Neutral citation: [2004] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL
New Court
48 Carey Street
London WC2A 3BZ

Case: 1021/1/1/03

29 January 2004

Before:

Sir Christopher Bellamy (President)
Mr Barry Colgate
Mr Richard Prosser OBE

Sitting as a Tribunal in England and Wales

BETWEEN

ALLSPORTS LIMITED

Appellant

-and-

THE OFFICE OF FAIR TRADING

Respondent

Mr Laurence West-KnightsQC and Mr George Peretz (instructed by Messrs Addleshaw Goddard) for Allsports Limited

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

Heard at New Court on 22 January 2004

JUDGMENT ON ALLSPORTS' APPLICATION FOR SUMMARY JUDGMENT

1. In this interlocutory application Allsports Limited ("Allsports") seeks, in effect, summary judgment in Allsports' favour on part of the appeal lodged by Allsports before the Tribunal on 1 October 2003 against decision no. CA98/06/2003 Price Fixing of Replica Football Kit adopted by the OFT on 1 August 2003 ("the decision"). We deal with that application by Allsports together with application by the OFT to introduce a further witness statement by a Mr May, and to make certain amendments to the defence, which raise essentially the same issues.

The decision

2. In the decision, the OFT found that seven sportswear retailers, namely JJB Sports plc ("JJB"), Allsports, Sports Soccer Ltd ("Sports Soccer", since renamed Sports World International Limited), Blacks Leisure Group Limited ("Blacks"), John David Sports plc ("JD"), Florence Clothiers (Scotland) Ltd ("Sports Connection") and Sportsetail Ltd ("Sportsetail"), together with Manchester United plc ("MU"), the Football Association Limited, and Umbro Holdings Limited ("Umbro"), a manufacturer of sportswear, had infringed Chapter I of the Competition Act 1998 ("the 1998 Act") by entering into a number of agreements or concerted practices to fix retail prices in relation to certain replica football shirts manufactured by Umbro including, in particular, those of the England team and Manchester United. The OFT imposed penalties under section 36 of the 1998 Act amounting to some £18 million in aggregate. The decision runs to some 237 pages.

3. Four of the parties involved, namely JJB, Allsports, MU and Umbro have appealed against the decision to the Tribunal under section 46 of the 1998 Act. The appeals of Umbro, who was fined £6.64 million, and MU, who was fined £1.65 million, are as to the amount of the penalty only. However JJB, who was fined £8.37 million, and Allsports, who was fined £1.35 million, contest both the existence of the infringements alleged against them and, in the alternative, the amount of the penalty imposed.

4. As far as Allsports is concerned, the decision alleges that Allsports was party to two price-fixing agreements in breach of the Chapter I prohibition.

5. The first of these alleged agreements is an agreement between Allsports, Blacks, JJB and JD, as well as Sports Soccer and Umbro, to fix the retail prices of England replica shirts around the time of the Euro 2000 football tournament. We refer to this agreement as "The England Euro 2000 Agreement". According to the OFT, the England Euro 2000 Agreement was made between 24 May and 2 June 2000, shortly before the start of the Euro 2000 tournament, and continued until 21 June 2000 when Sports Soccer commenced discounting the shirts in question, following England's defeat by Romania. According to the decision, the making of the agreement centres on a meeting which took place between Umbro and Sports Soccer on 24 May 2000 and subsequent telephone calls and contacts between Umbro and the principal sportswear retailers, including Allsports (see paragraphs 412 to 437 of the decision).

6. The second of the agreements alleged against Allsports is an agreement between at least Allsports, Blacks, JJB and MU, as well as Sports Soccer and Umbro, to fix the retail prices of MU replica shirts in 2000. We refer to this agreement as "The MU Agreement". According to the OFT, the making of this agreement centres in particular on a meeting between JJB, Allsports and Sports Soccer which took place on Sunday 8 June 2000 at the private house of Mr Hughes, the Managing Director of Allsports, as well as other contacts between the parties, notably at a 'Golf Day' dinner organised by Allsports on 25 May 2000 (see paragraphs 438 to 477 of the decision).

7. In the decision, Umbro and Sports Soccer are also found by the OFT to have been parties to a separate price fixing agreement in relation to major Umbro licensed replica shirts which is similar in content to, and overlaps in time with, the England Euro 2000 and MU Agreements (paragraphs 342 to 411 of the decision). Certain further agreements not involving Allsports are found by the OFT at paragraphs 478 to 530 of the decision.

The OFT's findings on the England Euro 2000 Agreement

8. Since Allsports' present application relates to the alleged England Euro 2000 Agreement, we set out below paragraphs 412 to 437 of the decision, which contains the OFT's findings as regards that agreement. It should be borne in mind, however, that those findings also refer back to earlier passages in the decision, particularly paragraphs 157 to

158, 160, 165, 167, 168, 169, 175, 176, 177, 178 to 181, 184, 202, 254 and 256. We also note that the England Euro 2000 Agreement was allegedly made at a point in time (late May/early June 2000) close to the making of the alleged MU Agreement, as to which the findings of the OFT are set out at paragraphs 438 to 477 of the decision. Paragraphs 450 to 452, 454 to 457 and 469 to 473 of the decision deal with Allsports' participation in the MU Agreement.

9. As regards the England Euro 2000 Agreement paragraphs 412 to 437 of the decision read as follows:-

> "412. The lead up to and participation by the England national team in Euro 2000, commencing at the beginning of June 2000, was a key selling period for the England home and away Replica Shirts manufactured by Umbro.
>
> 413. The Umbro staff who have provided witness statements, and in particular Mr Ronnie and Mr Attfield, have said that Umbro's early price-fixing meetings and agreements with Sports Soccer in March and April 2000 related specifically to Sports Soccer's pricing of the England home and away Replica Kit, and also that those agreements took place at the instigation of JJB. However, in the light of the England Direct Agreements concluded in February 2000 involving, *inter alia*, Umbro and JJB, the OFT considers it probable that JJB at least was a party to an agreement to fix the prices of England Replica Shirts at this early stage. Nevertheless the OFT does not make a finding to this effect in the light of all the evidence.
>
> 414. On 24 May 2000, at a meeting between Messrs Ronnie and Attfield of Umbro and Mr Ashley of Sports Soccer, Sports Soccer agreed to raise its prices of England home and away Replica Shirts. Sports Soccer appears to have insisted on an assurance that the other major retailers would not undercut its prices, thereby placing it at a commercial disadvantage. This led to Messrs Ronnie and Fellone telephoning, between them, each of the major retailers in order to make sure that they would price the England Replica Shirts at High Street Prices in the run up to and during England's participation in Euro 2000.
>
> 415. There is clear evidence that such agreement was reached, and that it included Allsports, Blacks, JJB, and JD, as well as Umbro and Sports Soccer:
>
> (a) During the meeting with OFT officials in August 2001, Mr Ashley of Sports Soccer described an agreement concluded by telephone between Umbro and other retailers during May and June 2000, including Mr Hughes of Allsports, Mr Knight of Blacks, Mr Sharpe of JJB, and possibly Mr Makin of JD.
>
> (b) The witness statements of Mr Ronnie and Mr Fellone of Umbro support each other and confirm the version of events described by Sports Soccer; they each mention the specific retailers whom they respectively called,

and from whom they received assurances (Mr Ronnie: JJB and Allsports; Mr Fellone: Blacks and JD amongst others).

(c) Mr Fellone of Umbro faxed Mr Ryman of Debenhams on 2 June 2000 stating that other retailers had agreed a pricing strategy to take effect from the following day. The fax said that it '*is imperative that I speak to you this afternoon to ensure that [you]…will fall in line with the above*'. Mr Fellone again faxed Mr Ryman on 8 June 2000 refusing to supply part of Debenhams' order for MU Replica Shirts due for launch on 1 August 2000. Debenhams has also expressly confirmed that on or around 22 May 2000 it was contacted by Mr Fellone of Umbro and asked to '*increase the price of the England shirt on or before 3rd June 2000 as* above. Although Mr Fellone called JD, he says that JD refused to end their 'hat trick'promotion. This evidence indicates that telephone calls of the type described by Sports Soccer and the Umbro witnesses did take place, and that, as Debenhams had refused to co-operate, it was punished by Umbro with a refusal to supply part of its order for MU Replica Shirts.

(d) Blacks has also confirmed that Umbro exerted pressure on it to maintain retail prices at various times. Mr Ashley stated in his meeting with OFT officials that Mr Knight of Blacks had contacted him directly to confirm that Sports Soccer had indeed agreed with Umbro to retail the England Replica Shirt at High Street Prices, and Mr Ashley gave the requested confirmation.

(e) Mr Brown of JD said that he was telephoned by Mr Ronnie of Umbro and that JD '*did become subject to pressure from Umbro to increase the retail price of replica England shirts*'.

(f) At a meeting on 2 June 2000 between Mr Ronnie of Umbro and Mr Hughes of Allsports, Mr Hughes telephoned Mr Knight of Blacks referring to the 'hat trick' promotion being run by JD on England Replica Kit. Mr Hughes asked whether Mr Knight was intending to do a similar promotion, and Mr Knight confirmed that Blacks would not do so.

(g) On 2 and 3 June 2000: (i) Blacks increased the prices of the adult and junior England home Replica Shirts to High Street Prices, and maintained the prices of the away Replica Shirts at High Street Prices or above; (ii) JD increased the prices of the adult and junior England home and away Replica Shirts to High Street Prices; (iii) Sports Soccer increased its prices on at least the adult home Replica Shirt to High Street Prices; (iv) JJB and Allsports maintained High Street Prices on England home and away Replica Shirts.

(h) In his fax of 6 June 2000 to Mr Draper of MU, Mr Marsh of Umbro referred to Umbro having received '*assurances from Sport[s]…Soccer and JJB that they will revise their current pricing of jerseys to reflect a price point which falls in line with market conditions*.' Mr Marsh states that, at the time he wrote the fax, he had heard '*that there had been discussions with the major retailers concerning current pricing of England*

jerseys, which many retailers had been discounting'. The OFT considers that his fax referred to discussions with the major retailers (at least Sports Soccer and JJB) about England and other Replica Shirts.

