Neutral Citation Number: [2006] EWCA Civ 1318

Case No: 2005/1071, 1074 and 1623

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
SIR CHRISTOPHER BELLAMY QC PRESIDING
[2004] CAT 24, [2005] CAT 13, and
[2004] CAT 17, [2005] CAT 22

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 19 October 2006

Before:

LORD JUSTICE CHADWICK
LORD JUSTICE WALL
and
LORD JUSTICE LLOYD

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Between:

2005/1071 and 1074	**(1) ARGOS LIMITED (2) LITTLEWOODS LIMITED**	**Appellants**
	- and -	
	OFFICE OF FAIR TRADING	**Respondent**

And between:

2005/1623	**JJB SPORTS PLC**	**Appellant**
	- and -	
	OFFICE OF FAIR TRADING	**Respondent**

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Mark Brealey Q.C. and Mark Hoskins (instructed by **Burges Salmon**) for **Argos Ltd**
Nicholas Green Q.C. and Marie Demetriou (instructed by **DLA Piper UK LLP**) for **Littlewoods Ltd**
Paul Lasok Q.C. and Mark Hoskins (instructed by **DLA Piper UK LLP**) for **JJB Sports plc**
Brian Doctor Q.C., Jon Turner Q.C. and Kassie Smith for the **OFT** in appeals 1071 and 1071
Stephen Morris Q.C., Jon Turner Q.C. and Anneli Howard for the **OFT** in appeal 1623, all instructed by **the Solicitor to the Office of Fair Trading**

Hearing dates: 9-11, 15-17 May 2006

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Approved Judgment

Lord Justice Lloyd:

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Introduction

1. This is the judgment of the court, to which all its members have contributed. The judgment relates to appeals arising out of two distinct investigations by the Office of Fair Trading (OFT) under the Competition Act 1998 (the 1998 Act, or the Act). One, referred to at the hearing as Toys and Games, was into agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games. The OFT's amended decision, number CA98/8/2003, was issued on 21 November 2003. It found that Hasbro, Argos and Littlewoods had been parties to an agreement in breach of the Chapter I prohibition under the 1998 Act. It imposed substantial penalties on Argos and Littlewoods, but not on Hasbro because of a leniency agreement in relation to that party. Argos and Littlewoods both appealed to the Competition Appeal Tribunal (the Tribunal) against the finding of breach of the Act and against the penalty imposed. The Tribunal rejected the appeal on liability though it reduced the penalties on each appellant. Each of Argos and Littlewoods appeals to this court, with the permission of Jonathan Parker LJ, on both liability and penalty.

2. The other investigation, known as Football Shirts, was into price-fixing of replica football kit. The OFT's decision, CA98/06/2003, was issued on 1 August 2003. It found that price-fixing agreements in breach of the Chapter I prohibition had been entered into by the Football Association, Manchester United plc, Umbro Holdings Ltd and a number of retailers including JJB Sports plc (JJB), Sports Soccer Ltd and Allsports Ltd in 2000 and 2001. It imposed penalties on the parties, apart from one which was by then in administration. JJB and Allsports appealed to the Tribunal against the finding of infringement and the penalty; Umbro and Manchester United appealed only on the amount of the penalty. On liability the Tribunal held that JJB had infringed the Chapter I prohibition, but not in all the respects in which the OFT had found, so that appeal was allowed in part. Allsports' appeal on liability was dismissed. On the appeals on penalty, the amount of each penalty was varied, in the case of JJB by a significant reduction. Only JJB appeals to this court, on liability and penalty, again with permission granted by Jonathan Parker LJ.

3. The facts of the Toys and Games appeal on the one hand and the Football Shirts appeal on the other are different and unconnected. However, the appeals on liability are only on points of law, and similar points arise on liability and also to some extent on penalty in each appeal. These appeals are the first to the Court of Appeal arising from these provisions of the 1998 Act. Accordingly, the appeals were directed to be heard in succession, by the same court.

4. The judgment which follows is regrettably long. The judgments under appeal were themselves very long, as were the decisions of the OFT against which the appeals to the Tribunal were brought. The length of the Tribunal's judgments reflects a number of factors, not the least being the conscientious attention to detail applied by the Tribunal to the process of deciding the cases before it, and explaining its reasoning. The cases were hard fought before the Tribunal, and a great deal was at stake. The sheer size of the judgments, especially those on liability, makes them quite difficult to manage, as the Tribunal itself no doubt found when composing them. The method adopted by the Tribunal of dealing with different aspects of the fact-finding process in different parts of the text allowed the judgments, perhaps inevitably, to be exposed to a close textual analysis by Counsel by reference to the use of different words or

phrases in different passages, which may well have been intended to refer to the same things with no difference of meaning, submitting that different meanings must have been intended by the use of different words.

5. Complicated as appeals of this kind to the Tribunal are often likely to be, it may be that the Tribunal will, over time, find it possible to deal with such appeals in judgments which are not so long as those under appeal in the present cases. A decision of the Tribunal such as those with which we are concerned is no different in principle from a decision of any other tribunal or a court after a trial involving disputed issues of fact, and maybe law. The reasoning of Griffiths LJ (as he then was) in *Eagil Trust Co Ltd v. Pigott-Brown* [1985] 3 All ER 119 at 122, endorsed by the Court of Appeal as being of general application in *English v. Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409, applies to such a judgment of the Tribunal as to any other. Griffiths LJ said:

> "a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties, and if need be, the Court of Appeal the basis on which he has acted … (see Sachs LJ in *Knight v. Clifton* [1971] Ch 700 at 721)."

6. The same applies to findings of fact, so that the Tribunal may not need to make a finding on every disputed factual issue. Nor is it always necessary for the Tribunal to set out each party's submissions in detail before explaining its reasons for deciding the case. We therefore express the hope that, in future, it will be possible for the Tribunal to express its findings of fact and its reasoning in more succinct form. Its efforts to do so will have the support of this court, provided always that the essential tasks identified by Griffiths LJ have been fulfilled.

7. We are conscious that our own judgment is very long and has taken a long time to prepare, but it does deal with appeals by three parties against findings both on liability and penalty in two separate cases, on points which have not previously arisen in the Court of Appeal. Without further delay or apology, we proceed to the substance of the appeals. After setting out the statutory provisions and discussing points of general application, we will deal with the Football Shirts appeal and then the Toys and Games appeals in turn on liability, and then turn to the penalty appeals, first setting out matters of general relevance, and then discussing the Football Shirts appeal and the Toys and Games appeals on penalty successively.

The statutory provisions

8. The statutory provisions governing liability, penalty, procedure and appeals are the same in relation to all the appeals.

9. The Chapter I prohibition is set out in section 2 of the 1998 Act as follows:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which-

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

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

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

This provision applies, within the United Kingdom, an equivalent prohibition to that set out in Article 81 of the EC Treaty.

10. In order that the national legislation should be applied consistently with the way in which the Treaty provisions are applied, the Act includes section 60. The first three subsections of that are as follows:

"(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between-

(a) the principles applied, and decision reached, by the court in determining that question; and

(b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

(3) The court must, in addition, have regard to any relevant decision or statement of the Commission."

11. The investigations by the OFT which led to the present appeals were undertaken under section 25 of the 1998 Act. Subsections (1) and (2) of that section are as follows:

"(1) In any of the following cases, the OFT may conduct an investigation.

> (2) The first case is where there are reasonable grounds for suspecting that there is an agreement which-
>
> > (a) may affect trade within the United Kingdom; and
> >
> > (b) has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom."

12. Extensive powers in relation to investigations are conferred on the OFT by sections 26 to 29. If the OFT finds that an agreement infringes the Chapter I prohibition, it may give directions such as it considers appropriate in order to bring the infringement to an end: section 32. In all the present cases the OFT was satisfied that, although there had been infringements, they had come to an end already so that no directions were needed.

13. Its power to impose penalties is conferred by section 36. We need to set out subsections (1), (3) and (8) of that section:

> "(1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 81(1), the OFT may require an undertaking which is a party to the agreement to pay the OFT a penalty in respect of the infringement.
>
> ...
>
> (3) The OFT may impose a penalty on an undertaking under subsection (1) or (2) only if the OFT is satisfied that the infringement has been committed intentionally or negligently by the undertaking.
>
> ...
>
> (8) No penalty fixed by the OFT under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State)."

14. Penalties so imposed are recoverable, if not paid when due, as a civil debt: see section 37. Section 38 contains provisions as to the appropriate level of a penalty. At the time relevant to these proceedings that section (ignoring provisions not now material) was as follows:

> "(1) The OFT must prepare and publish guidance as to the appropriate amount of any penalty under this Part.
>
> ...
>
> (4) No guidance is to be published under this section without the approval of the Secretary of State.
>
> ...

> (8) When setting the amount of a penalty under this Part, the OFT must have regard to the guidance for the time being in force under this section.
>
> (9) If a penalty or a fine has been imposed by the Commission, or by a court or other body in another Member State, in respect of an agreement or conduct, the OFT, an appeal tribunal or the appropriate court must take that penalty or fine into account when setting the amount of a penalty under this Part in relation to that agreement or conduct..
>
> (10) In subsection (9) "the appropriate court" means-
>
> > (a) in relation to England and Wales, the Court of Appeal"

We will refer later to the guidance which was in force at the relevant time as published under this section. The requirement of the approval of the Secretary of State, under subsection (4), differentiates the guidance on this topic from that provided for by, for example, section 52 of the Act.

15. Appeals to the Competition Appeal Tribunal are provided for by section 46:

> "(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> ......
>
> (3) In this section "decision" means a decision of the OFT-
>
> > (a) as to whether the Chapter I prohibition has been infringed,
> >
> > ...
> >
> > (i) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,"

16. Part 1 of Schedule 8 makes further provision about appeals. Paragraph 3 applied to the appeals in the present cases to the Tribunal. Its relevant provisions were as follows:

> "(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,

...

(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."

17. By contrast, some other types of appeal, not now relevant, are not to be decided "on the merits" but by applying the same principles as would be applied by a court on an application for judicial review: see paragraph 3A(2).

18. The appeals to the Tribunal in the present cases were, in effect, full hearings with such relevant evidence as any party wished to adduce, witnesses being cross-examined if appropriate. That is necessary so as to ensure that Article 6 of the European Convention on Human Rights is satisfied.

19. Further appeals are provided for by section 49:

"(1) An appeal lies to the appropriate court-

(a) from a decision of the Tribunal as to the amount of a penalty under section 36;

...

(c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47."

Thus the appeals about whether the several appellants were in breach of the Chapter I prohibition are limited to points of law arising from the decision of the Tribunal, but the appeals on penalty are not so limited.

20. The imposition of a penalty is not the only possible consequence of a finding of a breach of the Chapter I prohibition. Sections 47A and 47B (introduced by the Enterprise Act 2002) provide for claims for compensation by or on behalf of consumers where an infringement has been established.

The Chapter I prohibition – agreements and concerted practices

21. The Chapter I prohibition applies to agreements and also to concerted practices which do not have the formality or certainty of agreements. It is not legally necessary to distinguish between agreements and concerted practices, and references by the Tribunal in its judgments to agreements included concerted practices. We will differentiate between them only so far as seems necessary or appropriate. The Tribunal set out a summary of the relevant law which, in itself, is not controversial at paragraphs 150 to 163 of its judgment in the Football Shirts appeals and similarly at paragraphs 145 to 156 of its judgment in the Toys and Games appeals, drawing in each case on judgments of the European Court of Justice and the Court of First Instance. We will set out here the essential propositions, with references but not full quotations.

i) The object of the inclusion of concerted practices in the prohibition is to bring within Article 81 a form of coordination between undertakings which, short of the conclusion of an agreement properly so-called, knowingly substitutes practical co-operation between the undertakings for the risks of competition. A concerted practice does not have all the elements of an agreement but may arise out of co-ordination which becomes apparent from the behaviour of the participants. Parallel behaviour may amount to strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of the market: *ICI v Commission* [1972] ECR 619 ("*Dyestuffs*").

ii) The requirement of independent determination of policy on the market on the part of competitors strictly precludes any direct or indirect contacts between competing undertakings, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which the undertaking has decided to adopt or contemplates adopting on the market: *Suiker Unie v Commission* [1975] ECR 1663.

iii) The prohibition on concerted practices applies to all collusion between undertakings whatever the form it takes. An agreement arises from the expression by the participating undertakings of their joint intention to conduct themselves in a specific way. Concerted practices include forms of collusion having the same nature as agreements which are distinguishable from agreements by their intensity and the forms in which they manifest themselves: *Commission v Anic Partecipazioni* [1999] ECR I-4125.

iv) A decision on the part of a manufacturer which constitutes unilateral conduct of that undertaking escapes the Chapter I prohibition (though if the undertaking has a dominant position, it might be caught by the Chapter II prohibition). The concept of an agreement centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention: *Bayer v Commission* [2000] ECR II-3383, upheld by the European Court of Justice, Joined Cases C-2 and 3/01 P, 6 January 2004.

v) Although the concept of a concerted practice implies the existence of reciprocal contacts, that requirement may be met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it: *Cimenteries v Commission* [2000] ECR II-491.

vi) The fact that only one of a number of competing undertakings present at a meeting reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice: *Tate & Lyle v Commission* [2001] ECR II-2035.

Particular submissions in the Football Shirts appeal were based on the fact and implications of one party making complaints to another. Because that is specific to the Football Shirts appeal, we will deal with it later, at paragraphs [72] and following.

22. Counsel for all the Appellants submitted that many of the observations in the cases from which these propositions are drawn need to be understood in the light of the

particular facts. They pointed out that it is just as essential to a concerted practice as it is to an agreement that there be a consensus between the two or more undertakings said to be parties to the agreement or concerted practice. That is true, but concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for this purpose.

23. Particular attention was given in Counsel's submissions to the decisions in the *Bayer* case. It is therefore appropriate to refer to that case in more detail at this stage. The Commission had held that conduct on the part of Bayer in relation to its dealers, aimed at controlling the distribution of supplies of its products within the common market, and of preventing or limiting parallel imports, amounted to agreements or concerted practices in breach of Article 81. The CFI held that this was wrong on the facts, because the actions of Bayer were unilateral, not agreed to or acquiesced in by the dealers. In its judgment, the CFI said, at paragraph 69:

> "It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."

24. After referring to certain cases in which measures adopted in an apparently unilateral manner by a manufacturer had been held to constitute an agreement, the CFI went on to say this at paragraph 71:

> "That case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent."

This proposition was reaffirmed later in the judgment, in particular at paragraphs 173, 174 and 176, in which the phrase "concurrence of wills" is used repeatedly. It is unnecessary to quote these passages for present purposes, as they do not set out any different proposition from that already quoted.

25. In the meantime, after paragraph 71, the court considered in detail the facts as regards the conduct of the wholesale customers and held that it did not constitute sufficient proof in law of the acquiescence of the dealers in Bayer's policy designed to prevent parallel imports.

26. In the ECJ, the court referred at paragraph 97 to what the CFI had said at paragraph 69, quoted above. It recognised at paragraph 100 that "the existence of an agreement within the meaning of [Article 81] can be deduced from the conduct of the parties concerned". It then said this at paragraphs 101 and 102:

> "101. However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by Article 85(1) of the Treaty may be established simply on the basis of the expression of a unilateral policy

> aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of Article 86 of the Treaty.
>
> 102. For an agreement within the meaning of Article 85(1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers."

On that basis the court held that the approach of the CFI had been correct in law, and dismissed the appeal.

27. Counsel also cited a passage from Competition Law, 5th edition, by Professor Whish, at page 100, the correctness of which was not challenged, as follows:

> "These two cases [*Dyestuffs* and *Suiker Unie*] provide the legal test of what constitutes a concerted practice for the purpose of Article 81: there must be a mental consensus whereby practical co-operation is *knowingly* substituted for competition; however the consensus need not be achieved verbally, and can come about by direct or indirect contact between the parties."

Vertical and horizontal agreements and concerted practices

28. The Chapter I prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the same level of commercial operation. An agreement between a supplier and a commercial customer, which may be called a vertical agreement, may breach the prohibition as much as an agreement between competing suppliers of the same product or the same type of product, which can be referred to as a horizontal agreement.

29. Each of these types of agreement may be a serious breach of the prohibition, but horizontal agreements have generally been regarded as more serious. It is unavoidable for a supplier and a customer to have dealings and agreements, though they ought not to be anti-competitive. It is not normal for competing undertakings to have dealings with each other, so that any dealings which they do have are regarded with greater suspicion. However, it may be in the interests of a supplier and several of its customers to restrict competition in relation to the supplier's products, so that a serious breach of the Chapter I prohibition may be created by dealings between a supplier and two or more of its customers.

30. In the present appeals, neither Littlewoods nor JJB challenges the finding by the OFT of agreements or concerted practices on a vertical basis which infringe the Chapter I prohibition: between Hasbro and Littlewoods, and between Umbro and JJB. Each, however, submits (as does Argos, if its challenge as regards a bilateral agreement fails) that there was no horizontal element to the relevant dealings, and challenges the upholding by the Tribunal of the OFT's finding that there was.

31. It is not in dispute that there could be a trilateral or multilateral agreement or concerted practice between two or more customers and their common supplier, nor that this might come about by virtue of indirect contact between the customers via that supplier. Equally it is clear that there could be a series of bilateral vertical agreements between one supplier and several of its customers, none of the customers being aware of the fact or nature of the agreements between the supplier and other customers, such that there would be no horizontal element to the customers' agreements. If, on the other hand, each customer did know of the other agreements, it could be equivalent to a multilateral agreement between the supplier and each of the customers.

32. Since the appeals to this court are on points of law only, the question is whether, on the facts found by the Tribunal, its findings of trilateral agreements (and a bilateral agreement between Argos and Hasbro) are correct in law. It is therefore necessary, in each case, to examine the facts as found by the Tribunal. Common to the challenges by each Appellant is the theme that the Tribunal failed to accord enough weight to the requirement of subjective consensus between all parties if an agreement or concerted practice between them is to be found. In particular Counsel criticised what the Tribunal said at paragraph 659 of its judgment in *Football Shirts* (later cited in paragraph 779 of the judgment in *Toys and Games*), as follows:

> "Thus, for example, if one retailer A privately discloses to a supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The prohibition on direct *or indirect* contact between competitors on prices has been infringed."

It is said that this statement is, at the very least, too general, and that a finding that each of A, B and C is involved in a single concerted practice would require other connecting factors between the parties.

33. Similarly, Mr Lasok Q.C., for JJB, criticised as too general paragraph 664 of the same judgment, as follows:

> "The cases about complaints cited above, notably *Suiker Unie* at paragraphs 282 to 283, and the Commission's decision in *Hasselblad* at paragraph 42, show that if a competitor (A) complains to a supplier (B) about the market activities of another competitor (C), and the supplier B acts on A's complaint in a way which limits the competitive activity of C, then A, B and C are all parties to a concerted practice to prevent, restrict or distort competition. We can see the sense of that case law. Were it otherwise, established customers would always be able to exert pressure on suppliers not to supply new and more competitive outlets, free of any risk of infringing the Chapter I prohibition. A competitor who complains to a supplier about the activities of another competitor should not in our view be absolved of responsibility under the Act if the supplier chooses to act on the complaint."

34. In the light of these submissions it is necessary to examine the findings of fact made in each appeal by the Tribunal.

The Football Shirts appeal: the facts

35. The OFT had found that JJB was a party to four agreements or concerted practices: (1) one relating to the retail price of official England replica kit at the time of the European Championships in 2000, known as the England Agreement; (2) another, made in June 2000, relating to the retail price of official Manchester United replica kit shortly before the launch of MU's new strip at the beginning of August 2000 (the MU Agreement); (3) a third, called the Continuation Agreement, said to have lasted from mid-2000 until August 2001, relating to England and MU replica kit, and including the launch of the MU Centenary kit in July 2001; (4) another, called the England Direct Agreement, relating to the price at which England replica kit was sold online on behalf of the FA. The Tribunal, in its judgment on liability, [2004] CAT 17, found that JJB was not a party to the England Direct agreement, and that although it was a party to an agreement relating to the MU Centenary Shirt, it was not a party to a continuing agreement from mid-2000 until July 2001. Accordingly, the Tribunal found established JJB's participation in the England Agreement, the MU Agreement and the MU Centenary Shirt Agreement. All of these were found to be trilateral agreements. Only in relation to the England Agreement does JJB appeal, and the terms of its Appellant's Notice do not challenge the finding of a bilateral vertical agreement between itself and Umbro in relation to the England shirt for the Euro 2000 competition. It is only the horizontal, trilateral aspect of the England Agreement which is at issue on the appeal.

The factual background

36. Umbro was the manufacturer, under licence, of England kit and MU kit at the time, as well as that of some other prominent football clubs including Chelsea and Celtic. Its licence as regards MU was under review in 2000, and in the autumn of 2000 MU announced that, from 2002, the licence would be held by Nike. Umbro also sold sports clothing under its own brand.

37. JJB was the largest sports retailer in the UK, with 430 retail outlets, selling replica kit, other football club merchandise, general sportswear and sports equipment. In spring 2000 JJB accounted for a substantial proportion of Umbro's business, and was the largest buyer of replica kit from Umbro. The company had been built up by Mr David Whelan who, in 2000, was both chairman and chief operating officer. Mr Duncan Sharpe became chief executive officer in February 2001, but has since died (in October 2002).

38. Allsports was a sports retailer with some 240 outlets, mostly smaller than those of JJB. It had been built up by Mr David Hughes, who owned it and was its chairman.

39. Sports Soccer was a retailer of sports products including replica kit. In spring 2001 it had 90 outlets, mostly quite large. Its business was built up on discounting, aiming to sell larger volumes of replica kit at lower prices. Its founder, owner and driving force was Mr Mike Ashley.

40. In 1999, after an OFT investigation, the FA, the Scottish FA and the FA Premier League clubs gave the OFT a non-statutory assurance that they would take action to prevent resale price maintenance in the market for replica football kit. MU wrote to Umbro asking it to tell all its dealers that they were free to sell replica kit at whatever price they chose. Umbro did write to its dealers stating that it would not withhold supply of goods or take any other action to prevent the advertising or sale of replica kit at any price. The 1998 Act was not then in force: it came into force on 1 March 2000. In August 2000 Sports Soccer complained to the OFT that price-fixing was continuing in relation to replica kit.

41. Umbro's policy was selective as regards replica kit, limiting supplies to those regarded as authentic sports retailers and, for example, refusing to supply supermarkets. It was Umbro's practice (as it was also of other suppliers such as Nike) to publish recommended resale prices for replica kit. In 2000 it recommended £42.99 for an adult replica shirt and £32.99 for the junior equivalent. However, in 1998 at the time of the World Cup JJB had said that it would not sell an adult shirt for more than £40, and £39.99 became an effective ceiling price, referred to as the High Street price. Umbro and other suppliers of replica kit were hostile to discounting below the High Street price. The advent of Sports Soccer in 1999, as a substantial and active discounter in this market, generated a good deal of tension on the part of others involved in the market at all levels: other retailers, suppliers such as Umbro and licensors such as MU. In late 1999 and the early part of 2000 JJB met this challenge by substantial discounting in strategic outlets which were near a Sports Soccer shop. In February 2000 Sports Soccer indicated to Umbro that it intended to charge £32 for an adult England shirt and £24 for the junior shirt.

42. Later in 2000 new kit was to be launched by Celtic and Chelsea (both supplied by Umbro) and in August by MU, and the Euro 2000 competition, commencing in June 2000, was expected to generate high demand for the current England replica kit, which had been launched in 1999. It was the OFT's contention, as a result of its investigation, that this led Umbro to take steps aimed at ensuring that the principal kit retailers did not discount the prices of Umbro replica kit in the key selling periods, namely a period after launch for the new club kits, and the period just before and during the Euro 2000 competition for the England kit, and, at the same time, MU sought to ensure that retailers maintained the price of MU replica kit, and JJB also brought pressure to bear with a view to seeing that other retailers did not discount the price of replica kit.

43. So far as the England kit is concerned, the main objective of the relevant efforts was to see that Sports Soccer would not discount sales from shortly before the competition and during the competition (at least for as long as England remained a participant). The kit was already on sale, and Sports Soccer was selling it at a discounted price, between £32 and £34 for the adult product. It is not now in dispute that Sports Soccer agreed with Umbro to raise its prices for the England replica kit, on the basis of assurances that the other major retailers would not discount, and that it did raise its prices on 3 June, and maintained them until 21 June when England was knocked out of the tournament. The Tribunal reviewed in some detail the relationship between Umbro and Sports Soccer. Sports Soccer was very reluctant to agree not to discount prices, and even when it did agree, it did not always keep strictly to the agreement. Umbro was able to and did exert considerable pressure on Sports Soccer to persuade it

to agree not to discount, by threatening that it might not otherwise receive a full allocation of the replica kits, and perhaps also of other Umbro products. Sports Soccer could not afford to run the risk of not having adequate supplies of the "must have" England and MU replica shirts during peak selling periods. For that reason, Sports Soccer did agree to raise its prices for England kit late in May 2000, as well as agreeing to maintain High Street prices on replica kit for 60 days from launch, and, under further pressure from Umbro on 2 June, did in fact raise its prices for the England shirt the following day.

44. The OFT found that a number of other retailers, including JJB and Allsports, informed Umbro that they would not be discounting the price unless others did, and that on this basis they were parties to the agreement or concerted practice for the maintenance of the price of the England adult shirt at £39.99. The question for this court is whether the Tribunal was right to accept that JJB was a party. JJB does not deny that it told Umbro that it would not discount, but it disputes that this made it a party to an agreement or concerted practice with anyone other than Umbro.

45. The correctness of this depends on the facts found as regards the communications between JJB and Umbro and their context.

46. The Tribunal pointed out that retail sales of replica kit had traditionally been the subject of resale price maintenance. We have referred earlier to the investigation in 1999 and the non-statutory assurances given, leading to statements by Umbro in September 1999 inconsistent with the conduct now under consideration. Mr Ashley of Sports Soccer said in evidence that resale price maintenance was rife in the industry.

47. During 1999, however, and into early 2000, there had been a price war between JJB and Sports Soccer, JJB responding to the threat posed by the arrival of Sports Soccer as a significant retailer adopting discounting as its pricing policy. JJB ceased its main discounting campaign on 23 April 2000, but Sports Soccer continued to discount. On behalf of Umbro and Sports Soccer, the evidence given to the Tribunal was that, if Sports Soccer had discounted the England shirt during the Euro 2000 competition, JJB would have done so as well. Of course it was not for their witnesses to say what JJB would have done, but that was what they had expected would have happened, in the light of the price war which had occurred, even though by the beginning of May 2000 it had been, at least, suspended by JJB.

48. It was essential to Sports Soccer's agreement to raise its prices that it should be reassured that other retailers would not discount. It was for Mr Ronnie of Umbro to approach JJB on this point.

