pricing meant that “Argos would cease its strategy of pre-empting prices against other retailers and instead would price generally to suppliers’ suggested retail prices” (Needham I, paragraph 16). Although Mr. Needham was concerned that the new policy would leave Argos exposed to competitors, “our final decisions on retail pricing would now be closer to or at recommended retail prices” (paragraph 17).

377. However, the subsequent evidence before the Tribunal of Mr. Duddy and Mrs. Thompson shows that the policy of moving to market pricing did not in itself mean moving to RRP.

378. Mr. Duddy told us that his overall strategy was directed to improving Argos’ profitability by taking a wide variety of actions. Increasing prices where appropriate was an important element in that. However, Argos’ policy was one of “market pricing,” or pricing “on the market”. While Argos would no longer pre-emptively reduce prices in an effort to be absolutely the lowest priced retailer in the High Street, Argos could still price competitively against its principal rivals, such as Woolworths, Toys “R” Us and Index (Duddy II, paragraph 9). In cross-examination Mr. Duddy explained that “market pricing” may or may not mean increasing prices; it could include decreasing prices (Day 3, pp. 35-36). In a document presented to the GUS Board on 18 January 1999, Argos’ policy is described as:

“Match key competitors, including Index
Selective selling price increases
Selective price cutting on high-profile products” (Day 3, pp. 38).

379. Mr. Duddy went on to explain:

“The phrase ‘market pricing’ does not mean moving to prices on RRP. However, RRP tend to be established in the market, and it is difficult for retailers to price above an RRP if it has become the prevailing market price” (Day 3, p. 41).

“Our position was not to move close or near to pricing on RRP, our position was to move to pricing on the market.” (Day 3, p. 42)

“I did not see RRP as being the relevant factor relating to market pricing” (Day 3, p. 52)

380. As we understand that evidence, what Mr. Duddy meant was that Argos had no policy of moving to RRPs, unless it happened to be the case that the prevailing market price was already established at a supplier's RRP. That evidence contradicts, or at least heavily qualifies, the evidence originally given by Mrs. Thompson and Mr. Needham referred to above. It also shows that there was nothing "dictated" about Argos' move to RRPs, contrary to paragraph 24 of the notice of the appeal.

381. Moreover, Mr. Duddy emphasised that where it was a question of raising prices, that had to be accompanied by the establishment of "entry level" price points, i.e. where certain products in the range were pitched at the lowest price available in the market. Those products would attract customers who might then be persuaded to buy "value added" or "hero" products which carried much higher margins (Day 3, pp. 44 to 46).

382. Mrs. Thompson agreed with Mr. Duddy's evidence:

"Q Now Mr. Duddy has told us that a policy of moving to market pricing does not mean a policy of moving to RRPs; do you agree with that?

A Yes, I do"

(Day 3, p. 84)

383. Mrs. Thompson also emphasised that the policy of market pricing only meant going to RRPs if that meant matching competitors who were already at RRPs. Asked about paragraph 9 of Thompson I, she said:

"Q. Why would you have specifically explained this market pricing in terms of its closeness to recommended retail pricing?

A. For the reason I just gave, because many of our competitors did price products at the RRP, we would be aiming to match our competitors; so if our competitor was at an RRP, we would probably go to an RRP.

Q. Yes, but as I understand market pricing, the fact that it happens to be at or near the RRP is not relevant, it is the question of what everyone else is pricing at; that is the important point.

A. Yes, it is, and I was just clarifying that that could be RRP."

(Day 3, p. 85)

And at Day 3, p. 86:

"The move to near RRP or RRP would be driven purely and simply by us matching our competitors' prices."

384. An example of prices being both increased and decreased is a document prepared by Mrs. Thompson on 28 May 1999 making a comparison between the S/S 1999 catalogue and the S/ S 1998 catalogue. That shows that for S/S 1999 760 lines were increased in price, while 922 lines were decreased in price. According to Mrs. Thompson, in previous years the number of price increases would have been smaller, and the number of price decreases greater (Day 3, pp. 89-90). According to this document, however, in 1999 price increases played a relatively small part in improving Argos' margins. By far the most important "margin enhancers" were "not putting prices down", better cost prices, and savings on direct imports, which appear to have accounted for over 90% of the improved margin achieved in the S/S 1999 catalogue.

385. Mrs. Thompson was asked about that document of 28 May 1999 concerning margin improvements. The exchange was as follows (Day 3, pp. 87-88):

“Q.And secondly [the policy reflected in that document] bears no relationship whatsoever to RRP; they are irrelevant, it is not mentioned in this document.

A. RRP; they are not relevant.

Q. Yes. It is completely irrelevant, this question of RRP, to this policy that you were planning in August 1998.

A. Only to the extent that we would price to the market, and hence if the market was at RRP, we would price to RRP.”

386. In Thompson II, Mrs. Thompson also referred to a memo of 20 April 1999 to Argos buyers in which she instructed them: “Continue with our pricing policy of *not* pre-empting Index but ensuring we have hero prices, entry prices, across all groups” (paragraph 25). A later Argos document, sent to Mrs. Thompson on 28 January 2000 and headed “Price Perception”, also refers to the new pricing policy. It states,

“Our current policy is to be “on the market”.

In other words we are not aiming to drive down market prices aggressively, but we do aim to achieve a position where our customers will not get a better price elsewhere.”

(Thompson II, paragraph 26)

387. Mrs. Thompson also told us that “Argos is very sensitive about its price perception” (Thompson I, paragraph 10). With this in mind, Argos had given much thought to catalogue presentation in order to “focus on value and to highlight price cuts” (paragraph

31), as well as “featuring entry level products and added value products as hero lines” (paragraph 32). Mrs. Thompson also refers to “hero prices and entry price points” in her second witness statement (Thompson II, paragraph 20).

388. Mr. Needham’s evidence in cross-examination on the concept of market pricing was broadly consistent with that of Mr. Duddy and Mrs. Thompson. For example, he told us while the prevailing market price could in some instances have been the suppliers’ RRP,

“should there be a price lower than recommended retail price being charged by a particular retailer, we would match that” (Day 5, p. 10)

389. Mr. Needham also agreed that in 1998 the prevailing market price for toys was in most instances the price that Argos was charging at the time (Day 5, p. 16).

390. In summary, in the light of the above evidence, our principal findings about Argos’ change of policy following the GUS takeover are:

- (1) Argos progressively ceased to follow its previous policy of aggressively “pre-empting” market prices with the aim of being the lowest priced retailer in the High Street. That was one element of a wide ranging policy to improve margins.
- (2) Argos’ aim in pricing was to be “on the market”, that is to say to be pricing at the expected market level for particular products so as to match, rather than undercut, its competitors. However, it was and remained Argos’ policy that its customers “would not get a better price elsewhere”.
- (3) This policy of market pricing included both increasing and decreasing prices, depending on where the market was perceived to be. In practice, in the relevant catalogues, Argos still decreased many prices, while increasing others.
- (4) Argos’ policy of market pricing did not mean moving to RRPs. RRPs were not a relevant element in the policy.
- (5) Argos’ new policy might mean moving towards, or to, RRPs if its competitors were selling at RRPs. However, Argos’ policy was *not* to move to RRPs; Argos’ policy was to move to pricing on the market.
- (6) Argos’ policy was to move to market pricing while maintaining entry level price points and hero pricing across all categories.
- (7) Argos had the general aim of improving margins. Margins can be improved by buying on better terms, changing the product mix to include higher margin items, reducing costs or, in

certain circumstances, raising prices. A policy of improving margins does not necessarily imply raising prices, although it may do so.

- (8) The policy of market pricing did not imply that Argos would raise prices in a manner which would risk jeopardizing its competitiveness towards other retailers, bearing in mind that price was Argos' main competitive weapon. In particular it would not have been consistent with the new policy of market pricing for Argos to go out at prices significantly higher than other retailers, particularly on high profile items.

“Market pricing” as an explanation for Argos’ price increases on Hasbro toys

391. We do not think that Argos’ move to increase its prices to Hasbro’s RRP’s on Action Man and Core Games for the S/S 1999 catalogue, and to maintain those prices thereafter, can be accounted for entirely by the move to “market pricing” as explained above.

392. First, as Mr. Duddy and Mrs. Thompson explained, the move to being “on the market” did not in itself mean moving to RRP’s. RRP’s were not relevant. The policy was a much more flexible one, involving selective price increases, selective price decreases, and matching competitors.

393. As we understand it, the policy of being “on the market” meant that Argos would not price at RRP’s unless the market price was already at RRP’s. But that was not the case for toys in 1998, where toys were being sold below RRP’s. While selling at “the prevailing market price” might well imply not reducing toy prices further, as far as we can see going to “the prevailing market price” in 1999 would not have involved *raising* prices from the prevailing level.

394. Even if by the expression the “market price” one meant some price higher than the market price then prevailing, it was also part of the new policy that Argos intended to match, rather than undercut, its competitors. Yet to go to RRP’s in 1999 on Hasbro toys involved going above competitors’ prevailing prices, which were also below RRP’s. That would not be matching competitors’ prices, and thus would not be consistent with “market pricing” as explained to us. As Mr. Needham pointed out, if a competitor was below RRP (as was the case in toys) it was Argos’ policy to match that price by selling below RRP as well.

395. In addition, in the documents and explanations given to us, emphasis is placed on the importance of maintaining selective price cutting on high profile items, and also maintaining entry level prices – i.e., being the lowest priced product on the market at least for certain lines – in order to counteract any impression that Argos was pricing less competitively. Yet we detect no significant evidence of “entry level prices” or selective price cutting on any of the Hasbro Action Man and Core Games during the period with which this case is concerned.

396. If the move by Argos to RRP's in 1999 on the Action Man and Core Games ranges was explicable entirely by the adoption of a general policy following the GUS takeover, we would have expected to have evidence that a similar policy applied to other toys and games. However, Argos did not provide evidence to show that there was at the same time an upward movement of their retail prices for toys, for example toys supplied by other manufacturers. The evidence we have is that Argos' move to RRP's in 1999 applied to Hasbro's Core Games and Action Man ranges which were also subject to Hasbro's pricing initiative. We find that a considerable coincidence.

397. For those reasons, we do not accept that the policy of “market pricing” as explained to us provides a complete explanation for Argos' move to RRP's on the products here in question in 1999 and subsequently maintaining prices at RRP's.

Argos' motive for raising prices

398. We are, however, prepared to accept that, following the GUS takeover, there was pressure on Argos to achieve better margins, in particular on toys. That undoubtedly gave Argos a strong motive to raise prices. The desire for more margin, following the GUS takeover, in our view probably does explain why Argos would have wished to raise prices in 1999, even though to do so was not obviously consistent with the policy of “market pricing” as discussed above.

399. However, as Mr. Needham stressed, in raising and maintaining prices at RRP's on such high profile products, Argos was running a significant risk of being undercut by Littlewoods (Needham I, paragraph 17, Day 5, pp. 12-13). The issue in this case is whether Argos' preparedness to run that risk, on the products concerned, with possibly significant

detriment to its catalogue offering as a whole, was an entirely unilateral commercial decision, or whether it was affected by an agreement or concerted practice falling within the Chapter I prohibition. That issue, it seems to us, depends on a close analysis of the evidence considered below and cannot in our view be brushed aside, as Argos seeks to do, on the basis that the whole of this case is explicable in terms of Argos' new policy on market pricing.

Littlewoods' perception of Argos policy

400. Littlewoods similarly argues that its own decisions to raise and maintain its prices at Hasbro's RRP's on the same products and at the same time as Argos resulted from unilateral and independent commercial actions which were driven by (i) Littlewoods' perception of what Argos would do following the GUS takeover and (ii) Littlewoods' own need for increased margin. That is supported, according to Littlewoods, by the Strategic Review prepared in 1998 by Management Horizons.
401. Mrs. Paisley's evidence was that, on the basis of various newspaper reports and talk in the industry, "everyone in the Littlewoods' buying team expected Argos to be more inclined to adopt RRP's". She thought that the GUS takeover would "inevitably" imply moving to RRP's (Paisley I, paragraphs 5 and 13, Day 2, p. 120). In the course of cross-examination Mrs. Paisley qualified that by saying that in her view it was inevitable that Argos would charge RRP's "on a limited number of high-profile toys" (p. 123). However, Mrs. Paisley told us that she was not in a position to say whether Action Man and Core Games were or were not "high-profile toys" in that context (p. 123).
402. On the question whether the prospect of a price increase by Argos would have presented Littlewoods with a good opportunity to undercut Argos, Mrs. Paisley said that such a strategy "could have actually rendered us more unprofitable than we were": although she could see "some advantage" in such a course, it was "not my realm" to consider that (Day 2, pp. 130-132). She could not "agree or disagree" on whether it would have been possible for Littlewoods to sell below Hasbro's RRP's on certain lines without making a loss (p. 141), but she agreed that there could potentially be certain advantages in lower prices such as increased footfall and improved image. However a decision by Littlewoods to undercut would have had to have been "a weighed-up business decision" (p. 142).

403. Mr. Cowley in his witness statement said that, because of low margins “retailers invariably go out at RRPs” (Cowley, paragraph 3). However, in cross-examination he accepted that it was not true that in 1999 retailers went out at RRPs on branded toys. He also accepted that “we often go below RRP” (Day 4, pp. 5-7). Both those statements contradicted paragraph 3 of his witness statement. Mr. Cowley’s natural instinct was to undercut Argos, at least on certain lines (Day 4, p.21). As to the new Argos policy, which Mr. Cowley described as “hardly a policy” (Day 4, p. 9), Mr. Cowley thought that Argos was now “very likely” to go out at RRPs (Cowley, paragraph 5). He said that it was “common knowledge” within the toy industry that prices would be higher that year (Day 4, p.10), and that going to RRP was one “obvious way” of increasing margin (Day 4, p.13).
404. Similarly, Mr. Riley said that it was generally known in the retail world that Argos would be less aggressive on pricing, and that they “generally follow RRPs” on the major branded accounts (Riley paragraph 6, Day 4, pp. 57-58).
405. Mr. Burgess said that “it became generally known in the industry that Argos was changing its policy and was looking for more margin... We decided that it was now much safer to adhere to RRPs and this became our general practice” (Burgess, paragraph 5). In cross-examination Mr. Burgess added that the parity of pricing between Argos and Littlewoods came about “entirely as a result of the change in Argos’ policy”. The acquisition of Argos by GUS was, within the toy industry “a huge, huge thing” (Day 4, p.87). He also said that “there was a sea change within the toy industry as I saw it. I was not the only one that saw it, I was caught up in it, everybody was talking about it”. It was his “belief and hope that Argos would not be able to go down the road of cutting prices as much as they had done”. Littlewoods’ pricing for the S/S 1999 catalogue was “to test the water” (Day 4, p. 121). Mr. Burgess did not see undercutting Argos as an option, given the low margins on toys. For Mr. Burgess it was a “golden opportunity” to make margin (Day 4, pp. 117-119).
406. On the other hand, Mr. McMahon told us that although he was aware anecdotally and from reading the press that Argos might be going for extra margin, he “did not expect Argos to be going out at RRP” (Day 2, p. 92, 93). Mr. McMahon, at the time the senior Littlewoods executive concerned, thereby contradicted the views of the Littlewoods’ buyers set out in their witness statements. Mr. McMahon also told us that there were many other ways of improving margins, such as reducing costs, changing the mix of products, and putting more

effort behind higher margin lines (p. 94). Putting selling prices up was only one possibility. It was not part of Littlewoods' thinking that Argos was inevitably moving to RRP's (p. 96). However, Mr. McMahon maintained that in deciding to raise Littlewoods' prices to RRP's he took a calculated business risk, because Littlewoods needed extra margin (pp. 98-100).

407. Bearing all that evidence in mind, we remind ourselves that up to the A/W 1998 catalogue Littlewoods was pricing below Hasbro's RRP's. Even though we accept that Littlewoods wanted to earn more margin, a unilateral decision by Littlewoods to raise its prices to RRP's on high-profile products such as the Hasbro Action Man and Core Games ranges would have involved a very serious risk of being undercut by Argos. We think it improbable that Littlewoods' management would have been prepared to run that risk solely on the basis of what they had read in the newspapers and trade gossip.
408. Even accepting, as we do, that there was a perception within Littlewoods that Argos was aiming for "extra margin", and that, as Littlewoods saw it, one option for Argos was to raise prices, it does not follow that Argos would choose to raise its prices on exactly the same products as Littlewoods, or that Argos would go straight to RRP's in a uniform way on exactly the same products as Littlewoods chose to go straight to RRP's at the same time. Even if Argos was no longer pursuing a strategy of deep discounting across its entire product range, Argos' perceived need for extra margin would not necessarily lead it to abandon selective price cutting altogether; nor would Argos necessarily cease to price toys competitively as a means of attracting customers into the store to purchase other products.
409. Accordingly, we do not accept that Littlewoods' perception, based on press cuttings and trade talk, that Argos was "looking for extra margin" provides in itself a sufficient explanation for Littlewoods running the substantial risk of unilaterally raising its prices to RRP's in 1999, and maintaining them at that level thereafter, on Action Man and Core Games. It also seems to us a considerable coincidence that Littlewoods' unilateral decision or "gamble", as Mr. McMahon put it, should coincide almost exactly, in timing and extent, with the same decision taken by Argos on the same products, in circumstances where those were also the products to which Hasbro's pricing initiative applied.

410. Like Argos, Littlewoods has adduced no evidence that its move to RRP's on Action Man and Core Games in 1999 was part of a move to raise prices on toys generally. As far as we are aware, the principal common feature of the products on which both Argos and Littlewoods chose to go to RRP's in 1999 is that those were the products which were subject to the Hasbro pricing initiative.
411. The conclusion that it was very far from inevitable that, following the GUS takeover, Littlewoods would move to Hasbro's RRP's in parallel with Argos is also supported by the evidence from Littlewoods' buyers in other sectors which Littlewoods itself submitted to the OFT in January 2003. Thus in their various witness statements Mr. Overill (kitchen electrical products and small domestic appliances), Mr. Martin (photography), Mr. Gunn (audiovisual products and telephones) and Mr. McHarrie (electronic games, desktop technology and camcorders) all gave evidence that in their product areas the GUS takeover of Argos was seen by Littlewoods for the A/W 2000 season as an opportunity to undercut Argos. This, according to Mr. Martin, was an opportunity to "give them a bloody nose" (Martin paragraph 8). Mr. Overill mentions an instruction in April 2000 "to beat Argos on 85% to 100% of common lines" (Overill paragraph 5), and Mr. McHarrie states that he reduced his prices on the basis that even "knocking 50p off" the price of an electronic game "makes customers notice that we are cheaper than Argos and that leaves an impression. On key lines this can make a sizeable difference in demand" (McHarrie, paragraph 10).
412. While we accept that similar considerations would not necessarily apply in the same way to toys, because of the low margins in the toy sector, we do find it hard to accept that low margins in themselves, coupled with Littlewoods' perception based on newspapers and trade talk, is an adequate explanation for the extent at which Argos and Littlewoods both priced at Hasbro's RRP's on common products over the same period in question.
413. That conclusion in our view is not affected by the evidence put before the Tribunal at the hearing about the "Strategic Review" produced for Littlewoods by Management Horizons in September 1998. That Strategic Review concluded that Littlewoods had a long history of unsatisfactory financial performance, and "needs to raise its game". One of the suggestions by the consultants was that the price architecture should contain "fewer and higher price points". The consultants opined that Argos, newly acquired by GUS, was "unlikely to initiate a price war but will not allow Index to seriously undercut", but was "well placed to

match/ counter the current initiatives at Index”. The consultants said that direct competitors to Littlewoods “would respond aggressively” to a strategy of deep discounting; and that GUS “would not allow Argos to be undersold”. The consultants’ main recommendation was that the Littlewoods’ catalogue be structured around five “lifestyle themes”. Mr. McMahon was suggested as a leader of one of the project teams to carry this out.

414. This document was not produced by Littlewoods until a very late stage of these proceedings. It is concluded in very general terms. In their witness statements neither Mrs. Paisley nor Mr. McMahon give evidence as to whether or not this document had any, or if so what, influence on the particular pricing decisions with which this case is concerned, or indeed on any other management decision. In those circumstances, we do not think that the Strategic Review takes matters very much further.

415. We do accept, however, the general proposition that the view of Littlewoods’ senior management in 1998 was that Littlewoods’ business as a whole “needed extra margin”. We also accept Mr. McMahon’s evidence that at the material time Littlewoods as a business was trying to increase margins in its business overall (Day 2, p. 99, 101-102), and that the margins on toys were low.

416. However, as we see it, those circumstances gave Littlewoods a strong motive for raising prices. They do not, in themselves, explain the coincidence of price rises, both in timing and extent, which has occurred in this case. To determine whether, as regards Littlewoods, the raising and maintaining of those prices across several catalogues was a unilateral commercial decision, as Littlewoods submits, or whether it was affected by an agreement or concerted practice depends on a close analysis of the evidence. We do not accept that Littlewoods’ actions can be explained simply on the basis of what Littlewoods says was its perception of the effect of the GUS takeover of Argos.

Conclusions on the GUS takeover of Argos

417. Our principal conclusions from the foregoing are:

- (1) Hasbro was anxious to see better retail margins in the toy industry, in order to encourage toy sales, to maintain sales volumes, and in some cases to avoid delisting.
- (2) Following the GUS takeover, Argos was also interested in achieving better margins, provided that its competitive position was not undermined.
- (3) Low margins in Littlewoods' business gave Littlewoods too an interest in achieving higher margins on toys. Littlewoods' perception was that Argos would be pricing less aggressively and might raise prices on some lines.
- (4) However it was not inevitable that, as a result of the GUS takeover, Argos and Littlewoods would move to RRP's on toys, still less that both companies would spontaneously move to Hasbro's RRP's on Action Man and Core Games, and later other products in the same catalogues in either 1999 or 2000; nor was it inevitable that, having done so, both companies would remain virtually uniformly at Hasbro's RRP's for the whole of the period with which this case is concerned.
- (5) Even if both companies were not adverse to moving prices towards, or even to, RRP's in 1999 because of the low margins on Hasbro products, for either company to do so unilaterally would have meant running a substantial commercial risk of being undercut, with possibly damaging consequences for the whole catalogue.
- (6) The principal consequence of the GUS takeover was that for different reasons and by fortuitous coincidence of timing, Argos, Littlewoods and Hasbro each had an interest in raising prices.

418. The question whether, in those circumstances, the relevant pricing decisions were taken by Argos and Littlewoods lawfully and unilaterally depends upon an examination of the evidence, to which we now turn.

X. CHRONOLOGICAL SURVEY OF THE EVIDENCE

1997

419. As early as 1997, Mike McCulloch, then Group Sales Director of Hasbro, was concerned about the low retail margins on Hasbro products, which were to a significant extent the result of Argos using toys and games as "volume drivers" for its business, selling

significantly below RRP. As Argos was the market leader, other retailers tended to have to follow the Argos prices, with the result that retailers generally were not obtaining satisfactory profit margins.

420. According to the witness statement of Emma Wilson, one of Hasbro's in-house legal advisers, Mr. McCulloch sought legal advice in 1997 as to "the extent to which competition law allowed him to influence retail pricing and prevent retailers discounting from RRP" (Emma Wilson, paragraphs 5 and following).
421. As a result, in May and June 1997 Mr. McCulloch had various meetings with Hasbro's internal legal advisers. We are told that in May 1997 "Mike McCulloch was anxious to start talks with the retailers to sell his strategy of putting retail profit back into toys" and that by 10 June 1997 he had "spoken with Argos' buying director on how Hasbro proposed to maximise profitability". Mr. McCulloch's project was restricted, in the first instance, to Core Games and Action Man.
422. The legislation then in force was the Resale Prices Act 1976 which prohibited suppliers from agreeing, or imposing, minimum resale selling prices. That Act did not, however, make it unlawful for a supplier to recommend retail prices.
423. A meeting took place at Hasbro's offices at Stockley Park on 30 June 1997 at which Mr. McCulloch and Mr. Mike Brighty (Hasbro Sales Director) were present, together with Hasbro's internal and external legal advisers. As a result, a briefing note of "Do's and Don'ts" was finalised on 3 July 1997 and circulated to Mr. McCulloch and Mr. Brighty among others. This briefing note envisaged that discussions would take place with retailers about resale pricing. It included the following:
- "DO'S" – possible to discuss our views on pricing strategy, positioning of our products in the market, price elasticity and the information and evidence to support this.
- 'DON'TS' – do not indicate that we require any particular retail price or that we would make any supply or discount structure contingent on particular retail price – we cannot legally introduce such requirements."

424. According to Emma Wilson, “the sales team were aware that they were prevented from linking adherence to RRP’s to any form of financial incentive from Hasbro” (Emma Wilson, paragraph 18).

425. We have no evidence either way as to whether, at that stage, Mr. McCulloch followed matters up by having discussions with retailers. It appears, however, that low margins on Hasbro products persisted throughout 1997 and 1998.

Retail prices in 1998

426. Argos was taken over by GUS on 16 April 1998. It appears that the GUS takeover of Argos in April 1998 came too late to have a material effect on the A/W catalogue for 1998, which would have been in the course of finalisation in May 1998, for publication in July 1998 (see also Thomson, Day 1, p.38).

427. As appears from the figures produced by Argos set out at Appendix I to this judgment, in 1998 there was already some similarity in retail prices of Core Games and Action Man products in the Argos and Littlewoods 1998 catalogues. As Thomson pointed out, a degree of similarity on prices is to some extent understandable given the long established nature of some of the products in question (Day 1, p. 75). However, there was also considerable diversity in prices. Both counsel for Argos and Mr. Thomson (Day 1, p. 63) described the 1998 retail prices as “all over the place”. Moreover, in 1998 the retail prices of both Argos and Littlewoods were below Hasbro’s RRP’s on Action Man and Core Games: see Thomson, Day 1, p. 74. Neither appellant has suggested that its selling prices in the 1998 catalogues were at Hasbro’s RRP’s on Action Man and Core Games.

The Stockley Park Presentation of 23 October 1998

428. On 23 October 1998 there was an internal meeting at Stockley Park, Hasbro’s headquarters, at which Hasbro’s 1999 trading terms strategy was presented by Jonathan Evans, then Hasbro’s Trade Marketing Director, and Mike Brighty, Sales Director. This document indicates that for 1998

“Argos poor 1997 performance and Index strength has given less bought in margin driven by price competition”.

429. “Bought In Margin” or “BIM” is the difference between the retailer’s cost price (i.e. Hasbro’s selling price) and the retailer’s selling price to the customer.
430. For 1999, one of the objectives set out in the Stockley Park presentation was “Injecting greater profitability into Core Brands”. The main proposal for achieving this was the introduction of an annual rebate on the Action Man and Core Games ranges. According to the presentation, this rebate was to be
- “Paid in return for maintaining as a minimum the 1998 trade average bought in margin on Games of 1.5% and Action Man 5.5%.”
431. In other words, under this proposal the rebate was not to be paid in 1999 unless the retailer had maintained a retail selling price which enabled him to earn no less bought in margin on Action Man and Core Games than had been earned on average by the trade in 1998.
432. It appears to us that those responsible for preparing the presentation of 23 October 1998 had either misunderstood, or ignored, the legal advice that Hasbro had apparently received in 1997 to the effect that it was unlawful for Hasbro to pay a financial incentive in return for maintaining resale prices.
433. According to Mr. Bottomley, the meeting of the 23 October 1998 was “the start of the process that led to Hasbro’s pricing incentive/ strategy”. (Bottomley, paragraph 8). At paragraph 9 of his witness statement, Mr. Bottomley states:
- “The presentation was mainly about the development of a ‘Listing Initiative’ under which retailers were offered rebates of 5% by Hasbro for listing certain products in their catalogues which would otherwise be ‘de-listed’. Discussion also took place about a pricing initiative under which Hasbro would try to get retailers to list at RRP. Account managers were briefed to undertake audits of toy retailers and if they found that prices were not at RRP they were to have conversations with them to try and persuade them to adopt RRP. We were led to believe that these strategies had been looked at by our legal department and were OK. It is this meeting which I described at lines 23-25 of my interview with Mr. Lawrie.”
434. Paragraph 8 of Mr. Bottomley’s witness statement was not challenged. Nor, as we understand it, is it challenged that from late 1998 onwards Hasbro account managers were to undertake audits of toy retailers, and if they found that prices were not at RRP, they

were to have conversations with those retailers with a view to persuading them to adopt RRPs.

435. In his notes of interview with the OFT on 10 January 2001 Mr. Bottomley described the meeting of 23 October 1998 as follows:

“DB: When rejoined Hasbro in 1998 attended presentation led by Mike Brighty and Jonathan Evans and was led to believe that the pricing strategy has been looked at by our legal department and was OK.

BL: When did pricing strategy move into becoming a price-fixing type arrangement?

DB: Shortly after initial discussions in 1999.

BL: When did discussion move from margin discussions to discussion to agree prices?

DB: Conversations on adopting RRPs set by Hasbro took place in 1999.”

Hasbro’s pricing initiative

436. As described by Mr. Bottomley, Hasbro’s initiative had two elements, first the “Core Rebate,” and, secondly, Hasbro’s plan to persuade retailers to price at RRPs. We use the expression “pricing initiative” to mean that part of the initiative in which Hasbro sought to persuade retailers to price at RRPs (see Decision, paragraph 43).

437. As Mr. Bottomley put it, “Hasbro come out with a strategy that suited the retail trade at that moment in time... The initiative that came out... fitted nicely into the fact that... retailers wanted to generate more profit from toys... there was no margin in toys. So everybody, the retail trade wanted to put margin back into the toy industry...” (Day 2, p. 59; Bottomley, paragraph 10).

438. Mr. Bottomley himself did not have direct responsibility for the Argos account, which was the responsibility of Mike Brighty. Mr. Bottomley was responsible for the Littlewoods account from late 1998. His witness statement says that he took over in December 1998, but there is some doubt as to precisely when he took over: see Day 2, p. 3. Mr. Bottomley did not deal with day to day matters regarding the Littlewoods account. However, he told us that Hasbro’s sales and marketing team all worked together in the same sales office (Day

2, p. 56). We have no reason to believe that Mr. Bottomley did not know what was going on.

Mr. Bottomley's description of the pricing initiative

439. Mr. Bottomley in his witness statement told us:

“12. Argos and Littlewoods were key to the success of the pricing initiative since they were the market leaders – if they could be persuaded to maintain prices at RRP then other retailers would follow suit. We found it easy to get other retailers to adopt RRPs – what they did depended on whether Argos adopted RRPs...

...

14. ...In pursuance of the pricing initiative, I was party to a large number of conversations with retailers, including Littlewoods, at about this time. These discussions centred more on margin than on RRP. In these conversations, I would suggest to retailers that they should price at the Hasbro RRPs... Retailers would say that they were interested in pricing at Hasbro's RRPs, but couldn't because of Argos. What they meant was that, given Argos' pre-eminent position in the market, they couldn't afford to price at RRP unless Argos did the same. My reply to retailers was that exactly the same discussions were taking place with Argos so for the first time the whole industry would be involved.

...

16. I did not deal with Argos directly. However, as a result of the discussions that Mike Brighty of Hasbro had with Sue Porritt of Argos, I came to understand that Argos had indicated that they too would go out at Hasbro RRPs. Within Hasbro there was constant internal dialogue at all times about these discussions. I was aware of exactly what was being discussed with Argos, since Mike Brighty (who dealt with Hasbro) sat next to me. We would have a meeting each Monday morning to discuss the previous week's events and then we would discuss this with the whole team in the afternoon. These internal meetings discussed general business issues and were not solely account specific.

17. Mike Brighty and I had had discussions with the higher management of our customers, such as I describe above. However, it was Ian Thomson (the Littlewoods Account Manger) and Neil Wilson (the Argos Account Manager) who carried out the day-to-day discussions with Index and Argos. As I said in my interview with Mr. Lawrie, “Thompson and Wilson directed to carry out the arrangement by management

namely Brighty, McCulloch and myself. They were the messengers”. The “arrangement” refers to the understanding that I describe in this statement. Senior management would construct trading terms and the pricing initiative was a key part of them. Neil Wilson and Ian Thomson were implementing this policy – it is in that sense that I say they were “the messengers” i.e. it was their role to implement things.

18. In my interview I described the discussions with retailers as an “agreement” and stated that it started from 1 January 1999. It was not a written agreement that prices would be fixed at RRP. What I meant by the word “agreement” was that there was an understanding that retailers, including Argos and Littlewoods, would price at or near Hasbro’s RRPs. Even though we had this understanding, we would never know for certain what price Argos and Index would go out at until we saw their catalogues. However, we were then able to ascertain that they had indeed priced in line with the suggested RRPs.
19. With regards to the understanding with Argos, as I say in my interview in response to Mr. Lawrie’s question (lines 34-36), Ian Thomson had a “clear expectation that Argos would adhere” to Hasbro’s RRPs. Argos gave indications of their intention to do so to Neil Wilson and, even though Ian Thomson was the Littlewoods account manager, he would know of Argos’ indications from Neil Wilson, the Argos account manager. They were colleagues and worked closely together, but would never have known final pricing until the catalogues were produced.
20. In my interview with Mr. Lawrie I said that the “sales and account management teams knew of Argos... commitment to RRPs”. Every individual at Hasbro in these teams knew about the pricing initiative and the understanding that I refer to above. These matters were discussed at quarterly sales drives and at monthly meetings.
21. There were similar discussions on the lines outlined above with other retailers, but they were less important than Argos and Littlewoods who were the market leaders...”

440. None of the above evidence was challenged. Argos did not cross-examine Mr. Bottomley at all, and Littlewoods did so only shortly.

441. In preparing his witness statement Mr. Bottomley crossed out the words “I would ask them, ‘What do you think about maintaining retail prices?’”. He told us in cross-examination on behalf of Littlewoods that he personally had never asked a retailer to maintain a recommended retail price; and that he had “never threatened, coerced or pressurised any

retailer to maintain a retail price.” However, he told us that “I was part of an initiative instigated by Hasbro that asked retailers to sell at a recommended retail price” (Day 2, pp. 60-61).

442. It seems to us that Mr. Bottomley’s evidence establishes that:

- (i) Towards the end of 1998 Hasbro embarked on an orchestrated pricing initiative to persuade Argos, Littlewoods and other retailers to sell at Hasbro’s RRP’s.
- (ii) That initiative applied to those Action Man and Core Games products to which the core rebate also applied. According to Mr. Bottomley, the pricing initiative was a “key part” of the trading terms (Bottomley, paragraph 17).
- (iii) Once Argos and Littlewoods (and in particular Argos) were persuaded to price at RRP’s, other retailers were expected to follow suit.
- (iv) Mr. Bottomley had conversations with retailers, including Littlewoods, to persuade them to price at RRP’s.
- (v) Retailers indicated to Mr. Bottomley that they could not afford to price at RRP’s unless Argos did the same.
- (vi) Mr. Bottomley’s reply to that objection was that “exactly the same discussions were taking place with Argos so that for the first time the whole industry would be involved”
- (vii) Mr. Bottomley was aware that discussions about RRP’s were going on with Argos, including discussions between Mike Brighty and Sue Porritt.
- (viii) Mr. Bottomley learnt from Mike Brighty (who sat next to him in the same office) that Sue Porritt of Argos had indicated that Argos “would go out at Hasbro’s RRP’s”.
- (ix) The whole sales team at Hasbro knew of the discussions that were going on with Argos and Littlewoods respectively.
- (x) Ian Thomson (as regards Littlewoods) and Neil Wilson (as regards Argos) were directed by more senior management (Messrs. McCulloch, Bottomley and Brighty) to implement the policy, including the pricing initiative.
- (xi) Argos’ indications that it intended to price at RRP’s was known to Ian Thomson, the Littlewoods account manager, from Neil Wilson, the Hasbro account manager.
- (xii) Hasbro considered that it had “an understanding” that Argos and Littlewoods would price at or near Hasbro’s RRP’s, although Hasbro never knew for certain that they would do this until the catalogues came out.

- (xii) Everyone in the Hasbro sales teams knew of the pricing initiative and of “the understanding” to which Mr. Bottomley refers.

Contact between Hasbro and Argos in the latter part of 1998

443. Neither Mike Brighty of Hasbro (then Sales Director responsible for the Argos account) nor Sue Porritt (Mr. Brighty’s opposite number at Argos) gave any written statement or oral evidence in these proceedings. Neil Wilson, the Hasbro account manager responsible for Argos, did not take over his position until January 1999. Hence, the evidence before the Tribunal of contacts between Hasbro and Argos in the latter part of 1998 is indirect.

444. However, in Thompson II (paragraphs 8 and 9) Mrs. Thompson, then Associate Director for all merchandise in the Argos catalogue, to whom Sue Porritt reported, identified a meeting in “late 1998, possibly November” between Sue Porritt and Mike McCulloch (then Hasbro’s Head of Sales and Marketing) at Argos’ offices at Milton Keynes:

“Mike McCulloch told Sue Porritt that Hasbro were proposing that all retailers should sell at a given price and they would only be paid rebates if they agreed to sell at the relevant RRP. Sue came into my office and said something like “You will never guess what Mike has just said to me”. We both thought it was illegal. I also thought it was commercially unworkable. I think that Sue telephoned Mike McCulloch and told him this. From what Neil Wilson says at paragraph 9 this was also the advice Hasbro got.”

445. Mrs. Thompson accepted (Day 3, p. 99) that, whether or not it was legal to link the proposed rebate to retail prices, it was clear to Argos that Hasbro’s aim was to get “everyone” (i.e. all the principal retailers) to go out at RRP.

446. Mr. Neil Wilson gave evidence of what he learnt from senior management when he took over the Argos account in January 1999 and from trading team meetings at Hasbro before that time. He states:

“8. I was aware that in late 1998 and early 1999, Mike McCulloch, Hasbro’s Head of UK Sales and Marketing, had spoken to Maria Thompson at Argos, and possibly other buyers there such as Sue Porritt. In these discussions, they identified a need to increase margins on Hasbro products. Argos said that it would welcome any influence that Hasbro could exert to increase margins, by getting nearer to RRP and by other

means. I understood that Mike McCulloch said that Hasbro could help stabilise RRP's (i.e. persuade other retailers to go out at RRP's), and that Argos was willing to go along with this in principle and price at RRP's, but would react if it was undercut and would never give any guarantees on pricing.

9. In response to this pressure from Argos and other retailers to improve profitability and margins, Hasbro's senior management at director level (i.e. Mike McCulloch as well as David Bottomley and Mike Brighty, both Sales Directors) developed a strategy to raise margins on Hasbro products. The discussions with Argos were key to coming up with this strategy. There were a number of strategies laid down to increase margins, including pricing and listings initiatives, introducing clearance merchandise, an FOB programme and reducing cost prices. The first part of the strategy was a pricing initiative to increase retailer margins on Hasbro products by matching RRP's across the toy industry. I set out in more detail below how this worked in practice. The second part of the strategy was a listing initiative which ran concurrently with the pricing initiative and which involved payment of a rebate to retailers in return for listing certain products that might have otherwise have been de-listed. It was considered first by Hasbro Sales Directors to make the granting of a rebate also conditional on adhering to RRP, but it was realised that this would be illegal after consulting Hasbro's Legal Department.
10. Argos (and other retailers) were asked by Hasbro whether they were happy to match Hasbro's RRP's. Argos said it was prepared to match RRP's as long as it was not undercut by its competitors.
11. Although Hasbro management had developed this strategy, account managers such as Ian Thomson and myself then carried out the day-to-day practicalities of ensuring that it worked.
12. As to the level of detail that went into the discussions between Hasbro and Argos as described above I am not in a position to say, as I did not attend these meetings..."

447. Mr. Wilson's above evidence, albeit hearsay, was not challenged in cross-examination, nor did Mrs. Thompson or Mr. Needham of Argos file any witness statement challenging that evidence. That evidence in our view further supports the findings that in late 1998:

- (i) Mr. McCulloch had spoken, to Mrs. Thompson and/ or Sue Porritt, about the need to increase margins on Hasbro products and to 'stabilise' prices at RRP's
- (ii) Argos said that it would welcome any influence that Hasbro could exert to increase margins

- (iii) Mr. McCulloch had said to Mrs. Thompson and/ or Sue Porritt that Hasbro could help stabilise RRP's – i.e. persuade other retailers to go out at RRP's
- (iv) Argos had said that it was willing to price at RRP's, but would react if undercut, and would give no guarantees on pricing.
- (v) the core rebate, although not explicitly linked to RRP's, ran concurrently with Hasbro's pricing initiative to stabilise prices at RRP's.