(i) The section of the Umbro May 2000 monthly management report prepared by Mr Ronnie referred expressly to an agreement having been reached on the England Replica Shirts involving JJB, Sports Soccer, Blacks, JD and Allsports. It said:

'There has been a major step forward in the retail price of England [and] the launch of Manchester United. JJB, Sports Soccer, First Sports, JD Sports and all:sports have all agreed to retail their adults shirts at £39.99. This is following England being sold at various retail prices through April and May ranging from £24.99 to £29.99, £32.99 or £32.99 with a free £9.99 cap at JD Sports.

Following a month of dialogue with all the above accounts, Umbro cannot allow our statement product to be discounted.'

416. Furthermore, the implementation of the pricing agreement between the major retailers was facilitated in that the standard purchase order forms of Allsports and Blacks, submitted to Umbro, included intended actual retail selling prices. There was no legitimate commercial rationale for this practice. The OFT also notes Umbro's written representations which state that JJB generally only communicated its retail prices to Umbro in the context of complaints about other retailers and that retailers, including JJB, '*would have known (and often intended) that Umbro would use the information in its discussions with other retailers*'.

Views of the parties

417. Allsports has stated that evidence that it failed to change its prices is not evidence that it colluded on them. Allsports has stated that it is perfectly normal for products to remain highly priced during a buoyant sales period such as at the launch of the MU home Replica Shirt.

418. Allsports has questioned why Umbro would have telephoned Allsports and JJB to confirm their retail pricing intentions on England Replica Shirts if it was Allsports and JJB who were in fact placing pressure on Umbro to secure higher retail prices from Sports Soccer.

419. Allsports denies Mr Ronnie's account of the meeting on 2 June 2000 (when Mr Ronnie said that Mr Hughes called Mr Knight of Blacks in relation to JD's 'hat trick' promotion).

420. Allsports contends that Umbro's May 2000 monthly management report may simply have been exaggerated, and considers that the report was referring to '*indications that [Umbro]…may have been given (perfectly properly) by retailers as to their retail pricing intentions*'. While Allsports has confirmed

that, at least when discussing wholesale prices, it did discuss with Umbro its retail pricing intentions, and has accepted that Umbro monitored retail prices, Allsports claims that Umbro required information as to retailers' pricing intentions in order to determine its own wholesale prices. Allsports has also said that the reference to agreed prices in the Umbro May 2000 monthly management report was a '*loose reference to it having obtained information from allsports and others on order forms as to expected retail price*'. It denies that the OFT should attach any significance to these standard documents which reflected nothing more than Allsports' administrative convenience and the structure of its computer system.

421. JJB has denied participation in any infringement of the Act. JJB has stated that neither Mr Russell nor Mr Whelan took a call from Umbro about the pricing of the England home Replica Shirt and that had Mr Sharpe taken such a call, Allsports' WR on Rule 14 Notice p.23-25 (App 1, doc 10 to Supplemental Rule 14 Notice). Mr Sharpe would have had to inform Mr Russell and Mr Whelan if the agreement was to have any effect. JJB has said that he did not do this.

…

Conclusion of the OFT

426. As respects Allsports' point about price levels, evidence of sustained high **or** parallel pricing in isolation is not necessarily sufficient in all cases to find an infringement of the Chapter I prohibition. However, the OFT does not rely on this evidence in isolation. The OFT accepts that it may be normal for price to rise as demand for something rises. However, it would also be normal for retailers to compete with each other on high profile branded goods, particularly during key selling periods. In the light of the totality of the evidence, it cannot be accepted that a mere increase in demand was the explanation for the parties all simultaneously retailing England Replica Shirts at High Street Prices.

427. As to Allsports' question why Umbro should be calling Allsports or JJB to confirm their retail pricing intentions if they were the source of pressure, the OFT is satisfied that it does make sense that Umbro would want to confirm with all retailers what their precise pricing intentions would be and to give comfort about assurances being given by their competitors.

428. As respects Allsports' criticisms of Mr Ronnie's account of his meeting with Mr Hughes on 2 June 2000, the OFT notes that Mr Ronnie's account of the organisation and planning of the meeting on 8 June 2000 with respect to MU Replica Kit has been broadly corroborated, and there is no reason to doubt Mr Ronnie's account of Mr Hughes' conversation with Mr Knight with respect to England Replica Kit.

429. As respects the contention that Umbro's monthly management report for May 2000 was exaggerated. This is not accepted for the reasons given at paragraphs 329 and 330 above.

430. Further, the OFT does not accept that it was '*perfectly proper*' for retailers to have given Umbro information about their retail pricing intentions shortly before key selling periods, as this facilitated indirect collusion between retailers. As respects Allsports' argument that the intended retail prices communicated to Umbro could have been relevant to Umbro's determination of its wholesale prices, the OFT notes that Allsports' standard purchase order forms were submitted **after** agreement would have been reached between Allsports and Umbro over discount levels. It is accordingly unclear how such information was relevant. Given the unambiguous concerns of Mr Hughes of Allsports about discounted retail prices, the OFT considers that Allsports' (and Blacks') routine communication of its retail pricing intentions to Umbro in its purchase order forms at the very least facilitated implementation of Umbro's pricing policy.

431. As to JJB's denial that its officials received a call from Umbro about the pricing of England Replica Shirts, the OFT is satisfied on the basis of the totality of the evidence (including paragraphs (a)-(c) and (g)-(i) of 415 and 416 above) that, during April or May 2000, Umbro did expressly contact JJB to confirm both that Umbro was speaking to other retailers about the pricing of the England Replica Shirt, and to confirm that JJB's pricing intentions were still in line with expectations. If this call was taken by the late Mr Sharpe, who did not directly address this specific point in his witness statement, it is noted that he would not have needed to inform either Mr Russell or Mr Whelan of this call as JJB was already retailing at High Street Prices …

…

437. In conclusion, none of the Parties' objections alter the OFT's assessment of the weight of the evidence, or undermine its finding that Allsports, Blacks, JJB, and JD, as well as Sports Soccer and Umbro, all took part in an agreement to fix the prices of England home and away Replica Shirts during the key selling period of the run up to and England's participation in the Euro 2000 tournament. Although most of the parties continued to price England Replica Shirts at High Street Prices, the OFT finds in this decision only that this Replica Shirts Agreement ended when Sports Soccer began discounting these shirts on 21 June 2000."

The Rule 14 stage

10. We should note that, prior to the adoption of the contested decision, the OFT issued what is known as a Rule 14 notice on 16 May 2002, and subsequently issued a supplementary Rule 14 notice on 26 November 2002, pursuant to Rule 14 of the Director's Rules (S.I 2000 no. 293). By virtue of that Rule, if the OFT intends to take a decision that the Chapter I prohibition has been infringed, the OFT is required to set out in a written notice the facts upon which the OFT relies, the matters to which objection is taken, the action proposed and the reasons for it: Rule 14(3). Pursuant to Rule 14 (5), (7) and (8) the OFT

must, before taking a decision, give the party concerned the opportunity to inspect the documents in the OFT's files, and to make written and oral representations.

11. In the present case, Allsports submitted written representations in response to the first Rule 14 notice of 16 May 2002, and written and oral representations in response to the supplementary Rule 14 notice of 26 November 2002. Annexed to the supplementary Rule 14 notice of 26 November 2002 were a number of statements relied on by the OFT, including a statement by Mr Ronnie of Umbro dated 12 July 2002 which, for reasons which it is unnecessary to explain for present purposes, has become known as "Ronnie III". It appears to be common ground that the case made by the OFT crystallised at the stage of the supplementary Rule 14 notice of 26 November 2002.

12. In its reply to the Rule 14 and supplementary Rule 14 notices Allsports did not choose to furnish to the OFT any witness statements to contradict the case that was then being made against it by the OFT. Although putting in issue the matters relied on by the OFT, it seems to the Tribunal, at first sight, that Allsports' response to the OFT at the Rule 14 stage did not go into much detail, or put forward a detailed positive case.

Allsports' Appeal

13. In its notice of appeal dated 1 October 2003 Allsports contests the factual findings made against it in the decision, essentially on the grounds that it did not enter into either of the agreements or concerted practices alleged by the OFT. In relation to the England Euro 2000 Agreement Allsports denies, in particular, that it was ever telephoned by Mr Ronnie of Umbro shortly after 24 May 2000, to the effect alleged by the OFT in paragraphs 167, 414 to 415 and 427 of the decision. In relation to the MU Agreement, Allsports denies, essentially, that it entered into any such agreement or concerted practice. Allsports denies, in particular, that any agreement or understanding was reached at the meeting at Mr Hughes' private home on 8 June 2000.

14. Allsports, as it is fully entitled to do, has now provided to the Tribunal, as annexes to its notice of appeal, detailed witness statements from Messrs Hughes (24 pages), Guest (5 pages), Patrick (9 pages), Knight (2 pages) and Ms Charnock (7 pages), who are all past or present executives of Allsports. Mr Hughes is the Chairman. Those witness

statements are, it seems to us, considerably more explicit than the material that was put before the OFT at the Rule 14 stage. In particular the denials made of Allsports' participation in the alleged agreements seem at first sight to be more direct and more explicit than was the case at the Rule 14 stage. Allsports relies in the appeal on all that evidence.

15. JJB, in its notice of appeal, similarly denies the facts alleged by the OFT. The appeals to the Tribunal by Allsports and JJB turn, therefore, largely on contested matters of fact.

16. In the present case, the oral hearing of the four appeals is set down for two weeks commencing 8 March 2004. The appeals of JJB and Allsports will be heard first. It is envisaged that a substantial part of that hearing will be occupied by the hearing of evidence. Allsports and JJB have each indicated that they wish to cross-examine Messrs. Ronnie and Fellone of Umbro, and Mr Ashley of Sports Soccer, on the various witness statements they have made. The OFT has indicated that it wishes to cross-examine Messrs Hughes, Guest and Ms Charnock of Allsports, and four witnesses who have provided witness statements on behalf of JJB.

