Thursday, 20th May 2004

(10.30 am)

THE CHAIRMAN: Good morning, ladies and gentlemen. May I say, first of all, how grateful the tribunal is for the very helpful closing submissions that we have received.

I wonder if I could raise a point of housekeeping that we would like some observations from the parties on, at some point, which is how, from the point of view of the argument over the next day or so, you would like to handle the possible issue of penalty. We have no view on that at the moment, obviously, because the issue may or may not arise; that is to be seen.

There are, from a housekeeping point of view, probably three possibilities: one is that you make such arguments as you wish on penalty now, in the alternative, as it were; two, that we simply take the arguments that we have already had on penalty and we decide later on whether or indeed if we ever need any further argument on penalty, to fix at our discretion a further hearing on that if it ever becomes necessary, and I am not saying one way or the other whether it might be; or thirdly we take a strategic decision to park the penalty issue altogether and put it off completely, on the basis that if there should ever be any question arising on penalty, we have a separate hearing on that in any event.

At some point we would like some help from the parties on that issue.

MR BREALEY: Mr Green and I will discuss it later, but it appears that we may want to go down route three, to park it. To a certain extent, it may depend on the findings of fact.

THE CHAIRMAN: Our minds at the moment, as it were, are focused on the evidence, as I am sure the minds of all the legal representatives and others have been completely focused on the evidence. The consequences of the evidence is not a door we have opened yet. So it may be that that is the better course. I do not know if you have any first thoughts, Mr Doctor, on this point.

MR DOCTOR: I think our first response is your option two, that the submissions have been made, and they will become relevant only in the event of certain findings. We certainly would not wish to address it today, if no-one else wants to do that. If it does become relevant, we would submit that should stand, what has already been said, and if anyone wants to supplement it, no doubt they will ask you for that opportunity.

THE CHAIRMAN: Let us leave that issue there for the time being.

MR BREALEY: We drew straws, and I will go first.

Closing submissions by MR BREALEY

If I could highlight how I will present the oral submissions. Firstly, I will go through and emphasise the points in the written closing submissions on behalf of Argos, and as the tribunal will be aware, essentially we have two documents relating to that. One is the Action Man and core games document, and then you should have another document entitled "Other Toys".

THE CHAIRMAN: They are all one document in our papers.

MR BREALEY: Then we have the legal analysis.

THE CHAIRMAN: It is all in the same document.

MR BREALEY: I do not propose to go through the law on this today, but if we could have the legal analysis open, there is one point I would like to make on the legal analysis before I go to the facts.

The second page, note 5, could I just add a paragraph 1.8.8.7. The reason for that is that it is apparent from our analysis here that there must be an element of reciprocity, in our submission, and paragraph 1887 says:

"As has been pointed out above, paragraph 1849, the condition of reciprocity which is necessary for a finding of concerted practice is met."

So that is a paragraph where the court of first instance is actually applying the condition of less possibility and says that it is necessary for a finding of a concerted practice. I felt I should point out paragraph 1887.

Then we have the penalty submissions, which I will not address in the light of what we have just been talking about.

There is another document I will hand up, which essentially deals with two things. The first is what we say is the correct approach to the evidence, and I shall look at this, and that is basically paragraphs 1-21. Then there is a heading which we have called "Needham's Knowledge", which is basically taking out from Mr Wilson's evidence and Mr Needham's evidence those aspects where we say essentially the condition of reciprocity is just simply not met. That is what this document goes to; the correct approach to the documentary evidence, the oral evidence and Needham's knowledge. I shall go through that at the end.

Could I then start at the beginning, which really starts at paragraph 2 of the written closing submissions on behalf of Argos. We say the beginning is the effect of the GUS takeover. As we set out in paragraph 2, the OFT have always rejected in the decision at least, the case that Argos moved away from "its traditional position as a discounter". It has rejected the case that Argos has taken the independent decision to move prices upwards to market levels.

We say this is a very serious failing. We think this is apparent from our written submissions. I do not say it lightly, but we say that it displays a lack of objectivity towards the evidence, that this GUS policy has continually been denied.

The failure to accept Argos' case on the GUS takeover, this is paragraph 3, we say has led to some crucial mistakes in the OFT's assessment of the evidence. These relate in particular to the timing of the move to RRPs. We know it is spring/summer 1999, not autumn/winter 1999 -- the motive, in the OFT's view, for the alleged price fixing agreement. And we say that the OFT has simply misjudged the simple and wholly innocent reason for the industry gravitating to RRPs, which is to stop losing money.

We say the OFT has really misjudged the mood of the industry in 1998, before the takeover, and it completely misjudged the change that took place in 1999.

In paragraphs 4-11 we set out the case on low margins. Prior to spring/summer 1999 Argos' policy was to pre-empt the market; according to Maria Thompson, Argos would aim to undercut the other retailers when the

Argos catalogue was published.

This is the evidence from all the parties in this case. It is the evidence of Neil Wilson, who said that some retailers were threatening to delist. He repeated that in cross-examination. Mr Bottomley gave the colourful example of a retailer losing money when the customer used a credit card. Terry Duddy stated that "We made no profit on the Hasbro business, we made very low margins", and Maria Thompson said the same thing. The evidence from the Littlewoods witnesses, which I will come to later, again said the same thing.

The important point of this is that the OFT really underplays the unprofitable nature of the business. The OFT accepts, it is true, that margins were low. But in our submission it has not really grasped the appalling nature of the margins.

This lack of understanding was apparent from the economic propositions that the OFT put to the Littlewoods witnesses. We will come to this later. The important point is that the situation changed in 1998 when Argos stopped pre-empting the market. The industry heaved a sigh of relief. The industry reacted, as would be expected, by pricing at price point the RRP, where it stops losing so much money.

It is this crucial aspect, that the retailers were losing money, not just a question that the margins were low -- they were actually losing money. Money is a very important reason why the prices gravitated to the RRP. I think it is clear from the way the OFT presented its case that it really underplayed the fact that the retailers were losing money, and they are simply not in the business of losing money, they are there to make a profit.

We then set out the Argos change of policy to market pricing. We first refer to the new policy as it was explained by Terry Duddy in his first witness statement. If I could go to paragraph 6 of the first witness statement:

"In September 1998 sales of Argos were falling, costs were rising and profit forecasts were at risk. I found Argos to be a highly bureaucratic business with multiple layers of management, lack of pace; in essence, not a modern retailer. I wanted to drive growth and put pace back into the business. I wrote the document exhibited TD1 in November 1998."

He goes on:

"The main goal for the business was to regenerate profit growth and one of the ways to try to achieve this was to improve margin by increasing the retail prices of some of our products, particularly in low margin areas [core games and Action Man]. This is set out clearly on page 4 of the document."

If I could go to a couple of documents exhibited in volume 1, tab 14. A contemporaneous document exhibited to his statement, at tab 14. He refers to page 4, and that is at page 70:

"Sales profit development. Key actions: improve margin [the very first point] arising from increasing pricing."

While we are in this bundle, if I could go to page 106, this is a presentation that he made. He says:

"To regenerate profit and growth, to provide a base for sustainable profitable sales growth and increasing return on investment:

"Sales development; margin improvement."

The first point of action is increased pricing, then better terms and then increased mix.

So there is there, quite clearly, documentary evidence which suggests that Argos is moving away from pre-empting the market to increased pricing.

If we go on to page 111, this is a memorandum from Maria Thompson to Terry Duddy, 9th December 1998, "Away Day Action Points". We go over to page 112, and this is Maria Thompson speaking. It says at the bottom:

"Terms/price promise pricing, pricing/price promise".

Then:

"Process to measure effect of revised pricing policy on sales and competitiveness to be determined."

Page 112 at the bottom:

"Process to measure effect of revised pricing policy."

Again we have the documentary evidence referring to increased pricing, and then Maria Thompson is saying, "Well, we have to have a process to measure what the effect of that revised pricing policy is on sales". Again, a clear indication that there had been a change of policy.

Going back to the written submissions, Mr Duddy says:

"On prices, we had to move to a market pricing position. This was obvious on toys, where margins were too low. I thought that Argos could not afford to keep driving market share and losing money or to keep pre-empting the market. This meant that, rather than deeply discounting on price, we would price at the price expected over the life of a catalogue, six months, and if we needed to reduce a price, we would do this by monitoring the marketplace and using fliers and promotional activity to readdress the prices."

In cross-examination he said essentially the same thing. We have set it out there. The second quote:

"When I use the term 'moving to market prices', I am comparing circumstances where Argos had previously pre-empted the market price, and by that they have priced below what I thought was the average market price for those products. By 'moving to market prices', what I mean was that in circumstances where we were actively pre-empting those prices that we would move to market price for those products. The phrase 'market pricing' does not mean moving to prices on RRP. However, RRPs tend to be established in the market and it is difficult for retailers to price above an RRP if it has become the prevailing market price. Our position was not to move close or near to pricing on RRPs, our position was to move to pricing on the market. However, as I said earlier, it may be a circumstance where RRP has become the prevailing market price."

THE CHAIRMAN: If I can just ask one question on that point. I am still a little confused on this part of the case, as to how this works in the specific case of toys, where we have had a certain amount of evidence to the effect that Argos itself is a price leader or price setter, which would imply that Argos was already at the market price. So how does moving to a market price work if you are already at the market price and it does not mean moving to RRPs?

MR BREALEY: The answer is that to a certain extent there is a confusion as to what the market price is. What Mr Duddy is saying is that Argos would have gone out at a price. It then sees its competitor has gone out at a lower price, and then Argos has gone into the market and pre-empted it at the next catalogue. So it has gone down and pre-empted it. Mr Duddy is saying it has gone below what he feels is the proper market price.

In answer to the question, the Argos price is not necessarily the market price. As Maria Thompson says --

THE CHAIRMAN: We had quite a lot of discussion about whether market pricing meant moving up, staying the same or going down. If a competitor, as you suggest, went out at a lower price, and Argos felt it needed to come down to that price, that is again the market price; in other words, the market price in this part of the market is working itself out by competition.

MR BREALEY: Absolutely, so that could be the market price if Argos has come down to the competitor.

THE CHAIRMAN: I do not see why, in relation to toys, it necessarily follows that moving to market pricing should have any effect on the price of toys, especially as the Argos evidence as it turned out, as it came out through

Maria Thompson and others, was that RRPs had nothing to do with it.

MR BREALEY: I do not think she said that RRPs had nothing to do with it.

THE CHAIRMAN: She said they were not relevant.

MR BREALEY: I think when she said it was not relevant, that has to be taken in context. If her view of market pricing coincides with the RRPs, then they will go out at RRP. I think it would be wrong to say that her evidence is that RRP is irrelevant. It is relevant if the market price is the RRP.

The point you are putting to me, it would mean that Argos could not really have a change of policy because it would just be stuck in the mud.

THE CHAIRMAN: It is up to Argos to explain to us what the policy is. All I am saying is I am still a bit confused on what the explanation is. Probably it is my fault, I am not saying it is not, it is just that I am finding it hard to grasp.

MR BREALEY: First of all, the policy is increased margin, it wants to make more profit. Forget about market price at the moment, forget about increased pricing; it wants to make more profit.

It is losing money on toys. How does it go about making more money on toys? It increases the price. We will see this from Lesley Paisley, it has to increase the price. It increases the price to what it feels is the market price, and in the case of Action Man core games, that will be the RRP.

In other words, as I think Terry Duddy --

THE CHAIRMAN: As I have understood it, under the new policy, if they increase the market price to what they saw as RRP but other retailers did not follow, then they would come back to what the other retailers were pricing at in order to match them.

MR BREALEY: It depends, as Mr Needham said, on the extent to which they followed it or not. If it was a 5p or 10p difference, 5p, no, 10p, maybe, but if it was 20p, they would come down, and that would be the prevailing market price.

Mr Duddy is saying, in the passage I have just read out:

"I am comparing circumstances where Argos had previously pre-empted the market."

So there had been a price and Argos had pre-empted that price. That pre-empted price is not necessarily the market price. The new market price is Argos' assessment of where the market would settle if Argos were no longer pursuing an undercutting strategy.

It is to make more margin and Argos are no longer going to pre-empt the market, and so Mr Duddy is saying, "What do I think the average market price for those products will be? What do I think the market price will be?" That is what he is saying there.

That may be the Argos price, but it will not be the Argos' massively pre-empted and discounted price.

As for the relevance of the RRP, Maria Thompson, in the two passages we set out at paragraphs 14 and 15, first of all says:

"As I stated in my first witness statement, the move towards market pricing started in 1998."

They are moving away from pre-empting the market:

"Ie, intentionally undercutting the prevailing market price when it comes to final pricing."

As we have seen at the final pricing, they go out and do their study and they see what the average price is, and then when the catalogue comes out, in the old days they would pre-empt it. So it was a move away from pre-empting the market and a move towards generating more margin:

"In some instances this meant an increase compared to the historical price that was being charged by Argos."

She is saying there that when they come to final pricing, in some instances moving away from pre-empting meant an increase compared to the historical price. What she is saying there is that in that sort of situation the market price is not the Argos historical price:

"Or in relation to new product lines, not unnecessarily surrendering margin, as may have happened prior to the change in policy."

In other words, yes, in certain circumstances the market price may be the Argos price, but not necessarily. This is not an exact science. Again, in cross-examination she says:

"By matching the market [paragraph 15] by going to the market price, we would go to the market price, and many key competitors price many products and many product categories at RRP."

Again, the market price is above what Argos is charging:

"Therefore, Argos would be moving close to RRP because many of our competitors did price at the RRP, we would be aiming to match our competitors so if our competitor was at an RRP we would probably go to an RRP."

THE CHAIRMAN: We do not have any evidence -- indeed the evidence is all the other way -- that anybody was at RRP in relation to toys. Nobody was at RRP. I still have

difficulty seeing how this works in relation to these particular products we are talking about here.
MR BREALEY: It is final pricing in November 1998, and Argos with its new policy of making more profit says, "What are we going to do? Are we going to move away from pre-empting?"
THE CHAIRMAN: She says she is aiming to match her competitors.
MR BREALEY: One has to remember, this is across the whole entire industry, in the sense it is not just toys.
THE CHAIRMAN: It is not very helpful to us if we are talking about something that has not got anything to do with the case.
MR BREALEY: The OFT in its decision has said that there is no change of policy, and the document that I have just referred to from Mr Duddy is a change of policy across its entire -- they did not just wake up and say, "This is going to apply to toys". He came in and said, "This business needs to make more margin, more profit, and this is what we are going to do." So the change of policy was across its whole retail base.
When they are talking here about a change of policy, they are, in many respects, dealing with the OFT's rejection that there was any change of policy. The OFT have said in their decision that there was no change of

policy, that Argos would no longer be a discounter. We have to meet that.

In my respectful submission, it is helpful for her to say what they were doing generally. She is trying to describe what the change of policy was across the whole retail base.

Where toys come in -- and this is quite clear from the evidence, and it is quite clear from Neil Wilson's evidence, who understood what was going on -- where Action Man and core games was concerned, the margins were so appalling that if they were going to implement the policy of making more profit, they were going to the RRP. There was nothing else they could do. They have to put up the price. On one view, they did not go above the RRP, they go to the RRP. It is quite clear from our pricing analysis that in spring/summer 1999, in most instances, they went to the RRP.

If I try to encapsulate it at paragraph 18 of the written submissions, the thrust of the evidence we say is clear: Argos moved away from pre-empting the market. It is not just on toys, it is on cookers, lawn mowers. They moved away from pre-empting the market and moved away from chasing volume and market share at the expense of profit. That is Andrew Needham. If the prevailing market price or the anticipated market price was at RRP and the margin on the product was deemed insufficient, Argos was likely to charge the RRP.

It is, in my respectful submission, as simple as that.

Argos' pricing in the catalogue in spring/summer 1999, this move to market pricing on Action Man and core games is reflected in that catalogue. It is a critically relevant fact that the OFT has wholly failed to take this into account in its decision. It simply has not addressed the fact that Argos went to RRP in the spring/summer 1999 catalogue.

Andrew Needham, who was in charge of Action Man and games:

"This policy should be seen to take effect in toys [paragraph 20] in catalogue 51. As far as toys are concerned, the new Argos pricing policy took effect for me at the final pricing meetings."

We can see from the pricing analysis in our first skeleton that Argos priced Action Man at or near RRP more often than not at the 99p price point.

We say the reason for that is not any agreement that we were to go out to RRP in the spring/summer 1999. It was a consequence of a unilateral decision taken by Argos.

Again, Andrew Needham said in cross-examination, I refer the tribunal to the second passage:

"In terms of our own strategy on toys, where we needed to improve margins, the most that was on Action Man and core games in terms of their total turnover contribution, boys' toys were a substantial turnover, so consequently the easiest way to increase profitability in the first instance on boys' toys was to go after those two categories in terms of putting their prices up."

He is told he must not pre-empt, he must not discount, he is told he has to make more money on Action Man and core games. What is he going to do? He is going to put prices up. Then he says, is that a market price? I am going to put that up on the RRP, is that a market price? The answer is yes, the RRP is the anticipated market price. It is not the price Argos charged before, otherwise there is no change of policy.

THE CHAIRMAN: You are saying, "We will go up to RRP if we think that RRP is the market price". Is that another way of saying that if we go up to RRP, we expect everybody else to go up to RRP as well? Otherwise, it is rather hard to see how it is the market price.

To put it round the other way, if Argos went up to RRP but nobody else did, RRP would not any longer be the market price, on this theory.

MR BREALEY: Again, one comes back to Mr Duddy, at paragraph 13, when he says:

"Buyers will have to take an estimate of what they believe the price of that product will be at the time the catalogue is issued."

This is in paragraph 13, cross-examination. So they are sitting around a table and trying to work out what their pricing should be in the catalogue. They are told, "Do not pre-empt, I want more profit". So Andrew Needham says, "I am going to have to put the price up. I have to be on the market, I cannot be above what I think will be a market price". Is the RRP realistically a market price? He would say yes.

THE CHAIRMAN: That means assessing what price everyone else is going to charge.

MR BREALEY: He may think that is what everybody else will do, but that is what he thinks is a competitive price for the product. If people follow, so be it, and if they start pre-empting him then, as he said in his cross-examination, they would have to seriously look to see how they could respond, because they need to be on the market.