Mr. McCulloch's interview with the OFT

448. Mr. McCulloch was not called as a witness by the OFT. The record of his interview with the OFT on 10 October 2001 includes the following:

- “MM: We put plan together to put profit into retail sector. Had discussions with Argos, but they were unwilling to take on the plan because they were concerned about other retailers undermining them. Initiative was discussed with other retailers. Other retailers were always going to follow prices of Argos and Index. So other retailers felt whatever Argos and Index did was crucial to strategy.
- BL: Who did you speak to at Argos?
- MM: Maria Thompson and their head of toy buying at the time, Sue Porritt, who is no longer there.
- BL: Was anything agreed?
- MM: No not really. Two things came out of it: tying rebates to distribution and that Argos were critical to initiative to giving more profit to retailers. Told Argos that rest of retailers were price followers.
- ...
- MM: The bought in margin initiative was taken up by Argos and Index, and we seemed to lose track of things. RP of Argos crucial to market.
- BL: How many retailers were involved?
- MM: [The] crucial ones were Argos and Index. When they published their catalogues other retailers could see that they were pricing at suggested price points.
- BL: Who in Hasbro spoke to who at Argos, Index and other retailers?
- MM: Me. I spoke to Argos and Index in general terms about the initiative, but no specific agreement about retail pricing.
- ...

BL: So you never talked to Argos and Index about an arrangement.

MM: No. [I was] careful never to discuss retail pricing with them on advice of [our] legal dept”.

449. It is quite true, as Argos and Littlewoods point out, that when Mr. McCulloch was asked by the OFT if anything had been agreed, he replied “No not really”. He also said that there had been “no specific agreement” on retail pricing, and that he had not discussed “retail pricing” with Argos and Littlewoods, on the advice of Hasbro’s legal department.

450. However, we note that the above record of Mr. McCulloch’s OFT interview suggests that

- (i) Mr. McCulloch had had discussions with Argos about his “plan to put profit into retail sector”. In the context that “plan” almost certainly was, or included, Hasbro’s pricing initiative to persuade retailers to price at RRP’s
- (ii) Argos was concerned about being undercut by other retailers if they took on “the plan”. That confirms in our view that “the plan” as envisaged by Mr. McCulloch involved Argos raising its prices.
- (iii) Mr. McCulloch discussed his initiative with other retailers, who felt that whatever Argos and Littlewoods did was crucial
- (iv) Argos’ reaction was critical to the success of Hasbro’s initiative
- (v) Mr. McCulloch, having discussed the matter with other retailers, went back to Argos and told Argos that “the rest of the retailers were price followers”
- (vi) The Hasbro initiative was taken up by Argos and by other retailers.

451. The issue of whether or not there was a relevant agreement or concerted practice is, of course, the issue before the Tribunal. We do not know what Mr. McCulloch meant when he said “No, not really”, nor what, in Mr. McCulloch’s mind, was signified by the word “agreement”. But it seems to us nonetheless that it can reasonably be inferred from Mr. McCulloch’s interview with the OFT that (i) Mr. McCulloch actively sought to persuade retailers to price at Hasbro’s RRP’s; (ii) Argos was initially reluctant to take on Mr. McCulloch’s plan for fear of undercutting; and (iii) Mr. McCulloch was able to reassure Argos, after having spoken to other retailers, that other retailers would follow Argos.

Mr. McMahon's evidence about contacts with Mr. McCulloch

452. In his witness statement of 4 July 2002 Mr. McMahon said that Mr. McCulloch made suggestions to him as to moving to RRP's, but that he (Mr. McMahon) did not trust Argos and used to ignore Mr. McCulloch's suggestions. Hasbro was the most organised of the toy suppliers in coming up with suggestions as to retail prices, but they would never know whether Littlewoods would go with their suggestions until the catalogues came out. Mr. McMahon was sure that Hasbro was also suggesting prices to Argos, although that was not part of his ongoing discussions. After the GUS takeover, Mr. McMahon thought that Argos were pricing less aggressively than before, so he decided to go out with some of Hasbro's recommended prices, his gamble being that Argos was looking for extra margin and would not price as aggressively as before (McMahon I, paragraphs 7 and 8) . He told us

“Many of the toy companies including Hasbro were confirming to us that they did not think that Argos was planning to cut prices as deeply as before, this gave me extra confidence to go for higher margins. There was never any question though of specific pricing information from Argos being fed back to the Littlewoods team”.
(McMahon I, paragraph 8)

453. Mr. McMahon told us in cross-examination that, following the GUS takeover, he thought that Argos would price “as aggressively or un-aggressively as they required”. He did not expect them to sell at RRP (Day 2, p. 92 and 93) and “had no idea really what sort of prices Argos would sell at” (p. 92). Mr. McMahon did think that Argos could be driving for more margin, although there were many ways of achieving that, other than by raising prices (p. 94-95), but it was not part of Littlewoods' thinking that Argos was going to price at RRP's; had Littlewoods put its prices up and price increases from Argos had not materialised, Littlewoods would have been “seriously disadvantaged” (Day 2, p. 96). According to Mr. McMahon, Argos' prices in S/ S 1999 gave him some confidence that there would be an opportunity for extra margin in A/ W 1999. For A/ W 1999 Mr. McMahon therefore took a “calculated risk”, a “business risk”, based on the information that he had (Day 2, pp. 98-100). He maintained that he had had no discussions with Mr. McCulloch in 1998 or 1999 about going out at RRP's if Mr. McCulloch could get Argos to do likewise (Day 2, p. 104).

454. Mr. McMahon's evidence thus confirms that he had had discussions with Mr. McCulloch about raising prices to RRP's. Mr. McMahon does not deny that he knew that Mr.

McCulloch was having similar discussions with Argos. Mr. McMahon accepts that it would have been a very considerable risk if Littlewoods moved to RRPs and Argos did not. He also accepts that it was not inevitable that Argos would move to RRPs.

455. In those circumstances the main issue in our view is whether in the course of his discussions Mr. McCulloch explained to Mr. McMahon that Hasbro had a plan to persuade all retailers to price at RRPs, and that he (Mr. McCulloch) was able to reassure Mr. McMahon that Littlewoods would not be undercut by Argos if Littlewoods went to RRPs. Mr. McMahon denied any such conversation.

456. We do not accept Mr. McMahon's denial. We have evidence of at least two occasions, one relating to the Liverpool meeting and one relating to a discussion about the Tweenies doll, both discussed below, which in our view establishes that Mr. McMahon had had discussions with Mr. McCulloch in which the latter had given Mr. McMahon reassurance that, if Littlewoods went to RRPs, they would not be undercut by Argos. That evidence is reinforced by Mrs. Thompson's evidence that Mr. McCulloch was at the same time in fact talking to Sue Porritt at Argos, and by the evidence that the whole context of the Hasbro pricing initiative involved reassuring Argos and Littlewoods that they would not be undercut if they went to RRPs.

Mr. Thomson's presentation to Littlewoods at Liverpool

457. After the Stockley Park presentation of Hasbro's 1999 trading terms on 23 October 1998, Mr. Thomson's responsibility was to prepare a business plan for the presentation of those terms to Littlewoods. That plan featured the Core Brand rebate set out in the Stockley Park presentation, but there was no direct reference in Mr. Thomson's presentation to Littlewoods maintaining retail prices in order to earn the rebate. Mr. Thomson states that he cannot now recall why that was the case (Thomson, paragraph 48).

458. Apart from the Core Brand rebate, another feature of Hasbro's plan for 1999 was that Hasbro proposed to increase its list selling prices to Littlewoods. This meant that Littlewoods would earn less margin than it had in 1998 unless it increased its retail selling prices. Mr. Thomson included with his presentation various spreadsheets showing the expected volume of sales, the new list prices, and, in a column headed "1999 £ INDX",

retail selling prices including VAT. In his spreadsheets Mr. Thomson then calculated Littlewoods' margin (also referred to as POR) on the basis of the difference between the Littlewoods cost price from Hasbro and the retail selling price shown by Mr. Thomson, less VAT.

459. Although Mr. Thomson's witness statement refers to 99p price points, in the document before the Tribunal produced by Mrs. Paisley most of the retail selling prices shown by Mr. Thomson for Action Man and Core Games are at 95p price points.

460. Mr. Thomson's view was that if Littlewoods wished to earn no less margin (before rebate) on Action Man and Core Games than it had in 1998, Littlewoods would be virtually forced to adopt the retail selling prices shown by Mr. Thomson. Hasbro's intention was that the retailers would have "no alternative" but to adopt Hasbro's price points if they wished to earn the same margin before rebate as they had the previous year (Thomson, paragraphs 40 and 41).

461. It has been difficult to date the meeting at which Mr. Thomson made his presentation. The copy of Mr. Thomson's presentation which is before the Tribunal was taken from Littlewoods' files and bears the annotation "Mtg in J Mac's office 5/11/98" in Alan Burgess's handwriting. The "Year to date" pages bear the date 04/11/98 (Witness Bundle, pp. 420 – 424). Mr. Thomson told us that he had first created his floppy disks on 22 October 1998. However, he has identified an alteration on his floppy disk which leads him to think that the meeting may have been after 13 November 1998 (Day 1, p. 99). The Stockley Park presentation (at p.36) suggests that that plan would not be presented "to Sales, Trade Marketing colleagues" until "12/13 November". Mr. Bottomley's recollection was that the meeting was in early 1999, between the London and New York annual toy fairs (Day 2, p. 63).

462. At all events the meeting was attended by Mr. McCulloch, Mr. Bottomley and Mr. Thomson. Mr. Thomson told us that it was unusual for Mr. McCulloch to attend such a meeting. On the Littlewoods side, there was, according to Mr. Thomson, Mr. McMahon (Trading Director), Lesley Paisley (Buying Manager) and Alan Burgess (boys' toys and games Buyer). Mrs. Paisley had no recollection of attending the meeting. We have no

reason to doubt Mr. Thomson's evidence that she was there, especially since her opposite number Mr. Bottomley, was present. Mr. Bottomley's evidence did not set out any detail about the meeting.

The course of the Liverpool meeting with Littlewoods

- Mr. Thomson's evidence about the Liverpool meeting

463. According to Mr. Thomson, he presented Hasbro's new terms and Mr. McCulloch, Mr. Bottomley or he himself answered questions. In his witness statement, Mr. Thomson continues his account of the meeting as follows:

- “58. Index concerns about our plans for improving profitability on Hasbro merchandise surfaced towards the end of the presentation when we considered my Excel spreadsheet analysis. The spreadsheets showed that Index would need to price at the new .99p price points in order to make the necessary profit margins.
59. John McMahon and Lesley Paisley saw that the products in our Core Games and Action Man would have to be retailed at a certain price point in order to maintain that margin and expressed grave concerns over whether this could be done.
60. These grave concerns were how Hasbro could make other retailers do the same thing.
61. The issue over pricing was that Argos as direct competitor would be a direct threat to any action taken by Index and could compromise them severely if they undercut the pricing. This would mean that Index would lose credibility as a catalogue retailer and as a result of that lose market share. These might not have been the precise words that John McMahon used but the implication was the same.
62. It was at this point that Mike McCulloch intimated to John McMahon that he had been having discussions with the major opposition (Argos) and they were of the same opinion i.e. that they could not agree to the new pricing structure for fear of being undercut. It did need the agreement of both parties in order for the plan to work, but that if Index would agree to go along with it then Mike McCulloch, using this knowledge, was confident that he could persuade them to do the same.
63. John McMahon said that he would play ball and go along with the plan but if they (Argos) reneged on the deal and did not stick to the retail prices in their 1999 Autumn Winter Catalogue and he (Index)

did, he would be seriously disadvantaged. If this happened as a result he would do some serious price cutting in the next Index catalogue launch.

64. There was a great sense of satisfaction amongst Mike McCulloch, David Bottomley and myself after this meeting that we had at last been able to present a plan that would improve the profitability of the customers that we dealt with. Mike McCulloch said that he would have to go and see Argos to get their buy in. I am not sure if he intended to take Mike Brighty as well.
65. I was told shortly afterwards that Argos had agreed to go ahead. (I can't remember who passed on the details to me at that time but it would probably have been David Bottomley but I can't be entirely sure.) I do remember being asked to pass on the information to Index and I would have spoken directly to Alan Burgess as a result. Alan simply acknowledged this.
66. I don't know whether Mike McCulloch or David Bottomley spoke to their contacts at Index about the Argos decision. Mike McCulloch's contact would have been John McMahan and David Bottomley's, Lesley Paisley
67. At that time I spoke to Alan Burgess to tell him that we had had an agreement from Argos that the Core Brand recommended retail prices would be adhered to."

464. Mr. Thomson was cross-examined about this meeting. He stated:

"There are many parts of the conversation that I do not recollect and there are some that remain quite clear" (Day 1, p. 102).

465. Mr. Thomson accepted that Mr. McCulloch did not say to Mr. McMahan in mandatory terms "You must stick to our RRP's" (p. 107). Pressed about what Mr. McCulloch actually said to Mr. McMahan, Mr. Thomson said

"That is when Mike – it was then spotted that, how on earth could we ensure that to maintain the same margin at these price points that anyone else would follow suit? That is when Mike said that he had been having discussions with other parties, or another party..."

At the time, I cannot remember the specific words, but Mike McCulloch said that he had been talking to other parties or another party, or the opposition – I cannot remember the exact wording – about the same opinion. So he had obviously been having discussions with, at that time, I assumed, Argos. I cannot remember whether Argos was actually mentioned specifically but it was fairly clear as to the fact that it was." (pp. 107-108)

466. As to whether Mr. McMahon said anything like “I will play ball with you”, the exchange was as follows:

“A. The words “play ball” may not have been used, but I would go along with that there was a clear indication that he was willing to participate, as long as he knew that the opposition were going to do the same.

Q. Let us be absolutely crystal clear about this, because this is an important issue, and Mr. McMahon will want to explain what his position is. What do you mean by clear indication? What words did Mr. McMahon use?

A. As I said, it was along the lines of, “I will go along with your plan,” but he was very nervous about it and Mike McCulloch said at that time, “Well, you leave the next part of the process up to me”, and along the lines, “I am going to go and have a discussion with somebody else” or whatever, “and then I will come back to you once we have had that discussion.”

Q. You used the words “along the lines of”. I am going to press you further on this. What do you mean by “along the lines of”? Can you remember the exact words you used? Let us start with that.

A. No, I cannot remember the exact words used.

Q. Did Mike McCulloch ever get back to John McMahon?

A. I do not know whether Mike ever spoke to John directly but I certainly got the word back from David Bottomley, I think through Mike Brighty, that I had to go back to Index and say that a deal had been struck.

Q. You got the word from David Bottomley, who got the word from Mike Brighty?

A. Or Mike McCulloch, it would have been direct from Mike McCulloch. Or from Mike Brighty. Mike McCulloch might have told Mike Brighty, he may have told David direct. All I know is that I got the word back from David Bottomley at the time to go ahead and say that a deal had been struck, and to go back to Index and say that discussions had been favourable.

Q. We do not have Mr. McCulloch to explain what he did or did not do, but you do not know whether Mike McCulloch went back to John McMahon?

A. No.

Q. You think that Mike McCulloch might have said something to Mike Brighty, who might have said something to David Bottomley, who said something to you.

A. One would have to draw a conclusion from that, because I was given the information back through my sales director at the time. And Mike McCulloch had said he was going to have a conversation with somebody else about it, who I took to be Argos, and then he would get back to Index about that information” (Day 1, pp. 110-112).

467. In cross-examination on behalf of Argos, Mr. Thomson was shown the prices in the Argos 1999 catalogues. It was put to him that, on that basis, Argos had already decided to price at 99p price points at the time of the meeting with Littlewoods. Mr. Thomson maintained that he was not aware of that (Day 2, pp. 7-8). However, he maintained that he was nonetheless still certain that Mr. McCulloch had said to Mr. McMahan that he (McCulloch) had been having discussions with Argos, that Argos could not agree to the new pricing structure from fear of being undercut, and that it needed the agreement of both parties for the plan to work (p. 10). Mr. Thomson agreed that, given what he had been shown about Argos’ prices in the S/S 1999 catalogue, Mr. McMahan’s statement was inaccurate, but he maintained that Mr. McMahan had nonetheless said it (Day 2, p.11).

- Mr. McMahan’s evidence about the Liverpool meeting

468. Specifically as to the Liverpool meeting, in his second witness statement of 29 January 2004, Mr. McMahan did not challenge Mr. Thomson’s description of that meeting. In cross-examination, Mr. McMahan accepted that he was often talking to Mr. McCulloch about how margins could be improved, and that Mr. McCulloch would often ask him “Would you sell at recommended retail price?” (Day 2, p. 78). Mr. McMahan accepted that he was concerned that if Littlewoods went to RRP, Argos and other retailers might not do so (Day 2, p. 80). However, he denied that he had ever had any discussion with Mr. McCulloch about whether Hasbro could get other retailers to price at RRP (Day 2 pp. 79-80), nor expressed concern to Hasbro about what would happen if Littlewoods went to RRP and Argos did not (Day 2 p. 81). Mr. McMahan did, however, accept that his riposte to Mr. McCulloch’s suggestion of going to RRP would have been “I will be beaten by the competition” (Day 2, p. 82). He denied, however, that Mr. McCulloch had ever mentioned to him discussions with competitors over price, or said that a move to RRP would need the agreement of both Littlewoods and Argos, or that Mr. McCulloch had said that if

Littlewoods agreed he could persuade Argos to do the same, or that he (Mr. McMahon) had ever said that he would play ball but would react if undercut, or words to that effect (Day 2, pp. 82-83, 104).

- Mr. Burgess' evidence about the Liverpool meeting

469. In cross-examination (Day 4, pp. 81 to 145) Mr. Burgess did not recollect the focus of the Liverpool meeting being that Littlewoods would make more money by going out at RRP's, or that Littlewoods were being encouraged to do so. In his view Hasbro had been "manipulative and deceitful" in emphasising that they were putting more margin into toys while failing to mention that they intended to increase Hasbro's cost prices to Littlewoods (Day 4, p. 89). Mr. Burgess had only "recently" found out that Hasbro's presentation had involved raising Littlewoods cost prices, because that information was hidden in the appendices to Mr. Thomson's presentation and was not brought out at the meeting. He was now "incensed" by the fact that it was not apparent at the time that Hasbro's new cost prices virtually forced Littlewoods to go out at Hasbro's RRP's if they wished to make any money at all (Day 4, p. 90). Mr. Burgess accepted, however, that he would have worked through Mr. Thomson's appendices within a month of the presentation, but never raised the matter with anyone. Mr. Burgess did not recall Mrs. Paisley and Mr. McMahon expressing concerns about being undercut if they went to the price points suggested by Mr. Thomson's presentation (Day 4, p. 93), but later in cross-examination he said that he had "absolutely no doubt" that RRP's would have been discussed as part of Hasbro's plan to give Littlewoods extra margin though core rebates (Day 4, p. 113). The discussion of pricing would have extended to the price that Index would sell on the market (p. 114) and that "we will have discussed retail prices because that is very key to probably a lot of things that are in there" (p. 115). Mr. Burgess did not recall Mr. McCulloch mentioning that he had had discussions with the major opposition, but

"I am not saying they did not happen; all I am saying is the meeting that I was at, I did not hear them... I can only reiterate that I do not recall that conversation at all" (p. 116).

- Findings of the Tribunal

470. There is a conflict between Mr. Thomson's recollection about what Mr. McCulloch said at the Liverpool meeting and Mr. McMahon's recollection. The evidence of Mr. Bottomley

and Mrs. Paisley does not assist in resolving that conflict. Mr. Burgess' evidence is inconclusive but not inconsistent with Mr. Thomson's evidence. On the specific point of what Mr. McCulloch said to Mr. McMahon, we accept the evidence of Mr. Thomson. It seemed to us that Mr. Thomson's recollection of the gist of what was said in this part of the meeting was relatively clear, and we have no reason to think that his evidence on this point was invented or mistaken.

471. Mr. McMahon's recollection of the Liverpool meeting, on the other hand, was stated in somewhat vague terms. We did not find his denial of this part of the evidence to be convincing. We take into account that in the same part of his cross-examination Mr. McMahon also denied another conversation about a Tweenies doll which took place later, about which the evidence is strong (see below). Further, the fact that Mr. McCulloch had had discussions with Argos along the lines of his reported remarks is corroborated by other evidence already set out above.

472. Given all those circumstances and the context of the meeting, we find that during the Liverpool meeting (i) Mr. McMahon expressed the fear of being undercut by Argos if Littlewoods raised its prices; (ii) Mr. McCulloch responded by saying words to the effect that he had had discussions with Argos (possibly referred to as "the opposition") who had expressed the same fears, but who could be persuaded to raise their prices if they were reassured that they were not going to be undercut; and (iii) that Mr. McMahon said words to the effect that he too would be prepared to go along with raising prices if Argos were going to do the same, but that Littlewoods would react vigorously if it turned out that they had been undercut.

473. Furthermore, Mr. Thomson's evidence that he later went back to Alan Burgess to confirm to him that Argos had agreed to raise its prices was not challenged in cross-examination, nor did Mr. Burgess explicitly deny that when he gave evidence. We find that Mr. Thomson did so go back to Mr. Burgess to confirm that Argos was going to raise its prices.

474. As regards Mr. Burgess' evidence that he felt that Hasbro had been "manipulative and deceitful", it may well be that during the meeting Hasbro underplayed the fact that it was increasing its cost prices, but we do not see that as having much relevance to the issue we have to decide. The important point is that Mr. McMahon (and according to Mr. Thomson

Mrs. Paisley as well) saw that Hasbro was trying to get Littlewoods to go to RRP's and expressed concerns, at which point Mr. McCulloch reassured Mr. McMahon by referring to his discussions with Argos. On the specific issue of Hasbro's cost prices, we find it hard to believe that Mr. Burgess did not appreciate, at the latest shortly after the meeting, that Hasbro was preparing to increase its list prices. We also find it hard to believe that Littlewoods would have set its RRP's for 1999 without knowing what its costs were.

The Spring/ Summer catalogues 1999

475. We accept the appellants' submission that on Action Man and Core Games both Argos and Littlewoods to a significant extent moved to Hasbro's RRP's in the S/ S 1999 catalogues, rather than in the A/W 1999 catalogues as alleged in the Decision. That emerges from the prices set out at Appendix I to this judgment.
476. It appears that Littlewoods moved almost entirely to the 95p price points set out in the RRP's shown in Mr. Thomson's presentation at the Liverpool meeting. Argos appears to have gone to 99p price points, apparently slightly above the RRP. However, as already stated, we are also prepared to accept for present purposes that the 95p and the 99p price points are virtually the same from the perspective of the customer.
477. However, we do not accept the appellants' submission that, once it is shown that the move to RRP's took place for the S/ S 1999 catalogue, for which no agreement is alleged, rather than in respect of the A/W 1999 catalogue, the OFT's case necessarily falls to the ground.
478. We accept that no agreement or concerted practice is alleged in the Decision in respect of S/ S 1999. However, the evidence set out above shows that, prior to the publication of the S/ S 1999 catalogues in January 1999, Mr. McCulloch had had discussions with Sue Porritt at least about Argos moving to RRP's on Action Man and Core Games in the context of a plan by Mr. McCulloch to persuade all retailers to go to RRP's. A rebate on those products had also been discussed. We have accepted above that Mr. McCulloch mentioned his conversations with Argos at the time of the Liverpool meeting, which shows that such discussions had already taken place by then.

479. We are unable to determine on the evidence precisely when Argos took the decision to go to RRP's on some (but not all) Action Man and Core Games products in the S/ S 1999 catalogue. Mrs. Thompson tells us that "final pricing" was on 6 November 1998 (Thompson II, paragraph 21). In Needham I, Mr. Needham does not specify a date. He mentions that he told Mrs. Thompson and Sue Porritt that he was afraid of being undercut, but he does not state whether or how those fears were allayed (paragraph 17). We are not able to find, on the evidence, that Argos had definitely decided to raise prices before the Liverpool meeting.
480. Mr. Needham tells us that the S/ S 1999 catalogue prices were influenced by increases in Hasbro's cost prices (Needham II, paragraph 22) which suggests that the cost price increases shown in Mr. Thompson's Liverpool presentation were already known to Argos when the catalogue prices for S/ S 1999 were set. According to Mr. Needham, the first Hasbro preview meeting was in October/ November 1998 (Needham II, paragraph 4).
481. As regards Littlewoods, again it is impossible to date the Liverpool meeting precisely, or to indicate on what date Littlewoods' prices for its S/ S 1999 catalogue were set as regards Action Man and Core Games. Again, however, it appears that the increases in Hasbro cost prices referred to in Mr. Thomson's presentation were in fact taken into account in Littlewoods' catalogue prices for S/ S 1999.
482. Moreover, it is common ground that the products for which both Argos and Littlewoods raised prices to RRP's in the S/ S 1999 catalogue, namely Action Man and Core Games, were the products that were in fact the subject of the Hasbro pricing initiative. Neither appellant has adduced evidence to show that they also raised prices to RRP's in that catalogue on other relevant products. That both companies should do so on the same products, at the same time, on products which were subject to the Hasbro initiative, is again a considerable coincidence. Mr. Bottomley's unchallenged evidence is that the relevant arrangements were effective from 1 January 1999, i.e. before the publication of the S/ S 1999 catalogue.
483. In those circumstances, although the OFT has not found, on the evidence available, any agreement or concerted practice in respect of the prices of Action Man and Core Games for S/ S 1999, we are not prepared to exclude the possibility that relevant contacts between

Hasbro and Argos and Hasbro and Littlewoods had already taken place prior to both companies making their first move to RRP's on Action Man and Core Games in the S/ S 1999 catalogues.

484. In any event, whatever the position in relation to S/ S 1999, it does not follow that because certain products were sold at RRP's in the S/ S 1999 catalogue, then the same products would be sold at the RRP's in the A/ W catalogue, which is by far the more important. As Mr. McMahon told us, "the toy industry is all about the last three months of the year" (Day 2, pp. 90, 102). A number of witnesses emphasised the uncertainty of prices being the same from catalogue to catalogue, and Mrs. Thompson in particular emphasised Argos' policy of selective price increases and price decreases from one catalogue to the next. Mr. Wilson emphasised that:

"Argos was concerned about undercutting by any retailer and because they competed directly with Index they would be very concerned with how Index was pricing products. Argos would know, for example, what Index's Spring/ Summer prices were (because they were published in its catalogue) but they would not know what their intentions were with respect to Autumn/ Winter and that is where we came in." (paragraph 28)

485. In those circumstances even if, as the appellants submit and we accept, a certain move to RRP's took place in S/ S 1999, that would by no means preclude the existence of agreements or concerted practices for the A/W 1999 catalogues onwards.

The Hasbro/ Argos meeting held on 17 February 1999

486. A meeting between Hasbro and Argos was held on 17 February 1999 attended by Alistair Richards and Simon Gardner for Hasbro, and Terence Duddy and Maria Thompson for Argos. The evidence we have about this meeting is contained in three documents: a Hasbro internal document headed "Argos meeting 17/2/99", an email from Sue Porritt to the Argos toy merchandise team dated 19 February 1999, and a letter from Mr. Richards to Mr. Duddy dated 18 March 1999. We also have the evidence of Mr. Duddy and Mrs. Thompson. The OFT did not call Mr. Richards or Mr. Gardner. Mr. Bottomley, at paragraph 11, states that issues relating to margins and the pricing initiative were discussed at this meeting, but he was not present.

487. The internal Hasbro document states:

“Argos Meeting – 17/2/99

Issues

1. BIM eroding 5.5% 1998

Cover – Dialogue opened to stabilise RRP (initially Core Games, Action Man)

- Build in additional rebate earning”

488. The exact provenance of this document was not established, but there is no doubt that it is a Hasbro document prepared for the meeting in question.

489. Sue Porritt’s email to the Argos toy merchandise team is dated 19 February 1999 and is headed “Hasbro debrief from Terry Duddy meeting”. It includes the following:

“...2. Games Rebate

The specific issue of being forced to range Battleships & Connect 4 was raised. ARE advised that we can have an individual conversation around specific issues. Andrew will you take this up with Mike Brighty.

3. Pricing Strategy vs Rebate Pricing

MT indicated that we will react heavily to being undercut should it happen. Hasbro will not put money on the table to support this but will look at other methods of support. I will follow this up with Mike Brighty.

...”

490. Mr. Richards’ letter to Mr. Duddy of 18 March 1999 includes the following:

“Though you and Maria made clear that product availability and particularly profitability needs extra focus by Hasbro. I know that plans are in place but Simon and I will keep a personal watch on these areas, and will expect to show you progress the next time we meet.”

An unknown hand has written the word “cryptic” in manuscript on the copy of this letter obtained by the OFT from Hasbro’s files.

491. In cross-examination about the course of the meeting of 17 February 1999, Mr. Duddy said that it was likely that he explained to Mr. Richards and Mr. Gardner that “Argos would move to market pricing or ‘pricing on the market’”. He would not have indicated that Argos would only price at the RRP (Duddy II, paragraph 9; Day 3, pp. 51-52). Mr. Duddy did not accept that RRP were discussed at the meeting, and said he did not see RRP “as being the relevant factor relating to market pricing”; they were only relevant when they were the market price (Day 3, pp. 52, 53). Equally Mr. Duddy did not recall a discussion about Hasbro’s pricing initiative (pp. 53-55). However, he confirmed that he would have said that if Argos went out at the market price and a competitor charged less than that price,

Argos would respond by dropping its price and would look to the manufacturer for support such as paying for promotional flyers and supplying free stock (pp. 59-62). He agreed that he would have discussed this with Mr. Richards and Mr. Gardner, but denied that he had any expectation of support, or that that any understanding or arrangement had come into being. Mr. Duddy accepted that he expected Hasbro to find ways of providing more margin, but denied any suggestion that he expected Hasbro to prevent Argos from being undercut (pp. 68, 70).

492. As regards Sue Porritt's email, Mr. Duddy said he understood the email to be "broadly in line with the conversation... that should we go out at market pricing, and should those prices fall, then we would go back to Hasbro and look for support". He understood the words "We will react heavily to being undercut" to refer to a circumstance in which Argos would go back to Hasbro for support to keep Argos' margins up (Day 3, pp. 73, 74). As regards Mr. Richards' letter, Mr. Duddy said he thought the reference to "plans are in place" meant that "plans are in place to improve availability and profitability," and did not refer to Hasbro's pricing initiative (Day 3, p. 78).

493. Mrs. Thompson confirmed that she was present at the meeting of 17 February 1999 at which low margins were discussed, but also poor product availability (Thompson I, paragraph 21). She said that Hasbro was told that Argos intended to price more at a market price but would react if it was undercut by its competitors. Argos did not say that it intended to go out at the RRP (Thompson II, paragraph 12). The Hasbro price initiative was not discussed (Thompson II, paragraph 13, Day 3, p. 104). In cross-examination, Mrs. Thompson confirmed that Argos was giving Hasbro notice that it would be "coming back to them to assist us in repositioning prices if we were undercut". This meant "giving us money [or] giving us some free stock" (Day 3, p. 106). She emphasised that the undercutting might be done by any key competitor, such as Woolworths and Toys "R" Us, but Index was also a key competitor (Day 3, p. 110). Mrs. Thompson did not accept the OFT's suggestion that Argos was telling Hasbro that, if Argos went along with the Hasbro pricing initiative and was undercut, "you would get back to them, so they should take all steps they could to ensure that you were not undercut". Mrs. Thompson emphasised that Argos was not aware of any Hasbro initiative; Argos was moving away from pre-empting the market, and was no longer chasing market share unnecessarily (Day 3, pp. 111-113).

494. Mrs. Thompson understood the reference to ‘pricing strategy’ in the email of 19 February 1999 to be a reference to Argos’ pricing strategy, not Hasbro’s, and the reference to ‘rebate’ to refer to the fact that Argos would look to Hasbro for a rebate if it was undercut during the life of a catalogue. She did not know why Sue Porritt had used the words “vs Rebate Pricing” (Thompson II, paragraph 13). In cross-examination she said that the words, “We will react heavily to being undercut...” meant both that Argos would respond and reduce its prices, and that Argos would go back to Hasbro to seek their support (Day 3, pp. 115, 116). Rebates were not discussed at the meeting (p. 114). Mrs. Thompson denied that Hasbro “will have to do something about it, because Hasbro is being held responsible for that undercutting”, and reiterated that RRPs were not discussed at the meeting, “only the appalling profit that Argos made on toys...” (pp. 117, 118). The reference to “plans” in the letter of 18 March 1999 was a reference to Hasbro’s new system for stock control (Day 3, pp. 127-128).

495. Mr. Needham in cross-examination said that the reference in the email of 19 February 1999 to Argos reacting heavily meant that Argos could bring its prices down if undercut; Argos would then look to Hasbro for compensation (Day 5, 58-59).

- Findings of the Tribunal

496. The internal Hasbro document for the meeting of 17 February 1999 is further evidence that Hasbro had, by this stage, opened a dialogue “to stabilise RRPs”, initially on core games and Action Man. This dialogue included Argos. That is consistent with much other evidence in this case to the effect that Hasbro, as part of its pricing initiative, had opened a dialogue with the major retailers to persuade them to sell at RRPs on Action Man and Core Games: see, for example, Mr. Bottomley’s unchallenged statement. This internal Hasbro document also shows that “additional rebate earning” was closely associated with the action to stabilise RRPs that Hasbro was taking. However, it is not established that this document was used or referred to at the meeting itself.

497. As to the course of the meeting of 17 February, the nearest contemporary record is Sue Porritt’s email of 19 February 1999. The heading “Pricing Strategy vs rebate pricing” is in our view evidence that, contrary to Mrs. Thompson’s recollection, the question of a rebate had come up in the meeting. Since Hasbro was at the time introducing its core rebate it

seems likely that this is the rebate referred to. The words “Pricing Strategy vs rebate pricing” are, in our view, consistent with the OFT’s suggestion that the strategy referred to is Hasbro’s pricing initiative in conjunction with the core rebate. The words “MT indicated that we will react heavily to being undercut should it happen” strongly suggest to us that Argos was telling Hasbro of its intention to maintain higher prices than previously, but that if other retailers undercut (i.e. did not follow Argos), Argos would react vigorously.

498. Although Mr. Duddy and Mrs. Thompson maintained that this was a reference to “market pricing” we now know that Argos did in fact price at RRPs on the products in question. The reference to “support” is equally consistent with the OFT’s suggestion that Argos was conveying to Hasbro the message that if Argos’ prices were higher, as both Hasbro and Argos wanted them to be, but other retailers did not follow, Argos would hold Hasbro responsible. But it is not established precisely what such “support” would entail.
499. Our conclusion is that we are not in a position to make a definitive finding as to exactly what was said at the meeting of 17 February 1999. The evidence is however consistent with a discussion about Argos raising its retail prices and warning Hasbro of consequences if Argos was undercut. Ms. Porritt’s email of 19 February 1999 is ambiguous, but in our view tends to lend some support the case advanced by the OFT.
500. We agree with the appellants that the reference in Mr. Richards’ letter of 18 March 1999 that “plans are in place” is inconclusive.

Meeting between Maria Thompson and Mike McCulloch after 17 February 1999

501. Mrs. Thompson said that she had a meeting with Mike McCulloch some time after 17 February 1999. Most of the meeting was about Argos delisting two Hasbro games (Battleships and Connect 4). However, at the end of the meeting Mr. McCulloch said that Hasbro could make sure that the other retailers would go out at RRPs. However, Mrs. Thompson did not believe him. First, Hasbro could not control Argos’ pricing. Secondly, Hasbro could not control supermarkets’ pricing (Thompson I, paragraph 19, Thompson II, paragraphs 14 and 15).

502. In cross-examination Mrs. Thompson agreed that Mr. McCulloch must have been putting to her a plan whereby Hasbro would bring about a situation where retailers would all go out at the same price. Mrs. Thompson agreed that Mr. McCulloch was saying that Hasbro could get all the retailers to go out at the same price at RRPs. However, she did not see how Hasbro could ensure that, and thought that the suggestion was absurd (Day 3 pp. 119-126).

503. This meeting between Mrs. Thompson and Mr. McCulloch is in our view further evidence that Argos was well aware that Hasbro was seeking to persuade all the principal retailers to sell at RRPs, and had a plan to achieve that. Although Mrs. Thompson in her evidence characterised this suggestion as “absurd,” it is not denied that from 1999 onwards all the principal retailers did in fact go to Hasbro’s RRPs on Action Man and Core Games. It is hard to resist the inference that Mrs. Thompson must have come to realise that Hasbro’s indication that it could persuade other retailers to price at RRPs was not absurd after all.

Meeting between Neil Wilson and Sue Porritt on 29 March 1999

504. A contact report prepared by Neil Wilson about a meeting he had with Sue Porritt on 29 March 1999 states:

“Hasbro’s retail pricing strategy to increase trade bought-in margin was discussed. Sue understands our strategy but categorically stated that Argos will react to competitor pricing and ‘may be forced to react on price if sales are sluggish later in the year’. She implied that this would be out of her control!”

505. At this stage Hasbro’s strategy was to increase the trade bought-in margin by persuading retailers to price at RRPs while offering the core rebate on Action Man and Core Games. The contact report of 29 March 1999 is again consistent with Sue Porritt having understood that Hasbro was seeking to persuade the retail trade to price at RRPs. The words “Sue understands our strategy” are also consistent with Sue Porritt saying that Argos would follow the strategy (that is to say would price at RRPs), although Sue Porritt also says that Argos might have to cut prices either in response to competitor’s pricing, or if sales were sluggish. Again, the evidence points to the conclusion that (i) Argos knew that Hasbro was talking to other retailers as part of a strategy to stabilise prices at RRPs; and (ii) Argos gave Hasbro to understand that it was prepared to price at RRPs, but would react if undercut.

- Mr. Wilson's evidence

506. Mr. Wilson took over as the Argos account manager in January 1999. On 19 February 1999 he made a presentation to Argos as to the trade terms for 1999. This presentation was based on Argos selling Action Man and Core Games at Hasbro's RRP's. Those were also the products to which the core rebate applied. In his witness statement Mr. Wilson described the working out of Hasbro's pricing initiative in 1999 in the following terms:

- “15. From January to March 1999, Argos had gone through a selection process with me and Mike Brighty to decide which products were going into the catalogue. Argos then told me what products they were proposing to put in their catalogue. In March 1999, Argos and Index had made the final selection of the products that they would carry in the A/W 1999 catalogue. In my interview, I said, as regards the A/W 1999 catalogue, ‘Our role was to establish common products in both catalogues and set RRP's.’ I was referring to the pricing initiative. I now wish to clarify what I meant by establishing common products and setting RRP's.
16. When I was given the products selected for the catalogue, I established which were the common products carried by the majority of retailers (not specifically Index) and asked Argos what its price intentions were in relation to each of these products. I did not do this for products that were not common. I informed Argos what the Hasbro RRP's for the common products were and asked them whether any of our RRP's were a problem for them to match. Argos let me know whether they considered that a particular RRP was inappropriate. This was nearly always because Argos had spotted a different retailer charging a lower price, but it could also be because Argos felt the market would not stand the RRP and wanted to reduce the price to drive sales. By and large, when I presented Argos with Hasbro's proposed RRP's they said they were happy to follow them, although they did not give any guarantees and were subject to change. Occasionally their price would differ from the indication they had previously given.
17. At the same time, other account managers would go through the same process with their retailers. Once Argos had told me what their pricing intentions were, I passed on that information to other account managers within Hasbro to flag-up the products where the RRP was looking unlikely to be matched. It was then up to them to tell their accounts, and I do not know

how they presented this information. However, I know that they did tell their accounts.

...

19. Having determined Argos' pricing intentions and passed these on to the other account managers within Hasbro, I received information from those account managers regarding the intentions of other retailers to go with RRP. I then reverted to Argos and said, without being specific, that it was my belief that the future retail price of a product would or would not be at the RRP. I told Argos which products this related to. I never mentioned the name of the retailer who was involved or quantified exactly the price that retailer would go out at. I simply said to Argos that it was my belief from what retailers told us that this or that product would or would not be at the RRP.
20. I mainly had these conversations with Andrew Needham at Argos, as he was the buyer of boys' toys (including Action Man) and games, and sometimes with Sue Porritt, who was his boss. To a lesser extent I also dealt with Vanessa Clarkson, who was the Argos buyer for girls' toys, creative play and pre-school toys. These were the Argos buyers I would have the discussions with as described here. My involvement with Maria Thompson, who was more senior, was minimal.
21. In the interview I said, 'We never knew for sure if they would definitely commit to those prices, but had a 'gentleman's agreement' that they would... It was implied that RRP. s would be adhered to. But, we were not allowed to carry out any sanctions if RRP. s were not adhered to.' I described the process which I have set out above as a 'gentleman's agreement'. To clarify, what I meant was as follows. As I explain above, Argos had told me what their pricing intentions were and that they were intending to price at Hasbro's RRP. s. However, they never formally guaranteed that they would go out at those prices. There were not documents that set out these arrangements. If Argos chose not to charge RRP. s there was nothing we could do, as we knew it was illegal to, for example, offer incentives to Argos to adhere to RRP. s. That is why we only knew what the actual price would be (and whether Argos had kept to the price they had indicated to me) when we looked at the prices in Argos' catalogue.
22. Argos were fully aware that the pricing initiative involved Hasbro talking to other retailers. Argos monitored other retailers' prices. If they found out that a retailer was not at the Hasbro RRP, they contacted me to find out why there was a difference.
23. When Argos called me about the apparently lower price of another retailer, they contacted me to see if Hasbro could do

something about it, i.e. get the other retailer to go back to RRP. The understanding was that if Hasbro could give Argos an assurance that the other retailer would put the price back up to the RRP, Argos would also remain at the RRP. If not, Argos would have to make a decision about how it would price the product – usually by matching the competitor’s price.