The OFT's defence

17. The OFT's defence to Allsports' notice of appeal was served on 1 December 2003, and is supported also by a further witness statement by Mr Ronnie (known as Ronnie IV) which is dated 28 November 2003.

18. Paragraphs 8 to 9, 13 to 17 and 20 to 21 of the defence deal with the England Euro 2000 Agreement and read as follows:-

> "(a) The England Agreement
>
> 8. At §437 of the Decision, the OFT concluded that Allsports and others "all took part in an agreement to fix the prices of England home and away Replica Shirts during the key selling period of the run up to and England's participation in the Euro 2000 tournament". The OFT found that this agreement, which began on a date between 24 May and 2 June 2000, ended on 21 June 2000, when Sports Soccer began discounting these shirts.

9. The OFT's findings and anlysis in relation to the England Agreement are set out in§§ 412 to 436 of the Decision, to which the Tribunal is referred for their full contents. In summary:

   (a) The key facts relied upon by the OFT are set out at §§ 414 to 416. As regards Allsports in particular:

      (i) Following agreement between Umbro and Sports Soccer on 24 May 2000, Mr Ronnie of Umbro telephoned, amongst others, Allsports and received an assurance as to Allsports' pricing intentions for the England shirts: §§ 414 and 415 (b).

      (ii) Mr Ronnie and Mr Fellone of Umbro also telephoned other retailers at the same time. Mr Fellone telephoned, amongst others, Mr Knight of Blacks: § 415 (b).

      (iii) Mr Fellone faxed Debenhams on 2 June stating that "the other retailers" had agreed: § 415 (c).

      (iv) Mr Knight of Blacks telephoned Mr Ashley of Sports Soccer directly to obtain information from Mr Ashley that Sports Soccer had agreed with Umbro: § 415 (d).

      (v) On 2 June, and in the presence of Mr Ronnie, Mr Hughes of Allsports telephoned Mr Knight of Blacks asking the latter as to his intentions as to the pricing of the England Repica Kit: § 415 (f).

      (vi) With effect from 2 or 3 June 2000, the participating retailers increased or maintained the prices of England home and away Replica Shirts to or at High Street prices: § 415 (g).

      (vii) Umbro's May monthly management report records an agreement between the participating retailers, expressly naming Allsports, to sell adult England shirts at £39.99: § 415 (i).

   (b) The response of the parties is set out at §§ 417 to 425. In particular Allsports' contentions before the OFT are set out at §§ 417 to 420. Allsports' response was:

      (i) Its pricing for England shirts at the time is not evidence of collusion.

      (ii) It questioned the need for Umbro to telephone Allsports to confirm its retailing intentions, if Allsports had been exerting pressure on Umbro to secure higher retail prices from Sports Soccer.

(iii) It denied Mr Ronnie's account of the existence and content of the telephone call between Mr Hughes and Mr Knight on 2 June.

(iv) The Umbro May monthly management report may have been exaggerated. Allsports discussed its retail pricing intentions with Umbro in order to agree its wholesale prices. The receipt of pricing information from Allsports from order forms was merely a matter of administrative convenience.

(c) The OFT's conclusions are set out at § 426 to 436. The OFT's response to the particular contentions made by Allsports was:

(i) A mere increase in demand was not the explanation for the parties' simultaneous pricing of England Replica Shirts at the time; § 426.

(ii) The purpose of Umbro making phone calls would be to confirm with all retailers what their pricing intentions would be and to give comfort to retailers about assurances being given by other retailers: § 427.

(iii) There was no reason to doubt Mr Ronnie's account of the telephone conversation between Mr Hughes and Mr Knight on 2 June: § 428.

(iv) The OFT did not accept that the Umbro May monthly management report was exaggerated: § 429 referring to § 329.

(v) The giving of information by retailers to Umbro about pricing intentions was not innocent or proper. In view of Mr Hughes' publicly stated concerns about discounting, Allsports' communication of retail pricing to Umbro at least facilitated Umbro's pricing policy: § 430.

(2) Allsports' Appeal

13. In its Notice of Appeal, Allsports challenges the Decision both as to infringement and as to penalty.

14. During the course of the administrative stage, Allsports provided written representations on the Rule 14 Notice and on the Supplementary Rule 14 Notice. However no witness statements were supplied by any Allsports employee. Moreover Allsports declined the opportunity to make oral representations in response to the Rule 14 Notice and Mr Hughes, its Chairman, at no stage appeared personally at the OFT.

15. Now, in this appeal, Allsports, for the first time, puts forward and relies upon witness statement evidence from its key employees at the relevant

time, and in particular from its Chairman, Mr David Hughes. This is the first full account directly from those involved at Allsports. Moreover, Mr Hughes himself discloses, for the first time, the contents of his personal diary for the key dates in May and June 2000. Far from undermining the OFT's case, this diary contains material which further strengthens the case against Allsports.

16. As to infringement, Allsports contends that it did not participate in either the England Agreement or in the MU Agreement as alleged by the OFT in the Decision.

    (a) The England Agreement

17. As regards the England Agreement, Allsports contends that the OFT's case that it participated in the Agreement by virtue of a telephone call made by Mr Chris Ronnie of Umbro on a date after 24 May 2000 is wrong on the facts.

    (a) no such telephone call was made;
    (b) there was no reason for such a phone call to be made;
    (c) the evidence that it was made is not to be relied upon;
    (d) there are other reasons why Allsports, Sports Soccer and others priced England adult shirts at £39.99 from 2 June to 21 June 2000;
    (e) once the Tribunal does not accept Mr Ronnie's evidence as to the phone call, the appeal must succeed; it took no part in the England Agreement in any other way.

    …

(3) <u>The OFT's case on appeal</u>

The OFT's case on infringement

20. On this appeal, and on the basis of the evidence referred to in paragraphs 27 and 28 below, the OFT relies upon the findings and analysis in the Decision summarised in paragraphs 8 to 11 above, subject to the following observations:

21. As regards the England Agreement:

    (a) The phone call from Mr Ronnie to Allsports was made either to Mr Guest or Mr Hughes and in the working week commencing 30 May. In any event the precise date or recipient of the call need not be determined.

    (b) In the case of Allsports and JJB, Mr Ronnie has now clarified that the telephone calls he made after the meeting on 24 May and before 2/3 June were made to inform those retailers of the fact that in response to Allsports and JJB pressure and complaints, Umbro had managed to obtain Sports Soccer's agreement to increase its prices for England home and away Replica Shirt whilst England remained

in the championship. Mr Ronnie warned Allsports and JJB not themselves to discount as Sports Soccer would use any excuse not to abide by its agreement.

(c) Accordingly, to this limited extent, the OFT's findings, in so far as they refer to assurances given by Allsports, at §§ 414, 415 (b) and 427 (in part) are not adhered to. Nevertheless, the OFT's findings at §427 (and §431 as regards JJB) that the purpose of the phone calls to Allsports and to JJB was to give them comfort about assurances being given by their competitors is correct.

(d) The receipt by Allsports, in the course of a phone call from Mr Ronnie, of confirmation as to Sports Soccer's agreement with Umbro to raise prices amounts to participation by Allsports in an agreement or a concerted practice, within the meaning of the Chapter I prohibition, as to the pricing of the England Replica Shirt at the time of Euro 2000.

(e) Allsports' contention that the OFT's case is entirely dependent upon accepting Mr Ronnie's evidence as to the telephone call to Allsports is incorrect:

(i) That such a phone call to Allsports was made is supported by other strong circumstantial evidence: see all the matters listed at paragraphs 9 (a) (ii) - (vii) above.

(ii) Further, and in any event, even if the Tribunal were not satisfied that the telephone call between Mr Ronnie and someone at Allsports did take place, nevertheless other evidence is sufficient to establish that Allsports was party to an agreement or concerted practice as to the pricing of the England Replica Shirt at the time of Euro 2000, by virtue of Allsports' complaints, pressure and its knowledge. In this regard, as well as the matters referred at paragraphs 9 (a) (iii) - (vii) above, the OFT refers to the evidence that Allsports, and Mr Hughes in particular, was most concerned about other retailers discounting Replica Shirts, including the England shirt; Mr Hughes' words at the Golf Day dinner; his various diary entries about discounting and agreeing prices (including *specifically* the England shirt)…"

Allsports' application

19. Turning now to Allsports' present application to the Tribunal, Allsports applies for an order striking out the OFT's defence and/or giving judgment for Allsports on one of the two principal allegations made against it, namely Allsports' participation in the Euro 2000 England Agreement.

20. Allsports argues, essentially, that in paragraph 21 of the defence the OFT (i) has abandoned its case on the England Euro 2000 Agreement as set out in the decision; and (ii) has advanced two "new cases". According to Allsports, it would be wrong in principle, contrary to the procedural scheme of the 1998 Act, and unfair, for the Tribunal to permit those two new cases to be advanced. In any event, submits Allsports, parts of the new cases are too diffuse and vague to be dealt with.

Allsports' submissions

21. According to Allsports, the first "new case" made by the OFT is to change the nature of the telephone call made by Mr Ronnie to Allsports on which Allsports' alleged participation in the England Euro 2000 Agreement is based. Whereas paragraph 414 of the decision states that the telephone calls made by Mr Ronnie and Mr Fellone were made to each of the major retailers "in order to make sure that they would price the England replica shirts at High Street prices in the run up to and during England's participation in Euro 2000", paragraph 21(b) of the defence now states that Mr Ronnie's phone calls to Allsports and JJB were "made to inform those retailers of the fact that, in response to Allsports and JJB pressure and complaints, Umbro had managed to obtain Sports Soccer's agreement to increase its prices for England home and away Replica Shirt whilst England remained in the championship".