I come back to the fact that it cannot be that the historical Argos price which is the pre-empted discounted price is the market price. One is looking at

more profitability --
THE CHAIRMAN: It depends what the rest of the market is going to do. If Toys R Us, Woolworths and Littlewoods do not react, Argos is no longer on the market.
MR BREALEY: Then, as he said in cross-examination, if they had gone out at the 1999 RRP and Littlewoods or Woolworths or Toys R Us had pre-empted them at 25p, then he says that they would seriously consider whether to react or not, and they probably would. Then the price 20p below the RRP would have been the market price.
I come back to the fact that Andrew Needham said these core games and Action Man had such low margins -- and this comes across from the Littlewoods witnesses, as we will see in a moment -- that if you are pricing on what you think the market price will be and at the same time you are increasing profit, the market price is likely to be the RRP.
THE CHAIRMAN: There are some products in life where there is not actually any money to be made. The market price is so low that nobody can make any money out of it. That does not necessarily mean that is not the market price, it just means that everybody is not making any money.
MR BREALEY: Argos are taking a decision that they need to make more money and they are going to price at an RRP.

THE CHAIRMAN: You say they are going to price at a market price, not necessary the RRP.

MR BREALEY: That is true across the board, but when it comes to Andrew Needham and his final pricing with Sue Porrit and Maria Thompson and they say, "We cannot pre-empt, we need to make more money, what are we going to do?", the only way is up, and the only way up is the RRP.

If I can quickly go on to paragraph 26, moving ahead, Neil Wilson of Hasbro understood this. At paragraph 26, and this is under the heading "Sea Change":

"As the manager at Hasbro in charge of the Argos account, from January 1999 were you aware that the change of policy had occurred for the spring/summer 1999 catalogue?"

"Answer: Yes."

So he knew that there had been a change of policy in the spring/summer catalogue of 1999:

"I have been aware from discussions with senior management within Hasbro.

"Question: What did they say the implications were? [This is Hasbro Toys.]

"Answer: That Argos were looking to build more margin into their business, and one of the ways that they were looking to do that was to price at the recommended retail prices."

That is how Hasbro understood the position, that Argos was seeking to build more margin into their business, and as far as Action Man and core games was concerned, that was going to RRP.

All he is saying on the market price -- I have been passed something by Mr Hoskins. The combination of left and right is that Argos essentially -- and this comes from Day 3, page 43, the cross-examination of Terry Duddy:

"So it was feasible for us to think about taking price action in the spring/summer 1999 catalogue and it was important at that time when I joined to move swiftly to do that. We did that into the spring/summer 1999 catalogue, partly to give us an indication of what may happen in the future should we take these prices."

So "... partly to give us an indication of what may happen in the future should we take these prices."

At Day 3, page 45, line 13, this is the same point:

"So it is a combination of activities that had to take place in the following year. However, to repeat, I needed to take the action in spring/summer 1999 to get a feeling for what might happen."

As with all changes of policy, this is new, and

Terry Duddy's evidence is that they were doing this to test the water to see what might happen. But the bottom line is that going to RRP was not going above what Andrew Needham thought would be a realistic market price.

If someone had said to him, "Well, we have to price on the market, we have to have a market price, what have you done?" He would say, "I have priced at RRP. In my view, that is likely to be a realistic market price."

Can I go to paragraph 23. Before I go on to how the GUS takeover influenced the market, the sea change, it is, in our respectful submission, very, very important to note that in spring/summer 1999 Argos raised its prices, it raised its prices for Action Man and core games basically to RRP. That was a market price, and that was as a result of a unilateral decision by Argos.

THE CHAIRMAN: Although it is not part of the OFT's case, we have at least some evidence, admittedly scanty -- it may or may not be right, but at least there is some evidence -- that in late 1998 Hasbro had had some sort of contact with both Argos and Littlewoods.

MR BREALEY: As it had in 1997 and 1996.

THE CHAIRMAN: The evidence of Mr Thomson about what was said at the meeting in Liverpool in November 1998 is around about or not far off the time that final pricing

decisions would have been taken for the spring 1999
catalogue. So perhaps in the back of one's mind one has
a certain sense of unease about this part of case.

MR BREALEY: It was not in Liverpool, because that was
Littlewoods.

THE CHAIRMAN: It is the Liverpool meeting I am talking
about.

MR BREALEY: That was the meeting with Hasbro and
Littlewoods.

THE CHAIRMAN: Yes. That is the meeting at which Mr Thomson
says he heard Mr McCulloch say that he had discussions
with the opposition.

MR BREALEY: Can I make the very first point, that that has
never, ever been the case against us. You are quite
right to say that any evidence there is scanty. We have
always fought this case on the basis that the price
fixing agreement came into force for the autumn/winter
1999 catalogue. The OFT surreptitiously, at
paragraph 126J of its skeleton, seem to put in the
nuance that there may have been some price fixing
agreement beforehand, but that is not how it has been
portrayed to us. It has been portrayed to us right from
the beginning that on 23rd October Hasbro had an
internal meeting to discuss ways of injecting profit
back into the industry, and that was the 1999 trading

terms, that is 23rd October 1998.

We had our final pricing on 6th November 1998, and Ian Thomson's evidence was that the meeting with Littlewoods at Liverpool must have been 13th November 1998.

THE CHAIRMAN: Yes, that is roughly right.

MR BREALEY: Then we go on to the 17th February 1999, we have the Hasbro/Argos presentation of the trading terms. I think it is 19th February, and it is 17th February that there is the Richards/Duddy meeting. It has never been suggested to us that there was a price fixing agreement for the spring/summer 1999. Of course, it is our case -- you will see from the written submissions -- that the OFT's case that has always been put to us is how can you possibly explain the parity in pricing for autumn/winter 1999?

It is their case that the initiative, the listings initiative, the core brand rebate that was hatched on 23rd October, led to the pricing agreement in 1999.

I would ask the tribunal to reject any suggestion that this decision is about a price fixing agreement that was hatched between unknown people in 1998, prior to Argos' final pricing on 6th November.

Paragraph 23, we set out how the GUS takeover influenced the market, what we call a sea change. We take this evidence from Mr Burgess. He described it as a huge change within the industry. It may be difficult to pin down what the change was, although from Argos' perspective they know what it was. But the very important point that we get from paragraphs 23-26 is that the industry knew that there had been a change of policy.

At paragraph 25, Mr Burgess says it was the start of an era:

"Well, my expectation, what I had heard, what I had read, what I had seen, what I had been caught up with in terms of this whole department, the buzz, the talk, everything that happened at that time, my expectation was that it would continue to move towards RRPs. Of course, always in the back of my mind is, I thought for years, how long can this go on? Because Index is not making any money from Hasbro, in particular from Hasbro on toys, therefore it suggests to me that our major competitor, no matter how big they are, presumably also cannot be making money. So I was always hoping that, you know, something would happen to change the situation."

Again, we come to paragraph 26, that we have already seen, that this is clear evidence from the OFT's own witness, Mr Neil Wilson, that he was aware of a change of policy that had taken place in the spring/summer 1999, and the implication of that change of policy, and this evidence is crucial because of how the OFT have rejected the GUS takeover in its decision. This is his answer:

"Argos were looking to build more margin into their business, and one of the ways that they were looking to do that was to price at recommended retail prices."

That is a very, very important statement.

We have had the change of policy no longer to pre-empt. We are dealing with Action Man and core games. The Argos pricing in catalogue 51 for spring/summer, they have moved unilaterally to RRPs. We get the evidence that this change of policy is a sea change; it is the start of an era, as Mr Burgess says, it should not be talked down. And we get Mr Wilson being aware of this sea change.

But we also get the reaction of Littlewoods. Again, there is no suggestion in the decision that we agreed to fix prices for spring/summer 1999. Lesley Paisley, in paragraph 7, in her cross-examination, is essentially saying that when she saw this change of policy there were three options for Argos to take on those limited number of toys; she hastens to add, right at the end, on those limited number of toys there were three options.

The first option was to buy from the Far East, that is the first -- I think on these branded high profile toys there were very few other options. Basically the first option was to buy direct from the Far East to improve margin. That was discounted.

She then goes on to say in the next answer:

"It was not feasible to change the mix significantly, as customers would expect us and would look for certain toys. So my conclusion was that on some of these toys the only option Argos would have would be to move to RRPs."

That is consistent with Neil Wilson's evidence and that is consistent with what actually happened, because the margins were so appalling.

In an answer to a question from you, sir:

"This was the only practical one?

"Answer: It was the only option. That is why I felt it was inevitable -- on those particular toys, I hasten to add."

This is Littlewoods' reaction to the sea change that is taking place in the marketplace. What is the net effect of the reaction? Basically, it is a parity of pricing in the two spring/summer 1999 catalogues. The question: is this because of a price fixing agreement? Answer: no, and not one is alleged. Answer: it was because the market was reacting intelligently to this sea change.

At paragraphs 28-32 we set out -- I will not go through it again -- the prices that were actually charged in the spring/summer 1999 catalogue by both catalogue retailers. In paragraphs 30-32 we set out the evidence from the retailers that a difference of 4p makes absolutely no difference in the eyes of the consumer. The consumer is not going to be put off by a difference in price of 4p.

Mr Burgess says, in answer to a question:

"You see them, you say, as parity, that is a difference of between .95 and .99?

"Answer: Yes, I see them as similar prices."

So the evidence shows that by spring/summer 1999, both Argos and Littlewoods had moved to parity in pricing at or near RRP. Again, I reiterate, there has been no suggestion that that was the result of any agreement to fix prices at RRP. It was simply the market reacting intelligently to the takeover of Argos by GUS.

If you want me to go to the prices at all?

THE CHAIRMAN: No. I was just reminding myself that in the pricing analysis you had made various points about Argos being cheaper on certain lines and Littlewoods being cheaper on other lines, which might suggest that this point about the 99p being the same as the 95p was not in the forefront of the mind of whoever drafted the pricing analysis.

MR BREALEY: I think that is a little unfair, in the sense that it is cheaper, it is a fact. But I go back to paragraph 30 of the written submissions, that it is Argos' evidence, and it is in Maria Thompson's witness statement, that in seeking to determine the market price we would treat a difference of less than 5p as compared to other retailers as being the same price. We would not worry if it went out at a .99 price point."

In many respects, it is a point being made against us, because in our evidence it shows there is a parity. So it was in the forefront of our mind, but we were just stating as a fact that it was 4p cheaper. But the OFT read Maria Thompson's statement and they would know that, from Argos' perspective, 4p makes no difference.

This parity continued into autumn/winter 1999. In paragraph 34, we say:

"That Argos continued with its new policy is clear, not only from the oral evidence but from contemporaneous documents. For example, on 20th April 1999, Maria Thompson sent an e-mail to her buying managers relating to the autumn/winter 1999 catalogue: 'Continue with our pricing policy of not pre-empting Index, but ensuring that we have hero pricing entry prices across all groups'."

THE CHAIRMAN: What is hero pricing?

MR BREALEY: I think what Mr Terry Duddy described as the entry pricing, which is that you have a big splash on a microwave, this is the cheapest microwave in town. That informs the consumer that Argos is still very good value for money.

The document is at volume 1, just so that we can see it, tab 41. The witness statement is at tab 41, page 330. This is a memorandum to the buying managers from Maria Thompson, 20th April 1999, and then the second indent:

"Continue with our pricing policy of not pre-empting Index, ensuring we have hero prices [entry prices] across all groups."

Again, it is clear evidence of not pre-empting.

If we go further, so that I do not have to go to it later, at tab 42, page 334, the policy of not pre-empting is basically to be on the market. We see:

"Pricing policy: our current policy is to be on the market. In other words, we are not aiming to drive down market prices aggressively."

I come back: in Action Man and core games where they are making a loss and were trying to make more money, they are being told to make more margin, what are you going to do? "I am not going to drive down prices aggressively, I am going to increase the price to a price which I think will be on the market."

THE CHAIRMAN: It does go on:

"We do aim to achieve a position where our customers will not get a better price elsewhere. However, exactly what this means in terms of when we respond to competitors and reduce prices is woolly."

MR BREALEY: "Sometimes we do, sometimes we do not." The policy is not woolly, the policy is what we do, how they respond to the competitors.

THE CHAIRMAN: But the whole issue in this case is what effect this actual policy had or might have had in relation to these particular products on the facts that we have actually got.

MR BREALEY: Of course. It is an important point. The OFT have denied that there was a change of policy. We have to address that. They have denied that Argos ceased to drive down prices aggressively. They have denied that Argos ceased to pre-empt the market. We are simply producing documents which go to that denial.

When it comes to the specific items of Action Man and core games, as you rightly say the case is about

Action Man and core games, we come down to the simple fact that the implementation of that policy, in the words of Lesley Paisley, inevitably led to an RRP.

If one goes to the pricing analysis and one looks at core games in autumn/winter 1998, this is going to the question of how did the policy affect pricing. At B1, if one looks at spring/summer 1998, autumn/winter 1998, one sees that the pricing is all over the place.

Then, when one compares autumn/winter 1998 before the policy and then looks to see how that policy affected these products in question, they are primarily at 1999 price points at the RRP. That is the effect of the policy.

If one looks at Trivial Pursuit, in autumn/winter 1998 it was £39.79, and then one looks at spring/summer 1999, the RRP is £39.99 and Andrew Needham prices it at £39.99.

If one looks at Jenga, autumn/winter it was £9.65, he has put the price up to the RRP of £9.99.

Pictionary has gone up by 4p. Mouse Trap was £16.15 in autumn/winter 1998, and in spring/summer 1999 he has gone to the RRP of £16.99.

That is the effect of the policy, the prices went up to Ian Thomson's 99p price point. One asks, what is the reason for that? The reason for that, we say, is the clear fact that this was the effect of the GUS policy. This is not the effect of any price fixing agreement.

So yes, you are correct that when I refer to that document it is a statement of a general policy. But my reply to that is that I am dealing with a general case against me that we did not have a change of policy, and as regards the specific toys in question, Action Man and core games, in my respectful submission it is quite clear that the policy was the cause of Argos going to RRP.

I said at the beginning, this unilateral decision to go to RRP, which is reflected in the spring/summer 1999 catalogue, is relevant not only to timing but relevant to motive. We can see this relevance to motive from paragraph 37 onwards of the written submissions because the OFT, in my respectful submission, have just missed the fact -- although we said it in the oral proceedings and in the written submissions -- that Argos went to RRP in spring/summer 1999.

At paragraph 37, the line of questioning that the OFT put to the Littlewoods witnesses displayed an important shift in the OFT's position, because rather than suggesting that Littlewoods could not possibly move to RRP because of a fear of being undercut, hence the need for an agreement, the suggestion was that there must have been a price fixing agreement because Littlewoods did not undercut. Why should not Littlewoods go to 21 per cent market share, and not Argos, by undercutting Argos? That was the new case that was being put to the Littlewoods' witnesses.

There is very little doubt that there was an air of incredulity from all of the Littlewoods buyers and employees, and all of them, to a person, basically said that the OFT failed to understand the significance of losing money in business.

"What I think you fail to understand is that a business like Index, like any business, do have to make money to survive."

That was Mr Burgess. The same point was put to Mr Riley in relation to the Littlewoods spring/summer 2000 catalogue. He again, at paragraph 40, says that he was aware that Argos was less aggressive on pricing:

"This was generally known throughout the retail world. Argos were no longer trying to be the cheapest on lines. They generally followed RRPs with the major brand accounts. This was an event that was commonly being talked about."

It was suggested to him, "Why do you not go out at 20p below the RRP?" The fact that you did not would suggest, in the OFT's view, the fact that there was a price fixing agreement. At paragraph 43, he says:

"What I am telling you is that if I went lower than those prices, we would be precariously close to making -- in fact we made no money on these lines, I am almost certain of that. We came precariously close to being stupid in what we were doing. I cannot make that any clearer.

"Now, to suggest that by going lower we would somehow have all these other tangible benefits, you know, if we do not make any money, these other benefits are no good to us. Not lower than -- we do not make enough money to be lower than anybody else. I cannot make this point clearer to you. You make it out as if we could just keep cutting prices to the point where we cannot. On the branded products, our margins are so slight that we cannot do that."

Again, it comes back to my submission that the OFT have really failed to understand the concerns in the industry that they were losing money, and that when there was this sea change in late 1998, which is reflected in the spring/summer 1999 catalogue, the industry breathed a sigh of relief.

Then lastly, thereafter, Argos' policy did not change, its general policy. We have seen that document -- we have not put the citation in, which is volume 1, tab 42, page 334 -- but this current policy of not aiming to drive down market prices aggressively was the same policy as it was in the spring/summer 1999 catalogue. That same policy continued to be applied in the autumn/winter 2000 catalogue on Action Man and core games.

THE CHAIRMAN: Shall we take a short break at that point, Mr Brealey?

MR BREALEY: Yes.

THE CHAIRMAN: We will rise for a short while.

(11.40 am)

(A short break)

(11.50 am)

MR BREALEY: I have finished the section on the effect of the GUS takeover. As the tribunal knows, we say that when one looks at the pricing analysis and compares autumn/winter 1998, where the prices were all over the place, and then looks at spring/summer 1999, we see the movement to 99p price points and RRP.

I move on to paragraph 46 and deal with the OFT's case on Action Man. We are still on Action Man and core games.

Just to set out the documents, we first of all say what the OFT allegation is, and it is an allegation of price fixing. That is what we have been fined

£17 million for, price fixing. I then go on to summarise the evidence, at paragraphs 51-52. We will look at these. Essentially I have categorised the evidence in paragraphs 52 and 48 of the decision into five headings: sudden parity of prices; meetings; Hasbro obtaining Argos's pricing intention; Ian Thomson and his e-mail; and the monitoring. So that when one looks at the decision, those seem to be the categories of evidence against us. Then in the following paragraphs we deal with those five headings.

Paragraphs 46-50 set out the OFT's allegation against us. It is obviously one of price fixing normally at RRP. It has always been the OFT's case that there was an agreement to fix the retail prices of toys. The pricing initiative may not have involved resale price maintenance at first but it led to such agreements. While Hasbro could not force Littlewoods and Argos to adhere to RRPs, in fact they agreed to do so and in practice they generally set their prices accordingly.

Paragraph 47 sets out the bilateral and the trilateral. It is the OFT's view that Hasbro's pricing initiative led directly to an overall infringing agreement of concerted practice. The overall agreement included bilateral infringing agreements and/or concerted practices contingent on each other.

Then again in 1996, the agreements between Hasbro and Argos and 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.

So it is a very important element of the OFT's case that we entered into this price fixing agreement on the understanding with Hasbro that Littlewoods would do the same thing. We respectfully submit that the pricing analysis for the spring/summer 1999 catalogue blows a hole in that allegation. It destroys it. It destroys it for the simple reason that we went to those prices without any understanding that Hasbro would get Littlewoods to do the same thing.