24. In these circumstances, once I had spoken to Argos, I contacted the account manager in Hasbro who dealt with the retailer in question. He or she in turn called the buyer of the retailer who had the lower price. The account manager sought to find out why the price was lower and to persuade the retailer to go back to the RRP. Often the lower price turned out to be a temporary promotion, for instance to clear out stock, or a simple mistake, as most retailers were eager to charge RRP. I then informed Argos whether we were able to do anything and either provided the reassurance they sought or said that we could do nothing. Argos knew that this was the process that was going on.
25. ...In my conversations with Argos representatives, including Vanessa Clarkson and Andrew Needham, focus was more on retail price than cost price. They wanted to know if Hasbro could get the other retailer to move up to the RRP.
26. In my interview with the OFT I explained that ‘We would identify any undercutting and try to persuade the retailer to raise the[ir] price to the RRP. The account managers would contact their customers.’ This is the process that I have described in the preceding paragraphs.
27. The pricing initiative as explained above involved all retailers, not only Argos and Index. However, these two were a primary concern to Hasbro as they were the price setters in the toy market. When they had published their catalogues the other retailers would generally follow suit. Therefore it was necessary for Ian Thomson (the Account Manager for Littlewoods) and myself to have more of a dialogue with our respective accounts and be more involved. As I said in my interview with the OFT, ‘Argos and Index were the price setters/ leaders in the market. So needed to get them on board for our pricing strategy/ trading terms strategy to work’.
28. Argos was concerned about undercutting by any retailer and because they competed directly with Index they would be very concerned with how Index was pricing products. Argos would know, for example, what Index’s Spring/ Summer prices were (because they were published in its catalogue) but they would not know what their intentions were with respect to Autumn/ Winter and that is where we came in.
29. I had internal meetings with Ian Thomson when we would discuss Argos’ and Index’s pricing intentions. As a result, I

was able to provide Argos with reassurance as to probable future market pricing, i.e. that an RRP was likely or unlikely. This is what I meant in my interview with the OFT when I said 'Our role was to establish common products in both catalogues and set RRPs'. I was referring to Ian Thomson and myself and by 'both catalogues', I meant the Argos and Index catalogues.

30. I understand that Andrew Needham says in paragraph 36 of his witness statement that he never entered into conversations with Hasbro regarding Index and pricing. That is correct to the extent that I cannot recall being specific about Index in my conversations with Andrew Needham. As I said above, I would not be specific to Argos about any retailer or any retailer's price. Similarly, Andrew Needham would not specifically ask about Index. However, we would talk about the future anticipated market price and we were both aware that the Index price would be crucial to the outcome of the market price of any particular product.
31. I also note that Andrew Needham, at paragraph 24 of his witness statement, comments on the 'constant dialogue' between Hasbro and Argos on low margins and what could be done about them, for example, by movement on cost prices. However, as I said above, my conversations with Andrew Needham were not usually about cost prices. They dealt more with retail prices, as well as other strategies to increase margins such as clearance merchandise and FOB supply.
32. Andrew Needham also states that he was not aware of any Hasbro 'pricing initiative' or 'retail pricing initiative' and that as far as he was aware, there was no initiative to make Argos and other retailers adhere to RRPs. Although he is correct in his view that Hasbro had no strategy to force retailers to adhere to RRPs, Andrew Needham was certainly aware that Hasbro was communicating with retailers with a view to increasing margins by moving towards RRPs. I know this from conversations I had with him, including when he would pick up the telephone, say that he had seen an Action Man product for, say, £2 less than the RRP, and could Hasbro do anything about it. His purpose in calling me was that he wanted Hasbro to persuade the retailer to go back to RRP or, if we could not do that, to tell him so he could take account of that in his pricing. It was clear from this that he knew that Hasbro was persuading accounts to go to RRP.
33. When Andrew Needham uses the word 'adhere' to describe the initiative, he could be read as suggesting that there was some form of binding agreement. As I have explained, there were no sanctions that Hasbro employed if Argos decided not to price at RRPs as we were told by Hasbro's Legal Department that this would be illegal. Moreover sanctions would not necessarily have been appropriate as there was a general desire

to increase margins, a desire to co-operate within the industry and for there to be less undercutting of prices.

34. In July 1999, the Argos A/W 1999 catalogue was published. We were able to see from the catalogue that Argos had priced Core Games and the Action Man range more or less at Hasbro's RRP's. We were therefore reassured that the initiative was working and that, although they had offered no guarantees, Argos had priced at the levels that it had indicated to me in the vast majority of cases (i.e. in line with Hasbro's RRP's)."

507. According to Mr. Wilson, a similar process was followed in the S/S 2000 catalogue, although there was less discussion for this catalogue, partly because the catalogue was less important for toys, and partly because Hasbro and Argos were waiting to see what would happen at Christmas 1999 (Wilson, paragraphs 35-36).

508. None of the above evidence was challenged in cross-examination.

- *Mr. Needham's evidence*

509. In Needham I, Mr. Needham stated that he knew of no "pricing initiative", only the "listing initiative", which involved payment of the core rebate. For Mr. Needham "there was no initiative to make Argos and other retailers adhere to recommended retail prices" (paragraph 24). Argos would have indicated to Hasbro that it was considering moving to market pricing and/ or RRP's (if the RRP was felt to be the market price), but Mr. Needham made it clear that this information was not to be used against Argos. He did not expect that information to be passed on through Hasbro to other companies such as Littlewoods (paragraph 26). Argos was concerned about being undercut by other retailers if it moved to market pricing and/ or RRP's, and Mr. Needham had discussions with Hasbro about support (e.g. cost price reduction, funding advertising) if that were to happen. Argos never asked Hasbro to influence other retailers (paragraph 29). There was a dialogue between Hasbro and Argos on Argos' move towards RRP's, but only to the extent mentioned above (paragraph 34).

510. In Needham II, Mr. Needham said in response to Mr. Wilson's witness statement:

"15. As I said to the OFT at the oral hearing, I discussed retail prices with Hasbro. Discussions about retail prices with Hasbro would be inevitable as it sets the RRP's, its stated margin to Argos was the difference between the cost price and

the RRP and the RRP's appear on most of the documents emanating from Hasbro (for example, the Hasbro listings proposal presentation, the Hasbro business plan for Argos, the Hasbro Trading Terms presentation). However I wish to emphasise that these discussions were not a set process. We did not sit down and discuss individual RRP's in any routine way.

16. If Neil Wilson did ask me whether I was 'happy' or 'comfortable' with an RRP, I may have said yes but we did not have a discussion about whether Argos would be pricing at the RRP for each of the Core Games and Action Man products that were being listed. He did not go through each product, line by line, and ask me whether I was happy with each RRP. Neil Wilson sometimes asked me whether Hasbro's RRP's were set at the correct level. Hasbro, as did other toy manufacturers, sought our view on certain RRP's at the toy previews and toy fairs that I mentioned above. We also sometimes had general discussions about where we both thought the market price for a Hasbro product was likely to settle (i.e. what the future anticipated price for the product was likely to be during the life of the Argos catalogue). This discussion helped both of us. It provided Hasbro with some insight into where its products were going to settle in the market (as compared with other manufacturer's products). It helped me to ensure that the prices I set for Argos at catalogue launch were near what I anticipated the market price would be.
17. But it is important to recognise that, so far as I was concerned, these discussions were in no sense part of a plan to elicit my price intentions for Core Games and Action Man, let alone part of a plan to price normally at RRP on condition that Index did the same. This was simply not the case. Moreover, when Neil Wilson (at paragraph 19 of his statement) says 'I then reverted to Argos' as to his belief that a product would or would not be at the RRP, this was also not part of any plan or any systematic exchange. I certainly did not have the impression that Hasbro was eliciting my price intentions, with a view to passing these on to third parties and then reverting back to me with third party pricing intentions.

Hasbro communications with other retailers

18. The OFT states that I was aware that Hasbro was communicating with other retailers with a view to moving to RRP's (for example at paragraph 277 of the new decision relying on paragraph 32 of Neil Wilson's statement). I believe that there is a degree of confusion here. I feel that the OFT has misinterpreted this fact. I do not believe there is any real

contradiction between my statement and Neil Wilson's statement on this.

19. I said in my first statement (paragraph 24) that, as far as I am aware, 'there was no initiative to make Argos and other retailers adhere to recommended retail prices. Neil Wilson agrees with me at paragraph 32 of his statement ('he is correct in his view that Hasbro had no strategy to force retailers to adhere to RRP's'). When Neil Wilson says 'Andrew Needham was certainly aware that Hasbro was communicating with retailers with a view to increasing margins by moving towards RRP's' I regard this statement as a statement of the obvious. Hasbro would always tell Argos that if we priced at the RRP we would make more margin. I would not expect Hasbro to be any different with any other retailer. But I was not aware of any formal Hasbro initiative.
20. As to the issue of me phoning Neil Wilson if I saw a competitor pricing at way below the RRP, I agree with Neil Wilson at paragraphs 23 and 32 of his witness statement when he says that I called him to discuss lower prices offered by other retailers. But I do not agree with his interpretation of the purpose of the phone call. The purpose of the call was to try to ascertain whether the lower price was a result of a short or long term price promotion, not to ask Hasbro to get the other retailer to price at the RRP. I did not expect that Hasbro could do anything about our competitors' retail prices. If it was established that a lower price was due to a long term price promotion, Argos would need to react. Argos would seek financial assistance from Hasbro (for example, on cost price) – in other words, Argos would seek equivalent terms. But financial assistance from Hasbro was very rarely obtained. In any event, I believe that this whole issue is unrelated to the OFT's case that Argos agreed only to price at or near RRP's if Index would do the same. It is something that was happening way before Spring 1999 when the alleged price-fixing agreement is said to have come into existence."

511. In cross-examination, Mr. Needham said that possible RRP's were discussed in two situations. First, around preview time when Argos was selecting products for the forthcoming season, Hasbro would seek Argos' views as to whether a proposed RRP was commercially suitable for the product. The second discussion that would take place was where Hasbro would try to elicit Mr. Needham's views on the next catalogue pricing. There were three instances of the latter that related to specific products. But Mr. Needham did not "go line by line and say what we would actually be going out in the next catalogue" (Day 5, pp. 26-30). He accepted that Hasbro had on many occasions suggested that Argos should price at Hasbro's RRP's, especially when Hasbro came to know that Argos was

interested in increasing its margins; but the fact that Argos were thinking of moving to market prices or RRPs was elicited by Hasbro, not the other way round (Day 5, pp. 31-35). Mr. Needham accepted that it was very unusual to be discussing retail prices, although the conversations were “very, very general” (p. 35) and would involve “a generalised comment” (p. 38). Mr. Needham maintained that the discussion was about going to a market price which “could be anything” (p. 39). Argos told Hasbro that if it was undercut it would respond by cutting its own prices and seek margin support from Hasbro (pp. 41-43). If Argos saw another retailer selling at a lower price they would ask Hasbro whether the other retailer was getting a better price, and whether the other retailer’s price was going to back up (p. 43). Hasbro, however, never gave any margin support although they said they would consider it (p. 43, 48 and 49). Argos had similar conversations with other suppliers (p. 42). Argos was imparting confidential information to Hasbro, and expected Hasbro to respect that confidence (p. 51-52). Mr. Needham did not accept that what Argos was really saying was that Argos would go out at RRPs, but that if Index or other competitors did not go to RRPs, Argos would reduce its prices again (pp. 54-55). His discussion with Mr. Wilson had not gone beyond an intimation that there was “a general move in terms of our pricing policy” (p. 63). He denied any agreement or understanding (p. 64). Mr. Needham was surprised and disappointed that “private information” which he had given to Mr. Wilson had been passed on to Mr. Thomson in relation to three specific items (p. 68-69).

- Findings of the Tribunal

512. There does not seem to us to be much dispute between Mr. Wilson and Mr. Needham, although the latter in our view tended to downplay the nature and extent of his conversations with Mr. Wilson. We accept Mr. Wilson’s evidence, which was not challenged to any material extent. On the basis of that evidence we make at this stage the following findings:

- (i) For the A/W 1999 catalogue Mr. Wilson established the products that were common to Argos and other retailers and identified the RRPs for those products. In the present context those products were, for practical purposes, Action Man and Core Games.
- (ii) Mr. Wilson asked Mr. Needham what Argos’ pricing intentions were in respect of those products. He did this by asking Mr.

Needham whether Argos saw any problem in selling at any of the RRPs in question. This may not have involved going down a list, specific product by specific product. However we find that Mr. Needham would have known that Mr. Wilson was talking about Action Man and Core Games.

- (iii) Mr. Needham indicated to Mr. Wilson whether or not Argos would be happy to sell at Hasbro's RRPs for the products in question. In most circumstances Mr. Needham informed Mr. Wilson that he was happy to sell at those RRPs, but there would be occasions when Mr. Needham indicated that a particular RRP would be problematic. Mr. Needham did not give Mr. Wilson any guarantee, but he did tell Mr. Wilson what Argos' pricing intentions were in relation to the Hasbro products in question.
- (iv) Mr. Wilson passed on the information in question to other account managers at Hasbro who had been having similar conversations with other retailers. This included notably Mr. Thomson who dealt with Littlewoods. Mr. Wilson and Mr. Thomson had more of a dialogue with Argos and Littlewoods respectively than with other retailers because Argos and Littlewoods were the price setters or leaders in the market. Other account managers including Mr. Thomson would then pass other retailers' pricing intentions back to Mr. Wilson.
- (v) Mr. Wilson then reverted to Mr. Needham and told him whether he thought that the future retail price of a product would or would not be at the RRP. Mr. Wilson did not identify particular retailers, but he did identify which products this related to. Mr. Wilson said to Mr. Needham words to the effect that "it was [his] belief from what retailers told us that this or that product would or would not be at RRP" (Wilson, paragraph 19).
- (vi) Although Mr. Needham stated that he was unaware of any "formal" Hasbro pricing initiative, he accepts "as a statement of the obvious" that Hasbro was "communicating with retailers with a view to increasing margins towards RRPs" (Needham, paragraph 19). In our judgment it must have been apparent to Mr. Needham that Hasbro was talking to Littlewoods, Argos' principal catalogue retailer competitor, among others.
- (vii) In our view Mr. Needham must have been aware that, when Mr. Wilson reverted to him and told him whether this or that product would or would not be at RRP, the information being given to him was based on what other retailers had told Hasbro about their pricing intentions. Mr. Wilson explicitly states – and this was not challenged – that he "said to Argos that it was my belief from *what retailers told us* that this or that product would or would not be at the RRP".

- (viii) Mr. Needham must have known that his conversations with Mr. Wilson were taking place in a context where he (Mr. Needham) was aware that Hasbro was talking to Argos and its principal competitors, with a view to achieving a situation in which Argos, Littlewoods and other retailers were all pricing at Hasbro's RRP. Furthermore Mr. Needham must in our view have been aware that conversations of this kind would support or at least facilitate Hasbro's efforts to persuade other retailers to price at RRP.
- (ix) When Mr. Needham was told by Mr. Wilson whether he (Mr. Wilson) expected a particular product to be sold at RRP, Mr. Needham must have been aware that, by implication, Littlewoods was intending to be selling that product at RRP, even though Littlewoods had not been mentioned by name.

513. We specifically reject Argos' submission that the conversations in question were analogous to the sort of general conversations that might go on at a toy fair about the likely market price that a new product might be able to command. Whatever the legality of that type of conversation, there is a fundamental difference between a general conversation about the possible market price a new product might command, and a conversation between a retailer and a supplier in which the former states or indicates that he is prepared to sell at an RRP. This case concerns conversations of the latter, not the former, kind. Moreover, the conversations here in question concerned well established products such as Action Man and Core Games, and took place well after the 'toy fair' stage, which comes before the product is even selected for the catalogue. Mr. Wilson's evidence is specifically directed to conversations between a retailer and a supplier about the former's pricing intentions in respect of products that have already been selected for a particular catalogue.

514. Although Mr. Needham expressed his "disappointment" that information about Argos' pricing intentions was passed on to Littlewoods, in our view it must have been apparent to Argos that, if Hasbro was feeding back to Argos Hasbro's views as to other retailers' pricing intentions, by the same token Hasbro would be feeding such views to other retailers, based on Hasbro's conversations with Argos.

515. Moreover, it is not denied Argos was anxious to achieve better margins on toys, and to avoid being undercut. The indications from Mr. Wilson about other retailers' pricing intentions assisted Argos in achieving those objectives. Similarly, in telling Mr. Wilson

Argos' pricing intentions, Mr. Needham facilitated Hasbro's efforts to persuade other retailers to price at RRPs.

516. At paragraph 21 of his witness statement Mr. Wilson characterised what had occurred as “a gentleman's agreement” between Argos and Hasbro that RRPs would be adhered to. That description was not challenged in cross-examination. In our judgment, “gentleman's agreement” is an appropriate expression to convey what the evidence shows. Argos told Hasbro what its pricing intentions were, namely that it was intending to price at RRPs in the next catalogue. Those pricing intentions are highly confidential. Argos may not have communicated its intentions product by product, by going through a list, but there was no doubt that the stated intention applied to Action Man and Core Games. It is true that there was no certainty, and no guarantee that Argos would price at RRPs, and certainly no legally enforceable agreement. There may also from time to time have been some exceptions where Argos did not price at the price it had previously indicated. However, it seems to us implicit in the arrangements as described, unchallenged, by Mr. Wilson, that Hasbro had aroused in Argos an expectation that it would not be undercut if it sold at RRPs, and that Argos had indicated to Hasbro that it would go out at Hasbro's RRPs on the products in question in the next relevant catalogue. In our judgment, the above evidence establishes that there was an express or implied agreement, albeit verbal and with no guarantee, that Argos would sell at Hasbro's RRPs, at least to a material extent, on Action Man and Core Games in the A/ W 1999 and S/ S 2000 catalogues.

517. It also seems to us implicit in Mr. Wilson's evidence that if Hasbro had learnt from another retailer that such and such a product was not going to be at RRP, Hasbro would have felt under an obligation, albeit not a legal obligation, to inform Argos of that fact, albeit without identifying the retailer in question.

518. Furthermore, it is not denied that if Argos saw a Hasbro product on sale at another retailer at a price below RRP, Mr. Needham would ring up Mr. Wilson in order to find out what was going on. Similar telephone calls were made by Mrs. Wray, as discussed further below.

519. Mr. Wilson's evidence is that the purpose of such calls from Argos was to get Hasbro to do something about the fact that the other retailer was selling below RRP, for example by

persuading the retailer to raise its price back to RRP. Hasbro's normal reaction was to contact the retailer. Often it was a mistake, or a temporary stock clearance, but Hasbro would normally seek to persuade the retailer to go back to RRP. Mr. Wilson would then revert to Argos to inform them what the position was, it being understood that Argos would not react if Hasbro could reassure Argos that the other retailer was putting the price back up to the RRP (Wilson paragraphs 22-24, 32). Mr. Wilson's evidence, which we accept, was that these conversations were about the retailer's prices, not about Hasbro's cost prices (Wilson, paragraphs 25 and 31)

520. Mr. Needham's evidence is that this practice was to enable Argos to find out whether the other retailer was engaged in a short term or long term promotion, rather than to get the other retailer to price at RRP. If it turned out that it was a long term promotion, then Argos would need to react, and would seek financial assistance from Hasbro (Needham II, paragraph 20).

521. In our judgment, Mr. Needham must have known that, when he phoned Hasbro, Hasbro would react by contacting the other retailer to find out what the latter's pricing intentions were. On any view, therefore, Mr. Needham was expecting Hasbro to tell him what the pricing intentions of Argos' competitors were.

522. Moreover, in our judgment Mr. Needham must have known that Hasbro would attempt to persuade the retailer to put the price back up to RRP. Mr. Needham would have known that from the general context of the relationship in which both parties generally wished to see prices at RRPs. In addition Mr. Needham would have known that Hasbro was seeking to prevail upon other retailers to sell at RRPs because Hasbro would specifically come back and tell him whether or not it could give an assurance that the other retailer's price would revert to RRP. Furthermore, in giving such an assurance Hasbro was giving Mr. Needham information as to the pricing intentions of Argos' competitor. Whether or not this practice has been going on for many years, as Mr. Needham suggested, its effect in this case must in our judgment have been to help maintain retail prices at RRPs, to lessen the risk to Argos of being undercut, and to give Argos confidential information about other retailers' pricing intentions.

- *Mr. Thomson's evidence*

523. As to events following the Liverpool meeting, it appears that Littlewoods increased certain prices on Action Man and Core Games for A/W 1999 from 95 p to 99p following revised RRP's sent to Littlewoods by Mr. Thomson in May 1999. In his witness statement Mr. Thomson continued his account as follows:

- “68. Index would have had copies of the Excel Spreadsheets that I used to show the Retails, Volumes and Profit analysis from the Business Plan presentation that would have enabled them to price mark the relevant products for the launch of the 1999 Autumn Winter Catalogue.
69. There was a great degree of nervousness within Hasbro as to whether the prices would be adhered to because although there were verbal guarantees from Index and Argos, we would not know for sure until the respective Argos and Index catalogues were published.
70. The catalogues came out from Argos and Index around the same time in July 1999 (usually the 3rd week) and Neil Wilson and I checked the prices to see if the plan had worked.
71. It was a success – as we saw that the same retail price points for Core Games and Action Man had been applied in each catalogue.
72. Prior to the publication of the 2 catalogues I do not know if there was any other dialogue taking place with our other major accounts. After the publication of the Index and Argos catalogues at a sales meeting the rest of the account team were told that they could now convey to their accounts that the plan to improve profitability with Hasbro had started to work.
- ...
75. The impact of the new Hasbro 1999 Terms by Argos and Index was felt throughout the trade and nearly all of our customers stuck to the price points because Argos and Index who the price leaders had demonstrated that the new strategy was working.
- ...
77. The Business Planning Department was given the responsibility by senior management (the Sales Directors or Mike McCulloch) to monitor Retail Pricing. We had always monitored Retail pricing to understand what our customer's margins were in order to see their

profitability when selling Hasbro merchandise. This was used as an analytical tool when presenting Business Plans.

78. The emphasis on price monitoring now was to ensure that our other customers would fall in line so that Argos and Index would be confident that our plan was working throughout the UK. This would reduce the risk of them going back to price cutting in the following catalogues.
79. Retail audits were carried out by the Sales Team and the Business Planning Department on a monthly basis, and price anomalies were highlighted at our regular Sales Meetings. If a retailer's price on Core Brands was lower than the Argos/ Index price the relevant Account Manager was told to go back by either Mike Brighty or David Bottomley and tell the account to put the price up. We were left in no doubt by Mike Brighty or David Bottomley that this had to be done or else our customers would have no faith in our initiative to improve profit margins through our new terms.
80. If a price point was below the Argos/ Index core brand retails it was to be pointed out to the customer that they were reducing their profitability and affecting their margins. They could not complain to us if at the end of the year they had achieved a less than satisfactory margin when we were trying to improve the profitability of all of our customers.
81. I do not know how this was passed on to individual customers but it was suggested at the meetings that the threat of withholding rebates would be sufficient to make them put the price back up. Although this was suggested I am not aware of any rebates that were in fact withheld as it was deemed that the threat would be sufficient enough.
82. There was an incident regarding retail pricing at almost every monthly sales meeting that a relevant account handler would be instructed to go and sort out with his or her contacts within the customer base. Tesco and John Lewis Partnership is a couple of examples that I can think of.
83. Once we had established that Index and Argos held the prices in Autumn Winter 1999 the Sales Team were asked to continue this for Spring Summer 2000 by the Sales Directors.
84. During my various meetings with Index, mainly with Alan Burgess as it was his ranges that were in the Core Brands, I would comment on how successful the strategy had been for Autumn Winter 1999 and we should continue it for Spring Summer 2000.
85. I am aware that Neil Wilson was conducting a similar exercise with Argos and he would tell me that he was confident that Argos would stick to the plan.
86. In my discussions with Index I would tell them that Argos was still going to carry on with the policy of sticking to the Core Brand pricing. I was told that Argos would back the plan by Neil Wilson

and I would tell him that (Alan Burgess) Index was intending to do the same.

87. From my discussions with Alan Burgess regarding commitment to the plan there was never any instruction not to pass on information to Argos. I would tell Alan that I would be having discussions with the Argos account handler (Neil Wilson) in order to confirm that they (Argos) would still honour the price commitments of Core Games and Action Man.
88. My understanding was that the agreement to stick to the Core Brand pricing was still being monitored internally in Index by their senior management whom I took to be Lesley Paisley and John McMahon.
89. Continuing the initiative into Spring Summer 2000 was still met with caution internally at Hasbro and externally at Index. It had worked in Autumn Winter where most of the Toy business was done (75 to 80% of a year's turnover) and it was always the time where price mattered most. The temptation to cut price was still there because the lower the price the more footfall you would attract in store leading to increased market share.
90. To lose market share was unacceptable for Index and therefore it was considered to be a big risk for Index in case Argos undercut them.
91. I reported this back to David Bottomley and other senior management (Mike Brighty, Mike McCulloch) through corridor conversations and at Sales Meetings. Neil Wilson was also saying similar things about Argos's caution that Index would stick to the plan.
92. All I could do was reassure Alan Burgess that we were confident that the Strategy would hold for Spring Summer 2000 as well and that Argos would not undercut them.
93. At our various sales meetings we (the Sales Team) were left with no doubts from the Sales Directors that the new strategy had to be continued and failure was not an option. Neil and I were under intense pressure internally to make this a success as we were always told that Index and Argos were crucial to the plan. I had to make sure that they maintained the Retail Price points. Most vocal in this regard was Mike Brighty as he was the Sales Director responsible for Argos as part of his overall portfolio.
94. The conversations continued between Neil Wilson and myself from end July 1999 to the launch of the Spring Summer catalogues in the 3rd week of January 2000.
95. Once we had established that the plan was being adhered to in Autumn Winter 1999 Neil and I would still have conversations regarding Spring Summer 2000. This was done mainly to reassure both Neil and I and our accounts that they would continue with the plan.

96. Even though I was given the understanding from Alan Burgess that he intended to go with the Retails I could not be sure this happened until the catalogue was published.
97. The 2000 Spring Summer Catalogues for Index and Argos came out in January of that year (2nd or 3rd week of the month). Once again the prices were maintained across Core Games and Action Man. Internally [it] was seen that the plan to improve profitability with our customers on Hasbro product had succeeded. Prices on the Core Brands at other accounts continued to be monitored and if there were anomalies they were raised at Sales Meetings.
98. In August of 1999 when Index were finalising their listings for Spring Summer 2000 catalogue, the Sales Team were still talking about carrying the plan forward. Neil Wilson and I were confident that both of our accounts would continue to back the Hasbro strategy as our Buyers were gaining confidence from the evidence that was in print. The emphasis was more on Action Man as the range had changed for 2000 and Alan Burgess had indicated that he would be following our price points. Neil Wilson had had similar conversations with Argos.
99. For the launch of the Spring Summer 2000 catalogue I had indicated to Alan Burgess at Index that Argos would carry on with their commitment to maintain price points. The Argos and Index catalogues came out in January 2000 and once again the price points on Core Games and Action Man had been maintained.”

524. In cross-examination it was put to Mr. Thomson that it was more or less unavoidable in the market circumstances prevailing from late 1998 that retailers would have wished to put their prices up. He replied:

“That is correct, but that there was no guarantee that anyone was going to follow suit in the strategy that we laid out. That was one of the issues that we had all along, that no-one would agree to stick to any prices because both were afraid that either would undercut each other in order to gain market share.” (Day 1, p. 59)

525. It was put to Mr. Thomson that he had asked Index buyers what they thought of the RRP, and that they had replied to the effect “Well they seem to us to be okay”, thereby saying, in effect, that it was Littlewoods’ policy to follow the RRP, but giving no commitment to do so. Mr. Thomson considered that there was a commitment on the retail prices of Action Man and Core Games for A/ W 1999 and S/ S 2000 which was then carried forward (Day 1, pp. 144-145). He put it in these terms:

“Q. Let me put it this way: an answer to a candid question may be very different to someone committing to you that they would adhere to RRP or follow?”

- A. We already had a commitment, though, in the previous catalogues on Core Games and Action Man and we had seen the evidence over the previous two or three catalogues that in actual fact our pricing policy had worked and that these prices were adhered to.
- Q. That is quite a different thing. Again, you say you had a commitment in your previous two or three catalogues. Is that what you mean by that the price initiative we discussed earlier had worked?
- A. Yes, it had worked, and it was agreed that it had worked by both parties, which is the reason why we extended the range of products.
- Q. You said earlier, at no time did anyone guarantee that they would go out on your prices because you never know until the catalogue came out whether they would?
- A. When somebody said they agreed to the price, I would never in the back of my mind consider that a complete agreement. We would never be confident that this would be the case until the catalogue came out. When somebody gave a verbal agreement to say, yes, we will go along with you, we will go out at those prices, I would go away thinking, that is fine, we have the agreement but we will never be sure until the catalogue comes out.”

(Day 1, pp. 145-146)

526. In paragraph 13 of his witness statement Mr. Burgess states that once the new Argos policy took effect, although “suppliers’ account managers would still suggest to us that recommended retail prices would be observed”, Littlewoods now knew that this was more likely to be true because they could look at the catalogues. Mr. Thomson agreed that that was broadly consistent with his evidence (pp. 173-174) and that there was never any “threat”. At the end of the day, he said, “it was the buyer’s decision as to whether he wanted to price at that point, knowing all the proper facts” (p. 174). On the question whether he had ever explicitly asked Littlewoods for a price that he could pass on to Mr. Wilson, Mr. Thomson replied:

- “A. I would not have asked for a price, but we were talking about the range, particularly Action Man at that time, we were talking about the deal after we had made the presentation and we talked about going out at the RRP. There was an agreement to do it, when we were trying to promote, and that was improved profitability. There was never a guarantee that it would be adhered to and we never knew effectively that it would be adhered to until the catalogue came out later, after the selection process had been gone through” (p. 176).

And a little later, in answer to a clarificatory question from the Tribunal:

“A. Yes, there was reassurance that needed to be given during most of the conversations, which we tried to do by saying ‘Yes, I’ve had talks with my opposite number and this plan is going ahead, I am as confident as I can be that this will take place’. But there was never any certainty really until the catalogues were published that these prices did come out and were the same.” (pp. 178-179)

And later:

“Q. ...there was no guarantee that anyone would go out at your RRP, you have said that on a number of occasions.

A. That is correct, but there was an indication and a willingness to commit to the pricing.

Q. When you say an indication and a willingness to commit?

A. The words could have been, ‘Ian, I will go along with you, but are you sure this is going to happen?’ and I would say, ‘Yes, trust me, I will go back and talk to people to ensure this happens’.

Q. Who specifically said those words, because it is very vague.

A. They are in the court now in the back.

Q. Who particularly?

A. Alan Burgess.

Q. Can you remember an occasion when he specifically used those words?

A. Alan was very concerned about what we were doing, because it could have a major impact on their business if the pricing initiative did not follow through, did not take place.

Q. He was constantly sceptical?

A. He was not constantly sceptical. There was more confidence the longer we continued to do it. The more they saw this was actually working, the decision to talk about pricing started to evaporate. Going towards late 2000/early 2001, we did not need to talk a lot about retail price points because most of the retail price points that I presented on my spreadsheets were generally adhered to; some were not, but most were.”

(pp. 180-181)

527. Mr. Burgess did not give a witness statement in answer to Mr. Thomson's witness statement. In his original statement of 4 July 2002 he said at paragraphs 13 to 21:

- “13. As the new Argos policy described above at paragraph 5 took effect, however, all retailers gained confidence that prices could be set at the suppliers' RRP. This confidence grew as we viewed the Argos catalogues which evidenced the new policy of adhering to RRP. Suppliers' account managers would still suggest to us that recommended retail prices would be observed by Argos. However, we knew now that this was more likely to turn out to be true. Since 2000 discussions with suppliers on the likelihood of Argos going for recommended prices on any type of goods has reduced significantly. This is because the pattern of Argos' pricing on toys has become established, and retailers now generally adhere to RRP.
14. I would have had many discussions over the seasons with Ian Thomson on cost and retail pricing. I do not however recall particular conversations or the precise words that might have been used. Ian Thomson is just one out of about 60 suppliers with whom I deal and I spend a great deal of time talking to an enormous variety of people. I nevertheless set out below my recollection of the nature of the discussions I had with Ian Thomson.
15. Ian Thomson never threatened me in any way. He never said 'Alan, you must go out [at] these prices because if you don't it is going to be a real problem for you'. The means that Ian Thomson applied in favour of our following recommended retail prices involved encouragement only.
16. Similarly I do not remember Ian Thomson ever asking me to recommend to our price setting meeting that we adopt Hasbro's recommended retail prices.
17. I do not remember any specific instances, but during the selection period a number of conversations would have taken place when Ian Thomson would have asked for my views on retail prices. He might, for example, have said something like 'do you see any problem with these recommended prices on this range?' I might have responded by saying that they looked okay except perhaps for one or two where I thought, for instance, the product would sell at a higher or lower price. I would not have had that sort of conversation many times. It would have happened following the change in Argos' policy in 1998 and 1999. By 2000 the market had largely settled down to following recommended retail prices, but with some limited price cutting for tactical reasons. It is possible that Ian Thomson was trying to obtain my opinion on the recommended

retail prices to form a view in his own mind as to whether I was likely to follow them. To that extent he might have been quizzing me about my intentions.

18. I note that Ian Thomson himself has said to the OFT that he did not have discussions with retailers about RRPs because retailers were generally following Hasbro RRPs from Autumn/Winter 2000-2201. This would be about right.
19. I do remember vaguely Ian Thomson advising me that he thought Argos might accept his retail prices. I do not remember the words he used. I do not recall him saying that he had an agreement that Argos would follow RRPs if Littlewoods would. I think he was trying to give me the impression that if I went out at RRPs I would not be undercut by Argos.
20. Ian Thomson never said to me that he was going to pass on any of my opinions on the recommended retail prices to Argos or anyone else. I do not think that at the time I ever really addressed my mind to whether he intended to pass on this information to Argos.
21. I can therefore confirm that I certainly did not make any comments on Ian Thomson's recommended retail prices with the intention of my views being passed on to Argos. There was no agreement between myself and Ian Thomson that I would give him my views on the recommended retail prices if he would let me know what the views of Argos were. I never agreed with Ian Thomson that I would adopt, for the purposes of my proposal to the price setting meeting, his recommended retail prices."

528. Mr. Burgess accepted in cross-examination that Mr. Thomson was trying to encourage him to move to RRPs; that Mr. Thomson advised him that Argos might accept the RRPs; and that Mr. Thomson was trying to convince Mr. Burgess that he could not be undercut by Argos if he went out at RRPs (Day 4, pp. 124-126). Mr. Burgess maintained, however, that in his experience no national account manager

"could, with any certainty, give me information that I could rely on as regards prices that my major competitor would do... Ian Thomson is really no different... to any one of a... dozen Ian Thomsons from other companies... They all want to be my best friend... I have been in the trade for long enough; I have heard it all before. Ian Thomson at Hasbro is no different from a lot of people I deal with..."

(Day 4, pp. 127-128).

529. Mr. Burgess maintained that he did not go out at Hasbro's RRP's on the understanding that Hasbro would work hard to get everyone to do the same thing (p. 129).

- Findings of the Tribunal

530. Again, although there is a difference of emphasis between Mr. Thomson and Mr. Burgess, we do not detect a fundamental divergence in their evidence on the factual issues. We make the following findings in respect of the catalogues for A/W 1999 and S/S 2000.

- (i) Mr. Thomson gave detailed information to Littlewoods in spreadsheets showing Hasbro's RRP's, Littlewoods' cost prices, the margin between the two, and, in relation to Action Man and Core Games, the rebates available.
- (ii) Following on from his conversations with Mr. Burgess, Mr. Thomson considered that he had a "verbal guarantee" from Littlewoods that their prices would be at RRP's in A/W 1999 (Thomson, paragraph 69).
- (iii) Following the publication of the A/W 1999 catalogue there was further increased confidence on the part of Littlewoods that other retailers would price at RRP's.
- (iv) In his discussions with Mr. Burgess, Mr. Thomson gave Mr. Burgess assurances that Argos would stick to RRP's in relation to Action Man and Core Games. Mr. Thomson told Mr. Burgess that that information was based on what he had been told by Mr. Wilson, Hasbro's Argos account manager (Thomson paragraphs 86, 87, 99, Day, 1, p. 181).
- (v) Mr. Burgess gave Mr. Thomson to understand that Littlewoods would go with (i.e. price at) the Hasbro RRP's, although Mr. Thomson would not be sure that they would do this until the catalogue came out.
- (vi) Mr. Thomson confirms Mr. Wilson's evidence that it was Hasbro's practice to monitor retail prices. If a retailer was pricing below RRP's, the relevant account manager would contact the retailer and tell it to put its price up. Unlike Argos there is, however, little or no direct evidence that Littlewoods queried other retailers' prices with Hasbro.
- (vii) Mr. Thomson considered that although there was no binding guarantee, there was a commitment on the part of Littlewoods to follow Hasbro's RRP's. There was "verbal agreement to say, yes, we will go along with you, we will go out at those prices" (Day 1, pp. 145-146), "there was agreement to do it", although no guarantee that the agreement would be adhered to (p. 176). Mr. Burgess would say to Mr. Thomson words to the effect "Ian, I will go along with you, but are you sure this is going to

happen?” and Mr. Thomson would say words to the effect “Yes, trust me, I will go back and talk to people to ensure that this happens”.

531. In our judgment Mr. Thomson’s view that there was “verbal agreement” on the part of Littlewoods to price at Hasbro’s RRP’s on Action Man and Core Games is confirmed by the above evidence. Again, there was no guarantee that Littlewoods would do so, and no certainty, and there may have been occasional exceptions although few, if any, have been identified in the evidence. It also seems to us on the evidence that Hasbro had aroused in Littlewoods an expectation that Littlewoods would not be undercut by Argos if they priced at RRP’s, and Littlewoods had indicated to Hasbro that it was willing to sell at Hasbro’s RRP’s in the next relevant catalogue. On the above evidence, it seems to us to be established that there was an express or implied agreement, albeit verbal and with no guarantee, that Littlewoods would sell at Hasbro’s RRP’s, at least to a material extent on Action Man and Core Games in the A/ W 1999 and S/ S 2000 catalogues.

The Tweenies Doll 1999

532. According to the evidence of Mr. Cowley, Mr. Thomson put pressure on him to adhere to RRP’s during the lead up to S/S 2000. Mr. Cowley said that Mr. Thomson rang him to ask at what price he intended to go out with one of the Tweenies Dolls and said that Argos would be going out at £14.99. He “suggested that it would be safe for me to do so”. Mr. Cowley, who was proposing to go out at £12.99, refused to confirm that he would accept Mr. Thomson’s suggestion, whereupon Mr. Thomson suggested that he speak to John McMahon who had been talking to Mike McCulloch at Hasbro. This Mr. Cowley did, and Mr. McMahon “said words to the effect that he and Mike McCulloch had had a discussion about prices. He recommended that I went along with the suggestion of the £14.99 price point” (Cowley, paragraphs 7-9). In cross-examination, Mr. Cowley explained that he had no choice but to do this as Mr. McMahon was his buying director (Day 4, p. 35). He thought that Hasbro was trying to persuade Littlewoods to go out at £14.99 because that was the price “which they expected to be the High Street price” (p. 52).

533. Mr. McMahon denied in cross-examination that he told Alan Cowley that he had spoken to Mr. McCulloch about prices, and he said he could not recall why he recommended Mr. Cowley to go out at £14.99 (Day 2, pp. 106-108). The Tweenies Doll was subsequently

priced at £14.99 in both catalogues. Mrs. Paisley's witness statement confirmed that Mr. Cowley had reported to her his conversation with Mr. McMahon.

534. We have no reason not to accept Mr. Cowley's evidence about this conversation, which Mr. Cowley also reported to Mrs. Paisley. Mr. Cowley's evidence is also corroborated by Mr Thomson. It follows that we do not accept Mr. McMahon's denial that he told Mr. Cowley that it was alright to go to £14.99 because he had had discussions with Mr. McCulloch about pricing. As we have already said, Mr. McMahon's unconvincing denial of his conversations with Mr. McCulloch also throws doubt on his earlier denial of Mr. McCulloch's remarks made at the Liverpool meeting.