22. According to Allsports, that change results from a fundamental alteration in the evidence of Mr Ronnie. At paragraph 32 of Ronnie III, Mr Ronnie said:

> "32. Mike Ashley (of Sports Soccer) had stated, in the 24 May meeting, that if any other retailer discounted the England shirts he would follow suit. Phil Fellone and I therefore phoned the major retailers, <u>to ask them to agree to maintain prices on the England home kit</u> during the Euro 2000 tournament. I telephoned JJB and Allsports … Phil Fellone [telephoned others] (underlined emphasis added by Allsports).
>
> 33. JJB and Allsports agreed and I understand the other retailers contacted by Phil Fellone agreed …"

23. However, at paragraph 27 of Ronnie IV, Mr Ronnie now says:

> "I did not ring Allsports and JJB "to ask them to agree to maintain prices on the England home kit". There was no need to extract any formal agreement from those particular retailers, as they both were pricing at £39.99 anyway. The purpose of the call to them was to inform them that Umbro had got a guarantee from Sport Soccer. I warned them not to undercut the £39.99 price as Sports Soccer would use any excuse for retaliation. Once Sport Soccer had agreed that price, and these other retailers (Allsports and JJB) had been told this, they would not go below it."

24. That, submits Allsports, constitutes an abandonment, indeed a complete reversal, of the case made against Allsports in paragraph 414 of the decision as regards the telephone call made by Mr Ronnie. In particular, it is no longer alleged that Allsports "agreed" to anything.

25. In addition, submits Allsports, the OFT has now added a key new element in the case against Allsports, not found in the decision, namely that the OFT's case now is that Mr Ronnie's telephone calls were made "in response to Allsports … pressure and complaints".

26. According to Allsports, "Retailer pressure" from Allsports (unlike JJB) forms no part of the case against Allsports in the decision. The OFT is now seeking to introduce "complaints and pressure" from Allsports in an attempt to establish against Allsports an agreement or concerted practice different from and/or inconsistent with the case made in the decision. According to Allsports, paragraph 427 of the decision was an "afterthought" which does not alter the fundamentally new nature of the case now made against Allsports.

27. Moreover, submits Allsports, paragraph 21(e)(ii) of the defence sets out, in the alternative, a second "new case" against Allsports, namely that:

> "… even if the Tribunal were not satisfied that the telephone call between Mr Ronnie and someone at Allsports did take place, nevertheless other evidence is sufficient to establish that Allsports was party to an agreement or concerted practice as to the pricing of the England Replica Shirt at the time of 2000, by virtue of Allsports' complaints, pressure and its knowledge.

28. According to Allsports, there is no trace of that alternative new case in the decision. In addition, the alternative new case relies wholly on Allsports' complaints and pressure which are not alleged in the decision either.

29. Relying on *Argos and Littlewoods v. OFT* [2003] CAT 16 ("*Argos*") at paragraphs 61 to 67, Allsports submits that it is not now open to the OFT fundamentally to alter its case as to the nature of the agreement alleged against Allsports, and to add the new allegations as to retailer pressure. Moreover, the suggestion as to "retailer pressure" was made by the OFT at the Rule 14 stage, but abandoned in the decision. On that basis the Tribunal should strike out paragraph 21 of the defence and give judgment for Allsports as regards the alleged England Euro 2000 Agreement. It would be wrong to remit the matter to the OFT under paragraph 3(2) of Schedule 8 of the 1998 Act.

30. In addition, Allsports objects to the inclusion in the defence of various specific allegations of "pressure", which were either not made in the decision, or are referred to in the decision in a wholly different context. These specific alleged examples, together with the relevant paragraphs in the defence, are the letter of 20 April 1999 (paragraphs 47 and 55); an approach by Mr Guest to Mr Ronnie in May 2000 about JD (paragraph 59 (a)); an expression of concern by Mr Hughes to Mr Ronnie about discounting by Blacks, apparently at the end of May 2000 (paragraph 59 (b)); Mr Hughes' comments at the Golf Day on 25 May 2000 (paragraph 47); the holding back by Allsports of certain orders (paragraph 58) and a meeting between Mr Hughes and Mr Ronnie on 2 June 2000 (paragraphs 47 and 53).

31. According to Allsports, it is not open to the OFT to rely on these specific alleged examples. Those examples are not referred to in the decision. Moreover allegations of retail pressure were raised at the Rule 14 stage, but were abandoned in the decision. The OFT cannot now rely on material that was before it at the administrative stage but is not relied on in the decision.

32. Allsports stresses that Allsports' notice of appeal did not deal with retailer pressure because it was no longer alleged in the decision.

33. Although it dealt with the letter of 20 April 1999 in its defence, Allsports submits that that was in a quite different context. The approach by Mr Guest to Mr Ronnie about JD is mentioned at paragraph 60 of Ronnie III, but was not relied on in the decision. For that reason Mr Guest's witness statement does not deal with it. Mr Hughes' alleged expression of concern about Blacks does not occur in either Ronnie III or Ronnie IV, and was not mentioned at the Rule 14 stage or in the decision. Hence Mr Hughes' witness statement does not deal with it. As regards Mr Hughes' comments at the Golf Day as an example of retailer pressure, the quotation from paragraphs 37 to 40 of Ronnie III, at paragraph 173 of the decision, was not adopted by the OFT. In any event, the Golf Day comments relate only to the MU Agreement, not the England Euro 2000 Agreement. The alleged holding back of orders by Allsports was not mentioned at the Rule 14 stage, or in the decision, or in Ronnie III or Ronnie IV, and is not dealt with by Allsports in its evidence. As to the meeting between Mr Hughes and Mr Ronnie on 2 June 2000, the decision disavowed any suggestion of retailer pressure by Allsports. The extracts from paragraphs 41 to 46 of Ronnie III set out at paragraph 175 of the decision specifically omit all the references that could suggest pressure from Allsports, notwithstanding that, at the Rule 14 stage, paragraph 46 of Ronnie III was expressly relied on as "retailer pressure". Mr Hughes' witness statement does not deal with these matters, since they were not pursued in the decision.

34. Allsports further objects to the generalised assertions of retailer pressure now relied on in the defence. Similar assertions were made in the supplementary Rule 14 notice (see paragraph 20 of Ronnie III) but were not pursued in the decision. Paragraphs 8 to 11 and 13 of Ronnie IV are simply a rehash of these abandoned allegations. Similarly any allegation of pressure based on Allsports' position as official retailer to MU was not pursued in the decision, although raised at the Rule 14 stage. Paragraph 17 of Ronnie IV refers to complaints by JJB, not Allsports. In any event, submits Allsports, the generalised complaints of retailer pressure in paragraph 21 of the defence are too vague to enable Allsports to deal with them. Such lack of specificity at the appeal stage is impermissible.

35. According to Allsports, if paragraph 21 of the defence stands, there will have to be extensive re-proofing of witnesses, and possible disclosure of further documents by Umbro, with the result that the date for the hearing is unlikely to be effective.

36. In its oral submissions, Allsports emphasised that the notice of appeal proceeds on the basis that no finding of retailer pressure was made against Allsports in the decision. The vague assertions of pressure in the Rule 14 notice, since abandoned, cannot now be turned into findings, nor should the OFT now be allowed to rebuild the decision on the basis of miscellaneous material in the administrative file. It would be wrong to permit the OFT to raise a matter which, by definition, the notice of appeal could not address. The notice of appeal would have been very different had Allsports known of the pressure case now made by the OFT. This matter is crucial to Allsports, since without the allegation of pressure the OFT is no longer in a position to prove any infringement as regards the England Euro 2000 Agreement: see Case T-25/95 *Cimenteries CBR and others v. Commission* [2000] ECRII-491, at paragraphs 1848 to 1850. If the OFT's approach is correct, a prospective appellant would never know whether to appeal. It is not acceptable that an appellant can be presented with a new case which is, essentially, a "construct by counsel" rather than a formal finding in the decision.

37. As regards the OFT's application to submit an additional witness statement by Mr May of Umbro, Allsports submits that that statement raises new allegations of retailer pressure and should not be admitted, for the reasons already given. The same applies to certain suggested amendments to the OFT's defence.

The OFT's submissions

38. The OFT explains that, following the service of Allsports' witness statements, in particular that of Mr Hughes, the OFT went back to Mr Ronnie and took a further statement, which is Ronnie IV. Paragraph 21 of the defence simply reflects Mr Ronnie's frank response in Ronnie IV to Mr Hughes' statement. Plainly it was necessary for the OFT to plead its case so as to reflect Mr Ronnie's evidence in Ronnie IV and to correct so far as necessary Ronnie III.

39. As regards the substance of Mr Ronnie's telephone call, the OFT submits that the change is minor as between paragraphs 32 to 33 of Ronnie III and paragraphs 22 to 28 of Ronnie IV, and amounts to a simple clarification.

40. Even taken alone, the case about the telephone call as now pleaded in the defence on the basis of Ronnie IV is sufficient to establish an infringement against Allsports, and is not dependent on proving "retailer pressure": see *Cimenteries*, cited above, at paragraphs 1848 - 1850.

41. As regards "retailer pressure", this was raised at the Rule 14 stage. In the decision the OFT did not "abandon" the allegation of retailer pressure. It was simply unnecessary to make any findings about it, since Allsports did not directly address the issue of the phone call at the Rule 14 stage. Only now, in Mr Hughes' statement, that that issue has been the subject of a direct denial. In any event, paragraph 21 of the defence does not differ materially from paragraph 427 of the decision.

42. According to the OFT, there is a clear public interest in this matter proceeding to a hearing on the basis of the evidence now before the Tribunal, and there is no reason of principle or practice why that should not be done. The amount of further proofing of witnesses is minimal, and no further documents are likely to be relevant. There is no unfairness to Allsports since almost all the matters in question were either addressed by Allsports at the Rule 14 stage, or are alluded to in its existing witness statements.

43. According to the OFT, its approach is not contrary to the Tribunal's existing case law in the two *Napp* judgments (*Napp*: *preliminary issue* [2001] CAT 3, and *Napp: substance* [2002] CAT 1), *Aberdeen Journals (No.1)* [2002] CAT 4 and *Argos*, cited above: see in particular *Argos* at paragraphs 77 and 82. None of those cases involved a bona fide correction by a witness of a previous statement, made in the context of detailed new witness material produced by an appellant for the first time, and in relation to matters that have, in their essentials, been put in the administrative procedure, even if no express findings were made in the decision. There is no unfairness to Allsports in the approach adopted in paragraph 22 of the defence, and it would be wholly artificial to exclude the matters there raised or to remit the matter.