49. The Tribunal also examined in some detail the commercial relationship between Umbro and JJB. Given the size of its share of the market in sportswear, JJB had considerable market power, which enabled it, for example, to impose a ceiling price of £39.99 for adult replica shirts. The size of its orders from Umbro was such that it also had considerable bargaining power in relation to Umbro. Some of Umbro's replica kit were essential items for any sportswear retailer, including JJB, but Umbro was over dependent, as regards branded products, on its sales to JJB. In 2000 JJB spent £10.3 million buying replica kit from Umbro, but £20.5 million in buying Umbro's branded products. It could have caused Umbro real difficulties by switching

some or all of its branded product purchases to a rival such as Nike. Umbro therefore felt under pressure in early 2000 to do whatever it could to assuage any commercial concerns expressed to it by JJB.

50. JJB had a strong interest in seeing to it that discounting did not occur in relation to the England shirt during the Euro 2000 competition. The price competition that had taken place up to April 2000 must have had an adverse effect on JJB's margins. If Sports Soccer had discounted the England shirt during Euro 2000 JJB must, or at least might well, have done the same, which would have caused further damage to JJB's margins. JJB did not wish to see discounting on leading replica shirts, including the England shirt during Euro 2000, and expected Umbro to do something to see that discounting did not happen.

Pressure by JJB on Umbro

51. Umbro's witnesses gave evidence that JJB put pressure on Umbro to do something about discounting by Sports Soccer, using implied threats, and did so in particular in the lead up to Euro 2000. Mr Whelan, on behalf of JJB, denied any such pressure in his witness statements, but in cross-examination he accepted that he had conversations with Mr Ronnie or Mr McGuigan of Umbro about Sports Soccer's discounting in which Mr Whelan complained about the effect that Sports Soccer was having on the market, "rocking the boat", and said words to the effect of "they fly out of the store", about replica shirts, in order to convey his view that there was no need to discount the price of replica kit, with the implication that discounting should stop, and would ask "what the hell is going on": see the judgment at paragraph 416. The Tribunal commented, at paragraph 417, that:

> "We find it difficult to see why Mr. Whelan, the Chairman of JJB, should speak directly to Mr. McGuigan, the Chief Executive of Umbro, about the activities of a competitor other than with a view to getting Umbro to do something about it."

52. Similarly, Mr Ronnie of Umbro gave evidence, which was not challenged as such, that Mr Whelan or Mr Sharpe of JJB spoke to him and used words such as "this is getting out of hand, sort it" and "what is Umbro going to do about it" in reference to Sports Soccer's discounting policy, and that such calls were particularly frequent in the run-up to Euro 2000.

53. In turn Mr Fellone of Umbro gave evidence, summarised by the Tribunal at paragraph 419:

> "Mr. Fellone states that he or Mr. Bryan would receive calls from either Colin Russell or Duncan Sharpe. In such calls JJB "would point out those retailers who were discounting replica product and ask us to do something about it", as well as asking "why are they doing this, the products fly off the shelf". Mr. Fellone also said that JJB was well known in the industry as an aggressive retailer, and was consistently the most vociferous in its complaints about discounting: see - paragraphs 15 and 16 of Fellone III. That evidence by Mr. Fellone was not challenged in cross-examination. Mr. Fellone is accepted as

> an honest witness by all parties and we accept his evidence in those respects. JJB did not call Mr. Bryan to contradict him."

Mr Bryan had been employed by Umbro at the relevant time but by the time of the hearing before the Tribunal he was employed by JJB.

54. At paragraphs 421 to 422 the Tribunal said this:

> "421. Mr. Russell accepted that discounting by Sports Soccer was a recurrent theme in his conversations with Mr. Bryan (Day 9, p. 126). We find it difficult to accept that Mr. Russell's sole purpose in complaining to Mr. Bryan about discounting by Sports Soccer was "to get better terms for JJB". In our view, an able and experienced replica buyer such as Mr. Russell would have realised that Umbro might very well respond to complaints by a powerful customer such as JJB by looking for ways to curtail Sports Soccer's discounting. Mr. Guest of Allsports realised that (Day 11, p. 69) and it would be surprising if Mr. Russell did not. We therefore find it difficult to believe that Mr. Russell realised this only "with the benefit of hindsight", or that Mr. Russell did not realise that one option open to Umbro was to limit, or threaten to limit, supplies of replica kit to Sports Soccer.
>
> 422. Similarly in our view Mr. Whelan, who is even more experienced, would have realised that conversations such as those he had with Mr. McGuigan or Mr. Ronnie would or might lead Umbro to consider ways of limiting discounting by Sports Soccer, so as to mollify JJB. In our view that was one of the principal purposes, or at least the reasonably foreseeable effect, behind the conversations about Sports Soccer's discounting that took place in the relevant period between Mr. Whelan and Mr. McGuigan, Mr. Whelan and Mr. Ronnie, Mr. Russell and Mr. Fellone, and Mr. Russell and Mr. Bryan. "Getting better terms for JJB" does not seem to us to be an adequate explanation and there is no evidence of any discussion of "better terms" in the period prior to Euro 2000. In this case, in our view, JJB was making complaints and using its bargaining power with a view to affecting the discounting activities of a competitor. The fact that there is no written record of such conversations is immaterial given the evidence before the Tribunal that such conversations took place."

55. The Tribunal concluded at paragraph 424 that:

> "We therefore find that, to the extent set out above, JJB did make strong verbal complaints to Umbro in the Spring and early Summer of 2000 in relation to discounting by Sports Soccer and that such complaints exerted considerable pressure on Umbro to react in a way which would limit discounting by Sports Soccer and thus mollify JJB."

56. Mr Ronnie gave evidence that Umbro did feel under pressure from JJB as a result of these complaints, and that it responded by putting pressure on Sports Soccer to raise its prices. The Tribunal said, at paragraph 425:

> "In our view it was JJB's intention, or at least the reasonably foreseeable effect, of JJB's complaints, that Umbro would be prevailed upon to do something about JJB's discounting."

57. The Tribunal accepted at paragraphs 426 to 428 that there were other factors influencing Umbro in this direction: pressure from Allsports, pressure from MU about discounting replica kit generally, and its own commercial interest in maintaining a high price for its products so as to enhance their image with customers. Nevertheless it held that JJB's complaints were a significant and material factor in inducing Umbro to persuade Sports Soccer to raise its prices for the England shirt for Euro 2000 (paragraph 429). It seems to us that the Tribunal was right to regard this as an important part of the context for the communications between JJB and Umbro about JJB's pricing policy at the end of May 2000. JJB made it clear to Umbro that it wanted Sports Soccer to charge the High Street price, so that it would not have to discount its own prices, and it wanted Umbro to see that this happened.

58. It was as a result of this pressure that Umbro did secure the agreement of Sports Soccer to raise its prices, on 24 May 2000, and, following further pressure from Umbro, Sports Soccer did in fact raise its prices on 3 June. Sports Soccer required assurances from Umbro as to the intentions of other retailers. Umbro gave it those assurances, relating to JJB above all, being not only the principal retailer but also the party with whom Sports Soccer had been engaged in a price war for some 6 months up to April.

59. Mr Ronnie of Umbro gave evidence, which the Tribunal accepted, as follows (see paragraphs 598-9):

    i) He spoke to Mr Sharpe of JJB before Euro 2000 who told him that JJB intended to price replica shirts at £39.99.

    ii) He was therefore able to, and did, assure Mr Ashley of Sports Soccer that JJB, as well as other retailers, would price at £39.99 and would not undercut Sports Soccer.

    iii) Having told Mr Ashley this, and obtained the agreement of Sports Soccer to raise its prices, Mr Ronnie told Mr Sharpe of this, so as to make sure that JJB knew that Umbro was taking steps to control Sports Soccer's undercutting, and to warn JJB against any undercutting.

60. The Tribunal then referred to other evidence and circumstances in giving reasons for their acceptance of the evidence. At paragraph 618 it said this:

> "We do not think that it is necessary for the OFT to satisfy us of the dates or the precise sequence of the telephone conversations in question. In our view it is probable that the relevant "dialogue" went on in late April/ May 2000, but we do not think it matters whether Mr. Ronnie first sought assurances from JJB and then went back to Sports Soccer or whether it was some other process of going back and forth. Whatever the precise sequence, it is in our view established that in the course of Mr. Ronnie's telephone conversations Mr. Sharpe of JJB gave Umbro an assurance, or at least an indication, that JJB would

> maintain the £39.99 price point if other retailers did not discount. Mr. Ashley gave Mr. Ronnie a reciprocal assurance at the meeting on 24 May. It is most unlikely, in our view, that Mr. Ronnie did not inform Mr. Sharpe of that reciprocal assurance. We accept Mr. Ronnie's evidence that he did."

61. One of JJB's arguments was that there was no reason for Umbro to speak to JJB in order to find out what JJB's pricing intentions were, because it was well known that JJB did not discount except in response to competitors, and would not have discounted a major product such as the England shirt during the Euro 2000. The Tribunal rejected that, both because it had heard and accepted evidence that there were conversations on the point, and because JJB's own witnesses had said that the market could not be certain at what price JJB would sell. JJB's prices were highly confidential and its price on a launch was only decided a few days in advance. The England shirt was not a new launch, and JJB was already selling the England shirt at £39.99, but coming up to a critical selling period, during Euro 2000, JJB might have needed to take a new decision about pricing policy, and if Sports Soccer had gone on discounting JJB might have had to do the same. Umbro could not safely have assumed that JJB would continue to sell at £39.99 absent a specific assurance to that effect. For these reasons, as explained in its judgment, the Tribunal accepted that JJB did tell Umbro what its pricing intentions were in relation to the England replica kit in advance of the Euro 2000 competition.

The Tribunal's finding of a breach of the Chapter I prohibition

62. Thus, the Tribunal found that the discussion between Umbro and Sports Soccer in the course of which Sports Soccer agreed to raise its prices for the England replica kit to High Street prices, on the basis of assurances by Umbro that other retailers, including JJB, would not undercut that price, was preceded, and made possible, by one or more conversations between Mr Ronnie and Mr Sharpe in which the latter told the former what JJB's pricing intentions were for the England replica kit during Euro 2000. In turn it was followed by a further conversation in which Mr Ronnie confirmed to JJB that Sports Soccer had agreed to raise its prices.

63. On that basis the Tribunal made findings that JJB was party to an agreement or concerted practice in breach of the Chapter I prohibition, with Umbro and Sports Soccer, which it set out at paragraphs 654 and 655. These paragraphs were the subject of scrutiny in the course of submissions, and we must set them both out. We add (in italics) the aids to the textual analysis of parts of the finding which were used by Mr Lasok during the hearing, to which we refer later:

> "654. In those circumstances, we find *(1)* that there was an agreement, or concerted practice, within the meaning of the Chapter I prohibition involving at least JJB, Umbro and Sports Soccer, in which each of JJB and Sports Soccer either *(a)* agreed with Umbro, or *(b)* confirmed to Umbro their respective intention, not to discount from £39.99 during Euro 2000, on the understanding that no other major retailer would do so. *(2)* At the very least, each company knowingly gave Mr. Ronnie an intimation or assurance to that effect. Mr. Ronnie then confirmed to each company what the other's intentions were. That in our judgment is properly characterised either as an agreement

to fix the prices of the England shirts at £39.99 during Euro 2000, or as a concerted practice the object or effect of which was to influence the conduct on the market of a competitor, or to disclose to one competitor the future pricing intentions of another competitor, having both the object, and the effect, of maintaining the price of England shirts at £39.99 during Euro 2000.

655. We are satisfied on the evidence in this case that Mr. Ronnie of Umbro received assurances or intimations as to their future pricing intentions during Euro 2000 at least from each of Sports Soccer and JJB, and in each case passed those assurances or intimations on to the other company. In particular, we find that Mr. Ronnie confirmed to JJB Sports Soccer's agreement not to discount and "guaranteed" to Sports Soccer that other retailers, including by necessary implication JJB, would not undercut. *(3)(a)* In those circumstances, JJB, Umbro and Sports Soccer are all in our view properly to be regarded as parties to the same agreement or concerted practice. *(b)* In any event, it is in our view immaterial whether, technically speaking, the agreements or concerted practices are between Umbro and JJB, and Umbro and Sports Soccer, respectively. In either case the effect on competition is the same."

64. The Tribunal said, at 657, that it did not matter that the reciprocal contact between one competitor (JJB) and the other (Sports Soccer) took place indirectly via Umbro. In principle that is not in dispute. It also said, at 658, that it would not have made a difference if Mr Ronnie had not confirmed to JJB that Sports Soccer had agreed to raise its prices. In principle that is also the case, but the finding is that he did confirm it to JJB, and it seems to us that the correctness of the finding of an agreement or concerted practice on a trilateral basis involving JJB, Sports Soccer and Umbro is to be tested by reference to the facts which the Tribunal did find. We have cited at paragraph [32] above what the Tribunal said at paragraph 659, which relates to the consequences if there were communication by JJB to Umbro and then by Umbro to Sports Soccer, but not any further communication by Umbro to JJB. One point in that paragraph on which some submissions were made is whether it is sufficient that it should be reasonably foreseeable by A (even if not actually foreseen) that the information given by it to B would be passed on to C. This also relates to the significance of what the Tribunal said at paragraph 422 and 425, cited above at paragraphs [54] and [56].

65. Mr Lasok for JJB criticised the Tribunal's finding that JJB was party to a trilateral agreement or concerted practice on the basis that its findings as to the communications that had taken place did not justify such a conclusion. In particular he submitted that there was no finding that Mr Sharpe, when he told Mr Ronnie of JJB's pricing intentions, knew or expected that the information would be passed on to Sports Soccer, or that, when he heard from Mr Ronnie that Sports Soccer had agreed to raise its prices, he had requested that information, or acted on the basis of it, or that he knew that Sports Soccer knew that its pricing intention would be passed on to JJB. He also submitted that there was no evidence that when Mr Sharpe told Umbro of JJB's pricing intentions he was doing so otherwise than for legitimate reasons.

66. It seems to us that these submissions ignore important aspects of the Tribunal's findings and of the context. We would not wish to examine the communications between Mr Ronnie and Mr Sharpe separately from the context of the pressure brought to bear by JJB on Umbro to "do something" about Sports Soccer's discounting of prices for England replica kit. The Tribunal said at paragraph 663 that JJB's complaints were an additional reason for the conclusion that JJB was party to a trilateral agreement or concerted practice. We agree that they are an important part of the reasons why such a conclusion is justified. We see no point in examining whether that conclusion would be justified in the absence of the pressure and complaints.

67. Mr Lasok subjected the Tribunal's judgment to a close analysis, in particular drawing together and contrasting references to the same and overlapping subject-matter from sections XI (Umbro and JJB: pressure and complaints), XIII (Evidence on the England Agreement) and XIV (The England Agreement: findings as regards JJB) of the judgment. In doing so he was able to show, here and there, that the Tribunal used different words in different places to refer to what were probably intended to be the same things with no difference of meaning. He asked a rhetorical question as to whether Section XIII included findings of fact. In the course of his dissection of the judgment he focussed on a number of words used which, he submitted, were capable of different meanings, such as "understanding" (see paragraph 645) and "consensus" (see paragraphs 648 and 651) which might or might not be an element in something which could be a breach of the Chapter I prohibition. Paragraphs 654 and 655 in particular were subjected to his forensic examination, as indicated in the annotations which he proposed and which we have set out as insertions in the quotation at paragraph [63] above.

68. There are some points on which, with respect to the Tribunal, we would criticise its wording, for example as regards paragraph 422: see paragraph [90] below. It must, however, be remembered that this judgment, very long as it is (1055 paragraphs, and 300 pages as printed, without the Annex) was given after a 14 day hearing with oral evidence from 9 of the witnesses and very substantial documentation. In the judgment the Tribunal had to address evidence as to four different agreements, involving a wide variety of different points, and had to consider a great variety of issues of law and of fact, in relation to two distinct appeals. It seems to us that it would be unfair to criticise the Tribunal for having divided up its treatment of the material before it into different sections in the way it did. While it would be desirable to achieve a precise and consistent use of wording throughout a long judgment, it would be unreasonable to pick on slight differences of language here or there in relation to the same or similar subject matter, in order to cast doubt on the nature of the Tribunal's finding on a point. We do not propose to refer to more than a few of Mr Lasok's textual points on the judgment, but we have examined them all in preparing this judgment.

69. It is a fair comment, in the light of his submissions, that the Tribunal's approach, dealing with the various factual matters in different sections, makes it necessary to take all the relevant passages together in order to see any particular finding of fact in its proper context. It seems to us that Mr Lasok's submissions did sometimes tend to isolate some passages in which findings of fact are set out rather than to take account of the context as appearing from other passages, perhaps in a different section of the judgment.

70. He also submitted that, if there were any doubt as to a finding of fact made by the Tribunal, JJB is entitled to the benefit of that doubt, on general principles and particularly having regard to the status of the proceedings as being criminal in nature for the purposes of Article 6 of the ECHR. As a matter of general principle that is a fair point. The first question, however, is whether on a fair reading of the judgment as a whole there is any such doubt. In the particular case we are satisfied that there is no such doubt which would need to be resolved in favour of JJB.

71. Even if in future the Tribunal is able to dispose of appeals in shorter judgments, it would be too much to expect that its judgments, especially when dealing with issues of fact to be decided on contested and sometimes not very complete evidence, would be proof, any more than those of any other court which has to undertake such a task, against attack by able advocates such as that mounted by Mr Lasok.

The implications of complaints

72. Mr Lasok submitted that the law as to complaints does not permit a conclusion that, merely by complaining, the complainer is party to an agreement or concerted practice with the undertaking to which the complaint is made, let alone with the party complained about. Of course there is and could be no general rule on the point. There can be complaints of all sorts, by no means all of which are made in the expectation that anything will be done about the matter complained about, still less something that might amount to a breach of the Chapter I prohibition. In the present case, however, as the Tribunal pointed out at paragraph 667, the complaints were vigorous and repeated, they were made at the highest levels, and they were backed up by an implicit threat arising from the strength of JJB's commercial position in relation to Umbro.

73. Both Mr Morris Q.C. for the OFT and Mr Lasok based submissions on this point on the decision of the European Commission, and of the European Court of Justice on appeal, in *Camera Care v Victor Hasselblad AB* [1982] CMLR 233 and [1984] ECR 883, as to the relevance of complaints, and action in response to complaints, and the possibility that they may constitute a concerted practice. We will refer to that case, summarising the facts so far as they are relevant as shortly as possible.

74. Victor Hasselblad AB (VH), based in Sweden, made high quality cameras, many of which were sold in the EEC, through a network of national sole distributors, which included Hasselblad (GB) Ltd (HGB) in the UK, Ilford in Eire, and Têlos in France. Among Hasselblad's authorised distributors in the UK, for a time, was a company based in London called Camera Care (CC), but it ceased to be authorised after complaints by HGB about its advertising. The market for VH's products was such that there was price competition within the EEC, giving rise to a degree of parallel imports. HGB suffered from this phenomenon and complained to VH, which was able to identify to which of its national sole distributors a particular camera had been supplied. Through sample purchases from CC, VH was able to ascertain that its supplies had come from Ilford. It was then found that these had been bought from Ilford by a dealer based in Belfast, who had sold on to CC. In response to pressure from VH, prompted by HGB, Ilford agreed not to sell to any purchaser based in the UK. CC also bought products from Têlos, and despite agreeing not to resell them in the EEC, in fact sold to retail purchasers in England. Eventually Têlos refused to supply any more VH cameras to CC. There were also similar problems arising from

sales by the Belgian sole distributor, Prolux, to another dealer based in France, about which Têlos complained. The Commission noted that it was a regular practice of VH and its sole distributors to provide each other with their respective price lists and terms of business applicable in each Member State.

75. The proceedings arose from a complaint by CC against VH and HGB alleging breaches of Article 81 (as then numbered 85). The Commission upheld the complaint and imposed penalties. HGB appealed, unsuccessfully, to the ECJ.

76. In its decision, the Commission referred to the concept of concerted practice as explained in *Suiker Unie*. It said, at paragraph 42:

> "If an undertaking acts on the complaints made to it by another undertaking in connection with the competition from the former's products, this constitutes or is evidence of a concerted practice."

77. This proposition was explicitly based on VH having received and taken up complaints by HGB and raised them with Ilford and Têlos, obtaining from each an assurance or commitment not to sell to UK customers. As the Commission said at paragraph 44, in so doing Têlos and Ilford acted on and adopted the complaints made by the other sole distributors. At paragraphs 45 and 47 the Commission went on to say this:

> "45. In addition to Victor Hasselblad, which, in its capacity as manufacturer, played a major role in formulating this policy of market compartmentalisation, Hasselblad (GB) and Prolux knowingly and intentionally prompted the other sole distributors to act as they did. By acting in this way, the sole distributors in question (Hasselblad (GB), Ilford, Têlos, Prolux and Polack) arranged also among themselves not to export to other member-States on the Common Market. They thus complied with Victor Hasselblad's general sales policy, which had been notified to them, *viz.* to afford the sole distributors the maximum feasible territorial protection. This co-ordinated behaviour made normal market conditions, as they would have evolved in the presence of free circulation of goods, unattainable.
>
> ...
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> 47. Têlos's and Ilford's submission that they complied with the manufacturer's export ban only in form (Têlos) or only as a result of extreme pressure being exerted on it (Ilford) is irrelevant to the question whether there was a concerted practice. For a concerted practice to exist it is sufficient for an independent undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking. The motive or the knowledge that the act is unlawful is irrelevant."

78. Mr Lasok particularly relied on what the Commission said in the second sentence of paragraph 49:

> "49. The exchange of price-lists and business secrets between Victor Hasselblad, Hasselblad (GB), Ilford, Têlos, Prolux, Nordic and Polack

> was another ancillary device to ensure the market partitioning. No objections will normally be raised under competition law merely because a manufacturer asks its sole distributors for their price lists and for information regarding their terms of business (price rebates, bonuses, etc). However, Victor Hasselblad used the information it received to inform its sole distributors. As can be seen from Victor Hasselblad's letters of 18 June 1974 and 13 October 1978 to Têlos and to Hasselblad (GB) respectively, this exchange of information was designed precisely to prevent exports ('pirate exports') or to remove the incentive for them."

The Commission went on to note that price information was also exchanged directly between some of the sole distributors, which clearly served the same purpose.

79. This has to be seen in the context of paragraph 50 in which the Commission observed that the European Court of Justice and the Commission had stated, in several cases, that mutual notification between competitors of prices and the conditions governing discounts, rebates and the like which rank as business secrets "constitutes an anti-competitive measure" within the meaning of Article 81, and that:

> "This is all the more so where, as is usually the case, such information is sought or given for an anti-competitive purpose or with anti-competitive effects."

80. HGB appealed unsuccessfully. In the ECJ, on the question of concerted practice, the gist of the contention in favour of the finding of a concerted practice was dealt with as follows:

> "27. The applicant does not dispute that after the termination of the dealer agreement with Camera Care in 1978 it sought to stop supplies of Hasselblad cameras to Camera Care and with that end in view approached Victor Hasselblad, Ilford, Têlos and Prolux. However, it maintains that once Camera Care ceased to be an authorized distributor, it was justified in considering that authorized distributors and dealers could no longer supply Camera Care. In September 1979, however, following consultations with its lawyer, the applicant ceased its efforts to block supplies of equipment to Camera Care."

81. Mr Lasok submitted, correctly, that nothing in the judgment of the ECJ gives any specific endorsement to the sentence from paragraph 42 of the Commission's decision quoted at paragraph [76] above. He also pointed out that, in that case, there were complaints direct by one supplier (HGB) to another (Ilford and Têlos) as well as complaints by HGB to the manufacturer, VH, and that the complaints were specifically and expressly aimed at ensuring that Ilford and Têlos did not supply customers from outside their territories. In the present case, by contrast, the complaints were only from JJB to Umbro, not direct to Sports Soccer, and they were not in specific terms as to how the matter complained of (Sports Soccer's discounting of England shirts) should be addressed.

82. Certainly there are factual differences between this case and the *Hasselblad* case. In principle it does not matter whether the origin of an alleged concerted practice is said

to be a complaint by one undertaking, such as HGB or JJB, about the practices of another (Ilford or Têlos, or Sports Soccer), aimed at getting those practices changed, or a less confrontational proposal (as in the Toys and Games cases). What matters is the end result. If the complaints are addressed directly by one undertaking to that whose conduct is the subject of the complaint, then it would be difficult for the first to contend that, if the subject of the complaint changes its conduct so as to remove the cause for the complaint, that was not what was aimed at, so that the end result does not amount to a concerted practice for lack of consensus. It is only because, in the present case, the complaints were addressed indirectly, by JJB to Umbro, that it is necessary to examine JJB's state of mind in making the complaints in order to assess the submission that, although Umbro achieved the result that JJB said it wanted Umbro to arrange, it did not amount to a concerted practice involving JJB because of the absence of any subjective consensus on the part of JJB.

83. A further point of distinction which Mr Lasok sought to draw is that, in *Hasselblad,* the pressure was specifically directed towards an anti-competitive goal, namely to prevent sales to purchasers outside the particular distributor's territory, whereas in the present case, he submitted, JJB's complaints did not require that anything unlawful be done, and the cause for complaint could have been satisfied in a lawful manner. He pointed out that a complaint by one wholesale customer of a manufacturer to that manufacturer about the pricing policy of another such customer could be satisfied (if it was to be at all) by the manufacturer reducing the prices it charged to the complaining customer, or by discontinuing supplies to the other, neither of which (he said) would infringe the Chapter I prohibition nor, unless the withdrawal of supplies amounted to an abuse of a dominant position, the Chapter II prohibition. Thus, taken at its highest, JJB's demand that Umbro "do something" about Sports Soccer's discounting could not be understood as requiring Umbro to act unlawfully. Accordingly, if Umbro did act unlawfully, by coming to a price-fixing agreement with Sports Soccer, that was a matter of its choice, for which JJB should not be made responsible by treating it as a party to an agreement or concerted practice.

84. He also pointed out that on one occasion in 2001 when JJB did cancel an order of shirts from Umbro (MU Centenary shirts) in response to Sports Soccer selling MU home shirts at heavily discounted wholesale prices, JJB's motive was to put pressure on Umbro to sell MU home shirts to it at lower prices. That is true, but it was in a quite different situation, where JJB's complaint was that Umbro had sold to Sports Soccer at low clearance prices, and had not offered the same price to JJB as well as (or instead of) to Sports Soccer. While it is therefore factually correct to observe that Umbro could have reduced its wholesale prices to JJB for the England shirt at the time of the Euro 2000 competition, it does not seem to us that anyone could have supposed that it would do so. Umbro did not in fact offer to do so, nor is it said that JJB asked for this to be done. Equally, given the "must have" status of the product for any sportswear retailer, it could not have been expected that Umbro would refuse to supply the England shirt to Sports Soccer altogether, though it might use a threat of that, or more likely of a reduction in the quantities supplied, to persuade Sports Soccer to raise its prices. It seems to us that Mr Sharpe would have been astonished if, when Mr Ronnie telephoned him after 24 May, he had been told that Sports Soccer would not be selling the England shirt at all (after its current stocks had been exhausted) rather than (as he did say) that Sports Soccer would be selling at High Street prices. Accordingly it seems to us that, when Mr Whelan and others at JJB told Umbro to "do

something" about Sports Soccer's discounting of England shirts, meaning that they should see that the discounting stopped, they must be taken to have foreseen and intended that Umbro would at least try to get Sports Soccer to raise its prices, rather than that Umbro would do anything else to resolve the problem.