535. In our judgment this incident of the Tweenies Dolls is good evidence that Mr. McCulloch and Mr. McMahon had had discussions about pricing, as a result of which Mr. McCulloch had been able to reassure Mr. McMahon that he would not be undercut by Argos. This incident is, in addition, evidence of Mr. Thomson transmitting information to Littlewoods as to the specific price that he expected Argos to be charging, and of Littlewoods being persuaded to charge that price, on the basis that they would thereby be charging the same price as Argos. The incident also shows more senior Littlewoods management (Mr. McMahon) overriding the pricing decision of a buyer (Mr. Cowley) in order to avoid a situation where Littlewoods might be undercutting Argos. In our judgment had Mr. McMahon not overruled Mr. Cowley, the likelihood is that Littlewoods would have priced at £12.99, not £14.99. This evidence in our judgment confirms that Littlewoods was prepared to apply the agreement we have already found above to a Tweenies doll as well.

536. The S/S 2000 catalogue came out in January 2000, and remained in force until around May 2000.

537. The Act came into force on 1 March 2000.

Extending the pricing initiative for A/W 2000: Argos

538. Mr. Wilson's evidence is that at the end of 1999, Hasbro considered how to extend its pricing initiative. A trading strategy document was produced for 2000, apparently with the

initials of Mr. McCulloch on it. Under the heading of “The story so far” this document states:

“Retail pricing initiative has worked – maintaining Action Man and Games price points at suggested levels in Argos/ Index Catalogues and across the rest of our Distribution base.

...

Core Brands Rebate is a positive new element to drive Action Man distribution – Mothercare, Tesco, Argos and also to link into retail pricing.”

539. This trading strategy document shows that Hasbro considered that its pricing initiative had been successful in maintaining RRP's on Action Man and Core Games, particularly in the Argos/ Index catalogues. The reference to the core rebate being an element “to link in to retail pricing” strongly suggests to us that the core rebate, although not formally tied to the observance of the RRP's, was part of the package of terms that Hasbro offered to retailers in the context of its efforts to maintain retail prices at RRP's. As Mr. Wilson put it (Day 2, p. 31) “although Hasbro were giving rebates for giving a certain amount of listings, Hasbro were also talking to all accounts about retail pricing and parity with the RRP's alongside that”.

540. Under the heading “Key 2000 Terms Strategies” the trading strategy document states:

“Segment the Terms –v- defined category requirements in line with retail buying structures, e.g. Boys Toys, Games.

Build significantly improved BIM across the portfolio, in line with the new segmentation”.

541. In his witness statement, Mr. Wilson explains (paragraph 40) that the “new segmentation” refers to the brands to which the pricing initiative would be extended. As we understand it, this related to brands that were not yet universally at RRP's in both catalogues, and/ or had been subject to severe price cutting.

542. According to Mr. Wilson:

“41. These brands fell into three categories: ‘*Core Boys*’, covering Action Man, Star Wars, Transformers, Micro Machines and Batman; ‘*Games and Creative*’, covering Core Games and creative play products; and ‘*Growth Drivers*’, covering Tweenies, Pokemon, PlaySkool, Mr. Potato Head, Barney, Nerf, Feature Dolls, Art Attack and Puzz 3D.

42. These brands chosen were all key brands. We wanted to give retailers additional incentives to stock them, by giving the retailers more margin/ extra profitability. We decided to extend both the listing and pricing initiative to these brands.
43. As regards the listing initiative, retailers were offered additional rebates, up to 5 per cent, the precise amount depending on what product listings Hasbro's account managers agreed with their accounts. The amount of the rebate was flexible, depending on what was agreed with each account and the turnover achieved in respect of the key brands listed.
44. We communicated our message to Argos by saying that the pricing and listing initiatives were working and that we proposed to extend them to other brands. We asked them how they felt about this. A meeting took place in December 1999 between Sue Porritt, Mike Brighty and myself to review business in 1999 and to open the trading terms 2000 discussion. I made an internal contact report of this meeting, as was usually done by Hasbro for meetings with customers. I noted in my report that it was recognised that margins were going in the right direction. Sue Porritt was very positive regarding the new terms and that the initiatives that had applied to Action Man and Core Games in 1999 would be extended to other categories. It was recognised in the meeting that it was crucial that we maintained retail price stability as far as possible across our key brands so that the initiatives could succeed. Sue Porritt felt it was great that Hasbro could help maintain retail price stability, but said that Argos would react if it was undercut in order to remain competitive. By 'retail price stability', I meant retailers going out at the same price, i.e. Hasbro's RRP.
45. Following this meeting, and in line with the strategy to extend the listing initiative to these key brands as outlined in Hasbro's initial Strategy Document, I put together a proposal to put to Argos with incentives to stock these key brands. This proposal did not include all of the brands identified in the strategy document because I knew that Argos would not consider listing some of these. I targeted certain key products and discussed with Argos the possibility of it listing these and getting the rebates for doing so.
46. However, the extension of Hasbro's strategy went further than simply extending the listings initiative. By March 2000, Argos had chosen which of these key products it was going to list in its A/W 2000 catalogue. In line with the process that had been followed for the A/W 1999 catalogue (as I describe above), I received an indication from Argos that, all things being equal, it would adopt the RRP for certain of the products they were listing. Argos also indicated to me when they were not likely to price at the RRP in respect of certain other of the products,

the implication being that they were intending to price at the prevailing market rate.

47. I passed this information to the other account managers in Hasbro. They had received indications of their account's pricing intentions and informed me of them. I then informed Argos that, based on the indications received from accounts generally, the price for those products was likely or unlikely to be at the RRP, although there were no guarantees.
48. My contacts at Argos during this period were Andrew Needham, Vanessa Clarkson, to a lesser degree, and Sue Porritt.
49. Hasbro's overall strategy was all about increasing the retailer's margins, on the one hand by offering incentives to them to list key brands and, on the other hand, to encourage movement of their prices to RRP. The move towards RRP did not always mean an increase in retailer price. Sometimes, despite a move to RRP, the retail price would decrease as a result of Hasbro reducing its cost prices. This was especially the case in respect of Core Games. There were other strategies to increase retailer margins such as supplying clearance merchandise and FOB merchandise".

543. None of the above was challenged in cross-examination.

The meeting with Sue Porritt on 9 December 1999

544. Mr. Wilson's contact note of this meeting reads:

"Overall Reaction

SP was very positive about the new terms and the impact they will have on Argos business. It is crucial that we can maintain retail price stability across our key brands so that the plan can succeed. We plan to increase domestic margin from 6.3% to 13.8%."

545. That note confirms paragraph 44 of Mr. Wilson's statement, namely that the crucial importance of maintaining retail price stability was discussed in the meeting with Sue Porritt of 9 December 1999. It is clear that "the crucial importance of retail price stability" is a reference to Hasbro's plan to persuade all retailers to price at RRP on the further products to which the pricing initiative was now being extended. In the light of Mr. Wilson's statement, we have no reason to doubt that (i) Sue Porritt knew that Hasbro was seeking to ensure that other retailers went to RRP, not only on Action Man and Core Games but also on other products; (ii) Sue Porritt knew that it was an integral part of the

success of the extension of the initiative that Argos itself would go out at RRP's in the products in question; but that (iii) Sue Porritt told Mr. Wilson that Argos would react if it was undercut.

Extending the pricing initiative for A/W 2000: Littlewoods

- *Mr. Thomson's evidence*

546. Mr. Thomson explained the extension of the pricing initiative in 2000 in similar terms to those of Mr. Wilson:

- “101. I had started to talk about expanding the range to Alan Burgess and he was interested but worried that it would attract too much attention and that it would appear that Index and Argos were talking to each other about retail prices. I indicated to Alan Burgess that we could look at a limited range of product that would cover certain items in most of our Brands.
102. Neil Wilson and I came up with a range of products from our other brands and then went to our respective accounts to talk about it.
103. The ranges covered 3 POKeMON products, 2 Micro Machines products, 2 Hand Held Electronic Games products, 1 Girls product, 4 Get Set products, 2 Design and Draw products, and 8 Tweenies products.
104. In choosing these ranges we had pulled together a list of products that had been subject to price promotion and included new ranges like POKeMON that would also suffer. New high profile product had been subject to severe price cutting in the past, which led to complaints from the industry to us about the poor margins.
105. The purpose of going to Index and Argos was to encourage them that we could extend the ranges and that we had been successful in gaining commitment from either party during the last 2 catalogues. As the range was now extended above Core Games and Action Man this involved discussions with other Buyers at Index.
106. My discussions were directly with the Buyers responsible for the respective product ranges and I would normally spend a day in their offices in Liverpool. I would occasionally see Lesley Paisley if she came in to say hello and I remember that at some stage I told her about our plans to extend the range. She would say that it sounded good and would leave it to me to sort out.
107. Alan Burgess now looked after Boys Toys and Electronic Toys (I am not 100% sure that the Electronic Toys covered Hasbro products) and following on from the success of the 2 previous catalogues was keen to listen to my proposal. The product ranges I discussed with

Alan Burgess were POKeMON and Micro Machines (possibly Hand Held Electronic Games, but not sure). Alan Burgess was concerned that if he agreed he would be increasing the risk of being undermined by Argos because he was not convinced that they would agree to any more lines being included.

108. I explained that the Argos account handler (Neil Wilson) was having similar discussions to gain agreement with Argos to accept the same proposal. I would let him know if the outcome would change. There was no doubt that Alan Burgess knew that I was passing on to the Argos account handler (Neil Wilson) the contents of our discussion and that I would confirm the Argos intentions back to him after Neil had concluded his discussions with Argos.

109. In my dealings with Index I treated Alan Burgess as the Senior Buyer. He did the biggest share of Hasbro business and had been Toy Buyer for some time at Index. He also indicated that he would discuss my proposal with the other Buyers in order to give them the background to our arrangements.”

547. Mr. Thomson also discussed the matter with Katherine Runciman and Alan Cowley. As regards Alan Cowley, Mr. Thomson explained the previous arrangements regarding Action Man and Core Games but Mr. Cowley was reluctant to give any commitment. He told Mr. Cowley that similar discussions were taking place with Argos, through Mr. Wilson (Thomson, paragraphs 110-113). He also had discussions with Phil Riley who was concerned about being undercut.

548. In cross-examination, Mr. Thomson emphasised that there was a need to “give comfort” to retailers. They had been successful in doing so in other ranges, and extending the initiative would generate more profit and reduce the need to undercut competitors (Day 1, pp. 165, 166). He agreed that he never asked Katherine Runciman, “How are you going to price?”, but said that they talked about price points and that he indicated he would go back to his colleague with responsibility for Argos and indicate the products they could “feel comfortable about moving on and maintaining [their] recommended retail price” (Day 1, p. 168). He had “absolutely no doubt” that Littlewoods buyers knew he was “going back to talk to somebody in Hasbro... to make sure that what we were talking about was actually going to happen” (Day 1 p. 170). Ian Thomson described the arrangement as an “agreement in principle”, “a reassurance... that the plan is going ahead”, and “a willingness to commit to the pricing” (Day 1, pp. 177-180). He said “there was more confidence the longer we continued to do it” (Day 1, p. 181), and that when he went back to Littlewoods

buyers and said “we have got assurances, you would be quite comfortable to go ahead and price at that price point”, they would say “Yes, thanks very much” (Day 1, p. 190).

549. As to whether Mr. Thomson had talked to Mr. Burgess about expanding the range of products to be priced at RRPs, Mr. Burgess’ evidence was as follows (Day 4, pp. 137-140).

“Q. He, that is Thomson, started to talk about expanding the range to you.

A. I think that everyone would have been encouraged that more margin could be injected into the business, into the ranges, by everybody, and yes, Ian Thomson will have been one of those people who thought that, yes.

Q. When I say he started talking to you, he was starting to talk to you about expanding the range in which there was this co-operation which had previously been confined to core games and Action Man, to other toys.

A. As far as I can go on that, and I cannot be precise, Ian Thomson will probably have been trying to influence me to go out on RRPs on more items within his portfolio, as will just about every other account manager --

Q. Well, he says you were interested in expanding the range of this arrangement, but you were worried that it would attract too much attention and it would appear that Index and Argos were talking to each other about retail prices.

A. Well, I do not understand where that came from, and if that was the thoughts of Ian Thomson, then they are the thoughts of Ian Thomson, but I do not recognise that kind of discussion.

Q. Well, he says he indicated to you that both of you could look at a limited range of products that would cover certain items in most of Hasbro's brands.

A. I can be categorical that I had no specific discussions with Ian Thomson about extending any product ranges towards RRPs. I had my own agenda in terms of where I thought I could go on this. I am sure that I had lots of encouragement from Ian Thomson and everyone else to go out at RRPs on more products, but I do not remember specific discussions with Ian Thomson on specific lines within his range. Had those discussions taken place, I think I would have remembered them.

Q. In relation to the expanded range, he says that he discussed with you the Pokemon and Micro Machines, which were within your range, and possibly Hand Held Electronic games, but he is not sure about that.

- A. Well, he certainly did not have discussions with me on those products.
- Q. He says that you were concerned that if he agreed, there would be a risk once again of being undermined by Argos because you were not sure that they would agree to this kind of co-operation on more than the lines which had already been the subject of the earlier catalogues, Action Man and core games.
- A. We simply did not have discussions on specific items in terms of expanding the range. I do not recall those discussions.
- Q. What is more, he also says that in his discussions with you, he explained that his colleague, Wilson, Neil Wilson, who was handling the Argos account – he may not have mentioned the name of the man, but the colleague who was handling the Argos account was having the same discussions with Argos to accept the same proposal as he was putting to you.
- A. Well, I do not recall him saying that. As I have said before, I did not believe for one minute that Ian Thomson or anyone else could guarantee to me that my major competitor would be doing this, that or the other on prices. It had never ever happened before, and there was no reason why I would even think that that would be possible.
- Q. He says there is no doubt that you knew that Thomson was passing on to the Argos account handler the contents of his discussions with you, and the position was arranged that discussions would continue and he would come back to you after the Argos account handler had spoken to Argos, and he would tell you what the outcome was.
- A. Well, I have absolutely no idea why Ian Thomson would have a basis for thinking that.
- Q. In relation to these discussions, are you saying they did not happen or are you saying you do not recall whether they happened?
- A. I am saying that I do not recall that they happened.”

Mr. McCulloch and the meeting of 2 May 2000

550. Mrs. Paisley told us that she was in a meeting with Hasbro concerning logistics on 2 May 2000 when Mr. McCulloch came in, apparently for reasons of courtesy. He observed that Hasbro’s RRP’s had been followed the previous season, that that was a good situation, and that Hasbro would be recommending prices in the future. Mrs. Paisley told us that she

thought that this intervention was “rather strange” or “slightly odd” but she replied that she had no problem with Hasbro recommending retail prices (Paisley I, paragraph 21).

551. In cross-examination Mrs. Paisley said that she had not seen any connection between this incident and the email of 18 May 2000 (Day 3, pp. 19 to 21).

552. It seems to us that this intervention by Mr. McCulloch is further, albeit slight, evidence of Mr. McCulloch by implication reassuring Littlewoods that if they continued to price at RRP's they would not risk being undercut. Mr. McCulloch's oblique phraseology seems to us consistent with him realising that he could not be too explicit about what Hasbro was trying to achieve.

Email of 4 May 2000 relating to Gardens Galore

553. On 4 May 2000 Mr. Thomson emailed Karen Sobers and Katherine Runciman of Littlewoods that a product called Gardens Galore (which is mentioned in the email of 18 May 2000 referred to below at a price of £19.99) was “not selected by your major opposition so it will be an excellent margin opportunity”. In the event, Littlewoods priced this product at £24.99 (Day 2, paragraph 161).

554. Mrs. Paisley explained that the price of £24.99 for Gardens Galore was a mistake on the part of Katherine Runciman who had failed to pick up the reduction in the RRP. (Day 2 p. 161). We find that explanation unconvincing. An equally plausible explanation is that Littlewoods took the opportunity to make more margin on this product knowing that it was not listed by Argos.

The emails of 18 and 19 May 2000

- The emails

555. On 18 May 2000 Mr. Thomson and Mr. Wilson sent a joint internal email to some 20 other members of the Hasbro sales team. This is headed “Argos – Index Retail Pricing Initiative”. The opening part of the email states:

“Neil and I have spoken to our respective contacts at Argos and Index and put together a proposal regarding the maintenance of

certain retails within our portfolio. This is a step in the right direction and it is fair to say that both Accounts are keen to improve margins but at the same time are taking a cautious approach in case either party reneges on a price agreement... While it is acknowledged that certain areas of the business will be price conscious we have attempted to increase some of the Spring Summer retails and get agreement on other products to go out at our recommended prices. It goes without saying that Action Man and Games prices will be maintained as per earlier agreements.”

The list of products are detailed below.

POKeMon

Battle Figures 2 Pk 4.99

Pokeball Balster 3 Pk. 6.99 (Index 6.95 S/ S)

Movie 5 Pk 8.99

Interactive Pikachu 23.99 (23.75 S/ S)

Micro Machines

Transforming Team Truck (Argos 28.75 on Super Truck City S/ S)

Rally Race Track 19.99

Girls

Baby All Gone 19.99 (Argos 19.50 S/ S)

Preschool

Mr Frosty 14.99

Tweenies

Standard Plush 14.99

Story Time 24.99

Cuddle and Squeeze Doodles 24.99

Get Set

Chocolate Factory 19.99 (Index 18.99 S/ S)

Egyptian Mystery 29.99

Mastering Mosaics 19.99

Gardens Galore 19.99

Design & Draw

Spirograph 14.99 (Index 13.85 S/ S)

Super Sticker Factory 17.99 (Index 17.90 S/ S)

HHE

Monopoly 29.99

Both accounts have agreed to the above price points so this information should be translated to other accounts.

The proof in the pudding will be when both Catalogues are published, but Neil and I are confident that they will play ball.”

556. Later the same day Mr. Thomson sent the following email to Lesley Paisley at Littlewoods, copied to Alan Burgess, Alan Cowley, Phil Riley and Katherine Runciman, with copies to Mr. Bottomley, Mr. Brighty, and Mr. McCulloch, under the heading “Urgent-Price Initiative”:

“Following on from various conversations regarding Price Points and opportunities to make more margin I am able to confirm a list of products and prices that Argos have committed to. **Games and Action Man** prices will continue to be adhered to and the retails are on your range sheets provided by me as part of the selection proposal process.

Listed below are the products and prices.

POKeMON

Battle Figures 2 Pk 4.99

Pokeball Blaster 3 Pk 6.99

Interactive Pikachu 23.99

Micro Machines

Transforming Team Truck 29.99

Rally Race Track 19.99

Hand Held Electronic

Monopoly 29.99

Bop It 19.99

Girls

Baby all Gone

Get Set

Chocolate Factory 19.99

Egyptian Mystery 29.99

Mastering Mosaics 19.99

Gardens Galore 19.99 (Not listed in Argos)

Design & Draw

Spirograph 14.99

Super Sticker Factory 17.99

Tweenies

All Standard Plush 14.99

All Story Time Product 24.99

Cuddle and Squeeze Doodles 24.99

If you have any questions regarding the above please come back to me and I will do my best to answer them.”

557. A copy of the above email was found in Mr. Burgess’ files with various products having been ticked.

558. On 19 May 2000 Mr. Brighty replied to Mr. Thomson:

“Ian ... This is a great initiative that you and Neil have instigated!!!!!!!!!! However, a word to the wise, never ever put anything in writing, its highly illegal and it could bite you right in the arse!!!! suggest you phone Lesley and tell her to trash? Talk to Dave. Mike.”

- *Mr. Thomson's evidence*

559. According to Mr. Thomson:

- “117. My email to Lesley Paisley, Alan Burgess, Alan Cowley, Katherine Runciman and Phil Riley on 18th May 2000 was sent to confirm that agreement had been reached with Argos (through Neil Wilson) and that they would price at the levels set out in the email. This was also to give them the confidence to go ahead and set the prices for these lines in the forthcoming Autumn Winter 2000 catalogue. The contents of my email should not have come as any surprise because as I have explained we had previously discussed the initiatives involved.
118. I copied David Bottomley, Mike Brighty and Mike McCulloch in order to confirm that we had reached a joint agreement with Argos and Index. My Coordinator Kerron Clare was copied in as well for an information point of view.
119. Before I sent out the email to Lesley and the Team at Index I discussed with Neil Wilson on how we should pass on the information to the rest of the Hasbro sales team. He agreed that I should construct an email and send it out to all concerned.”

560. Mr. Thomson told us that when he received Mr. Brighty's email of 19 May 2000, he went to see Mr. Brighty. Mr. Thomson was aware that what Hasbro was doing was of “a dubious nature” but he did not think it was illegal, particularly since what had happened had been approved by senior management. Mr. Brighty said that “what we were doing was seriously illegal because it was price-fixing and while we had been talking about it to our accounts, putting it in writing was a different matter entirely” (Thomson, paragraphs 126-127).

561. In cross-examination Mr. Thomson explained the use of the word “agreement” in the internal email of 18 May 2000. He said that “months of talks” (Day 1, p. 139) had taken place with the buyers about how successful Hasbro's pricing initiative had been.

“...so internally at Hasbro we were very optimistic about the way that everything had been going and how successful it had been, which then translated to us trying to go for a bigger range of product, to which we could have narrowed it down in Hasbro, and then I went

out to talk to Index, and the buyers, and I know that Neil Wilson went and talked about it to Argos.

MR. GREEN: The discussions you had, to be clear, were on how successful the price initiative had been?

A. Yes.

Q. Those are the matters we have already discussed.

A. We had seen from the catalogues following on from that business plan presentation in late 1998 that the prices and the structure had been adhered to, the evidence was there, in every single catalogue launch after that.

Q. That is what you mean, as I understand it, in that sentence that says:

‘Whilst it is acknowledged that certain areas of the business will be price conscious, we have attempted to increase some of the spring/summer retails and get agreement on other products to go out at our recommended prices. It goes without saying that Action Man and games price will be maintained as per our earlier agreements.’

A. Yes.

Q. The word "agreement" there is describing the initiative and the matters we have just discussed?

A. The agreement was that the prices would be stuck to as per our recommended retail prices, as per the spreadsheets that I presented to the individual buyers.

Q. When you say the agreement was that they would be stuck to, let me ask you about that. You have explained at some length how there was an initiative to, as you put it in paragraph 41 of your statement, increase list prices and make it almost unavoidable that they would go out at your price point. You then saw that that was working, and you thought, right, the initiative is working, we have got agreement as to the initiative?

A. The initiative was working, and the way we knew the initiative was working was because these prices were published in catalogues following on from that presentation. We were never very sure that it would be adhered to until the catalogues were published. While there was verbal agreement to do this, there was never any guarantee until we saw the date logs when they were published after the events.

Q. When you say verbal agreements, again the terminology is extremely important. You recommend to someone that they follow your price and you say, ‘Bob, will you follow my pricing? I am recommending that you follow the pricing’, and they say, ‘Yes, it looks like a reasonable price, we are going to go out at it’. Is that the sort of conversation you are talking about?

A. The conversations regarding this particular e-mail had led me to talk to the buyers beforehand to initiate the process whereby we were

trying to expand the list of products that would have a common price, and at that time I would talk to the buyers about it and then go back to find out what was happening between Neil Wilson and Argos as to whether he was being successful.

THE CHAIRMAN: By "a common price", what did you mean by a common price?

A. By going out at the same price. We wanted to establish that this range of products here on this e-mail were going to go out at these retail price points, so therefore Argos would follow and go out at the same price, and all we were trying to set was a common number of products that we could go back to the respective accounts.

Q. A common price as between the accounts?

A. Yes, as between the accounts and the buyers.

MR. GREEN: We do know that the prices here were not in fact adhered to by Argos. Did you know that, that a number of the prices here were not followed by Argos?

A. Some of them may not have. As I said earlier, some of these products, in principle I was told that we had an agreement, which is why I went out with this e-mail. As I said, there were never any guarantees that that would be the case, until the catalogue was published.

Q. They never explicitly guaranteed to you that they would go out at these prices?

A. You never got the guarantee. It was, yes, we will agree, to go along with your prices, as long as we are feeling comfortable that everyone else is. There was obviously a great deal of nervousness about what we were trying to do and also when we were setting this up as to whether the prices would be followed through.

Q. The Index buyers who have given evidence in this case and are going to give evidence are quite emphatic that they never guaranteed to you that they would go out at a particular price. That will be their evidence.

A. All I would say, the interpretation of that is that what we went along to talk about, the range of products, there was a buy-in from the buyers to say, "Yes, we will go along with that, we are nervous about that, but as long as you can assure us that the prices will be adhered to then we will take the risk".

Q. Are you saying someone said to you, "So long as you can assure us we will take the risk"?

MR. DOCTOR: That price would be adhered to.

A. That prices would be adhered to. I would then say, "Okay, I will then go back to Hasbro and talk to my counterpart and I will then confirm it to you later as to whether that is going ahead", which is

the reason for this e-mail, that I was actually confirming what had happened and what had been discussed in previous discussions.

- MR. GREEN: Index buyers will say that they certainly had discussions with you where you might ask a candid question, "What do you think of these prices?" and they may say "Well, what do you think of these RRPs?" and they would say, "Well, seem to us to be okay", and they would effectively be saying to you, that is our policy, we are going to follow the RRPs. That may be very different this to them committing to you that they will follow your RRPs.
- A. No.
- Q. Let me put it this way: an answer to a candid question may be very different to someone committing to you that they would adhere to RRPs or follow?
- A. We already had a commitment, though, in the previous catalogues on Core Games and Action Man and we had seen the evidence over the previous two or three catalogues that in actual fact our pricing policy had worked and that these prices were adhered to.
- Q. That is quite a different thing. Again, you say you had had a commitment in your previous two or three catalogues. Is what you mean by that the price initiative we discussed earlier had worked?
- A. Yes, it had worked, and it was agreed that it had worked by both parties, which is the reason why we extended the range of products.
- Q. You said earlier, at no time did anyone guarantee that they would go out on your prices because you never know until the catalogue came out whether they would?
- A. When somebody said they agreed to the price, I would never in the back of my mind consider that a complete agreement. We would never be confident that this would be the case until the catalogue came out. When somebody gave a verbal agreement to say, yes, we will go along with you, we will go out at those prices, I would go away thinking, that is fine, we have the agreement but we will never be sure until the catalogue comes out.
- Q. The Index buyers will say that there were discussions you had with them about whether the RRP was a good one or a bad one or whether they intended to go out with it, and because it was their policy to go out with it, they might very well say yes. Would you construe that as an agreement to go out with your RRPs?
- A. Specifically on this list, yes, there were many talks and discussions about pricing and the rest of the range, as to where we saw the right retail price point. But specifically this range was pulled together with the express knowledge that we had had the discussions and this was a range we were going to go forward with, because we were increasing the work we had done in the past with our previous business plan for Core Games and Action Man.

- Q. But the discussions you had were of the type I have just specifically asked you about?
- A. They were discussed around these, and I talked to the buyers about what we were going to do.
- Q. I do not think you quite answered the question. If you ask a candid question, "What do you think of my RRPs, are you intending to go out with it?" A buyer might say, "Yes, it is my policy to go out with the RRPs." Is that the sort of conversation you had?
- A. On these specific products, yes, there was agreement to go out on these recommended retail price points.
- Q. You understood that to be the agreement?
- A. That is why I followed it up interminably back at Hasbro. Once we got the agreement, I followed it up with this e-mail and then confirmed it back to Lesley Paisley and the other buyers."

(Day 1, pp. 140-147)

- Mr. Wilson's evidence

562. As regards the internal email of 18 May 2000, Mr. Wilson recalls Mr. Thomson saying that he was going to send such an email. His recollection is that both he and Mr. Thomson had received instructions from Argos and Littlewoods respectively as to their pricing intentions in respect of the products concerned. Mr. Wilson considered that the reference in the email to Action Man and Games was in line with the arrangements previously described. As regards the reference to a "price agreement" Mr. Wilson said that although there was never any guarantee, or sanction, this indicated that Hasbro "were confident that Argos and Index were likely to adopt the prices for the products listed" (Wilson, paragraphs 50-55).

563. In cross-examination, in answer to the question whether the use of the word "agreed" in the internal email was inaccurate, Mr. Wilson said

"It is, yes. There was no guarantee, and no formal agreement that cases that were given by Argos would be the actual prices in their forthcoming catalogue." (Day 2, p. 37)

564. As regards certain suggested discrepancies between the prices in the email and the price in fact changed in the catalogue, Mr. Wilson maintained that the prices in the email reflected the price indications that Argos had given him.

- Mr. Bottomley's evidence

565. Mr. Bottomley described the extension of the initiative in these terms:

- “24. The initiative was extended to other products once we could see that the initiative was working and was successful. It was driven as much by retailers as by Hasbro. The products that were chosen were key brands that Hasbro wanted retailers to list. Hasbro then put to the retailers, including Argos and Index, the possibility of making more margin on these additional products by moving to RRP.
25. I understand that Neil Wilson spoke to the buyers at Argos in this regard and Ian Thomson spoke to the buyers at Index and we were led to understand from their report back on their discussions that Argos and Index would price at the RRP for these products in addition to the earlier understanding, which had been confirmed to Action Man and Core Games.
26. I have been shown a copy of an internal Hasbro email date 18 May 2000 from Ian Thomson and Neil Wilson entitled ‘*Argos – Index Retail Pricing Initiative*’. This was circulated to a number of people at Hasbro including myself. The email was sent around the office at the time that prices were being set for the A/W 2000 catalogue and Argos and Littlewoods were making their final listing decisions.
27. The opening remarks in the email (*‘Neil and I have spoken to our respective contacts at Argos and Index and put together a proposal regarding the maintenance of certain retails within our portfolio’*) were a reflection of the understanding relating to pricing at or near RRP that I have described above.
28. The reference to ‘proposal’ is to the presentations that were given by Hasbro to retailers over a period of a few months prior to this email in which discussions about matching RRP took place and which resulted in Hasbro’s belief that the prices set out in that email would be adopted. All retailers, including Argos and Littlewoods, were aware that Hasbro was instigating price discussions with all retailers because of the way we presented the initiative to them. It is incorrect to suggest that Neil and Ian were acting unilaterally in putting together this proposal: it was based on detailed discussions and conversations that they had had with Argos and Littlewoods about pricing at RRP. Each was aware that similar discussions were taking place with the other and that a big effort was being made to get all retailers to price at RRP.
29. In the email, Ian Thomson refers to the cautious approach adopted by Argos and Littlewoods which reflected the concern that each held that the other would not price at RRP. For example, in around December 1999, Lesley Paisley said to me that she was prepared to do this but that she thought Argos would let Hasbro and the industry down.
30. I have also been shown a copy of an email from Ian Thomson to Lesley Paisley and others at Index (and copied to me) dated 18 May 2002 and sent an hour or two after the internal email of that date which I refer to in the previous paragraphs. Ian Thomson sent this

email simply to record how Hasbro were conducting the pricing initiative.

31. Where Ian Thomson says he was able to 'confirm a list of products and prices that Argos have committed to' he could obviously give no guarantee that Argos would price at RRPs. What Ian Thomson was saying was that a colleague of his, Neil Wilson, had had conversations with Argos and, as a result of those conversations, this is what we believe are the prices that Argos are going out at.
32. It would be incorrect to say that Ian Thomson was simply taking a risk based on what he hoped Argos might do: Hasbro was not in the business of risk taking. He was saying what he believed to be the reality based on the discussions he and colleagues had had with the industry.
33. When Ian Thomson said in his email that both Littlewoods and Argos were cautious lest the other 'reneges on a price agreement', he was referring to the concern of both those parties that each would be prepared to price at RRPs, but only so long as the other did so. Obviously, we could not guarantee anything and depended on their co-operation. Until we actually saw the A/W 1999 catalogues we could not be sure that Argos and Littlewoods would in fact price at RRPs as they had led us to believe they would do provided the other also did so, but once that became available, we could see that the understanding based on the conversations and discussions with retailers was working.
34. At paragraphs 26 and 27 of her witness statement, Lesley Paisley states that she remembers being surprised at receiving the email of 18 May. Because of her senior position within Littlewoods, she would not ordinarily have been copied in on an email from Ian Thomson. He would usually only contact Littlewoods buyers. However, she was aware that discussions about RRPs had taken place because I had spoken to her about them.
...
36. The Index and Argos A/W 2000 catalogues were released to the public in July 2000. We could see from the catalogues that Argos and Index continued to price at Hasbro's RRPs for Core Games and the Action Man range in line with the pricing initiative and the understanding that I describe above. However, we could also see that they were now generally pricing at the Hasbro RRPs for the additional products in line with the extension of the initiative".

566. In cross-examination Mr. Bottomley said that Mr. Thomson would have had "a fair expectation" that the pricing he had been told about would happen. Mr. Bottomley's knowledge of the email was derived from his conversations with Messrs. Wilson and Thomson rather than on direct discussions Mr. Bottomley had had with Argos and

Littlewoods (Day 2, p. 67). Apart from that, Mr. Bottomley's evidence was not challenged by Littlewoods. Mr. Bottomley's evidence was not challenged by Argos.

- *Mr. McCulloch's evidence*

567. In his statement to the OFT Mr. McCulloch described Mr. Thomson's email to Littlewoods as "An over-zealous approach by the account managers. An ill conceived approach". He said "The emails look worse than they actually are". In the light of the evidence we have heard, we attach little weight to Mr. McCulloch's comments.

- *Mr. Needham's evidence*

568. In his first witness statement Mr. Needham said that Mr. Thomson's email was based on "false assumptions". He did not tell Neil Wilson or anyone else Argos' prices. He said that since the prices were all Hasbro's RRP's, Neil Wilson simply assumed that Argos would be going out at those prices. In fact, for certain products Argos went out at different prices (Needham I, paragraph 39). In his second witness statement, Mr. Needham said that the prices of Action Man and Core Games were merely an extension of the prices from previous catalogues. With POKeMON and Micro Machines he priced mostly below RRP's (Needham II, paragraph 26). In cross-examination Mr. Needham maintained that the information in Mr. Thomson's email could not have come from him, and that it contained a number of errors. Mr. Wilson never asked for specific product detail (Day 5, pp. 70-71, 81). He maintained that his subsequent conversation about Interactive Pikachu (see below) was in response to an attempt by Neil Wilson to persuade Argos not to react to a lower price in the previous Littlewoods catalogue (Day 5, pp. 72 to 82).

- *Mrs. Paisley's evidence*

569. In her interview with the OFT Mrs. Paisley said:

"I didn't see this email as improper. I saw it as a list of retail prices that Hasbro was recommending to us. I don't remember if Ian Thomson asked me to delete it."

570. In her first witness statement Mrs. Paisley said:

“26. I do recall receiving the email from Ian Thomson on 18th May 2000. I remember being surprised to receive such an email. I was surprised that he even suggested that Argos was committed to these prices. It was inconceivable to me that Argos would have committed to Hasbro on retail prices on any product let alone all these products. Moreover, I don't understand how he could suggest that Argos would continue to observe RRP's on Action Man and games. I do not recall being telephoned by Ian Thomson and asked to delete it. I do not know why he would have asked me to delete it but not the other recipients. It is possible that this email is related to the intervention of Mike McCulloch in the meeting with Hasbro on 2nd May, but I certainly made no connection between these two events at the time.”

571. In cross-examination Mrs. Paisley accepted that this email would have arrived just before Littlewoods set its final prices. At this stage Littlewoods would have already known what Hasbro's RRP's were. Mrs. Paisley was very surprised to see Mr. Thomson purporting to confirm what Argos' prices were going to be and that he believed that Argos had committed to those prices. The information in question was highly confidential and sensitive (Day 2, pp. 143-148). Mrs. Paisley agreed that, contrary to what she had said to the OFT, the email was improper, but that when interviewed by the OFT she and her team were “rabbits in headlights” (see also Day 3, p. 3). She did not discuss the email with colleagues because it “lacked credibility” and she “did not see it as important”. Mrs. Paisley resisted the OFT's suggestion that her surprise was due to the fact that Mr. Thomson had committed himself to writing, rather than to contents of the email itself (Day 2, pp. 149-152, Day 3, p. 2). As far as Mrs. Paisley was concerned there were no agreements in place with Hasbro or Argos: Littlewoods decided its own prices (Day 2, pp. 154-155). Mrs. Paisley did not recall Mr. Thomson telephoning to ask her to delete the email (Day 3, p. 1). As to the fact that Argos did not charge the prices in question for all the products shown in the email Mrs. Paisley commented “Argos did not go with the prices recommended in the email which is precisely how I suspected they would play it”. Littlewoods did, however, go with those prices (pp. 159-160). The pricing as to Gardens Galore was a mistake by the buyer (p. 161). Mrs. Paisley also agreed that her interview with the OFT had taken place more than two weeks after the OFT's initial visit, voluntarily, and by arrangement, and with a Littlewoods lawyer present. Nonetheless, she felt scared at the time (Day 3, pp. 6-10). Mrs. Paisley did not recall having been told by Mr. Thomson at

a meeting that the initiative had been extended to further products (Day 3, p. 14). Mrs. Paisley also pointed out that for certain products the prices given in Mr. Thomson's email did not correspond to Argos' prices or in some cases Hasbro's RRP's.

572. Mrs. Paisley's second witness statement did not deal at all with the witness statements of Messrs. Bottomley, Wilson and Thomson.

Mr. Burgess' evidence

573. As with Mrs. Paisley, no witness statement from Mr. Burgess was served in response to the witness statements of Messrs Bottomley, Wilson and Thomson. In his interview with the OFT Mr. Burgess said:

“SH: Do you remember this email and what does it mean to you:

AB: I don't particularly remember it, and whether I believe it or not is another matter. To me it just seems like Hasbro giving us their RRP's.

SH: Who put the markings on it?

AB: I don't know. I think all those categories are mine, yes, yes they are. I may have asked my assistant to check if we were going with these prices. It looks like they've been checked as being the same as our prices.

SH: Would you have been asked by Hasbro to commit to these prices?

AB: No. They haven't asked me to commit to any prices and I wouldn't commit even if I had been asked.

SH: Do you seek price information of your competitors from Hasbro?

AB: No. We seek to find out what our competitors are doing. We get their listings but not information about what their prices will be.

SH: So you get information on their listings. You wouldn't be surprised then if similar information about your products was passed to your competitors?

AB: Yes, I would expect that.”

574. In his witness statement of 4 July 2002 Mr. Burgess said:

“It is difficult for me to recall the situation on 18 May 2000 and I do not remember this email or the circumstances in which it was sent. It is an unusual email and I do not recall ever receiving one like it. If

it had been significant I would have remembered. It looks as if it was ticked by me or my assistant, presumably checking it against our own prices. I was asked about this by the OFT. I gave my reply in similar terms and I stand by that. It is certainly not evidence of any agreement on my part to adopt RRP, or any extension of any such agreement to a wider range of products.” (paragraph 24)

575. In cross-examination Mr. Burgess accepted that he had printed out Mr. Thomson’s email; that the markings on it were probably those of his assistant; that the email was received close to final pricing, at a time when it is “crucial” that the information in the catalogue is correct; and that the likelihood is that Mr. Burgess’ assistant could have gone through it to “identify if there is anything particularly important that I need to look at” (Day 4, pp. 130-132). Mr. Burgess said that in his interview with the OFT he had made a mistake when he identified the prices in question as being Hasbro’s RRP’s (p. 134), but he maintained that he had no recollection of the email, so he could not comment further. He denied that the document had been used to check against Littlewoods’ own prices (p.134). Mr. Burgess accepted that Mr. Thomson had tried to influence him to go out at RRP’s on some items in the portfolio but he did not recognise any discussion in which he had expressed nervousness about doing so (p.137), and he did not recall discussing specific products (p.138), nor did he recall Mr. Thomson saying that Neil Wilson was having similar discussions with Argos (p. 139), nor Mr. Thomson telling him that he would come back to Mr. Burgess after he had spoken to Neil Wilson about Argos (p.139). Mr. Burgess was not saying that such discussions never happened, but he was saying that he did not recall them (pp. 139-140).

- *Mr. Cowley’s evidence*

576. In his interview with the OFT Mr. Cowley said

“SH – What can you tell me about this email?

AC – Well I don’t remember receiving it. It’s got three of my lines on there. It first lists some of the products we are taking, but not all of them; it’s not complete. Action Man and boxed games are not on there, and we take them, so it’s not complete. I don’t know why they would send it. The three lines that are mine did go out at those prices.

SH – Do you consider this email to be anything out of the ordinary?

AC – I can’t remember seeing anything else like this. But, we wouldn’t tell Hasbro our prices.