44. As to the specific instances of retailer pressure referred to in the defence, the OFT makes detailed comments on each allegation relied on in an annex to its submissions. The OFT points out, notably, that both the letter of 20 April 1999 and the alleged conversation between Messrs Guest and Ronnie concerning the JD promotion are dealt with in Mr

Guest's existing witness statement. Mr Hughes' concern about discounting by Blacks in the South East occurs in earlier statements by Mr Ronnie prepared for the purposes of Umbro's leniency application. That evidence raises a short point which Mr Hughes could quickly deal with. Mr Hughes has already dealt with the Golf Day in his witness statement. The holding back allegation is in Umbro's May 2000 monthly management report, which is in the OFT file. That report rebuts Allsports' allegation at paragraph 6.5 of the notice of appeal that there is no evidence of retailer pressure in Umbro's contemporary documentation. The passage in question is also dealt with in Ms Charnock's evidence. The meeting of 2 June 2000 is dealt with in Mr Hughes' witness statement and was discussed in Ronnie III which has been available throughout the proceedings. Other points raised by Allsports go to the merits, and can only be addressed after the evidence has been heard.

45. As far as the allegedly "generalised assertions" of retailer pressure are concerned the general matters alleged, particularly in paragraph 20 of Ronnie III and paragraph 11 of Ronnie IV, still constitute admissible evidence which the OFT is entitled to adduce.

46. Mr May's evidence is relevant for the same reasons, and responds to Ms Charnock's evidence on behalf of Allsports

The statutory framework

47. The relevant statutory provisions governing the procedure to be followed by the OFT and the Tribunal are set out in *Argos*, cited above, at paragraphs 8 to 21 and 38 to 48, to which reference should be made. We remind ourselves, briefly, that the combined effect of section 31 of the 1998 Act and Rule 14 of the Director's Rules is that, prior to adopting a decision, the OFT must give a person against whom it is proposed to take a decision of infringement a written notice, commonly referred to as a Rule 14 notice, stating the facts upon which the OFT relies, the matters to which the OFT has taken objection, the action proposed, and the reasons for it. The person concerned then has an opportunity to reply to the Rule 14 notice in writing and orally. Pursuant to Rules 15 and 17 of the Director's Rules, the OFT's decision must also set out the facts upon which it is based and the reasons for it.

48. An appeal to the Tribunal lies under section 46 (1) of the 1998 Act "against, or with respect to, the decision". Pursuant to Schedule 8, paragraph 2, of the 1998 Act, as amended, the notice of appeal must, notably,

> "set out the grounds of appeal in sufficient detail to indicate …
>
> (b) to what extent (if any) the appellant contends that the decision against, or with respect to which, the appeal is brought was based on an error of fact or was wrong in law; …"

49. As far as the powers of the Tribunal are concerned, paragraph 3 of Schedule 8 to the 1998 Act 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,
> …
> (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 by 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."

50. Rules 19 to 24 of the Tribunal's Rules (S1 2003 no. 1372) give the Tribunal very wide powers of case management, including powers to order disclosure of documents, hear witnesses and permit cross-examination.

The Tribunal's existing case law

51. In *Napp: preliminary issue* [2001] CAT 3 the Tribunal said this at paragraphs 75 to 81 on the question of the OFT adducing new evidence before the Tribunal:

"75. As regards the judicial stage, we have already set out the provisions of the Act and the Rules which provide that the appeal is a full appeal on the merits, conducted by reference to witnesses and documents, under the discretionary control of the Tribunal. The ample nature of that appeal seems to us to equate to that under consideration in *Lloyd v McMahon* [1987] 2 WLR 821 where the House of Lords indicated that a court enjoying such a jurisdiction could in certain circumstances legitimately correct unfairness which may have occurred in the administrative procedure below without necessarily quashing the decision concerned: see Lord Bridge at pp884F to 885C and Lord Templeman at p.891 E-G.

76. In that connection we note that the appellant is not limited to placing before this Tribunal the evidence he has placed before the Director but may expand, enlarge upon or indeed abandon that evidence and present a new case. Since there is no right to test the evidence of witnesses before the Director, it is at this judicial stage of the proceedings that the applicant may apply to test by cross-examination the evidence of all relevant witnesses against him.

77. We doubt, however, whether exactly the same liberal approach to the submission of new evidence can be applied to the Director. In our view the exercise of the discretion to allow new evidence by the Director at the appeal stage should take strongly into account the principle the Director should normally be prepared to defend the decision on the basis of the material before him when he took that decision. It is particularly important that the Director's decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act, with important legal consequences, which in principle fixes the Director's position. In our view further investigations after the decision of primary facts, in an attempt to strengthen by better evidence a decision already taken, should not in general be countenanced.

78. Were it otherwise, the important procedural safeguards envisaged by Rule 14 of the Director's Rules would be much diminished or even circumvented altogether. There would be a risk that appellants could be faced with a "moving target". The Tribunal itself would be in difficulties if, instead of determining the appeal essentially by reference to the merits of the decision in the light of the material relied on by the Director at the time, the Tribunal was effectively adjudicating on a "bolstered" version of the decision. The Director himself concedes that he cannot 'make a new case' before the Tribunal.

79. For these reasons our provisional conclusion is that there should be a presumption against permitting the Director to submit new evidence that could properly have been made available during the administrative procedure.

80. On the other hand, there may well be cases where the Tribunal is persuaded not to apply the presumption we have indicated. As stated in the *Guide*, the procedures of this Tribunal are designed to deal with cases justly, in close harmony with the overriding objective in civil litigation under Rule 1.1 of the Civil Procedure Rules. That includes, so far as practicable, ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate, proceeding expeditiously, and allotting to the case an appropriate share of the court's resources. Those considerations may militate against permitting new evidence by the Director, but in some circumstances considerations of fairness may point in the other direction. An obvious example is where a party makes a new allegation or produces a new expert's report which the Director seeks to counter.

81. One factor that may well be relevant in this connection is the fairness of the appeal process itself. In accordance with the Act, the first occasion on which the Decision first

> receives full public judicial scrutiny is in this Tribunal. An appellant will often have submitted voluminous pleadings, witness statements, and documents unconstrained by the evidence presented to the Director. The Director, at the administrative stage, may not always be able to foresee (although of course he should endeavour to do so) from what direction or in what strength an attack might come at the appeal stage. A situation whereby the appellant could always have a "free run" before the Tribunal, but the Director was always confined to the material used in the administrative procedure could lead to a significant lack of balance and fairness in the appeal process."

52. The Tribunal made similar observations in its judgment on the substance in *Napp* [2002] CAT 1 at paragraphs 116 to 119 and 133 to 135. It is to be noted that in *Napp* itself the Tribunal permitted the Director to adduce new evidence, essentially in rebuttal of a more detailed case made by the appellant in the appeal and to complete the evidential picture: paragraphs 114 to 126 of that judgment. The Tribunal also exercised its own powers to order the disclosure of further new documents, which were in fact of considerable importance in determining the outcome of that case: see *Napp* at paragraphs 91 to 82, 127 to 130, and 311 to 333.

53. In *Aberdeen Journals (No.1)* the issue was whether the Director could rely before the Tribunal on certain documents which had not been put to the defendant at the Rule 14 stage, for the purpose of establishing the relevant market. In declining to allow the Director to do so, the Tribunal said, notably:

> 169. However, it seems to us that the situation in the present case is not identical to the situation with which the Tribunal was concerned in *Napp*. The additional evidence adduced by the Director in *Napp* was primarily directed to rebutting various detailed allegations made by the appellants in that case (see paragraphs 121 to 126 of that judgment), or concerned material that came to light after the Director had taken his decision which went to rebuttal issues and completed the evidential picture (paragraphs 307 et seq of that judgment).
>
> 170. In the present case, by contrast, the documents on which the Director relies in the defence go directly to an essential part of the case on relevant market which it is up to the Director to establish in the Decision and to put in the course of the administrative procedure. Aberdeen Journals did not know the Director was relying on these documents until the stage when the Director's defence was lodged before the Tribunal.
>
> 173. These factual circumstances distinguish this case from *Napp*, where it was not found by the Tribunal that the material admitted as further evidence should have been put during the administrative procedure. The situation in this case is that Aberdeen Journals has not had the opportunity to comment, during the administrative procedure, on additional documents on which the Director now relies to support a primary finding in the Decision to establish his case on the relevant market. As the Tribunal said in *Napp*, at

paragraph 116 “it is of obvious importance that, in the administrative procedure, the provisions of Rule 14 of the Director’s Rules are properly observed”. Moreover, the documents have not been included in the Decision either, so could not have been addressed by Aberdeen Journals in framing its notice of appeal.

54. The Tribunal concluded at paragraph 178:

> 178. Aberdeen Journals has decided to take a formal objection to the documents in question. In those circumstances, for the reasons given above, we do not think we should take the documents in question into account for the purpose of upholding an essential element in the Decision, namely the definition of the relevant market, in circumstances where (i) the documents are not referred to in the Decision nor in a Rule 14 Notice or equivalent document; and (ii) no convincing reason is advanced for that omission.

55. However, in *Aberdeen Journals (No.1)* the Tribunal considered that it was in the interests of justice that the procedure should continue, and remitted the matter to the Director with a view to a continuation of the administrative procedure. In due course a further decision was adopted which was the subject of the Tribunal’s judgment in *Aberdeen Journals (No. 2)* [2003]: CAT 11.