85. The Tribunal said that the pressure by JJB on Umbro could not be explained as JJB's attempt to get better terms for JJB: see paragraph 422. That being so, the explanation for the pressure had to be a wish that, given that Sports Soccer would be selling the shirts, it should do so at High Street prices instead of at a discount.

86. Accordingly, although Mr Lasok is right to say that the last sentence of paragraph 664 of the judgment is too wide, if it were taken as an entirely general proposition, because the circumstances of the complaint might be such that the complainer did not expect any action, or at least any unlawful action, to be taken in response to his complaint, nevertheless in the present case on the facts the case against JJB is that it did want action to be taken upon the complaint, and foresaw that the action taken might be a price-fixing agreement between Umbro and Sports Soccer, which would be unlawful. If that case is made good on the facts as found, then it seems to us that JJB should not be absolved from responsibility by saying that it was for Umbro to choose what to do, and that JJB had no responsibility for it, and could not be regarded as willing the result, so as to be dissociated from any agreement or concerted practice between Umbro and Sports Soccer.

87. Mr Lasok submitted that, for an undertaking to be involved in an anti-competitive arrangement reached between others, it must know of the arrangement, not merely of the possibility that there might be such an arrangement. He cited passages from the judgment of the CFI in *Cimenteries v Commission*, Cases T-25/95 etc. [2000] ECR II-491 for this proposition, where the CFI considered whether one undertaking, which undoubtedly entered into a limited agreement or concerted practice, was aware that the others with whom it was dealing were themselves part of a much wider and more serious agreement or concerted practice, and concluded that it was not, and was therefore not to be penalised on the basis that it was a participant in the more serious breach of Article 81.

88. In general that is no doubt the case, but it seems to us that, where the first undertaking, in effect, asks the second to do something in relation to a third which would be an anti-competitive agreement or concerted practice, and the second does do so, the first cannot rely on the fact that it may not have known whether the second and third did enter into such an agreement or concerted practice in order to assert that it was not involved as a participant in what they did. No doubt Umbro's staff did not perceive JJB's conduct as "asking" Umbro to act in relation to Sports Soccer, but it did amount to a particularly forceful form of request or demand.

89. The complaints and pressure by JJB on Umbro were part of the reason why Umbro, by Mr Ronnie, set out to try to get Sports Soccer to agree to raise its prices for England replica kit. They were not the sole reason but they were a significant factor. It seems to us that the level and extent of the pressure described by the Tribunal in the relevant part of its judgment (the analysis is in paragraphs 414 to 429, following a long review of the relevant evidence from paragraph 400) was such that JJB plainly did expect Umbro to do something in response, vis-à-vis Sports Soccer. At paragraph 416 the Tribunal referred to Mr Whelan's evidence in terms summarised at paragraph

[51] above, and in the following paragraph they made the comment also quoted in paragraph [51]. Mr Ronnie gave evidence (see paragraph 418) that Mr Whelan or Mr Sharpe used words to the effect of "this is getting out of hand, get it sorted". Mr Fellone of Umbro said (see paragraph 419) that Mr Sharpe or Mr Russell of JJB would ring him, identify discounting retailers and "ask us to do something about it". The Tribunal did not accept the evidence of Mr Russell of JJB that he was only concerned to get better terms for JJB: see paragraph 421 quoted above. From that passage it is clear that the Tribunal believed that Mr Russell realised that Umbro might very well respond by finding ways to curtail Sports Soccer's discounting and that a limit, or threatened limit, of supplies was one option that might be used.

90. In paragraph 422 (also quoted above, at paragraph [54]) the Tribunal referred to what Mr Whelan would have realised. Towards the end of that paragraph it said that JJB was making complaints and using its bargaining power "with a view to affecting the discounting practices of a competitor", that is to say, in order to see that Umbro did something to prevent Sports Soccer from discounting, or persuade it not to discount. In the middle of the paragraph the Tribunal said that leading Umbro to consider ways of limiting discounting by Sports Soccer was "one of the principal purposes, or at least the reasonably foreseeable effect" of the conversations in which JJB complained about Sports Soccer's discounting. That is reflected later in paragraph 596: "Those complaints were intended, or had the reasonably foreseeable effect, of putting commercial pressure on Umbro to do something about discounting". Given the terms of the complaints and the strength of Mr Whelan's views, not to mention his evident commercial acumen and experience, we do not understand the basis for the Tribunal's apparent hesitation in concluding, in these paragraphs, that the complaints were intended to have the result of forcing Umbro to tackle the question of Sports Soccer's discounting. It is another question whether JJB did expect or should have expected that Umbro would threaten to limit Sports Soccer's supplies in order to persuade Sports Soccer to agree to raise its prices. But all the evidence reviewed in the passage from paragraph 400 onwards about the pressure which JJB did bring to bear on Umbro seems to us to lead to the conclusion that it was intended to make Umbro face up to the issue of Sports Soccer's discounting, rather than that this was no more than a reasonably foreseeable consequence which, subjectively, those who voiced the complaints on behalf of JJB may not in fact have foreseen. Nothing that the Tribunal said about Mr Whelan suggests that he is someone who would not realise the reasonably foreseeable consequences of something said by him in this sort of commercial context. Accordingly it seems to us that the pressure applied by JJB to Umbro should be seen, as the Tribunal described it later in paragraph 422, as imposed "with a view to affecting the discounting activities of a competitor". For reasons set out above, it also seems to us that JJB cannot escape responsibility by saying that, for all it knew, Umbro might satisfy its demand in a lawful way.

91. That being so, we do not need to decide, in the context of the Football Shirts appeal, whether Mr Lasok's criticism of paragraph 659 of the Tribunal's judgment, referred to at paragraph [32] above, is justified. But it does seem to us that the Tribunal may have gone too far, in that paragraph, insofar as it suggests that if one retailer (A) privately discloses to a supplier (B) its future pricing intentions "in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions" and B then passes that pricing information on to a competing retailer (C) then A, B and C are all to be regarded as parties to a concerted

practice having as its object or effect the prevention, restriction or distortion of competition. The Tribunal may have gone too far if it intended that suggestion to extend to cases in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact, appreciate that the information was being passed to him with A's concurrence. This is not such a case on the facts.

The communications between JJB, Umbro and Sports Soccer

92. Thus, the starting point for an analysis of the communications between Mr Ronnie and Mr Sharpe is not that Mr Ronnie, unprompted, called Mr Sharpe to ask about JJB's pricing intentions as regards England replica kit during Euro 2000. Rather the starting point is that JJB had been badgering Umbro for some time to do something about the fact that Sports Soccer was already selling England replica kit at a discount, and that a crucial selling period was approaching during which it would be particularly important for JJB that it should not have to face or engage in a price war, such as it had been engaged in with Sports Soccer for some 6 months until April 2000, and that JJB's commercial strength as against Umbro was such that Umbro had to try to do something to satisfy JJB's concerns. Furthermore, Mr Ronnie knew, from speaking to Mr Ashley of Sports Soccer, that if he was to have any chance of persuading Sports Soccer to agree to raise its prices, he would have to be able to assure Mr Ashley that other retailers, including JJB, would not discount themselves. That was the context in which Mr Ronnie spoke to Mr Sharpe and was told that JJB would not discount.

93. At that time JJB was selling the England shirt at the High Street price, and had made it clear to Umbro that it wanted to be able to go on doing so. Sports Soccer, on the other hand, was selling at a discount. There had been a price war between JJB and Sports Soccer although it had come to an end in April when JJB stopped discounting as a general policy as against Sports Soccer. JJB's detailed pricing policy, certainly as regards the launch of a new product, was confidential and was decided only a few days in advance (see paragraph 628), so that other parties could not safely assume that they knew what JJB would do in terms of pricing.

94. Mr Ronnie spoke to Mr Sharpe about JJB's pricing intentions, in response to which Mr Sharpe told him that JJB would sell at High Street prices unless others discounted. Mr Lasok submitted that there was no finding, and no basis for a finding, that Mr Sharpe knew that this information would go any further than Umbro, and certainly not that it would be passed to Sports Soccer. We disagree. It seems to us that it must have been apparent to Mr Sharpe, even if there was no express reference to Sports Soccer, that Mr Ronnie wanted the information in the context of taking steps to guard against discounting. Mr Sharpe was among those who had spoke to Umbro staff about the Sports Soccer discounting policy. It would be extraordinary to suppose that, when Mr Ronnie asked him about JJB's own attitude to pricing England replica kit during Euro 2000, it did not occur to Mr Sharpe that this was connected with the question of discounting by Sports Soccer and attempts to prevent it occurring, which Mr Sharpe and others at JJB had been asking for over some time past.

95. Mr Lasok took up a sentence in paragraph 661 of the Tribunal's judgment, as follows:

> "In the present case there is no evidence that JJB disclosed its future pricing intentions to Umbro for some legitimate purpose."

He said that this revealed a wrong approach to the burden of proof; it was not for JJB to prove that its purpose was legitimate, but for the OFT to prove the opposite. On the face of that sentence alone, that criticism could be justified. However, in the context of the other material which was before the Tribunal, the matter is to be seen quite differently. There was ample evidence, especially from the pressure brought to bear by JJB on Umbro, that the purpose of the disclosure was anti-competitive. Absent any basis for a suggestion that there was some different and legitimate purpose to the disclosure, the OFT's burden of proof had been discharged. The Tribunal's reference is therefore to the absence of any such material.

96. In those circumstances it seems to us to be more than somewhat artificial to suggest that Mr Sharpe did not envisage that the information would be passed on to Sports Soccer, or that he did not expect to receive a later call from Mr Ronnie after the latter had spoken to Sports Soccer.

97. The second stage in the process was Mr Ronnie's call to Mr Ashley, to persuade him that he should raise Sports Soccer's prices for the England shirt. It is evident that Mr Ashley was very reluctant to do so. It required pressure from Umbro by way of veiled or not so veiled threats as regards supplies. It also required an assurance that other retailers would not be discounting the shirts. Mr Ronnie gave him that assurance. He did not mention any retailer by name, but because JJB was so dominant in the field, any assurance as to retailers must have been taken, and intended to be taken, as including JJB. Mr Ashley agreed to raise Sports Soccer's prices on that basis, conditionally on the others also raising or maintaining their prices to or at the same level. It seems to us that, in turn, he must have recognised that others concerned would be told of his agreement. He knew, from what Mr Ronnie told him about other retailers, that Umbro had been in touch with the other retailers about their pricing intentions, and that these had been passed on to him. He must have realised that what he told Mr Ronnie about Sports Soccer's intentions would, correspondingly, be passed back to the others, including, necessarily, JJB.

98. Then at the third stage, Mr Ronnie telephoned Mr Sharpe again and told him that Sports Soccer had agreed to raise their prices and to sell at High Street prices. He did so in order to make it known to JJB that Umbro had, as asked, "done something" about Sports Soccer's discounting, by securing an agreement that it would come to an end as regards this product. He also needed to make sure that JJB knew of this because of Mr Sharpe having mentioned that JJB might discount if others did, so that JJB should be aware that, at any rate if Sports Soccer kept to their agreement, JJB would not need to discount. Because Sports Soccer was still selling at a discount at that time, JJB could not be sure what Sports Soccer's intentions were unless informed of them by Umbro. But for being told that Sports Soccer had agreed to raise its prices, it might not have been willing to wait until 3 June to see whether Sports Soccer did in fact come into line. There may therefore have been a risk that, if the information as to Sports Soccer's intentions was not passed on to JJB, the latter would respond to Sports Soccer's still discounted price by discounting itself, which would certainly have led to Sports Soccer not raising its prices. It does not seem to us that, in this context, Mr Sharpe could have been surprised to receive this telephone call.

Mr Lasok in his written material described the call as coming "out of the blue". We do not think that can be right.

99. Mr Lasok submitted that, when Mr Sharpe told Mr Ronnie of JJB's pricing intentions at the first stage, he was doing nothing which could be regarded as anti-competitive, and he referred to the second sentence of paragraph 49 of the Commission's decision in *Hasselblad*, quoted above. It does not seem to us that this is correct. It is one thing for a manufacturer to ask its distributors, as a matter of routine, to inform it of the prices at which and the terms on which they sell its products, which it may wish or need to be aware of for its own commercial purposes and in the context of the ongoing relationship with each distributor separately. It is quite another (as it was found to be in the *Hasselblad* case itself) where the information is obtained in order to be shared with other customers of the same manufacturer. It is all the more another thing if the information is given to the manufacturer in the context of pressure by the party supplying the information, brought to bear on the manufacturer, in order to get another customer into line as regards prices, expecting that the information may be used by the manufacturer in relation to the other customer to persuade it to raise its prices.

100. Another submission by Mr Lasok on this point was that Mr Ronnie's call to Mr Sharpe did not affect JJB's conduct on the market, because JJB was already selling at High Street prices, and this did not change. That ignores the fact that, if Sports Soccer had not raised its prices, JJB might itself have discounted. On being told by Mr Ronnie of Sports Soccer's agreement, JJB knew that, assuming that Sports Soccer complied with their agreement and that no other major retailer broke ranks and discounted, JJB would be able to maintain its prices at their current level. A decision not to discount, in such circumstances, is just as much conduct on the market as a decision to discount would be.

101. Putting his same point in different terms, Mr Lasok borrowed from the words of the ECJ in *Bayer* (see paragraph [26] above) and submitted that Mr Ronnie did not, by his call back to Mr Sharpe, "invite" JJB to fulfil an anti-competitive goal jointly with Umbro and Sports Soccer. We disagree, though we can see that this is not the language that the parties would have used at the time. The context was that JJB had started the process by issuing what could, in a sense, be called an "invitation" to Umbro, by way of its pressure to do something about Sports Soccer's discounting. That invitation involved bringing Sports Soccer in as well, in order to achieve the anti-competitive aim of stabilising prices at the High Street price level and avoiding a price-cutting war. In that context, when Mr Ronnie spoke again to Mr Sharpe, it was not only to tell him that Sports Soccer had agreed, but also to make sure that JJB was aware that Sports Soccer would be raising its prices, and JJB need not consider discounting on its own part. Of course, it was known that JJB wanted prices raised and it was therefore easy to see that JJB would accede to Mr Ronnie's "invitation" to maintain JJB's prices. If it seems unnatural to speak, in these circumstances, of Umbro inviting JJB to fulfil an anti-competitive goal jointly with Umbro and Sports Soccer, the main reason is that JJB had taken the original initiative towards the anti-competitive arrangement, by putting pressure on Umbro in the first place. Umbro would not have regarded JJB's pressure on it as an "invitation", but in terms of the language of the ECJ, it could be regarded as such.

The Football Shirts appeal on liability - conclusion

102. In these circumstances it seems to us that the Tribunal was entitled to find that (1) JJB provided confidential price information to Umbro in circumstances in which it was obvious that it would or might be passed on to Sports Soccer in support of Umbro's attempt to persuade Sports Soccer to raise its prices (thereby adopting the pricing policy which JJB explicitly wanted adopted by all significant retailers), (2) Umbro did use the information in relation to Sports Soccer in that way, (3) Sports Soccer did agree to raise its prices in reliance on this information, and foreseeing that others including JJB would be told of its agreement, and later did raise its prices as it had agreed to do, and (4) Umbro did tell JJB of this, thereby making it clear to JJB that it would be able to maintain its prices at their current level, as it did.

103. It also seems to us that the Tribunal was right to hold that this sequence of events amounted to a concerted practice to which JJB was a party, as well as Umbro and Sports Soccer, whereby the two retailers coordinated their conduct on the market in such as way as, knowingly, to substitute practical co-operation between them for the risks of competition (see *Dyestuffs*, referred to at paragraph [21(i)] above), which had the object or effect of preventing, restricting or distorting competition and in particular of fixing the retail sale price of England replica football shirts in the period before and during Euro 2000, and therefore constituted a breach of the Chapter I prohibition.

104. Mr Lasok analysed paragraphs 654 and 655 of the judgment in his submissions and criticised the Tribunal's language in those paragraphs. He questioned the use of the word "knowingly" in the part of paragraph 654 annotated in the quotation set out above (at paragraph [63]) as (2). Each of JJB and Sports Soccer knew that it was giving Umbro an intimation of its intended pricing. He submitted that the use of the word meant no more than that. But that cannot be right. It is not a case of an unconscious disclosure of pricing intentions, for example by someone talking in his sleep. It seems to us plain that "knowingly" must, in context, refer to the knowledge of JJB and Sports Soccer respectively that their pricing intentions would be passed on by Umbro to the other. For the reasons already given, it seems to us that this finding was justified.

105. He also suggested that when, in the part of paragraph 655 annotated as (3)(b) in the quotation set out above, the Tribunal used the words "technically speaking", this should be understood as meaning "on a correct legal analysis", and that the Tribunal there recognised that there was no proper basis for the finding of a trilateral concerted practice. Whatever may be meant by those words, we disagree with Mr Lasok's submission. It seems to us that the facts as found do plainly justify a finding of a trilateral concerted practice. We also consider that, even if that were wrong, so that there were two separate agreements or concerted practices between JJB and Umbro, on the one hand, and Umbro and Sports Soccer, on the other, the respective parties' knowledge of what was going on as regards the other agreement or concerted practice, and the interdependent relationship between the two, would mean that each of the vertical concerted practices was capable of being regarded as being as serious a breach as if there had been a trilateral concerted practice with horizontal operation, and certainly far more serious than two unrelated vertical concerted practices, the customer party in each case being unaware of the fact or circumstances of the other.

106. Mr Lasok submitted that the Tribunal's decision in the Football Shirts case has caused uncertainty in commercial circles, casting doubt on freedom of discussion on a vertical basis, above all between manufacturers and their principal customers, in relation to matters which both parties need reasonably to be able to discuss, including actual or likely retail prices, profit margins and wholesale prices or terms of sale. It seems to us that the present decision, and that of the Tribunal, ought not to be seen as casting any cloud of illegality over such discussions, so long as they are conducted on a bilateral basis and limited to discussions of the nature described. As the Tribunal said, there is a risk that discussions about possible prices, or about historic prices, can tend towards discussion of future prices, and agreement as to what they should be. Any party to such discussions on a vertical basis needs to be aware of that risk and to avoid it. But this case is not about such discussions at all. Nor does it outlaw complaints by a wholesale customer to its supplier in general, especially if they are directed at getting better terms for the business between those two parties. In the present case the complaints did not have that aim, and the discussions between manufacturer and customer had a strong and unusual context which makes it clear that there was a horizontal element in the subject of discussion. That is what makes what happened in the present case a breach of the Chapter I prohibition. In our judgment the Tribunal was right to hold that there had been such a breach consisting of a trilateral concerted practice involving JJB, Umbro and Sports Soccer. We dismiss JJB's appeal on liability.

The Toys and Games appeal: general

107. In its decision of 21 November 2003 (CA98/8/2003) the OFT found that Argos and Littlewoods had, with Hasbro (UK) Limited ("Hasbro"), infringed the Chapter I prohibition by entering into agreements and/or concerted practices which fixed the prices at which certain toys and games manufactured by Hasbro would be retailed by Argos and Littlewoods. The infringement was found to comprise two vertical bilateral agreements – the one between Hasbro and Argos and the other between Hasbro and Littlewoods - to fix prices for certain Hasbro products at Hasbro's RRPs; and a trilateral agreement, with a horizontal component, between Hasbro, Argos and Littlewoods to the same effect.

108. The OFT imposed substantial penalties in respect of the infringements which it found established. It ordered Argos to pay a penalty of £17.28 million; and it ordered Littlewoods to pay a penalty of £5.37 million. It assessed the penalty which (but for leniency) Hasbro would have been ordered to pay at £15.59 million; but, because it took the view that Hasbro had come forward with information that led to the discovery of the infringements, that penalty was reduced to nil.

109. Argos and Littlewoods each appealed to the Competition Appeal Tribunal against both findings of infringement and penalty. Hasbro had no need to appeal against penalty; and it did not appeal against the findings of infringement. Save that Hasbro, and certain of its employees, provided evidence to the Tribunal upon which the OFT relied, Hasbro took no part in the appeal before the Tribunal.

110. The decision as to infringement was upheld by the Tribunal in a judgment ([2004] CAT 24) handed down on 14 December 2004. The judgment is substantial, extending over 792 paragraphs with an appendix. In the present context sections X (Chronological Survey of the Evidence), XI (Summary of Findings as to a bilateral

agreement or concerted practice between Hasbro and Argos) and XIII (Summary of Findings as to a trilateral concerted practice between Hasbro, Argos and Littlewoods) are of particular importance, having in mind (i) that Littlewoods does not appeal to this Court from the findings that it was party, with Hasbro, to a vertical bilateral agreement and (ii) that the appeal to this Court on liability is confined to points of law. Nevertheless, in the circumstances that the Tribunal's conclusion that a trilateral concerted practice had been established is based on its view that the two vertical bilateral agreements were intended to operate "in parallel" – in the sense that each was made with the intent that the other should be observed – it is necessary to have regard, also, to section XII (Summary of Findings as to a bilateral agreement or concerted practice between Hasbro and Littlewoods).

111. The Tribunal, in a separate judgment ([2005] CAT 13) handed down on 29 April 2005, reduced the penalties which the OFT had imposed on Argos and Littlewoods to, respectively, £15.0 million and £4.5 million. There are appeals to this Court by Argos and Littlewoods from the Tribunal's refusal to reduce those penalties to a lesser amount, or to nil. In particular it is said that the Tribunal was wrong (at section IV of its penalty judgment) in failing to appreciate that the principle of equal treatment required that Argos and Littlewoods be treated no less favourably than Hasbro.

The factual background

112. Argos and Littlewoods are the two major high street catalogue retailers in the United Kingdom. Each publishes two catalogues in the course of a year: one for the spring/summer season and the other for the autumn/winter season. Prices for the products to be listed in the catalogues need to be established at a relatively early stage in advance of publication. Prices for the autumn/winter catalogue (published in late July) will be fixed in May: prices for the spring/summer catalogue (published in January) will be fixed in November. Once set, the prices in the catalogue are essentially fixed during the season for which the relevant catalogue is current, though it may be possible to publicise special offers or price variations by supplementary leaflets. Catalogue retailers must go to the market with prices which are as keen as possible; all the more so, if their business is based upon discounting from suppliers' recommended retail prices (RRPs).

113. Hasbro is a leading global manufacturer of toys and games. It is one of the largest suppliers of toy and games in the United Kingdom. It supplies such well-known toys and games as 'Action Man', 'Monopoly' and 'Cluedo'.

114. In 1998 retailers were thought by Hasbro management to be unhappy with the margins they were receiving on Hasbro's branded products. Hasbro responded to this situation by approaching Argos and Littlewoods to seek their adherence to two marketing initiatives: described as a "pricing initiative" and a "listing initiative". The pricing initiative sought to maintain retail margins on Hasbro's toys and games by persuading retailers to retail Hasbro products at Hasbro's RRPs. The initiative was initially limited to the Core Games and Action Man ranges. These were the products in respect of which price-cutting had been most intense.

115. Hasbro regarded the participation of Argos and Littlewoods as necessary for the success of its pricing initiative. Argos was generally accepted as the price-setter. But Argos would have been unlikely to make any commitment to follow Hasbro's RRPs

unless it were reassured that, in doing so, its catalogue prices would not be undercut by those in the Littlewoods catalogue. It was therefore necessary for the success of the pricing initiative for Hasbro to be in a position to reassure Argos that Littlewoods would also be committed to follow the same prices. It was with that in mind that, towards the end of 1998 and at the beginning of 1999, discussions took place between Hasbro's sales team and the relevant buyers for Argos; and discussions took place between Hasbro's sales team and the relevant buyers for Littlewoods. There was no evidence of direct contact between Argos and Littlewoods. But there was, thereafter, an assimilation of the prices in the Argos' catalogues and the Littlewoods' catalogues for the products subject to the pricing initiative – Core Games and Action Man. That price similarity could be seen in the spring/summer 1999 catalogues; it was apparent in the autumn/winter 1999 and the spring/summer 2000 catalogues; and it was continued (and extended to other product lines) in the autumn/winter 2000 and spring/summer 2001 catalogues.

The OFT decision

116. Those involved in the early discussions on behalf of Hasbro included Mr Mike McCulloch (head of marketing and sales), Mr David Bottomley and Mr Mike Brighty (sales directors) and, in later discussions, Mr Bottomley, Mr Neil Wilson (business account manager for the Argos account) and Mr Ian Thomson (business account manager for the Littlewoods account). On the basis of detailed witness statements from three of those Hasbro employees – Mr Bottomley, Mr Wilson and Mr Thomson - and contemporary documents, the OFT found that Hasbro's pricing initiative had led directly to an overall infringing agreement or concerted practice between Hasbro, Argos and Littlewoods. In particular, the OFT were satisfied that the discussions had led to bilateral agreements or concerted practices between Hasbro and Argos, on the one hand, and between Hasbro and Littlewoods, on the other hand which were contingent on each other and which formed part of a pattern of continuous conduct with a common objective. The parallel bilateral agreements or concerted practices, thus linked, were to be read together as one agreement or concerted practice between the three companies.

117. The OFT explained its approach at paragraph 96 of its decision:

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

118. At paragraph 128 of its judgment on liability the Tribunal set out a number of the key findings made by the OFT in reaching that conclusion. The numbered paragraphs to which reference is made are those in the OFT decision:

> "The witness statements of David Bottomley, Neil Wilson and Ian Thomson clearly show that Argos and Littlewoods took part in the pricing initiative (to price agreed products at or near Hasbro's RRP) on the understanding with Hasbro that Hasbro would get the other retailer to do the same." (paragraph 97)
>
> "Although the OFT has no evidence that Argos and Littlewoods spoke directly, confidential information was exchanged between them with Hasbro acting as the fixer or middleman." (paragraph 99)
>
> "Hasbro's, Argos's and Littlewoods's direct and close involvement is clearly shown by the series of emails sent around 18 May 2000 and in particular the two emails sent by Ian Thomson." (paragraph 100)
>
> "The witness statements of Ian Thomson, Neil Wilson and David Bottomley show that Argos and Littlewoods did not "commit" themselves to price at or near Hasbro's RRPs in the sense that they formally bound themselves or guaranteed to adhere to them. In particular, they reserved the option to react to undercutting by another retailer. However as is demonstrated by the evidence above, Argos and Littlewoods did inform Hasbro of their pricing intentions and Hasbro felt confident that they would price accordingly and in line with its RRPs." (paragraph 101)
>
> "As well as being evidence of Argos's and Littlewoods's commitment to Hasbro's prices (in the sense indicated in paragraph 101 above), the information about Argos's pricing intentions in the email from Hasbro to Littlewoods of 18 May 2000 also had the effect, at the very least, of substantially reducing in advance any uncertainty that Littlewoods would have had to Argos's pricing policy for the products in question." (paragraph 102)
>
> "Once it was seen (in the A/W 1999 Catalogue) that both parties had in fact carried out their part of the arrangement, this built trust, so that they could go forward with the same arrangement in connection with the next catalogue, with more confidence. Once confidence built up, they felt able to extend the arrangement to other products (as happened), secure in the knowledge that the arrangement was working well and would be just as successful in relation to the new products as it had in relation to the initial products." (paragraph 104)
>
> "It is also clear that without both Argos's and Littlewoods's involvement the move towards recommended prices would not have succeeded, since they were in a special position as catalogue retailers to provide a signal to the market that margins would not be eroded." (paragraph 107)

119. The two e-mails of 18 May 2000 sent by Mr Thomson, to which reference is made in paragraph 100 of the OFT's decision and in the Tribunal's summary, were, first, an internal e-mail to other members of the Hasbro team:

> "Neil [Wilson] and I have spoken to our respective contacts at Argos and Index [Littlewoods] and put together a proposal regarding the maintenance of certain retails within our portfolio. This is a step in the right direction and it is fair to say that both Accounts are keen to improve margins but at the same time are taking a cautious approach in case either party reneges on a price agreement. ... It goes without saying that Action Man and Games prices will be maintained as per earlier agreements.
>
> [A list of Hasbro products and prices to which the initiative was being extended to is then set out]
>
> Both accounts have agreed to the above price points so this information should be translated to other accounts.
>
> The proof in the pudding will be when both Catalogues are published, but Neil and I are confident that they will play ball."