SF – Which are the three lines which you deal with?

AC – The bottom three.

SF – The Tweenies products?

AC – Yes.

SF – And you say that they went out at the prices indicated on the email?

AC – To the best of my knowledge they went out at those prices, yes. The price for the basic product had already been established in the previous Spring/Summer catalogue.”

577. In his witness statement of 4 July 2002 Mr. Cowley said:

“I have seen the email of 18 May 2000 sent by Ian Thomson to Lesley Paisley, Alan Burgess, Katherine Runciman, Phil Riley and myself. At the time I did not attach any importance to the email. It refers, in the first line, to various conversations regarding price points and opportunities to make more margin. Discussions about margins and price points are common issues for discussion with suppliers. I am not aware of what conversations Ian Thomson was referring to. I presume the conversations relate to the Autumn/Winter 2000 catalogue. I have no recollection concerning conversations with Ian Thomson at the time. The last three items on the list concern products I bought from Hasbro. I actually went out at the prices on the Tweenies items (the last three in the list) that are mentioned in the email but I certainly didn't ask for this email or this information. I am absolutely clear that there was no understanding between myself and Ian Thomson that I would adhere to his recommended retail prices or that I would give him views on those recommended retail prices that would be passed back to Argos.”
(paragraph 14)

578. Three of the products shown on the email of 18 May 2000 were Mr. Cowley's responsibility (All Standard Plush, All Story Time and Cuddle and Squeeze Doodles). In cross-examination, he agreed that it was extremely uncommon and highly unusual to be told what prices a competitor was going to be charging (Day 4, p.23), but he did not attach much importance to the email since it only concerned three of his products (p.24). He did not believe what Mr. Thomson was saying, and resisted the suggestion that what had happened was what he expected to have happened (pp. 25-26). He took the email to mean that those are the prices that Hasbro expected Argos to be going out at (p.28). The prices shown were the prevailing prices in the market (p.28).

- *Mr. Riley*

579. Mr. Riley did not remember receiving the email but he had deleted it. It did not concern any of his own lines (Riley, paragraph 21). He accepted in cross-examination that games, which are mentioned in the email, fell within his responsibility, but he would not believe what Hasbro was trying to tell him about Argos' expected RRP's. The email was "strange and irrelevant" (Day 4, pp. 75-79).

- *Retail prices*

580. The evidence is that Littlewoods priced at the prices shown in the email of 18 May 2000 on all products save two. The two exceptions are Interactive Pikachu, which was the subject of further contact following an email of 25 May 2000, discussed below, and Gardens Galore, which was the subject of Mr. Thomson's earlier email of 4 May 2000. That appears to us to confirm that Littlewoods did take into account the information set out in the email, as modified by further information in respect of Interactive Pikachu and Gardens Galore.

581. The Decision at paragraph 77 states that a further product, Super Sticker Factory, was priced by both Argos and Littlewoods at £17.99, the price shown in the email, whereas the RRP was £19.99. The information before the Tribunal, however, is that the RRP was £17.99, so nothing turns on that point.

582. As far as Argos is concerned, 13 out of 17 products were priced at the price shown in the email of 18 May 2000. Of the four exceptions, Interactive Pikachu was priced at £23.75 by both Argos and Littlewoods following the further contact set out below. Pokeball Blaster was priced at £6.95, not £6.99, but on the appellant's argument that is the same price. That leaves only two products: Transforming Team Truck (£28.99 not £29.99) and Rally Race Truck (£18.99 not £19.99).

583. In our judgment the above shows a high degree of correlation between the price indications which Mr. Wilson says, in his unchallenged evidence, that he was given by Mr. Needham, and the prices which Argos actually charged.

584. It is also striking, in our judgment, that 34 of the 35 common products on Action Man and Core Games, which are also referred to in the email of 18 May 2000, were priced identically by both companies.

Findings of the Tribunal on the extension of the pricing initiative and the emails of 18 May 2000

585. The unchallenged evidence of Mr. Wilson is that the Argos products and prices which are referred to in the email of 18 May 2000 were not randomly selected but were the subject of detailed discussion. Mr. Wilson had selected a number of key brands, and had put together a proposal that Argos should list the brands in question, in return for the core rebate. Once Argos had selected the products, Argos indicated to Mr. Wilson on which products it would price at RRP, and on whether there were products where they were not going to do so. Mr. Wilson then discussed the matter with other Hasbro account managers, including Mr. Thomson, and then passed back to Mr. Needham Hasbro's indications, in the light of its discussions with other retailers, as to whether or not particular products would be at RRP (Wilson, paragraphs 45 to 47). The products listed in the email represented the result of this process. Despite Mr. Needham's evidence that he did not tell Mr. Wilson Argos' prices, and that Mr. Wilson "simply assumed" that Argos would go out at RRPs, we have no reason to doubt Mr. Wilson's unchallenged evidence that he ascertained from Mr. Needham the products which Argos was prepared to sell at RRPs, and reported back to Mr. Needham if other retailers were unlikely to follow RRPs on those products (Wilson, paragraphs 46 and 47).

586. Mr. Thomson followed a similar process with Littlewoods, during what he describes as "months of talks". It is clear from Mr. Thomson's evidence that the products shown in the email represent a specific range of products, as identified by Mr. Wilson and Mr. Thomson, which formed part of a definite strategy on Hasbro's part to persuade both Argos and Littlewoods to agree to sell at RRPs on those specific products, as well as continuing with the previous arrangements on Action Man and Core Games. With only 3 exceptions out of 52 products overall, Mr. Wilson and Mr. Thomson succeeded.

587. More specifically as regards Littlewoods, we accept Mr. Thomson's evidence that Mr. Burgess was worried that what they were discussing "would attract too much attention" and that "it would appear that Argos and Index were talking to each other about retail prices" (Thomson, paragraph 101); that Mr. Burgess was concerned about being undercut by Argos because he was not convinced Argos would agree to further lines (Thomson, paragraph 107); that Mr. Burgess knew that Mr. Thomson was having discussions with Mr. Wilson, and that Mr. Thomson would confirm Argos' intentions back to Mr. Burgess (Thomson, paragraph 108).
588. Mr. Burgess did not convincingly deny any of these matters, although he said that he did not have a recollection of them. Mr. Burgess came to accept in cross-examination that he was not in a position to deny the discussions, only that he could not recollect them.
589. We also note that the evidence of both Mr. Wilson and Mr. Thomson is corroborated not only by each other, but by the evidence of Mr. Bottomley.
590. We also accept that it is likely that Mrs. Paisley knew of the discussions relating to an extension of the price initiative since both Mr. Thomson (Thomson, paragraph 106) and Mr. Bottomley (paragraph 34) said that she was aware of the discussions.
591. Turning to the wording of the internal email of 18 May 2000, we note that this was the result of Mr. Thomson's discussions with Mr. Wilson and was sent in their joint names. It is headed "Argos – Index Retail Pricing Initiative".
592. The words "both accounts are keen to improve margins but at the same time are taking a cautious approach in case either party reneges on a price agreement" constitute in our view contemporaneous evidence that both Argos and Littlewoods were treating Hasbro's attempt to extend the pricing initiative with caution. However, each was aware that Hasbro was in discussions with the other party, and were concerned lest the other party "renege on a price agreement". That evidence is inconsistent with the contentions of Argos and Littlewoods that their pricing decisions were taken entirely unilaterally in the light of market forces. We can see no convincing reason why Mr. Thomson and Mr. Wilson should have used those words in the internal email if they did not accurately describe what the situation was.

593. The words

“It goes without saying that Action Man and Games prices will be maintained as per earlier agreements”

confirm in our view that the earlier arrangements regarding Action Man and Core Games discussed above had resulted in what Mr. Thomson and Mr. Wilson considered to be “agreements”. That wording also confirms that the agreements in question were continuing for the A/W 2000 catalogues. That in turn is consistent with the high degree of identical prices on the Action Man and Core Games products seen in those catalogues.

594. As to the words

“Both accounts have agreed to these above price points so this information should be translated to the other accounts”

that wording corroborates the evidence of both Mr. Wilson and Mr. Thomson to the effect that at the time they considered that both accounts had “agreed” the above price points.

595. As to Mr. Wilson’s reply in cross-examination that it was inaccurate to use the word “agreed”, it is clear to us that what he meant by that was that there was no formal agreement, and that nothing was guaranteed. That answer did not in our view detract from the combined evidence of Messrs. Wilson, Thomson and Bottomley to the effect that the internal email of 18 May 2000 reflects the fact that verbal agreements had been reached, albeit that there was no guarantee and no certainty until the catalogues were published. We note, moreover, that Mr. Thomson and Mr. Wilson were sufficiently confident of the agreements to propose that

“this information should be translated to other accounts”.

596. The above analysis is confirmed by the following words

“The proof of the pudding will be when both catalogues are published, but Neil and I are confident that they will play ball”.

597. The internal email of 18 May 2000 is in our view strong contemporaneous corroboration of the evidence of Mr. Wilson and Mr. Thomson that they had secured from both companies verbal agreement on the price points in question.

598. As to the email sent to Littlewoods by Mr. Thomson on 18 May 2000, that email first contains the words

“I am able to confirm a list of products and prices that Argos have committed to.”

599. Contrary to the appellants’ submissions, we do not think Mr. Thomson’s email can be dismissed as a unilateral attempt on his part to persuade Littlewoods to adopt certain RRP. As Mr. Thomson pointed out, this email followed lengthy talks with Mr. Burgess in particular who had been made aware of parallel discussions going on with Argos. On the basis of the evidence of Mr. Wilson and Mr. Bottomley, we do not think that Mr. Thomson was incorrect in saying that those were the prices “that Argos have committed to”, provided that “committed” is understood in the sense of a verbal agreement, but not a guarantee. It follows that Mr. Thomson was informing Littlewoods of the prices at which Argos had verbally indicated it was going to go out.

600. As to the reactions of the recipients of the email, we have already found above that Mrs. Paisley’s explanation to the Tribunal for her statement to the OFT that she did not see this email as “improper” was not persuasive. Our view is that, at the time, Mrs. Paisley would have regarded this email as conveying Argos’ proposed prices to Littlewoods and not, as she told the OFT, conveying Hasbro’s RRP to Littlewoods. We think it likely either that it did not occur to Mrs. Paisley at the time that such a communication was improper, or that she simply accepted it as confirmation of the discussions with Hasbro that she had been aware of, but not directly involved in.

601. There is no doubt that Mr. Burgess or his assistant took the email of 18 May 2000 into account, as shown by the markings on the document. Again, Mr. Burgess’ absence of any relevant recollection as to how that came about did not advance Littlewoods’ case. Contrary to his assertion to the OFT that the document seemed to him to be Hasbro giving Littlewoods its RRP, we have no reason to think that Mr. Burgess did not take this email to be what it said it was, namely the prices that Argos were intending to charge.

602. We accept that Mr. Cowley may have seen himself as not directly concerned by the email, but it did refer to three of his products which were all, in the event, priced at the prices

shown in the email. We have already referred to other occasions where Mr. Cowley, despite his protests, went along with Mr. Thomson's suggestions on prices.

603. Although Mr. Riley did not think that the email had much to do with him, the email does state

“Games and Action Man prices will continue to be adhered to...”

That in our view would have been read by Littlewoods as a clear statement that Argos would continue to price at RRP's on Action Man and Core Games. That is further evidence both that there was an earlier agreement on Action Man and Core Games and that the agreement continued for A/W 2000.

Conclusion on the emails

604. We conclude that the evidence concerning the emails of 18 May 2000 provides solid corroboration of the OFT's case as to the agreements or concerted practices alleged. It is apparent from Mr. Brighty's email of 19 May 2000 that he was in no doubt that Hasbro's activities were unlawful.

- Interactive Pikachu

605. On 25 May 2000 Mr. Wilson sent this email to Mr. Brighty and Mr. Thomson:

“Argos have confirmed that Interactive Pikachu will be at 23.75 not 23.99 for A/W. Please advise Index accordingly.”

606. According to Mr. Wilson, Argos had indicated to him that they were prepared to price Interactive Pikachu at RRP (£23.99) and this was the price that was included in the 18 May 2000 emails. However, Andrew Needham of Argos then contacted him and indicated that they were no longer proposing to go out at that price. Mr. Wilson said:

“The purpose of this email was to inform Ian Thomson that Argos had indicated to me that they were now not prepared to out at the RRP. I said in the email “Please advise Index according”. I expected him to contact Index to inform them that the prevailing market price for this product was likely to be below the Hasbro RRP, without mentioning Argos specifically. I note that, in the event, both Argos and Index priced Interactive Pikachu at £23.75 in their A/W 2000 catalogue.” (paragraph 68)

Mr. Wilson was not cross-examined on that evidence.

607. Mr. Thomson said (at paragraphs 130 to 131 of his witness statement):

“On the 25th of May 2000 I received an email marked urgent from Neil Wilson asking me to advise Index that Argos were going to sell Interactive Pikachu at £23.75 not £23.99 as they had previously agreed. Interactive Pikachu was a toy in the POKeMON range. I phoned Alan Burgess to make him aware of the issue and that he could change his pricing if he wanted to. He thanked me for passing on the information but did not commit on how he was going to act, he was going to think about it.

The Autumn/Winter catalogue came out and my recollection was that the pricing was adhered to in both catalogues.”

Mr. Thomson was not cross-examined on that evidence.

608. In Needham I, paragraph 40, Mr. Needham said:

“Argos had priced the Interactive Pikachu at £23.99 in its Spring/Summer 2000 catalogue, which was the RRP. Index’s Spring/Summer 2000 price for the product was £23.75. For the Autumn/Winter 2000 catalogue Argos had decided to react to Index’s lower price. I do not remember a conversation specifically, but I believe I was asked by Neil Wilson at Hasbro to hold firm on the £23.99 RRP. I said that I would have to react to the lower pricing and Argos went down to £23.75 to match the Index price. I would not have even said to Neil Wilson that Argos was going to react to Index’s lower pricing, had I known that the information was going to be passed to another retailer. Argos did not discuss its prices with suppliers and I had no idea that Hasbro was passing on prices to Index. I find it quite staggering that this systematic reporting went on within Hasbro.”

609. In cross-examination Mr. Needham explained that Interactive Pikachu had been carried in the S/S 2000 catalogue at £23.99 against Hasbro’s RRP of £24.99 because it was a ‘hot’ product. Index had launched at £23.75, and this had undercut Argos. Mr. Needham felt that he needed to match that price in the A/W 2000 catalogue. Mr. Wilson tried to persuade him to hold the price at £23.99, but Mr. Needham resisted that. Mr. Wilson had elicited his pricing intentions, but according to Mr. Needham he was “stating the obvious”. He did not tell Mr. Wilson what the price was going to be, but merely responded to Mr.

Wilson's enquiry. He did not expect what he told Mr. Wilson to be passed back to another retailer (Day 5, pp. 72-80).

610. Mr. Burgess does not mention the email of 25 May 2000 in his witness statement. The price of £23.99 had been ticked against Interactive Pikachu in the email of 18 May 2000. However, Mr. Burgess did not remember any conversation with Mr. Thomson about Interactive Pikachu (Day 4, p.140).
611. In our view, Mr. Wilson's email of 25 May 2000, following soon after the email of 18 May 2000, was intended to enable Mr. Thomson to tell Littlewoods that the Argos price for Interactive Pikachu was to be different from the price notified in the earlier email. It further appears that Littlewoods did not follow the price notified in the email of 18 May 2000 (£23.99) but continued to price at £23.75. We agree with the OFT that this episode demonstrates in a specific way Littlewoods being passed information about Argos prices and, apparently, pricing in line with those prices.
612. As to how Argos came to notify Hasbro of the price of £23.75, Mr. Wilson was not cross-examined on his statement that Mr. Needham had originally told him that the price would be £23.99, which was the price included in the email of 18 May 2000, but that Mr. Needham had then contacted him again to say the price would be £23.75. That evidence would signify Argos being prepared to keep Hasbro actively informed of its selling prices. Even on Mr. Needham's version, to the effect that Mr. Wilson contacted him, Argos was prepared to keep Hasbro informed of its pricing intentions in the case of a product where Argos felt, apparently exceptionally, that it should be priced below RRP. That is consistent with Argos wishing Hasbro to know its pricing intentions. We cannot think of any legitimate reason why Mr. Needham would have wished to tell Mr. Wilson highly confidential information about Argos' future pricing intentions.

Tweenies – November and December 2000

613. On 29 November 2000 Henry Foulds of Hasbro's marketing department sent an email to Ian Thomson telling him that the RRP for Tweenies Plush was being reduced to £12.99. Mr. Thomson replied on 30 November 1999, with a copy to Mr. Bottomley:

“Henry, we can’t reduce the price to everyone else when Argos and Index are in print at £14.99. They can’t change their prices as already discussed as this will compromise their business. The whole point of making Argos and Index toe the line on Retails was to set a precedent that the rest of the trade would follow.

If you need to discuss further then I suggest we arrange a meeting to discuss and we will need to include Charles.

Regards, Ian”

614. Mr. Bottomley replied to Mr. Thomson a little later:

“Ian, please check urgently with Charles as I believe Argos have been able to re price the deadline was yesterday.

I would say in future to brand that we require a great deal better communication of price decreases as given the huge amount of work we have put into retail pricing in the last 2 years, the last thing we need is for 2 major customers to be out of line.

Please all of you get together.

Regards

David B”

615. Mr. Thomson’s response the same day to Mr. Bottomley was:

“David,

I have asked Alan Cowley to change the price and the reaction has been explosive to say the least, especially after my last telephone call 2 weeks ago to make sure that he maintained £14.99 when he threw the phone down on me in another fit of rage.

I / We have been accused of being nothing but a bunch of F?????g incompetents and totally unprofessional.

First we set the price at £16.99 then we set the price at £14.99 and now we are at £12.99. Hardly surprising that he reacted badly and has said that he will not list a single Tweenies or Preschool product in A/W next year.

In future can we make sure that this does not happen again.

I have an excellent relationship with the Index team, except Alan Cowley (and I have being trying to build one with him) and I don’t need him to shout about Hasbro incompetence to the rest of his colleagues.

Regards, Ian”

616. That was followed by an email from Mr. Cowley to Mr. Thompson on 28 December 2000 in these terms:

“Ian, Reference our conversation pre Christmas regarding Hasbro’s late decision to reduce the price of the Tweenies soft toys featured in the Index SS01 catalogue.

Fortunately for both of us we were in fact able to amend the selling prices at the last minute due to an unexpected delay in catalogue production. This however literally meant ‘holding up the presses’, entailing an additional cost of £4000 which will be debited to your account shortly

I will not elaborate on the consequences if we had not been able to do so, resulting in our being undercut by Argos and other High St outlets, especially when you had earlier been so insistent that we went out at the same price!

Regards,

Alan Cowley”

617. Mr. Thomson explained in his witness statement:

“138. There was an incident involving a price reduction with Tweenies that had an effect on Index. Tweenies was being looked after by Henry Foulds (Preschool Marketing Manger at Hasbro) at that time and he sent an email in late November 2000 telling us that he was reducing the Retail Price point of the Standard Tweenies Plush items to £12.99. This followed previous intentions to move the price point up to £16.99, which was later changed to £14.99.

139. My response was that it was too late to do this as Index and Argos (I assumed) would have probably finalised their prices for Spring/Summer 2001 and it would be too late to change them. I was also very aware that Alan Cowley would be extremely upset if he was in print at £14.99 when the other major accounts like Woolworth’s and Toys “R” Us were going out at £12.99. This would mean that our policy of using the catalogues to set the price points would backfire and could potentially lead to the start of price-cutting again.

140. I did not want to upset Alan Cowley as I had already talked to him about maintaining the price point at £16.99 previously and then £14.99 recently, and I was never completely sure he would comply as he did not like it when I notified him of changes like this. The decision was taken to go ahead with the reduction despite my opinion as Argos had indicated that they could change their price.

141. The response to my phone call was explosive, as I had already discussed the issue with Alan Cowley twice about the price point for Spring/ Summer 2001. He was extremely upset and told me that it was probably too late to do anything about it and that he would now be compromised versus the competition. As a consequence of all this fooling around he would probably not list any Tweenies product going forward. Alan Cowley did manage to change the price but charged Hasbro £4,000 for the late notice. David Bottomley tried to get this charge waived but failed to change their minds.”

618. In cross-examination Mr. Thomson explained:

“A. We had gone out to speak to Index, and I had spoken to Alan Cowley about positioning Tweenies at a retail price point of £14.99. Following on from that meeting, this is when the prices started to change. I knew that going back to Index to talk to Alan about this would not have been a pleasant discussion and at the same time, because we knew that the prices had been set, to go back again and start to rearrange things, it was going to be very difficult...

...

Q. ...I think this is one instance when you insisted to Alan Cowley or used some such words and he threw the phone down on you?

A. There may have been two instances with Alan Cowley regarding prices, but with Alan, because I was not sure he would do it, I said “This is the price we would like to go out at, and as further proof of maintaining these prices, talk to McMahon, and look at what we have been doing with Action Man and Core Games, and it has worked”. At the time, Alan never like to have any changes at all to any of his plans, the list price would be acceptable because that might help the margin, but certainly anything to do with retail margins, he was never happy when we had to make a change to any of the plans we had pulled together earlier.”

(Day 1, pp. 130-132)

619. Mr. Thomson accepted that this was not the first time that he had had a ‘contretemps’ with Alan Cowley (p.132). He said that the reference in Mr. Cowley’s email of 28 December 2000 to an earlier occasion where Mr. Thomson had ‘insisted’ on everyone going out at the same price was a reference to the occasion when Mr. Cowley had thrown the phone down in a fit of rage (pp. 135-136).

620. In his interview with the OFT Mr. Cowley said:

“AC-Shortly before we went to print on the Spring/Summer catalogue Hasbro informed me that they had reduced the price on this product. I was concerned that if we were not able to reduce the price in our catalogue that we wouldn’t be competitive on this line with Argos TRU and other retailers. Hasbro lowered the RRP from £14.99 to £12.99. The margin to us was the same as Hasbro had lowered the list price by the same amount. This would give us the same margin as before and I felt that this was a realistic selling price for us.

SH- Was Hasbro insisting you went out at those prices?

AC- No. Hasbro told me that this would be the probable price on the high street. They never insisted, insisted is the wrong word. They wouldn’t be able to force us to go at that price. They suggested this price, not insisted. The meaning of the word “insistent” in PJS 020 is that they had been convinced that £14.99 would have been the probable retail price on the high street.

SH- So what’s the position with recommended prices?

AC- Hasbro isn’t one of my bigger accounts. I just do pre-school with Hasbro. Most manufacturers recommend prices, we look at these, and sometimes we’ll go out at that price. The pre-school market is competitive. Suppliers recommend prices but we usually take it with a pinch of salt and think others will go below it so we often go below it.

SH- Has Hasbro ever asked you what prices you will retail at?

AC- I’ve not been asked what prices we will go out at. I’d say it was none of their business. We’ll go out at a price which we think the market can bear.”

621. Mr. Cowley said in his witness statement:

“I do remember one further occasion when Ian Thomson claimed to know what the Argos selling price would be. This was in December 2000 when Hasbro suddenly, and belatedly as far as the production of the catalogues was concerned, reduced their cost prices so that the suggested selling price fell from £14.99 to £12.99 on Tweenies. That in itself presented no problem for retailers, and was even a potential benefit. However, I was extremely angry because I initially thought that it was too late to change the prices in our Spring/Summer 2001 catalogue. If Hasbro had quoted this price to me earlier then I would have decided to follow the RRP. However, I was now faced with a situation whereby on a well known branded product, because of what I thought was poor management by Hasbro, Littlewoods risked being £2.00 above the RRP. Ian Thomson told me that Argos would have time to reduce their retail price and suggested that we did the same. Given the new cost price I would now be undercut by Argos and by other high street retailers if I remained at £14.99.

In the event, at the last moment I managed to change the catalogue price to £12.99. I charged Hasbro £4,000 for the trouble of making this very late change. I attach at Annex “A” a copy of the correspondence relating to this isolated incident. I used the word “insistent” in the email of 28th December 2000 to exaggerate the case and make the point that it was his fault and Hasbro should pay for it. This tactic was successful: Hasbro paid the £4000 and they were discouraged from making late changes in the future. We would have wanted to price at the new RRP in any event but believed we might be prevented from so doing by the extreme lateness of the price change.”

(paragraphs 12-13)

622. In cross-examination Mr. Cowley could not remember Mr. Thomson saying that Argos would have time to change their price (Day 4, pp. 38-39). He denied any relevant agreement or arrangement which extended the previous deal on Action Man and Core Games to Tweenies (p.39). The reference to “both of us” in Mr. Cowley’s email of 28 December 2000 was to Hasbro and Index (p.40); the “consequences” he referred to were the consequences of being undercut, and the resulting adverse perception of customers to the whole Littlewoods catalogue (p.41); “all” referred to the whole High Street, including Argos (p.42), but did not imply any agreement that the whole market could charge the same price (pp. 42-43); the “consequences” did not refer to the possibility that Littlewoods might rethink its commitment to any Hasbro plan (p.43); the charge of £4000 to Hasbro was a normal commercial charge, not because Hasbro was in breach of some arrangement (pp. 44-47). Although Mr. Thomson would be able to guess what Mr. Cowley’s price was, Mr. Cowley did not tell him (p.48).

623. This exchange of correspondence is evidence of two occasions when Mr. Thomson had prevailed on Mr. Cowley to price in accordance with Hasbro’s wishes. The first occasion was apparently about two weeks before 30 November 2000, when Mr. Thomson had sought to make sure that Mr. Cowley maintained a price of £14.99 on the relevant doll. Although Mr. Cowley apparently threw the phone down in a rage, it appears that Littlewoods was prepared to price at £14.99. Mr. Cowley was therefore understandably upset when Mr. Thomson reverted to him for a second time, on 30 November 1999, this time to prevail upon him to go out at £12.99. That Mr. Cowley agreed to do, since he did not wish to be undercut if he remained at £14.99.

624. This incident in our view is a further demonstration of Hasbro's attempts to keep Argos' and Littlewoods' prices in line with each other, and Littlewoods' willingness to price at the retail selling prices Hasbro were indicating.

625. As to Mr. Cowley's remark in the email of 28 December 2000 that Mr. Thomson "had earlier been so insistent that we went out at the same price"

that is evidence (i) that Hasbro was insisting that Littlewoods should price at the same price as other retailers; and (ii) that Littlewoods knew that the price in question was the price that other retailers (including by necessary implication Argos) were intending to charge. We did not find Mr. Cowley's alternative explanations as to why he used the word "insisted" to be convincing.

Email of 15 April 2001 from Charles Cooper to Jonathan Ward

626. An email dated 15 April 2000 from Charles Cooper of Hasbro to Jonathan Ward of Hasbro is listed in the documents relied on by the OFT in the Decision, and is in the papers produced before the Tribunal.

627. However, this document is not linked to any specific allegation in the Decision, and was not subject to any witness evidence, cross-examination or submissions by any party. We therefore disregard it.

Email from Mr. Snow to Mr. Cooper dated 23 February 2001

628. An email from David Snow to Charles Cooper of 23 February 2001 reads:

"Charles

I had discussed with Sharon Clark at GUS re Retail Prices as I wanted to offer suggestions for RRP's in order to keep GUS and Littlewoods on a level playing field. I explained that in the past we have tried to ensure that Littlewoods and GUS were going out at the right price. She agreed this is something she was keen to do this year, ensuring prices are as close as possible to the high street.

The discussion about prices is happening W/C26/02/01. The strange part of our conversation happened is when she stated she would not be telling me her retails for the coming catalogue, she stated she has

never ever done this before, thus contradicting Ian Thomsons process he used to go through each year. I am going to pick up with her on my return and attempt to obtain pricing details and persuade her to price in line with Littlewoods. On your return could you please find out from Andrew/Argos if any guidelines have been set by Argos on pricing for GUS.

If we cannot ensure level pricing between GUS and Littlewoods for A/W I would suggest there will be a cause of concern on the Argos/Index agreement for A/W 2001.

Can we please discuss on my return...

David

CC: Ian Thomson”

629. Mr. Snow was Hasbro’s National Account Manager for Argos from June 2000. Charles Cooper was Neil Wilson’s successor with effect from October 2000. The above email apparently relates to a discussion Mr. Snow had had with Sharon Clarke at GUS Home Shopping with a view to ensuring “level pricing” between GUS Home Shopping and Littlewoods Home Shopping - i.e. the two mail order catalogue businesses run by GUS and Littlewoods respectively. According to the email, Ms. Clarke stated that she was keen to ensure that GUS and Littlewoods were going out at the right price, and that those prices were as close as possible to the High Street. However Ms. Clarke refused to disclose to Mr. Snow her proposed retail prices,

“thus contradicting Ian Thomson’s process he used to go through each year.”

630. In the email Mr. Snow expresses his intention to attempt to “obtain pricing details and persuade her to price in line with Littlewoods”. He asks Ms. Clarke to find out whether any guidelines have been issued by “Andrew/Argos” (presumably a reference to Andrew Needham) for pricing by GUS Home Shopping. He then states “If we cannot ensure level pricing between GUS and Littlewoods for A/W I would suggest there will be a cause of concern on the Argos/Index agreement for A/W 2001.”

631. Mr. Thomson told us in his witness statement:

“147. David Snow (GUS Account Manger) told me that GUS was going to be more competitive with pricing for A/W 2001. I asked David to try and talk to Sharon Clarke at GUS Home Shopping and establish what price they were intending to go out at. I was conscious that Littlewoods Home Shopping were putting me under pressure to improve their margins but at the

same time there were going to try and be only 20% above High Street retailers. I wanted David to try and get GUS to price product near or around Littlewoods which was something that they had done in the past.

148. Pricing in Home Shopping has never been a major issue as Grattan and Empire tended to price between 30 to 35% above the High Street and GUS and Littlewoods between 25 to 30% above the High Street.
149. Discussion had been generalised and when looking at pricing we would talk along the lines of being near or around other competitors. If for example GUS had indicated that they wanted to sell an Action Man product for £35 I would be asked if this was in line with everyone else. I would look at my chart and see that the price point on that particular product would be between £35 and £40 and tell them that they were in the ball park but if they wanted to make more margin could increase up to £40. It is against this background that David Snow sent his E-Mail to Charles Cooper and I was not copied in on it. David talked to me about the situation.
150. Sharon Clarke was an assistant Buyer at GUS; it must be noted that the GUS catalogue is a Mail Order catalogue and not a high street catalogue like Argos and Index. (GUS had been purchased by Argos.)
151. I had in the past discussed the proposed catalogue prices as mentioned above and expressed my disbelief that she had denied this to David Snow. As far as I am aware the situation never resolved itself as David Snow did not believe he could go back and talk to Sharon again. I told him just to forget it and if anything happened we would tackle any future problems if they arose. The issue never came up again after that.”

632. Mr. Thomson was not cross-examined on that evidence.

633. Mr. Snow in his statement to the OFT said

“BL shows DS another email.

DS: I was involved in informing Gus, not Argos, of RRP.

BL: You were aware of what is described as an agreement on RRP with Argos and Index.

DS: Yes. Discussions with GUS on home shopping were just a continuation of that.”

634. In our judgment, this evidence confirms that in early 2001 there was, in Hasbro’s eyes, “an Argos/ Index agreement”. The essence of that agreement, as it is to be inferred from the above email, was that both companies would align their prices on Hasbro’s RRP. Mr.

Snows' concern as expressed in the email is that GUS Home Shopping was reluctant to disclose its retail prices in the way that Index and Argos had disclosed their expected retail prices to Hasbro. That confirms that the "Argos/ Index agreement" worked through the exchange of the expected selling prices of Argos and Littlewoods to Hasbro. The reference in the email to contacting "Andrew" (Andrew Needham) suggests that Mr. Snow thought it would be appropriate to enlist Mr. Needham's help in putting in place with GUS Home Shopping an arrangement similar to the one that Argos had with Hasbro.

Email exchange between Charles Cooper and Ian Thomson of 3 and 4 April 2001

635. On 3 April 2001 Mr. Thomson sent an email at 6.23pm to Mr. Cooper in these terms

"Index are keen to price the Ferris Wheel at the Argos S/S price of £49.99 in their A/W 2001 catalogue.

Can you ensure that Argos will match the price and if you know of any retail price difference will you try and get them to comply.

Let me know your thoughts on the matter

Regards, Ian"

636. Mr. Cooper replied on 4 April 2001 at 9.50am

"no change planned"

637. In his witness statement Mr. Thomson had recalled this exchange as resulting from a decision by Argos not to list the Ferris Wheel. Accordingly he went back to Gerry Smith of Littlewoods, Alan Burgess' assistant, and told him that it would be safe to list the Ferris Wheel at £49.99. (Thomson, paragraphs 143-144). However, in examination-in-chief he corrected that to say that in fact Argos were listing the item, but that he had gone back to Gerry Smith to tell him that it was safe to go out at £49.99 (Day 1, p. 28). In cross-examination he said "I would have said it probably was safe to go out at £49.99 ... even though Argos were running the item because Charles Cooper told me it was okay" but he could not recall specifically what he said (Day 1, p. 31). Mr. Thomson agreed that the events in this case occurred up to five years ago and that "there are some things that are particularly clear and there are others that I am not so clear on". He had tried to indicate in his witness statement where his memory was unclear (Day 1 pp. 31-32).

638. Mr. Needham told us

“With reference to ... Ian Thomson’s e-mail of 3 April 2001, £49.99 was the RRP. No-one else had been stocking the product previously apart from Argos, so I was comfortable with pricing at the RRP (I thought the RRP was the most the market would pay for the product and I did not have to react to any other retailer’s lower price). When other retailers started to stock the product, I was happy commercially to continue pricing at the RRP – the product was a K’NEX product and not a key line for Argos. I did not have any conversation with Charles Cooper about matching the Index price. I never had conversations of that type with Charles Cooper, not with anyone else at Hasbro.”

(Needham I, paragraph 43)

639. In cross-examination Mr. Needham said that Mr. Cooper had asked whether the Ferris Wheel was going to carry on at £49.99 and Mr. Needham had said “Yes”, believing that he was the only retailer who was stocking the product. This was a “one off” conversation. (Day 4, pp. 83-84).

640. In our judgment, this evidence shows, first, that Littlewoods were discussing their intended retail price for the Ferris Wheel with Mr. Thomson, and had indicated to him that they wanted to match the Argos price. It is a reasonable inference that Littlewoods wanted to know whether it was safe to do so, or at least that Mr. Thomson wished to be able to advise Littlewoods whether it was safe to price at the Argos price. That shows continuing discussion between Hasbro and Littlewoods about retail prices and, by implication, the seeking by Littlewoods of information from Hasbro about other retailers’ prices. Mr. Thomson then spoke to Charles Cooper, Mr. Wilson’s successor, with a view to Mr. Cooper prevailing upon Argos to price at the same price as Littlewoods. As it happens, no persuasion was necessary since Argos was not planning to change the price.

641. Even on Mr. Needham’s account of the matter, Argos disclosed its expected retail selling price to Hasbro. In the context it seems to us that Mr. Needham must have known or could reasonably have foreseen that Mr. Cooper was seeking information about Argos’ retail prices in the context of Hasbro’s efforts to procure retailers to price at RRP. It is difficult to see any legitimate reason why Hasbro should seek confidential information of this kind and why Argos should be prepared to disclose it.

Email from Mr. Bottomley to Mr. Cooper dated 24 April 2001 in relation to "Dinghy"

642. This email reads:

"Charles
please follow this up urgently, as we can not allow a £14.99 price on
the dinghy.
Thanks
DB
CC: Rachel House"

643. Mr. Bottomley told us:

"The dinghy was part of the Action Man range. It was an F.O.B (Free-on-Board) item and therefore had a higher margin. Hasbro had designed a double page spread for the Argos catalogue for Action Man which included the dinghy. The designers, who had been contracted by Hasbro, had incorrectly entered the price for this item. As a result of this email, the error was corrected and the dinghy was priced at the RRP. I was the person who spotted that potentially we could have had a retailer undercutting RRP, which we could not allow given the arrangements which were then in place and working well."

(Bottomley, paragraph 42)

644. He was not cross-examined on that.

645. Mr. Needham said (Needham I, paragraph 42)

"I decided that I wanted Argos to run the Action Man Dinghy as it was a key line, I spoke to Rachel House in the Hasbro FOB sales team and she said that the RRP was £14.99. Hasbro then discovered internally that it had made a mistake on pricing and that the RRP should in fact be £19.99."

646. He was not cross-examined on this point.

647. It seems to us that this evidence, standing alone, is somewhat inconclusive. It is, however, an illustration of Hasbro's concern that RRP's should not be undermined. Mr. Bottomley

was not cross-examined on his evidence that at this time “the arrangements” were still in place and “working well”.

Email of 22 May 2001 from David Snow to Charles Cooper

648. On 22 May 2001 Mr. Snow sent the following email to Charles Cooper:

“Charles

I had a call today from Jacqui Wray at Argos stating the following items are on sale in the trade at prices lower than recommended retail prices. They are as follows

Walmart

Jnr Monopoly £9.88

Pictionary £17.72

Payday £13.44

Twister £6.81

Asda

Kart Extreme £19.98

Motorbike Extreme £14.47

I stated that Hasbro cannot control prices due to it being illegal.

Regards

David”

649. By this stage the OFT had visited Hasbro’s premises on 15 May 2001. Mr. Bottomley told us:

“44. I have been shown a copy of an email of 22 May 2001 from David Snow to Charles Cooper reporting on a telephone conversation that David had had with Jacqui Wray of Argos. At that time, Charles Cooper was responsible for the Argos account. Jacqui Wray had phoned David to complain that various items were on sale at Asda and Walmart at prices lower than the Hasbro RRP’s.

45. I have been shown Jacqui Wray’s recollection of this e-mail in her witness statement. She suggests in paragraph 9 of her

statement that she called David Snow because she wanted to find out whether Asda/Walmart “had received a very low cost price from Hasbro”, i.e. that Argos was being treated less favourably as compared with other retailers in relation to cost price. She states (at paragraph 10) that she did not and would never have asked David Snow to force other retailers to put their retail prices up.

46. I have to say I am very surprised by what she says and disagree with her explanation. Jacqui Wray rang Hasbro on a number of occasions complaining about retail prices. She did not call about cost prices. She knew that, as Hasbro’s largest customer, Argos were getting terms as good as those given to the rest of the industry by Hasbro. She would want to know why other retailers were pricing differently from Argos. The reason she would contact Hasbro about it was because she would expect us to do something about it, i.e. persuade those other retailers to price at Hasbro’s RRP.”

That evidence was not challenged in cross-examination.

650. Mr. Needham explained (Needham I, paragraph 44)

“If Argos was being undercut on a product, it would speak to the relevant supplier to ask what the supplier was going to do to help Argos reposition its price i.e. how the supplier was going to support Argos to reduce its price and would the supplier provide support to assist Argos in communicating this new price to the customer? In this particular instance I believe it was Walmart clearing old stock at a discount, as the products in question were about to be repackaged by Hasbro. I may well have asked Jacqui Wray to call Hasbro to try find out what was going on. Hasbro did nothing to help Argos react to this pricing and in fact, I did not expect Hasbro to do anything as they never have done”

651. In Needham II, paragraph 20, already cited above, Mr. Needham maintained that calls of this nature were directed to seeking financial incentive, or better cost prices, from Hasbro.

652. In cross-examination on whether he would phone Mr. Wilson about other retailers’ prices Mr. Needham said : (Day 5, pp. 85-88)

“A. Yes, I would like to comment on that. Frequently we would actually monitor the marketplace, and produce pricing comparisons with all our leading competitors' prices, and invariably, if we were being undercut, we would want to understand what was happening in that instance, we would want to understand whether that undercutting was a short-term price promotion that would only last for a few weeks, for

instance. So in that instance, we could actually make an informed decision whether or not to react to that price or not. It may have been, for instance --

THE CHAIRMAN: So you wanted to make --

A. We needed to an informed decision.

THE CHAIRMAN: What you have said is an informed decision, a decision on the basis of the best information you could get.

A. Correct, yes. The other instance is maybe that perhaps some of those products were old clearance items that they were discounting. So there were many, many factors that we would try to collect from our account managers to ascertain whether it was the right decision or not to actually match that lower price, and in some instances we did, and if it was a short-term promotion, sometimes we did not.

THE CHAIRMAN: So you would try and establish with them, "Is this a short-term promotion with X, or is this an end of line sale, or have they got some special deal?"

A. Absolutely, yes.

THE CHAIRMAN: And you would do your best to find out from them.

A. Absolutely.

THE CHAIRMAN: On the whole, would you be able to find out from them what you were seeking?