56. In *Argos*, cited above, the OFT sought to rely on the appeal on three witness statements that had not been relied on at the Rule 14 stage in order to establish essential elements of the allegedly infringing agreements or concerted practices. At paragraph 66 of *Argos* the Tribunal said:

> 66. Turning to the principles to be distilled from the *Napp* cases and *Aberdeen Journals (No. 1)*, we note the following:
>
> (1) The Director should normally be prepared to defend the decision on the basis of the material before him when he took the decision. The decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act which fixes the Director’s position. An attempt to strengthen by better evidence a decision already taken should not in general be countenanced: *Napp: preliminary issue* at [77].
>
> (2) Were it otherwise, the important procedural safeguards envisaged by Rule 14 of the Director’s Rules would be much diminished or even circumvented altogether. There would be a risk that appellants would be faced with a “moving target”. The Tribunal would not be adjudicating on the decision as taken, but on a “bolstered version”: *Napp: preliminary issue* at [78]; *Aberdeen Journals (No. 1)* at [176].
>
> (3) There is therefore a presumption against permitting the Director to submit new evidence that could have been made available in the administrative procedure: *Napp: preliminary issue*, at [79]; *Napp: substance*, at [133].
>
> (4) That presumption may be rebutted, notably, where what the OFT wishes to do is to

adduce evidence in rebuttal of a case made on appeal, as distinct from evidence that is intrinsic to the proof of the infringement alleged in the decision: *Napp: preliminary issue*, at [83]; *Napp: substance* at [119]; *Aberdeen Journals (No. 1)*, at [169].

(5) On the other hand, where the new evidence goes to an essential part of the case which it was up to the OFT to make in the decision, the Tribunal will not admit evidence that was not put to the parties in the course of the Rule 14 procedure: *Aberdeen Journals (No. 1)* at [169] to [178]. This approach applies where the evidence in question goes to "an essential part of the case … which it is up to the Director to establish", or is relied on "to support a primary finding in the decision", or is sought to be adduced "for the purpose of upholding an essential element in the decision": *Aberdeen Journals (No. 1)*, at [170], [173] and [178] respectively.

(6) The Tribunal should resist a situation in which matters of fact, or the meaning to be attributed to particular documents, are canvassed for the first time at the level of the Tribunal, when they could and should have been raised in the administrative procedure and dealt with in the decision: *Aberdeen Journals (No. 1)*, at [177].

(7) If there is relevant evidence sought to be adduced on appeal which has not been the subject of the Rule 14 procedure, the Tribunal has power to remit the matter to the Director for the Rule 14 procedure to be followed, if satisfied that the interests of justice so require: *Aberdeen Journals (No. 1)*, at [190] to [197].

57. In *Argos* the appellants had advanced no new evidence beyond that already relied on at the Rule 14 stage. The new witness statements introduced by the OFT were, on the other hand, material new evidence of infringement, and were likely to be a central feature of the OFT's case before the Tribunal: see paragraphs 68 to 71 of *Argos*. However, having declined to admit the new statements, the Tribunal considered that it was in the interests of justice that the matter should proceed, and remitted the case to the OFT with a view to the Rule 14 procedure being resumed. In due course the OFT adopted a further decision, which is now pending on appeal before the Tribunal. In taking that course the Tribunal said, notably, at paragraph 82 of *Argos*:

> "Thirdly, in our view the Tribunal needs to take account of the interests of justice and the wider public interest. Those interests include not only the interests of the appellants in a "fair trial" but the interest of the OFT in establishing infringements of the Chapter I prohibition and the public interest that the Chapter I prohibition should be fairly and properly enforced. The present case involves serious allegations against two nationally known retailers, and has wider ramifications, not only for the appellants, but also, notably, for Hasbro and for consumers. The impact of the case in retailing generally in the United Kingdom may be not inconsiderable. In those circumstances it does not seem to the Tribunal that it is in the interests of the proper administration of justice, or in the wider public interest, for this appeal to proceed on the basis that the Tribunal cannot see the full picture, because apparently highly material evidence is excluded."

The Tribunal's approach in this case

58. Against the background of that case law, we observe, first, that in this emerging jurisdiction the Tribunal regularly finds itself confronted with procedural issues in factual circumstances that have not previously arisen. In such a context, although the Tribunal is endeavouring to develop a consistent body of case law, the Tribunal's previous decisions are not necessarily determinative of new problems, nor is the Tribunal's case law fully developed at this early stage of its existence.

59. That said, it seems to us to emerge from *Napp*, *Aberdeen Journals (No. 1)* and *Argos* that the Tribunal must attach particular importance to three considerations: (1) that the statutory procedural scheme must, so far as possible, be respected; (2) that the procedure taken as a whole, and the procedure before the Tribunal in particular, must be fair; and (3) that the public interest in the proper enforcement of the Chapter I and Chapter II prohibitions must be given due weight. In that latter regard it is to be noted that even where the Tribunal has found a procedural error, as in *Aberdeen Journals (No. 1)* and *Argos*, the Tribunal has given the OFT an opportunity to correct that procedural error, rather than entering immediate final judgment for the defendant.

60. It is equally apparent from the three cases so far decided by the Tribunal that a balance has to be struck between the various competing considerations in question, avoiding undue technicality, while at the same time maintaining procedural fairness. Where that balance is to be struck will depend on the circumstances of the particular case. *Napp*, where, in the event, a very considerable body of additional evidence was admitted on the appeal, fell on one side of the line. *Aberdeen Journals (No. 1)* and *Argos*, which both involved the failure to include essential elements of the OFT's case in either the Rule 14 notice, or the decision, fell the other side of the line.

61. In deciding where, in an individual case, the line is to be drawn, it is also important to bear in mind that an appeal before the Tribunal, especially an appeal such as the present involving witness evidence, is by its nature a dynamic process. In the course of the appeal the appellant may, as here, produce further witness statements. In responding to those statements, the OFT may wish to adduce new elements. The Tribunal may, as here,

order the disclosure of further documents, not available at the administrative stage, or may itself ask for further documents, as in *Napp*. Witnesses giving oral evidence may say things under cross-examination which form part of the Tribunal's record but which, by definition, were not part of the administrative procedure. By this natural process of litigation new facts may emerge, or existing facts may assume a greater (or less) relevance than was first supposed. It is in our view inevitable that matters will often be gone into in more detail on appeal than was possible at the administrative stage, particularly since at that stage the OFT has no power to compel witnesses or to cross-examine. As a matter of general approach, we do not think we should seek artificially to limit or inhibit a deeper development of the case at the appeal stage, always provided that the basic procedural framework, and the overriding principle of fairness, are respected.

62. In our view, it is particularly important that we should not artificially limit the development of the evidence at the appeal stage in a case where, for whatever reason, an appellant has not put in witness statements at the Rule 14 stage and then seeks to do so for the first time before the Tribunal. In those circumstances, in our view fairness requires that the OFT should have a certain latitude to develop its case in response to that new evidence, always provided that the Rule 14 procedure has been properly followed. Were it not so, the appeal process could become "lopsided", to the undue advantage of appellants who, for whatever reason, choose not to put in evidence at the Rule 14 stage.

63. We also consider that, in a case such as the present, we should be cautious about making interlocutory rulings touching on evidential questions when that evidence is yet to be heard.

The present case

64. Turning to the situation in the present case, the Tribunal is faced with new factual circumstances in which it must endeavour to apply the existing case law. In our view the issues can be conveniently analysed under three headings: (1) Mr Ronnie's telephone conversation; (2) Retailer pressure; and (3) the OFT's alternative case, at paragraph 21 (e) (ii) of the defence, advanced on the alternative basis that no telephone conversation is proved to have taken place.

65. We emphasise, however, that for obvious reasons we wish to say as little as possible at this stage about the underlying facts of this case, or as to the correctness, weight or relevance of any particular evidence regarding the factual issues we may ultimately have to consider. This being, in effect, an application for summary judgment, what we have to decide at this stage is whether, as a matter of law or procedural fairness, the OFT should be prevented from relying on the matters referred to in paragraph 21 of the defence. We have absolutely no view at present as to the underlying merit of the case there pleaded.

Mr Ronnie's telephone conversation

66. In paragraphs 31 to 33 of Ronnie III, Mr Ronnie said this:

> "31. On Friday 26 May 2000 Sports Soccer increased the price of the England shirts to £40. I remember this because Mike Ashley made every area manager call me on the Friday night to confirm the price of the shirts. I had a lot of messages from Sports Soccer area managers on my mobile phone.
>
> Other retailers May 2000
>
> 32. Mike Ashley had stated, in the 24 May meeting, that if any other retailer discounted the England shirts he would follow suit. Phil Fellone and I therefore phoned the major retailers, to ask them to agree to maintain prices on the England home kit during the Euro 2000 tournament. I telephoned JJB and Allsports; Phil Fellone telephoned JD Sports, Debenhams, First Sport and John Lewis.
>
> 33. JJB and Allsports agreed, and I understand that the other retailers contacted by Phil Fellone agreed, with the exception of JD Sports' promotion of the England shirt (see further below at §§ 60-64), and Debenhams which refused to withdraw the England kit from its Blue Cross sale (see witness statement of Phil Fellone)."

67. In paragraphs 23 to 27 of Ronnie IV, Mr Ronnie said this:

> 23. I would like to clarify a point made in paragraph 32 of my OFT statement and to reply to David Hughes' and David Whelan's version of events.
>
> 24. I did call Allsports and JJB to tell them that Sports Soccer had agreed to launch the shirt at £39.99. Obtaining Sports Soccer's agreement to such an increase was a considerable "result" for Umbro, which I relayed to the retailers in response to their persistent complaints about Sports Soccer's discounting and the need to do something about it. I also informed them of our achievement in an effort to secure JJB and Allsports' commitments to

> supporting Umbro on a wider range of products. I definitely called Allsports as they had been as vocal as JJB about the pricing of the product.
>
> 25. I cannot now remember exactly who I spoke to at Allsports. My instinct tells me that I would have spoken to Michael Guest as he was more involved in the day-to-day running of the replica kit business within Allsports. I cannot comment on whether he told David Hughes or not.
>
> 26. My recollection is that I rang Duncan Sharpe at JJB to inform him that Sports Soccer had given us a price guarantee.
>
> 27. So far as I was concerned, the task I had to carry out was somewhat different from Phil Fellone's, as described at paragraph 28 below. I did not ring Allsports and JJB "to ask them to agree to maintain prices on the England home kit". There was no need to extract any formal agreement from those particular retailers, as they were both pricing at £39.99 anyway. The purpose of the call to them was to inform them that Umbro had got a guarantee from Sports Soccer. I warned them not to undercut the £39.99 as Sports Soccer would use any excuse for retaliation. Once Sports Soccer had agreed that price, and these other retailers (Allsports and JJB) had been told this, they would not go below it."