And, second, an e-mail entitled "Urgent – Pricing Initiative" to the Littlewoods buying team which, after setting out most of the product and price information contained in the first e-mail, went on in these terms:

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

Mr Thomson gave evidence that the e-mail was designed to confirm to the Littlewoods' buying team that agreement had been reached with Argos and to give them confidence to set those prices for the extended range of products in the autumn/winter 2000 catalogues.

120. The OFT concluded:

> "On the basis of the evidence taken as a whole, it is the OFT's view that there was collusion between Hasbro, Argos and Littlewoods which pursued a common objective regarding the price of certain Hasbro toys and games. Each was aware of the other's involvement and the nature of its intentions regarding its conduct in the relevant markets. The OFT concludes that this conduct constituted an overall agreement and/or concerted practice between these three undertakings." (paragraph 108)

The Tribunal's findings of fact

121. Section X of the Tribunal's judgment on liability (Chronological Survey of the Evidence) extends from paragraph 419 through to paragraph 657. At paragraphs 506

to 522 the Tribunal examined the working of the Hasbro pricing initiative for autumn/winter 1999 and spring/summer 2000 in relation to Argos. In particular, the Tribunal examined the evidence of Mr Wilson (Hasbro's manager for the Argos account) and Mr Andrew Needham (the buyer at Argos with responsibility for boys' toys, games and construction toys during the relevant period). At paragraph 512 it said this:

> "512. There does not seem to us to be much dispute between Mr. Wilson and Mr. Needham, although the latter in our view tended to downplay the nature and extent of his conversations with Mr. Wilson. We accept Mr. Wilson's evidence, which was not challenged to any material extent. On the basis of that evidence we make at this stage the following findings:
>
> (i) For the A/W 1999 catalogue Mr. Wilson established the products that were common to Argos and other retailers and identified the RRPs for those products. In the present context those products were, for practical purposes, Action Man and Core Games.
>
> (ii) Mr. Wilson asked Mr. Needham what Argos' pricing intentions were in respect of those products. He did this by asking Mr. Needham whether Argos saw any problem in selling at any of the RRPs in question. This may not have involved going down a list, specific product by specific product. However we find that Mr. Needham would have known that Mr. Wilson was talking about Action Man and Core Games.
>
> (iii) Mr. Needham indicated to Mr. Wilson whether or not Argos would be happy to sell at Hasbro's RRPs for the products in question. In most circumstances Mr. Needham informed Mr. Wilson that he was happy to sell at those RRPs, but there would be occasions when Mr. Needham indicated that a particular RRP would be problematic. Mr. Needham did not give Mr. Wilson any guarantee, but he did tell Mr. Wilson what Argos' pricing intentions were in relation to the Hasbro products in question.
>
> (iv) Mr. Wilson passed on the information in question to other account managers at Hasbro who had been having similar conversations with other retailers. This included notably Mr. Thomson who dealt with Littlewoods. Mr. Wilson and Mr. Thomson had more of a dialogue with Argos and Littlewoods respectively than with other retailers because Argos and Littlewoods were the price setters or leaders in the market. Other account managers including Mr. Thomson would then pass other retailers' pricing intentions back to Mr. Wilson.
>
> (v) Mr. Wilson then reverted to Mr. Needham and told him whether he thought that the future retail price of a product would or would not be at the RRP. Mr. Wilson did not identify particular retailers, but he did identify which products this related to. Mr. Wilson said to Mr. Needham words to the effect that "it was [his]

belief from what retailers told us that this or that product would or would not be at RRP" (Wilson, paragraph 19).

(vi) Although Mr. Needham stated that he was unaware of any "formal" Hasbro pricing initiative, he accepts "as a statement of the obvious" that Hasbro was "communicating with retailers with a view to increasing margins towards RRPs" (Needham, paragraph 19). In our judgment it must have been apparent to Mr. Needham that Hasbro was talking to Littlewoods, Argos' principal catalogue retailer competitor, among others.

(vii) In our view Mr. Needham must have been aware that, when Mr. Wilson reverted to him and told him whether this or that product would or would not be at RRP, the information being given to him was based on what other retailers had told Hasbro about their pricing intentions. Mr. Wilson explicitly states – and this was not challenged – that he "said to Argos that it was my belief from *what retailers told us* that this or that product would or would not be at the RRP".

(viii) Mr. Needham must have known that his conversations with Mr. Wilson were taking place in a context where he (Mr. Needham) was aware that Hasbro was talking to Argos and its principal competitors, with a view to achieving a situation in which Argos, Littlewoods and other retailers were all pricing at Hasbro's RRPs. Furthermore Mr. Needham must in our view have been aware that conversations of this kind would support or at least facilitate Hasbro's efforts to persuade other retailers to price at RRPs.

(ix) When Mr. Needham was told by Mr. Wilson whether he (Mr. Wilson) expected a particular product to be sold at RRP, Mr. Needham must have been aware that, by implication, Littlewoods was intending to be selling that product at RRP, even though Littlewoods had not been mentioned by name."

122. At paragraphs 513 to 516 , the Tribunal went on to say this:

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

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

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

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

123. At paragraphs 523 to 531 the Tribunal carried out the same exercise in relation to Littlewoods – that is to say, it examined the working of the Hasbro pricing initiative for the autumn/winter 1999 and spring/summer 2000 catalogues in relation to Littlewoods. In particular, it examined the evidence of Mr Thomson (Hasbro's manager for the Littlewoods account) and Mr Alan Burgess (the buyer at Littlewoods with responsibility for boys' toys, electronics and construction toys during the relevant period). At paragraph 530 the Tribunal said this:

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

(i) Mr. Thomson gave detailed information to Littlewoods in spreadsheets showing Hasbro's RRPs, Littlewoods' cost prices, the margin between the two, and, in relation to Action Man and Core Games, the rebates available.

(ii) Following on from his conversations with Mr. Burgess, Mr. Thomson considered that he had a 'verbal guarantee' from Littlewoods that their prices would be at RRPs in A/W 1999 (Thomson, paragraph 69).

(iii) Following the publication of the A/W 1999 catalogue there was further increased confidence on the part of Littlewoods that other retailers would price at RRPs.

(iv) In his discussions with Mr. Burgess, Mr. Thomson gave Mr. Burgess assurances that Argos would stick to RRPs in relation to Action Man and Core Games. Mr. Thomson told Mr. Burgess that that information was based on what he had been told by Mr. Wilson, Hasbro's Argos account manager (Thomson, paragraphs 86, 87, 99, Day, 1, p. 181).

(v) Mr. Burgess gave Mr. Thomson to understand that Littlewoods would go with (i.e. price at) the Hasbro RRPs, although Mr. Thomson would not be sure that they would do this until the catalogue came out.

(vi) Mr. Thomson confirms Mr. Wilson's evidence that it was Hasbro's practice to monitor retail prices. If a retailer was pricing below RRPs, the relevant account manager would contact the retailer and tell it to put its price up. Unlike Argos there is, however, little or no direct evidence that Littlewoods queried other retailers' prices with Hasbro.

(vii) Mr. Thomson considered that although there was no binding guarantee, there was a commitment on the part of Littlewoods to follow Hasbro's RRPs. There was 'verbal agreement to say, yes, we will go along with you, we will go out at those prices' (Day 1, pp. 145-146), 'there was agreement to do it', although no guarantee that the agreement would be adhered to (p. 176). Mr. Burgess would say to Mr. Thomson words to the effect 'Ian, I will go along with you, but are you sure this is going to happen?' and Mr. Thomson would say words to the effect 'Yes, trust me, I will go back and talk to people to ensure that this happens'."

124. The Tribunal went on to say this, at paragraph 531 of its judgment:

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

125. In the final paragraphs of section X of its judgment the Tribunal drew on the evidence of Mr Bottomley (Hasbro's sales director):

> "656. In his witness statement Mr. Bottomley summarised the position as follows:
>
> > 'What existed between Hasbro and Argos and Hasbro and Littlewoods was an understanding that, because of the obvious benefit to everyone in the industry, prices would be at or near RRP. There was no absolute certainty that Argos and Littlewoods would do this and there was no sanction against a 'defaulter'. However, the obvious advantages that flowed from higher margins and the absence of a threat of undercutting by rivals were sufficient incentives to ensure that retailers stuck with the initiative. Also, the consumer benefited from lower prices for games as a result of lower cost prices. ... The listing and pricing initiatives came about as a result of low margins that were a concern across the entire industry and shared by Argos and Littlewoods. Argos was sympathetic to both initiatives and was actively involved in discussions on pricing. Littlewoods followed Argos's lead, but was also involved in discussions with Hasbro about pricing in the manner I described above.' (Bottomley, 47-48).
>
> 657. That evidence was not challenged by either Argos or Littlewoods. Again that is evidence of the existence of an "understanding" between Hasbro and Argos and Hasbro and Littlewoods that prices would be at or near RRPs. In our judgement, the evidence set out above, viewed in its totality, amply confirms the existence of agreements or understandings to that effect."

The Tribunal's conclusions on liability

126. The chronological survey of the evidence, set out in section X of its judgment, led the Tribunal to conclude, in section XI, that, from the autumn/winter 1999 catalogues, there was an agreement within the meaning of the Chapter I prohibition between

Hasbro and Argos to the effect that Argos would sell Hasbro's Action Man and Core Games ranges at the retail prices recommended by Hasbro; and that that agreement was extended to certain other toys and games with effect from the autumn/winter 2000 catalogues. The Tribunal accepted that the agreement – which was informal, legally unenforceable and never reduced to writing - did not result in any guarantee that Argos would follow Hasbro's RRPs; and that there were cases in which it did not do so. The evidence upon which that conclusion is based is then set out, in summary but at some length, at paragraphs 673 to 699. The summary of evidence reflects the findings of fact made by the Tribunal in section X of its judgment. It is not, we think, necessary to rehearse that evidence in this judgment. The Tribunal affirmed its conclusion at paragraph 700.

127. The Tribunal went on to find, at paragraph 701, that the evidence established "at the very least" a concerted practice between Hasbro and Argos that Argos would price at or near the RRPs in question for most of the products in the ranges in question. It explained the basis for its conclusion at paragraphs 702 to 704:

> "702. As already indicated, a 'concerted practice' as defined in *Dyestuffs* falls short of 'an agreement', but constitutes a 'form of coordination' which 'knowingly substitutes practical cooperation for the risks of competition'. The principle is that each 'economic operator must determine independently the policy which it intends to adopt' on the market. That principle precludes 'direct or indirect contact' between economic operators, 'the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market'. A key concept in the idea of a concerted practice is that of 'removing in advance any uncertainty as to the future conduct of ... competitors', as a result of 'reciprocal contacts' having that object or effect.
>
> 703. In our judgment the underlying idea of 'concerted practice' is equally applicable to the vertical relationship between a supplier and a retailer. In the present case Argos disclosed its pricing intentions to its supplier, Hasbro. Those pricing intentions are highly confidential matters which would not in normal circumstances be disclosed in advance. Argos was told by Mr. Wilson what Hasbro expected retail prices to be, based on Hasbro's conversations with other retailers. Argos must have known or could reasonably have foreseen that its discussion with Hasbro reflected Hasbro's discussions with other retailers. In our view such conduct was a 'form of practical coordination' which knowingly substituted practical cooperation for the risks of competition. In particular, those reciprocal contacts reduced uncertainty on Argos' part as to what other retailers' pricing intentions were, and reduced uncertainty on Hasbro's part on what Argos' prices would be. That, in turn, facilitated Hasbro's conversations with other retailers especially Littlewoods, with a view to ensuring that they too priced at RRPs.

> 704. In our judgment the evidence set out above shows ample reciprocity on the part of Argos and Hasbro. Hasbro gave Argos the information at its disposal as to the likely retail prices other retailers and Argos shared with Hasbro its future pricing intentions. In practice, as a result, Argos priced at Hasbro's RRPs on the vast majority of the products in question."

128. The Tribunal examined in detail the arguments advanced on behalf of Argos to support a case that its pricing decisions were wholly unilateral and lacking in any element of consensus. It rejected those arguments for the reasons which it gave. At paragraph 725, the Tribunal said this:

> "725. We have already dealt at length with the principal factual submissions made by Argos. We specifically reject Argos' arguments that the contacts that took place were too vague and general to give rise to an agreement or concerted practice. In our judgment, both in relation to pricing on Action Man and Core Games, and later in relation to other toys, the evidence establishes the agreement or concerted practice which we have found to exist."

129. In the final paragraph of section XI of its judgment the Tribunal said this:

> "726. We conclude on the totality of the evidence that from 1 March 2000 to 15 May 2001 Hasbro and Argos were party to a verbal agreement or concerted practice for at least the S/S 2000, A/W 2000 and S/S 2001 catalogues to the effect that Argos would to a material extent price at or near Hasbro's RRP on Action Man and Core Games and, for the A/ W 2000 and S/S 2001 catalogues, certain other products. That agreement or concerted practice had the object or effect of preventing, restricting or distorting competition and thus fell within the Chapter I prohibition. We are prepared to accept that the agreement or concerted practice terminated when the OFT visited Hasbro on 15 May 2001."

The significance of 1 March 2000, in that context, is that that was the day upon which the Chapter I prohibition was brought into force.

130. In section XII of its judgment the Tribunal reached a similar conclusion in relation to Littlewoods. It expressed that conclusion in the final paragraph of section XII:

> "777. We conclude on the totality of the evidence that from 1 March 2000 to 15 May 2001 Littlewoods and Hasbro were party to a verbal agreement or concerted practice for at least the S/S 2000, A/W 2000 and S/ S 2001 catalogues to the effect that Littlewoods would to a material extent price at or near Hasbro's RRPs on Action Man and Core Games and, for the A/W 2000 and S/S 2001 catalogues, certain other products. That agreement or concerted practice had the object or effect of preventing, restricting or distorting competition and thus fell within the Chapter I prohibition. We are prepared to accept that the agreement or concerted practice terminated when the OFT visited Hasbro on 15 May 2001."

131. Having reached those conclusions, the Tribunal then went on (in section XIII of its judgement) to make findings as to a trilateral concerted practice between Hasbro, Argos and Littlewoods. It introduced section XIII by pointing out that (as was the case) it had found there to have been "two bilateral agreements or concerted practices, between Hasbro and Argos and Hasbro and Littlewoods, which operated in parallel, whereby each company agreed with Hasbro to price at or near RRPs on Action Man, Core Games and later certain other products, or pursued a concerted practice with the same object or effect". It observed that "In those circumstances it does not seem to us to make much difference whether the correct analysis is that there was, in addition, a tripartite agreement or concerted practice having the same object or effect"; but that "In our judgment, this aspect of the case is most conveniently analysed in the light of the case law on concerted practices".

132. The Tribunal referred to the judgment in *JJB and Allsports v OFT* ([2004] CAT 17) which it had already delivered; in particular to its observation, at paragraph 655 of that judgment (quoted at paragraph [63] above), that the supplier (Umbro) and the two retailers (JJB Sports and Sports Soccer) were properly to be regarded as parties to the same agreement or concerted practice. It set out, again, the analysis in paragraphs 657 to 660 of that judgment to which we have already referred earlier in this judgment (paragraph [64] above). Although it is unnecessary to rehearse that analysis, it will be convenient to have in mind paragraphs 659 and 660 of the *JJB Sports* judgment:

> "659. Thus, for example, if one retailer A privately discloses to a supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The prohibition on direct *or indirect* contact between competitors on prices has been infringed.
>
> 660. As regards A, the position might in our view be different only if it could be shown that retailer A revealed its future pricing intentions to its supplier B for some legitimate purpose not related in any way to competition, and could not reasonably have foreseen that such information would be used by B in a way capable of affecting market conditions. It seems to us that such disclosure by a retailer to a supplier will rarely be legitimate, otherwise resale price maintenance could be reintroduced by the back door."

The Tribunal observed that "In our judgment, a similar analysis applies in the present case".

133. In the following paragraphs of section XIII the Tribunal explained why it took that view. The reasoning is central to the present appeal and it is, we think, necessary to set it out at length:

> "780. Dealing first with Littlewoods, the evidence already set out shows that Littlewoods was regularly given by Hasbro advance information about Argos' pricing intentions. Thus the evidence shows,

for example (i) Mr. McCulloch told Mr. McMahon at the Liverpool meeting of his discussions with Argos, to the effect that Argos was prepared to go to RRPs on Action Man and Core Games if it was reassured about not being undercut. (ii) Mr. Thomson subsequently went back to Mr. Burgess and informed him that a deal had been struck whereby Argos agreed to raise its prices to RRPs. (iii) In his discussions with Mr. Burgess during 1999, Mr. Thomson frequently reassured the latter that Argos was proposing to price at Hasbro's RRPs, and that Littlewoods would not be undercut if it did the same. (iv) Mr. Cowley's conversation with Mr. McMahon in late 1999 indicates that the latter was still aware of his conversations with Mr. McCulloch about Argos' pricing intentions and took those conversations into account in saying to Mr. Cowley that he should price the Tweenies doll at Hasbro's RRP. (v) Similar discussions took place between Mr. Thomson and Mr. Burgess in relation to the S/S 2000 catalogue. (vi) Littlewoods through Mr. Burgess in his conversations with Mr. Thomson informed the latter of Littlewoods' intention to price at RRPs. (vii) Mr. Burgess at all material times knew, because Mr. [Thomson] told him, that parallel discussions were going on with Argos, and that Mr. Thomson was passing back to Mr. Wilson the gist of his conversations with Mr. Burgess. (viii) Littlewoods priced at or near RRPs on Action Man and Core Games for the A/W 1999 and S/S 2000 catalogues, and in our judgment cannot have failed to take the foregoing into account in reaching its pricing decisions (see also Case T1/89 *Rhone Poulenc v Commission* [1991] ECR II- 867, paragraphs 122 and 123).

781. The Act came into force on 1 March 2000. In our judgment, the foregoing shows that, as of that date, there was an established concerted practice which involved the disclosure to Littlewoods, via the intermediary of Hasbro, of Argos' pricing intentions, the object and effect of which was to influence the conduct on the market of Littlewoods, Argos's principal competitor in catalogue retailing. In our view such a concerted practice constituted *indirect* contact between economic operators (Argos and Littlewoods) the object and effect of which was either to influence future conduct on the market, or to disclose future pricing intentions, within the principles of *Suiker Unie* and other cases cited above.

782. The facts in our judgment are even more explicit when it comes to the A/W 2000 catalogue. The evidence shows that Mr. Thomson had extensive discussions with Mr. Burgess and the other Littlewoods buyers on extending the pricing arrangement to other products. Littlewoods was then expressly informed, in the email of 18 May 2000, of 'the prices that Argos has committed to' in respect of a list of further products. That email also shows Littlewoods being expressly informed that the prices of Action Man and Core Games will be 'adhered to' which in the context can only mean that Argos intended to continue to price at RRPs on those products. Again, that in our judgment amounts to indirect contact between economic operators, the

object or effect of which was to influence conduct on the market or reveal future pricing intentions. In fact Littlewoods priced at RRPs on the products in question. The contacts over Interactive Pikachu about 25 May 2000 are further evidence of that concerted practice.

783. As to the S/S 2001 catalogue, the concerted practice continued, to all intents and purposes in the same way as before. The continued existence of that practice is shown in particular by Mr. Thomson's conversation with Mr. Cowley about Tweenies dolls at the end of 2000, the email of 28 December 2000, and the emails of 23 February 2001 and 3 April 2001.

784. Turning to Argos, the evidence is that in 1998 and 1999 Mr. McCulloch had conversations with Sue Porritt and Mrs. Thompson. In the course of these conversations Argos was informed of Hasbro's retail pricing strategy to the effect that Hasbro was making a coordinated effort to persuade all retailers to price at RRPs on Action Man and Core Games. At some point Sue Porritt informed Hasbro (Mr. McCulloch or Mr. Brighty) that Argos was in principle prepared to price at RRPs on Action Man and Core Games, which information was passed within Hasbro to Mr. Thomson, who duly passed the information on to Mr. Burgess at Littlewoods.

785. It is in that context that from 1999 onwards contacts took place between Mr. Wilson and Mr. Needham in which the former would ascertain the latter's pricing intentions on Action Man and Core Games. Mr. Wilson would then discuss the matter with Mr. Thomson in the light of Mr. Thomson's knowledge of Littlewood's pricing intentions. Mr. Wilson would then go back to Mr. Needham and indicate to him what he thought the retail prices of particular products would be. It is not disputed that Mr. Needham knew that Hasbro was having similar conversations with other retailers.

786. We assume in Argos' favour that Mr. Wilson did not expressly say 'these are Littlewoods' prices'. We also assume that there was not necessarily a detailed discussion between Mr. Needham and Mr. Wilson about the specific prices of approximately 30 products in the Action Man and Core Games ranges. Nonetheless, the upshot of the conversations was that Mr. Wilson knew that it was Argos' intention to price at RRPs on these products, and Argos knew that other retailers were likely to be at RRPs.

787. In our judgment, in participating in those discussions through Mr. Needham, Argos must be taken to have known, or could at least have reasonably foreseen, that the information about pricing intentions which it was passing to Hasbro would be used by the latter in a way that would facilitate the maintenance of prices at RRPs in the market. Since Argos was receiving from Mr. Wilson information which Argos knew was based on information Hasbro had received from other retailers, Argos must have known that Hasbro would have been engaged in similar conversations with other retailers, based on the

information which Hasbro had received from Argos. In these circumstances it seems to us that Argos also participated in *indirect* contacts with other economic operators the object or effect of which was to influence conduct in the market or to disclose future pricing intentions. The element of reciprocity is to be found notably in the fact that Argos was conveying its future pricing intentions and Mr. Wilson was conveying back to Argos information about other [retailers'] pricing intentions.

788. In our judgment it is immaterial to the analysis whether or not Mr. Wilson specifically identified Littlewoods by name to Mr. Needham. Argos through Mr. Needham must have known that Hasbro's conversation with other retailers would have included Littlewoods, and could have reasonably foreseen that, when Mr. Wilson indicated other retailers' pricing intentions, that information must have been based in particular on information coming from Littlewoods. In our judgment undercutting by Littlewoods, the principal rival catalogue retailer, would have been of considerable concern to Mr. Needham (see e.g. Wilson, paragraph 30).

789. As regards the extension of the discussions between Mr. Wilson and Mr. Needham to other products in the A/W 2000 catalogue, in our judgment Argos through Mr. Needham must have known or could have reasonably foreseen that similar discussions were taking place with other retailers, including Littlewoods. In disclosing its expected pricing intentions on the products mentioned in the emails of 18 May 2000, and confirming, expressly or by implication, its adherence to RRPs on Action Man and Core Games, Argos in our judgment at the least supported Hasbro's efforts to ensure that other retailers, and in particular Littlewoods, observed RRPs and did not engage in undercutting. The contents of the emails of 18 May 2000, discussed at length above, fully confirm that conclusion. That conclusion also applies to the other incidents involving the Interactive Pikachu and the Ferris Wheel.

790. In all those circumstances we further conclude on the evidence that Argos and Littlewoods are properly to be regarded as party to a tripartite concerted practice with Hasbro and, indirectly, each other to the effect that each party would to a material extent price at or near Hasbro's RRPs on Action Man and Core Games and, for the A/W 2000 and S/S 2001 catalogues, certain other products. The object or effect of that concerted practice was to prevent, restrict or distort competition, within the meaning of the Chapter I prohibition. That concerted practice similarly lasted from 1 March 2000 to 15 May 2001."

The appeals on liability

134. By its appellant's notice, Argos challenges the Tribunal's conclusions both in relation to the bilateral agreement to which it was held to be party with Hasbro and in relation to the trilateral agreement. Littlewoods had appeared to advance a similar (two-part)

challenge in its appellant's notice; but, as its case was developed in written and oral argument, it was accepted that a challenge to the conclusion that it had been party to a bilateral agreement could not be sustained. As it was put in Littlewood's revised skeleton argument: "Littlewoods disagrees with the CAT's finding of a bilateral agreement between itself and Hasbro but recognises that the Court of Appeal has no jurisdiction to interfere with the findings of fact made by the CAT".

135. In relation to the bilateral agreements, it is said (on behalf of Argos) that the Tribunal erred in law "in categorising the evidence as an agreement or concerted practice between Argos and Hasbro that Argos would sell Hasbro's toys at retail prices recommended by Hasbro". It is said that, in law, there is a distinction between a price fixing agreement and a price information exchange; that the evidence as found by the Tribunal did not support a finding of price fixing; and that the evidence was capable only of supporting (but did not support) a price information exchange. And, it is said (on behalf of Littlewoods) that the Tribunal was wrong, on the evidence, to characterise the bilateral agreement between Hasbro and Littlewoods as a price fixing agreement when "at its highest, the evidence could only in law support a finding of a price information exchange".

136. It is, we think, not unfair to say that the challenge by Argos to the finding that there was any relevant agreement between Hasbro and Argos as to prices was not pursued with much vigour at the oral hearing of the appeal. But the challenge was not abandoned. Given that an appeal to this Court from a finding of liability made by the Tribunal lies only on a point of law, we are satisfied that the challenge cannot be sustained. The Tribunal set out, at length, the evidence on which it made the findings of fact that it did. We have referred to that evidence earlier in this judgment: it is unnecessary to rehearse it again. It is enough to say that the evidence is detailed, specific and was (as the Tribunal found) largely unchallenged. The Tribunal was entitled to accept that evidence; and, having accepted that evidence, the Tribunal was entitled to reach the conclusion that it did.