If I could try to analyse the evidence that is against us. We have essentially the evidence against us at paragraphs 42-58 of the decision. What I would like to do is to try to deal with the evidence against us by reference to certain aspects of the decision, as the tribunal has indicated.

THE CHAIRMAN: Thank you.

MR BREALEY: The first piece of evidence is that the OFT finds that there was a sudden parity of prices in the autumn/winter 1999 catalogue, and that can only be explained by a price fixing agreement.

When one looks at paragraph 53, when one looks at the decision on the GUS takeover, there are several passages in the decision which refer to the GUS takeover, but in essence we summarise the OFT's case as follows: the OFT does not accept that there was a change of policy at all. Even if there was a change of policy, it does not mean that prices would increase or that they would go to RRP, and even if the change of policy did involve price increases, this would not explain why the prices were at RRP in autumn/winter 1999.

At paragraph 53 of these written submissions we are setting out the OFT's case against us.

Dealing with the parts of the decision which refer to GUS -- because this is not in paragraphs 52-58, this comes later in rejecting our arguments. At paragraphs 135-137 the OFT dismissed that there was any change of policy at all. It concludes:

"There is nothing to support what the OFT describe as the monumental change of policy on the part of Argos."

That is one of the reasons we have had to draw the tribunal's attention to these documents, because it does show that there was a very important change of policy on the part of Argos.

THE CHAIRMAN: The documents are those exhibited to Mr Duddy's second witness statement; is that right?
MR BREALEY: That is right.
THE CHAIRMAN: Had those documents been produced to the OFT during the Rule 14 proceedings?
MR BREALEY: They had, in the sense that we had the oral hearing of the original decision and Maria Thompson gave evidence to the OFT, so did Andrew Needham, and they explained that we had this change of policy and we had moved to RRPs for Action Man and core games in spring/summer 1999. The document entitled "Margin Contributions" was before the OFT, but the OFT in its original decision rejected that evidence. They said there was nothing to support this change of policy.
We then appealed that decision, and that is when Mr Duddy's second witness statement was sworn. So when it went back for reconsideration by the OFT, when they wanted to serve the three witness statements, they had all these documents to hand when the new Rule 14 notice came out.
The OFT, notwithstanding those documents attached to Mr Duddy's statement, still maintained that there was no change of policy on the part of Argos.
THE CHAIRMAN: They are specifically saying at paragraph 136 that there is no documentary evidence that supports the

change of policy.

You are submitting that is wrong, and just so we can be clear, you are referring to what particular documents specifically?

MR DOCTOR: May I just get the chronology right? I think it is Mr Duddy's first witness statement that was served for the purposes of these proceedings after the original decision was made. His second witness statement was served after the second --

THE CHAIRMAN: It is January 2004.

MR DOCTOR: Yes, it was served in January 2004.

THE CHAIRMAN: That is after the decision?

MR DOCTOR: After the second decision. The second decision was November 2003.

MR BREALEY: Those documents were before the OFT before the amended decision.

THE CHAIRMAN: When you say those documents, can we tie it down?

MR BREALEY: We can.

THE CHAIRMAN: So that we are absolutely clear what we are talking about.

MR BREALEY: If we go to Mr Duddy's statement in volume 1, this is at tab 13. This was sworn for the purposes of the very first notice of appeal. Then the OFT wanted the new witness statements, went back for the new Rule

14. So they had this when they reconsidered all the evidence.

The document at TD1, which I referred to earlier, is at 00070, that is at page 4 of this document, sales/profit increasing pricing. The other document I referred to is at page 106, the margin improvement/increased pricing.

The other document --

THE CHAIRMAN: These documents are what date?

MR BREALEY: TD1 is November 1998. At paragraph 9 of his statement, he says:

"As the proposed revised pricing strategy and other major changes to the business have been developed, I needed to bring the Argos board on side and develop an action plan. In order to do this there were two board away days held on 30th November and 1st December 1998 and 17th December 1998. The agenda for the first away day is attached as TD2."

THE CHAIRMAN: The date of TD1?

MR BREALEY: TD1 is --

THE CHAIRMAN: It is described as November 1998. That is at paragraph 6 of his statement.

MR BREALEY: TD3, which is the document at page 106, is referred to at paragraph 10 of his statement, and the other document, which is at page 106. So these are the presentations from the first away day and action points, that is TD3 and TD4, and these are late 1998, 30th November to 1st December and 17th December. We get that from paragraph 9.

THE CHAIRMAN: Thank you. What they say in paragraph 135 of the decision is that not one of these documents refers to a policy to move to market pricing, let alone a move to RRPs. You challenge that by saying that in fact, at page 70, there is a reference to increasing pricing and at page 106 the reference is to increased pricing.

MR BREALEY: And page 112 is a reference to the effect of the revised pricing policy. That then refers back to paragraph 7 of his statement, where he says:

"This was obvious on toys, where margins were too low. I thought that Argos could not afford to keep driving market share and losing money or to keep pre-empting the market. This meant that, rather than deeply discounting on price, we would price at the price expected over the life of the catalogue, six months, and if we needed to reduce a price we would do this by monitoring the marketplace and the use of flyers."

To be fair, the document that I referred to attached to Mr Needham's statement, which refers to the market, I think comes after the amended decision.

MR DOCTOR: Yes, February.

MR BREALEY: The memorandum of 20th April 1999, which says:

"Continue with our pricing policy of not pre-empting Index" is after the new decision. In our original skeleton we set out all the documents that we say refer to this.

The first point to note is that, at paragraph 54 of our written submissions, we are met, before this tribunal, with a case that there was no policy at all. That is in the decision.

Then we are met with, well, there was no move towards RRPs. At paragraph 55, again at paragraph 181 of the decision, the OFT has dismissed and continued to dismiss the representation that Argos moved away from its traditional position as a discounter.

At paragraph 56 of our written submissions, this is, in my submission, very important. If we go to paragraphs 353 and 354 of the decision, we have set it out in the written submissions, but at paragraphs 353 and 354, when we got Neil Wilson's statement, we, in our reply to the new Rule 14 notice, sought clarification. Neil Wilson had said that as a result of the Argos change in policy, Argos was seeking to improve its margins and profitability. We basically said, "Well, will you not accept that there was a change in policy, as we have said all along?" The OFT said no. At paragraph 354 -- we set this out at paragraph 56 -- the OFT say:

"It is one thing to say that one says that Neil Wilson was aware that following the takeover by GUS Argos wanted to improve its profitability. It is quite another thing to say that one accepts that the two witnesses were aware that Argos had taken an independent decision to move its prices upwards to market levels. The OFT is prepared to accept that the testimony of Neil Wilson and David Bottomley supports the former but not the latter."

So that is how the OFT was interpreting its own witness' evidence, Neil Wilson.

Just jumping ahead, so I can make the point, if one goes to paragraph 70-71 of our written submissions, again we set out what the OFT have said and then we have set out what Neil Wilson said in answer to a very simple question. We have seen this already:

"Were you aware that the change of policy had occurred for the spring/summer 1999 catalogue?

"Answer: Yes."

Therefore accepting that, as far as he was aware, there was a change in policy:

"Question: No leading question: what did they say the implications were?

"Answer: That Argos were looking to build more margin into their business, and one of the ways they were looking to do that was to price at recommended retail prices."

In a stroke, it absolutely destroys the OFT's interpretation of its own witness at paragraph 354 of the decision.

That was how the decision put the case against us: no policy at all, no move towards RRPs on Action Man and core games.

Then the last point, if they are wrong on all that, there is no explanation for the autumn/winter 1999 parity. I am looking at paragraph 57 of the written submissions. The OFT states that in any event any change in policy which might lead to pricing at RRPs does not explain the sudden change in parity in the autumn/winter 1999 catalogue. From this, it infers a collusion on prices. We set out some of the paragraphs.

I would ask the tribunal to note paragraph 186, this is our paragraph 58:

"The GUS takeover of Argos occurred in April 1998. However, the move to RRPs is not generally seen until late 1999/early 2000. Hence, it is not clear how either of the earlier events could have sparked the change in policy that took place more than a year later."

We have just seen from the pricing analysis attached to our skeleton argument that indeed the move to RRPs was seen in early 1999 in the spring/summer catalogue.

Again, this theme of the conspiracy theory that there was a sudden parity of prices in the autumn/winter 1999 catalogue, the OFT lead almost with this point in their original skeleton argument to the tribunal, and they set out table 3, which is at paragraph 56 of the decision, and again the OFT lead with this table in their skeleton --

THE CHAIRMAN: Yes, we have seen it.

MR BREALEY: They try and portray that there was in spring/summer no parity whatsoever and all of a sudden in autumn/winter 1999 there was parity.

In the OFT's skeleton they say that was a dramatic change in autumn/winter 1999. The true reason for this remarkable change is the concerted practice, that Argos would charge RRPs provided that Littlewoods would do the same.

Then at paragraph 62 of our written observations we set out those paragraphs, the crucial paragraphs in the decision, from paragraphs 54 onwards, where the OFT repeatedly make the case that we cannot explain why there was this sudden change in autumn/winter in 1999.

The last sentence of paragraph 54:

"The same disparity and lack of convergence has also been evident in the 1998 catalogues, which therefore contrasted with the sudden change to uniformity in autumn/winter 1999 -- see paragraph 56 below."

That is their famous table 3, which they say supports this inference of collusion.

Paragraph 55, 57 and 58 are all along the same lines.

For example paragraph 57, which refers to the autumn/winter catalogue, they say these were the first catalogues at which price fixing agreements essentially applied:

"When the catalogues were published in July 1999 it became clear that they had priced nearly all the Action Man products and core games at the levels indicated normally at Hasbro RRPs. This had been very different in the three previous catalogues, as shown in table 3."

In a nutshell, OFT concentrates on autumn/winter 1999, completely misses spring/summer 1999. They then say price fixing agreement; we say, hang on a minute, you have to actually look to see what happened in spring/summer 1999. What did Argos do? You cannot just say that in Action Man there were 12 common products, none at the same price. Argos priced at RRP and was 4p more expensive than Littlewoods. To say that there were just 12 common products and none at the same price completely misses the point.

That is the decision, and the edifice for this decision is built on the sudden parity pricing in autumn 1999. We say that, once we take that away, this decision just goes.

How the case has been put before the tribunal: whether or not it is now a dramatic volte face, in the light of their skeleton, is open to debate. But it appears to be accepted that there was some change of policy. At paragraph 65 it has been described by the OFT now, the change of policy in the spring/summer 1999, as a fairytale come true and as a remarkable reversal:

"The change in policy also involved an increase in prices and a move to RRPs."

That, I have already referred to at paragraphs 70-71, is clear evidence from the OFT's own witness when you put a simple question to him.

At paragraph 72-74 we say that it is inevitable that once it accepted that there was a unilateral change of policy in Argos not to pre-empt the market, that policy led to Argos pricing Action Man and core games at RRP in spring/summer 1999. The market reacted intelligently to the change in policy. The prices for Action Man and core games in the spring/summer 1999 were at parity. One can see the reason for the continued parity in prices for the autumn/winter catalogue.

I just refer the tribunal to paragraph 126G, which is at page 50 of the OFT's latest skeleton, where it says:

"It requires some considerable leap of imagination to understand why a policy of market pricing should have led straight to pricing at RRP."

We say there is no considerable leap of imagination at all. Neil Wilson could see it, the market could see it, and that is exactly what happened. We say that Argos' policy continued and the market reacted intelligently to that policy, which was anticipated in 1998 and had become visible by January 1999 when the catalogue came out.

That is my submissions on the effect of the GUS takeover and how the OFT essentially misses the point.

There is a further point to make about the sudden parity in autumn/winter 1999, which is also ignored by the OFT. This is the evidence of Ian Thomson in his witness statement, where he says at paragraph 41:

"In order to make sure that the same bought-in margins were achieved from the previous year, the list prices were increased on our core brands, which meant that there was no alternative but to go out at the 99p price point."

That is the OFT's evidence that Hasbro priced so that there was no alternative but to go out at the 99p price point. We just make the simple observation that if that is their evidence that Hasbro did that, why is it that they are saying there is simply no explanation for the sudden parity in prices in autumn/winter 1999?

The decision is silent on this issue. The OFT never considers or analyses the effect on the market of Hasbro acting in this way.

That is the first piece of evidence, in paragraph 52A, which is that the OFT find there is a sudden parity of pricing in the 1999 autumn/winter catalogue.

I move on to the second piece of evidence, which is the two meetings between Argos and Hasbro. I remind the tribunal that in the original decision, when it found that there was a price fixing agreement, the OFT disbelieved Andrew Needham that it was a listing initiative. We say this in our first skeleton argument. To a certain extent, we say this leads us to the point we make in paragraph 82, I think this is an important point: that the OFT in its decision confuses on many occasions the lawful discussions of the 1999 trading terms with an unlawful price fixing agreement.

The 1999 trading terms have been described by various Hasbro witnesses as "a strategy", "a pricing strategy that seeks the retail trade" and "a pricing initiative instigated by Hasbro".

In short, when one is looking at the meetings that took place, not only with Argos, there were essentially two, but with Littlewoods as well, one has to be very clear that when the retail pricing initiative, for example, is used, what does that mean? Are they discussing the 1999 trading terms, or is it some sort of price fixing agreement? We say that the OFT confuses the two issues.

In our submission, the confusion to a certain extent arises because in the original decision it disavowed any listing initiative.

The second point we make at paragraph 83, which is the general observation on Hasbro meetings, is that a lot of the evidence against Argos is either circumstantial -- ie there must be collusion because there was a parity -- or it is hearsay. This is something we have touched on in the new document.

One has to be very careful about accepting the hearsay evidence against Argos, particularly when the evidence is that these account managers were under intense pressure to ensure that retailers went out at RRPs, that was their belief; and, according to Mr Burgess, in his view, Hasbro had been manipulative and deceitful.

It is precisely in these sorts of circumstances that one must be very cautious to accept hearsay evidence because the person who was alleged to have said the statement is not on oath, is not subject to any cross-examination, and as one knows, the more a statement is repeated, the more likely it is to be inaccurate.

Those are the general observations on Hasbro's meetings.

THE CHAIRMAN: Would it be perhaps right to say that in paragraph 153 the OFT is perhaps a little more guarded than normal, the submission might be put, to perhaps suggest? What they say is they accept in the overall context of this case that unilateral conduct on the part of Hasbro to try and encourage Littlewoods to adhere to RRP is not on its own compelling evidence of an agreement.

That might be a little more guarded than: "The OFT accepts that attempts by Hasbro to try and encourage, et cetera, et cetera, is lawful." It depends how far it goes.

MR BREALEY: Absolutely.

THE CHAIRMAN: One could say, since the entry into force of the Act, any attempt by a supplier to encourage a retailer to adhere to an RRP is getting into very dangerous territory.

MR BREALEY: To pick up the point at paragraph 313 of the decision, the OFT says:

"The OFT does not dispute that insofar as Hasbro's pricing initiative was no more than merely recommending RRPs to Argos and Littlewoods, individually and separately that was not unlawful."

THE CHAIRMAN: Yes, perhaps, so far as it goes, that is even more guarded, because all that is saying is that a recommended RRP is not unlawful, which it is not at the moment.

MR BREALEY: We would submit that it is inherent in an RRP, it is a recommended retail price, that the OFT is accepting that there must be discussions between the manufacturer, the supplier and the buyer as to the validity of that recommendation.

THE CHAIRMAN: I think that is a further step that is OFT does not take in this decision.

MR BREALEY: If it does not, then in my respectful submission it is wrong, because what it cannot do is impose any sanctions or coerce or in any way fetter morally or legally, economically fetter the discretion of the purchaser to price as it wants. But to suggest, "Well, you can have an RRP but you cannot have a dialogue about it", in our respectful submission goes way off the mark.

It is inherent in --

THE CHAIRMAN: Would it depend on what the outcome of the dialogue was?

MR BREALEY: No, not really, because it may well be that Neil Wilson was a very persuasive character and when he has his meeting in February 1999 setting out the core brand rebate and the listing rebate and they get round the table, he may be very persuasive and persuade Andrew Needham that this is a fantastic opportunity and commercially it is sound, and Andrew Needham is persuaded that he should go out at RRP.

THE CHAIRMAN: That is lawful, as far as you are concerned?

MR BREALEY: We say it is lawful.

THE CHAIRMAN: Lawful for a supplier to persuade a retailer to go out at RRP?

MR BREALEY: Yes, provided the buyer's freedom to set the prices is in no way fettered, and that is where the sanctions coercion comes in. As part and parcel of every day --

THE CHAIRMAN: That approach would more or less legalise resale price maintenance, would it not?
MR BREALEY: No, it legalises RRP, if there is coercion or incentives then that does --
THE CHAIRMAN: It is one thing to discuss where an RRP might be, but to say, "Well, I am thinking of putting the RRP at a certain level, how do you think the market might react to that?", that is one sort of discussion. But to actually do your best to persuade a supplier to price at that RRP is a step further, is it not?
MR BREALEY: In my submission, no. Rather than being a sanction of retail price maintenance, it would be the end, it would be the death knell of RRPs, because it would mean that you have an RRP that in no shape or form can the supplier say, "This is a good RRP".
THE CHAIRMAN: It is one thing to say that this is a good RRP. It is quite another thing to say, or to try to persuade someone, to actually price at it. That is coming very close to collusion as to what the retail price should be, is it not?
MR BREALEY: As long as economically the buyer's freedom is in no sense fettered, the answer to that must be no.
THE CHAIRMAN: But the question of the fettering of the freedom does not enter into it. None of these agreements fetter anybody's freedom. You could have

a blacklist and so forth as you did in the old days, but short of that --

MR BREALEY: An economic incentive, a sanction, unless you go out at that price -- again, in the old franchising block exemptions, you have a recommended price, but you cannot have a concerted practice to go out at that price.

THE CHAIRMAN: If you try to persuade someone to go out at that price, are you not getting very close to the risk that you will find yourself, perhaps unwittingly, having a concerted practice as to what price to go out at?

MR BREALEY: I would not even agree with Mr Green's submission that that is close to getting to retail price maintenance. If the question is: is it getting close? That means it is not close enough. If one looks at tab 52, which is Andrew Needham's -- in volume 1, tab 36, this is the Cat 52 listings proposal. As I understand, the OFT do not contend that this is unlawful.

In this document there are many instances of how much margin Argos would make if it priced at the RRP. For example, to take a simple example, Neil Wilson may say to Andrew Needham, "If you price at the RRP you will make £10, if you do not, you will continue making £8". Neil Wilson would say, "In my view, you are better off going out at the RRP because you will make more money that way". That is just normal business interaction.