68. First, we have no reason to doubt the OFT's explanation that Ronnie IV came into existence in the course of the preparation, on behalf of the OFT, of witness evidence in response to the extensive witness evidence served for the first time by Allsports in this appeal.

69. Secondly, while Mr Ronnie may or may not be cross-examined on the difference between Ronnie III and Ronnie IV, and how that difference came about, it seems to us that, at this stage, we must assume, for the purposes of this application only, that Ronnie IV represents the evidence that Mr Ronnie proposes to give in the witness box and, in respect to the disputed telephone call, represents a bona fide modification or clarification of what he said in Ronnie III.

70. Thirdly, in the course of litigation it is not unusual that a witness may honestly wish to modify a previous statement, particularly when asked to consider opposing witness statements that had not previously been available to him. In our view, what has apparently occurred here appears, at this stage, to be an incident of litigation of a not unknown kind which has occurred in the course of preparing rebuttal evidence. There is nothing to suggest that this is an attempt by the OFT to strengthen its decision by better

evidence or a "bolstered version", as was the case in *Aberdeen Journals (No. 1)* and *Argos*. Indeed, it seems to us that the contrary is the case.

71. Fourthly, at this stage, we are unpersuaded that either the difference between paragraph 21 (b) of the defence and paragraph 414 of the decision, or the difference between paragraphs 32 and 33 of Ronnie III and paragraphs 23 to 27 of Ronnie IV, is as fundamental as Allsports submits.

72. On this part of the case, the OFT continues to rely on the same telephone call as before, made at the same time by Mr Ronnie to Allsports, with a view to informing Allsports of the agreement apparently reached between Mr Ronnie and Mr Ashley of Sports Soccer as to the pricing of England replica football shirts on 24 May 2000, in the course of the "ring around" by Mr Ronnie and Mr Fellone described in the decision. In these respects, the OFT's case has not changed. While Mr Ronnie has clarified the precise content of the phone call, our provisional impression at this stage is that the difference between Ronnie III and Ronnie IV is a matter of degree and clarification, rather than a fundamental volte face or denial by Mr Ronnie of his previous evidence. In any event, such difference as there is can no doubt be exploited by Allsports in cross-examination, if it so wishes.

73. Similarly, the difference between paragraph 414 of the decision and paragraph 21 of the defence does not seem to us to be as great as Allsports suggests. We note, in particular, that the central allegation in the last sentence of paragraph 414 of the decision is that the purpose of the phone call was to "make sure that [the major retailers] would price the England replica shirts at High Street prices in the run up to and during England's participation in Euro 2000", and that the OFT finds, at paragraph 427 that:

> "it does make sense that Umbro would want to confirm with all retailers what their precise pricing intentions would be and to give comfort about assurances being given by their competitors."

74. In these circumstances, we do not think that the evidence in Ronnie IV, on which paragraph 21 of the defence is based, represents something so fundamentally different from what is said in the decision as to preclude the OFT from relying on it. Nor, at this stage, and subject to further argument at the hearing, do we think that much is likely to turn on whether Allsports' participation (if established) is to be classified as an agreement

or a concerted practice. Moreover, in our provisional view, subject to further argument, Allsports' participation in any such agreement and concerted practice, does not necessarily depend wholly on the precise content of that phone call, but on an assessment of all the evidence, including the matters referred to in paragraph 415 of the decision which place that phone call in its factual context.

75. Fifthly, at this stage it is not appropriate to go into matters of law as to what does or does not constitute an agreement or concerted practice in the light of *Cimenteries* and many other cases. Suffice to say that we are not presently persuaded that, standing alone, Mr Ronnie's telephone conversation, as now described in Ronnie IV, would not constitute relevant, and possibly decisive, evidence of an agreement or concerted practice to which Allsports was a party in respect of the England Euro 2000 shirts. The precise content of any such agreement or practice, and the legal principles applicable, cannot, however, usefully be determined at this interlocutory stage, but will require full argument at the substantive hearing, after the evidence has been given. We have an open mind on that point.

76. Sixthly, balancing the various interests involved, we are not persuaded that it would be unfair to Allsports to allow the OFT to maintain the position it now advances on the basis of Ronnie IV. Allsports may have to obtain the comments of Mr Hughes and Mr Guest on that evidence, but we see no major difficulty there. On the other hand, it would seem to us artificial and disproportionate to exclude the evidence of Ronnie IV, or prevent the OFT from relying on it, particularly in circumstances where Allsports has for the first time produced witness evidence on the appeal.

(2) *Retailer pressure*

77. It is common ground that at the Rule 14 stage the OFT made various allegations of "retailer pressure" against Allsports: see e.g. paragraph 85 of the supplementary Rule 14 Notice. In its written reply to that notice of 8 July 2003 Allsports denied any such pressure. In its oral representations Allsports complained that the allegations of retailer pressure made against it were very vague but produced no witness evidence.

78. Allegations of retailer pressure are not made expressly in the decision as against Allsports, although in the decision general reliance is placed on Ronnie III.

79. Paragraph 20 of Ronnie III states:

> "20. During 1999 and early 2000, the complaints by retailers - in particular MUFC, Allsports and JJB - regarding Sports Soccer's pricing of replica kits intensified. Although Umbro had helped build up Sports Soccer as a rival to JJB, Umbro felt that it had to respond to these complaints, in order to protect its sales to the other large retail accounts. Umbro simply could not afford for JJB to cancel or reduce orders, as the business was then still financially vulnerable, following the MBO in 1999. We were also concerned about the renewal of the MUFC sponsorship contract, which is addressed by Martin Prothero".

80. In paragraphs 6.3 to 6.5 of its notice of appeal dated 1 October 2003 Allsports said this:

> "6.3. The OFT expresses at § 338 the view that it was not in Umbro's commercial interest to admit anything which might implicate its customers, since it might damage relationships with them. But that is simply speculation. No basis is given for the proposition that Umbro's customers would seek to, or be commercially able to, punish it in any way. Umbro is the monopoly supplier of that Replica Kit for which it is licensed (including England Replica kit); so all sportswear retailers are likely to want to maintain a good relationship with it, and need to keep a commercial relationship with it. Indeed, the findings in the contested decision concerning the pressure put upon retailers by Umbro, and its behaviour in cutting off supplies to retailers such as Sports Soccer and JD whose behaviour at times displeased it, suggest that it is the retailers who have to fear pressure from Umbro, rather than vice versa.
> 6.4. Umbro's enthusiasm to blame its retailer customers is illustrated by the vague and unparticularised assertions of retailer pressure made against Allsports in Umbro's employees' witness statements, essentially as an afterthought to allegations made against JJB. Similar vague assertions were made against "retailers" in its written representations to the OFT. It appears that the OFT has little faith in these allegations as regards Allsports, as no attempt is now made to rely on them.
>
> 6.5. In spite of Umbro's attempts to blame its retailer customers for its conduct, there is no evidence of retailer pressure in Umbro's generally extensive contemporaneous documentation - monthly management reports, notes of telephone conversations, internal e-mails - in the 2000 period".

81. In paragraphs 5 to 13 of Ronnie IV, signed on 28 November 2003, Mr Ronnie now states:

> "The relationship between Umbro and the retailers
>
> 5. At paragraph 6.3. of its notice of appeal, Allsports says that there is no basis for the claim that Umbro's customers would be commercially able to punish it in any way, especially when Umbro is the monopoly supplier of replica kits.
>
> 6. Although it is true that Umbro was the sole supplier of certain replica shirts, that was only one side of the business. Moreover, at the time, Umbro was over-dependent on sales of replica (flagship products), which are not stable. Brands such as Nike and Adidas had been much more successful across a wider product range and I wanted Umbro to emulate that.
>
> 7. In order to achieve this strategy, Umbro was reliant on retailers "supporting" or stocking a wide range of Umbro products. This gave the retailers a lever with which to exert pressure on Umbro in relation to replica kit. Umbro was especially vulnerable as its top three accounts (JJB, Sports Soccer and Allsports) accounted for over [ ] of its total business. JJB's business alone accounted for [ ] of Umbro's overall business in Spring 2000. The threat of any of these major accounts - but especially from JJB in footwear - withdrawing their support from a wider range of Umbro's product than just replica, thus represented a serious threat to the success of the Umbro business.
>
> 8. When we received complaints from Allsports and JJB about discounts offered by other retailers, there was an underlying threat that they would withdraw support for Umbro as a brand in their stores if we did not do something about it. This would have serious repercussions for the Umbro business.
>
> 9. Also, perceived pressure (because nothing was explicitly stated) came in the form of order cancellations, a sudden reduction in the volume of a particular product that had been ordered and a perceived reluctance to place orders for Umbro products in future. These actions were not limited to replica kit but extended to apparel, footwear and other sports goods. Their timing would normally coincide with a recent retail promotion by one of Allsports' or JJB's competitors.
>
> 10. I received complaints from Allsports directly from David Hughes or Michael Guest, Allsports' buying director, who controlled their buying and merchandising decisions on a day-to-day basis. Although Allsports' buying power was less than JJB's, they were still one of our top three accounts and there was an underlying

threat that Allsports would reduce support across the range of Umbro products.

11. It is difficult now to recall particular examples of pressure exerted by Allsports (para 6.4 of Allsports Notice of Appeal), but these always hung unspoken in the background. I would say that Allsports were just as vocal as JJB about discounting.

12. Specific examples of pressure from Allsports that I do recall include:

    a. the criticisms made by David Hughes at the Allsports Golf Day on 25 May 2000, in front of Manchester United and Umbro's competitors, regarding Umbro's supposed lack of control over the retail situation of the MU product. This was at a sensitive time when David Hughes knew Umbro was re-negotiating the renewal of its sponsorship contract with MUFC;

    b. the implicit threat during David Hughes' meeting with me on 2 June 2000 that if Umbro did not take steps to stop JD's "hat trick promotion" it would create a problem for Umbro's relationship with Allsports (see paragraph 45 of my OFT statement);

    c. David Hughes' comments on 2 June 2000 that if Umbro could not ensure that the new MU shirt would not be discounted, it would affect Umbro re-signing the Manchester United deal (see paragraph 46 of my original statement).