137. We reject the submission that the evidence was capable only of supporting a finding that there was a price information exchange. On the findings of fact made by the Tribunal, the assurances given by Argos to Hasbro went beyond the exchange of price information. The submission overlooks, as it seems to us, the finding at paragraph 516 of the Tribunal's judgment that, although "It is true that there was no certainty, and no guarantee that Argos would price at RRPs, and certainly no legally enforceable agreement", it was implicit, in the arrangements as described, unchallenged, by Mr. Wilson, that "Hasbro had aroused in Argos an expectation that it would not be undercut if it sold at RRPs, and that Argos had indicated to Hasbro that it would go out at Hasbro's RRPs on the products in question in the next relevant catalogue". As the Tribunal put it:

> "In our judgment, the above evidence establishes that there was an express or implied agreement, albeit verbal and with no guarantee, that Argos would sell at Hasbro's RRPs, at least to a material extent, on Action Man and Core Games in the A/ W 1999 and S/ S 2000 catalogues."

138. We turn, therefore, to the challenge to the Tribunal's finding that there was a trilateral agreement or concerted practice. The challenge (advanced by both Argos and

Littlewoods) is, perhaps, most clearly articulated at paragraph 37 of the skeleton argument filed on behalf of Littlewoods:

> "[The Tribunal's] failure to appreciate that the *Bayer* judgments qualified or clarified earlier case law on the meaning of agreement and concerted practice tainted the CAT's entire approach to the evidence and led it wrongly to conclude that there was a tripartite agreement or concerted practice between Hasbro, Argos and Littlewoods. In cases such as the present where there is no direct contact between two undertakings (viz Littlewoods and Argos), it is particularly important to analyse the evidence carefully in order to establish whether . . . the subjective consensus requirement has been met. The CAT failed to do this and did not make any sufficient findings of fact on this point. The judgment is therefore defective as a matter of law as it did not deal with the essential element of the infringement i.e. the subjective consensus between the parties."

139. We have set out the relevant passages in the judgments of the CFI and the ECJ in *Bayer v Commission* (Joined Cases C-2/01 and C-3/01) [2000] ECR II-3383 earlier in this judgment, at paragraphs [23] to [26]. We draw attention, in the present context, to the observation, at paragraph 102 in the judgment of the Court of Justice, that "it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly".

140. We have expressed our view, in paragraph [91], when discussing the Tribunal's judgment on liability in the Football Shirts appeal, that the Tribunal may have gone too far in paragraph 659 of that judgment, with its suggestion that if a retailer (A) privately discloses to a supplier (B) its future pricing intentions "in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions" and B then passes that pricing information on to a competing retailer (C), that is sufficient basis for concluding, even if A did not in fact foresee what was reasonably foreseeable or C did not appreciate the basis on which A had provided the information, that A, B and C are all to be regarded as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. But it is not necessary to decide whether a proposition in such wide terms could be supported in order to determine the appeal in Toys and Games any more than it is for the other appeal.

141. The proposition which, in our view, falls squarely within the *Bayer* judgment in the ECJ and which is sufficient to dispose of the point in the present appeal can be stated in more restricted terms: if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition. The case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be

taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so.

142. The findings of fact made by the Tribunal bring the case within the proposition which we have just set out, whichever of Argos or Littlewoods is cast as retailer A.

(1) Taking Argos as retailer A and Littlewoods as retailer C, the relevant findings were these. Argos (through Mr Needham) disclosed to Hasbro (through Mr Wilson) its future pricing intentions for the autumn/winter 1999 and spring/summer 2000 catalogues in respect of Core Games and Action Man – paragraph 512(i)-(iii). It did so in circumstances in which (as Mr Needham accepted "as a statement of the obvious") Hasbro was "communicating with other retailers with a view to increasing margins towards RRPs" – paragraph 512(vi). Mr Needham "must have known" that his conversations with Mr Wilson were taking place in a context where Hasbro was talking to Argos and its principal competitors "with a view to achieving a situation in which Argos, Littlewoods and other retailers were all pricing at Hasbro's RRPs" – paragraph 512(viii). Mr Needham "must have been aware" that the disclosure that he was making to Mr Wilson "would support or at least facilitate Hasbro's efforts to persuade other retailers to price at RRPs" – (*ibid*). Hasbro (through Mr Thomson) did in fact disclose to Littlewoods (through Mr Burgess) Argos' pricing intentions as to Core Games and Action Man: "Mr Thomson gave Mr Burgess assurances that Argos would stick to RRPs" in relation to those products – paragraph 530(iv). Mr Burgess knew that Hasbro had been in discussion with Argos (*ibid*). Littlewoods did rely upon the information in determining its own future pricing intentions – paragraph 530(vii). "Hasbro had aroused in Littlewoods an expectation that Littlewoods would not be undercut by Argos if they priced at RRPs, and Littlewoods had indicated to Hasbro that it was willing to sell at Hasbro's RRPs in the next relevant catalogue" – paragraph 531.

(2) Taking Littlewoods as retailer A and Argos as retailer C, the relevant findings are these. Littlewoods (through Mr Burgess) disclosed to Hasbro (through Mr Thomson) its future pricing intentions for the autumn/winter 1999 and spring/summer 2000 catalogues in respect of Core Games and Action Man – paragraph 530(iv). It did so in circumstances in which Mr Burgess knew that Mr Thomson would "go back and talk to people" to ensure that competitors also priced at Hasbro's RRPs – paragraph 530(vii). Hasbro (through Mr Wilson) did, in fact, disclose to Argos (through Mr Needham) Littlewoods' future pricing intentions as to Core Games and Action Man – paragraph 512(vi) and (vii). Mr Needham "must have been aware" that the information had come from Littlewoods – (*ibid*). Argos did rely upon the information in determining its own pricing intentions: "The indications from Mr Wilson about other retailers' pricing intentions assisted Argos in achieving [its objectives of a better margin on toys while avoiding being undercut]" - paragraph 515.

The conduct to which we have referred occurred before the Act came into force on 1 March 2000, but the Tribunal proceeded on the basis that the agreements or concerted practices which had been reached before that date continued, and were extended, after that date. This conduct is therefore a relevant illustration of the point.

143. On the facts found by the Tribunal it seems to us impossible to avoid the conclusion that Hasbro's pricing initiative was acceptable to both Argos and Littlewoods. To adopt and adapt the observation of the Court of Justice in *Bayer*: "the manifestation of the wish of one of the contracting parties [Argos or Littlewoods] to achieve an anti-competitive goal – [when made known to the other, through the initiative of Hasbro] - constitute[d] an invitation to the other party, whether express or implied, to fulfil that goal jointly".

144. It was pointed out on behalf of Argos (correctly) that, when the Tribunal came to set out its reasons in paragraphs 784 to 790, it used the phrase "[Argos/Mr Needham] must be taken to have known, or could at least have reasonably foreseen" – paragraphs 787, 788 and 789. It is said that a finding that Argos or Mr Needham "could reasonably have foreseen" that Argos' future pricing intentions, disclosed to Hasbro, would be passed on by Hasbro to Littlewoods would not be sufficient to support a finding of a tripartite agreement. It was necessary for the Tribunal to find that Argos did foresee that that would happen. We are content to accept (without finding it necessary to decide) that that submission is correct. But it does not assist Argos on its present appeal, any more than a similar submission by JJB did on its appeal: see paragraph [90] above. When read as a whole it is plain that the Tribunal did find that Argos must be taken to have intended that its pricing intentions would be passed on to other retailers (including Littlewoods) in order to support or facilitate Hasbro's efforts to persuade other retailers to adhere to its pricing initiative – paragraph 512(viii) of the Tribunal's judgment. The point is made at paragraph 514 (to which we have already referred):

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

145. For those reasons we dismiss the appeals by Argos and Littlewoods on liability. The Tribunal was correct to reach the decision which it did in [2004] CAT 24.

The appeals on penalty - general

146. JJB appeals against the penalty imposed by the Tribunal, in its separate judgment [2005] CAT 22 handed down on 19 May 2005, of £6.7 million (reduced from £8.373 million as imposed by the OFT). Argos and Littlewoods likewise appeal on penalty, against the penalties of £15 million and £4.5 million respectively (reduced from £17.28 million and £5.27 million) imposed by the Tribunal in its judgment [2005] CAT 13 handed down on 29 April 2005. All of the penalty appeals involve one issue of principle, concerning the relevance to the Tribunal (and in turn to the Court of Appeal) of the Guidance issued under section 38 of the 1998 Act. The appeals also raise a number of points on the application of that Guidance by the OFT and, insofar as it did apply it, by the Tribunal; one of these points, about the "relevant product market", is common to all the appeals. Another point, about non-discrimination, is raised in all the appeals, but it is more important in the Toys and Games appeal. We will start by setting out the relevant parts of the Guidance issued under section 38, and dealing with the point of principle as to the relevance of the Guidance, and then refer

to the position on the other general points, before dealing with the facts of the penalty appeals in turn.

The guidance as to the appropriate amount of any penalty

147. Pursuant to section 38 the Director General of Fair Trading, the predecessor of the OFT, issued guidance in notice OFT 423 in March 2000 (the Guidance), which is that which was relevant at the time, although it has since then been replaced by a new version of the Notice (with the same number) published in December 2004. In the light of submissions made to us, we must set out quite a number of passages from the Guidance, including footnotes where relevant. Part 1 is headed Introduction, Part 2 Steps for determining the level of a penalty and Part 3 Lenient treatment for undertakings coming forward with information.

148. From the introductory passages we cite paragraphs 1.8 to 1.10, as follows:

> "1.8 The twin objectives of the Director's policy on financial penalties are to impose penalties on infringing undertakings which reflect the seriousness of the infringement and to ensure that the threat of penalties will deter undertakings from engaging in anticompetitive practices. The Director therefore intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements[4] between undertakings which fix prices or share markets and other cartel activities[5], as well as serious abuses of a dominant position, which the Director considers are among the most serious infringements caught under the Act. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities that are contrary to the Chapter I and Chapter II prohibitions.
>
> > 4 The term "agreement" includes a concerted practice and decision by an association of undertakings.
> >
> > 5 For the purposes of this guidance, cartel activities are agreements, decisions by associations of undertakings or concerted practices which infringe the Act and involve price fixing, bid rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market dividing (based on the OECD definition of "hard core cartels").
>
> 1.9 The Director also wishes to encourage members of cartels to come forward with evidence on the existence and activities of any cartel in which they are involved and therefore the guidance sets out in Part 3 a clear policy on when lenient treatment will be given to such undertakings.
>
> 1.10 The guidance has been drafted to increase transparency by setting out the steps which the Director will follow when calculating the amount of a penalty."

149. Turning to the detail of the assessment of a penalty, we quote from Part 2:

> "2.1 Any financial penalty imposed by the Director under section 36 of the Act will be calculated following a five step approach:
>
> > calculation of the starting point by applying a percentage determined by the nature of the infringement to the "relevant turnover" of the undertaking (see paragraph 2.3 below)
> >
> > adjustment for duration
> >
> > adjustment for other factors
> >
> > adjustment for further aggravating or mitigating factors
> >
> > adjustment if the maximum penalty of 10% of the "section 36(8) turnover" of the undertaking is exceeded and to avoid double jeopardy.
>
> Details on each of these steps are set out in paragraphs 2.3 to 2.15 below.
>
> 2.2 A member of a cartel may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if the requirements set out in Part 3 of this guidance are satisfied.
>
> **Step 1 - starting point**
>
> 2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated by applying a percentage rate to the "relevant turnover" of the undertaking, up to a maximum of 10%. The "relevant turnover" is the turnover of the undertaking in the relevant product market and relevant geographical market[7] affected by the infringement in the last financial year. This may include turnover generated outside the United Kingdom if the relevant geographical market for the relevant product is wider than the United Kingdom.
>
> > [7] See the Competition Guideline Market Definition for further information on the relevant product market and relevant geographic market. The relevant product market and relevant geographic market will be determined as part of the Director's decision that an infringement has taken place.
>
> 2.4 The actual percentage rate which will be applied to the "relevant turnover" will depend upon the nature of the infringement. The more serious the infringement, the higher the percentage rate is likely to be. Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements caught under the Chapter I prohibition. Conduct which infringes the Chapter II prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have, a particularly

serious effect on competition, for example, predatory pricing, is also one of the most serious infringements under the Act. The starting point for such activities and conduct will be calculated by applying a percentage likely to be at or near 10% of the "relevant turnover" of the infringing undertakings.

2.5 It is the Director's assessment of the seriousness of the infringement which will determine the percentage of "relevant turnover" which is chosen as the starting point for the financial penalty. When making his assessment, the Director will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment will be made on a case by case basis for all types of infringement."

150. Step 1 is applied separately to each of several undertakings involved in any infringement: see paragraph 2.6. Step 2 provides for an adjustment for duration:

"2.7 The starting point may be increased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement."

151. Step 3 allows for adjustment for other factors:

"2.8 The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives, outlined in paragraph 1.8 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anti-competitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings, which might be considering activities which are contrary to the Chapter I and Chapter II prohibitions. Considerations at this stage may include, for example, the Director's estimate of the gain made or likely to be made by the infringing undertaking from the infringement. Where relevant, the Director's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the "relevant" market under consideration. The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking.

2.9 This step may result in a substantial adjustment of the financial penalty calculated at the earlier steps. The consequence may be that the penalty which is imposed is much larger than would otherwise have been imposed. The result of any one of steps 2 or 3 above or 4 below may well be to take the penalty over 10% of the "relevant turnover" identified as step 1, but the overall cap on penalties is 10%

of the "section 36(8) turnover" referred to in step 5 below and must not be exceeded."

152. Step 4 deals with further aggravating and mitigating factors:

"2.10 The basic amount of the financial penalty, adjusted as appropriate at steps 2 and 3, may be increased where there are other aggravating factors, or decreased where there are mitigating factors.

2.11 Aggravating factors include:

- role of the undertaking as a leader in, or an instigator of, the infringement;

- involvement of directors or senior management;

- retaliatory measures taken against other undertakings aimed at ensuring the continuation of the infringement;

- continuing the infringement after the start of the investigation;

- repeated infringements by the same undertaking or other undertakings in the same group.

2.12 Mitigating factors include:

- role of the undertaking, for example, where the undertaking is acting under severe duress or pressure;

- genuine uncertainty as to whether the agreement or conduct constituted an infringement;

- adequate steps having been taken with a view to ensuring compliance with the Act;

- infringements which are committed negligently rather than intentionally;

- co-operation which enables the enforcement process to be concluded more effectively and/or speedily than would otherwise be the case, over and above that expected of any undertaking.

Note: In cartel cases an undertaking which cooperates fully with the investigation may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if it meets the requirements set out in Part 3 of this guidance."

153. Step 5 deals with ensuring that the statutory maximum under section 36(8) is not exceeded and that, if a penalty or fine has been imposed by the European Commission

or by a court or other body in another member state for the agreement or conduct, that is taken into account.

154. As referred to in paragraph 2.2 and elsewhere, there is provision in Part 3 for immunity from, or reduction of, penalty in given circumstances under the so-called leniency regime. The policy behind the leniency regime is to encourage parties to cartel activities (as defined in footnote 5 to paragraph 1.8 quoted above) to come forward and inform the OFT of the existence of the cartel. The scheme allows for different levels of leniency: total immunity as of right under paragraph 3.4 or on a discretionary basis under paragraph 3.6, and a discretionary reduction of penalty by up to 50% under paragraph 3.8. The conditions for entitlement to total immunity are set out in paragraph 3.4.

> "3.4 In order to benefit from total immunity under this paragraph, the undertaking must be the **first** to provide the Director with evidence of the existence and activities of a cartel **before** he has commenced an investigation of the undertakings involved; provided that the Director does not already have sufficient information to establish the existence of the alleged cartel, and the following conditions are satisfied:
>
> the undertaking must:
>
> a) provide the Director with all the information, documents and evidence available to it regarding the existence and activities of the cartel;
>
> b) maintain continuous and complete cooperation throughout the investigation;
>
> c) not have compelled another undertaking to take part in the cartel and not have acted as the instigator or played the leading role in the cartel; and
>
> d) refrain from further participation in the cartel from the time it discloses the cartel."

155. If the OFT has already commenced an investigation but has not yet given notice of a proposal to make a decision that the Chapter I prohibition has been infringed, immunity may be granted if the undertaking is the first to provide evidence to the OFT of the existence and activities of the cartel and if conditions (a) to (d) set out in paragraph 3.4 are satisfied: see paragraph 3.6. Paragraph 3.7 deals with the basis for the OFT's consideration of the discretionary grant of immunity.

156. A reduction in the level of penalty may be available if paragraphs 3.4 and 3.6 are not satisfied, under paragraph 3.8:

> "3.8 Undertakings which provide evidence of the existence and activities of a cartel **before written notice of a proposed infringement decision is given**, but are not the first to come forward, or do not meet all the requirements under paragraphs 3.4 or 3.6 above, will be granted a **reduction** in the amount of a financial penalty which

would otherwise be imposed of up to 50%, if the following conditions are met:

the undertakings must:

a) provide the Director with all the information, documents and evidence available to them regarding the existence and activities of the cartel;

b) maintain continuous and complete cooperation throughout the investigation; and

c) refrain from further participation in the cartel from the time they disclose the cartel."

157. In addition there is separate provision, not relevant on the facts of these cases, for an undertaking which is cooperating in an investigation in relation to cartel activities in one market and which is involved in a separate cartel in another market, to receive the same immunity or reduction of penalty in relation to its activities in both markets: paragraphs 3.10 and 3.11.

158. Also relevant in the present case is paragraph 3.12, as follows:

> "3.12 An undertaking coming forward with evidence of a cartel may be concerned about the disclosure of its identity as an undertaking which has volunteered information. The Director will therefore endeavour, where possible, to keep the identity of such undertakings confidential throughout the course of the investigation."

159. For this reason, the fact that one party has the benefit of a conditional immunity or leniency agreement may well not be known to others who are the subject of the same investigation until, at the earliest, publication of the OFT's decision. That was so in the present case, as regards the Toys and Games investigation, where Hasbro had the benefit of a leniency agreement.

The Guidance as to the amount of the penalty: its relevance to the Tribunal

160. In accordance with section 38(8) of the Act, the OFT is required to "have regard" to the currently published guidance in deciding what penalty to impose for a breach of the Chapter I prohibition. The section says nothing about the relevance of the Guidance on an appeal to the Tribunal, or on an appeal on penalty to the Court of Appeal. By contrast, section 38(9) refers specifically to the Tribunal and any court to which an appeal lies when requiring that a penalty or a fine imposed by the Commission, or by a court or other body in another Member State, in respect of an agreement or conduct, must be taken into account when setting the amount of a penalty under the Act in relation to that agreement or conduct. The absence of reference to the Tribunal or a court in the immediately preceding sub-section is striking and cannot be accidental.

161. The language of section 38(8) is general in nature. It does not bind the OFT to follow the Guidance in all respects in every case. However, in accordance with general principle, the OFT must give reasons for any significant departure from the Guidance:

compare the judgment of the CFI in *Tokai Carbon v Commission,* Case T-236/01, decided on 29 April 2004, at paragraph 231:

> "As the Commission decided to apply in this particular case the differentiation method laid down in the Guidelines, it was required to adhere to them, and where it departs from them it must set out expressly the reasons for justifying such a departure."

162. The Tribunal had to consider the relevance of the Guidance to its own decisions for the first time in an earlier appeal, *Napp Pharmaceutical Holdings* [2002] CAT 1. After observing that the Tribunal is not bound by the Guidance, and is not even expressly required by the Act to have regard to it, and having quoted from Schedule 8 paragraph 3(2) of the Act as to its powers on an appeal as regards penalty, the Tribunal said this:

> "499. It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed ab initio by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment.
>
> 500. That said, it does not seem to us appropriate to disregard the Director's Guidance, or the Director's own approach in the Decision under challenge, when reaching our own conclusion as to what the penalty should be. The Director's Guidance will no doubt over time take account of the various indications given by this Tribunal in appeals against penalties.
>
> 501. We emphasise, however, that the only constraint on the amount of the penalty binding on this Tribunal is that which flows from the Maximum Penalties Order ... It is clear from that Order that Parliament intended that it is the overall turnover of the undertaking concerned, rather than its turnover in the products affected by the infringement, which is the final determinant for the amount of the penalty ...
>
> 502. We agree with the thrust of the Director's Guidance that while the turnover in the products affected by the infringement may be an indicative starting point for the assessment of the penalty, the sum imposed must be such as to constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct. The policy objectives of the Act will not be achieved unless this Tribunal is prepared to uphold severe penalties for serious infringements. As the Guidance makes clear, the achievement of the necessary deterrent may well involve penalties above, often well

> above, 10 per cent of turnover in the products directly concerned by the infringement, subject only to the overall 'cap' imposed by the Maximum Penalties Order. The position in this respect is no different in principle under Article 15(2) of Council Regulation no. 17, albeit that the applicable maximum penalty under that provision is differently calculated."

163. In *Napp*, and in turn in the two judgments under appeal, the Tribunal commented on the application of the Guidance by the Director (in *Napp*) and by the OFT (in the present cases), then went on to set out its own views on the seriousness of the infringement, and to make its own assessment of the penalty, on the basis of a "broad brush" approach, taking the case as a whole. The Tribunal carried out a "cross check" to see whether the amount so arrived at would be within the parameters set out in the Guidance, and concluded that it would be. It seems to us that this is an appropriate approach for the Tribunal.

164. In any given case the Tribunal may have to review the penalty in any event because, following a hearing, the facts may have been found differently from those on which the OFT proceeded. Correspondingly, on an appeal to the Court of Appeal the same may apply if an appeal on liability has (unlike in the present cases) been successful in showing that, though there was some infringement, it was not the same as that which the Tribunal found.

165. We agree in particular with what the Tribunal said at paragraph 499 of its judgment in *Napp*, quoted above. In the case of the Court of Appeal, it seems to us that it is right for the court to recognise that the Tribunal is an expert and specialised body, and that, subject to any difference in the basis on which the infringements are to be considered as a result of any appeal on liability, the court should hesitate before interfering with the Tribunal's assessment of the appropriate penalty.

Relevant product market – the principle

166. In accordance with paragraph 2.3 of the Guidance the starting point for determining the level of financial penalty which will be imposed on an undertaking is to be calculated by applying a percentage rate to the "relevant turnover" of the undertaking, up to a maximum of 10%. The "relevant turnover" is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year. By footnote 7, this is explained as follows:

> "See the Competition Act guideline *Market Definition* for further information on the relevant product market and relevant geographic market. The relevant product market and relevant geographic market will be determined as part of the Director's decision that an infringement has taken place."

167. The puzzling feature of this note is that in a Chapter I case there will by no means necessarily have been a determination of the relevant product market as part of the decision that an infringement has taken place. Such a determination is needed in a Chapter II case, where it is or may be necessary to determine what is the relevant product market, in order to establish whether the undertaking in question is in a dominant position in that market, but it is not, or not often, needed in a Chapter I case,

at any rate if the object of the agreement is to restrict competition, as in a price-fixing case. (The current guidance issued in 2004 includes a corresponding footnote, but without the second sentence.)

168. For the Appellants it was submitted that the OFT cannot properly apply the first step under the Guidance unless it has conducted an analysis of the market in order to establish what is the relevant product market, at any rate if there is any dispute as to the scope of that market (as there is in these cases) or any suggestion that the market includes anything other than sales of the actual products or services directly the subject of the anti-competitive agreement or concerted practice. The OFT rejected that contention, and the Tribunal upheld that position. For the OFT it was submitted to us that it cannot be a necessary requirement to undertake such an analysis in a Chapter I case, because to do so is unnecessary for any other purpose, and it could be a very expensive and time-consuming exercise, depending on economic expertise as applied to detailed statistical facts as to what may be relevant sales. In particular it could not be necessary for such an analysis to be undertaken at the stage of an appeal on penalty to the Tribunal, if there is any difference between the facts as to liability found by the Tribunal and those on which the OFT proceeded. The Tribunal could not conduct the analysis itself, and to require it to be carried out on a contested basis before the Tribunal would make the penalty hearing very much longer and more expensive.

169. We agree that neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty. The process of applying a SSNIP test (small but significant non-transitory increase in price) to determine what product or service is substitutable for any relevant item does not have to be undertaken in this context, nor does any other formal process of analysis need to be applied.

170. On the other hand, the OFT and in turn the Tribunal do have to be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement. Issues were taken on this in both appeals, which will be dealt with in turn on the facts.

171. The Tribunal held at paragraph 111 in the judgment on penalty in Football Shirts that no formal analysis was necessary in order to decide on the relevant product market for penalty purposes in a Chapter I prohibition case. It said at paragraph 112 that the OFT had to have a reasonable basis for identifying the particular market which it took as the relevant product market for this purpose. It pointed out that the market which has to be considered is the relevant product market "affected by the infringement", and that the link between the infringement and its effect on the market concerned may be rather arbitrary, because of the mismatch of dates in a short-term infringement resulting from the use of the last financial year's figures: paragraphs 113 and 114. Following from this, it said at paragraph 115 that the calculation of the turnover for the relevant product market might include elements which were arbitrary, so long as the overall penalty was appropriate to the infringement in question. It also said that the OFT could properly take account of turnover not only in products directly affected by the infringement, but also that in neighbouring products which may reasonably be considered to have been affected by the infringement: paragraph 116. Pursuing that point, the Tribunal said, at paragraph 119 of the penalty judgment:

> "However, in the present context, lack of physical substitutability between different items does not in our view preclude the OFT from grouping certain items together as a relevant product market (or perhaps, technically speaking, a series of closely associated or neighbouring product markets) if such a grouping reflects commercial reality and it can reasonably be shown that the products so grouped were "affected by" the infringement."

172. Mr Lasok submitted that, as elsewhere, when using the words "technically speaking", the Tribunal meant "on a correct legal analysis" (see paragraph [105] above), and he submitted that it is not legitimate to bring such related or neighbouring markets into account under step 1 of the Guidance. We will come to that point on the facts in due course. He also submitted that to bring into account as part of the relevant product market in this context something which is properly to be regarded as a distinct but related or neighbouring market was to apply paragraph 2.8 of the Guidance, which is relevant at step 3, but to do so in the wrong context. We agree that paragraph 2.8 does show that a neighbouring market in which the infringing undertaking makes consequential profits may be relevant to be brought into account at step 3, in deciding on the relevant multiplier. The OFT will be aware of this in making its calculations. It is appropriate that the OFT should be clear as to the basis on which it considers, at step 1, turnover in products which could be said to form part of such a related market, and to be sure that, if paragraph 2.8 is invoked, there is no element of double-counting. It does not seem to us, however, that this passage shows that "relevant product market" needs to be applied as a term of art in relation to penalty in a Chapter I case, on the basis suggested by Mr Lasok, or so as to exclude the approach actually adopted by the OFT and approved by the Tribunal in these cases.

173. As a matter of principle, we agree with what the Tribunal said about the correct approach for the OFT to the question of relevant product market, as summarised in paragraph [171] above. There is inevitably an arbitrary element in the calculation, in the sense there described. Inevitably also, in the absence of a formal market analysis, the market as ascertained may be other than that which would be established, in a Chapter II case, by the formal analysis which would have been carried out in such a case. The purpose of the identification of the relevant product market in relation to penalty is quite different, and it is not necessary or appropriate to be so exact as when ascertaining a market for the purpose of seeing whether an undertaking has a dominant position in a relevant market, before deciding whether that position, if it exists, has been abused. Thus, as it seems to us, the reason why it is not necessary, at any rate in a Chapter I case involving price-fixing, to conduct a formal market analysis is the same as the reason why the market which is taken for calculation of the turnover relevant for Step 1 on a penalty assessment may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal analysis, such as substitutability or, on the other hand, by limiting the turnover in question to sales of the very products or services which were the direct subject of the price-fixing arrangement or other anti-competitive practice.