THE CHAIRMAN: Not since the 1998 Act came into force, Mr Brealey. I think that is one of the problems with this case, that the culture in parts of the retail trade does not seem to have cottoned on to the sea change that this Act has produced.

MR BREALEY: If the persuasion leads to a fettering of discretion -- and one gets this from Service Master; we can have a look at this -- there has to be some taking away of one's independent decisions. So that is the old franchising case in EC law. From memory, the Commission specifically refers to the taking away of some freedom of action. This document in no shape or form takes away --

THE CHAIRMAN: Are you saying that for the concerted practice to be proved in this case the taking away of some freedom of action is an ingredient or a test?

MR BREALEY: Absolutely, yes.

THE CHAIRMAN: Have we had that submission before?

MR BREALEY: I have never had the submission put to me by the OFT that this document was unlawful.

THE CHAIRMAN: No-one at the moment is saying that it is. But you have been submitting that there is nothing at all unlawful about a supplier seeking to persuade a retailer to go out at a certain RRP, and the only point that I think the tribunal is putting back is, is that not quite a dangerous kind of activity because it can lead to some understanding to the effect that the retailer will go out at RRP, or as to the price that the retailer may charge?

It is an area that is not perhaps as clear-cut as one might think. But you are quite right to say that that at the moment is not part of the case against you.

MR BREALEY: That is right. If I could just make two points. The first point is that, looking at our submissions -- I am not sure we have to pick it up -- but if we look at the legal submissions made to the OFT in the oral hearing on the very first Rule 14 notice, which is at file 5, page 309, we did quote from what the European Commission stated in Service Master, which was:

"The recommendation of sales prices to franchisees is not a restriction of competition since franchisees remain entirely free to determine their own prices for the supply of services."

So the commission there is emphasising --

THE CHAIRMAN: No-one would disagree with that. But we are on a different point at the moment.

MR BREALEY: To be persuaded that something is a good idea, in my submission, in law means that you have always been entirely free to make up your mind. It is only when there is some sort of incentive or coercion that economically you are no longer free to make up your own mind.

We do say that that is not the case against us. We do say that the Cat 52 listing proposal, they have never objected to this at all. In our skeleton argument we have set out at paragraph 4 -- the very first skeleton argument -- what was not alleged against us. At paragraph 53, for example:

"The Hasbro managers of the Argos and Littlewoods account, Neil Wilson, was asked to enter into dialogue with the two retailers to try to ensure that they supported the pricing initiative. Hasbro set the RRPs after several discussions with Argos. This is normal practice in the industry."

So Argos does have an input in the first place in the RRP, and the OFT say that this is normal practice in the industry.

THE CHAIRMAN: Where are you?

MR BREALEY: Paragraph 53 of the decision.

In any event this is probably a moot point because it is our case that, although Neil Wilson may have had discussions with us, we certainly never were persuaded to do anything that he basically said. We were always our own masters, and as we will see in a moment, the most that happened was that Neil Wilson asked us whether we were happy. So there is no evidence in actual fact that Neil Wilson sat down with us around the table and said, "You must go out at the RRP."

There is his evidence, which we will come on to in a moment, that basically he asked us whether we were happy.

In my submission, it will be a sad day if you get fined £17 million for saying, "I am happy, but I cannot give you any guarantees and it is subject to change".

Coming back to the meeting on 17th February 1999, we say that the decision is unclear on this. The OFT's case on the 17th February meeting is at paragraph 111. They say that it is strong evidence of a price fixing agreement.

At paragraph 355-366, when it is being pressed, it merely says:

"The evidence suggests that some discussion of prices and margins took place."

On the specifics of the meeting, we set out the attendees at paragraph 86. We say that the overwhelming evidence from Mr Duddy is at paragraph 86.
Paragraph 111 says:

"There is also other strong evidence that Hasbro agreed to fix prices with Argos, the paper prepared for the meeting between Hasbro and Argos on 17th February refers to dialogue hoping to stabilise RRPs."

THE CHAIRMAN: They are referring there to the two documents, rather than to the meeting itself, are they not? They are referring to the report of the meeting in the second one, that is true.

MR BREALEY: If they are only relying on that document then I can shorten this process. Basically paragraph 111 refers back to paragraph 51, which is essentially the core evidence relating to setting up this price fixing agreement on Action Man and core games.

It is not only referring to --

THE CHAIRMAN: That is true, yes. I think it is paragraph 51 to which you need direct your fire, rather than paragraph 111.

MR BREALEY: Yes. We say in paragraph 84, this is referred to at paragraph 51 of the amended decision, but we say it is a bit unclear because at paragraph 111 it refers to the paper as strong evidence, and we say, this is at paragraph 355, we say, "What are you actually alleging against us in this meeting? Are you saying there was a price fixing agreement hatched?" That is where we get the response at paragraph 356, which we say tells us pretty little. At paragraph 355 we have said:

"Argos admits that the meeting on 17th February took place, that a move to market prices by Argos was discussed, in the context of we want more margin. It is important to know whether it is the OFT's case that Argos agreed to fix prices in this meeting. It is denied that Hasbro's pricing initiative as defined by the OFT at 43 was discussed. David Bottomley's statement amounts to hearsay. The OFT's response, we say, is unhelpful. The OFT's finding of infringement does not stand or fall on what was discussed at the meeting. It stands even if there was no meeting. The Hasbro's pricing initiative, which may not in itself have been a breach of the Act."

Now that, again, is important from the conversation we have just had because they are saying then that Hasbro's pricing initiative, which is the initiative defined in paragraph 43, which is that they go out to persuade, may not in itself have been a breach of the Act, led directly to other arrangements which were a breach. Anyway, we get a fairly vague response, in our submission, and therefore we deal with it as best we can.

At paragraph 86 of our submissions we list the attendees. The tribunal has heard the evidence from Terry Duddy that he made it plain that Argos would no longer tolerate low profit margins, indicating an attempt from the previous margin position and we have set it out. At paragraph 87, we make the point that the OFT has not obtained any evidence from Simon Gardner, who has not called Alistair Richards as a witness, but we note in his note of the interview:

"Did you have any knowledge of Argos and Index agreeing prices?

"Answer: No idea, I do not, if I had known I would have stopped it."

The only witness evidence from the OFT is David Bottomley, and we basically dismiss that as inaccurate hearsay.

At paragraph 89, we say the evidence available to the tribunal from those actually present at the meeting is overwhelming, there was no price fixing agreement hatched at the 17th February meeting.

We then deal with the Hasbro document. This was a point made by the tribunal: the OFT have never explained that the document was provided to it by Hasbro, where it came from, no witness has been called to explain it. The overwhelming evidence is that it was not provided to Argos before the meeting. Again, we have the evidence of Maria Thompson and Mr Duddy that there was simply no price fixing agreement in whatever shape or form or adherence to RRPs at that meeting.

We then get the Sue Porrit e-mail, which the OFT rely on at paragraph 51. We deal with this. Again, the only evidence comes from us, Mr Duddy and Maria Thompson. In essence, the OFT have perceived a nuance in this e-mail -- and I should add, this is one of the e-mails that we say is unlawfully used against us, because this was never raised before, it was never put to us before, and this was used for the first time against us after the amended Rule 14 notice.

THE CHAIRMAN: I am sorry, you will have to remind me of this point. This e-mail was not raised in the second Rule 14 notice?

MR BREALEY: If you remember, we had a CMC -- I think it is file 21.

THE CHAIRMAN: File 21 is the disclosure bundle, documents disclosed. This was concerning the disclosure of various Hasbro documents.

MR BREALEY: Yes.

THE CHAIRMAN: Do you want to come back to this after the adjournment?

MR BREALEY: Yes.

THE CHAIRMAN: I do not want to lose the point.

MR BREALEY: The point is that we objected to the new Rule 14 notice, and I think the decision, because there were certain documents referred to that had never been put to us. We had previously, when the master got remitted back, there was a clear mandate that the order was that you put everything on the table and then put the documents to Argos and Littlewoods.

This was never put to us before. So when they adopted the decision, this was the first time that they annexed it to the decision, the first time we had seen it. I am sure there is a file that deals with the CMC.

THE CHAIRMAN: Let us not take time now.

MR BREALEY: It is file 10 where the OFT served a supplemental Rule 14 on Argos and we set out the situation as follows.

THE CHAIRMAN: We do not have the second decision yet; is that right?

MR BREALEY: That is right. It has gone back, and there has been a clear order that certain things be put to us. The OFT first applied to serve the witness statement -- looking at paragraph 4 -- and then having been granted permission to produce a statement, the OFT then served statements that quite clearly went beyond mere clarification and contained important new evidence. So it is coming back to me now.

The orders, at paragraph 5, stated that the original decision should be remitted back to permit the three witness statements to be the subject of the Rule 14 notice. The transcript of 30th July makes it clear that Argos were trying to proceed on the basis that there was not a general remittal. At no stage in any of the four case management conferences --

THE CHAIRMAN: That is another point. What I want to know at the moment is whether this e-mail of 19th February 1999 was not served at all until after the decision?

MR BREALEY: You are absolutely right and I am wrong on that, we did see this e-mail at the amended Rule 14 stage. But what we were saying is that it went beyond the order which remitted it back to the OFT to clarify its case.

THE CHAIRMAN: Thank you.

MR BREALEY: This is one of the documents. The simple thing to note about this is when it says "Pricing Strategy v Rebate Pricing", looking at paragraph 92, when the OFT say pricing strategy, they have read that as Hasbro's pricing strategy; whether or not to persuade retailers to go out at RRP or price fixing we really do not know because the OFT do not make it clear, but our evidence is quite clear that the pricing strategy was the GUS takeover and the change of policy, the move to market pricing and away from pre-empting the market. That was the clear evidence of Terry Duddy and Maria Thompson.

So the OFT read into this e-mail something which is quite clearly not there.

THE CHAIRMAN: What do you think the words "Pricing Strategy v Rebate Pricing" are supposed to mean?

MR BREALEY: Maria Thompson said if it said "Pricing Strategy and Rebate Pricing" it would make more sense to her -- this is an e-mail from Sue Porrit. But as Terry Duddy, Maria Thompson and Andrew Needham said, which is that they are referring to the Argos strategy of not pre-empting, and if they were undercut they would come back to Hasbro for support.

We see that quite clearly, Hasbro will not put money on the table to support this but would look at other methods of support. Their evidence was that this was normal dialogue between supplier and purchaser, where the purchaser or retailer is always coming back for support from the supplier.

If Argos has gone out of the market and it is undercut, it will want some support. That is what the sense of paragraphs 93, 94 and 95 goes to.

If the OFT want to persuade the tribunal that this has the nuance which they say it has, all it had to do was call Alistair Richards. He could have said, "No, Terry Duddy and Maria Thompson are wrong, it was not about the Argos pricing strategy, we were clearly talking about the Hasbro pricing strategy". But they have not done that.

Another example of the OFT trying to find a nuance when things are not there, we see again from paragraphs 96-97, which is a letter dated 18th March from Alistair Richards to Terry Duddy. This is the follow-up letter, which is a month later. The letter states:

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

It is suggested by the OFT, and it was put to Maria Thompson and Terry Duddy that "plans are in place" means plans to price fix. All it means, as Maria Thompson says, is that it was concerned with a SAP logistics system which was not working properly. Just for reference, this is also referred to in a Charles Cooper e-mail -- I will not go to it now -- which is set out at paragraph 37 of our skeleton argument on other toys, where he also refers to the problems with the SAP logistics systems.

That is all it is. Yet the OFT read something into it. If they really wanted to prove that this nuance that "plans are in place" means price fixing, they should have called Alistair Richards.

That is the first meeting that is alleged against us, that is paragraph 51. Just pausing before lunch, and trying to speed up, when one looks at how much of the decision is left of paragraphs 42-58, we say that we can strike a line through paragraphs 58, 57 and 56 because that relates to the sudden parity in pricing. One can strike a line through the last paragraph of 54. Again, that refers to the sudden change in uniformity.

We can now strike a line through paragraph 51, insofar as it relates to Argos, because we say that that is simply not compelling evidence of a price fixing agreement of the type alleged against us.

That takes me to the second meeting which the OFT say is relevant, which is the contact report prepared by Neil Wilson. This is at paragraph 52. We deal with this at paragraphs 100-105 of our written observations. The essence, we say again, this is a very innocent and innocuous document. Neil Wilson does not even specifically deal with this meeting in his witness statement.

It is dealing with a discussion between supplier and retailer about the 1999 trading terms, and it should be seen as that and nothing more.

If the OFT wants to see something more in it, we would refer to the fact that Sue Porrit is categorical -- these are not her words, these are Neil Wilson's words -- that Argos will not be uncompetitive.

Lastly on meetings, just before lunch -- and I will try to speed up -- meetings with Mike McCulloch, at page 106, the OFT essentially dismiss his evidence on the basis, in paragraph 140, that he was not close to Argos. This is actually an important point because Mr McCulloch did say -- looking at paragraph 107 of the observations -- they [Hasbro] could not have an agreement with Argos. Argos price how they want."

That was his evidence to the OFT. The OFT have essentially disregarded his evidence, on the basis that he was not closely related to Argos. It is something that we pick up on in our supplemental document that I handed up; that the same applies to David Bottomley and Ian Thomson. If the OFT are going to have this policy of excluding evidence from Hasbro employees because they were not closely related, then they should also carry that through to the likes of Ian Thomson and David Bottomley, which similarly, we will see, they had no direct dealings with Argos whatsoever. So, if you are going to have an exclusionary policy, you carry it through.

Is that a convenient moment?

THE CHAIRMAN: I think it is, Mr Brealey. How are we getting on generally from the time point of view?

MR BREALEY: I will finish in half an hour.

THE CHAIRMAN: Very good. 2.00 pm.

(1.00 pm)

(The short adjournment)

(2.05 pm)

THE CHAIRMAN: Yes, Mr Brealey.

MR BREALEY: Sir, I am looking at paragraph 109 of the written submissions, and paragraph 57 of the decision, because I am trying to tie in the submissions with the relevant paragraphs of the decision.

THE CHAIRMAN: Yes, that is a very helpful way of doing it, if I may say so.

MR BREALEY: This paragraph says:

"The Argos and Littlewoods autumn/winter 1999 catalogues were the first catalogues for which the Hasbro account managers had applied the process that is described in paragraph 53."

As we have already seen, they go on to say that the Hasbro RRPs were very different in the three previous catalogues, which we know is not correct, but what I am concerned with here is the process that is described in paragraph 53, and if we go back to paragraph 53, this sets out paragraphs 16 to 19 of Neil Wilson's statement.

THE CHAIRMAN: Yes.

MR BREALEY: It does not really give any comment on that, but it sets it out. If I can just make the observation that obviously the OFT use this evidence in support of their case, whereas we use the evidence to support our case.

THE CHAIRMAN: So both sides rely on the same thing and draw an opposite conclusion.

MR BREALEY: Absolutely. We say it is helpful, they say it is unhelpful. We make the point at paragraphs 110 and 111 that this process was not specific; I think this, to a certain extent, is important, this was not specific to Argos and Littlewoods, this was something that Hasbro was doing to all its retailers. But at paragraphs 112 to 123, we specifically deal with the allegation that there was a bilateral agreement between us and Hasbro to fix retail prices.

At paragraph 114 essentially we set out paragraph 16 of Wilson, and just by way of comment, the first few lines:

"When I was given the products selected for the catalogue, I established which were the common products carried by the majority of retailers, not specifically Index, and asked Argos what its pricing intentions were."

Then towards the bottom:

"By and large, when I presented Argos with Hasbro's RRPs, they said they were happy to follow them, although they did not give any guarantees, and were subject to change."

So I make the observation there that at that stage, Andrew Needham has made up his mind, there has not been any kind of coercion or persuasion -- Neil Wilson is saying, "Are you happy?", and he said, "I am happy", so there was nothing in the past that was necessarily bad; and Andrew Needham is saying, for the future, it is always subject to change, and he is not giving any guarantees.

Mr Wilson clarifies his evidence, which we say is even more favourable to us, in cross-examination, because Mr Wilson's belief that Argos was happy to match Hasbro's RRPs -- this is at paragraph 115 of our submissions -- was largely based on assumption, and discussions relating to RRPs of particular products only took place by exception:

"There was no systematic procedure, there was a general willingness across Argos and the rest of the trade to move towards retail prices, so to a degree it was assumed that that would be the case, and we would only have discussed by exception the items where there may have been a problem with sticking to the RRP, so there was no systematic procedure, no."

Then at paragraph 117, as the tribunal knows, I put to Mr Wilson Mr Needham's statement, and Mr Wilson said that was a fair reflection of the discussions that took place.

He did not go through each product line by line and ask whether Andrew Needham was happy with each RRP; Neil Wilson sometimes asked him about whether the RRP was set at the correct level, and the tribunal can see the evidence there. But we say that simply does not support any agreement, bilateral agreement to fix the price of RRPs, and again, importantly, at paragraph 119, Mr Wilson repeated in cross-examination that Argos' intention was always subject to change for any number of possible reasons:

"Obviously, subsequently, after that time, for a number of possible reasons, Argos' pricing intentions changed."

Just to summarise the evidence so far, and this is at paragraph 121, first, there was no systematic discussion of RRPs with Argos; the next bit needs to be rephrased, but Mr Wilson's belief that Argos was happy to follow Hasbro's RRPs was largely based on assumption, or we could just say Mr Wilson assumed that Argos was happy to follow RRPs.

Discussions about RRPs of particular products only took place by exception. Discussions that did take place on Hasbro RRPs concerned whether they were set at the correct level; and Argos never formally guaranteed that they would go out at RRPs. They were always subject to change for a number of possible reasons.

Those are the five key ingredients that we get out of the evidence of Mr Wilson, who agrees essentially with Andrew Needham's statement; we say that it is far from clear that Mr Needham was aware of this, in fact we say he was totally unaware. We say when one looks at the evidence and asks the question, is that evidence of an agreement to adhere to RRPs, we say it is not.

Merely for a supplier to say, "Are you happy with this?", that is an innocent question -- the buyer should be able to say, "Yes, I am happy with that", that is normal commercial relations, but in the context of that answer, "I am happy", there is nothing that the supplier has done to fetter Mr Needham's decision to say whether he was happy or not, it is his own unilateral decision, and, moreover, there is nothing that is going to fetter

Mr Needham for the future if he wants to change his mind.

That is the difference between us and the OFT on that. When it comes to the intentions and the alleged trilateral agreement, we say that the case, if it can be, is even less convincing from the OFT, because the crucial thing to note from Neil Wilson's evidence is that if information was exchanged, it was of an extremely general nature, it was never of a specific nature. I say "never", there may have been one or two instances which Mr Needham deals with. But the evidence coming from Mr Wilson is that the information was of a general nature, and it was never part of Mr Wilson's plan -- and this is important -- that he intended to pass on to Index the specific price that Argos was indicating.