A. Yes, they would tell us if it was a short-term promotion, they would tell us if it was clearance stock. They would not discuss whether it was through better trading terms, of course, because they would always insist that Argos had the same trading terms, which was part of their standard negotiations. In that telephone conversation we may have said, "Right, okay, if this is a longer term promotion, what are you going to do about this for Argos? Are you going to actually help support us in our promotional activity, so that we can match the market price?" Now that was not only the type of conversations that happened on toys, it happened across the entire business, and it was very much a case of trying to establish what we needed to do to remain competitive and what options were available to us in terms of the support packages that we would try to obtain from suppliers.

MR. DOCTOR: Well, Mr. Wilson said, and this is in paragraph 32 of his statement, that your purpose in calling him to say that you had seen an Action Man product for, say, £2 less than the RRP, was that you wanted Hasbro to persuade the retailer to go back to RRP, or, if Hasbro could not achieve that, to confirm that to you, so that you could take account of that in your pricing.

- A. We did not expect that at all. We knew that that could never happen, and those conversations were never had.
- Q. He says it was clear from this that you knew that Hasbro was persuading accounts to go to RRP.
- A. Can I answer that question? I think that is a statement of the obvious in many respects from Neil Wilson. Neil Wilson and Hasbro were constantly going round to retailers, when retailers were complaining about margin -- and this had been going on for years. When retailers complain about margin, their first stock response would be, "Well, put your recommended retail price up", so it would have been naive of me to assume that other account managers within Hasbro were not having these same sorts of conversations with the competitors."

653. In her witness statement Mrs. Wray could not recall the previous telephone conversation referred to in Mr. Snow's email, but she made calls of this nature to suppliers on a regular basis to monitor competitors' prices, to ensure that Argos was competitive against the rest of the market. She also wanted to check that Argos was receiving fair terms from Hasbro, similar to those other retailers were receiving, but not to ask Hasbro to force other retailers to raise their prices (Wray, paragraphs 5-10). In cross-examination Ms. Wray said

- "A. We would telephone the suppliers, as I said, when we spotted a price cheaper than ourselves; we would telephone the supplier and say, "Is it in a promotion, is it indefinitely?" If it was indefinitely, we would possibly say, you know, can we have the same terms, is it funded by yourselves or is it just something they have done on their own back?"
- Q. He says that the reason you were phoning up was to convey a message from Argos that Hasbro should do something about it, that is to persuade the other retailers to price at Hasbro's RRP.
- A. I have never asked a supplier to go to another retailer and insist they put their prices up, and I have hardly had -- I have had very few conversations with David Bottomley, in fact I can hardly remember having any conversations with David Bottomley. My port of call would always be with David Snow or Charles Cooper, who was the account manager at the time."
- (Day 5, pp. 92-93)

654. The evidence of Mrs. Wray and Mr. Needham confirms that it was Argos' regular practice to draw to Hasbro's attention to instances of Argos being undercut and to seek information from Hasbro as to the circumstances in which this was occurring. As we have already held above, Argos was thereby seeking and apparently often obtaining confidential information about other retailers' pricing intentions. That, in itself, would in our view tend to maintain

prices at a higher level than they might otherwise have been. Mr. Wilson was not cross-examined on his evidence that the purpose of such calls was to procure Hasbro to persuade the retailer to raise his prices to RRPs, and in fact Hasbro would often do so. Whether such purpose was explicit or implicit, in our view Mr. Needham must have known or could have reasonably foreseen that calls of this kind to Hasbro would reinforce the prevailing level of prices at RRPs and reduce the risk of Argos being undercut.

655. Mr. Snow's answer to Ms. Wray that "Hasbro cannot control prices due to its being illegal" does not assist the appellants, since by that stage the OFT had visited Hasbro's premises and the company had been alerted to the illegality of attempts to control retail prices.

Mr. Bottomley's overall view

656. In his witness statement Mr. Bottomley summarised the position as follows:

"What existed between Hasbro and Argos and Hasbro and Littlewoods was an understanding that, because of the obvious benefit to everyone in the industry, prices would be at or near RRP. There was no absolute certainty that Argos and Littlewoods would do this and there was no sanction against a 'defaulter'. However, the obvious advantages that flowed from higher margins and the absence of a threat of undercutting by rivals were sufficient incentives to ensure that retailers stuck with the initiative. Also, the consumer benefited from lower prices for games as a result of lower cost prices. ... The listing and pricing initiatives came about as a result of low margins that were a concern across the entire industry and shared by Argos and Littlewoods. Argos was sympathetic to both initiatives and was actively involved in discussions on pricing. Littlewoods followed Argos's lead, but was also involved in discussions with Hasbro about pricing in the manner I described above."

(Bottomley, 47-48).

657. That evidence was not challenged by either Argos or Littlewoods. Again that is evidence of the existence of an "understanding" between Hasbro and Argos and Hasbro and Littlewoods that prices would be at or near RRPs. In our judgement, the evidence set out above, viewed in its totality, amply confirms the existence of agreements or understandings to that effect.

XI SUMMARY OF FINDINGS AS TO A BILATERAL AGREEMENT OR CONCERTED PRACTICE BETWEEN HASBRO AND ARGOS

The relevant law

658. An “agreement” for the purposes of section 2 of the Act does not have to be a legally binding agreement: see the cases cited in Section VI above. We accept for working purposes that an “agreement” may arise from the expression of the parties’ “joint intention to conduct themselves on the market in a particular way” (*Bayer*, cited above, at paragraph 67) and that the concept “centres around the existence of a concurrence of wills” (*Bayer*, at paragraph 69). An agreement can, however, exist where one party manifests its wish to achieve an anti-competitive goal, and the other party tacitly accepts that (*Bayer*, at paragraph 71, on appeal at paragraph 102). Tacit acceptance may be inferred from conduct (*Bayer*, on appeal at paragraph 100). An agreement, in our view, can be constituted by an “understanding” even if there is nothing to prevent either party from going back on, or disregarding, the understanding in question.

659. A “concerted practice”, on the other hand, is a form of collusion falling short of an agreement which “knowingly substitutes practical cooperation between [the parties] for the risks of competition” (*Dyestuffs*, cited above, at paragraph 64). Although that does not involve “the working out of an actual plan”, nonetheless:

“each economic operator must determine independently the policy which he intends to adopt on the market including the choice of the persons and undertakings to which he makes offers or sells.” (*Suiker Unie* at paragraph 173)

660. That in turn,

“strictly precludes any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.” (*Suiker Unie* at paragraph 174)

661. In particular, a concerted practice may arise if there are reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market (*Suiker Unie* at paragraph 175).

662. The Court of First Instance said in *Cimenteries*, cited above, that “reciprocal contacts” are established

“where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it...” (paragraph 1849).

and that

“It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part” (paragraph 1852).

663. The fact that only one participant reveals his future intentions or other competitive information does not exclude the possibility of a concerted practice, since the recipient of the information in question cannot normally fail to take that information into account when formulating its policy on the market: e.g. *Tate & Lyle*, cited above, at paragraph 58.

664. Moreover, a concerted practice may arise if undertaking A complains to undertaking B about the activities of a third undertaking C, and undertaking B acts on those complaints in such a way as to lead to conditions of competition which do not correspond to normal conditions in the market, for example by prevailing upon C to limit its competitive activities. In those circumstances A, B, and C may all be guilty of a concerted practice: see notably *Suiker Unie* at paragraphs 282 to 283.

665. It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other: see Cases T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931 (“*PVC II*”), paragraphs 696 to 698; *Anic*, cited above, at paragraphs 131 to 133.

666. Contrary to the submissions of the appellants, it does not seem to us that the judgments in *Bayer* are intended to qualify the principles of *Suiker Unie* and many subsequent cases.

667. In *Bayer*, the manufacturer had sought to obstruct parallel exports by the wholesalers concerned, contrary to the wishes of the latter. To establish an “agreement” the Commission alleged that Bayer had imposed an export ban, established a monitoring system, threatened exporting wholesalers, and made its supply policy conditional upon

compliance by the wholesalers with an export ban, which the wholesalers had then accepted in order to obtain supplies. However, following a detailed analysis the Court of First Instance held that none of the facts relied on by the Commission were established (paragraph 109). Moreover, the Commission had not proved any tacit acquiescence on the part of the wholesalers. On the contrary, the documents showed “a firm and persistent intention to react against a policy that was fundamentally contrary to their interests” (paragraph 129). There was no proof of “any concurrence of wills or acquiescence” (paragraph 144): “the true intentions and actual conduct [of the wholesalers] could not be further removed from any intention to comply with, or align themselves upon, Bayer’s policy” (paragraph 148), but was on the contrary “designed to circumvent Bayer’s new policy” (paragraph 156).

668. It is not in our view surprising that it was held in those circumstances that there was no ‘agreement’ between Bayer and the wholesalers since the consensual element, even by way of tacit acceptance, was lacking. That is a very different circumstance from the present case where, contrary to *Bayer*, the evidence shows a large degree of consensus.

669. The Court of First Instance in *Bayer* also confirmed that an ‘agreement’ for the purposes of Article 81(1) can be constituted by tacit acceptance (*Bayer*, at paragraphs 158 to 171, upheld by the Court of Justice at paragraphs 102 and 142).

670. Under section 2 of the Act, any such agreement or concerted practice must, in addition, have as its object or effect the prevention, restriction or distortion of competition. The OFT does not, however, have to prove an effect if the object is restrictive of competition: *Consten and Grundig*, cited above, and many subsequent cases.

Agreement

671. In our judgment the evidence amply establishes that at least from the A/ W 1999 catalogue onwards until mid-2001 there was an “agreement” within the meaning of the Chapter I prohibition between Hasbro and Argos to the effect that Argos would sell Hasbro’s Action Man and Core Games ranges at the retail prices recommended by Hasbro. That “agreement” was extended to certain other toys and games with effect from the A/W 2000 catalogues. We refer to all the evidence set out above, which we briefly summarise here.

672. The “agreement” that we find to exist was not a formal agreement, nor was it a legally binding agreement. The agreement was a verbal agreement. It was not reduced to writing. The agreement did not result in any guarantee that Argos would follow Hasbro’s RRP’s, and there were some exceptions.
673. It is not disputed that from late 1998 onwards Hasbro launched a pricing initiative with a view to persuading toy retailers to price at RRP’s on Action Man and Core Games. A core rebate was also offered on those products; see generally the Stockley Park presentation of 23 October 1998, and the unchallenged evidence of Mr. Bottomley.
674. As far as Argos is concerned, discussions on these matters took place between Mr. McCulloch and Mr. Brighty of Hasbro and, at least, Sue Porritt of Argos. In the course of those discussions Sue Porritt and Mrs. Thompson of Argos came to know that Hasbro was actively seeking to persuade all the principal retailers to price at RRP’s on Action Man and Core Games as a way of injecting more margin into those products, in association with the offer of a core rebate. Sue Porritt reported to Mrs. Thompson a conversation to that effect that she had had with Mr. McCulloch.
675. At or about the same time Sue Porritt indicated to Mike Brighty that Argos was prepared to go out at Hasbro’s RRP’s on Action Man and Core Games (Bottomley, paragraph 16). Hasbro set up an internal structure whereby Mr. Wilson (for the Argos account) and Mr. Thomson (for the Littlewoods account) had the responsibility of implementing an arrangement whereby both Argos and Littlewoods would price at Hasbro’s RRP’s (Bottomley, paragraph 17; Wilson, paragraphs 11 onwards).
676. Mr. McCulloch spoke to Ms. Thompson and/ or Sue Porritt and said that Hasbro could stabilise RRP’s (i.e. persuade other retailers to go out at RRP’s). Mrs. Thompson and/ or Sue Porritt said to Mr. McCulloch that Argos was willing to go along with that in principle and price at Hasbro’s RRP’s but would react if it was undercut and could not give any guarantees on pricing (Wilson, paragraphs 8 and 10).
677. At a meeting in Liverpool prior to the publication of the S/ S 1999 catalogue Mr. McCulloch said to Mr. McMahon of Littlewoods words to the effect that he had had discussions with Argos, that Argos was prepared to agree to pricing at Hasbro’s RRP’s, but

were concerned about undercutting. Mr. McCulloch gave Mr. McMahon to understand that if Littlewoods would go to RRPs, Argos could be persuaded to do the same. Mr. McMahon indicated that he could go along with that, but would react if undercut (Thomson, paragraphs 62 to 63), Day 1, pp. 107 to 108 and 110 to 112).

678. In our judgment it is reasonably to be inferred from the evidence that Mr. McCulloch and/or Mr. Brighty gave reassurance to Argos that if Argos went to RRPs, other retailers would follow. Argos certainly knew that Hasbro was actively seeking to persuade other retailers to do so.
679. The first move to RRPs on Action Man and Core Games was for the S/ S 1999 catalogue. Although no agreement is alleged in respect of that catalogue, the evidence does not permit the Tribunal to rule out the possibility that relevant contacts between Hasbro and Argos had already influenced the pricing in that catalogue. In any event, neither Argos nor Littlewoods could be certain whether RRPs would still be followed in the A/W 1999 catalogue (see e.g. Wilson, paragraph 28).
680. It is uncertain how far these matters were mentioned at a meeting between Argos and Hasbro on 17 February 1999. A document prepared by Hasbro for that meeting refers to “Cover-Dialogue opened to stabilise RRPs (initially Core Games, Action Man)”. An email from Sue Porritt to the Argos toys team dated 19 February 1999 suggests that Hasbro’s pricing initiative and the payment of a rebate was discussed at the meeting, but the Tribunal cannot make a definite finding.
681. At some date after 17 February 1999 Mr. McCulloch mentioned to Mrs. Thompson Hasbro’s plan to persuade all retailers to go to RRPs. Mrs. Thompson told us that she was highly sceptical of that plan, but in our view Mrs. Thompson must have come to realise that it was not impracticable (Thompson II, paragraphs 14 and 15, Day 3, pp. 119-126).
682. A meeting took place between Sue Porritt and Mr. Wilson on 29 March 1999. Mr. Wilson’s contact report of that meeting is evidence that (i) Argos knew that Hasbro was talking to other retailers as part of its strategy to stabilise prices at RRPs; and (ii) Argos gave Hasbro to understand that it was prepared to price at RRPs but would react if undercut.

683. There is virtually unchallenged evidence that a mechanism was in place to ensure that Argos priced Action Man and Core Games at Hasbro's RRP's in the A/W 1999 catalogue. That mechanism is described in detail in Mr. Wilson's statement. Briefly, Mr. Wilson would, once the products had been selected, ask Mr. Needham whether Hasbro's proposed RRP's on Action Man and Core Games were acceptable, and Mr. Needham would indicate whether or not they were. Mr. Wilson would then consult his colleagues at Hasbro including Mr. Thomson as to other retailers' pricing intentions. He would then revert to Mr. Needham, stating his belief as to what the expected retail price for this or that product would be, on the basis of what other retailers had said, albeit without identifying the other retailers in question.
684. In our judgment Mr. Needham must have known that Mr. Wilson was passing on to him information as to other retailers' pricing intentions in the context of Hasbro's known attempt to persuade the retail trade generally to price at RRP's (Wilson, paragraphs 16, 17 and 19 to 22).
685. Similarly, Mr. Needham must have known or could reasonably have foreseen that, if Hasbro was feeding back to Argos Hasbro's views on other retailers' pricing intentions, then Hasbro must have been reflecting Argos' views back to other retailers.
686. In conjunction with that mechanism, it was Argos' practice to phone Mr. Wilson if Argos saw another retailer pricing at a lower price. As a result, Hasbro would attempt to persuade the other retailer to raise its price to RRP, and would then revert to Argos and inform Argos (Mr. Needham) what the other retailer's pricing intentions were (Wilson, paragraphs 22-26, 30, 32, Day 5, pp. 82 to 93).
687. For the reasons we have already set out, Mr. Wilson's evidence in our judgment establishes what he describes as a "gentleman's agreement". Argos told Hasbro what its pricing intentions were, namely that it was intending to price at RRP's in the next catalogue. Those pricing intentions are highly confidential. Argos may not have communicated its intentions product by product, by going through a list, but there was no doubt that the stated intentions applied to Action Man and Core Games. It is true that there was no certainty, and no guarantee that Argos would price at RRP's, and certainly no legally enforceable

agreement. There may also from time to time have been some exceptions where Argos did not price at the price it had previously indicated. However, it seems to us implicit in the arrangements as described, unchallenged, by Mr. Wilson, that there was an express or implied agreement, albeit verbal and with no guarantee, that Argos would sell at Hasbro's RRPs, at least to a material extent, on Action Man and Core Games in the A/ W 1999 and S/ S 2000 catalogues.

688. Hasbro's pricing initiative was extended to other products for A/ W 2000. That was explained to Sue Porritt at a meeting of 9 December 2000. Mr. Wilson's contact report of that meeting establishes that (i) Sue Porritt knew that Hasbro was seeking to ensure that other retailers went to RRPs, not only on Action Man and Core Games but also on other products; (ii) Sue Porritt knew that it was an integral part of the success of the extension of the initiative that Argos itself would go out at RRPs in the products in question; but that (iii) Sue Porritt told Mr. Wilson that Argos would react if it was undercut (see also Wilson, paragraph 44 to 45).

689. The mechanism for extending the price initiative was similar to the mechanism earlier adopted for Action Man and Core Games. Mr. Wilson identified certain key products and persuaded Argos to list them. He received indications from Mr. Needham that, other things being equal, Argos would adopt RRPs on certain of those products. Mr. Wilson passed that information to other account managers within Hasbro, notably Mr. Thomson. Mr. Wilson was then informed of other retailers' pricing intentions, including those of Littlewoods. Mr. Wilson then went back to Mr. Needham and informed him, on the basis of that information, whether the retail price for those products was likely or unlikely to be at the RRP (Wilson, paragraphs 45 to 47).

690. The fact that an agreement had been reached is in our view confirmed by the terms of the internal email of 18 May 2000. This email, prepared by Mr. Thomson, is sent jointly by Mr. Wilson and Mr. Thomson to over 20 Hasbro executives, including senior management such as Mr. McCulloch, Mr. Brighty and Mr. Bottomley. We think it highly unlikely that Mr. Thomson would have misrepresented the position within Hasbro by saying that there was an agreement if in fact no agreement had been reached. The fact that the information in the internal email was to be "translated to other accounts" confirms that Mr. Thomson and Mr. Wilson considered that the information in question was reliable.

691. The internal email of 18 May 2000 corroborates the evidence of Mr. Thomson and Mr. Wilson, upon which the appellants had the opportunity to cross-examine, that both Argos and Littlewoods “were taking a cautious approach in case either party reneges on a price agreement”. The email further confirms that

“Both accounts have agreed the above price points”

and that Mr. Wilson and Mr. Thomson were

“confident that they will play ball”

albeit that “the proof of the pudding will be when both catalogues are published”.

692. In addition, the internal email of 18 May 2000 confirms the existence of the earlier agreements on Action Man and Core Games, and shows that those agreements continued for A/W 2000:

“It goes without saying that Action Man and Games prices will be maintained as per earlier agreements”.

693. Looked at in the context of the evidence as a whole, in our judgment there is no good reason for not taking the internal email at face value. That email in our judgment shows that “both accounts have agreed the above price points” and that “Action Man and Games prices will be maintained as per earlier agreements”.

694. As to Mr. Wilson’s reply in cross-examination that it was inaccurate to use the word “agreed”, we have already held that what he meant by that was that there was no formal agreement, and that nothing was guaranteed. That answer did not in our view detract from the combined evidence of Messrs. Wilson, Thomson and Bottomley to the effect that the internal email of 18 May 2000 reflects the fact that verbal agreements had been reached, albeit that there was no guarantee and no certainty until the catalogues were published.

695. That conclusion is in our view further confirmed by the email that Mr. Thomson sent Littlewoods shortly afterwards on 18 May 2000. That email states

“I am able to confirm a list of products and prices that Argos has committed to. **Games and Action Man** prices will continue to be adhered to...”

696. In addition, as already shown earlier in this judgment, the pricing patterns seen in the A/ W 2000 catalogue further support the OFT's case.
697. The incident concerning the Interactive Pikachu around 25 May 2000 indicates Argos' willingness to communicate its pricing intentions to Hasbro. It is difficult to see a legitimate reason why Argos should communicate such confidential information. That information was communicated in a context where Argos knew that Hasbro was seeking to stabilise prices at RRP's and avoid undercutting among retailers.
698. The existence of the agreement we have found is further confirmed by Mr. Thomson's email of 30 November 2000 ("the whole point of making Argos and Index toe the line on retails"), Mr. Cowley's email of 28 December 2000 ("when you had been so insistent that we all went out at the same price"), and Mr. Snow's email of 23 February 2001 which refers to "the Argos/ Index agreement for A/ W 2001".
699. Finally the incident regarding the Ferris Wheel referred to in the emails of 3 and 4 April 2001 further illustrates Argos' willingness to disclose to Hasbro confidential information about its expected selling prices in circumstances where Argos must have known of Hasbro's efforts to procure retailers to price at RRP's and avoid undercutting.
700. For those reasons we reach the conclusion that a verbal agreement with Hasbro that Argos would price at or near Hasbro's RRP's on Action Man and Core Games was in effect after 1 March 2000 for at least the S/ S 2000, A/ W 2000 and S/ S 2001 catalogues, and for the other common products identified above for the A/ W 2000 and S/ S 2001 catalogues. That agreement existed before 1 March 2000 but became unlawful after that date, for the remainder of the life of the S/ S 2000 catalogue and then for subsequent catalogues. We are prepared to assume that the agreement terminated on 15 May 2001, the date of the OFT's visit.

Concerted practice

701. In the alternative, we find that the above evidence establishes, at the very least, a concerted practice between Hasbro and Argos to the effect that Argos would price at or near the RRP's in question for most of the products in the ranges in question.

702. As already indicated, a “concerted practice” as defined in *Dyestuffs* falls short of “an agreement”, but constitutes a “form of coordination” which “knowingly substitutes practical cooperation for the risks of competition”. The principle is that each “economic operator must determine independently the policy which it intends to adopt” on the market. That principle precludes “direct or indirect contact” between economic operators, “the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market”. A key concept in the idea of a concerted practice is that of “removing in advance any uncertainty as to the future conduct of... competitors”, as a result of “reciprocal contacts” having that object or effect.

703. In our judgment the underlying idea of “concerted practice” is equally applicable to the vertical relationship between a supplier and a retailer. In the present case Argos disclosed its pricing intentions to its supplier, Hasbro. Those pricing intentions are highly confidential matters which would not in normal circumstances be disclosed in advance. Argos was told by Mr. Wilson what Hasbro expected retail prices to be, based on Hasbro’s conversations with other retailers. Argos must have known or could reasonably have foreseen that its discussion with Hasbro reflected Hasbro’s discussions with other retailers. In our view such conduct was a “form of practical coordination” which knowingly substituted practical cooperation for the risks of competition. In particular, those reciprocal contacts reduced uncertainty on Argos’ part as to what other retailers’ pricing intentions were, and reduced uncertainty on Hasbro’s part on what Argos’ prices would be. That, in turn, facilitated Hasbro’s conversations with other retailers especially Littlewoods, with a view to ensuring that they too priced at RRP.

704. In our judgment the evidence set out above shows ample reciprocity on the part of Argos and Hasbro. Hasbro gave Argos the information at its disposal as to the likely retail prices other retailers and Argos shared with Hasbro its future pricing intentions. In practice, as a result, Argos priced at Hasbro’s RRP on the vast majority of the products in question.

Argos’ remaining submissions

705. In our judgment, those conclusions are not undermined by the various arguments advanced by Argos, most of which we have already dealt with. We add the following further comments on Argos' submissions.
706. Argos argues, first, that the industry "innocently gravitated" towards RRP's following the GUS takeover. Argos moved to RRP's for S/S 1999 and Littlewoods "correctly anticipated" that move. Thereafter it was "natural" for the industry to remain uniformly at RRP's. We have already rejected this argument, essentially for three reasons already set out in section IX above.
707. First, as regards S/ S 1999, even if no agreement has been found in the Decision, the Tribunal is not prepared to draw the inference that the first move to RRP's in S/S 1999 was uninfluenced by contacts between Hasbro and Argos.
708. Secondly, whatever the position regarding S/S 1999, the issue is whether, as regards A/W 1999 and subsequent catalogues, there was in place an agreement or concerted practice between Hasbro and Argos directed at maintaining Argos' selling prices at or near RRP's. The submission that everything is explained by "market pricing" and/or low margins on toys simply does not face up to the evidence that in our judgment establishes a verbal agreement and/or concerted practice to that effect, as set out above. If an agreement or concerted practice is established on the facts, the question of what the pricing position might have been in the absence of that agreement or concerted practice is irrelevant to the issue of liability.
709. Thirdly, the policy of "market pricing" as explained to us does not in our view account for the pricing patterns seen in this case. Market pricing did not necessarily or imply going to RRP's. Moreover, a market pricing policy which, we are told, involved selective price cutting and entry point pricing does not in our judgment satisfactorily explain the virtual absence of price competition over a two-year period on the high profile products with which this case is concerned especially when, historically speaking, competitive pricing on toys had always been seen as an important element of the success of the catalogue overall.
710. Next, Argos submits that "attempts to encourage retailers to price at RRP's are legal" and that the OFT accepted that in the Decision at paragraph 153. Moreover, says Argos, the

OFT accepted that Hasbro's pricing initiative was not in itself unlawful at paragraphs 95, 313 and 308 of the Decision.

711. We observe, first, that this submission does not in our view reflect what the OFT found in the Decision, which was as follows:

“It is the OFT's view that Hasbro's pricing initiative led directly to an overall infringing agreement and/or concerted practice between Hasbro, Argos and Littlewoods...”

(paragraph 95)

“The OFT accepts in the overall context of this case that unilateral conduct on the part of Hasbro to try and encourage Littlewoods to adhere to RRP is not on its own compelling evidence of an agreement. However, as shown in this Decision, the OFT has evidence that Hasbro's behaviour and its co-ordination between itself, Littlewoods and Argos involved much more than unilateral conduct.”

(paragraph 153)

“The OFT's case is that what may have started as a lawful pricing initiative by Hasbro led directly to the infringing agreements.”

(paragraph 308)

“The OFT does not dispute that insofar as Hasbro's pricing initiative was no more than merely recommending RRPs to Argos and Littlewoods, individually and separately, that was not unlawful. But the evidence is that any such initiative led directly to the infringing agreements.”

(paragraph 313)

712. In our judgment, the OFT did not, in the Decision, embrace the proposition that it is necessarily lawful for a supplier to seek to persuade a retailer to price at RRPs. The most that can be said, in our view, is that the OFT stated, notably at paragraph 313 of the Decision, that the mere fact that a supplier unilaterally recommends retail prices does not, in itself, establish an agreement or concerted practice for the purposes of the Chapter I prohibition.

713. In any event, broad assertions such as “it is lawful for a supplier to seek to persuade a retailer to follow RRPs” or that Hasbro's pricing initiative was “lawful in itself” do not seem to us to be helpful ways of analysing the facts of the present case. The question at

issue is whether there has, as a matter of fact, come into being “an agreement or concerted practice having as its object or effect the prevention, restriction or distortion of competition”. If a supplier seeks to “persuade” a retailer to observe RRP there may not be much doubt (and there is none in this case) that the object of the supplier’s action, and its effect, if achieved, is to prevent, restrict or distort competition. The issue then is whether what occurred can properly be characterised as purely unilateral action on the part of the supplier, or whether the facts disclose a sufficient degree of consensus to give rise to a relevant agreement or concerted practice. The notion of consensus may be expressed in a number of different ways, for example a “joint intention” to conduct oneself on the market in a certain way, a “concurrence of wills”, or “tacit acceptance”. But the issue in every case, in our judgment, is whether the conduct in question falls to be analysed as purely unilateral, or whether there are sufficient elements of consensus or coordination to give rise, expressly or by implication, to an agreement, whether formal or informal, written or unwritten, or to a concerted practice. That issue is a question of fact in each case.

714. Furthermore, in our judgment the question whether conduct is purely unilateral, or has the necessary degree of consensus, acquiescence or reciprocity to give rise, expressly or by implication, to an agreement or concerted practice is a question of fact and degree, to be determined objectively on the basis of what was done, said or written on behalf of the relevant undertakings at the time, taking into account the surrounding circumstances.

715. For that reason, in our judgment submissions such as “it is lawful to persuade a retailer to charge the supplier’s RRP, provided that the supplier does not incentivise the retailer, and the retailer does not fetter his discretion”, are incorrectly focussed. The correct question to focus on is whether, on the facts, an agreement or concerted practice having as its object or effect the prevention, restriction or distortion of competition is established by the evidence. In our judgment, such an agreement or concerted practice is established on the evidence in this case.

716. Argos further submits that if an agreement or concerted practice is found to exist in this case, the practice of publishing RRPs will be rendered virtually useless or at least will have to be severely curtailed.

717. It is true that the practice of recommending retail prices may lead on to anti-competitive agreements or practices of various kinds as illustrated by the Report of the Monopolies and Mergers Commission on *Domestic Electrical Goods Cm 3675-I (1997)*. However, we are not concerned in this judgment to determine at what point the unilateral recommendation by a supplier of RRP's may or may not lead on to an agreement or concerted practice within the Chapter I prohibition. We are concerned with the facts of the present case.

718. On the particular facts of the present case the contacts and discussions that took place in our judgment went well beyond possibly legitimate discussions and led on to agreements or concerted practices on prices.

719. As to Argos' submissions that it is "standard practice within the industry" for suppliers to reveal to Argos information about other retailers' pricing intentions, the Tribunal held in *JJB & Allsports vs OFT*, cited above, at paragraphs 659 to 666, that if a retailer complains to a supplier about the prices of another retailer, and the supplier approaches the retailer with a view to persuading that retailer to raise his prices, and the retailer in fact does so, then a concerted practice within the meaning of the Chapter I prohibition may have come into being, provided that there is a relationship of cause and effect between the original retailer's complaint and the other retailer's decision to raise prices.

720. Argos further argues that the focus of Hasbro's efforts was on the lawful core rebate. As to that argument, it is not expressly alleged in the Decision that the core rebate, as such, was unlawful. However, the evidence before the Tribunal is to the effect that the core rebate was, in fact, inextricably bound up with Hasbro's pricing initiative, and seems to have applied in practice to those products in relation to which we have found an agreement or concerted practice. We do not need to decide whether or not the core rebate formed part of the agreement or concerted practice that we have found to exist. Nor do we think it useful to determine whether "taken alone" the core rebate was lawful since the core rebate was closely associated with the pricing initiative. In our judgment the agreement or concerted practice that we have found to exist in parallel with the core rebate fell within the Chapter I prohibition.

721. Argos relies on the fact that the evidence shows that Hasbro sought to elicit the pricing intentions of retailers other than Argos and Littlewoods. However, the fact that the pricing

initiative organized by Hasbro may in fact have extended to retailers other than Argos and Littlewoods does not in our judgment alter our finding that Argos was party to a relevant agreement or concerted practice with Hasbro.

722. Moreover, the evidence is that Argos was the market leader and Littlewoods was Argos' principal competitor in catalogue retailing. Hasbro's tactics, as the evidence shows, were first to secure agreement with Argos and Littlewoods. Thereafter, other accounts could more easily be brought "on board" if necessary. See, for example, the evidence of Mr. Bottomley, at paragraph 12, and the internal Hasbro email of 18 May 2000 which refers to the information now being "translated to other accounts".

723. Neither do we accept Argos' agreement that its principal fear of undercutting would have come from Woolworths and Toys "R" Us, and not Littlewoods. While it is true that Woolworths and Toys "R" Us are larger than Littlewoods, Littlewoods was Argos' only competitor as a catalogue retailer. In our view, it was important to Argos that it should not be undercut by Littlewoods, as shown for example by the win/ lose/ draw analysis that Argos conducted. There is also the consideration that Argos could not easily reposition its prices if it found, when the catalogues came out, that Littlewoods' catalogue was more competitively priced. The evidence is that 10p, 15p or 25p in the catalogue price can make a difference, as illustrated for example by Mr. Needham's evidence that he felt he had to price Interactive Pikachu at £23.75 rather than £23.99.

724. Argos further submits that the parity of prices is also largely explained by the rise in Hasbro's cost prices. However, in our judgment there was still a margin for manoeuvre for both companies to price at less than RRP's at least on certain products, without necessarily engaging in "deep discounting" or precipitating a price war. Some selective price cutting on key lines would have been consistent with Argos' policy of market pricing, and is in our judgment to be expected in normal competitive conditions, notwithstanding the poor margins on toys. Moreover if, as the appellants submit, the core rebate was not linked to maintaining RRP's, the extra margin generated by that rebate would have been available to support a certain degree of price competition. The fact that it was not inevitable that both companies would price at RRP's is also clear from the evidence (i) that both Argos and Littlewoods frequently expressed the fear that they would be undercut and (ii) that Hasbro went to considerable lengths to ensure that undercutting did not take place. In those

circumstances we reject the submission that Hasbro's cost prices made the observance of RRP's inevitable.

725. We have already dealt at length with the principal factual submissions made by Argos. We specifically reject Argos' arguments that the contacts that took place were too vague and general to give rise to an agreement or concerted practice. In our judgment, both in relation to pricing on Action Man and Core Games, and later in relation to other toys, the evidence establishes the agreement or concerted practice which we have found to exist.

Conclusion

726. We conclude on the totality of the evidence that from 1 March 2000 to 15 May 2001 Hasbro and Argos were party to a verbal agreement or concerted practice for at least the S/ S 2000, A/ W 2000 and S/ S 2001 catalogues to the effect that Argos would to a material extent price at or near Hasbro's RRP on Action Man and Core Games and, for the A/ W 2000 and S/ S 2001 catalogues, certain other products. That agreement or concerted practice had the object or effect of preventing, restricting or distorting competition and thus fell within the Chapter I prohibition. We are prepared to accept that the agreement or concerted practice terminated when the OFT visited Hasbro on 15 May 2001.

XII SUMMARY OF FINDINGS AS TO A BILATERAL AGREEMENT OR CONCERTED PRACTICE BETWEEN HASBRO AND LITTLEWOODS

727. We have already set out above the relevant legal principles.

Agreement

728. In our judgment, the evidence amply establishes that at least from the A/ W catalogue 1999 onwards until mid-2001 there was an "agreement" within the meaning of the Chapter I prohibition between Hasbro and Littlewoods to the effect that Littlewoods would sell Hasbro's Action Man and Core Games ranges at the retail prices recommended by Hasbro. That "agreement" was extended to other toys and games with effect from the A/W 2000 catalogue. We refer to all the evidence set out above, which we briefly summarise here.

729. The agreement that we find to exist was not a formal agreement, nor was it a legally binding agreement. The agreement was a verbal agreement. It was not reduced to writing. The agreement did not involve any guarantee that Littlewoods would follow Hasbro's RRPs, although Littlewoods almost invariably did so.
730. It is not disputed that from late 1998 onwards Hasbro launched a pricing initiative with a view to persuading toy retailers to price at RRPs on Action Man and Core Games. A core rebate was also offered on those products; see generally the Stockley Park presentation of 23 October 1998, and the unchallenged evidence of Mr. Bottomley.
731. As far as Littlewoods is concerned, Littlewoods knew at least from the Liverpool meeting onwards, that Mr. McCulloch had had discussions with Argos, and that he, Mr. McCulloch, was in a position to reassure Littlewoods that they would not be undercut by Argos if they priced at RRPs on Action Man and Core Games. Mr. Thomson's evidence about what Mr. McCulloch said on that occasion, which we accept, is also supported by Mr. Cowley's conversation with Mr. McMahon about the Tweenies doll in late 1999. Mr. Bottomley also gave unchallenged, albeit general, evidence to the effect that he had had conversations about RRPs with retailers, including Littlewoods, in which he had said that "the same discussions were taking place with Argos so for the first time the whole industry would be involved" (Bottomley, paragraph 14).
732. Thereafter, the implementation of the agreement with Littlewoods was principally the responsibility of Mr. Thomson. In our judgment, Mr. Thomson told Mr. Burgess after the Liverpool meeting that Hasbro "had an agreement from Argos that the Core Brand (i.e. Action Man and Core Games) recommended retail prices would be adhered to" (Thomson, paragraph 67). We have no reason to disbelieve Mr. Thomson that "he got word back from David Bottomley at the time to go ahead and say that a deal had been struck and to go back to Index and say that discussions had been favourable" (Day 1, p. 112).
733. Mr. Thomson's evidence, which we accept, was that from A/ W 1999 onwards he had a "verbal guarantee" that Littlewoods would price at Hasbro's RRPs on Action Man and Core Games (Thomson, paragraph 69). Mr. Thomson would have regular conversations with Alan Burgess in which he would say that he had been having discussions with Mr. Wilson and that Argos would stick to RRPs on Action Man and Core Games (Thomson, paragraph

87). Mr. Thomson's view was that he had a verbal agreement from Mr. Burgess to go out at RRP's although "I would go away thinking that is fine, we have the agreement but we will never be sure until the catalogue comes out" (Day 1, p. 146). His conversations with Mr. Burgess were along the lines of Mr. Thomson saying "Yes, I've had talks with my opposite number, and this plan is going ahead, I am as confident as I can be that this will take place" (Day 1, p. 179). Mr. Burgess would give "an indication and a willingness to commit to the pricing", the conversation being along the lines of Mr. Burgess saying "I am going along with you, but are you sure that this is going to happen?" and Mr. Thomson replying "Yes, trust me, I will go back and talk to people to ensure this happens" (Day 1, pp. 180-181).

734. In relation to the S/ S 2000 catalogue, Mr. Thomson's evidence was that Littlewoods was still cautious about sticking to RRP's (Thomson, paragraphs 88 to 91). Mr. Thomson therefore reassured Mr. Burgess that the strategy would hold for S/ S 2000, "that Argos would not undercut them" (Thomson, paragraph 92) and that "Argos would carry on with their commitment to maintain price points" (Thomson, paragraph 99). Mr. Thomson was "given the understanding from Alan Burgess that he intended to go with the retailers" (paragraph 96) although Mr. Thomson could not be certain until the catalogues were published.

735. As we have already found, in our view the contrary evidence of Mr. Burgess to the effect that his conversations with Mr. Thomson were vague and general, that he could not rely on what Mr. Thomson was telling him, and that he took his own pricing decisions, significantly downplayed the nature and purport of Mr. Burgess' conversations with Mr. Thomson. On a number of occasions Mr. Burgess told us that he had no recollection of particular matters. Mr. Burgess did not seriously deny that Mr. Thomson had conveyed to him that Littlewoods would not be undercut by Argos if Littlewoods priced at RRP's. It is not disputed that Littlewoods did in fact price at RRP's. In our judgment, in the course of his conversations with Mr. Thomson, Mr. Burgess did indicate his willingness to go out at RRP's on Action Man and Core Games. Mr. Thomson reported that back to Mr. Wilson who was then able to tell Mr. Needham that RRP's were likely to be observed.

736. The foregoing is further confirmed by Mr. Thomson's conversation with Mr. Cowley about the Tweenies doll in late 1999, as established by the evidence of Mr. Cowley. It is not

disputed that on this occasion Mr. Thomson told Mr. Cowley that Argos was going out at £14.99 on the doll in question, and that it would be safe for Littlewoods to do so. Mr. Thomson's objective was plainly to ensure that Littlewoods priced at the same price as Argos. Mr. Thomson suggested that Mr. Cowley speak to Mr. McMahon, who had had discussions with Mr. McCulloch. Again, Mr. Thomson's suggestion was made in order to convince Mr. Cowley that it was appropriate to go out at £14.99. Mr. McMahon then confirmed to Mr. Cowley that he had had a discussion with Mr. McCulloch about prices, and that the doll should be priced at £14.99. Mr. Cowley felt that he had no choice but to adopt this price.

737. This incident, perhaps small in itself, has a wider significance. It confirms that Mr. McMahon had had discussions with Mr. McCulloch about prices and, in the light of those discussions, did not wish to see Littlewoods undercut Argos on this product. It also confirms that Mr. Thomson did pass on Argos' expected price to Littlewoods and that Mr. McMahon was not unaware of that fact. It shows Littlewoods taking account of Argos' expected pricing in setting its own prices. This incident which, to his credit, was volunteered in evidence by Mr. Cowley, in our judgment lends general credence to Mr. Thomson's evidence about the kind of conversations he was having with Littlewoods.

738. As regards the A/ W 2000 catalogue, in our judgment the evidence is that the previous agreement on Action Man and Core Games continued, and that the agreement was extended to other products.

739. Mr. Thomson's evidence, which we accept, was that he had talked in detail to Mr. Burgess about extending the principle of selling at RRP's to other products, although Mr. Burgess "was worried that it would appear that Argos and Index were talking to each other about retail prices" (paragraph 101). Mr. Thomson discussed at least Pokemon and Micro Machines with Mr. Burgess and explained to him that Mr. Wilson was having similar discussions with Argos, and that Mr. Thomson would confirm to Mr. Burgess the outcome of the discussions. Mr. Burgess knew that Mr. Thomson was passing the content of his conversations with Mr. Burgess to Mr. Wilson (Thomson, paragraphs 107 to 109). In cross-examination Mr. Burgess was eventually constrained to admit that he was not denying that such discussions took place, although he could not remember them (Day 4, p. 140). We find that such discussions did take place.