Non-discrimination – the principle

174. JJB complained that, at step 3, it was treated more harshly than Umbro or the Football Association, without good reason. It said that this is inconsistent with a general rule

of European law against unjustified discrimination. Littlewoods and Argos both complained that Hasbro was let off entirely, when they said that it should by rights have had its penalty reduced by no more than 50%, under the leniency regime in the Guidance. This argument, too, relies on the principle against unjustified discrimination. It is therefore convenient to review the law on this at this point.

175. The Appellants relied on a number of recent decisions of the CFI, to which we must refer. The principle is succinctly stated in *Tokai Carbon v Commission*, already cited, at paragraph 219, as follows:

> "The fact none the less remains that such a division by categories must comply with the principle of equal treatment, according to which it is prohibited to treat similar situations differently and different situations in the same way, unless such treatment is objectively justified (*FETTCSA*, paragraph 406)."

176. Similarly in *CMA CGM v Commission* Case T-213/00 [2003] ECR II-913, this was said at paragraphs 405-6:

> "405. The applicants claim that the Commission infringed the principle of non-discrimination by dividing them into groups, since undertakings of very different sizes are included in the groups identified in the contested decision and the undertakings at the top and bottom of adjacent groups, which are similar in size, are treated differently whilst lines at the top and bottom of any single group which are different in size are treated similarly.
>
> 406. According to settled case-law, the principle of equal treatment is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25)."

In that case the principle of non-discrimination was accepted by the CFI as invalidating one aspect of the Commission's decision on penalty.

177. Greatest reliance, in the Toys and Games appeals, was placed on the decision of the CFI in *JFE Engineering* Joined Cases T-67, 68, 71 and 78/00, decided on 8 July 2004. In those cases there were separate proceedings against Japanese undertakings and against European undertakings for, essentially, the same infringements of Article 81. The Commission imposed penalties on the Japanese undertakings which were more severe than those imposed on the European undertakings. On appeal the Japanese undertakings contended that this differentiation was inconsistent with the principle of equal treatment. The CFI accepted this argument. The Court said this:

> "572. The Commission enjoys a degree of latitude in determining fines and, in so far as its Guidelines do not require it to take account systematically of any given circumstance (see paragraphs 537 and 553 above, and the case-law cited), it can determine which factors should be taken into account for that purpose, which enables it to adapt its

assessment to specific cases. Its assessment must, however, be carried out in compliance with Community law, which includes not only the provisions of the Treaty but also the general principles of law (see, by analogy, Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 38).

573. By thus omitting to take account of the infringement found in Article 2 of the contested decision in determining the fine imposed on the European producers, the Commission treated different situations in the same way but without relying on objective reasons capable of justifying that approach. It follows that it infringed the general Community law principle of equal treatment (see, to that effect, Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129, paragraph 309, and the case-law cited).

574. Consequently, the present plea alleging breach of the principle of equal treatment must be upheld. Accordingly, it is appropriate for the Court to exercise its unlimited jurisdiction, deriving from Article 229 EC and Article 17 of Regulation No 17, to adjust the amount of the fines imposed by Article 4 of the contested decision.

575. In that connection, the Commission observed at the hearing that the possible existence of unequal treatment referred to above should logically lead to an increase in the fines imposed on the European producers, rather than a reduction of the amount of the fines imposed on the Japanese producers. It must be observed, in that context, that, contrary to the views put forward by JFE-Kawasaki in this case in connection with another plea (see paragraph 512 above), Commission representatives may, subject to any express instructions to the contrary from their superiors, lawfully plead that the Community judicature should exercise its unlimited jurisdiction to increase the amount of a fine set by the Members of the Commission. The mere fact that a Commission representative asks the Community judicature to exercise a power available to it and puts forward arguments which might justify such a course of action cannot mean that the representative is acting in the stead of the Members of the Commission.

576. It must be considered that, in the circumstances of this case, the most appropriate way of restoring a fair balance between the addressees of the contested decision would be to increase the amount of the fine imposed on each of the European producers which brought an action calling upon the Court to change the amount of its fine and therefore to reassess the amount of the fine, rather than to reduce the amount of the fines imposed on the Japanese applicants. The abovementioned unequal treatment does not relate to the proportionally over-severe fine imposed on the Japanese producers, the method of calculation adopted by the Commission in setting their fines having been held to be perfectly lawful in itself (see paragraphs 531 to 558 above), but, on the contrary, relates to the fact that the gravity of the offending conduct of the European producers, appraised as a whole,

> was under-evaluated by comparison with the unlawful conduct of the Japanese producers.
>
> 577. Moreover, the applicants in Cases T-44/00, T-48/00, and T-50/00, namely Mannesmann, Corus and Dalmine, each asked the Court in their applications to exercise in that connection its unlimited jurisdiction to change the amount of the fine imposed. It must be recognised that, where the exercise of that jurisdiction is requested by an applicant, including in connection with an application for reduction of a fine, the Court is therefore empowered to amend the contested measure, even if it does not annul it, having regard to all the factual circumstances, in order to amend the amount of the fine imposed (see, to that effect, *Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 180 above, paragraph 692). Moreover, the unlimited jurisdiction conferred on the Community judicature by Article 17 of Regulation No 17 in accordance with Article 229 CE, expressly includes the power to increase the fine imposed, if appropriate."

178. The European undertakings, though before the court, had not been given notice of the possibility that the penalty imposed on them might be increased. Accordingly the CFI did not consider it appropriate to take that course, even though it was open to the court. The court therefore reduced the penalties imposed on the Japanese undertakings: see paragraph 579:

> "It follows that the most suitable way of remedying the unequal treatment observed in this case is, for the purpose of determining the amount of the fine imposed on each of the Japanese applicants, to reduce the amount decided on by the Commission in respect of the gravity of the infringement, in recital 163 to the contested decision. In the exercise of its unlimited jurisdiction, the Court considers, having regard to all the circumstances of this case, that the fine should be reduced from EUR 10 million to EUR 9 million for each of the Japanese applicants."

179. As the references in those passages to previous case law show, there have been previous cases in which the principle of equal treatment is recognised as a rule of Community law. We do not find it necessary to cite from more than one of these earlier cases, Case T-311/94 *BPB de Eendracht v Commission* at paragraph 309, as follows:

> "Lastly, in so far as the applicant submits that it has been the subject of discrimination in comparison with Stora and Rena, the Court points out that, in accordance with settled law, the principle of equal treatment, a general principle of Community law, is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25; to the same effect Case T-100/92 *La Pietra v Commission* [1994] ECR-SC II-275, paragraph 50)."

180. Thus, Community law requires that comparable situations are to be treated the same way, and that different situations are to be treated differently, unless a departure from this is objectively justified. The question in the present cases is whether the situations which have been treated differently are in fact comparable, and if so, whether there is an objective justification for the difference of treatment. In addition, in the Toys and Games appeals, there are separate procedural points arising in relation to the discrimination argument, but we will not anticipate those at this stage.

The Football Shirts appeal: penalty

181. JJB took the following points in support of its appeal:

i) The Tribunal had not paid proper regard to the Guidance on the appropriate amount of the penalty.

ii) There had been no proper analysis of the relevant product market, and in any event the market used for this purpose by the OFT, and approved by the Tribunal, was too wide. The issue here was whether the market consisted only of shirts (whether or not including goalkeepers' shirts, which are different) or of the whole kit including shorts and socks.

iii) The OFT's starting percentage of 9% at step 1 under the Guidance was too high, and in any event it should have been reduced by the Tribunal following JJB's partial success on the infringements.

iv) The factor of three applied by the OFT at step 3, for deterrence, was too high, in particular as compared with the factor of two applied to the FA and to Umbro: JJB invoked the rule against discrimination here.

v) The Tribunal was wrong to take the view that JJB's pressure on Umbro had been greater than the OFT had thought, when applying step 4.

vi) The Tribunal had applied an excessive and unjustified uplift in relation to JJB's participation in the MU Centenary shirt agreement.

Application of the Guidance

182. As we have said above, it seems to us that the Tribunal's position in relation to the Guidance, as set out in *Napp* and followed in this case, was correct. It was not bound under the Act to have regard to the Guidance, unlike the OFT, but it was right for it to take account of the Guidance, and to use the application of the Guidance as a cross-check for the result otherwise arrived at from its own reasoning. We find no error in the judgment on penalty in this respect.

Relevant product market

183. As regards the relevant product market, the OFT took for this purpose the market in replica kit as a whole, including shorts and socks, and also goalkeepers' shirts. JJB did not take issue with the inclusion of junior shirts, but it did challenge the inclusion of shorts and socks, and of goalkeepers' shirts.

184. The evidence was that the ratio of sales of shirts to shorts and socks was 5:1:1. It was accepted by the OFT and the Tribunal that shorts and socks are not substitutable for shirts.

185. The OFT's reasons for taking the market in replica kit as a whole were expressed in paragraphs 553-4 of their decision, as follows:

> "553. First, the OFT is satisfied that all but one of the agreements covered by this decision had as their object the price-fixing of various Umbro licensed Replica Shirts. The England Direct Agreements went wider than this and extended to other FA Licensed Merchandise. In each case, sales of Replica Shirts are the most important item of Replica Kit and drive sales of replica shorts and socks. Therefore, whilst a Replica Kit is comprised of several products (adult and junior shirt, shorts, socks and infant kits) which are sold separately and whilst a fan who wants to wear a pair of shorts cannot substitute this for a Replica Shirt, this does not necessarily mean that each kind of product is a distinct relevant product market. A Replica Kit is designed and marketed at launch as a single product and with the same purpose of showing visible support for a particular club or team by distinguishing itself from the Replica Kits of other clubs or teams. The home, away, third and goalkeeper's Replica Kits have the same characteristics, prices and intended use as each other.
>
> 554. Secondly, a manufacturer is normally exclusively licensed to manufacture all these items together and, in the case of Umbro during the period of the infringement, to distribute and sell all products comprising a club or team's Replica Kit. The OFT therefore remains satisfied that the most appropriate market definition in the present case, for the purposes of the imposition of a penalty, is each club or team's Replica Kit and in particular that the relevant product market is not narrower than this."

186. The inclusion of shorts and socks in the relevant product market made a substantial difference to the penalty imposed on JJB. The Tribunal showed at paragraphs 134 and 135 that to exclude them would have reduced the sum reached after Step 3 by at least £633,000 overall. There were no comparable figures for the effect of excluding goalkeepers' shirts.

187. The Tribunal dealt briefly with the question of goalkeepers' shirts, on which JJB had produced no evidence, but there was evidence that the arrangements between Umbro and Sports Soccer extended to these shirts. Accordingly, it could be inferred that JJB's pressure against discounting had had an effect on the price at which these items were sold by, in particular, Sports Soccer, as well as on that of the ordinary shirt. On that basis, at paragraph 133 of the penalty judgment, the Tribunal said:

> "In our view, other things being equal, there is likely to be a relationship between the price of the normal replica shirt and the goalkeeper shirt in the sense that the one is unlikely to be out of proportion to the other. We see no reason to exclude goalkeepers'

> shirts from the relevant market for the purposes of the penalty calculation."

188. In relation to shorts and socks, having referred to the figures as to respective sales, the pattern of trading and of purchases in relation to replica kit, including the prices of the respective elements of the kit, and the nature of the pressure brought to bear against discounting by, among others, JJB, the Tribunal said this, at paragraphs 147 and 148:

> "147. Even though, in the Decision, the infringements found are limited to shirts, it does not seem to us that these appellants can reasonably complain that the OFT has based its calculation on the turnover in replica kit as a whole in circumstances where (a) the pressure from these appellants to eliminate discounting extended to replica kit generally and (b) the aims of the appellants were largely achieved in that, with the one exception of the MU shorts and socks sold by Sports Soccer at the time of the MU launch in 2000, the shirts, the socks and shorts were not discounted by any principal retailer during key selling periods, including JJB, Allsports and MU.
>
> 148. In all those circumstances we do not think the OFT acted unreasonably as regards JJB, Allsports and MU in bringing into account the turnover relating to shorts and socks, as well as shirts, as turnover "affected by the infringement" as the starting point for the calculation."

189. In the light of what we have already said at paragraphs 166 to 173 above about the correct approach to "relevant product market" for penalty purposes, it seems to us that this approach by the Tribunal, approving that of the OFT, is entirely consistent with the requirements of the law. It is articulated on a reasonable and properly reasoned basis. It does not matter that the market is not the same as would have been relevant if a Chapter II infringement had had to be considered and a formal analysis made of the market for that purpose. It does not matter that the market includes items which are not substitutable for others. It does not matter whether "technically speaking" some parts of the market adopted might otherwise be analysed as being in a related or neighbouring market. We find no error in the Tribunal's decision on this point.

The starting percentage of 9%

190. The next question is whether the OFT's starting percentage of 9% was appropriate, in itself or in the light of the partial success of JJB's appeal to the Tribunal on liability. JJB submitted that its involvement in breaches of the Chapter I prohibition should be regarded as far removed from the most serious, persistent and long-term breaches, and that accordingly it is quite wrong that a figure as close to the top of the range (10%) as the OFT did choose should be taken as the starting point under step 1, all the more so since the OFT proceeded on a basis of liability which was partly discharged on appeal.

191. The breaches which have been found of the Chapter I prohibition were relatively short-term, and were perhaps not (in some cases) carefully premeditated or planned. JJB was not by any means the only promoter of arrangements in breach of the prohibition: the FA, MU, Umbro and Allsports all had their own reasons for disliking

discounting and wanting to see it reduced. Nevertheless JJB was a very important participant in the market, and it exercised its influence, for example in relation to Umbro, in ways which wholly disregarded the constraints of competition law. It is also true that JJB was not a party to the non-statutory assurances given in 1999, but the OFT and the Tribunal (see paragraph 172 of the penalty judgment) rightly proceeded on the basis that JJB must have been aware that price-fixing was against the law.

192. As for the short-term nature of the arrangements, they were made at fairly short notice in relation to a market which is affected on a short term basis by external and other factors, such as the period of an international competition, during which there is a substantial increase in customer demand for quite a short time. The participants in the market needed to, and did, respond to a situation such as this quickly and on a short term basis. It does not seem to us that, in those circumstances, it is any mitigation at all for JJB to show that the agreements or concerted practices in question did not apply for a long time. They applied for as long as they needed to apply, and they affected items of high retail customer demand, at the time of a peak in that demand.

193. It seems to us that the picture which Mr Lasok sought to draw of JJB's involvement in the various agreements or concerted practices understated substantially the significance of his client's participation. So far as the England Agreement is concerned, the reasons which we have given above for holding that JJB was party to a concerted practice in breach of the Chapter I prohibition in that respect show that JJB was using its influence in the market, and in particular in relation to Umbro, in order to achieve the unlawful purpose which it desired, and did so in a determined and assertive manner, by way of a vigorous campaign of complaints to Umbro about Sports Soccer's discounting. So far as the other two agreements are concerned, Mr Lasok submitted that JJB did very little at all, and almost became involved by accident. He may well be right that JJB did not do a lot, but it did not have to. In the case of the MU agreement, this took place at a "horizontal" meeting between competitors. Very little needs to be said in such a context to give rise to an agreement or concerted practice, and this is particularly true of a participant in the market as important as JJB.

194. The Tribunal held, rightly, that its primary task was to determine whether the overall figure for penalty was appropriate in all the circumstances, and that it would not be right to take any given step in the process in isolation from the others. In particular it considered the points taken in relation to steps 1 and 3 together. On step 1, looking at the matter generally, it said this at paragraph 155 of the penalty judgment:

> "The OFT emphasises that the agreements concerned key selling periods for high profile products; that the products are mass market consumer products; that many consumers are children; and that the parties were exploiting the loyalty of fans in question. We have also found, in the Liability Judgment, that there was a culture of resale price maintenance in the industry despite the 1999 assurances: see paragraphs 369 to 372 of that Judgment. In all those circumstances, we see nothing unreasonable in the OFT selecting a percentage of 9% as the percentage of relevant turnover to be applied as the starting point in this case of price fixing. That is in accordance with paragraphs 1.8 and 2.4 of the Guidance."

195. Turning to JJB, and to the impact of having allowed JJB's appeal to the extent of holding that it did not participate in the England Direct agreement, nor in the Continuation Agreement except in relation to the MU Centenary Shirt, the Tribunal held that this difference as regards the basis of liability did not justify a reduction of the starting figure, taking into account the seriousness of the three breaches of the Chapter I prohibition that had been proved against JJB.

196. Mr Lasok submitted that the OFT is likely, in practice, to use a system of bands in order to determine the starting point for a penalty, with 10% reserved for the most heinous and serious breaches, whether of the Chapter I or the Chapter II prohibition, and other less grave breaches deserving a lower percentage, down to or towards 1%. He accepted that a breach consisting of a horizontal agreement or concerted practice is more serious than one which is purely vertical, but suggested that, even so, the possible variety of horizontal breaches, in terms of scope, seriousness and otherwise, is such that it would be fair to regard the band of potentially appropriate percentages as ranging from, say, 6% up to 10%. On that footing he suggested that JJB's part in the three agreements or concerted practices in question should be rated as near the lower end of the band, so that a percentage of 6% or at most 7% would be appropriate, rather than 9% which should be reserved for something near to the most serious breaches.

197. In support of this argument, Mr Lasok sought to obtain a statement from the OFT as to what band or bands (if any) the OFT uses at Step 1 when determining penalties. No conclusive information was provided on this during the hearing, not surprisingly because the point appears to have been raised for the first time by Mr Lasok in the course of his submissions. In correspondence since the hearing, which has been copied to us, the OFT stated that it does not use bands, but approaches each case individually on its own facts and merits in accordance with the Guidance. In those circumstances, Mr Lasok was left with the submission that 9% must be too high, and at any rate that the change in the basis of liability as a result of the partial success of the appeal to the Tribunal on liability shows that the percentage should be reduced from 9%.

198. It does not seem to us to follow at all that, if 9% is the right starting point for a breach of the Chapter I prohibition involving four separate agreements or concerted practices, a lower percentage must be right if only three agreements or concerted practices are proved. We note that the OFT adopted, and the Tribunal approved, 9% as the starting point for Allsports, against which only two infringements were alleged and proved (the England Agreement and the MU Agreement), and for MU, as regards which only one agreement was alleged and proved. The Tribunal observed that, although it did not consider that JJB was a party to the Continuation Agreement as such, it was a party to the most serious individual exercise in price-fixing which was the subject of that agreement, namely the MU Centenary Agreement. It also took the view that the England Direct agreement, which it found JJB was not a party to, was the least serious of the four agreements under consideration. We can find no error in the Tribunal's approach on this aspect of the process of reviewing the penalty for JJB. It did reduce the penalty on JJB in order to reflect the partial success of the appeal on liability (see paragraph 200).

The multiplier used at Step 3

199. Next Mr Lasok submitted that the OFT's multiplier of three at stage 3 was excessive, and in particular that it offended against the principle of equal treatment because a multiplier of two was used for Umbro and for the FA. In considering this submission we think it right (as the Tribunal said at paragraph 163) that when the question of discrimination is considered, account must be taken of the total effect of all the various steps in the calculation of the penalty, rather than considering the effect of each step separately.

200. As the Tribunal observed, the multiplier at step 3 is an important element in the calculation. It is to be applied for the sake of the deterrent effect of the penalty, and it can have a substantial effect on the amount of the penalty.

201. The Tribunal explained its view of the seriousness of JJB's conduct, as regards the need for a deterrent penalty, at paragraph 169 and 170. At paragraphs 174 to 177 it reviewed the corresponding position as regards Umbro, and explained why it regarded a penalty using a multiplier of two at this stage as having an appropriate deterrent effect on Umbro, concluding in paragraph 177 as follows:

> "As it is, Umbro's penalty as a proportion of turnover and as a proportion of the statutory maximum is significantly more severe than the penalty imposed on the other appellants, which is a matter to which we revert later in this judgment."

202. We find no fault in the Tribunal's reasoning on this point. Mr Lasok submitted that, by comparison with Umbro, JJB's role was "reactive and passive in nature". We cannot accept that. For reasons indicated above in relation to the liability appeal, it seems to us that JJB was proactive and aggressive, in its campaign to make Umbro put Sports Soccer under pressure. The fact that Allsports sought to do the same, and that Umbro had its own reasons for doing so as well, does not mean that JJB was not an active party and entitled to be regarded by the Tribunal as an instigator.

203. The Tribunal dealt with the FA on a different basis, attaching importance to the FA's status as a non-profit making body which invests heavily in the grass roots of football. It regarded the OFT as justified in taking into account the need to strike a balance between harming the FA's ability to invest in football, on the one hand, and ensuring that the FA observed high standards on the other hand.

204. Mr Lasok criticised this reasoning as involving confusion of thought. He submitted that the FA's position as an organisation not set up for profit, and as part of the establishment, should be irrelevant to the assessment of the need for the penalty imposed to have a deterrent effect. Otherwise, he said, the FA, which did give the non-statutory assurances in 1999 and nevertheless went on to flout them in 2000, would not be deterred from repeating such breaches of the Chapter I prohibition.

205. The point, which is the basis for Mr Lasok's submission in this respect, that a not-for-profit organisation, which forms, in a sense, part of the establishment, needs to be deterred from repeated infringements of the 1998 Act just as much as a commercial undertaking does, is fair and justified. Nevertheless, the circumstances of the FA are quite different from those of JJB and the other commercial undertakings which were

involved in the various infringements found by the OFT to have occurred. For this reason, and because of the need to consider the rule about equal treatment in relation to the penalties as imposed overall, rather than in relation to particular elements in the calculation, it does not seem to us that Mr Lasok is justified in criticising the OFT for the use of a different multiplier from that applied to JJB, nor the Tribunal for approving it.

Excessive uplift factors

206. That leaves two points on penalty of a rather different kind, namely that the Tribunal increased the uplift factor applied at step 4 on the basis that the OFT had taken too lenient a view of the pressure imposed by JJB on Umbro, and applied an uplift factor of 20% in respect of JJB's participation in the MU Centenary Agreement. The Tribunal did express the view that the pressure brought to bear by JJB on Umbro was greater than the OFT had allowed for (paragraphs 197 and 203). It took that factor into account in its overall consideration of the penalty, but not by applying any particular percentage or multiplier in the calculation (see paragraph 197). What it did say, when conducting the cross-check by reference to the application of the Guidance, was that the OFT could have applied an uplift factor of 20% rather than 10% on the grounds of JJB's pressure on Umbro, and therefore its role as an instigator of the infringement (see paragraph 203). It also said, in the same context, that the OFT could have increased the penalty otherwise arrived at by 20% to take account of the fact that, though JJB was not a party to the Continuation Agreement, it was a party to the MU Centenary Agreement which, on that basis, was a separate and new agreement entered into in 2001 (see paragraphs 204-5).

207. Mr Lasok is entitled to say that a significant element in the Tribunal's reasoning on penalty was the view that the evidence at the hearing before the Tribunal justified a view that JJB had put greater pressure on Umbro than the OFT had considered. However, it seems to us that this view on the part of the Tribunal is well supported by a comparison of paragraphs 412 to 437 of the OFT decision with the Tribunal's own treatment of the pressure brought to bear on Umbro by JJB at section XI of the judgment on liability. The Tribunal was able to form a better view of the facts as a result of the process of oral evidence and cross-examination at the hearing, and it was therefore able to find that important features of the written evidence on behalf of JJB were inaccurate, in the light of answers in cross-examination. The OFT may not have been able to (and certainly did not) reach such conclusions after its administrative investigation. Mr Lasok compared some passages in each of the two documents, suggesting that there was little difference between the conclusions reached by each, and that, if anything, the OFT had thought that JJB had behaved worse, by using explicit threats. It does not seem to us that these selected quotations can properly be taken on their own. Having compared the respective passages in the OFT decision and the Tribunal's liability judgment in which each dealt with the point at length, it seems to us that the Tribunal's comment in the penalty judgment on this point is fully justified.

208. Likewise, the Tribunal referred to an uplift of 20% in respect of the MU Centenary Agreement in the context of its cross-check applying the Guidance. JJB does not appeal against the finding that it was a party to this agreement. It is a logical consequence of the success of the appeal in respect of the Continuation Agreement that the duration of the 2000 Agreements (taking the England Agreement and the MU

Agreement together because of their closeness in time as well as subject-matter) was no more than a year, and a multiplier of 1.5 could not be applied, as the OFT had applied it. It also followed, however, that the MU Centenary Agreement was a new and separate agreement, which it would be proper to reflect in the penalty calculation accordingly.

209. Mr Lasok's real point on this is that the Tribunal was wrong to describe that agreement, as regards JJB at least, as being a serious infringement, because JJB's involvement did not alter any other party's conduct, Umbro and Sports Soccer having already come to the price-fixing agreement before JJB knew anything about it or became involved in any way.

210. Mr Morris, for the OFT, was justified, in our view, in making the point that a notional uplift of 20% was generous to JJB rather than otherwise, in dealing with this infringement. The Tribunal could have taken the view that, however serious it was, it should be approached as an entirely separate infringement for penalty purposes, attracting a separate penalty, which might very well have produced a higher figure than adding 20% to the calculation arrived at otherwise in respect of the 2000 infringements, especially if an uplift were applied to that, as it legitimately could have been, for the fact that it was a repeated infringement.

211. In relation to these last two points taken by Mr Lasok, it is also important to remember that the two uplifts with which he took issue did not form part of the Tribunal's principal reasoning on its way to setting a penalty of £6.7 million, at paragraph 200, but of their cross-check by reference to the Guidance. It is legitimate for Mr Lasok to raise the points, but even if there were substance to them (contrary to our view) they would not go to the heart of the Tribunal's reasoning.

Conclusion on JJB's penalty appeal

212. Accordingly, in our view, none of the criticisms mounted on behalf of JJB of the Tribunal's judgment on penalty is made out, and we dismiss JJB's appeal on penalty as well as that on liability.

The Toys and Games appeals: penalty

The Tribunal's conclusions on penalty

213. As we have said, Argos and Littlewoods each appealed to the Tribunal from the penalties which the OFT had imposed. The Tribunal reduced the amount of those penalties; but there are appeals to this Court from the Tribunal's refusal to reduce them to a lesser amount, or to nil.

214. The Tribunal's judgment ([2005] CAT 13) on penalties was handed down on 29 April 2005. It was not as long as the judgment on liability; but, nevertheless, it comprised 250 paragraphs, divided into nine sections. In the present context, the relevant sections are section IV (Discrimination), section V (Relevant Product Market) and section VIII (Overall Assessment).

Relevant product market

215. As we have explained, the Guidance issued pursuant to section 38 of the 1998 Act requires the OFT to follow a five step approach in assessing the appropriate financial penalty to be imposed under section 36 of that Act. The first step is to calculate the starting point by applying a percentage, determined by the nature of the infringement, to the "relevant turnover" of the undertaking. "Relevant turnover" in that context is the turnover in the relevant product market and the relevant geographic market in the last financial year – paragraph 2.3.