So, for example, at paragraph 19 of Neil Wilson's statement:

"Having determined Argos' pricing intentions and passed these on to the other account managers within Hasbro, I received information from those account managers regarding the intentions of other retailers to go with RRPs. I then reverted to Argos and said, without being specific, that it was my belief that the future retail price of the product would or would not be at the RRP. I told Argos which products this related to. I never mentioned the name of the retailer who was involved, or quantified exactly the price the retailer would go out at. I simply said to Argos that it was my belief from what retailers told us that this or that product would or would not be at the RRP."

So it is not specific to Littlewoods, it is merely the information going into the Hasbro pot, and Neil Wilson saying, "We feel/we do not feel this RRP is realistic". It is the same sort of discussion they would have at the toy fairs.

THE CHAIRMAN: Is that quite right? He is not there discussing what the RRP should be, he is discussing whether other retailers will or will not price at the RRP. That is a pretty big difference, is it not?

MR BREALEY: Well, the first point is that there is an allegation against us that we price fixed with Littlewoods, and that can only, we say, really stack up if Mr Wilson was passing specific information from Argos to Littlewoods and vice versa. So we have to establish that was not the case.

Then the next question is: well, what if Wilson is passing on very, very general information as to whether or not he thought the price would or would not be at the RRP? That is just general information which is not price-sensitive. It is Wilson's view as to whether or not someone is going to price at RRP. It is a pot of information. It is simply not specific to any one retailer.

So from this information, Andrew Needham would not know whether Index was going to price, or whoever, whether Woolworths were going to price, because it would always be subject to change.

If one looks at how Andrew Needham is looking at this, and he has said to Neil Wilson, "I am happy to go with RRP, but it is always subject to change" --

THE CHAIRMAN: Well, Andrew Needham is, at the least, receiving intelligence from Neil Wilson as to other retailers' intentions. And Andrew Needham seems to regard that as perfectly normal.

MR BREALEY: Well, I think what Andrew Needham says in his evidence is that he certainly did not regard this as in any part systematic, and I think one has to appreciate this is not a systematic plan. This is not a two way dialogue. And we can go to Andrew Needham -- we should go to Andrew Needham to see what he says at paragraph 17.

THE CHAIRMAN: It is just that Mr Wilson here is saying he got information from other account managers within Hasbro as to the intention of other retailers, and then without being specific, he then told Argos what other retailers' intentions were. It is obviously a question for us on mature reflection to see where the line is, and whether it was crossed, but that, on any view, is sailing very close to the wind, is it not, if this evidence is right?

MR BREALEY: Well, first of all, before I go on to Andrew Needham, the last sentence:

"I simply said to Argos that it was my belief, from what retailers told us, that this or that product would or would not be at the RRP."

That is essentially a supplier informing Argos of his view that the product would or would not be at the RRP. Whether or not Andrew Needham believes that is neither here nor there. We have got the evidence from Littlewoods that there are several Ian Thomsons, always saying to the buyers, "Well, this RRP is a great RRP".

THE CHAIRMAN: But what is, in your submission, going on here? Why is Mr Wilson telling Argos what other retailers are going to do?

MR BREALEY: Whether the price was a realistic price. It is all part and parcel -- this is before final pricing, and as Neil Wilson has said, and we have just seen the paragraphs, there is a dialogue between manufacturer and supplier as to where the price is going to settle.

THE CHAIRMAN: The OFT's case is that this sort of information transmitted at a stage just before final pricing decisions are taken is bound to have some influence on Argos' decision as to where it is going to pitch its own prices. It is not a very complicated case that is being made here.

MR BREALEY: Well, first of all, the case against us is that we fixed the price with Littlewoods, and one has to ask the question whether this evidence is evidence of us fixing the price with Littlewoods or whether this is just Hasbro communicating information to buyers in Hasbro's attempt to persuade buyers to go out at the RRP. In other words --

THE CHAIRMAN: So it is not disputed that Hasbro was attempting to persuade buyers to go out at RRP?

MR BREALEY: I think nearly every single witness in this case has testified to the fact that Hasbro was always trying to persuade the retailers to go out at RRP, so that if Neil Wilson says, "I think from what I have been discussing with [whoever] the feedback that I am getting from the market is that this RRP is a good RRP" --

THE CHAIRMAN: We have to keep trying to distinguish between where the RRP should be and whether people are going to go out at RRP. They are quite different points. There is some confusion sometimes in the witnesses' heads between those two situations.

MR BREALEY: Well, as you know --

THE CHAIRMAN: The RRPs have been set by now, everybody knows what the RRPs are. They are not going to be discussing them.

MR BREALEY: So there have been discussions prior to the RRPs being set whether it is a realistic RRP or not. We know that the RRP changes, we have seen this from our pricing analysis: the RRP is not cast in stone and sometimes there are lower cost prices, and the RRPs change; they are not just there in January 1999 and they do not change, the RRPs do change.

From the buyer's perspective, from Andrew Needham's perspective, all he is being given is some information from a supplier which says that the RRP is a good RRP.

THE CHAIRMAN: Well, that is not really what paragraph 19 says, is it? It is whether retailers are going to price to the RRPs or not.

MR BREALEY: Well, at paragraph 17 of Andrew Needham's statement, he says:

"But it is important to recognise that as far as I was concerned, these discussions were in no sense part of a plan to elicit my price intentions for core games and Action Man, let alone part of a plan to price normally at RRP on condition that Index did the same.

This was simply not the case. Moreover, when Neil Wilson (at paragraph 19 of his statement), says I then reverted to Argos as to his belief that a product would or would not be the RRP, this was also not part of any plan or any systematic exchange. I certainly did not have the impression that Hasbro was eliciting my price intentions, with a view to passing these on to third parties and then reverting back to me with third party intentions."

So he is saying there that as far as he is concerned he did not consider that when he had a conversation like this -- which we have already seen was not in any way systematic, it was just, "Are you happy with an RRP?" There was no systematic procedure. But he is saying that if he did have a conversation, he certainly did not have the view that it was passing them on to third parties "and then reverting back to me with third party pricing intentions". That is paragraph 17 of Andrew Needham's statement, quite clearly saying that he did not understand the conversations to be reverting back to Andrew Needham with third party intentions.

Again, a question that does arise from the legal analysis, the Cement case: did Andrew Needham request or accept this information?

THE CHAIRMAN: Yes.

MR BREALEY: Just before we leave this general and specific -- because I know we are going to be running short of time; just to refer you to the passage in Neil Wilson's statement which relates to the Pikachu. We deal with this in our observations; we say this is simply not evidence of an agreement to price at RRPs. But at paragraph 68 of Neil Wilson's statement --

THE CHAIRMAN: That is volume 1, file?

MR BREALEY: File 2, tab 68. Again, this is how Neil Wilson understands it, but the clear point that comes from this is that even in the Pikachu, which is the exception, which Neil Wilson says is the exception:

> "The purpose of this e-mail was to inform Ian Thomson that Argos had indicated to me that they were now prepared to go out at the RRP. I said in the e-mail 'Please advise Index accordingly'. I expected him to contact Index to inform them that the prevailing market price for this product was likely to be below the Hasbro RRP, without mentioning Argos specifically."

So if one is looking at Argos' mindset here -- as Andrew Needham has said, there was an innocent discussion about Pikachu, we will come on to that, but it is important to note that in Neil Wilson's mindset, he is not intending to pass on Argos' pricing intentions to Index, because of the words "without mentioning Argos specifically":

"I expected him to contact Index ... likely to be below the Hasbro RRP, without mentioning Argos specifically."

Forgetting about Hasbro -- one has to remember again that Ian Thomson is told this is a plan to persuade retailers to go out at RRP, and that plan cannot fail; we know that, we know from his evidence that he says he was under intense pressure. So this is the internal Hasbro people, but the simple point I am making is that if Neil Wilson does not expect Littlewoods to receive the specific intentions of Argos, how on earth can the OFT say that Argos must have intended its specific intentions to be passed on to Littlewoods? I appreciate that does not deal with whether the general is unlawful or not, but as regards the specifics, it fully supports Andrew Needham's statement in paragraphs 17 to 19 of his second statement.

THE CHAIRMAN: Yes.

MR BREALEY: But I can only reiterate that if the tribunal take the view that Neil Wilson is wrong to have said, "I simply said to Argos it was my belief from what retailers told us that this or that product would or would not be at the RRP", that is not how Andrew Needham understood it, because at paragraph 17 of his statement:

"I did not understand that he was reverting back to me with third party pricing intentions."

Again, I can only repeat, for the last time, Neil Wilson's evidence, which we set out at paragraph 115, that there was no systematic procedure.

(2.30 pm)

Paragraphs 128 to 132 concern Ian Thomson's evidence of agreement on RRPs; we have set that out there. We say it is an important part of the OFT's case that Argos only priced at RRP for Action Man and core games: in other words, there was a mutual assurance by both parties. The evidence produced to the tribunal does not support this finding, and then we set out four reasons why that mutual assurance part of the OFT's case, as far as Ian Thomson is concerned, is not made out, and I will not go through this but just summarise it: the cross-examination by us of Ian Thomson led him to accept that what Mr McCulloch had said, if it was said, was inaccurate, that is paragraph 131 of our written observations.

We know that Neil Wilson was not the author of the internal Hasbro e-mail, that was Ian Thomson, and we know that both men essentially conceded that the use of the language is inaccurate.

Then we make the point about if there was such a plan from Argos, then they would need the co-operation of Woolworths and Toys R Us; that is paragraphs 136 to 139.

And paragraph 140 is that Argos intended to protect itself anyway with flyers; when it unilaterally went to RRPs in spring/summer 1999, it had mechanisms to protect itself.

Then the last part of the evidence on Action Man against us is monitoring, and as the tribunal will know, we say that sort of conversation happened in 1997 and 1998, it is always going on, as Mr Riley said; you just phone up to find out what is going on.

But that is the evidence against us on Action Man. Just very quickly to summarise on Action Man, we say that there was no sudden parity in autumn/winter 1999, it happened because of the GUS policy in spring/summer 1999. As far as Hasbro trying to elicit the buyers' intentions, that was Hasbro's unilateral act, it was Hasbro picking up the phone and asking a question, and I think what comes from Andrew Needham's cross-examination is that he innocently answered a question, did not think anything of it -- this comes from Andrew Needham, which we have set out in the paper which sets out his evidence. He certainly did not think that he was part of any plan (a) that third parties would know what his intentions were, or (b) that he was receiving information as to other parties' intentions.

The paper that I handed up right at the beginning, which is Argos' submission on the correct approach to the evidence, I will deal with that just very quickly now, and then go on to other toys, which I will spend ten minutes on, just so I can say what is in it.

We are trying here to set out the correct approach to the documentary evidence and the oral evidence, and we give various illustrations as to the dangers of accepting hearsay.

Then at paragraph 22 we have this section called "Needham's Knowledge", and here we set out Wilson, but importantly Andrew Needham, as to his state of mind, as to what he thought was going on. So that is almost like a crib sheet, one can see where he is coming from.

THE CHAIRMAN: Yes.

MR BREALEY: We say that when one applies Needham to the reciprocity in the Cement case, even on this high watermark, there is no concerted practice, bilateral or trilateral, on price.

Can I then move to other toys? I shall be as brief as I can, it is set out. In order to speed things up, this is not in the submissions, can I make six points? Then hopefully that will help.

The first point I would like to make is that one has to look to see whether there was an agreement of the two buyers, Andrew Needham and Vanessa Clarkson. This is the first point. Of Andrew Needham's toys, Ian Thomson only got one out of five correct. So it is too simple just to say, "Well, look, there are 17 common products"; they were having specific discussions with Needham, specific discussions with Clarkson, and on Andrew Needham, one out of five. The proof is not in the pudding.

Of Andrew Needham's toys, we say that the Interactive Pikachu is strong evidence against an agreement to adhere to RRP, which is the case against us. If Andrew Needham had wanted to fix prices, he would have informed Neil Wilson about the others. The fact that he did not means, we say, there cannot have been any agreement. So that is the first point: one has to look, in order to see whether there is an agreement, at what actually happened with Andrew Needham's toys, and Ian Thomson only gets one out of five correct. The Interactive Pikachu, we say, is strong evidence against an agreement, because if it was evidence of an agreement you would expect Andrew Needham to have informed Neil Wilson, "I have changed my mind on Pikachu, I have changed my mind on all the others, and you must inform

Index, because they will be pretty upset if they go out at £1 more expensive". That is the first point, that one has to look at Andrew Needham.

The second point on the internal versus Index e-mail is that Bop It does not appear on the internal list, so that product does not appear on the internal list, and Neil Wilson could give no explanation for that. That is Day 2, page 44, line 4.

The third point is that Gardens Galore, Argos did not list.

The fourth point relates to Tweenies, and they were priced at RRP, yes, but she has also priced them at RRP at Christmas 1999 and spring/summer 2000. So we say there was no sudden change in Tweenies pricing in autumn/winter 2000.

The fifth point is -- and this relates to the other categories of toys that she is responsible for, which is about six: of the other half dozen products, it has to be remembered that she priced 27 out of 32 Hasbro products for autumn/winter 2000 at the RRP, so merely to say, "Aha, you priced -- well, okay, we accept we got it wrong on the boys' toys, we know that Bop It has no explanation, Gardens Galore did not list, Tweenies okay, you have been pricing since 1999 at RRP, but what about the others?"; it has to be viewed in the context of what she did generally that year, and she priced 27 out of 32 at RRP. The reason is given in her statement that she was after more margin.

The sixth general point I would like to make on the other toys is that when you actually look at the prices, it shows competitive pricing, not price collusion. We set this out in the submissions: as Neil Wilson acknowledged on two occasions, when one looks at Andrew Needham's toys, both Littlewoods and Argos are reacting to each other, and we were lower in spring/summer 2000, and Littlewoods reacted to us; vice versa.

The evidence from Neil Wilson, far from being collusion: when you actually look at spring/summer 2000, autumn/winter 2000 and spring/summer 2001, there is evidence of competitive pricing, not price collusion.

THE CHAIRMAN: How are you getting on, Mr Brealey?

MR BREALEY: I know I am going to have to finish. If I could just finish on paragraphs 30 and 32, which essentially make good that point, that is my sixth point that I have just been making: the Pikachu had already been considered above; the Pokemon Battle Figures and Pokeball Blaster, there showing the relevant pricing information, and I went through this with Mr Wilson:

"In other words, the pattern is that both Argos and

Littlewoods are reacting to the previous spring/summer 2000, is that a fair assumption, correct?" And he answered, "Yes".

The very last point: when it comes to spring/summer 2001, again, this is paragraph 39 -- and I will finish off on this. I asked Neil Wilson what was happening when you compared autumn/winter 2000 with spring/summer 2001:

"Pokemon is not listed, Micro Machines we saw from the autumn/winter 2000 that Argos had not gone out on the RRP, it was at £28.99 for the truck, £18.99 for the track; do you see what is happening in spring/summer 2001?

"Answer: Yes, quite clearly, it looks as though Index are matching the autumn/winter Argos price of the previous year."

So they had come down, which is what normally happens, they look at each other's pricing when they are doing their pricing analysis, and they try and work out what is happening. In that instance, Littlewoods came down to match our price, which was not at the RRP, and we would say that the pricing for those catalogues, for those other toys, cannot on any view be evidence of a price fixing agreement.

I am sorry to have taken --

THE CHAIRMAN: No, that is fine. I do not want you to feel that you have not had the time you need, Mr Brealey.

MR BREALEY: I know that Mr Green has half a day, and Mr Doctor has half a day, and I have already eaten into it.

THE CHAIRMAN: Thank you very much indeed.

Closing submissions by MR GREEN

MR GREEN: Thank you. Can I start by making an observation about how and why we are here? We are here because in 2001 the OFT did not conduct a proper investigation; they did not take or conduct proper interviews with any of the relevant personnel; they did not properly collect documents; they never investigated the market, the GUS takeover; they never investigated the issue of margins or price points; that the interviews that formed the decision to move ahead with this case were scanty in the extreme.

Mr Brealey has spent half a day plus an hour, and some 92 pages of transcript have come up; two hours of an interview, one hour of an interview with some of the witnesses, one or two sides of A4. That was the basis upon which the OFT proceeded in this case.

We are here because the OFT have abandoned a large number of witnesses, Mr McCulloch is the most striking example. He was the progenitor of the so-called price initiative. We have seen from the evidence, and in particular Miss Emma Wilson's witness statement, that in 1997, he went to the Hasbro legal department and said, "We have a problem, we would like to introduce more margin to the retailers, we want a list of dos and don'ts because I want to be on the right side of the law".

He was the person who initiated the Hasbro policy; he attended, according to the witnesses who have come before the tribunal, most of the crucial meetings. Words that he is purported to have spoken are being debated, yet he is not here. He could have been compelled by the OFT, but he was not.

We have not seen Mr Brighty, Mr Evans, Mr Richards or any of the other people who are principal protagonists in this case. The net effect is that we have to deduce, infer and speculate about the events which did or did not happen.

What I would like to do this afternoon is to concentrate primarily on the facts, and divide my presentation into two broad sections: first, the events surrounding the presentation of the 1999 terms, and secondly, the aftermath, namely the period throughout 1999 and 2000.

Now as part of my --

THE CHAIRMAN: Could I just ask, Mr Green, whether you ever invited the OFT to call Mr McCulloch?

MR GREEN: Well, I do not think it is for us remotely to suggest to the OFT who they should call. They had McCulloch in a room in 2001. They did not take a proper note of his interview, they did not call him back, they did not exercise statutory powers to call him to give evidence here. He was a Hasbro man, he was a witness who the OFT relied upon, and they still rely upon him in the decision. They are the party who should come to court with the cards laid flat upon the table, and they have deliberately chosen not to call McCulloch, not least because we are convinced he would have given evidence against the OFT.

His statement to the OFT in 2001 makes it clear that insofar as he was concerned, no agreement of any sort was arrived at with retailers, and he specifically says -- and this is an important point that I will return to -- that on the advice of his legal department, he did not discuss retail prices with buyers, and the entire question of legal advice is a significant one which I will deal with discretely.

But as a matter of law, a public body with a burden of proof to establish in a clear and compelling way evidence, in a case which turns upon who said what to whom, is bound to call the witnesses both for and against its case. We have no influence over any of the Hasbro witnesses, even if we knew where they lived.

So let me get straight down to the first principal allegation, not in the decision, but which has arisen as an issue, which is how the spring/summer 1999 prices and the correlation between the prices came about.