740. Mr. Thomson had similar discussions with Katherine Runciman regarding the girls and creative toys (Thomson, paragraph 110) and with Mr. Cowley regarding the Tweenies. Mr. Cowley would not acknowledge the existence of the previous arrangements on Action Man and Core Games which Mr. Thomson then explained to him (Thomson paragraph 112). Mr. Thomson also discussed the matter in a more limited way with Mr. Riley, then a trainee buyer with responsibility for boxed games, and secured an acknowledgement from the latter that Littlewoods would continue to follow the same pricing strategy on those products, Mr. Thomson having intimated that that was the strategy that Littlewoods' "opposition or main competitor" was following (Thomson, paragraph 114). Having heard the evidence, we have no reason to doubt that those discussions, which Mr. Thomson described as "months of talks", took place. That is also confirmed by the fact that Mr. Thomson subsequently copied his email of 18 May 2000 to all the relevant buyers at Littlewoods, namely Mr. Burgess, Ms. Runciman, Mr. Cowley and Mr. Riley, as well as Mrs. Paisley.

741. We have no reason to doubt that Mrs. Paisley knew, at least in outline, of the discussions which were going on, as indicated by Mr. Thomson (paragraph 106) and Mr. Bottomley (paragraphs 29 and 34).

742. We have no reason to doubt Mr. Thomson's evidence that as a result of those discussions there came into being a verbal agreement, falling short of a guarantee, that Littlewoods would follow Hasbro's RRP's on the products in question, and would continue to follow RRP's on Action Man and Core Games. Thus Mr. Thomson said in cross-examination (Day 1, pp. 140 to 147):

"The agreement was that the prices would be stuck to as per our recommended retail prices..."

"While there was verbal agreement to do this, there was never any guarantee..."

"Some of these products, in principle I was told that we had an agreement, which is why I went out with this email. As I said, there were never any guarantees..."

"You never got the guarantee. It was, yes, we will agree, to go along with your prices as long as we are feeling comfortable that everyone else is. There was obviously a great deal of nervousness about what we were trying to do..."

“...there was a buy-in from the buyers to say, ‘Yes, we will go along with that, we are nervous about that but as long as you can assure us that the prices will be adhered to then will take the risk’”

“We already had a commitment, though, in the previous catalogues on Core Games and Action Man...”

“When somebody said they agreed to the price, I would never in the back of my mind consider that a complete agreement. We would never be confident that this would be the case until the catalogue came out. When somebody gave a verbal agreement to say, yes, we will go along with you, we will go out at those prices, I would go away thinking, that is fine, we have the agreement but we will never be sure until the catalogue comes out.”

“Specifically on this list, yes, there were many talks and discussions about pricing and the rest of the range, as to where we saw the right retail price point. But specifically this range was pulled together with the express knowledge that we had had the discussions and this was a range we were going to go forward with, because we were increasing the work we had done in the past with our previous business plan for Core Games and Action Man.”

“On these specific products, yes, there was agreement to go out on these recommended retail price points...”

“That is why I followed it up interminably back at Hasbro. Once we got the agreement, I followed it up with this e-mail and then confirmed it back to Lesley Paisley and the other buyers.”

743. The fact that an agreement had been reached is in our view confirmed by the terms of the internal email of 18 May 2000. As we have already said in relation to Argos, this email, prepared by Mr. Thomson, is sent jointly by Mr. Wilson and Mr. Thomson to over 20 Hasbro executives, including senior management such as Mr. McCulloch, Mr. Brighty and Mr. Bottomley. As we have already held, we think it highly unlikely that Mr. Thomson would have misrepresented the position within Hasbro by saying that there was an agreement if in fact no agreement had been reached.

744. The internal email of 18 May 2000 corroborates the evidence of Mr. Thomson and Mr. Wilson that both Argos and Littlewoods “were taking a cautious approach in case either party reneges on a price agreement”. The email further confirms that

“Both accounts have agreed the above price points”

and that Mr. Wilson and Mr. Thomson were

“confident that they will play ball”

albeit that “the proof of the pudding will be when both catalogues are published”.

745. In addition, the internal email of 18 May 2000 confirms that:

“It goes without saying that Action Man and Games prices will be maintained as per earlier agreements”.

746. The email that Mr. Thomson sent Littlewoods shortly afterwards on 18 May 2000 states

“I am able to confirm a list of products and prices that Argos has committed to. **Games and Action Man** prices will continue to be adhered to...”

747. We reject the suggestion that this email is merely Mr. Thomson’s unilateral attempt to persuade Littlewoods to adopt the prices in question: the evidence we have set out confirms that Mr. Thomson had already reached agreement in principle with Littlewoods on the retail prices in question. This email in our view constitutes Mr. Thomson’s confirmation to Littlewoods that Argos too had agreed to those prices, Mr. Thomson having earlier said to Littlewoods that he would confirm back to them what Argos’ position was.

748. None of the Littlewoods buyers came back to Mr. Thomson or indicated to Hasbro any surprise that they had received such an email. That absence of any overt reaction on the part of Littlewoods supports the inference that, at the time, Littlewoods saw Mr. Thomson’s email as the expected confirmation from Mr. Thomson of what Argos’ prices were expected to be.

749. Either Mr. Burgess or his assistant went through the email as regards Mr. Burgess’ products and ticked them off. That again shows Littlewoods taking account, in its pricing decisions, of information about Argos’ pricing decisions and aligning itself on Argos’ expected price.

750. We have already found above that we do not accept Mrs. Paisley’s attempted explanation for her statement to the OFT that she did not regard this email as “improper”. In our judgment, the likeliest explanation is that, at the time, Mrs. Paisley saw this email for what it was, namely Mr. Thomson’s confirmation of Argos’ expected prices. We do not accept the statements of Mrs. Paisley and Mr. Burgess to the OFT to the effect that they thought

the email was merely Hasbro's RRPs. Hasbro's RRPs would have been already known. The email states on its face that it is "a list of products and prices that Argos have committed to" and we do not think that either Mrs. Paisley or Mr. Burgess would have read it any other way.

751. In addition, the statement in the email of 18 May 2000 that "Games and Action Man prices will continue to be adhered to" must in our judgment have been understood by Littlewoods to mean that Argos would be pricing at RRPs for those products as well.
752. On the entire ranges of Action Man, Core Games and the additional toys referred to in the email of 18 May 2000 – some 52 products altogether – Littlewoods priced at Hasbro's RRPs on all but two products, namely Gardens Galore and Interactive Pikachu.
753. The exception for Gardens Galore is explained by the fact that Littlewoods already knew from Mr. Thomson's email of 4 May 2000 that Argos was not listing this product. Although Mrs. Paisley says that this was "a mistake", that seems to us to be a considerable coincidence.
754. As regards Interactive Pikachu, we have no reason to doubt Mr. Thomson's evidence that, following Mr. Wilson's email of 25 May 2000, he told Mr. Burgess that Argos would be pricing at £23.75 and not the £23.99 as indicated in the email of 18 May 2000. The price of £23.99 is, however, ticked on the copy of the email found in Mr. Burgess' files. In our judgment the most likely explanation for the fact that Littlewoods remained at £23.75 is that, once again, Littlewoods was aware of Argos' pricing intentions and decided to stay at the same price.
755. On the basis of Mr. Thomson's evidence, which is corroborated by Mr. Wilson's evidence, and supported by Mr. Bottomley's evidence (at paragraphs 26 to 34), and the documents, and the surrounding circumstances and prices, we find that Littlewoods did reach a verbal agreement with Hasbro to price at or near Hasbro's RRPs on Action Man, Core Games and the products set out in the email of 18 May 2000, albeit that there was no guarantee to that effect.

756. As regards the S/ S 2001 catalogue, Mr. Thomson's evidence was that discussions about prices were less intense because by then Argos and Littlewoods had confidence "that neither party would renege". Nonetheless we have no reason to suppose that the underlying agreement which we have found, to the effect that Littlewoods would price at or near Hasbro's RRP's on Action Man, Core Games and the other common products, did not continue as regards S/ S 2001.

757. Confirmation that an agreement to that effect between Littlewoods and Hasbro continued for S/ S 2001 is to be found in Mr. Wilson's discussions with Mr. Cowley on the Tweenies doll at the end of 1999. Following internal discussions within Hasbro (see Mr. Thomson's email of 30 November which refers to "making Argos and Littlewoods toe the line on retails"), Mr. Thomson told Mr. Cowley successively that Argos was pricing at Hasbro's reduced RRP of £14.99, and then at Hasbro's revised RRP of £12.99. On both occasions Mr. Cowley was prepared to price at the same price. In his email of 28 December 2000 he speaks of Mr. Thomson being

"insistent that we all went out at the same price".

758. That in our judgment is clear evidence of Littlewoods being aware of Hasbro's efforts to secure that Argos and Littlewoods, at least, were at the same price, at Hasbro's RRP's. In addition, Mr. Snow's email to Mr. Cooper of 23 February 2001 is evidence that, at that date, Hasbro considered there to be an "Index/ Argos agreement". Finally it may be inferred from Mr. Thomson's email of 3 April 2001 that in the A/ W 2001 catalogue Littlewoods were keen to price the Ferris Wheel at the Argos S/ S 2001 price of £49.99. That suggests that as late as April 2001 Littlewoods was in discussions with Mr. Thomson about retail prices, and that conversations in which Mr. Thomson would ascertain the Argos price, and then reassure Littlewoods at what price it was safe to go out at, were still taking place.

759. For those reasons we reach the conclusion that a verbal agreement with Hasbro that Littlewoods would price at or near Hasbro's RRP's on Action Man and Core Games was in effect after 1 March 2000 for at least the S/ S 2000, A/ W 2000 and S/ S 2001 catalogues, and for the other common products identified above for the A/ W 2000 and S/ S 2001 catalogues. That agreement existed before 1 March 2000 but became unlawful after that date, for the remainder of the life of the S/ S 2000 catalogue and then for subsequent

catalogues. We are prepared to assume that the agreement terminated on 15 May 2001, the date of the OFT's visit.

Concerted practice

760. In the alternative, we find that the above evidence establishes, at the very least, a concerted practice between Hasbro and Littlewoods to the effect that Littlewoods would price at or near the RRP's in question for most of the products in the ranges in question.

761. As we have already held in relation to Argos, in our judgment the underlying idea of "concerted practice" is equally applicable to the vertical relationship between a supplier and a retailer. In the present case Mr. Thomson kept Littlewoods informed of Argos' pricing intentions. Littlewoods disclosed its pricing intentions to its supplier, Hasbro. Those pricing intentions are highly confidential matters which would not in normal circumstances be disclosed in advance. Littlewoods must have known that its discussion with Hasbro reflected Hasbro's discussions with Argos, and that is expressly confirmed by the email of 18 May 2000. In our view such conduct was a "form of practical coordination" which knowingly substituted practical cooperation for the risks of competition. In particular, those reciprocal contacts reduced uncertainty on Littlewoods part as to what Argos' pricing intentions were, and reduced uncertainty on Hasbro's part on what Littlewoods' prices' would be. That in turn facilitated Hasbro's discussions with other retailers, especially Argos, with a view to ensuring that they too priced at RRP's.

762. In our judgment the evidence set out above shows ample reciprocity on the part of Littlewoods and Hasbro. Hasbro gave Littlewoods the information at its disposal as to Argos' likely retail prices and Littlewoods shared with Hasbro its future pricing intentions. In practice, as a result, Littlewoods priced at Hasbro's RRP's on the vast majority of the products in question.

Littlewoods' remaining submissions

763. We have dealt earlier in this judgment with most of Littlewoods' contrary arguments. In particular, we reject Littlewoods' submissions as to the credibility of Mr. Thomson's evidence, which is corroborated by Mr. Wilson and Mr. Bottomley, and by the documents we have referred to. We found the evidence of Mr. McMahon and Mrs. Paisley to be

unsatisfactory in the respects already indicated, and Mr. Burgess' lack of recollection did not enable him to contradict convincingly the evidence of Mr. Thomson. In our view, none of the evidence advanced by Littlewoods was such as to undermine the evidence placed before the Tribunal by the OFT.

764. We have already found that the fact that Mr. McCulloch did not give evidence does not alter the conclusion that we have reached.

765. Littlewoods' arguments based on their perception of the GUS takeover, and the first move to RRPs in the S/ S 1999 catalogue, were not in our view persuasive, for the reasons already given. Whatever may or may not have occurred in relation to the S/ S 1999 catalogue, in our view the evidence set out above establishes that an agreement or concerted practice was in existence from A/ W 1999 onwards. The fact that after the Stockley Park presentation the core rebate was not formally tied to RRPs, albeit closely associated with Hasbro's pricing initiative, does not in our view assist Littlewoods. We accept, in its essentials, Mr. Thomson's evidence as to what was said by Mr. McCulloch and Mr. McMahon in the course of the Liverpool meeting.

766. Littlewoods' submission that the existence of an agreement on Action Man and Core Games for the A/ W 1999 catalogue is largely based on inferences drawn from a comparison of the prices in the catalogues is not well founded. In our judgment such an agreement is established from the totality of the evidence, including Mr. Thomson's evidence and the reference in the emails of 18 May 2000 to "earlier agreements" and to prices being "adhered to" on Action Man and Core Games.

767. As regards the A/ W 2000 catalogue and the extension of Hasbro's pricing initiative to other products, we have already set out above the evidence upon which we base our conclusions. We do not accept Littlewoods' criticisms of the email of 18 May 2000. The fact that the prices were observed on all but two products by Littlewoods (for both of which there is an explanation) and on the vast majority of products by Argos in the A/ W 2000 catalogue supports the OFT's case. The suggestion that Mr. Cowley never made a "commitment" on price is not in our view inconsistent with Littlewoods having given Mr. Thomson to understand that they would follow Hasbro's RRPs on the products in question, including the Tweenies.

768. Littlewoods submits that discussions between suppliers and buyers in which the former seek to persuade the latter to price at RRP's are common. We have already dealt with this argument in response to submissions by Argos. In our judgment, the evidence in this case goes well beyond the kind of conversation that might be considered lawful. For a catalogue retailer, information as to its future catalogue prices is highly confidential. For information as to future catalogue prices to be disclosed to, or discussed with, a supplier is in our view both unusual and inappropriate. That is particularly so where, as here, Littlewoods (through at least Mr. Burgess and Mr. Cowley) was discussing its pricing intentions with Hasbro in circumstances where it knew that parallel discussions about pricing on the same products were going on with Argos.

769. We are able to accept a number of points that Littlewoods makes. Littlewoods was not coerced. There was no guarantee as to Littlewoods' prices until the catalogue was published. Littlewoods had low margins and was not financially strong. There was not unlimited room for manoeuvre on prices, given Hasbro's cost prices and the price points established in the market. Littlewoods would have gained confidence from succeeding catalogues that Argos was no longer pursuing its policy of "pre-empting" the market. Nonetheless, in our judgment none of those points detracts from or contradicts the evidence set out above that a verbal agreement or concerted practice had come into existence. We add that we have had little evidence or argument about the effect of TV advertisements, and we have no reason to think that such advertisements affect the factual findings we have made.

770. Littlewoods makes much of Mr. Thomson's apparently prickly relationship with Mr. Cowley, on the basis of which, says Littlewoods, it is unlikely that any price agreement came into existence. The first answer to that is that Mr. Cowley was responsible for only three of the many products to which the agreement applied. In any event, we have drawn attention to at least two instances where Mr. Cowley must have known that he had been told Argos' likely retail price, and went along with Hasbro's suggestions to adopt the same price.

771. Littlewoods further submits that there was no agreement because nothing was ever authorised by Mrs. Paisley. It is trite law that the fact that an employee of an undertaking is not authorised to make an infringing agreement does not relieve the undertaking of its

liability: e.g. Cases 100/80 etc. *Musique Diffusion Française v Commission* [1983] ECR 1825. In the present case Mrs. Paisley had very wide ranging responsibilities. We see nothing to suggest that Mr. Burgess and the other buyers did not have effective delegated authority to enter into discussions with Mr. Thomson even if, formally speaking, the catalogue prices had to be signed off by Mrs. Paisley. Moreover, the evidence is that Mrs. Paisley was informed, at least in general terms, of what was going on.

772. Finally, Littlewoods placed reliance on the legal advice which it submitted that Hasbro had received in support of its submission that the relevant discussions had not strayed into an unlawful agreement.

773. As to that submission, it is apparent that Hasbro, through Mr. McCulloch, took legal advice in 1997 and that Mr. McCulloch and Mr. Brighty were aware of that advice. We do not know exactly what that advice was, but a list of “Do’s and Don’ts” was apparently prepared. In 1997 the relevant legislation was the Resale Prices Act 1976 and the Restrictive Trade Practices Act 1976. We have no evidence that advice was ever taken with regard to the Competition Act 1998.

774. As to whether it may be inferred that Mr. McCulloch would have followed whatever advice he obtained, the evidence is that on at least two occasions, in a conversation in late 1998 with Sue Porritt, and in the Stockley Park presentation in October 1998, Mr. McCulloch apparently ignored, or had misunderstood, the legal advice he was given in 1997. In addition, Mr. Thomson told us that he had asked whether what was proposed in the Stockley Park presentation was legal, and was told that it was. We have no reason to doubt Mr. Thomson’s evidence on this point. Mr. Wilson states that the Hasbro legal department advised in 1998 that the core rebate could not be explicitly linked to maintaining resale prices. Mr. McCulloch refers in his OFT interview to advice from the Hasbro legal department not to discuss specific retail prices.

775. On the other hand, Mr. Brighty’s email of 19 May 2000 shows that Mr. Brighty was well aware that the contents of Mr. Wilson’s email of 18 May 2000 to Littlewoods were “highly illegal”, should not have been put into writing, and ought to be destroyed. Mr. Wilson also said in his OFT interview:

“I knew that we were not meant to do this, and [that] we were sailing close to the wind. Advised this in 1999. Told not to put anything in writing but thought that it was OK to do so verbally”.

776. It does not seem to us that this confused picture materially assists the Littlewoods case.

Conclusion

777. We conclude on the totality of the evidence that from 1 March 2000 to 15 May 2001 Littlewoods and Hasbro were party to a verbal agreement or concerted practice for at least the S/ S 2000, A/ W 2000 and S/ S 2001 catalogues to the effect that Littlewoods would to a material extent price at or near Hasbro’s RRP’s on Action Man and Core Games and, for the A/ W 2000 and S/ S 2001 catalogues, certain other products. That agreement or concerted practice had the object or effect of preventing, restricting or distorting competition and thus fell within the Chapter I prohibition. We are prepared to accept that the agreement or concerted practice terminated when the OFT visited Hasbro on 15 May 2001.

XIII FINDINGS AS TO A TRILATERAL CONCERTED PRACTICE BETWEEN HASBRO, ARGOS AND LITTLEWOODS

778. We have found above two bilateral agreements or concerted practices, between Hasbro and Argos and Hasbro and Littlewoods, which operated in parallel, whereby each company agreed with Hasbro to price at or near RRP’s on Action Man, Core Games and later certain other products, or pursued a concerted practice with the same object or effect. In those circumstances it does not seem to us to make much difference whether the correct analysis is that there was, in addition, a tripartite agreement or concerted practice having the same object or effect. Nonetheless, our findings on this point are as follows.

779. In our judgment, this aspect of the case is most conveniently analysed in the light of the case law on concerted practices. In its recent judgment in *JJB and Allsports v OFT*, cited above, the Tribunal was confronted with the situation in which a supplier (Umbro) received assurances or intimations about their future pricing intentions from two retailers (JJB and Sports Soccer), and in each case passed those assurances or intimations on to the other retailer concerned. The Tribunal held (at paragraph 655) that the supplier and the two

retailers were properly to be regarded as parties to the same agreement or concerted practice. The Tribunal said at paragraph 657 to 660:

“657. It is true that cases such as *Suiker Unie*, cited above, concern situations where one competitor reveals *directly* to another his future pricing intentions. However, in our view it does not make any difference that in this case the reciprocal contact took place through the intermediary of Umbro without direct contact between JJB and Sports Soccer. *Suiker Unie* and subsequent cases state that what is strictly precluded is “any direct or *indirect* contact” between economic operators the object or effect of which is either to influence future market conduct or to disclose future intentions. In our view, the above facts establish at the least the *indirect* disclosure by one competitor (JJB) through a supplier (Umbro) of its future intentions to another competitor (Sports Soccer), the effect of which was to influence the conduct of the latter on the market. That is then followed by the disclosure to JJB of Sports Soccer’s future pricing intentions, again indirectly through the intermediary of Umbro.

658. We have expressly found that Mr. Ronnie did go back to JJB to inform them of Sports Soccer’s pricing intentions. However, we do not accept that the analysis would be substantially different even if Mr. Ronnie had not done so. *Cimenteries* (at paragraphs 1849 and 1852) and *Tate & Lyle* (at paragraphs 54 to 60), cited above, show that even the *unilateral* disclosure of future pricing intentions can constitute a concerted practice if the effect of disclosure is in fact to reduce uncertainty in the marketplace.

659. Thus, for example, if one retailer A privately discloses to a supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The prohibition on direct *or indirect* contact between competitors on prices has been infringed.

660. As regards A, the position might in our view be different only if it could be shown that retailer A revealed its future pricing intentions to its supplier B for some legitimate purpose not related in any way to competition, and could not reasonably have foreseen that such information would be used by B in a way capable of affecting market conditions. It seems to us that such disclosure by a retailer to a supplier will rarely be legitimate, otherwise resale price maintenance could be reintroduced by the back door.”

(See also paragraphs 710 to 714 of the same judgment)

In our judgment, a similar analysis applies in the present case.

780. Dealing first with Littlewoods, the evidence already set out shows that Littlewoods was regularly given by Hasbro advance information about Argos' pricing intentions. Thus the evidence shows, for example (i) Mr. McCulloch told Mr. McMahon at the Liverpool meeting of his discussions with Argos, to the effect that Argos was prepared to go to RRP's on Action Man and Core Games if it was reassured about not being undercut. (ii) Mr. Thomson subsequently went back to Mr. Burgess and informed him that a deal had been struck whereby Argos agreed to raise its prices to RRP's. (iii) In his discussions with Mr. Burgess during 1999, Mr. Thomson frequently reassured the latter that Argos was proposing to price at Hasbro's RRP's, and that Littlewoods would not be undercut if it did the same. (iv) Mr. Cowley's conversation with Mr. McMahon in late 1999 indicates that the latter was still aware of his conversations with Mr. McCulloch about Argos' pricing intentions and took those conversations into account in saying to Mr. Cowley that he should price the Tweenies doll at Hasbro's RRP. (v) Similar discussions took place between Mr. Thomson and Mr. Burgess in relation to the S/S 2000 catalogue. (vi) Littlewoods through Mr. Burgess in his conversations with Mr. Thomson informed the latter of Littlewoods' intention to price at RRP's. (vii) Mr. Burgess at all material times knew, because Mr. Wilson told him, that parallel discussions were going on with Argos, and that Mr. Thomson was passing back to Mr. Wilson the gist of his conversations with Mr. Burgess. (viii) Littlewoods priced at or near RRP's on Action Man and Core Games for the A/W 1999 and S/S 2000 catalogues, and in our judgment cannot have failed to take the foregoing into account in reaching its pricing decisions (see also Case T1/89 *Rhone Poulenc v Commission* [1991] ECR II- 867, paragraphs 122 and 123).

781. The Act came into force on 1 March 2000. In our judgment, the foregoing shows that, as of that date, there was an established concerted practice which involved the disclosure to Littlewoods, via the intermediary of Hasbro, of Argos' pricing intentions, the object and effect of which was to influence the conduct on the market of Littlewoods, Argos's principal competitor in catalogue retailing. In our view such a concerted practice constituted *indirect* contact between economic operators (Argos and Littlewoods) the object and effect of which was either to influence future conduct on the market, or to

disclose future pricing intentions, within the principles of *Suiker Unie* and other cases cited above.

782. The facts in our judgment are even more explicit when it comes to the A/W 2000 catalogue. The evidence shows that Mr. Thomson had extensive discussions with Mr. Burgess and the other Littlewoods buyers on extending the pricing arrangement to other products. Littlewoods was then expressly informed, in the email of 18 May 2000, of “the prices that Argos has committed to” in respect of a list of further products. That email also shows Littlewoods being expressly informed that the prices of Action Man and Core Games will be “adhered to” which in the context can only mean that Argos intended to continue to price at RRP’s on those products. Again, that in our judgment amounts to indirect contact between economic operators, the object or effect of which was to influence conduct on the market or reveal future pricing intentions. In fact Littlewoods priced at RRP’s on the products in question. The contacts over Interactive Pikachu about 25 May 2000 are further evidence of that concerted practice.

783. As to the S/S 2001 catalogue, the concerted practice continued, to all intents and purposes in the same way as before. The continued existence of that practice is shown in particular by Mr. Thomson’s conversation with Mr. Cowley about Tweenies dolls at the end of 2000, the email of 28 December 2000, and the emails of 23 February 2001 and 3 April 2001.

784. Turning to Argos, the evidence is that in 1998 and 1999 Mr. McCulloch had conversations with Sue Porritt and Mrs. Thompson. In the course of these conversations Argos was informed of Hasbro’s retail pricing strategy to the effect that Hasbro was making a coordinated effort to persuade all retailers to price at RRP’s on Action Man and Core Games. At some point Sue Porritt informed Hasbro (Mr. McCulloch or Mr. Brighty) that Argos was in principle prepared to price at RRP’s on Action Man and Core Games, which information was passed within Hasbro to Mr. Thomson, who duly passed the information on to Mr. Burgess at Littlewoods.

785. It is in that context that from 1999 onwards contacts took place between Mr. Wilson and Mr. Needham in which the former would ascertain the latter’s pricing intentions on Action Man and Core Games. Mr. Wilson would then discuss the matter with Mr. Thomson in the light of Mr. Thomson’s knowledge of Littlewood’s pricing intentions. Mr. Wilson would

then go back to Mr. Needham and indicate to him what he thought the retail prices of particular products would be. It is not disputed that Mr. Needham knew that Hasbro was having similar conversations with other retailers.

786. We assume in Argos' favour that Mr. Wilson did not expressly say "these are Littlewoods' prices". We also assume that there was not necessarily a detailed discussion between Mr. Needham and Mr. Wilson about the specific prices of approximately 30 products in the Action Man and Core Games ranges. Nonetheless, the upshot of the conversations was that Mr. Wilson knew that it was Argos' intention to price at RRP's on these products, and Argos knew that other retailers were likely to be at RRP's.

787. In our judgment, in participating in those discussions through Mr. Needham, Argos must be taken to have known, or could at least have reasonably foreseen, that the information about pricing intentions which it was passing to Hasbro would be used by the latter in a way that would facilitate the maintenance of prices at RRP's in the market. Since Argos was receiving from Mr. Wilson information which Argos knew was based on information Hasbro had received from other retailers, Argos must have known that Hasbro would have been engaged in similar conversations with other retailers, based on the information which Hasbro had received from Argos. In these circumstances it seems to us that Argos also participated in *indirect* contacts with other economic operators the object or effect of which was to influence conduct in the market or to disclose future pricing intentions. The element of reciprocity is to be found notably in the fact that Argos was conveying its future pricing intentions and Mr. Wilson was conveying back to Argos information about other retailer's pricing intentions.

788. In our judgment it is immaterial to the analysis whether or not Mr. Wilson specifically identified Littlewoods by name to Mr. Needham. Argos through Mr. Needham must have known that Hasbro's conversation with other retailers would have included Littlewoods, and could have reasonably foreseen that, when Mr. Wilson indicated other retailers' pricing intentions, that information must have been based in particular on information coming from Littlewoods. In our judgment undercutting by Littlewoods, the principal rival catalogue retailer, would have been of considerable concern to Mr. Needham (see e.g. Wilson, paragraph 30).

789. As regards the extension of the discussions between Mr. Wilson and Mr. Needham to other products in the A/W 2000 catalogue, in our judgment Argos through Mr. Needham must have known or could have reasonably foreseen that similar discussions were taking place with other retailers, including Littlewoods. In disclosing its expected pricing intentions on the products mentioned in the emails of 18 May 2000, and confirming, expressly or by implication, its adherence to RRP's on Action Man and Core Games, Argos in our judgment at the least supported Hasbro's efforts to ensure that other retailers, and in particular Littlewoods, observed RRP's and did not engage in undercutting. The contents of the emails of 18 May 2000, discussed at length above, fully confirm that conclusion. That conclusion also applies to the other incidents involving the Interactive Pikachu and the Ferris Wheel.

790. In all those circumstances we further conclude on the evidence that Argos and Littlewoods are properly to be regarded as party to a tripartite concerted practice with Hasbro and, indirectly, each other to the effect that each party would to a material extent price at or near Hasbro's RRP's on Action Man and Core Games and, for the A/ W 2000 and S/ S 2001 catalogues, certain other products. The object or effect of that concerted practice was to prevent, restrict or distort competition, within the meaning of the Chapter I prohibition. That concerted practice similarly lasted from 1 March 2000 to 15 May 2001.

XIV CONCLUSION

791. For all the reasons given above we unanimously conclude that the appeals of Argos and Littlewoods on liability against the OFT's decision CA98/8/2003 of 21 November 2003 must be dismissed.

792. The Tribunal will now proceed to hear the appeals as regards the amount of the penalties. All further orders and directions are adjourned to a date to be notified by the Registry.

Christopher Bellamy

Antony Lewis

Vindelyn Smith-Hillman

Charles Dhanowa

Registrar

14 December 2004

Neutral citation: [2004] CAT 24

IN THE COMPETITION
APPEAL TRIBUNAL

Cases: 1014 and 1015/1/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB

14 December 2004

Before:

Sir Christopher Bellamy (President)
The Honourable Antony Lewis
Ms. Vindelyn Smith-Hillman

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ARGOS LIMITED
(2) LITTLEWOODS LIMITED

Appellants

-v.-

OFFICE OF FAIR TRADING
(formerly the Director General of Fair Trading)

Respondent

APPENDIX I

(Evidence as to prices charged by Argos and Littlewoods in respect of Action Man, Core Games and other toys from 1998 onwards)

ARGOS AND LITTLEWOODS CATALOGUE PRICES AND AVAILABLE RRRS

"X" means that the product is not listed
 Note: The catalogue prices are taken from Document D.5 of Annex A of the Decision

Catalogue number	S/S 98		A/W 98	
	Argos	Littlewoods	Argos	Littlewoods
Core games				
Battleships	£12.50	X	£12.30	X
Trivial Pursuit Genus	£39.85	X	£39.79	X
Jenga	£9.65	£9.75	£9.65	£9.75
Pictionary	£29.95	X	£29.95	£29.95
Mouse Trap	£16.15	£16.45	£16.15	£16.15
Monopoly Jr	X	X	£10.40	X
Cluedo	X	X	£13.35	£13.45
Guess Who	£13.25	£13.45	£13.20	£13.25
Hungry Hippos	X	X	£14.35	£14.45
Twister	£11.69	£11.95	£11.50	£11.65
Buckaroo	£11.50	£11.75	£11.40	£11.45
Kerplunk	£11.65	£11.95	£11.55	£11.65
Frustration	£7.75	£7.95	£7.75	£7.75
Monopoly	£13.85	£13.95	£13.79	£13.80
Operation	£11.75	£12.15	£11.75	£11.70
Connect 4	X	£9.45	£9.35	£9.35

Catalogue number	RRP's Sent by Hasbro to OFT in 2003 (1)		S/S 99		RRP 19.02.99 Cat. 52 Listings Proposal (2)		AW 99	
	Argos	Littlewoods	Argos	Littlewoods	Argos	Littlewoods	Argos	Littlewoods
Core games								
Battleships	X		X		X		X	
Trivial Pursuit Genus	£39.99		£39.99		£39.95		£39.99	
Jenga	£9.99		£9.99		£9.95		£9.99	
Pictionary	£29.99		£29.99		£29.99		£29.99	
Mouse Trap	£16.99		£16.99		£16.95		£16.99	
Monopoly Jr	£9.99		X		£9.95		£9.99	
Cluedo	£14.99		£14.99		£14.95		£14.99	
Guess Who	£13.99		£14.99		£14.95		£14.99	
Hungry Hippos	£14.99		X		£14.95		£14.99	
Twister	£12.49		£12.85		£12.95		£12.99	
Buckaroo	£12.99		£12.95		£12.95		£12.99	
Kerplunk	£12.49		£12.95		£12.95		£12.99	
Frustration	£8.49		£8.95		£8.95		£8.99	
Monopoly	£14.99		£14.99		£14.99		£14.99	
Operation	£12.49		£12.95		£12.95		£12.99	
Connect 4	£9.99		X		£9.95		X	

(1) Tab C(a)
(2) Tab C(b)

RRPs Sent by Hasbro to OFT in 2003 (1)	RRP 28.09.99 Argos formal Range & Price Form (3)	RRP 07.12.99 2000 Trading Terms (4)	S/S 00	Annex 5 to Argos' representations (5) [4/6/04] and [4/11/214]	AW 00
			Argos	Argos	Argos
Core games					
Battleships	X	X	X	X	X
Trivial Pursuit Genus	£29.99	£29.99	£29.99	£29.99	£29.99
Jenga	£6.99	N/A	X	£6.99	£6.99
Pictionary	£19.99	£19.99	£19.99	£19.99	£19.99
Mouse Trap	£14.99	£14.99	£14.99	£14.99	£14.99
Monopoly Jr	£9.99	N/A	X	£9.99	£9.99
Monopoly	£14.99	N/A	X	£14.99	£14.99
Cluedo	£12.99	£12.99	£12.99	£12.99	£12.99
Guess Who	£9.99	£9.99	£9.99	£9.99	£9.99
Hungry Hippos	£9.99	£9.99	£9.99	£9.99	£9.99
Twister	£9.99	£9.99	£9.99	£9.99	£9.99
Buckaroo	£9.99	£9.99	£9.99	£9.99	£9.99
Kerplunk	£6.99	£6.99	£6.99	£6.99	£6.99
Frustration	£14.99	£14.99	£14.99	£14.99	£14.99
Monopoly	£9.99	£9.99	£9.99	£9.99	£9.99
Operation	£7.99	N/A	X	X	X
Connect 4					
(1) Tab C(a)					
(3) Tab C(c)					
(4) Tab C(d)					
(5) Tab C(e)					

Catalogue number

53

54

Littlewoods

Littlewoods

RRPs Sent by Hasbro to OFT in 2003 (1)	RRP 2001 S/S Preview (Hasbro) (6)	RRP 12.10.00 Argos Range and Price Form (7)	S/S 01	Argos	Littlewoods
				55	
X	X	X	X	X	X
£29.99	X	£29.99	£29.99	£29.99	£29.99
£6.99	X	X	X	X	£6.99
£19.99	X	£19.99	£19.99	£19.99	£19.99
£14.99	X	£14.99	£14.99	£14.99	£14.99
X	X	X	X	X	X
£17.99	X	X	X	X	£17.99
£9.99	X	X	X	X	£9.99
£9.99	X	£9.99	£9.99	£9.99	£9.99
£9.99	X	£9.99	£9.99	£9.99	£9.99
£9.99	X	£9.99	£9.99	£9.99	£9.99
£9.99	X	£9.99	£9.99	£9.99	£9.99
£7.99	X	X	X	X	£7.99
£17.99	X	£17.99	£17.99	£17.99	£17.99
£9.99	X	£9.99	£9.99	£9.99	£9.99
£7.99	£7.99	X	X	X	£7.99

Core games

- Battleships
- Trivial Pursuit Genius
- Jenga
- Pictionary
- Mouse Trap
- Monopoly Jr
- Cluedo
- Guess Who
- Hungry Hippos
- Twister
- Buckaroo
- Kerplunk
- Frustration
- Monopoly
- Operation
- Connect 4

(1) Tab C(a)
(6) Tab C(f)
(7) Tab C(g)

ARGOS AND LITTLEWOODS CATALOGUE PRICES AND AVAILABLE RRFPS

X means that the product is not listed
 Note: The catalogue prices are taken from Document D.5 of Annex A of the Decision

Catalogue number	S/S 98		AW 98	
	Argos	Littlewoods	Argos	Littlewoods
	49		50	
Action Man range				
Mountain Bike Extreme	X	X	X	X
Net Trapper	X	X	X	X
Action Kite	X	X	X	X
4x4 Jeep	X	£27.99	X	£27.99
Driller	X	X	X	X
Cutting Edge (Argos)/Cutter Extreme (LW)	X	X	X	X
Mission Defence	£7.89	X	£7.89	X
Multi Mission Pack	X	X	£14.99	X
Helicopter Attack	£8.99	X	£8.99	X
Action Man Roller-Extreme	£22.25	£21.85	£21.75	£21.75
Scuba Extreme	X	X	X	£9.45
Bungee Jump Extreme Action Man	£9.50	£9.65	£9.25	X
Super X Dirt	X	X	X	£14.99
Dr X	X	X	£17.45	£17.65
Dr X 2000	X	X	X	X
Dr X 2001	X	X	X	X
Dr X 2002	X	X	X	X
Ocean Mission (without figure)	X	X	X	X
Ocean Mission (with figure)	X	X	X	X
Rapid Extreme	X	X	X	X
Hovercraft	X	X	X	X
Sub Aqua	X	X	X	X
Mission Tape recorder	X	X	X	X
Walkie Talkie	X	X	X	X
Lunchbox & flask	X	X	X	X
Photo Mission	X	X	X	X
Action Man & X Twin Pack	X	X	X	X
Special Forces	X	X	X	X
Total Mission	X	X	X	X
Silver Speeder	X	X	X	X
Silver Speeder driver	X	X	X	X
Super Ninja	X	X	X	X
Scooter	X	X	X	X
Playsuit	X	X	£13.75	X
Supercharger 4x4	X	X	£33.40	£32.90
Save the tiger	X	X	X	X
Jungle Dart	X	X	X	X
Jungle Explorer	X	X	X	X
Mission Case	X	£7.99	X	£8.99
Skateboard extreme	X	X	X	X
Ice extreme	X	X	X	X
Polar ski	X	X	X	X

	S/S 98	Argos	Littlewoods	A/W 98	Argos	Littlewoods
Polar Bike Rider	X	X	X	X	X	X
Polar Bike	X	X	X	X	X	X
Professor Gangrene				£14.20		£14.45
Space Explorer	X	X	X	X	X	X
Lunar mission	X	X	X	X	X	X
Security Defence	X	X	X	X	X	X
Mission Grand Prix Driver	X	X	X	X	X	X
Mission Grand Prix	X	X	X	X	X	X
Helicopter Rescue	X	X	X	X	X	X
Falcon Master	X	X	X	X	X	X
Boomerang extreme	X	X	X	X	X	X
Mission Grizzly	X	X	X	X	X	X
FX LCD Animated graphic speaking watch	X	X	X	X	X	X
Mission Torpedo	X	X	X	X	X	X
Mountain skateboard extreme	X	X	X	X	X	X
Hydro speeder	X	X	X	X	X	X
Jungle explorer & exclusive figure	X	X	X	X	X	X
Operation Camouflage	X	X	X	X	X	X
Canoe Extreme	X	X	X	X	X	X
Arctic Surf Bike & Rider	X	X	X	X	X	X
Tokyo Extreme	X	X	X	X	X	X
Street Roller	X	X	X	X	X	X
Motor Bike Extreme	X	X	X	X	X	X
Extreme Kart & Driver	X	X	X	X	X	X
Stunt bike & rider	X	X	X	X	X	X
Operations Sahara	X	X	X	X	X	X
Disc Extreme	X	X	X	X	X	X
Street Mission	X	X	X	X	X	X
Desert Buggy	X	X	X	X	X	X
Mission Crocodile	X	X	X	X	X	X
Air Surfer	X	X	X	X	X	X
Deep Sea Mission	X	X	X	X	X	X
Amazon Dinghy	X	X	X	X	X	X
Arctic Rally Car Driver	X	X	X	X	X	X
Arctic Rally Car	X	X	X	X	X	X
Tempest	X	X	X	X	X	X
Motor Bike Extreme & Rider	X	X	X	X	X	X
Motor Bike Extreme	X	X	X	X	X	X
Kart Extreme & Driver	X	X	X	X	X	X
Mission Headquarters	X	X	X	X	X	X
Urban HQ	X	X	X	X	X	X
Urban Mission	X	X	X	X	X	X
Secret Mission Diary	X	X	X	X	X	X
Cranebuster Survival Kit/Unit	X	X	X	X	X	X
Protector II Intruder Alert	X	X	X	X	X	X
Chopper Bike	X	X	X	X	X	X
Wristl Torch	X	X	X	X	X	X
Mini Metal Detector	X	X	X	X	X	X
Video Comm	X	X	X	X	X	X
Moulding Set	X	X	X	X	X	X
Radiocontrolled Silver Speeder	X	X	X	X	X	X
Tracker Torch	X	X	X	X	X	X
X Catcher	X	X	X	X	X	X