216. The Tribunal rejected (correctly, as we have held earlier in this judgment) the submission advanced on behalf of Argos that in a Chapter I case such as the present the OFT was required to identify the relevant product market by the method that it would adopt in a Chapter II case. In such a Chapter I case it was sufficient for the OFT to show that there was a reasonable basis for choosing to identify the relevant product market as it had. The Tribunal accepted that the calculation of the starting point might contain an arbitrary element; provided always that the overall figure resulting from the calculation was appropriate to the infringement in question.

217. The OFT had identified separate product markets for the following categories: boys' toys, games and puzzles, hand-held electronic games, girls' toys, creative, plush, and infant and pre-school. As the Tribunal observed, the OFT's approach had been to identify broad categories of toys and games, without investigating whether, within those categories, there were relevant sub-markets. No challenge was made by Argos to the broad categories: but it was said that it could not be assumed that all the toys within each broad category necessarily constituted a relevant market in the sense required by the Guidance in a Chapter II case. The Tribunal accepted that criticism: but this, of course, was not a Chapter II case.

218. The Tribunal noted that the categorisation adopted by the OFT was, in fact, the categorisation used internally both by Hasbro and by Argos' buying department. It concluded that, within the toys industry, there were recognised market sectors which corresponded to the broad categories identified by the OFT. It held that it had been unnecessary, for the purpose of the calculation of the starting point in the present case, for the OFT to have broken down the broad categories into relevant sub-markets; whether by reference to a SSNIP test or otherwise. To attempt to do so "would have been quite unrealistic and a massive waste of resources". The Tribunal concluded that: "The OFT's approach in this case had the merit of simplicity, and we are not prepared to say that it was unreasonable".

219. On the basis of the categorisation adopted by the OFT, Action Man and Core Games – the products covered by the infringing agreements at the outset - fell within the categories of boys' toys and games and puzzles. But the extension of the infringing agreements to include the products listed in the e-mail of 18 May 2000 brought other categories - girls' toys, infant and pre-school, creative, plush and hand-held electronic games - into the calculation. The OFT had brought into account, in calculating the starting point in respect of each party, the whole of that party's turnover in each category. The Tribunal accepted that that was a reasonable approach in relation to boys' toys, games and puzzles and plush. But the Tribunal took a different view in relation to the girls' toys, infant and pre-school, creative and hand-held electronic games sectors – for the reasons which it explained at paragraphs 202 to 206 of its

penalty judgment. It held that, insofar as the OFT had brought into account the whole of the turnover for the girls' toys, infant and pre-school, creative and hand-held electronic games sectors, "the OFT's approach is insufficiently supported by evidence or analysis". Nevertheless, "a proportion of that turnover should be included, since infringements relating to products in that sector did occur".

220. Notwithstanding that conclusion, the Tribunal made no adjustment to the OFT's calculation as to the starting point for the purposes of step 1 of the five step approach. It explained, at paragraph 207, that, in its original calculation, the OFT had not applied a multiplier for deterrence under step 3. It observed that "If the turnover base used under Steps 1 and 2 were to be reduced, in our view the question whether the resulting penalty was sufficiently high to have the necessary deterrent effect would have to be re-examined." It illustrated that point, at paragraph 208, by a calculation based upon the allocation of what it described as "an arbitrary 5 per cent of turnover" to girls' toys, infant and pre-school, creative and hand-held electronic games. Without adjustment for deterrence the figures arising from that calculation would have led to the imposition of a penalty of £8.18 million on Argos and a penalty of £2.358 million on Littlewoods. But the Tribunal took the view, as it said at paragraph 209, that "penalties of that order would not have a sufficient deterrent effect in the circumstances of this case, and would have called for an adjustment by the OFT under Step 3". Had the OFT applied to those figures a multiplier of 2.5 under step 3 – which, as the Tribunal thought, would have been fully justified to ensure deterrence - the resulting figures of £20.45 million (Argos) and £5.90 million (Littlewoods) would have been very close to the step 3 figures at which the OFT did, in fact, arrive.

221. In the circumstances that the Tribunal would proceed to make its own assessment, it rejected the submissions advanced on behalf of Argos on the relevant market issue, "subject to the Tribunal's overall assessment set out under Section VIII below". It had observed, earlier in its judgment (at paragraph 190), that Littlewoods had made no challenge of its own on that issue.

Overall assessment

222. In making its own overall assessment of the appropriate penalties, the Tribunal reminded itself that the infringements in question had been committed by "large, well known, firms and concern well known branded products sold to consumers, predominantly as presents for children". Price competition on the products covered by the infringing agreements had been "effectively stifled for a period of some fourteen months throughout an important sector of the retail trade". In addition, there would have been an effect on competing products, especially where Hasbro had a strong market position. Argos and Littlewoods were the two principal catalogue retailers. They had built up their respective businesses largely on the basis of a reputation for being competitive on price. But, on the facts found by the Tribunal, they had "engaged in agreements and concerted practices inimical to price competition in the toys and games in question, to the detriment of their customers." Substantial penalties were appropriate for the infringements in question. There was a need for a clear message that discussions between supplier and retailer leading to infringements of the Chapter I prohibition, such as those which had been found to have taken place in the present case, risked heavy sanctions under the Act.

223. The Tribunal was not persuaded that the penalties imposed on either Argos or Littlewoods by the OFT were disproportionate – for the reasons which it explained in paragraphs 239 to 241 of its penalty judgment. Nevertheless, it decided to reduce those penalties. At paragraphs 242 to 244 it said this:

> "242. All that said, we remain conscious of the argument advanced by Argos that, by bringing into the penalty calculation the whole of Argos and Littlewoods turnover in girls' toys, creative, infant and pre-school and hand-held electronics, the OFT did include as 'relevant turnover' some turnover which may have been affected only peripherally by the infringements.
>
> 243. It is true that we have held that, even if the OFT had included a smaller proportion of that turnover, the OFT would have been fully entitled to include a multiplier of between 2 and 3 at Step 3 to bring the penalty up to an appropriate deterrent level. Nonetheless, in our view care should be taken to ensure that any penalties so re-calculated should not inadvertently become inflated above the level necessary for deterrence.
>
> 244. In those circumstances we propose to reassess the penalties on Argos and Littlewoods on the basis of assumptions that seem to us both realistic and conservative. In our view, in the context of the Tribunal's jurisdiction to make a broad assessment we have decided to reduce the penalties on Argos and Littlewoods to £15 million and £4.50 million respectively, on the technical ground that the OFT's method of calculation may have given rise to penalties that are slightly too high."

224. The Tribunal then made a "cross-check", applying the OFT's methodology and adopting the illustrative figures (set out at paragraph 208 of its judgment) to which we have already referred. Although it had already observed that the OFT would have been "fully justified" in applying a multiplier of 2.5 to those figures for the purposes of adjustment under step 3, the Tribunal asked itself what "the lowest multiplier that could reasonably be applied" would be. It thought that it would be wrong to go below a multiplier of 2.0. Applying that multiplier at step 3, and then reducing the resulting figures by the 10% actually applied by the OFT at step 4, would give rise to penalties for Argos of £14.76 million and for Littlewoods of £4.32 million. The Tribunal concluded:

> "247. On the other hand, it is necessary to take account of the fact that the above calculations are extremely conservative. We also bear in mind that, in this case, the infringements affected not just the prices and turnover of Argos and Littlewoods but the prices and hence the turnover of other retailers which is not reflected in the calculations at all. In those circumstances a small rounding up of the above figures is in our view fully justified. The above approach gives rise to an average reduction of around 15 per cent in the penalties compared with the penalties imposed by the OFT. In percentage terms the reduction is slightly more for Littlewoods and slightly less for Argos as a result of the different "mix" within the relevant turnovers of the two companies.

> Nonetheless the overall result is in our view fair to both Argos and Littlewoods.
>
> 248. Taking all the above into account, our assessment is that a penalty of £15.0 million for Argos and £4.50 million for Littlewoods is the lowest penalty that could reasonably be justified in the circumstances, to meet the gravity of the case and to have an appropriate deterrent effect."

The appeals on penalty

225. The principal ground advanced by Argos in support of its appeal from the Tribunal's decision as to penalty is that both the OFT and the Tribunal "failed to have regard to the guidance for the time being in force" – that is to say, failed to have regard to the Guidance published pursuant to section 38(8) of the 1998 Act.

226. In particular, it is said that the OFT failed to conduct the analysis of market definition required by paragraph 2.3 of the Guidance. As we have held, earlier in this judgment, that criticism is misconceived. It is not necessary, at least in a Chapter I case involving price-fixing, to carry out the formal analysis of the product market – by, for example, applying a SSNIP test – that would be required in a Chapter II case. All that is needed is that the OFT be satisfied on a reasonable and properly reasoned basis, that it can identify the relevant product market affected by the infringement.

227. On the basis that that is all that is needed in a price-fixing case under Chapter I, Argos submits that, nevertheless, the OFT's approach to market definition in the present case was "wholly inadequate". It is said that, having concluded that there was not much scope for substitutability between the broad categories which it had identified – boys' toys, games and puzzles, girls' toys, etc. – the OFT ought to have gone on to consider whether there was substitutability within each category. That is to say, the OFT ought to have considered (for example) whether there were sub-markets within the category of boys' toys. Littlewoods adopts those submissions.

228. That criticism is met, as it seems to us, by the findings of the Tribunal. As we have explained, the Tribunal noted that the categorisation adopted by the OFT was, in fact, the categorisation used internally both by Hasbro and by Argos' buying department. The Tribunal concluded that, "from a business point of view", there were recognised market sectors within the toys industry which corresponded to the broad categories identified by the OFT. It noted, also, that there had been no challenge by any of the three parties (Hasbro, Argos and Littlewoods), in their rule 14 notices, to the approach to categorisation which the OFT adopted. In particular, as the Tribunal observed at paragraph 189 of its penalty judgment: "The fact that Hasbro, one of the largest toy manufacturers in the world, did not challenge the OFT's market categories, but only which toy belonged to which, strongly suggests to us that Hasbro saw the sense of the market categories relied on by the OFT". The Tribunal was not prepared to hold that the OFT's approach to market categorisation had been unreasonable. For the reasons which we have already explained, we should recognise and respect the Tribunal's expertise on an appeal from that finding.

229. A second answer to the criticism of the OFT's approach to categorisation is that the appeal to this Court on penalty is not an appeal from the OFT's decision: it is an

appeal from the penalty imposed by the Tribunal exercising its own judgment. It is important to keep in mind that the Tribunal set aside the penalty imposed by the OFT and substituted the reduced penalty which it thought was proportionate to the infringements which it found to have been committed.

230. We have set out, earlier in this judgment, the Tribunal's view, expressed at paragraph 499 of its judgment in *Napp Pharmaceutical Holdings* [2002] CAT 1, that it "has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance". As we have said, we agree with that view. The question in this Court – in a case where the Tribunal's findings of infringement are upheld – is whether the Tribunal was wrong to impose the penalty which it did. In addressing that question, the Court must have regard to the reasoning of the Tribunal.

231. The Tribunal set out the reasons which had led it to impose the penalties which it did in a full and careful judgment. It explained why it thought that the broad categories identified by the OFT provided a basis for the calculation of the starting point – by reference to "relevant turnover" – which was "not unreasonable". It accepted that calculation on that basis might introduce "an arbitrary element"; but explained why that was, itself, acceptable. There was the overriding safeguard that "the overall figure resulting from the totality of the calculation is appropriate to the infringement in question". It accepted that the OFT should not have brought into account the whole of the turnover attributable to four of the market sectors which the OFT had identified: girls' toys, infant and pre-school, creative and hand-held electronic games. It recognised that the effect of that methodology might be that the penalties imposed had "inadvertently become inflated above the level necessary for deterrence" and that "the OFT's method of calculation may have given rise to penalties that are slightly too high". It took the view that that justified the Tribunal in making its own assessment of penalty; which it did "on the basis of assumptions which seem to us both realistic and conservative" and "in the context of the Tribunal's jurisdiction to make a broad assessment". In our view, none of those steps in the reasoning of the Tribunal can be faulted. Its own assessment of penalty - at £15.0 million for Argos and £4.5 million for Littlewoods – was "the lowest penalty that could reasonably be justified in the circumstances, to meet the gravity of the case and to have an appropriate deterrent effect". As we have said, this Court should recognise that the Tribunal is an expert and specialised body: this Court should hesitate before interfering with its assessment of the penalty needed to mark the gravity of the infringement which has occurred and to deter future infringers. We are not persuaded that we should do so in this case.

Unequal treatment of Hasbro as compared with Argos and Littlewoods

232. Argos and Littlewoods took a distinct point on penalty, arising from the fact that the OFT remitted the whole of the penalty of £15.59 million which it would otherwise have imposed on Hasbro, and did so under the leniency regime. They submitted that, on the OFT's own findings, with which the Tribunal's findings were consistent, a correct application of that regime could not have permitted more than a reduction of 50% in the penalty which was otherwise appropriate to be imposed on Hasbro, because Hasbro was the instigator of the cartel activity. They argued that the principle of non-discrimination, discussed above in general terms, requires that Argos and Littlewoods should be treated with equal favour. If, to take an example for purposes of illustration, the right approach would have been to remit 40% of the

penalty which would otherwise have been imposed on Hasbro, then Hasbro has been favoured to the extent of 60%. Argos and Littlewoods could then contend that the penalty imposed on each of them ought to be reduced by 60% in order to reflect the principle that comparable acts should be treated in a comparable way.

233. Before the Tribunal they argued that their penalty should be reduced to nil, but we can see no tenable basis for that. It is evident, for reasons to be explained later, that if the OFT had not given Hasbro complete immunity, it would have reduced its penalty by 50% on grounds which could not have led to any complaint of unequal treatment on the part of Argos and Littlewoods. Accordingly if, as Argos and Littlewoods argued for, their penalties were reduced to nil, each of them would receive twice as much favour as Hasbro. The most that Argos and Littlewoods can claim is a reduction of penalty corresponding to the 50% to which Hasbro was, on their submissions, not entitled. For reasons mentioned later, their maximum reduction would in fact be slightly less than 50%.

234. The Tribunal rejected this argument, for a number of reasons. It said that, strictly speaking, it was not open to it to enquire into Hasbro's conduct and as to whether the complete remission of its penalty was appropriate, Hasbro not being before it. Nevertheless, having considered Hasbro's conduct and the circumstances in which leniency was extended to it, it said that there was in fact no breach of the equal treatment principle, because Argos and Littlewoods were not properly comparable to Hasbro, since they had not, unlike Hasbro, applied for leniency. It further held that the OFT's treatment of Hasbro did not fall outside a reasonable application of the Guidance, given the margin of appreciation to be allowed to the OFT in that regard.

The relevant procedural history

235. It is necessary to refer in outline to the facts as to how immunity came to be accorded to Hasbro. Some of this is drawn from material which was supplied to the court at the end of the hearing. This was before the Tribunal and is referred to in paragraphs 51 to 58 and 125 to 127 of the penalty judgment. The OFT had commenced an investigation into dealings between Hasbro and its distributors. Hasbro's solicitors, retained in relation to this investigation, examined documents held by Hasbro for that purpose. In the course of doing so they found some material which suggested that there may have been dealings with Argos and Littlewoods which involved separate breaches of the Chapter I prohibition. Mindful of the leniency regime, Hasbro disclosed this material to the OFT. Hasbro's solicitors wrote to the OFT on 14 September 2001 applying for immunity under paragraph 3.6 of the Guidance, or in the alternative a reduction under paragraph 3.8. On 18 September 2001 the OFT and Hasbro came to an immunity agreement under which the OFT granted Hasbro total immunity, conditional on Hasbro complying with relevant conditions including as to future co-operation. The conditions also included that required by item (c) under paragraph 3.4 of the Guidance, relevantly that Hasbro had not acted as the instigator or played the leading role in the cartel.

236. In May 2002, the OFT informed the solicitors that it was not satisfied that Hasbro did satisfy condition (c). Hasbro made written and oral representations on this point at that stage. Then on 11 November 2002 the OFT wrote again, specifying seven items of evidence which the writer said

> "show, particularly when read together and in the light of the evidence as a whole, [Hasbro] playing the role of an instigator. No evidence has been produced to the Director General to show, or from which it can reasonably be inferred, that any other company played the role of an instigator in this matter."

The seven items of evidence consisted of three internal emails dating from 2000 and four extracts from statements made during the investigation.

237. On 27 November 2002 Hasbro's solicitors replied, making both general and detailed points in response, and seeking to persuade the OFT that it would be wrong, on this material, to withdraw the immunity. We will refer later to some of the points taken, at this stage and earlier, on behalf of Hasbro.

238. On 5 February 2003 the OFT wrote to Hasbro's solicitors to inform them that the OFT had decided not to withdraw Hasbro's immunity. On 19 February 2003 the OFT published its original decision on the investigation, in which it recorded that it had allowed Hasbro immunity under the leniency regime.

239. That original decision was not referred to in detail in the course of argument before us but, for reasons which will appear, it seems to us that it is important on this point. We have seen it in the form in which it is available on the OFT's website, somewhat redacted on grounds of commercial confidentiality. It was later superseded by an amended decision, to which we were referred during the hearing of the appeal. That came to be made because, once Argos and Littlewoods had appealed against the original decision, an issue arose from the OFT's wish to use, in opposition to that appeal, witness statements from three former Hasbro employees which had not been relied on in the administrative procedure before the OFT, and on which Argos and Littlewoods had therefore not been able to comment. The Tribunal decided on 30 July 2003 (see [2003] CAT 16) to refer the matter back to the OFT so that the witness statements could be considered under the administrative procedure. It was this renewal of the administrative process that led, in due course, to the amended decision, effectively against Argos and Littlewoods only, though it included passages dealing with Hasbro's involvement. The text dealing with Hasbro's involvement is essentially the same as that of the original decision. (When referring hereafter to passages in the original decision, we will add, in italics, a reference to the corresponding paragraph number in the amended decision, for comparison purposes.) It was not open to the OFT to revisit the question of Hasbro's immunity, having granted that at the stage of the original decision. In due course Argos and Littlewoods appealed against the amended decision as well, and that became the effective appeal to the Tribunal.

240. In the original decision, the OFT described what it called Hasbro's pricing initiative, in 1998, from paragraph 39 (*39*) onwards, which it later said developed into unlawful agreements: see paragraph 262 (*306*). At paragraphs 50 to 54 (*62* to *83*, a much fuller treatment) it described the extension of the previous arrangements in May 2000 to other products, by way of a "process of discussions co-ordinated by Hasbro" (paragraph 51, *67*), a process illustrated by several emails dating from May 2000 disclosed to it by Hasbro. This was an important part of the basis for its decision, at paragraphs 302-4 (*366-8*) that there had been breaches of the Chapter I prohibition. At paragraphs 55 to 58 (*84* to *91*) it described Hasbro's monitoring of the arrangement

and at paragraphs 60 to 70 (*92* to *108*, a fuller discussion) it set out the basis for its finding there to have been a trilateral concerted practice in breach of the Chapter I prohibition. At paragraph 65 (*99*) it described Hasbro as having acted as "the fixer or middleman" for the exchange of confidential information between Argos and Littlewoods.

241. In Part III of the decision the OFT dealt in some detail with representations made on behalf of the several parties, and set out its response. In the course of this the OFT made a number of points which it is appropriate to mention in this context. At paragraph 245 (*289*) it said:

> "However, it is also made clear in the statements that in practice RRPs were generally adhered to and that the more this was observed to happen the more smoothly Hasbro's initiative worked with less need for Hasbro's active involvement in facilitating the arrangements."

242. At paragraph 264 (*308*) it said:

> "The Director's case is that what may have started as a lawful pricing initiative by Hasbro led directly to the infringing agreements. There is no confusion between the two: the one led to the other. There is ample evidence, both documentary and in the statements of the Hasbro employees, that it was a vital part of the pricing initiative to persuade (rather than "make", which the Director accepts Hasbro was not in a position to do) retailers to move towards adhering to RRPs. There is equally persuasive evidence (see the statements of Mike McCulloch and Lesley Paisley (among others)) that it was indeed Hasbro that took the initiative in proposing a move to RRPs. The result was the unlawful agreements. Once the agreements were up and running and being seen to be effective, Hasbro could then properly be regarded as the facilitator in ensuring that the arrangements went on working (and indeed could be extended). It is difficult on the evidence to infer that this extension, as described in Ian Thomson's e-mails of 18 May 2000 …, was likely to have been prompted by anyone other than Hasbro. It is not the Director's case that the setting of the RRPs was part of the unlawful arrangements; it was agreeing to adhere to them (or, on occasion, to some other price) on the understanding that the other would do so also that was unlawful, irrespective of how the prices in question were set or at what level they were pitched. It is entirely irrelevant that Hasbro could not coerce retailers into abiding by RRPs – that has never been the Director's contention. Nor is it part of the Director's case that monitoring the market was in itself unlawful. It is the Director's view that the evidence of monitoring by Hasbro and the way in which it is described in statements and documents goes towards demonstrating the existence of arrangements that were unlawful."

243. Following on from that, at paragraph 267 (*311*) the original decision said:

> "In the OFT's view the evidence is strongly persuasive that at all times Hasbro was both fixer and facilitator in that it set the arrangements up, arranged for them to be extended and kept a close eye on their smooth

> running. That Hasbro may have had to do little active intervening only goes to demonstrate how effective the agreements were in stifling price competition in the products in question."

244. At paragraph 273 (*317*) this was said on the subject of leniency, in the context of representations by Argos about disclosure:

> "Section 56(2) applies to certain representations made by Hasbro which relate to the application of the OFT's leniency programme, where it is necessary in the public interest to treat these representations as confidential in order to preserve the integrity of the leniency programme. The desirability for confidentiality does not solely concern the identity of the party which has applied for leniency, but also the OFT's reasons for granting or refusing leniency. This is in the form of a private agreement between the OFT and the applicant and as part of the duty of full co-operation that is involved, the applicant is expected to enter into a dialogue with the OFT that in other circumstances it would be likely to regard as contrary to its commercial best interests and which could in many cases lead to reprisals against it or its employees from the other parties involved. In this case Hasbro was given assurances that any representations it made would be regarded by OFT as confidential."

245. The original decision dealt with the calculation of the penalties from paragraph 311 (*375*) onwards. At paragraph 339 (*403*), concerned with the application of stage 4 under the Guidance to the penalty for Hasbro, it said this:

> "The Director has considered the evidence regarding who should be considered to have been an instigator or the instigator of the infringing agreements. As noted in paragraph 252 above, it is the Director's view that discussions between Hasbro and Argos and Hasbro and Littlewoods took place over a period of time and that there evolved an understanding (which the Director can accept was partly influenced by a desire on the part of both Argos and Littlewoods to increase profitability on toys and games by moving towards RRPs) that both Argos and Littlewoods would agree to adhere to RRPs on Action Man and core games on the understanding that the other would do likewise. In the circumstances the Director accepts it would be difficult to point to a particular meeting or discussion as the occasion when the infringing price-fixing agreements came into being. However, on any reading of the evidence the Director believes that it is sufficiently persuasive for it to find that Hasbro acted as <u>an</u> instigator of the infringements. Therefore the Director has decided to increase the amount of the penalty by 10 per cent."

246. At paragraph 342 (*406*) the original decision stated that the reduction in penalty which would normally be allowed to a party which had co-operated in the investigation would not be given to Hasbro because it benefitted from the leniency programme and its co-operation had been given in that context. At paragraph 347 (*411*) it was recorded that Hasbro had applied for and received 100% leniency, so that its penalty was reduced to nil.

Summary of conclusions on unequal treatment

247. For reasons which we will set out below, we have come to the conclusion that Argos' and Littlewoods' appeals against penalty cannot succeed on the ground of unequal treatment, but our reasons are not in all respects the same as those of the Tribunal. We confine our reasons to cases, such as the present, in which the undertaking said to have been favoured by the unequal treatment has not itself appealed. In summary, our reasons are as follows:

i) It seems to us that the Tribunal would not have been justified in refusing to enquire at all into the circumstances in which Hasbro's penalty was remitted in full, in particular because of Hasbro's role in the cartel activities which the Tribunal did have to examine.

ii) We do not regard the principle of unequal treatment as inapplicable on the ground that Hasbro, having applied for leniency, was thereby in a position which was not relevantly comparable to that of Argos and Littlewoods. Rather, it seems to us that Hasbro was in a comparable position to them in all respects except insofar as the application of the leniency regime was objectively justifiable. A reduction of Hasbro's penalty by 50% was plainly justified, and Argos and Littlewoods could not have complained about that. But they were entitled to argue that complete immunity was not justified.

iii) We agree with the Tribunal that the question whether Hasbro was entitled to immunity had to be tested on the material available to the OFT in February 2003, when the grant of immunity was confirmed, not by reference to material which became available to the OFT thereafter, nor to that which was put before the Tribunal, or the Tribunal's findings.

iv) If and to the extent that it was possible to determine that, on that material, the grant of immunity was not objectively justified, the less favoured undertaking would in principle be entitled to a reduction of its penalty corresponding to the extent to which the reduction of the other undertaking's penalty was not justified.

v) In practice, in these circumstances, the Tribunal was right to consider that this question had to be approached on, in effect, a judicial review basis.

vi) The OFT did not express its reasons for the grant of immunity. Argos and Littlewoods cannot and do not complain of that as such. It is not possible, on the facts, for Argos and Littlewoods to show, by inference from the available material, that the grant of immunity was not objectively justified.

The Tribunal's duty to enquire about unequal treatment of Hasbro

248. The Tribunal did consider the justification for the OFT's grant of immunity to Hasbro, but held that, strictly, it should not do so. We cannot agree that it would have been justified in not enquiring at all into the circumstances in which Hasbro's penalty was remitted in full.

249. On this point, the Tribunal accepted a submission from the OFT, based on some decisions of the European Court of Justice and the Court of First Instance, to the effect that an undertaking which has been shown to be in breach of Article 81 cannot escape being penalised on the ground that no penalty has been imposed on another undertaking whose circumstances are not the subject of proceedings before the Community judicature: see *Ahlström Osakeyhtiö v Commission* ("*Woodpulp*") Joined Cases C-89/95 etc [1993] ECR I-1307, *Dunlop Slazenger v Commission* Case T-43/92 [1994] ECR II-441, *Van Megen Sports v Commission* Case T-49/95 [1996] ECR II-1799 and *KE KELIT v Commission* Case T-17/99 [2002] ECR II-1647.