In order to put that into context, I need to deal with the facts chronologically. We have set this out in our closing submission, and I am not going to go into great detail on the documents, but I will summarise what we say the points are. At appropriate points, I will simply give you references, and then there will be some documents I will need to draw your attention to.

We cover the question of the presentation of the 1999 terms in section C. The context to that meeting may be summarised as follows: first, it is a fact that until 1998 and the GUS takeover, Argos was an initiator of price reductions. There does not seem to be much doubt about that in the evidence.

It also seems to be clear that the change in that policy was brought about by the GUS takeover, and it is also very clear that the implications of that takeover were very widely recognised by the retail sector generally, and indeed, they were recognised before the takeover was consummated.

In this regard, I would like to show you one document -- I am not certain if you have seen it before, but it was inserted into the tribunal's files in the course of the hearing as tab 18A of the core bundle.

THE CHAIRMAN: 18A?

MR GREEN: I hope it has been inserted. It will be after page 97, I hope. I beg your pardon, page 18, because, of course, you do not have the tabs.

THE CHAIRMAN: We have a page 18A.

MR GREEN: Yes. It has limited relevance, this document, but it simply shows -- it is a board minute, Richard Darling, who is a Littlewoods man; you see at the bottom left it is dated 20th March 1998. If you see under the notes, the third note down:

"Personal care in Argos performing very badly, but no figures quoted. There is talk that the pricing will not be cut as deep for autumn/winter 1998, because they cannot afford to do it in the light of GUS."

Simply one reflection of the fact that the market was attuned to what GUS was doing or was proposing to do even at that early stage, even before the takeover, which was, as I recollect, 24th April; this was two or three weeks earlier, and this can only have been on the basis of press speculation.

So it is part of the context to the presentation of the 1999 terms that there was a change of policy brought about by GUS, and that it was appreciated, broadly and widely, in the retail sector.

Now we submit it is also a fact that when Littlewoods came to set its prices for autumn/winter, it managed to do so in a way which led to a significant degree of price correlation. I am talking about autumn/winter now, in other words prices which would have been determined upon in May/June.

There is not exact correlation, but even before discussions in late 1998, there was a degree of price correlation. You will recollect that in the Ian Thomson presentation, as an annex, there was a table comparing the autumn/winter prices for Argos and Littlewoods, and there was a very high degree of correlation; Mr Thomson gave evidence that his management or his marketing department had put that table together, and there was some debate between myself and Mr Doctor as to whether the catalogue prices reflected that degree of correlation, or whether the prices were correlated because of subsequent leafleting or whatever.

But an irreducible minimum is that there was a degree of price correlation, so even when we are dealing with late 1998, there appear to be -- and it is not something the tribunal has to make a finding about, but there appear to be moves towards correlation of prices by reference to the GUS takeover.

THE CHAIRMAN: What we do not have, I think, for 1998 are the RRPs, so we do not know how these relate to RRPs.

MR GREEN: That is correct. The next relevant fact which provides context to the presentation is the September 1998 Management Horizons report to Index, and I will return to this later and provide a summary of our submissions on it, and give you the relevant pages.

But Index went out and obtained its own independent external advice from Management Horizons, who advised them, amongst other things, that across a range of products, not just toys, Argos would, in their view, no longer be an initiator of a price war, under a rejuvenated GUS, as they put it. They also said it was no longer a viable strategy to continue with deep discounting, and that it was no longer viable not to chase margin; in other words, the ship had to turn around, and Mr McMahon explained that this was because there was a change of ownership and management in 1998, and there was a decision that Index had to make money in the future.

Significantly, in that same report, which was addressed to, amongst others, Mr McMahon, who was responsible for implementing it, the advice was given that they should go to higher prices and fewer price points.

These facts are set out in our closing submissions at paragraphs 40 to 75, and one draws a number of conclusions from these facts. First, the GUS takeover was a profound event in the UK retailing sector generally, and it signified a shift by Argos from volume to margin. This shift was widely observed, and the implications understood; the implications were understood specifically within Index and Littlewoods, because, not least, they took external management advice, who confirmed the implications of that shift in policy by Argos.

Argos, according to the experts, would not initiate a price war, but if we initiated a price war, Argos would win.

Just to give you the relevant page numbers for your reference later, the report is witness statement volume 2, tab 51, and the relevant pages are as follows: 484, 485, 487, 493, 517, 521, 533, 589. Mr McMahon was not cross-examined on this document, though he explained in evidence that it was a document that he relied upon in formulating the Littlewoods and Index policy. He therefore acted upon the advice, and as is clear, I think, from page 589, if I have my reference right, he was one of the few people within Index who was specifically identified in the report as a person responsible for implementing the report.

He also said in evidence that within Index, management had been given clear instructions by the new owners to make Index profitable.

In our closing submission at paragraphs 52 and 53, we have set out a table which sets out the two views of life as to the extent of correlation in price in autumn/winter 1998, and in paragraph 52, it appears that seven out of 12 of the core games were listed at the same price.

When Ian Thomson was asked about this degree of correlation, and his answer, I think, applies regardless of the precise extent to which there was correlation, he said as follows -- and we have quoted the section at paragraph 53 of our closing:

"Question: The point I am putting to you is that for reasons which are not suggested in any way to be unlawful, there was a high degree of commonality a long time before autumn/winter 1999.

"Answer: For years, these products -- many of the products in the spreadsheet here, especially the games like Buckaroo, Operation and Twister, these games -- and like Mousetrap -- have been sold by us in the UK or by other companies in the UK for a period of anywhere up to 35 or 40 years. These products had also been sold within Argos and Index for some considerable time, and had probably established themselves at these price points anyway, because of natural evolution."

So Mr Thomson's view was that there were processes and forces of natural evolution operating in the market which exerted an impact even in early 1998, and those prices would have been set in May or June of that year.

In spring/summer 1999, the prices for which would have been set in autumn of the previous year -- I will come back to the question of dates shortly -- it is clear that Index pushed the prices up and went to RRP, and you have seen the table before, but we have summarised it at paragraph 64 of our closing.

Spring/summer 1999, almost complete total commonality between the RRP and Littlewoods' retail price. The only difference between Argos and Littlewoods is that there is a 4p difference in some instances, and as we have seen, both Littlewoods and Argos employees treated the 4p difference as no difference. So whether one says the Littlewoods prices are fractionally less, or whether one says de facto they are equivalent, one finds a very high degree of commonality in spring/summer 1999, and one sees the same for core games, which is the table at paragraph 69, whereby again, if one ignores the 4p, there is commonality.

So the question is: how did that table come into existence? Why was there commonality in spring/summer 1999?

Now what appears to have driven this is that although Littlewoods did not know it at the time, Argos was going through the same thought process; in other words, you cannot continue to lose money, you must chase margins.

There was, arising out of the evidence, a different and interesting perspective on life: the Argos employees had a policy of finding the market price, but they explained that very often that might be at RRP; that was not something which my clients recognised. My clients simply observed Argos through the catalogues, observed the public reaction to the takeover, and formed their own view on the basis of external advice that it was sensible to push prices up, that Argos would not initiate a price war, that they should not themselves initiate a price war, and they should go for higher prices and fewer price points.

A difference of perception, perhaps, between Argos and Littlewoods, but entirely consistent with reality; it is what one would have expected.

Once the spring/summer prices were published at the end of January/beginning of February 1999, both Argos and Index will have seen that they have both gone out at increased prices at or near the RRP. Again, interestingly, Mr Duddy gave evidence that he thought it was a risk, and so did Mr McMahon: a calculated risk, a business decision.

It is important to understand how the risk works out in this case: the risk was greatest at the time they were setting spring/summer 1999, because that was the first time either could test the waters, and see how the market was reacting to the GUS takeover.

Both of them said that it was less of a risk than going out in autumn/winter of the following year, because there were fewer sales to be derived from spring/summer than from autumn/winter, but there was a risk, and they both, in a calculating way, took it because it was a rational business risk to take.

Once the spring/summer results were known, that risk was greatly diminished, because both could see the observable consequences that both had gone out at or around RRPs, which meant that for the next catalogue, autumn/winter, there was still a residual risk, but it was very substantially reduced, and that seems to me quite plain; again, the evidence shows that, and I will come back to that.

Now before examining the meeting itself, and everything that surrounds it, I want to make a few submissions about Hasbro's position. We have set this out in our closing submissions between 76 and 92, and we deal with a number of issues, including the legal advice taken by Mike McCulloch. What appears to have happened is that Hasbro had wished to recommend to retailers that they follow RRPs from 1997 onwards.

However, Mr McCulloch, who was the progenitor of the policy, seemed to know that there was a legal risk attached to this, and he sought and obtained legal advice, including from Emma Wilson, the legal counsel to Hasbro, and subsequently from external lawyers, David Aitman, the then head of the competition group at Denton Hall.

We have set out the evidence from Miss Emma Wilson's witness statement at paragraphs 77 to 80, and indeed through to paragraph 82.

One of the things that Mr McCulloch was given was something called dos and don'ts, and we have summarised some relevant parts from the dos and don'ts at paragraph 81. One of the dos and don'ts said as follows:

"Make clear throughout discussions that all margin indications are in no way to be construed as a binding commitment, and we can give no binding assurances as to how the rest of the marketplace will react to our discussions."

So Mr McCulloch was aware, because he had had legal advice which he had sought voluntarily, that he could give no binding assurances as to how the rest of the marketplace would react to discussions.

He was, we would submit, sensitised to the legal issues, and he wished to stay within the law.

Now in the Stockley Park presentation on 23rd October, as the tribunal knows, the so-called price initiative was unveiled.

The first point to make is that the words "price initiative" was never a phrase used in presentations to Littlewoods. The document which was used as the basis for the Littlewoods/Index presentation simply said, "1999 terms", and I think a number of aspects of this are worthy of mention.

The 1999 trading terms envisaged a two-pronged strategy which we have summarised at paragraph 84 of our closing submissions. First of all, to push list prices up -- and this was very important, Hasbro wished to increase list prices, and although you have seen the document before, because it is such an important document, would you look, please, at page 34 of the core bundle? A very large chart, emphasising that average prices would increase by between 5 and 6 per cent over 1998 to 1999; list prices would increase.

But to counteract that, there were to be a large number of rebates granted retroactively, and if one jumps back to page 28 of the same bundle, under the heading "Core Grand Profit Rebate", one sees a list of rebates, and again, you have seen this document before, you will see there are the best part of 15 pages of descriptions of rebates, a huge amount of rebate analysis, but you will see this phrase:

"Paid in return for maintaining as a minimum the 1998 trade average bought-in margin on games of 1.5 per cent and Action Man 5.5 per cent" --

THE CHAIRMAN: Sorry, which page are you on?

MR GREEN: Page 28, the conditional margin point; in other words, you got your rebate for maintaining a trade average bought-in margin. This was the element of the policy which got them into trouble, and which Mike McCulloch got his knuckles rapped for by his own legal department. It was, according to Hasbro's own legal department, a step too far.

Again, I will give you the reference, because it will be in the transcript for later, we deal with this in detail at paragraphs 88 to 92 of the closing, but Hasbro sought legal advice, and that element was stripped out, this conditional rebate, the rebate conditional upon adhering to some form of influence over price. That was stripped out of the policy, and it was not presented to Littlewoods. It is not in the Littlewoods presentation, and the evidence makes clear -- again, references and the full details are in the closing -- that McCulloch had a discussion with Argos about that, and he was told in no uncertain terms by Argos that that was illegal.

Neil Wilson says as much in his witness statement, he says -- and this is in paragraph 90 of our closing:

"It was considered first by Hasbro's sales directors to make the granting of a rebate also conditional upon adhering to RRP, but it was realised this would be illegal after consulting Hasbro's legal department."

Now Mike McCulloch was therefore sensitised as to the legal niceties, because he sought advice in 1997; he would have been hyper-sensitised before he came to the Littlewoods presentation, because he had been in trouble with the Hasbro legal department just weeks, or whenever it was, before this question over the date.

It is also consistent with the evidence he gave to the Office of Fair Trading, which is in the witness statements bundle, volume 1, tab 29, if you would look at that, please. Tab 29, volume 1 of the witness statement bundle, page 231. I will pick up three sections of this evidence to the OFT, this will save me coming back to it later, but the first is on page 231 at the bottom, about eight or nine lines at the bottom, where there is blanked out text, there is a reference to "The e-mails". Mike McCulloch says:

"The e-mails look worse than they actually are. They are not evidence of [an] agreement on pricing by retailers. An overzealous approach by the account managers. An ill conceived approach.

"Bob Lawrie: What did you do when you discovered the e-mails?

"MM: Paper on dos and don'ts on communications with retailers."

We know he had a paper on dos and don'ts, we do not have Mr McCulloch to explain what he meant by that, but that is at least on the face of it a reference to the document he already had:

"BL: So you are not aware of the discussions between Hasbro and Argos and Index?

"MM: No, not involved. As far as other retailers concerned [there was] no need to communicate, they had bought into the initiative and were happy to follow Argos' price lead.

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

"MM: No. I was careful never to discuss retail pricing with them on advice of our legal department."

So his evidence in 2001 was that he did not discuss retail pricing, on the advice of his legal department; that is consistent with what we know about the build-up by Mike McCulloch to the presentation with Littlewoods, and the fact that he was anxious to obtain legal advice, and that, for reasons which no one has been able to explain, the initial internal presentation at Hasbro had overstepped the mark, but they had then retrenched, on the advice of the legal department, in order to sit on the right side of the line.

Now in that context, is it conceivable that Mike McCulloch, when he went to see Littlewoods and Index, with that experience, and those incidents behind him, would have done precisely what the dos and don'ts said he should not have done?

THE CHAIRMAN: When you get to a convenient moment, Mr Green?

MR GREEN: It is convenient now.
THE CHAIRMAN: We will just rise for five minutes.
(3.12 pm)
(A short break)
(3.24 pm)
THE CHAIRMAN: Yes.
MR GREEN: I was dealing with Hasbro's position coming up to the meeting, and I want to deal now with the evidence Mr Burgess gave as to what he described as deceit. He said it was something that had come upon him recently, he was not asked about that -- and I surmise, certainly this is not evidence, that it comes from reading Ian Thomson's witness statement about the way in which the increase in list prices was desired to have the effect of forcing people to go out at RRPs.

But the evidence Mr Burgess gave was that he felt Ian Thomson had been deceitful at the presentation, and I want to show you just why he was in fact being deceitful at that presentation. In fact, it is very clear from the presentation that Hasbro gave, which is at tab 49 of the bundle. I can deal with this fairly quickly.
THE CHAIRMAN: Sorry, which bundle are we in?
MR GREEN: I beg your pardon, witness statement bundle, volume 2, tab 49. It is the annex to Lesley Paisley's

statement, her second statement, which was just a vehicle for annexing a certain number of documents which Littlewoods had found. The first point is that it does not say "price initiative", it just simply says "1999 business plan", this is page 379.

You will see, on the bottom right-hand sides, "Meeting in J Mc's office, 5/11/98", so the evidence suggests that is Alan Burgess' handwriting. The date of the meeting is a point I wish to concentrate on in a moment to give you the relevant references, but it seems that it is impossible it was 5th November. It is highly likely it was either the end of 1998 or the beginning of 1999, and I will show you why that is the case shortly. And indeed the short point is that it is almost certainly going to be something between four and ten weeks after prices were set for spring/summer 1999. It is impossible to put a precise date on it, but it is going to be a significant amount of time after --

THE CHAIRMAN: Do we know anything about the origin of this manuscript annotation on the front?

MR GREEN: Only that Alan Burgess says it is his handwriting. My recollection --

THE CHAIRMAN: He has dated it 5th November.

MR GREEN: My recollection is that -- well, the answer is no, we do not know, but I will explain why it is almost impossible for it to be the 5th. Ian Thomson says it cannot have been the 5th, it had to be after the 13th. David Bottomley is pretty sure that it was early 1999, and he has a reason for saying that. There are other reasons why it is almost inconceivable that it was the 5th, as opposed to some date after the 13th at the earliest.

But the point is that almost whichever date it turns out to have been on, it will have been at some time after prices were set for the spring/summer 1999 catalogue, because again, I will give you the references, the evidence seems to be that the catalogue had already gone to press and been delayed by the end of November, and by looking at other references one deduces that prices will have been set probably in late September, possibly October; at the very latest, very early November. There are references which lead one to suggest --

THE CHAIRMAN: There is reference to a final pricing meeting on 6th November.

MR GREEN: I think that was Argos. You may be right.

THE CHAIRMAN: That is Argos, that is true. We do not know about Littlewoods yet, or at least I have not focused on it.

MR GREEN: But I will give you the references; I think one

can put two and two together and make a reasonable four.
So far as this document is concerned, there is first of all the title which does not refer to "initiative". I will go through the references quite quickly. Page 381, the mission:
"To increase Index market share ..."
THE CHAIRMAN: Now you are going to show us why this is misleading?
MR GREEN: Yes:
"To increase Index market share by driving incremental growth in turnover while improving profitability."
I am going to make the same point throughout: no reference to increase in list price. Page 390:
"Where are we heading? Opportunistic product stocked. Serviceability has improved."
You will remember there was a certain amount of disgruntlement about service levels. Mr McMahon said he had a number of fairly fractious conversations with Mr McCulloch about service levels:
"Games pages looking better. Achieve turnover."
Again, no reference to increased prices. Page 398, the objectives, which is the heading. 399:
"Index objectives: increase turnover and gain market share while improving profitability.

"Hasbro objectives: to improve profitability from 9.8 to 14.5 per cent."

Then the package, at page 400; and 401 through to 411, so ten pages, in which the reference is virtually exclusively to different types of rebate, and there is no mention of list prices or RRPs.

Just by skimming through those pages, you see that is the case. They talk about new beneficial trade terms on page 402; they do not talk about putting the list price up.

Now importantly, in particular given Mr Doctor's cross-examination, if you turn to page 442 you will see that there is something called the Index line plan 1999. It was put to witnesses, and indeed it is stated in the OFT's closing that there was no deception, because the prices were in the spreadsheet at the end.

If you look at the bottom of each of these pages, from 443 onwards, you will see it says "Prices still to be confirmed", and on every one of these pages, right the way through to 455, so 12 pages, with all the prices on, it says, "Prices still to be confirmed", covering both the list price and the RRP. So the representation made in this document was that both list prices and RRPs were yet to be fixed.

Now internally, Hasbro emphasised the squeeze, the pushing up the list price, and the giving of the retrospective rebate, and as Mr Thomson explains in his witness statement, paragraphs 41 and 42, internally, they perceived that this would force retailers inevitably to RRPs: very low margins, few price points, highly advertised products.