	S/S 98	Argos	Littlewoods	A/W 98	Argos	Littlewoods
Arctic Surf Bike	X	X	X	X	X	X
Arctic Climber	X	X	X	X	X	X
SFX Stunt Bike - 15	X	X	X	X	X	X
Motorbike Extreme Driver	X	X	X	X	X	X
Arctic Explorer	X	X	X	X	X	X
Landsurfer	X	X	X	X	X	X
Disc Extreme Costume	X	X	X	X	X	X
Operation S.O.S	X	X	X	X	X	X
Windsurfer	X	X	X	X	X	X
Aqua Mission	X	X	X	X	X	X
Vertical Mission	X	X	X	X	X	X
Marine Mission	X	X	X	X	X	X
Action Man Mountain Mission	X	X	X	X	X	X
Elite force figures	X	X	X	X	X	X
Ninjitsu Extreme	X	X	X	X	X	X
Operation Jungle/Auto fire	£7.75	£7.75	£7.75	£7.45	£7.65	£7.65
Power Extreme Suit	X	X	X	X	X	X
Super Speed Bike and Rider	X	X	X	X	X	X
Super Car and Driver	X	X	X	X	X	X
Mortar Combat	X	X	X	X	X	X
Action Man and Tempest Twin pack	X	X	X	X	X	X
Sky Diver	£21.75	£21.75	£22.25	£21.45	£21.45	£21.45
Super Samurai	£11.25	£11.25	£11.15	X	£9.99	£9.99
Gyro Copier	£24.85	£24.85	£24.45	£23.45	£24.25	£24.25
Moonraker	£28.50	£28.50	£28.75	£28.35	£28.45	£28.45
Dr. X Chopper	£19.85	£19.85	£19.25	£18.85	£19.15	£19.15
Super Bike	£19.65	£19.65	£20.90	£19.45	£19.60	£19.60
Street Commander	£29.50	£29.50	£29.95	£29.20	£29.40	£29.40
Action Man Bowman	£15.95	£15.95	£16.75	£14.85	£15.65	£15.65
Desert Patrol	X	X	X	£19.35	£19.20	£19.20
2-in-1 canoe	£14.95	£14.95	£15.45	£14.85	£14.85	£14.85
Ninja Kick Action Man	£19.75	£19.75	£19.45	£19.65	£19.25	£19.25
Action Man Polar Mission and Blizzard	X	X	X	£24.45	£24.45	£24.45
Arctic Diver	X	X	X	£9.15	£15.65	£15.45
Sports Extreme	£9.25	£9.25	£9.99	£24.75	X	X
Street Car Racer	£24.75	£24.75	£26.35	X	X	X
Stealth Jet	£54.25	£54.25	£55.25	X	X	X
Jet Pilot	£13.95	£13.95	£14.75	X	X	X
Crime Buster Action Man and Raid	£23.85	£23.85	X	X	X	X
Dr X Green Hand	£16.85	£16.85	X	X	X	X
Paraglider	£14.95	£14.95	X	X	X	X
Arctic Mission	£14.95	£14.95	X	£9.95	X	X
Swimmer Action Man	£12.65	£12.65	X	£12.55	X	X
Patrol Vehicle	X	X	X	X	X	X
Action Man Street Patrol	X	X	X	X	X	X

RRPs sent by
Hasbro to OFT in
2003 (1)

RRP 19.02.99
Cat. 52 Listings
Proposal (2)

Catalogue number	RRPs sent by Hasbro to OFT in 2003 (1)	S/S 99 Argos	Littlewoods	RRP 19.02.99 Cat. 52 Listings Proposal (2)	Argos	Littlewoods
		51			52	
Action Man range						
Mountain Bike Extreme	£19.95	£19.99	£19.95	£19.99	£19.99	£19.99
Net Trapper	£14.95	£14.99	£14.95	£14.99	£14.99	£14.99
Action Rifle	£19.95	£19.99	£19.95	£19.99	£19.99	£19.99
4x4 Jeep	X	X	£24.99	X	£24.99	£24.99
Drifter	£17.95	X	X	£17.99	£14.99	£14.99
Cutting Edge (Argos/Cultar Extreme (LW))	£9.95	X	X	£9.99	£7.99	£7.99
Mission Defence	X	£7.99	X	X	X	X
Multi Mission Pack	X	£9.99	X	X	X	X
Helicopter Attack	X	£8.99	X	X	X	X
Action Man Roller Extreme	£19.95	£19.99	£19.95	X	X	X
Scuba Extreme	X	£9.99	X	X	X	X
Bungee Jump Extreme Action Man	£9.95	£9.99	£9.95	X	X	X
Super X Dirt	X	X	£12.99	X	X	£14.99
Dr X 1999	£17.95	£17.99	£17.95	£17.99	£14.99	£14.99
Dr X 2000	X	X	X	X	X	X
Dr X 2001	X	X	X	X	X	X
Dr X 2002	X	X	X	X	X	£19.99
Ocean Mission (without figure)	X	X	X	X	X	X
Ocean Mission (with figure)	X	X	X	X	X	X
Rapid Extreme	X	X	X	X	X	X
Hovercraft	£19.95	£19.99	£19.95	£19.99	£19.99	£19.99
Sub Aqua	£9.95	X	£9.95	£9.99	£9.99	£9.99
Mission Tape recorder	X	X	X	X	X	X
Walkie Talkie	X	£14.99	X	X	£14.99	£14.99
Lunchbox & flask	X	X	X	X	X	X
Photo Mission	£19.95	£19.49	£19.95	£19.99	£19.99	£19.99
Action Man & X Twin Pack	X	£17.99	£18.99	£17.99	£17.99	£17.99
Special Forces	X	X	X	£19.99	£14.99	£14.99
Total Mission	X	X	X	X	£9.99	X
Silver Speeder	£24.95	X	X	£24.99	£24.99	£24.99
Silver Speeder driver	£7.95	£7.99	£7.95	£7.99	£5.99	£5.99
Super Ninja	£9.95	£9.99	£9.95	£9.99	£9.99	£9.99
Scooter	X	X	X	X	X	X
Playsuit	X	£13.75	£13.99	X	£13.75	£13.75
Supercharger 4x4	X	X	X	X	£34.99	£34.99
Save the liger	X	X	X	X	X	X
Jungle Dart	X	X	X	X	X	X
Jungle Explorer	X	X	X	X	X	X
Mission Case	X	X	£9.99	X	X	£9.99
Skateboard extreme	X	X	X	X	X	X
Ice extreme	X	X	X	X	X	X

RRPs sent by Hasbro to OFT in 2003 (1)

RRP 19.02.99 Cat. 52 Listings Proposal (2)

	S/S 99 Argos	Littlewoods	AIW 99 Argos	Littlewoods
Polar ski	X	X	X	X
Polar Bike Rider	X	X	X	X
Polar Bike	X	X	X	X
Professor Gangrene	X	X	X	X
Space Explorer	X	X	X	X
Lunar mission	X	X	X	X
Security Defence	X	X	X	X
Mission Grand Prix Driver	X	X	X	X
Mission Grand Prix	X	X	X	X
Helicopter Rescue	X	X	X	X
Falcon Master	X	X	X	X
Boomerang extreme	X	X	X	X
Mission Grizzly	X	X	X	X
FX LCD Animated graphic speaking watch	X	X	X	X
Mission Torpedo	X	X	X	X
Mountain skateboard extreme	X	X	X	X
Hydro speeder	X	X	X	X
Jungle explorer & exclusive figure	X	X	X	X
Operation Camouflage	X	X	X	X
Canoe Extreme	X	X	X	X
Arctic Surf Bike & Rider	X	X	X	X
Tokyo Extreme	X	X	X	X
Street Roller	X	X	X	X
Motor Bike Extreme	X	X	X	X
Extreme Kart & Driver	X	X	X	X
Stunt bike & rider	X	X	X	X
Operations Sahara	X	X	X	X
Disc Extreme	X	X	X	X
Street Mission	X	X	X	X
Desert Buggy	X	X	X	X
Mission Crocodile	X	X	X	X
Air Surfer	X	X	X	X
Deep Sea Mission	X	X	X	X
Amazon Dinghy	X	X	X	X
Arctic Rally Car Driver	X	X	X	X
Arctic Rally Car	X	X	X	X
Tempest	X	X	X	X
Motor Bike Extreme & Rider	X	X	X	X
Motor Bike Extreme	X	X	X	X
Kart Extreme & Driver	X	X	X	X
Mission Headquarters	X	X	X	X
Urban HQ	X	X	X	X
Urban Mission	X	X	X	X
Secret Mission Diary	X	X	X	X
Crinebuster Survival Kit/Unit	X	X	X	£17.99
Protector II Intruder Alert	X	X	X	£9.99
Chopper Bike	X	X	X	£9.99
				X

	RRPs sent by Hasbro to OFT in 2003 (1)		RRP 19.02.99 Cat. 52 Listings Proposal (2)		AW 99 Argos		Littlewoods	
Wristl Torch	X	X	X	X	X	X	X	X
Mini Metal Detector	X	X	X	X	X	X	X	X
Video Comm	X	X	X	X	X	X	X	X
Moulding Set	X	X	X	X	X	X	X	X
Radiocontrolled Silver Speeder	X	X	X	X	X	X	X	X
Tracker Torch	X	X	X	X	X	X	X	X
X Catcher	X	X	X	X	X	X	X	X
Arctic Surf Bike	X	X	X	X	X	X	X	X
Arctic Climber	X	X	X	X	X	X	X	X
SFX Stunt Bike - 15	X	X	X	X	X	X	X	X
Motorbike Extreme Driver	X	X	X	X	X	X	X	X
Arctic Explorer	X	X	X	X	X	X	X	X
Landsurfer	X	X	X	X	X	X	X	X
Disc Extreme Costume	X	X	X	X	X	X	X	X
Operation S.O.S	X	X	X	X	X	X	X	X
Windsurfer	X	X	X	X	X	X	X	X
Aqua Mission	X	X	X	X	X	X	X	X
Vertical Mission	X	X	X	X	X	X	X	X
Marine Mission	X	X	X	X	X	X	X	X
Action Man Mountain Mission	X	X	X	X	X	X	X	X
Elite force figures	X	X	X	X	X	X	X	X
Ninjitsu Extreme	X	X	X	X	X	X	X	X
Operation Jungle/Auto fire	X	X	X	X	X	X	X	X
Power Extreme Suit	X	X	X	X	X	X	X	X
Super Speed Bike and Rider	X	X	X	X	X	X	X	X
Super Car and Driver	X	X	X	X	X	X	X	X
Mortar Combat	X	X	X	X	X	X	X	X
Action Man and Tempesst Twin pack	X	X	X	X	X	X	X	X
Sky Diver	X	X	X	X	X	X	X	X
Super Samurai	X	X	X	X	X	X	X	X
Gyro Copler	X	X	X	X	X	X	X	X
Moonraker	X	X	X	X	X	X	X	X
Dr X Chopper	X	X	X	X	X	X	X	X
Super Bike	X	X	X	X	X	X	X	X
Street Commander	X	X	X	X	X	X	X	X
Action Man Bowman	X	X	X	X	X	X	X	X
Desert Patrol	X	X	X	X	X	X	X	X
2-in-1 canoe	X	X	X	X	X	X	X	X
Ninja Kick Action Man	X	X	X	X	X	X	X	X
Action Man Polar Mission and Blizzard	X	X	X	X	X	X	X	X
Arctic Diver	X	X	X	X	X	X	X	X
Sports Extreme	X	X	X	X	X	X	X	X
Street Car Racer	X	X	X	X	X	X	X	X
Stealth Jet	X	X	X	X	X	X	X	X
Jet Pilot	X	X	X	X	X	X	X	X
Crime Buster Action Man and Raid	X	X	X	X	X	X	X	X
Dr X Green Hand	X	X	X	X	X	X	X	X

RRPs sent by
Hasbro to OFT in
2003 (1)

- Paraglider
- Arctic Mission
- Swimmer Action Man
- Patrol Vehicle
- Action Man Street Patrol

RRP-19.02.99
Cat. 52 Listings
Proposal (2)

	S/S 99	Argos	Littlewoods	AW 99	Argos	Littlewoods
Paraglider	X	X	X	X	X	X
Arctic Mission	X	X	X	X	X	X
Swimmer Action Man	X	X	X	X	X	X
Patrol Vehicle	X	X	X	X	X	X
Action Man Street Patrol	X	X	X	X	X	X

(1) Tab C(a)
(2) Tab C(b)

RRPs sent by Hasbro to OFT in 2003 (1)	RRP 01.09.99 (8)	RRP 28.09.99 Range and Price Form (3)	RRP 07.12.99 2000 Trading Terms (4)	S/S 00 Argos Littlewoods	RRP 07.12.99 2000 Trading Terms (4)	Annex 5 to Argos' written representations (5) [4/6/164] and [4/11/214]	A/W 00 Argos Littlewoods
Catalogue number				53			54
Action Man range							
Mountain Bike Extreme	X	£19.99	£19.99	£19.99	£19.99		X
Nel Trapper	X	X	X	X	X		X
Action Kite	X	X	X	X	X		X
4x4 Jeep	X	X	£24.99	£24.99	£24.99		£24.99
Driller	X	X	X	X	X		X
Cutting Edge (Argos)/Cutter Extreme (LW)	7.99 (LW)	X	X	X	£7.99		X
Mission Defence	X	X	X	X	X		X
Multi Mission Pack	X	X	X	X	X		X
Helicopter Attack	X	X	X	X	X		X
Action Man Roller Extreme	X	X	X	X	X		X
Scuba Extreme	X	X	X	X	X		X
Bungee Jump Extreme Action Man	X	X	X	X	X		X
Super X Dirt	X	X	X	X	X		X
Dr X	X	X	X	X	X		X
Dr X 2000	£8.99	£8.99	£8.99	£8.99	£8.99	X	£8.99
Dr X 2001	X	X	X	X	X		X
Dr X 2002	X	X	X	X	X		X
Ocean Mission (without figure)	X	X	X	X	X		X
Ocean Mission (with figure)	X	X	X	X	X		X
Rapid Extreme	X	X	X	X	X		X
Hovercraft	X	X	X	X	X		X
Sub Aqua	£9.99	£9.99	£9.99	£9.99	£9.99		£17.99
Mission Tape recorder	X	X	X	X	X		X
Walkie Talkie	X	X	X	X	X		X
Lunchbox & flask	X	X	X	X	X		X
Photo Mission	X	X	X	X	X		X
Action Man & X Twin Pack	X	X	X	X	X		X
Special Forces	X	X	X	X	X		X
Total Mission	X	X	X	X	X		X
Silver Speeder	£24.99	£24.99	£24.99	£24.99	£24.99	£24.99	£24.99
Silver Speeder driver	£5.99	£5.99	£5.99	£5.99	£5.99		£5.99
Super Ninja	X	X	X	X	X		X
Scooter	X	X	X	X	X		X
Playsuit	X	X	X	X	X		X
Supercharger 4x4	X	X	X	X	X		X
Save the tiger	£12.99	£12.99	£12.99	£12.99	£12.99	£12.99	£12.99

	RRP sent by Hasbro to OFT in 2003 (1)	RRP 01.09.99 Fax from Neil Wilson (8)	RRP 28.09.99 Range and Price Form (3)	RRP 07.12.99 2000 Trading Terms (4)	Annex 5 to Argos' written representations (5) [4/6/164] and [4/11/214]	Argos A/VW 00	Littlewoods
Jungle Dart	£6.99	£6.99	£6.99	£6.99	£6.99	£6.99	£6.99
Jungle Explorer	£12.99	£14.99	£12.99	£12.99	£12.99	X	£12.99
Mission Case	X	X	X	X	X	X	X
Skateboard extreme	£19.99	£19.99	£19.99	£19.99	£19.99	£19.99	£19.99
Ice extreme	£9.99	£12.99	£9.99	£9.99	£9.99	£9.99	£9.99
Polar ski	£14.99	£19.99	£14.99	£14.99	£14.99	£14.99	£14.99
Polar Bike Rider	£7.99	£7.99	£7.99	£7.99	£7.99	£7.99	£7.99
Polar Bike	£14.99	£14.99	£14.99	£14.99	£14.99	£14.99	£14.99
Professor Gangrene	£14.99	£14.99	£14.99	£14.99	£14.99	£14.99	£14.99
Space Explorer	£19.99	X	X	X	X	£19.99	£19.99
Lunar mission	X	X	X	X	X	£17.99	£19.99
Security Defence	£17.99	X	X	X	£17.99	£17.99	£17.99
Mission Grand Prix Driver	£8.99	X	X	X	£8.99	£8.99	£8.99
Mission Grand Prix	£34.99	X	X	X	£34.99	£34.99	£34.99
Backpack	X	X	X	X	X	X	X
Helicopter Rescue	X	X	X	X	X	X	X
Falcon Masier	£14.99	£14.99	X	X	£14.99	£14.99	£14.99
Boomerang extreme	£8.99	£8.99	£8.99	£8.99	£8.99	£8.99	£8.99
Mission Grizzly	£29.99	X	X	X	£29.99	£29.99	£29.99
FX LCD Animated graphic speaking watch	X	X	X	X	X	£11.99	X
Mission Torpedo	£12.99	X	X	X	£12.99	£12.99	£12.99
Mountain skateboard extreme	X	X	X	X	X	£13.99	X
Hydro speeder	X	X	X	X	X	£7.99	X
Jungle explorer & exclusive figure	X	X	X	X	£17.99	£17.99	X
Operation Camouflage	£14.99	X	X	X	£14.99	£14.99	£14.99
Canoe Extreme	X	X	X	X	X	£14.99	X
Arctic Surf Bike & Rider	X	X	X	X	X	X	X
Tokyo Extreme	X	X	X	X	X	X	X
Street Roller	X	X	X	X	X	X	X
Motor Bike Extreme	X	X	X	X	X	X	X
Extreme Kart & Driver	X	X	X	X	X	X	X
Stunt bike & rider	X	X	X	X	X	X	X
Operations Sahara	X	X	X	X	X	X	X
Disc Extreme	X	X	X	X	X	X	X
Street Mission	X	X	X	X	X	X	X
Desert Buggy	X	X	X	X	X	X	X
Mission Crocodile	X	X	X	X	X	X	X
Air Surfer	X	X	X	X	X	X	X
Deep Sea Mission	X	X	X	X	X	X	X

	RRPs sent by Hasbro to OFT in 2003 (1)	RRP 01.09.99 Fax from Neil Wilson (8)	RRP 28.09.99 Range and Price Form (3)	RRP 07.12.99 2000 Trading Terms (4)	S/S 00 Argos	Littlewoods	RRP 07.12.99 2000 Trading Terms (4)	Annex 5 to Argos' written representations (5) (4/6/164) and [4/11/214]	A/W 00 Argos	Littlewoods
Amazon Dinghy	X	X	X	X	X	X	X	X	X	X
Arctic Rally Car Driver	X	X	X	X	X	X	X	X	X	X
Arctic Rally Car	X	X	X	X	X	X	X	X	X	X
Tempest	X	X	X	X	X	X	X	X	X	X
Motor Bike Extreme & Rider	X	X	X	X	X	X	X	X	X	X
Motor Bike Extreme	X	X	X	X	X	X	X	X	X	X
Kart Extreme & Driver	X	X	X	X	X	X	X	X	X	X
Mission Headquarters	X	X	X	X	X	X	X	X	X	X
Urban HQ	X	X	X	X	X	X	X	X	X	X
Urban Mission	X	X	X	X	X	X	X	X	X	X
Secret Mission Diary	X	X	X	X	X	X	X	X	X	X
Crimebuster Survival Kit/Unit	X	X	X	X	X	X	X	X	X	X
Protector II Intruder Alert	X	X	X	X	X	X	X	X	X	X
Chopper Bike	X	X	X	X	X	X	X	X	X	X
Whirl T Torch	X	X	X	X	X	X	X	X	X	X
Mini Metal Detector	X	X	X	X	X	X	X	X	X	X
Video Comm	X	X	X	X	X	X	X	X	X	X
Moulding Set	X	X	X	X	X	X	X	X	X	X
Radiocontrolled Silver Speeder	X	X	X	X	X	X	X	X	X	X
Tracker Torch	X	X	X	X	X	X	X	X	X	X
X Catcher	X	X	X	X	X	X	X	X	X	X
Arctic Surf Bike	X	X	X	X	X	X	X	X	X	X
Arctic Climber	X	X	X	X	X	X	X	X	X	X
SFX Slunt Bike - 15	X	X	X	X	X	X	X	X	X	X
Motorbike Extreme Driver	X	X	X	X	X	X	X	X	X	X
Arctic Explorer	X	X	X	X	X	X	X	X	X	X
Landsurfer	X	X	X	X	X	X	X	X	X	X
Disc Extreme Costume	X	X	X	X	X	X	X	X	X	X
Operation S.O.S	X	X	X	X	X	X	X	X	X	X
Windsurfer	X	X	X	X	X	X	X	X	X	X
Aqua Mission	X	X	X	X	X	X	X	X	X	X
Vertical Mission	X	X	X	X	X	X	X	X	X	X
Marine Mission	X	X	X	X	X	X	X	X	X	X
Action Man Mountain Mission	X	X	X	X	X	X	X	X	X	X
Elite force figures	X	X	X	X	X	X	X	X	X	X
Ninjitsu Extreme	X	X	X	X	X	X	X	X	X	X
Operation Jungle/Auto fire	X	X	X	X	X	X	X	X	X	X
Power Extreme Suit	X	X	X	X	X	X	X	X	X	X
Super Speed Bike and Rider	X	X	X	X	X	X	X	X	X	X
Super Car and Driver	X	X	X	X	X	X	X	X	X	X
Mortar Combat	X	X	X	X	X	X	X	X	X	X
Action Man and Tempest Twin pack	X	X	X	X	X	X	X	X	X	X

	RRP sent by Hasbro to OFT in 2003 (1)		RRP 01.09.99 Fax from Neil Wilson (8)		RRP 28.09.99 Range and Price Form (3)		RRP 07.12.99 Trading Terms (4)		Annex 5 to Argos' written representations (5) [4/6/164] and [4/11/214]		A/W 00 Argos Littlewoods	
	(1)	(8)	(3)	(4)	(3)	(4)	(4)	(4)	(5)	(5)	(00)	(Littlewoods)
Sky Diver	X	X	X	X	X	X	X	X	X	X	X	X
Super Samurai	X	X	X	X	X	X	X	X	X	X	X	X
Gyro Copter	X	X	X	X	X	X	X	X	X	X	X	X
Moonraker	X	X	X	X	X	X	X	X	X	X	X	X
Dr X Chopper	X	X	X	X	X	X	X	X	X	X	X	X
Super Bike	X	X	X	X	X	X	X	X	X	X	X	X
Street Commander	X	X	X	X	X	X	X	X	X	X	X	X
Action Man Bowman	X	X	X	X	X	X	X	X	X	X	X	X
Desert Patrol	X	X	X	X	X	X	X	X	X	X	X	X
2-in-1 canoe	X	X	X	X	X	X	X	X	X	X	X	X
Ninja Kick Action Man	X	X	X	X	X	X	X	X	X	X	X	X
Action Man Polar Mission and Blizzard	X	X	X	X	X	X	X	X	X	X	X	X
Arctic Diver	X	X	X	X	X	X	X	X	X	X	X	X
Sports Xtreme	X	X	X	X	X	X	X	X	X	X	X	X
Street Car Racer	X	X	X	X	X	X	X	X	X	X	X	X
Stealth Jet	X	X	X	X	X	X	X	X	X	X	X	X
Jet Pilot	X	X	X	X	X	X	X	X	X	X	X	X
Crime Buster Action Man and Raid	X	X	X	X	X	X	X	X	X	X	X	X
Dr X Green Hand	X	X	X	X	X	X	X	X	X	X	X	X
Paraglider	X	X	X	X	X	X	X	X	X	X	X	X
Arctic Mission	X	X	X	X	X	X	X	X	X	X	X	X
Swimmer Action Man	X	X	X	X	X	X	X	X	X	X	X	X
Patrol Vehicle	X	X	X	X	X	X	X	X	X	X	X	X
Action Man Street Patrol	X	X	X	X	X	X	X	X	X	X	X	X

- (1) Tab C(a)
- (3) Tab C(c)
- (4) Tab C(d)
- (5) Tab C(e)
- (8) Tab C(h)

RRPs sent by RRP 12.10.00 RRP S/S
 Hasbro to OFT Range and Preview
 in 2003 (1) Price Form (7) (Hasbro) (6) S/S 01
 Argos Littlewoods

Catalogue number	55	55	£9.99	£9.99	£9.99	£12.99	£13.75	£13.99
Action Man range	X	X	X	X	X	X	X	X
Mountain Bike Extreme	X	X	X	X	X	X	X	X
Net Trapper	X	X	X	X	X	X	X	X
Action Kite	X	X	X	X	X	X	X	X
4x4 Jeep	X	X	X	X	X	X	X	X
Driller	X	X	X	X	X	X	X	X
Cutting Edge (Argos)/Cutter Extreme (LW)	X	X	X	X	X	X	X	X
Mission Defence	X	X	X	X	X	X	X	X
Multi Mission Pack	X	X	X	X	X	X	X	X
Helicopter Attack	X	X	X	X	X	X	X	X
Action Man Roller Extreme	X	X	X	X	X	X	X	X
Scuba Extreme	X	X	X	X	X	X	X	X
Bungee Jump Extreme Action Man	X	X	X	X	X	X	X	X
Super X Dirt	X	X	X	X	X	X	X	X
Dr X	X	X	X	X	X	X	X	X
Dr X 2000	X	X	X	X	X	X	X	X
Dr X 2001	X	X	X	X	X	X	X	X
Dr X 2002	X	X	X	X	X	X	X	X
Ocean Mission (without figure)	X	X	X	X	X	X	X	X
Ocean Mission (with figure)	X	X	X	X	X	X	X	X
Rapid Extreme	X	X	X	X	X	X	X	X
Hovercraft	X	X	X	X	X	X	X	X
Sub Aqua	X	X	X	X	X	X	X	X
Mission Tape recorder	X	X	X	X	X	X	X	X
Walkie Talkie	X	X	X	X	X	X	X	X
Lunchbox & flask	X	X	X	X	X	X	X	X
Photo Mission	X	X	X	X	X	X	X	X
Action Man & X Twin Pack	X	X	X	X	X	X	X	X
Special Forces	X	X	X	X	X	X	X	X
Total Mission	X	X	X	X	X	X	X	X
Silver Speeder	X	X	X	X	X	X	X	X
Silver Speeder driver	X	X	X	X	X	X	X	X
Super Ninja	X	X	X	X	X	X	X	X
ScOOTer	X	X	X	X	X	X	X	X
Playsuit	X	X	X	X	X	X	X	X
Supercharger 4x4	X	X	X	X	X	X	X	X
Save the tiger	X	X	X	X	X	X	X	X
Jungle Dart	X	X	X	X	X	X	X	X
Jungle Explorer	X	X	X	X	X	X	X	X
Mission Case	X	X	X	X	X	X	X	X
Skateboard extreme	X	X	X	X	X	X	X	X
Ice extreme	X	X	X	X	X	X	X	X
Polar ski	X	X	X	X	X	X	X	X
Polar Bike Rider	X	X	X	X	X	X	X	X

	RRPs sent by Hasbro to OFT in 2003 (£)	RRP 12.10.00 Range and Price Form (7)	RRP S/S Preview (Hasbro) (6)	S/S 01 Argos	Littlewoods
Polar Bike	X	X	X	X	X
Professor Gangrene	£14.99	X	£14.99	£14.99	£14.99
Space Explorer	X	X	X	X	X
Lunar mission	X	X	X	X	£17.99
Security Defence	X	X	X	X	X
Mission Grand Prix Driver	£8.99	X	£8.99	X	£8.99
Mission Grand Prix	£34.99	£34.99	£34.99	£34.99	£34.99
Helicopter Rescue	X	X	X	X	X
Falcon Master	X	X	X	X	X
Boomerang extreme	X	X	X	X	X
Mission Grizzly	X	X	X	X	X
FX LCD Animated graphic speaking watch	X	X	X	X	X
Mission Torpedo	X	X	X	£11.99	X
Mountain skateboard extreme	X	X	X	£13.99	X
Hydro speeder	X	X	X	X	X
Jungle explorer & exclusive figure	X	X	X	X	X
Operation Camouflage	X	X	X	X	X
Canoe Extreme	X	X	X	X	X
Arctic Surf Bike & Rider	X	X	X	£17.99	£17.99
Tokyo Extreme	£9.99	£9.99	£9.99	£9.99	X
Street Roller	£7.99	£7.99	£9.99	£9.99	£7.99
Motor Bike Extreme	X	£14.99	£14.99	£14.99	£14.99
Extreme Kart & Driver	X	X	X	£22.99	£22.99
Stunt bike & rider	X	£19.99	£19.99	£19.99	£19.99
Operations Sahara	£14.99	£14.99	£14.99	£14.99	X
Disc Extreme	£9.99	£9.99	£9.99	£9.99	£9.99
Street Mission	£14.99	£14.99	£14.99	£14.99	£14.99
Desert Buggy	£12.99	£12.99	£12.99	£12.99	£12.99
Mission Crocodile	£14.99	£14.99	£14.99	£14.99	£14.99
Air Surfer	£19.99	£19.99	£19.99	£19.99	£19.99
Deep Sea Mission	X	X	X	X	X
Amazon Dinghy	X	X	X	X	X
Arctic Rally Car Driver	£6.99	X	X	X	X
Arctic Rally Car	£29.99	X	X	X	X
Tempest	£7.99	X	X	X	£7.99
Motor Bike Extreme & Rider	X	X	X	X	X
Motor Bike Extreme	X	X	X	X	X
Kart Extreme & Driver	£22.99	£22.99	£22.99	X	£22.99
Mission Headquarters	X	X	X	X	X
Urban HQ	X	X	X	X	X
Urban Mission	X	X	X	X	X
Secret Mission Diary	X	X	X	X	X
Crimebuster Survival Kit/Unit	X	X	X	X	X
Protector II Intruder Alert	X	X	X	X	X
Chopper Bike	X	X	X	X	X
Whirlis! Torch	X	X	X	X	£14.99
Mint Metal Detector	X	X	X	X	X
Video Comm	X	X	X	X	X
Moulding Set	X	X	X	X	X
Radiocontrolled Silver Speeder	X	X	X	X	X

	RRPs sent by Hasbro to OFT in 2003 (1)	RRP 12,10.00 Range and Price Form (7)	RRP S/S Preview (Hasbro) (6)	S/S 01 Argos	Littlewoods
Tracker Torch	X	X	X	X	X
X Catcher	X	X	X	X	X
Arctic Surf Bike	£17.99	£17.99	£17.99	X	£17.99
Arctic Climber	£9.99	X	£9.99	X	£9.99
SFX Stunt Bike - 15	X	X	X	£19.99	£19.99
Motorbike Extreme Driver	X	X	X	X	X
Arctic Explorer	X	X	X	X	X
Landsurfer	X	X	X	X	X
Disc Extreme Costume	X	X	X	X	X
Operation S.O.S	X	X	X	X	X
Windsurfer	X	X	X	X	X
Aqua Mission	X	X	X	X	X
Vertical Mission	X	X	X	X	X
Marine Mission	X	X	X	X	X
Action Man Mountain Mission	X	X	X	X	X
Elite force figures	X	X	X	X	X
Ninjitsu Extreme	X	X	X	X	X
Operation Jungle/Auto fire	X	X	X	X	X
Power Extreme Suit	X	X	X	X	X
Super Speed Bike and Rider	X	X	X	X	X
Super Car and Driver	X	X	X	X	X
Mortar Combat	X	X	X	X	X
Action Man and Tempest Twin pack	X	X	X	X	X
Sky Diver	X	X	X	X	X
Super Samurai	X	X	X	X	X
Gyro Copter	X	X	X	X	X
Moonraker	X	X	X	X	X
Dr X Chopper	X	X	X	X	X
Super Bike	X	X	X	X	X
Street Commander	X	X	X	X	X
Action Man Bowman	X	X	X	X	X
Desert Patrol	X	X	X	X	X
2-in-1 canoe	X	X	X	X	X
Ninja Kick Action Man	X	X	X	X	X
Action Man Polar Mission and Blizzard	X	X	X	X	X
Arctic Diver	X	X	X	X	X
Sports Extreme	X	X	X	X	X
Street Car Racer	X	X	X	X	X
Stealth Jet	X	X	X	X	X
Jet Pilot	X	X	X	X	X
Crime Buster Action Man and Raid	X	X	X	X	X
Dr X Green Hand	X	X	X	X	X
Paraglider	X	X	X	X	X
Arctic Mission	X	X	X	X	X
Swimmer Action Man	X	X	X	X	X
Patrol Vehicle	X	X	X	X	X
Action Man Street Patrol	X	X	X	X	X

(1) Tab C(a)
(6) Tab C(f)

RRPs sent by Hasbro to OFT in 2003 (1) RRP 12.10.00 Range and Price Form (7) RRP S/S Preview (Hasbro) (6) S/S 01 Argos Littlewoods

(7) Tab C(g)

ARGOS AND LITTLEWOODS CATALOGUE PRICES AND AVAILABLE RPPS

"X" means that the product is not listed
 Note: The catalogue prices are taken from Document D.5 of Annex A of the Decision

Catalogue number	S/S 98		A/W 98	
	Argos	Littlewoods	Argos	Littlewoods
	49		50	
Other boys' toys:				
Pokemon	X	X	X	X
Pokemon Battlefigures 2-pack	X	X	X	X
Pokeball Blaster 3-pack	X	X	X	X
Interactive Pikachu	X	X	X	X
Micro Machines				
Transforming Team Truck	X	X	X	X
Rally Race Track	X	X	X	X
Hand-held electronic games				
Monopoly	X	X	X	X
Bop It	X	X	X	X
Bop It Extreme	X	X	X	X
Girls' toys				
Baby All Gone	X	£19.99	£19.50	£19.99
Creative toys				
"Get Set" Chocolate Factory	£18.75	X	£18.40	£18.50
"Get Set" Egyptian Adventure	X	X	£26.75	£28.50
"Get Set" Mastering Mosaics	X	X	£19.50	£18.99
"Get Set" Gardens Galore	X	X	X	X
Spirograph	£13.95	£14.99	£13.85	£14.99
Super Sticker Factory	£17.90	X	£17.90	£17.85
Plush/infant and pre-school				
Twenties all Standard Plush	X	X	X	X
Twenties All Story Time Product	X	X	X	X
Twenties Cuddle & Squeeza Doodles	X	X	X	X

Catalogue number	RRPs sent by Hasbro to OFT in 2003 (1)		S/S 99		A/W 99	
	RRP	RRP	Argos	Littlewoods	Argos	Littlewoods
Other boys' toys:						
Pokemon	X		X	X	X	X
Pokemon Battlefigures 2-pack	X		X	X	X	X
Pokeball Blaster 3-pack	X		X	X	X	X
Interactive Pikachu						
Micro Machines	X		X	X	X	X
Transforming Team Truck	X		X	X	X	X
Rally Race Truck						
Hand-held electronic games						
Monopoly	£29.99		X	X	£29.99	£29.95
Bop It	£19.99		X	X	£19.99	£19.99
Bop It Extreme	X		X	X	X	X
Girls' toys						
Baby All Gone	£19.99		£19.99	X	£19.50	£19.89
Creative toys						
"Get Set" Chocolate Factory	£19.99		£19.99	£19.45	£19.99	£19.50
"Get Set" Egyptian Adventure	£29.99		X	X	X	X
"Get Set" Mastering Mosaics	£19.99		X	X	£19.45	£19.50
"Get Set" Gardens Galore	X		X	X	X	X
Spirograph	£14.99		£14.99	£14.75	£13.85	£14.75
Super Slicker Factory	£17.99		X	X	£17.90	£18.50
Plush/infant and pre-school						
Twenties All Standard Plush	X		X	X	X	X
Twenties All Story Time Product	X		X	X	X	X
Twenties Cuddle & Squeeze Doodles	X		X	X	X	X

(1) Tab C(a)

RRPs sent by Hasbro to OFT in 2003 (1)	RRP Range and Price Form (3)	RRP 01.09.99 Fax: Neil Wilson - Andrew Needham (8)	RRP 07.12.99 2000 Trading Terms (4)	S/S 00	RRP 28.09.99 Range and Price Form (3)	RRP 07.12.99 2000 Trading Terms (4)	Annex A to Argos' written representations (5) [4/6/164] and [4/11/214]	Argos	Argos	Littlewoods (2)
Catalogue number				Argos				Argos	Littlewoods	
				53				54		
Other boys' toys:										
Pokemon	£4.99	£4.99	X	X	X	£4.99	£4.99	£4.99	£4.99	
Pokemon Battlefigures 2-pack	£7.99	X	X	£6.99	X	£7.99	£6.99	£6.99	£6.99	
Pokeball Blaster 3-pack	£24.99	£24.99	X	£23.99	X	X	£23.99	£23.75	£23.75	
Interactive Pikachu										
Micro Machines										
Transforming Team Truck	£29.99	X	X	X	X	X	£29.99	£28.99	£29.99	
Rally Race Truck	£19.99	X	X	X	X	X	£19.99	£18.99	£19.99	
Hand-held electronic games										
Monopoly	£29.99	X	X	X	X	X	X	£29.99	£29.99	
Bop It	£19.99	X	X	X	X	X	X	X	X	
Bop It Extreme	£19.99	X	X	X	X	X	X	£19.99	£19.99	
Girls' toys										
Baby All Gone	£19.99	X	X	£19.50	X	X	£19.99	£19.99	£19.99	
Creative toys										
"Get Set" Chocolate Factory	£19.99	X	X	X	X	£19.99	£19.99	£19.99	£19.99	
"Get Set" Egyptian Adventure	£29.99	X	X	X	X	X	£29.99	£29.99	£29.99	
"Get Set" Mastering Mosaics	£19.99	X	X	X	X	X	£19.99	£19.99	£19.99	
"Get Set" Gardens Galore	£19.99	X	X	X	X	X	X	X	X	
Spirograph	£14.99	X	X	X	X	£14.99	£14.99	£14.99	£14.99	
Super Slicker Factory	£17.99	X	X	X	X	£17.99	£17.99	£17.99	£17.99	
Plush/infant and pre-school										
Twenties all Standard Plush	£14.99	X	X	£14.99	X	£14.99	£14.99	£14.99	£14.99	
Twenties All Story Time Product	£24.99	X	X	X	X	X	£24.99	£24.99	£24.99	
Twenties Cuddie & Squeeze Doodles	£24.99	X	X	X	X	X	X	£24.99	£24.99	

- (1) Tab C(e)
- (3) Tab C(c)
- (4) Tab C(d)
- (5) Tab C(e)
- (6) Tab C(h)

RRPs sent by Hasbro to OFT in 2003 (1)	RRP 12.10.00 Range and Price Form (7)	RRP 2001 SIS Preview (Hasbro) (6)	SIS 01	Argos	Littlewoods
Catalogue number 55					
Other boys' toys:					
Pokemon	X	X	X	X	X
Pokemon Baillifigures 2-pack	X	X	X	X	X
Pokeball Blaster 3-pack	X	X	X	X	X
Interactive Pikachu	X	X	X	X	X
Micro Machines	£29.99	£29.99	£28.99	£28.99	£28.99
Transforming Team Truck	£19.99	£19.99	£18.99	£18.99	£18.99
Rally Race Track					
Hand-held electronic games					
Monopoly	X	X	X	X	£19.99
Bop II	X	X	X	X	X
Bop II Extreme	£19.99	X	X	X	£19.99
Girls' toys					
Baby All Gone	X	X	X	X	X
Creative toys					
"Get Set" Chocolate Factory	£19.99	X	X	X	£19.99
"Get Set" Egyptian Adventure	£19.99	X	X	X	£29.99
"Get Set" Mastering Mosaics	£19.99	X	X	X	£19.99
"Get Set" Gardens Galore	X	X	X	X	X
Spirograph	£14.99	X	X	X	£14.99
Super Sticker Factory	£14.99	X	X	X	£17.99
Plush/infant and pre-school					
Twenties all Standard Plush	X	X	X	X	X
Twenties All Story Time Product	£24.99	£24.99	£24.99	£24.99	£24.99
Twenties Cuddle & Squeeze Doodles	£24.99	£24.99	£24.99	£24.99	X

(1) Tab C(a)

(6) Tab C(f)

(7) Tab C(g)