250. In relation to proceedings arising from investigations into widespread cartel activities, where the relevant regulator (the Commission, the OFT, or as the case may be) decides to penalise some but not all of those undertakings who have been, or may have been, involved in the cartel, perhaps ignoring some whose involvement it regards as having been relatively peripheral, it is entirely understandable that the view should be taken that one undertaking upon whom a penalty is imposed cannot plead in mitigation of penalty that the regulator should have imposed a penalty on some other undertaking which it says was just as guilty as it was itself, but against which the regulator, in the exercise of its discretion as regards investigation, chose not to proceed at all, or not in the same way. In the *Woodpulp* case, the Commission found breaches of Article 81 by 40 out of 115 wood pulp producers (and three of their trade associations), regarding the 40, it seems, as the important suppliers, as compared with the others who sold only small quantities and probably followed the selling prices of the more important suppliers. It found one relevant infringement (the only one on which its decision was upheld by the Court of Justice on appeal) to have been committed by a number of undertakings which were the subject of the investigation; some of them were subjected to fines but one was not. Neither the Report for the Hearing (which records at pages I-1407 and 1408 some reasons advanced by the Commission for not imposing fines despite findings of infringement, but not in relation to this particular infringement) nor the Opinion of the Advocate-General discloses the reason for this difference of treatment. The Court fixed a fine of ECU 20,000 for this infringement as regards those undertakings which had been fined by the Commission in respect of it. As regards the failure to fine the other undertaking, without alluding to the principle of equal treatment, it dealt with the point shortly, as follows at paragraph 197:

> "Where an undertaking has acted in breach of Article 85(1) of the Treaty, it cannot escape being penalized altogether on the ground that another trader had not been fined, when that trader's circumstances are not even the subject of proceedings before the Court."

251. In *KE KELIT*, the appellant complained of the Commission not having proceeded at all against two undertakings which it said had conducted themselves materially in just the same way as it had itself been found to have done. The Commission denied that one of the two was in a comparable position and, as regards the other, contended that there was insufficient proof of its participation in the cartel. The CFI rejected the argument in similar terms to those used by the Court in *Woodpulp*.

252. In *Dunlop Slazenger* and *Van Megen*, the investigations had been of more limited scope, and the complaint in each case was of the failure to impose a penalty on one undertaking which had been the subject of the investigation. The CFI rejected this as

a ground for arguing that the penalty on the appellant undertaking should be brought into question. In one case the undertaking not subject to a penalty was said to be "a small undertaking which played a minor and passive role in the infringement at issue". In the other case it seems clear that the circumstances of the two undertakings were not at all comparable as regards their involvement in the infringements.

253. In the present case, by contrast, the conduct of Hasbro was at the centre of the investigation, which concerned only Hasbro, Argos and Littlewoods. The OFT could not, and did not, choose not to enquire into the conduct of Hasbro. It had to do so in order to find whether there had been infringements of the Chapter I prohibition, and it found such infringements established on the part of all three subject undertakings. It explained fully what it had found to have been done by Hasbro. It decided what penalty it would otherwise have imposed on Hasbro. Only then did it apply the leniency agreement which it had reached with Hasbro, and in the result remitted the penalty altogether.

254. Thus the facts of the present case are not at all similar to those of the cases cited by the Tribunal in which the Court of Justice and the CFI have refused to regard different treatment of one undertaking as a ground for arguing that the penalty imposed on another should be reduced or remitted. They do also differ in one respect from those of *JFE Engineering*, much relied on for Argos and Littlewoods, namely that in that case all relevant parties were before the CFI, albeit in separate appeals.

255. It seems to us that, whether or not Argos and Littlewoods are right to contend that Hasbro was the instigator of the cartel activity, Hasbro's role in that activity was so significant that neither the OFT nor the Tribunal could consider the issues raised in respect of Argos and Littlewoods without also addressing what Hasbro did in relation to the other two undertakings. Nor, of course, did they attempt to do so.

256. Given that Hasbro emerged from the OFT's investigation free of penalty, although the subject of a finding of infringement of the Chapter I prohibition, it would have been surprising if it had appealed against the finding of breach. The conduct in question occurred too early to have been the potential basis for a claim by a third party under section 47A or section 47B of the Act, introduced by the Enterprise Act 2002. Accordingly, the Tribunal had to deal only with appeals by Argos and Littlewoods. Nevertheless these were appeals against the OFT's findings and penalties imposed as a result of a single investigation into the conduct of all three undertakings. In relation to that investigation, and in particular in imposing penalties, the OFT had to comply with the principle of equal treatment, if and insofar as it was relevant. Argos and Littlewoods are entitled to contend on appeal that this principle applied but was not followed. It does not seem to us that, in a case where the conduct of the undertaking to which it is said that undue favour was given was so centrally involved in the activities and in the investigation, and even in the appeal, it could be right to exclude unequal treatment from the available grounds of appeal on the preliminary ground that (because it was so substantially favoured) the favoured undertaking did not itself appeal.

257. On the Tribunal's reasoning and the OFT's argument this ground of appeal would be available if, for example, leniency had been allowed, when arguably it should not have been, by a reduction of 25% under paragraph 3.8, so that the favoured party, being subject to a substantial penalty, itself appealed. In that case, the other parties

could rely on unequal treatment, as the Japanese parties did in *JFE Engineering*. The favoured undertaking would, on the other hand, have to weigh up (as well as all other relevant factors) the risk that, by bringing such an appeal, it would expose itself to the jurisdiction of the Tribunal to increase the penalty imposed on it. It might therefore decide that, discretion being the better part of valour, it would not challenge the finding of breach or the penalty, for fear of ending up with the same finding of breach and a heavier penalty. We do not see why the ability of the other parties to rely on unequal treatment as a ground of appeal at all should depend on the decision of the favoured undertaking whether or not to appeal. If there has been unequal treatment in the imposition of penalty, the OFT has acted in breach of relevant principles of Community law, and therefore of the Act. That breach ought in principle to be available to the other undertakings as a ground of appeal.

258. For reasons which will appear, the absence of the favoured party from the appeal is likely to have a significant effect on the way this ground of appeal can be argued, but we do not consider that it should exclude the possibility of relying on such a ground as a matter of principle.

259. We would therefore distinguish *Woodpulp* and *KE KELIT* on the ground that the undertaking said to have been favoured had (in the latter case) not even been the subject of the investigation by the regulator, and that in neither case had the facts been found by reference to which the contention that there had been unequal treatment could be tested. As regards *Dunlop Slazenger* and *Van Megen*, where the undertaking favoured had been the subject of the investigation, and had been found to have been involved in an infringement, the distinguishing factor was that the favoured undertaking had not been central to the cartel activity. Here, by contrast, Hasbro's conduct was at the centre of the activity and of the investigation, was the subject of findings by the OFT, and in turn was inevitably examined closely on the appeal to the Tribunal.

260. It may well be that the situation arising in the present case is factually unusual but, in our judgment, it was open to Argos and Littlewoods to rely on the unequal treatment ground of appeal, despite the fact that Hasbro was not a party to the appeal to the Tribunal. The OFT was bound to comply with the principle of equal treatment. If it did not, then the penalty imposed on Argos and Littlewoods was legally wrong as to its amount, and they should be able to so contend, given that the relevant conduct of Hasbro had been fully investigated, and findings had been made about it, by the OFT, given its central role in the cartel activity, and also given the discrete nature of the point relied on in order to show unequal treatment, namely that, as "the instigator", Hasbro did not qualify under the Guidance for more than 50% remission of penalty. We can see that it could well be different if the argument was that the OFT should have regarded one undertaking's conduct as a whole as being just as serious as that of another, where a judgment would have to be reached as to the relative culpability of two or more undertakings involved in different ways and to different extents in an overall cartel activity. An example of that kind is provided by the reliance on this rule by JJB in its appeal on penalty: see paragraphs [199] to [205] above. In the Toys and Games case, however, the OFT made findings on at least some of the points which are relevant to the rightness or otherwise of its approach. Moreover, although Hasbro was not a party to the appeal, the Tribunal had to consider its conduct, because it had to consider that of each of Argos and Littlewoods vis-à-vis Hasbro.

261. We accept that this point is fatal to reliance by Argos and Littlewoods on anything other than the single, clear point, whether immunity could properly have been granted to Hasbro on the basis that it had complied with condition (c) despite being found to have been an instigator, and no other party having been so found. Other points were relied on before the Tribunal, which summarised the points taken as follows, in paragraph 112 of the penalty judgment.

> "(i) Hasbro was "the" instigator or played "the" leading role in the cartel; (ii) Hasbro did not come forward before the relevant investigation had started; (iii) Hasbro did not co-operate fully with the OFT; (iv) the OFT gave no reasons from granting leniency to Hasbro; and (v) the OFT had improper reasons for granting leniency to Hasbro."

262. The first point seems to us to be legitimate to be taken on appeal (subject to the other comments about it made in this judgment) because it arose directly from the subject matter of the OFT investigation and concerned the conduct of all three relevant parties which had to be examined closely in relation to the other issues on the appeal. We do not regard the second and third points, concerning the course of the investigation, as legitimate subjects of an appeal. It does not seem to us that it could be right for an Appellant to raise issues on appeal which would require the Tribunal to examine the course of the investigation as between the OFT and another party, in respects which do not in themselves affect the position of the Appellant. The fourth point (not pursued in the Court of Appeal) seems to us to be unjustified. The reasons given by the OFT and referred to at paragraph [244] above seem to us to be sufficient justification for not expressing its reasons for the grant of immunity or leniency. The fifth point was not pursued before us and we need say no more about it. It seems to us that the Tribunal could properly have refrained from dealing with the second point (on which, in effect, nothing turned anyway, since the position under paragraph 3.6 of the Guidance would not have been substantially different from that under paragraph 3.4) which it discussed at paragraphs 140 to 149, and with the third point, covered at paragraphs 150 to 156.

263. In paragraphs 89 to 101 of its judgment on penalty in relation to Argos and Littlewoods the Tribunal mentioned a number of other reasons for not allowing the unequal treatment ground of appeal to be considered, which arise from the absence of Hasbro as a party before the Tribunal. One was that, Hasbro not being a party to the appeal, findings of the kind that would need to be made would adversely affect Hasbro and its employees as regards reputation, and might have other consequences, for example in the context of civil actions for damages. However, the OFT had itself made findings, which were already public, which could have that effect and potentially those consequences. It does not seem to us that for these issues to be raised on appeal would make any significant difference in these respects, especially on the basis that, for the reasons which we have mentioned, the issue on appeal is limited to whether Hasbro was not entitled to immunity on the basis that it was "the" instigator.

264. At paragraph 98 of its penalty judgment, the Tribunal found the justification for the approach taken by the Court in *Woodpulp* to be that

> "in many if not most cases it would be impossible or at least very difficult for the Community Court, or in the domestic context this Tribunal, to investigate the circumstances of another undertaking, who was not before it, in order to determine whether there had been a breach of the principle of equal treatment as regards the appellant who was before the Court."

265. We agree that if the conduct of the allegedly favoured undertaking was not the subject of the investigation (as in *KE KELIT*), the argument based on unequal treatment could not be made to the Tribunal. There are constraints on the Tribunal's consideration of its conduct even when it has been the subject of the OFT's investigation. We will come to that point later.

266. In the same paragraph the Tribunal also made a different point:

> "In any event, the Court, or in this case the Tribunal, would risk being drawn into the essentially collateral exercise of determining what was the proper penalty for the other undertaking not before it, rather than determining whether the penalty imposed on the appellant who was before it was appropriate to the infringement committed by that appellant. To attempt such a collateral exercise would, in our view, normally be inappropriate."

267. In some cases this might present a problem. In the instant case, Argos and Littlewoods contend that Hasbro was not eligible for more than 50% remission. They do not contend that it was not even eligible for that much remission. If the OFT had decided that Hasbro was not eligible for immunity, it is clear from its letter of 11 November 2002 that it would have awarded a 50% reduction, from the figure which it determined (£15.59 million), the correctness of which as such was not in issue. In practice, therefore, this factor does not give rise to any difficulty in this case. On the facts of this case, if it came to the point, Argos and Littlewoods would be entitled to have their penalties reduced by 50%. (Strictly, to ensure proper comparability and to avoid double counting, the 10% reduction allowed to each of Argos and Littlewoods at stage 4 under the Guidance ought probably to be added back before the 50% reduction is made, since Hasbro did not have the benefit of such a reduction by reason of its entitlement under the leniency regime.) If this were a real issue in another case, it may be that the Tribunal would have to consider referring to the OFT (under rule 19(2)(j)) the question what remission the OFT would have accorded to the favoured party if it had treated it as eligible for no more than 50%, and then allowing the penalty appeals to the extent of a reduction corresponding to the excessive favour so quantified. However, the Tribunal would in any event have to determine what penalty was appropriate to the infringement committed by the appellant party, because that would be the starting point to which the consequences of the principle of equal treatment would have to be applied.

268. In those circumstances, it seems to us that the reasons given by the Tribunal, in paragraphs 99 to 101, for entering on a consideration of Hasbro's circumstances are among those which made it necessary for it to do so.

Is Hasbro's position comparable with that of Argos and Littlewoods?

269. The Tribunal rejected the argument about unequal treatment on its merits, saying that Hasbro came forward to the OFT voluntarily with evidence of an infringement of the Chapter I prohibition, whereas Argos and Littlewoods did not. Thus, it held, like was not being compared with like. Of course, that difference of fact does justify a difference of treatment. The question is whether it justifies the difference of treatment which the OFT applied. Hasbro was eligible for lenient treatment. Argos and Littlewoods could not have complained if Hasbro's penalty had been remitted to the extent of up to 50%. Such a difference of treatment would have been objectively justified.

270. Apart from the application of the leniency regime, however, and in particular the extent to which any one of them could be said to be an instigator of the concerted practice, the situations of Hasbro, Argos and Littlewoods were all precisely comparable. Moreover, up to the point at which the OFT considered the leniency regime in relation to Hasbro, it did treat them alike. The only difference was in the application of that regime, and the only issue that has to be considered under this ground of appeal is whether that regime was correctly applied. Argos and Littlewoods argued that the Tribunal's position amounts to saying that the conferring of leniency on Hasbro itself puts Hasbro in a materially different, and not comparable, position to Argos and Littlewoods. We do not agree with that interpretation of the Tribunal's judgment, but we would accept the proposition that it is not enough to say that Hasbro did cooperate and did apply for leniency, and that this differentiates its position fundamentally from that of the others. It only differentiates Hasbro's position if and insofar as the proper and reasonable application of the Guidance justifies different treatment. In its skeleton argument on this appeal, amplified by the powerful oral submissions presented to us by Mr Doctor Q.C., the OFT submitted that it, and in turn the Tribunal, treated Hasbro as not being in a similar position to Argos and Littlewoods because Hasbro applied for leniency and complied with the leniency conditions. If Hasbro did comply with the leniency conditions, then the different treatment could not be called into question. The issue is whether it did so comply. It does not seem to us that the Tribunal's reasoning at paragraphs 102 and 103 of the penalty judgment is sufficient to render an enquiry into whether Hasbro did qualify for complete remission irrelevant on the appeal to the Tribunal.

How to test whether Hasbro was entitled to immunity?

271. The submission for Argos and Littlewoods is that the OFT was wrong to allow Hasbro immunity, and in particular that the OFT should have proceeded on the basis that Hasbro was the instigator, so did not satisfy condition (c) in paragraph 3.4, as required by paragraph 3.6, and was at most eligible for a reduction of penalty under paragraph 3.8. The OFT came to its decision on that, as we have described, in February 2003, at the time of its original decision in the investigation. It seems to us that the correctness of that decision has to be assessed by reference to the material available to the OFT at that time. It would be wrong to argue that the decision can be shown to have been incorrect by reference to material which the OFT did not have at the time.

272. In this context the different nature of appeal proceedings from decisions of the OFT and those from the Commission should be noted. On appeal from the Commission,

now to the CFI, there is no new investigation of facts. Thus the CFI is necessarily limited to deciding the case by reference to the same facts as those on which any relevant decision of the Commission was taken, as they appear from the Commission's decision itself. On an appeal under the Act, by contrast, the Tribunal receives evidence which is not limited to that which was available to the OFT, and decides the case on its merits. The importance of that factor is what led the Tribunal to refer the matter back to the OFT on the first appeal, as described at paragraph [239] above. On Argos' and Littlewoods' appeals, therefore, the Tribunal had to decide the issues arising as regards liability and penalty on the basis of the Tribunal's own conclusions from the evidence which it had heard. This will almost always be different from that which the OFT had to go on, and certainly it was in this case.

273. The Tribunal held that the question of leniency could not have been reconsidered by the OFT itself by reference to witness statements provided by employees and ex-employees of Hasbro after the first decision by the OFT made in February 2003, at the stage when the matter was remitted to the OFT by the Tribunal (see penalty judgment paragraph 132), and that it was not relevant to consider findings by the Tribunal itself in its judgment on liability, which were not directed to the issue of Hasbro's role as an, or the, instigator (paragraph 134) and also that it was at least extremely doubtful whether findings by the Tribunal after oral evidence and cross-examination were relevant to the validity of the OFT's decision to accord Hasbro full remission of penalty in February 2003 (paragraph 135). It said that any view on that question reached by the Tribunal would not resolve the "quite different question of whether the OFT had remained within its margin of appreciation in deciding, in February 2003, not to withdraw full immunity from Hasbro" (paragraph 135) or "whether it was reasonable for the OFT to take the view it did in February 2003" (paragraph 136).

274. On behalf of Littlewoods, Mr Green Q.C. (whose submissions on this topic were adopted by Mr Brealey Q.C. for Argos) contended that this approach was wrong because it treated the question as one of judicial review, not of a full appeal, whereas appeals to the Tribunal whether on penalty or on liability are full appeals, in relation to which the evidence before the Tribunal is what matters. He submitted that to limit an appeal by one party, even if only on a particular aspect of the case, in such a way that only material before the OFT is allowed to be taken into account, would be inconsistent with that full right of appeal.

275. However, it seems to us that on this particular point, of unequal treatment, the Tribunal must limit its consideration to the material which was before the OFT, at least where the favoured party has not itself appealed. We believe that this is what the Tribunal had in mind at paragraph 109 of its penalty judgment:

> "Even assuming that the matter is not entirely precluded by the *Woodpulp* jurisprudence, in our judgment any investigation by the Tribunal at the behest of A as to whether the OFT had followed the *Guidance* as regards the treatment of B, could extend at most to the question whether it is established that the OFT's treatment of B fell outside a reasonable application of the *Guidance* given the OFT's margin of appreciation in that regard."

276. Whether or not that is exactly the right formulation, it does, in our judgment rightly, recognise that the Tribunal's first task in this respect is to review the OFT's decision

and consider whether it was one which it was open to the OFT to make, rather than, as with other aspects of the appeal, to decide it on its own merits on the basis of evidence adduced before the Tribunal. It could not be right to hold that the OFT should have decided, in February 2003, that Hasbro was the instigator, and should therefore not have given it full immunity, by reference to evidence which was not available to the OFT at that time. We agree with what the Tribunal said on this at paragraph 129 of the penalty judgment, and as to the exclusion of later material at paragraph 132. For our part we do not regard it as "extremely doubtful" that findings of fact by the Tribunal on the basis of the evidence before it could be relevant (see its paragraph 135) but as plain that they are not relevant.

How to decide whether there has been unequal treatment?

277. At paragraph 111 the Tribunal said:

> "in our judgment the Tribunal should at most interfere only if it is satisfied that the OFT's failure to apply the *Guidance* in any reasonable way vis-à-vis B gave rise to a manifest injustice vis-à-vis A."

278. We find more difficulty with this proposition. Certainly there are respects in which the application of the Guidance involves exercises of discretion and judgment, with which the Tribunal would be slow to interfere unless it could be shown that the OFT had misdirected itself as to the scope of its discretion, or had erred in principle in some other way. The statutory obligation imposed on the OFT in relation to the Guidance is to have regard to it. That does not altogether preclude a departure from it. In principle the departure should be not only deliberate but also reasoned and justified. The Tribunal would not be justified in overturning a penalty decision reached in such circumstances if the decision not to follow the Guidance was sufficiently explained, and was rationally based. In such a case, even if the difference of result as regards the two undertakings in question was sufficient to bring into play the principle of equal treatment, it is likely that the treatment of the more favoured undertaking could be shown to be objectively justifiable, by reference to the factors identified by the OFT in explaining why it did not follow the Guidance in the particular case.

279. The position is complicated, for present purposes, by the fact that the OFT has not expressed its reasons for granting immunity, and has stated in terms that these are confidential. We will deal with the implications of that later.

280. However, coming back to the requirement of manifest injustice, identified by the Tribunal in paragraph 111 of the penalty judgment, it seems to us that the principle of equal treatment requires that, if two undertakings in comparable circumstances have been dealt with in unlike ways, the difference of treatment is wrong in law unless, and except to the extent that, it is objectively justified. If it is wrong in law, then the less favoured undertaking is entitled to appeal and to have its penalty reduced to the extent necessary to eliminate the inequality of treatment. We do not think that it is necessary to show manifest injustice in addition to such an unjustified difference of treatment.

The absence of reasons expressed by the OFT for the grant of immunity

281. The principal difficulty in this case, which would always be likely to arise in such a situation, is that the OFT did not provide a reasoned decision for its giving Hasbro immunity. It found facts, some of which are relevant, in its original decision, but it did not explain, in that decision or elsewhere, its reasons for granting immunity. As explained in a passage from its original decision quoted above (paragraph [244]) this is regarded as a matter of confidentiality: "The desirability for confidentiality does not solely concern the identity of the party which has applied for leniency, but also the OFT's reasons for granting or refusing leniency." It is possible to draw some inferences as to the OFT's reasons from the original decision and from the correspondence about immunity between the OFT and Hasbro's solicitors. But there is a limit to what conclusions can properly be reached on this basis, and the Tribunal would have to be cautious about drawing inferences as to the basis of the OFT's decision. This is a further reason for proceeding on a basis analogous to judicial review.

Was there unequal treatment on the facts of this case?

282. In this respect it is necessary to consider the material which passed between the OFT and Hasbro's solicitors on the question of immunity, to which we have already referred (paragraph [235]), as well as the terms of the original decision.

283. The starting point for the submission by Argos and Littlewoods is that the OFT found that Hasbro was an instigator, and did not hold that any other party was an instigator, despite this passage in paragraph 355 (*419*):

> "While there is some evidence that Argos was <u>an</u> instigator, there is no clear evidence against Argos in this respect and therefore it is not appropriate to make an adjustment to the penalty for Argos in respect of this aggravating factor."

284. On this basis, Mr Green submitted that, no other party having been found to be an instigator, it must follow that the OFT was satisfied that Hasbro was the only instigator. If so, it did not satisfy condition (c). On its own that is a short, clear and forensically cogent point.

285. However, the comments of the OFT in correspondence with Hasbro's solicitors, and the points made by those solicitors, seem to us to show that the context for the grant of immunity is more complicated and a good deal less clear. On behalf of Hasbro a number of different points were made. We summarise below some of the main points.

   i) As regards the overall context, and the policy of the leniency regime, it was said that the regime needed to be applied in a way which would promote its underlying policy, namely to encourage undertakings to come forward so as to assist the OFT in uncovering otherwise secret cartels. It was said (with a comparison to the published approach of the Department of Justice in US cases) that the withdrawal of immunity needed to be justified by clear and strong information, and that if it was not, then the leniency regime might be discredited so as to appear less attractive in the eyes of business, and would thereby fail to achieve its objective. (This point was made in Hasbro's solicitors' written representations in July 2002 and was not specifically reiterated in November, but it was not withdrawn and remained pertinent.)

ii) Specifically, it was argued, on general principles, that the OFT needed to have strong and compelling evidence to show that the conditions of the leniency agreement were not satisfied, before it could impose a penalty on that basis. It was not sufficient, as against Hasbro, to conclude that Hasbro was an instigator and that no other party was proved to have been one. Whether, as against Argos, for example, the evidence that it was an instigator was not sufficient for that to be taken into account in imposing a penalty on it was said to be a different question from whether the evidence as a whole showed, as against Hasbro, that Hasbro was the instigator.

iii) Moreover, the relevance of conduct before 1 March 2000 was put in issue. In its decision the OFT inevitably considered such conduct, as part of the story leading up to what happened after the Act came into force. It did not have to express a view, in the decision, as to whether Hasbro was an instigator, still less the instigator, after 1 March 2000. Hasbro's solicitors argued that the OFT would have to be satisfied of that in order to withdraw immunity.

iv) In addition, of course, Hasbro's solicitors took issue with the OFT on the inferences to be drawn from the material on which it said it relied for its provisional conclusion that Hasbro had been the instigator.

286. Because of the absence of reasons for the confirmation of immunity in February 2003, we do not know on what grounds the OFT decided to confirm it. The natural inference is that it was on one or more of the grounds advanced by Hasbro's solicitors, referred to above. In those circumstances, this ground of appeal by Argos and Littlewoods could only succeed if these factors could not provide any rational basis for a decision by the OFT to confirm the immunity.

287. It seems to us that, while different views might be taken as to the cogency and correctness of some of these points, particularly the relevance or otherwise of conduct before 1 March 2000, it is impossible to say that the OFT could not rationally conclude that it was appropriate to confirm the immunity in these circumstances.

288. A factor which, as it seems to us, could have appeared to the OFT to be particularly powerful is the first of those mentioned in paragraph [285] above. We would regard it as fully legitimate for the OFT to have taken this into account, together with any uncertainty that it felt as to whether it was or could be satisfied, as against Hasbro, that Hasbro had failed to satisfy condition (c), and to have resolved its doubts in favour of confirming the immunity, in order not to risk the leniency regime seeming to be less attractive to others in the future. We do not know whether the OFT did proceed on that basis, and we do not say that it could not reasonably have taken a different approach, such as that the grant of immunity depended not on a policy approach but on the strict application of the Guidance. However, if, as we think, this was a possible and legitimate approach on the part of the OFT on the material which it had, then it follows that Argos and Littlewoods cannot show that the OFT's decision was not within the range of decisions legitimately open to it on the available material. At paragraph 130 of the penalty judgment the Tribunal gave its reasons for coming to

the same view. Those do not include the policy approach, mentioned at paragraph [285(i)] above, but otherwise the reasons there given are much the same as those which have brought us to the same conclusion.

Conclusion on unequal treatment

289. We have therefore come to the same conclusion as the Tribunal, though for partly different reasons, namely that this ground of appeal against the penalties imposed is not made out, despite Mr Green's clear, frank and skilful submissions.

290. The constraints on any enquiry as to the correctness of a decision about immunity or leniency by the OFT which result from its policy of not expressing its reasons on the point are such that it is unlikely that it would ever be possible to show that the grant of immunity or lesser leniency amounted to unequal treatment as between two or more undertakings involved in the same cartel activities, if the favoured undertaking is not a party to the appeal. In practice the point will be capable of being maintained only rarely, if ever, where the favoured party chooses the path of discretion and does not appeal. In the result, the situation may not differ greatly from that which was succinctly stated by the ECJ in *Woodpulp* at paragraph 197, quoted at paragraph [250] above. In principle, it seems to us that there may be rare cases (of which this might have been one, because of the central role of Hasbro in the infringements alleged) in which the point could be taken by another party which considered itself to have been the victim of unequal treatment. In practice, the point cannot be made good on the facts in this case, and it must be improbable that such an argument could be made good, in the absence of the favoured party from the proceedings before the Tribunal.

Toys and Games penalty appeals: result

291. For those reasons we dismiss the appeals by Argos and Littlewoods on penalty as well as those on liability. The Tribunal was entitled to reach the conclusions which it did in [2005] CAT 13.