Externally, they emphasised exclusively the rebate, and they represented to Index that the prices were inchoate, had yet to be confirmed or fixed.

The Stockley Park presentation -- and let me just give you the reference, page 35, the internal Stockley Park presentation at page 35 has an interesting table, because it compares the list price against the RRP, and it appears --

THE CHAIRMAN: Sorry, which page of which bundle?

MR GREEN: This is core bundle, page 35. It appears that internally, Hasbro had identified both the list price and the RRP. (Pause). Sorry, it is not page 35.

THE CHAIRMAN: Page 34? No. Not the one you have just shown us? Page 33?

MR GREEN: Yes, I think it is page 33. Internally, they seem to have a pretty good idea of both the list price and the retail price, and one can see that the margins on these products were extremely tight.

Neither that slide nor the next slide at page 34 were presented as part of the Index presentation, yet they were absolutely fundamental to the internal presentation. We submit, and this is relevant to the evidential point, and the credibility of Ian Thomson's evidence, that Hasbro did manipulate the presentation in order to emphasise the question of rebates, and to very much downplay any question of retail pricing, and that is consistent with Mike McCulloch's statement to the OFT when he was interviewed that on the advice of the legal department, he did not refer to retail pricing.

He did not refer to retail pricing because they did not want to emphasise retail pricing, because, as Mr Burgess explained, that was going to be a red rag to a bull. It is not a very attractive proposition to say, "We are going to whack your list prices up, but do not worry we will negotiate a few retrospective discounts which you will get three, six nine months down the line". That is a very, very different form of conversation to one which says, "We will improve your margins by giving you very substantial rebates, and here is 10 pages of discussion about rebates, and do not worry about the list prices, we have not yet fixed them".

If you are trying to present a package along those lines, you do not talk about retail prices, it is just not natural to talk about retail prices.

Now that was Hasbro's perception; then one comes to the meeting itself. The first question is: on what date did it occur? Now it seems to us that the first point comes out of the Stockley Park presentation, in which there is a timetable for implementation of the initiative, which is set out on page 36 of the core bundle, under the heading "Next Steps". It says, item 1:

"Can the managers to formulate business plan include category management programme in conjunction with trade marketing. Business plan to include ..."

Then an identification of the matters to be covered. Nothing there suggests an increase in list prices. Then 3:

"Presentation to sales, trade marketing colleagues 12/13 November to agree objectives", and then at some point after 12th and 13th November, 4:

"Present plan to accounts; timing to be agreed with sales directors."

So on this basis, the meeting could not have been the 5th, because the business plan was only going to be presented to sales, trade marketing colleagues on 12th and 13th November, and then only after that date was there going to be a presentation of plans to accounts, and timing was to be agreed with sales directors.

Now Ian Thomson's evidence on this, and I will give you the references and then summarise the evidence -- firstly, Day 1, pages 98 and 99; and the second reference is Day 1, pages 103 and 104. There he gave evidence that he reviewed his business plan on or about the 13th on his computer, and he would have done that before the presentation, so his view is it had to be after the 13th. In his witness statement, he says late 1998/early 1999.

The fourth point: David Bottomley only became sales director in December, before then he was responsible for FOB products, and he was only at the meeting because he was a sales director, which again suggests that it was likely to be December or later.

And his evidence, I will give you the references, but unless you want me to I will not take you to them, is at Day 2, page 61, lines 19 to 22, and page 63, lines 17 to 24; he is, and I am quoting him, "pretty sure that it was January or February". He is pretty sure because he can tie it into his recollection of either the London or New York Toy Fair in January or February; he cannot be more precise than that.

It would appear that the meeting in all probability occurred either in very late 1998 or early 1999, but this would, we submit, on any view be a considerable period of time after prices were set for spring/summer 1999, so the next question is: when were prices set for spring/summer 1999? Again, to save time, let me summarise the points and give you the references as I go along.

Peter Edmonds' witness statement, which is tab 23, paragraph 7; he was not called to be cross-examined, although we tendered him. He took over from John McMahon in September 2000, he took his job. He says that the prices for spring/summer 2001 were being settled in September. Now that is the year after, but it gives an indication of when the process was ongoing the previous year.

This is consistent with the famous Tweenies incident in November of 2000 with Alan Cowley. The incident arose, as you will recollect, because the catalogue had already gone to press, and was due shortly to be published, when Hasbro notified Littlewoods of a changed price. The correspondence, which is in the core bundle, file 26, at pages 96 to 100, is centred on 30th November, by which time the catalogue had already gone to the printer, and indeed unusually had been delayed, which very strongly suggests that the catalogues will go to the printers possibly early

November, and therefore prices will be at some earlier stage.

This is also consistent with Ian Thomson's witness statement at paragraph 98, which is tab 61 of the second witness statement bundle, who says that in August 1999, Index were finalising what he describes as listings -- not prices, but listings, for spring/summer 2000; so he would place the finalisation process as or about August. Now that, I accept, does not necessarily indicate precisely what the price would be, but it gives you an indication that it is going to be either very early November or more likely October, and that would then be consistent with what we know about Argos, which is they apparently set prices on the 6th, and since both companies were working to similar timetables, one would expect a degree of similarity.

Ian Thomson's own evidence when cross-examined about the Tweenies incident also confirms that the catalogue had been put to bed, but unusually had been delayed; the reference to that is Day 1, page 133, lines 1 to 8.

So one deduces from this that the prices were set probably in October, conceivably the beginning of November, but that the meeting was either a month or two months later.

Now one can introduce a margin of error into those dates and still come to the conclusion that the spring/summer 1999 prices could not, on any view, have been affected by any discussions of whatever nature between Hasbro and Littlewoods/Index concerning Argos.

Of course the OFT's case is not about spring/summer 1999, it is about autumn/winter 1999, and it is not therefore suggested in the decision that there was anything untoward happening at that time. We did not therefore have to come to this court to address that issue, but we believe we now have been able to do so, we would submit, satisfactorily.

So coming back then to the actual meeting itself, a great deal of evidence has been given about this. We have set out all the references and the details in paragraphs 93 to 106 of our closing, and I would like to summarise the points we wish to make about it.

Both John McMahon and Alan Burgess gave detailed evidence about the meeting; they were there. Neither has any recollection of Mike McCulloch suggesting that he obtained assurances from Argos, and such a situation or a scenario is lacking in credibility.

First, it is the opposite of the policy Hasbro were advancing which was in relation to retro rebates for listing and pagination, and Hasbro did not wish to discuss list prices, because this was bound to be controversial. Therefore, the conversation which Mr Thomson refers to is inherently improbable.

Secondly, it is flatly rejected by Mr John McMahon. He was not someone who, according to his evidence, even knew about list prices. It was not his job to be engaged in the details of the list prices. He would not have known what they were, and he would not have been interested in them.

He says he never had any conversation with Mike McCulloch about that matter, and he is adamant about this, and Mike McCulloch's evidence to the OFT was that on legal advice, he did not discuss retail prices.

Thirdly, the version by Ian Thomson is flatly contradicted by Mr Burgess, whose strong feeling, as we have seen, was that he was deceived; his explanation, we would submit, is convincing and consistent with the presentation and the form in which it was concocted.

Fourthly, and I will return to the position of Ian Thomson as a witness later, is that Ian Thomson's recollection is vague and imprecise: he could not recall the words used, he could not recall who initiated the conversation, and as on a number of occasions with his evidence, he put words into his witness statement which later in cross-examination he accepted were not precise, he could not remember the details of the conversations;

yet when it came to his witness statement, he always felt able to be more precise than in truth he ever could be.

I will deal compendiously with the position of Ian Thomson later, because plainly, you will have to take account of him as a credible witness or otherwise, whether or not you believe his recollection of events is reliable for the purposes of proof.

Fifthly, I have already mentioned this point, it is inconsistent with Mike McCulloch's own evidence to the OFT. He is not here to give his version of events, but we are entitled to say to you that in light of what he said to the OFT, and in light of the background to his taking legal advice, it is inherently improbable that he would have said what it is suggested he did say.

The next point I think can be picked up in our closing submissions at paragraph 103, and I think in reality, looking at it, I have dealt with this: this is the exchange between the tribunal and Mr Burgess.

THE CHAIRMAN: I think we probably have dealt with this.

MR GREEN: I think we have picked that up, and got the point. The next point is that even if one took Mr Thomson's evidence at face value, all he says is that Mr McMahon and Mr McCulloch only mooted the possibility of an understanding, but it is clear that the understanding which was being mooted was dependent upon two things: first, it was dependent upon Mike McCulloch speaking to Argos about the so-called arrangement, and secondly, it was dependent upon Mike McCulloch communicating any agreement that he arrived at with Argos back to John McMahon.

Only if these two events occurred could the circle be drawn together, but there is no evidence that he did either of those two things.

As to the first, Mike McCulloch speaking to Argos, given the rebuff he had had in relation to conditional rebates, the possibility that contrary to his legal advice he would go to Argos to stitch them up is simply ridiculous

(3.45 pm)

There is not a shred of evidence that he did this. Moreover, as to the second point, would he come back to Mr McMahon, again, not a shred of evidence that he did come back to Mr McMahon; Mr McMahon is quite adamant that his conversation with McCulloch simply did not occur, and plainly, on that basis, McCulloch never came back to him.

There is a third improbability about this, which is that Mr McMahon had already taken the gamble, he had already decided to go out at RRPs, for the reasons

I have just discussed with the tribunal. Why would he therefore need reassurance from Mike McCulloch in relation to a decision he had already taken? He recognised it was a gamble to go out at RRPs, it was his calculated risk. It was put to him by Mr Doctor that it was irrational; he said, "All right, irrational, but it was a good business decision", it was a business decision. He had taken the risk, he did not need comfort, he had already done the decision. It was a done deal, so far as he was concerned. Internally, they had decided on external advice to do what they did.

We have set out the details in our closing at paragraph 104, and paragraphs 107 to 110, but there is an inherent improbability about Ian Thomson's rendition of events. Now there is a possibility which one can discount, which is that Mike McCulloch instructed Dave Bottomley to close the circle by speaking to Lesley Paisley. This is refuted by both Lesley Paisley and David Bottomley.

Mrs Paisley was adamant that she had never spoken to David Bottomley about any understanding with Argos; she was not pressed or quizzed on this at all.

David Bottomley said that he only had very generalised discussions with his middle management counterparts, and that he was always referred back to buyers. He does not suggest that he was instructed by Mike McCulloch to close the circle. That was his oral evidence.

His information about the events going on at the coal face were derived from those who were at the coal face, not because he had direct experience of them himself. There is, therefore, no evidence suggesting that the circle was closed by reference to Lesley Paisley or David Bottomley.

So in conclusion, nothing in the meeting led Index to adjust its price policy. Index's price policy was set before the meeting; it was set when prices for spring/summer 1999 were decided upon. Whether Index continued with this policy would turn upon how Argos and Index interrelated in the spring/summer 1999 catalogues. When those catalogues were published, it was an observable fact as to whether or not the risk taken by both companies was a good risk.

We have set out the prices in paragraphs 64, 69 and 72 of our closing, which show the correlation of prices for Action Man and core games, and you will see the prices were significantly increased, and at RRP.

So no agreement was reached in the meeting, not a single Hasbro person said they threatened or coerced or pressurised Littlewoods into following RRPs. They all suggested that they recommended RRPs. Ian Thomson kept on repeatedly referring back to his Excel spreadsheets.

No spreadsheets were apparently attached to the presentation, and moreover, list prices were not fixed at the time of the presentation, nor were RRPs fixed.

In conclusion on the meeting, we submit, and I am parking the credibility of Ian Thomson for a little while, but there is simply no evidence to suggest there was any agreement at that meeting, and that the decision to push prices up had been taken weeks or months earlier; that was a risk which John McMahon had taken, and he was waiting at that point to see how it eventuated.

Now one then comes to the second part of my factual submission, which concerns the aftermath of that meeting. This starts at paragraph 107 of our closing submissions, which is headed "1999, Aftermath of the Meeting".

The next stage in the analysis concerns the autumn/winter 1999 catalogue, which, as you know, the OFT place a great deal of reliance upon, as being an abnormal change in market circumstances. With respect, that is complete nonsense. Given what had happened in spring/summer 1999, there was a high degree of inevitability that Littlewoods and Index would go out following the same policy in autumn/winter 1999. The risk had already been taken on an entirely unilateral basis, and whilst it is logical to suppose that there was some residual risk, because autumn/winter carried a greater value than spring/summer, as both parties explained to the tribunal, they were testing the water, and indeed, the paragraphs that Mr Brealey read to you this morning from, I think, pages 43 and 45 of Mr Duddy's evidence make it clear that he, in his view, was trying to test the waters with his pricing for spring/summer.

Unilaterally, he would push prices up, go out at higher prices nearer to RRPs, and see what happened. As it happens, John McMahon was taking the same decision, and they both came to very much the same result. The recommended RRP was used as the benchmark for setting prices, and there is no suggestion in the decision, nor can there be any suggestion on the facts, that the decisions taken in relation to their spring/summer prices were affected by any form of agreement.

So in the aftermath, both parties having seen what had happened, there was, we submit, a high degree of inevitability that the policy would simply be extended. Why would they not -- one has to remember that at this point in time they were both making a loss. These were not products upon which they made a reasonable margin. Why would Littlewoods seek to undercut, which would mean a diversion and a retraction from the policy it had embarked upon, risking initiating another price war with Argos, when its external consultants had explicitly advised it not to do that?

There would be no logic in John McMahon saying, "Let us now initiate a price war", when (a) they are after margin, (b) spring/summer 1999 indicates that they can get more margin if they continue with the policy, (c) if they undercut, they risk initiating a price war with Argos which they have been advised they cannot win.

THE CHAIRMAN: Mr Green, what I would like to ask about that part of the analysis is whether there is, as it were, something missing, which is that toys seem to have traditionally been low margin products, partly because they are viewed as very important for attracting footfall, as I believe it is called, into the store; and they are in that sense used, to some extent, as a promotional item, especially in the case of heavily promoted products that are advertised on TV at Christmas time, et cetera, et cetera.

What I did not really pick up in the Littlewoods evidence was any sort of balance between the desire to actually make a bit more money on toys, or certainly that part of the business, against the general strategy of trying to get as many people into the store as possible, which one might possibly have thought one might do by maintaining the prices at least slightly below Argos', with a view to getting that collateral benefit.

MR GREEN: I think there were four or five points to make. The first point is a point we have made in paragraph 126 of our closing, which is that the proposition is illogical: if the opportunity to undercut Argos had been so advantageous, it begs the question of why Index would have chosen to enter into a price fixing agreement.

In other words, the proposition is that you can be more rational by undercutting, and you are less rational by entering into an agreement, yet we entered into an agreement, because rationally, we thought that was the sensible thing to do.

One has to remember that the notion that these products were footfall generators is limited. Evidence was given that the FOB products, which could be very similar, a form of copycat product, would generate much, much higher margins, and one can overestimate the importance of these highly branded products. They were must-haves in the sense that they were desirable to have, but there was a constant battle about delisting the products, which was very much one of the motive forces leading Hasbro to introduce its initiative in 1998. There were threats of delisting, so they were not so powerful that they had to be had at all prices and in all circumstances.

THE CHAIRMAN: There was a certain amount of discussion about delisting at the margin, with Connect 4 and Battleships, but it is hard to imagine anybody wanting to delist some of the core games and Action Man; it is almost unimaginable.

MR GREEN: That may or may not be true, but one has to remember that if one is shown an important product that one is making a loss on, and you see an opportunity to make a profit on it, and you have a management who have said, "Listen, Index have been loss-making for years and frankly, unless we turn this around we might close Index", which was John McMahon's evidence, then it is a rational policy to take to push for margin.

What John McMahon gave by way of evidence to the tribunal was what happened: he had been told by the new owners, "You have to turn the ship around". The first thing you are bound to go out at at RRP are those products which are low margin/high advertising, you have more or less got to go out at RRP. If you are seeing an opportunity to get some margin on those, rather than just perpetuating the loss by selling more and more below cost, why on earth would you not do that? At the very least, that was a perfectly rational policy, even if it could be said that another strand to that might have been: why not take the advantage?

But you must remember that they had had external advice which said, "Do not initiate a price war, you will not win with a rejuvenated GUS in a price war". That would have been flatly contradictory to the external advice that John McMahon had had, which was, "Do not initiate a price war. In a price war, deep discounting will rebound upon you and you will lose more than Argos".

The only question is: was it rational for John McMahon to take that view? Answer: yes, he was advised to do so. It is the facts, he was under new management, they were threatening Index with closure or Draconian consequences, and he was being given an opportunity to make more money. He was told, "Do not initiate a price war".

It is perfectly reasonable for him to take the view that he did at that time. The OFT have a mountain to overcome if they are going to suggest that that was so irrational that extending the policy from spring/summer

1999 to autumn/winter 1999 is off the radar, and only explicable by reference to a cartel, or an arrangement of some description.

That, we submit, is a mountainous task which they do not even remotely come close to meeting. Index's policy was sensible, it was justified, and it was in accordance with their own decision-making; it cannot be explained by reference to any form of agreement.

Phil Riley's evidence to the tribunal I think was quite graphic. He was a buyer, he had been given his instructions about the margin he was required to obtain, and we have set out his evidence at paragraph 127:

"What I am telling you is that if I went lower than those prices, we would be precariously close to making -- in fact, we made no money on these lines, I am almost certain of that. We came precariously close to being stupid in what we were doing. I cannot make that any clearer. Now to suggest that by going lower we would somehow have all these other tangible benefits, you know, if we do not make any money these other benefits are no good to us."

THE CHAIRMAN: That does not quite meet the point, because if there is something in the point that toys are there to attract people into the shop, you do not make the money on toys, but you make it on something else.