13. Allsports alleges at para 6.5. of its Notice of Appeal that there is no record of any pressure in Umbro's internal documentation. I agree that there would be little written record, but the reason for this was because Umbro ran its everyday business through face-to-face communication and by phone, rather than by e-mail or other correspondence. Complaints from retailers would be received by the account manager at Umbro (especially Phil Bryan, Umbro's key account manager for JJB) and would then be passed to Phil Fellone and myself. We often had meetings together to discuss the circumstances of the complaint".

82. It seems to us that the statements about retailer pressure now set out in Ronnie IV were made, at least in part, to deal with paragraphs 6.3 to 6.5 of Allsports' Notice of Appeal. Again, we do not see this as new evidence, specifically obtained in order to "bolster" the decision. In our view, this is evidence in reply to Allsports' arguments, comprising a

fuller account of Mr Ronnie's previous evidence on matters which already formed part of the general context of the case at the Rule 14 stage.

83. In our view the above extracts from Ronnie IV are potentially relevant to a proper understanding of the general background context of the present case. That evidence is further relevant to the question as to why Mr Ronnie should have felt it necessary to telephone Allsports, as he says he did. That latter issue is plainly raised and considered in the decision.

84. The general issue of retailer pressure may also be relevant to the existence of the England Euro 2000 Agreement, or a concerted practice to the same effect. However, as we have said, we reserve for further argument the question whether the existence of such pressure is a necessary ingredient to the agreement or practice alleged.

85. Against that background, the narrow issue before the Tribunal is whether the OFT should now be allowed to plead, as they do in paragraph 21 (b) of the defence, that Mr Ronnie's alleged telephone calls were made to inform other retailers that "in response to Allsports' pressure and complaints" Umbro had managed to obtain Sports Soccer's agreement to increase its shirt prices to High Street levels during the Euro 2000 tournament, notwithstanding that no "retailer pressure" case is made against Allsports in the decision.

86. On that issue, we note, first, that allegations of retailer pressure were made against Allsports during the Rule 14 procedure. This case is not, therefore, akin to *Aberdeen Journals (No. 1)* and *Argos*, where the OFT was seeking to rely on new allegations that had not been raised during the Rule 14 procedure. Indeed, Allsports apparently used the hypothesis of such pressure in order to mount an argument in its defence recorded at paragraph 418 of the decision, to which the OFT replies at paragraph 427.

87. Secondly, we are not on the material before us prepared to infer that the OFT intended in the decision to "abandon" the allegation of retailer pressure, with the inference that the OFT should not now be permitted to go back on an abandoned case. It is true that the decision does not expressly rely on retailer pressure by Allsports as it does against JJB, but that in our view does not imply "abandonment" of the point. It simply shows that, for whatever reason, there is no express conclusion about retailer pressure in the decision as

regards Allsports. Moreover, we do not think it can reasonably be inferred that the OFT was no longer relying on Ronnie III, which is referred to generally throughout the decision. Paragraph 20 of Ronnie III mentions general pressure from Allsports, and paragraphs 45 and 46 give specific examples, albeit not expressly referred to in the decision. Paragraphs 418 and 427 of the decision show that the issue of pressure was relevant to the issues addressed by the OFT in the decision and other paragraphs (e.g. paragraph 175) refer to incidents from which pressure could be inferred.

88. Thirdly, the issue of retailer pressure has now been raised squarely by the content of Ronnie IV, and in our view reasonably raised in response to the extensive evidence now served by Allsports. It seems to us that it would be inappropriate to exclude that evidence, or prevent Mr Ronnie from giving it. Such a course would in our view distort the witness evidence, and prevent the Tribunal from seeing the whole picture, contrary to the general interests of justice referred to by the Tribunal in *Napp: preliminary issue* at paragraphs 76 and 81, and *Argos* at paragraph 82. If that evidence is to be given, it seems to us logical to permit the OFT to plead, in paragraph 21 of the defence, the reliance which the OFT seeks to place upon it.

89. We are not satisfied that this course would be procedurally unfair to Allsports, notwithstanding that an allegation of retailer pressure against Allsports is not explicitly made in the decision. The issue was raised in the Rule 14 notice, so Allsports has had ample time to consider it. The matter is already referred to, albeit indirectly, in the notice of appeal. Although it may be that Allsports may need to take supplementary witness statements from Mr Hughes and Mr Guest, we do not accept that that is a difficult or extensive exercise, given that Allsports has had the defence since 1 December. As to the alleged vagueness of the allegations, it seem to us that Ronnie IV sets out Mr Ronnie's recollection sufficiently to enable Mr Hughes and/or Mr Guest to deal with it in any witness statement they may wish to serve in reply. The weight and relevance of the evidence is a matter that can be more fully argued at the hearing. We doubt whether any formal amendment of the notice of appeal, or the service of a reply is necessary. We are not satisfied that any further disclosure is likely to be needed, given the extensive disclosure of Umbro documents that has already taken place.

90. As regards Allsports' argument that, on this approach, an appellant cannot know what case he will ultimately face on appeal, it seems to us that where an appellant produces no

witness evidence at the Rule 14 stage, and then serves extensive further evidence at the appeal stage, the OFT cannot reasonably be denied the opportunity to respond. Subject to the requirements of procedural fairness, such response may involve the OFT being permitted by the Tribunal to elaborate its case, so that a proper balance is achieved between the interests of the appellant and the public interest which the OFT represents: see *Napp: preliminary issue* at paragraph 81.

91. As to the specific instances of 'pressure'objected to by Allsports, we are not dealing at this stage with the relevance, in time or otherwise, of the matters relied on, but with whether they can be relied on at all. The specific examples regarding the Golf Day on 25 May 2000 and the meeting of 2 June 2000 are mentioned in Ronnie IV, figured in the Rule 14 proceedings and are already referred to in Mr Hughes' statement. The other matters referred to have, with one exception, all been dealt with in existing witness statements, figure in one way or another in the decision, and arose in the course of the Rule 14 proceedings, as the OFT explains in an annex to its submissions. We accept the points made in that annex. In our view, it does not require much further work on the part of Allsports to deal with the specific instances raised, to the extent that they have not already been dealt with.

92. The only matter which has not previously figured in the OFT's file is Mr Hughes' alleged concern about Blacks' discounting in the South East, which is referred to in paragraph 59 of the defence. That incident is taken from an earlier statement of Mr Ronnie made in the context of an application for leniency not previously disclosed. It is not mentioned in the Rule 14 notice, the decision, Ronnie III or Ronnie IV.

93. In our view, this is a borderline case. The principles set out in the Tribunal's case law could arguably justify the exclusion of this particular incident. On the other hand, in view of the extensive witness evidence now served by Allsports, it seems to us that it would be artificial to exclude this particular incident, which forms part of the OFT's rebuttal of the detailed denials now put forward by Allsports. We are not, therefore, prepared to strike out paragraph 59 of the defence, at this interlocutory stage. We do not anticipate that it would be difficult for Allsports to obtain Mr Hughes' comments on this allegation.

94. For the above reasons, we are against Allsports on its application to strike out, at this stage, paragraph 21 of the defence and the related allegedly specific instances of pressure to which Allsports has referred.

Paragraph 21 (e) (ii) of the defence

95. At paragraph 21 (e) (ii) of the defence the OFT suggests that, even if Mr Ronnie's telephone call to Allsports is not established, Allsports can be shown to be a party to the England Euro 2000 Agreement on the basis of the matters referred to in paragraph 9 (a) (iii) to (vi) of the defence - which are matters set out in paragraph 415 of the decision, Mr Hughes' concern about discounting by other retailers including discounting on the England shirt, Mr Hughes' remarks at the Golf Day dinner and Mr Hughes' diary entries, including diary entries about the England shirt.

96. As we see it, paragraph 21 (e) (ii) of the defence does not involve any new or additional evidence in addition to the matters to which we have already referred, other than Mr Hughes' diary entries, which were not available to the OFT when the decision was taken. As we see it, the OFT's argument here is that even if one of the elements referred to in the decision (i.e. the telephone call referred to at paragraphs 414 and 415 (a) and (b) of the decision) is not proved, there is sufficient other evidence to establish Allsports' participation in the England Euro 2000 Agreement. That seems to us to be largely an argument of law, which falls to be made after the evidence has been given, including the new evidence from Mr Hughes' diary. The argument does not require, as we see it, the preparation of further evidence beyond that which has already been discussed above.

97. The difficulty the Tribunal is in, at this interlocutory stage, is that Allsports itself has produced a significant amount of new evidence, to which the OFT has - in our view legitimately - also responded with further witness statements. As we have earlier indicated, the dynamics of this appeal have now developed since the decision was taken, and the matter is being argued on the basis of a deeper and more intensive analysis of the facts and witness evidence than occurred at the rule 14 stage. In these circumstances, bearing in mind that this is an appeal "on the merits", we do not feel it would be right, at this stage, to pre-empt matters by disallowing the argument that is put forward at

paragraph 21 (e) (ii) of the defence. We do not, however, preclude the possibility of making further rulings on this issue once the evidence has been heard.

98. For all these reasons we refuse Allsports' application for summary judgment and/or to strike out paragraph 21 of the defence.

Mr May's evidence

99. In our view, Mr May's evidence is primarily in response to Ms Charnock's evidence. To the extent that his evidence goes beyond matters referred to by Ms Charnock, we think his evidence is reasonably introduced by the OFT in the context of the extensive witness evidence that Allsports now relies on that was not before the OFT at the Rule 14 stage.

100. Subject to any points of detail there may be, we also allow the defence to be amended as proposed by the OFT.

Christopher Bellamy Barry Colgate Richard Prosser

Delivered in open court 29 January 2004

Charles Dhanowa
Registrar