MR GREEN: But one must not forget that both John McMahon
and Lesley Paisley were looking at a very wide range of
goods. John McMahon made this point I think
explicitly -- I have the reference somewhere. He was
looking at what they both describe in their statements
as a form of strategic undercutting on occasion; but
they would not necessarily just do it on toys. They
might do it, he said, on electrical goods. They might
do it on a range of goods.
THE CHAIRMAN: One would have thought that toys would be
an obvious thing to think about.
MR GREEN: It may be.
THE CHAIRMAN: But that never sort of surfaced in the
thinking, that is the puzzle. They never said, "Well,
we weighed up this against that, and we decided to go
for margin"; all they said was, "We went for margin".
MR GREEN: That is their thinking, that is their evidence.
To say it is irrational not occasionally to drop
10 pence, when they have been specifically advised, "Do
not do that, you will lose out in a price war" --
THE CHAIRMAN: I do not know that the question is whether it
is irrational or not, but simply trying to understand
how all these different forces play against each other.
MR GREEN: All I can say is that their evidence is their
evidence. This is the position as they saw it at the

time. With the benefit of hindsight, one might come back and say, "Well, you should have instructed an econometrician, who would have quantified the perceived benefit of dropping prices on the following eight products by 20p, you then measure that and set that off against the benefits of increased footfall that you might get". As Lesley Paisley said, her customers do not go in for big baskets. There is no great collateral or ripple effect on other products; you have not got the wealthiest customers. They go in to get the toy and not necessarily the other things. So the econometrician would have to work out that ripple effect, and then he would have to work out what the risk was of inspiring a price war, which would then spiral prices back to the pre-1998 situation, which the management had said was unsatisfactory.

Now perhaps with the benefit of hindsight they should have done that analysis; they did not. Our submission is that if they had, they would have come to the conclusion they did come to: their customers are not the wealthiest customers, they do not come in and buy an increased number of products simply because they see that Action Man is 25 or 30p cheaper. That is their understanding of the marketplace. Maybe that is as far as one can go on that point.

(4.00 pm)

We deal in our closing submissions first of all with the autumn/winter 1999 catalogue at paragraphs 111 to 129. We have set out the OFT's position in their skeleton at 112, and we say that that just simply is not the case. It does not stack up. When you actually look at the autumn/winter 1999 prices, one can see that -- and this is in paragraph 120 and paragraph 122: this illustrates the points which we have summarised at paragraphs 115 through to 119, which are, in brief, Littlewoods was simply continuing its policy of pricing at RRP, following on from spring/summer 1999; secondly, that they had seen the impact of the GUS takeover, and they had seen that the principle had worked, moving prices up to RRPs and fewer price points; and generally, the industry was moving towards 99 price points.

Therefore, in the table at 120 and 122, one sees that the move between spring/summer and autumn/winter was largely a move upwards of 4p: Buckaroo, 4p up; Cluedo, 4p up; Frustration, 4p up; same for Guess Who, Jenga, Kerplunk, Monopoly, Operation and Twister. And ditto for Action Man; they simply went from the 95 price point to the 99 price point, which was, in all cases, the RRP.

So either no change, if you treat the 4 point as irrelevant, or a very small but entirely logical change, given what had happened in spring/summer 1999.

Now this is a central pillar in the OFT's case. As I said right at the outset, they did not conduct any proper market analysis at the outset of this case; they did not even have the Hasbro RRPs until this litigation came along. They never bothered to get them, they never bothered to use their statutory powers to get those RRPs, they never bothered to do any research on the GUS takeover, they never bothered to go and get an investment analyst to talk about the perception of the takeover in the marketplace. They had never examined the question of margins. They had never done any form of the analysis that we have just been debating: what was a rational decision to undertake at the time.

All they did was drag a few people in, make a few notes of conversations, and jump to the conclusion there was a cartel.

One now moves to the question of the extension to other toys, which we have dealt with in paragraph 130 and onwards of our closing submissions. We have summarised in paragraph 130 the OFT's position as set out in the decision, we have given a precis of the relevant paragraphs.

As we say in paragraph 132 to paragraph 134, there was a presentation document internally at Hasbro, whereby this pre-existing initiative was extended.

What is interesting about the internal Hasbro document is that it is entirely consistent with the internal document at Stockley Park, in the sense that they say, "We extend the initiative", which was the price squeeze, and the retrospective rebates. That is how Neil Wilson explained it, and we have set out his evidence at paragraph 133.

He said in cross-examination:

"Hasbro's product portfolio was segmented into three different areas: boys' toys, games and what were called growth drivers, and different terms or rebates and discounts applied to the different areas.

"What the presentation document is saying is that the trading terms initiatives on games and Action Man have been rolled out to other products.

"There were listings rebates that were given in 1999 against Action Man and games. That was being extended to other brands within Hasbro in 2000.

"In 1999, the rebates applied to just one boys' toy, which was Action Man. The following year it was extended to Star Wars, Transformers, Micro Machines and Batman. The games rebate was extended to creative play, and the growth drivers were new for 2000, they were not in existence in 1999."

Hasbro's strategy of extending its two pronged pricing initiative, this is our submission at paragraph 134 -- one, raising list prices and two, offering rebates -- to a wider range of toys provides an explanation why retailers' prices on these products moved together in the autumn/winter catalogue.

A point which I wished to make at the outset was to put this extension into context. There is a table attached at tab 52 of the second volume of the witness statements that I would like you to have a look at, if you would, please.

The relevance of this table is as follows, that there are listed here approximately -- well, in excess of 20 products, none of which are referred to in the famous 18th May e-mail, or which are said to be subject to the extension agreement, but all of which involve going out at the RRP, and similarity of pricing.

We have been through this table, which I think covers all of the toy products, and we have excluded from the analysis anything which was core games, Action Man or extension. We have just looked to see what happened to the other prices.

What I will do, if I may, is quickly just identify

which other products harmonised --
THE CHAIRMAN: I am sorry, Mr Green, this table comes from what?
MR GREEN: It is an exhibit to Mrs Paisley's second witness statement, it was a document which we found and exhibited for the purpose of this litigation. It is produced off Index's internal system.
THE CHAIRMAN: So it is Littlewoods' catalogue prices.
MR GREEN: Yes. I will take you through them fairly quickly. Halfway down the first page, you will see Animorph Mega Figure, and halfway across the column, you will see £11.75 and £11.75. The first column is Littlewoods spring/summer 2000, and Argos spring/summer 2000.
If you go down about seven or eight items --
THE CHAIRMAN: The first two columns that are headed "2000" are slightly cut off in our version.
MR GREEN: If you like, because I have them written in --
THE CHAIRMAN: The first one is Littlewoods and the second one is Argos?
MR GREEN: The next one is Argos 1998. Littlewoods spring/summer 1998; Argos 1998; Littlewoods autumn/winter 1999; Argos autumn/winter 1999; Littlewoods spring/summer 2000; Argos spring/summer 2000; Littlewoods autumn/winter 2000; Argos

autumn/winter 2000.

Then you have Littlewoods spring/summer 2001; Argos spring/summer 2001; Littlewoods autumn/winter 2001; Argos autumn/winter 2001. That replicates itself on the subsequent pages.

THE CHAIRMAN: Yes.

MR GREEN: So the first one is Animorph Mega figures, £11.75 for both Littlewoods and Argos, not said to be subject to agreement, yet the same price at RRP.

The next, about six or seven items down, Art Attack Bin, £16.99, and had been so from Littlewoods autumn/winter 1999 through to Littlewoods spring/summer 2000.

At the bottom, Beast Machine Basic Figures, £4.95. And then Beast Machine Deluxe Figures, £9.75 and £9.95; a slight difference there.

Turning over, Big Brother, that is seven items down, for 2001, £19.99, both Littlewoods and Argos. Chuck My Talking Truck, just about halfway, £28.99, one gap, £28.49, Littlewoods autumn/winter 2000, so basically at the same price, apart from one.

Comm-Talk Reader, both £12.75 for spring/summer 2000, not said to be subject to an agreement, yet they got there.

Darth Maul at the bottom, £6.75, not said to be subject to an agreement, yet they got there.

On the next page, Discovering Mosaics; they were not available until 2001, but they got to £19.99 almost immediately at the RRP.

THE CHAIRMAN: Where do we see the RRPs?

MR GREEN: I will check that fact.

THE CHAIRMAN: Are these Hasbro products or somebody else's products?

MR GREEN: They are all Hasbro products. Can I come back to you on just the correlation to the RRP? Downfall, about 12 or 13 down, £14.75 in autumn/winter 1999, but then £9.99, both of them, autumn/winter 2000.

Dreamphone, £29.99, autumn/winter 2000. Towards the bottom, about two thirds of the way down, Falcon Master, £14.99, autumn/winter 2000. There are just a few more.

At the top of the next page we have the Grand Prix; Grand Prix at the top, £34.99 for 2001, when it became available, and it appears that it had been at £34.99 for Littlewoods in two previous catalogues, so it was a transparent price. Grand Prix Car, £34.99 in both catalogues in autumn/winter 2000. Grand Prix Driver, £8.99.

If one turns over, Moods, at the top; they got to the same price in 2001, but they had not been available before that.

Going to the next chunk of product down, in the middle, Movie Five Pack, £8.99 in autumn/winter 2000.

In the next chunk of product, fourth and sixth line down, Multi Constructor Set and Naboo Star Fighter; again, identical prices for autumn/winter 1999 going to spring/summer 2000.

THE CHAIRMAN: Just help me again with your explanation for the fact that all these prices are identical?

MR GREEN: Normal market forces: in other words, anything other than an agreement, because it is not suggested that any of this substantial correlation -- with a few exceptions, as one would expect to see, but it has to be anything other than an agreement. One can only say. Well, it is a combination of market forces.

THE CHAIRMAN: It would perhaps suggest a distinct reluctance to compete with each other on price.

MR GREEN: Well, if that is the case, then again it occurs through normal market forces. If you have observable catalogue prices coming out twice a year, and you know what your opposition priced at just a few months ago, and you also know they are chasing more margin, there is a high degree of probability of you saying, "Bingo, they are going at £19.99, they did so last time, why would they not go at £19.99 next time, in particular since we did? They will assume we will go out at that price, we will assume they go out at that price", and you do.

THE CHAIRMAN: So intelligent price leadership?

MR GREEN: Intelligent price leadership. One has to remember, I think there is an important point, which is whatever pent-up pressures arise in the marketplace, it can only manifest itself twice a year. There is very limited scope for leafleting or varying the price outside of the two catalogues.

THE CHAIRMAN: You say that is a very limited possibility?

MR GREEN: It appears to be limited. I mean, it happens, and it can have some effect, but the principal opportunity to fix your price in the mind of the public occurs twice a year, so that you are inevitably going to watch your competitors' reaction, their publicly available catalogue, and react to it, and you are unlikely to want to set your price by reference to a leafleting campaign which will be less effective after the event.

(4.15 pm)

Shall I very quickly just finish off -- because there are only, I think, five or six more items here, and just identify them for you.

On the next page at the top, Play Along Barney: spring/summer 2000, they went to £29.75, and they stayed there for two catalogues.

About halfway down, the delightfully sounding Professor Gangrene.

THE CHAIRMAN: Sorry, I have lost the good professor for a moment.

MR GREEN: Professor Gangrene, just above halfway down, £14.99 from spring/summer 2000 onwards.

Then you have Qui Gon Jinn, a few items down, £6.75, followed by Qui Gon Jinn Single Sabre at £19.99.

Two lines down from the next set of text, Ready to Play Set: not available until 2001, and then straight in at £29.99.

Then below that, Save the Tiger: £12.99 in spring/summer 2000, and for the two following catalogues, when it then became unavailable.

Mr Hoskins is apparently very keen on Puppy Racers, which is two below Professor Gangrene. Yes, I mean, there may have been more; these were ones we picked up fairly quickly.

Then there is just the very final page, on our quick run-through -- there may be others, there probably are, but we have been trying to exclude those which are said to be subject to the arrangement. True You, on the last page, £24.99 in 2001, which actually replicated the price in 1999.

Then Weakest Link, £19.99, coming in 2001. Then finally X Catcher, £12.99 in autumn/winter 2000.

Again, if the extension of the product range and the coalescence towards similar pricing can only have happened through an arrangement, how does one explain the significant number of additional toys, outside of the category of toys suggested to be subject to an arrangement?

It strongly suggests that what drove the coalescence of prices were market forces: very powerful and strong market forces that I have been engaged in describing to you this afternoon.

THE CHAIRMAN: Just very quickly glancing at these charts, without having had time really to absorb it, we again perhaps get the picture that for autumn/winter 1998, much more of a divergence of prices on most of these -- not all, but quite a number of examples of divergence. Sometimes Littlewoods lower, very often Argos lower.

MR GREEN: Yes, we would rely on that. I mean, our point is a limited one for autumn/winter 1998, which is that to some limited degree, you see coalescence; it is not entirely disparate, but that is to be expected, because autumn/winter 1998 prices would have been set in May/June, which would have been literally a month or two months after the GUS takeover. That does not give Argos, Index, Toys R Us, Woolworths or whoever an opportunity to really digest the implications of what is happening.

We have seen that within Index, that digestion process occurred in the Management Horizons report in September, and as Mr McMahon said, they needed to make prices go up quickly, and they did so for spring/summer 1999. So it is quite logical that you will see some degree of coalescence, but a much greater degree in spring/summer 1999.

If market forces drive this, this is precisely what one would expect to see. I think the Argos evidence was that GUS first affected prices in spring/summer 1999, I think Terry Duddy was quite plain about that.

So this is what we would say you would naturally expect to see with the sorts of market forces that we have seen operating on a market which is transparent, because the catalogue prices are there to be seen, it is all in the public domain. You have two opportunities a year to take the punt, and that pressure which builds up in between necessarily manifests itself on those limited occasions.

It is unlike the High Street, who can shift prices day by day, simply by sending someone in to change the ticket overnight.

THE CHAIRMAN: Yes.

MR GREEN: Would you like me to go on a bit today?
THE CHAIRMAN: Well, we do have to rise at 4.30 anyway. How are you getting on for time? I have the impression you have got on quite well.
MR GREEN: I am doing pretty well actually.
THE CHAIRMAN: But I do not want to hurry you unduly.
MR GREEN: We have set out in very considerable detail, with as many references as we could --
THE CHAIRMAN: It is all very helpful indeed for us.
MR GREEN: What I would prefer to do is to try and give you a broader picture than simply going through a lot of documents which we have already referred to, and a lot of transcript evidence. So I am making good progress, and I think I could probably very well be finished probably within an hour.

I do want, at the end of my submissions, to deal with what one might describe as the issue of dangerous discussions: what can you say, and how far can you get to the line, and when do you cross over the line? I think that is an important issue. I would like to spend a bit of time at the end of my submissions on that. But I am doing pretty well in terms of the evidence.

I am happy to spend six or seven minutes now cracking on?

THE CHAIRMAN: Why do we not go on for just another few minutes to make use of the time, if that is all right.

MR GREEN: Perhaps it is an appropriate moment to deal with my general observations about the credibility of Ian Thomson's evidence. We have set out some observations on that evidence in paragraphs 26 through to 37; again, we have put references to transcripts and documents in, but I would like to stand back from the minutiae and make some general observations about his evidence.

I think I have nine points to make. The first point is this: it is clear that his evidence was put together without assistance. This is a criticism I make of the evidence. He put it together without seeing the documents, he had not read the witness statements in any detail, he had not looked at prices or the catalogues.

For this reason, there is an innate unreliability in his evidence. In any normal case, whether before this tribunal or before the High Court, witnesses have access to documents to enable them to refresh their memories, and that process will generally be assisted by an experienced litigation solicitor, helping them by bringing to their attention relevant documents and the like, and that is particularly important when a witness is trying to get his or her mind around conversations which happened some years ago.

That is the first point. The second point is an express example of the problem Ian Thomson had in producing accurate evidence. We have summarised the detail in paragraph 29 of our closing. It was the first thing he dealt with, which was paragraphs 143 and 144 of his statement; you may recollect it. He corrected his statement as he went into the witness box.

The point that we make here is that when he wrote his statement in June 2003, he was utterly confident and clear in his own mind, apparently, that this particular product was not going to go out in the Argos catalogue, and as a result he had had a conversation with somebody, Gary Smith, that that person had freedom to go out at a price that they wished to go out at. He had a clear recollection of a conversation.

Having had an opportunity to simply check that fact, he realised that it could not have been true, and he not only accepted that it was false, he also accepted that his recollection of the conversation, and indeed many conversations, was inaccurate and imprecise. We have set out the cross-examination of him on that point at paragraph 31:

"I would have said it was probably safe to go out at £49.99, even though Argos were running the item, because

Charles Cooper told me it was okay.

"What you just said is 'it would have been said', you do not actually recollect what you actually said?

"Answer: Not specifically."

This was typical, and there are a large number of incidents which we have been able to analyse from his statement and in evidence where it simply cannot be correct, yet when he produced his statement, he appeared to have an implacable conviction that he was in fact correct. This was a striking example, and it was the first point he came into the witness box and dealt with.

The third point is that he said he had conversations with Andrea Gornall about extending the range, and I cross-examined him quite closely on this. We dealt with this in paragraphs 206 to 208 of our closing.

He said quite unequivocally that he had conversations with her about extending the range; I was waiting for him to say, "But, of course, I could not have done, because Andrea Gornall was on maternity leave at the time", yet he had a clear recollection of having conversations with her at a point in time which could only have been early 2000, just shortly prior to May. She was not in the office, she was on maternity leave from December of the previous year until September the following year.

Yet did he come back to my questions and say, "Well, she was not there, I could not have had those conversations"? No; we have set out in paragraphs 206 to 208 his evidence as to his conversations with Andrea Gornall. But he could not have had them. It is not suggested by the OFT that she was lying when she came into the witness box and said, "I was on maternity leave"; she just simply could not have had those conversations.

This is the evidence:

"It was along the lines I mentioned earlier, when we were talking about how successful the previous plans had been, and that we were extending our range of products. I was talking to her specifically, as I would have done to any of the buyers, with her or Alan Cowley, and I would have detailed out the product specifically. There were still no guarantees at the end of the day.

"The conversation to try to persuade Andrea or anyone else with regard to product would have been that we had been successful in dealing with some of our other ranges. We were looking to establish this. I have talked to the other buyers about it, and this is the product I want to look at. I would have singled out certain products. I would have talked about the fact that we could improve the profitability of the products if we went out at the retail price point and I would then have discussions to make sure this could happen back at Hasbro with my colleague."

His answer was in the hypothetical. He was quite clear he remembered speaking to Andrea, but he could not have done. It is an illustration of the fact that not having prepared his statement in the normal way, his recollection was simply faulty.

The fourth point about Ian Thomson concerns his approach to legal advice; we have dealt with this in paragraph 33 of the closing. As to this, his answers were either disingenuous or his memory was very defective. He says in paragraph 45 of his witness statement that he got legal comfort at the time of the Stockley Park presentation, but as you know, all the other witnesses say that no comfort could have been given, because the Stockley Park presentation generated a crisis over the conditional rebates, and Mike McCulloch was advised that they could not pursue that policy, and Neil Wilson was aware of it; Neil Wilson was quite clear that Ian Thomson would have known.

So there are two alternatives: either Ian Thomson's memory is defective, or his evidence was disingenuous. Either way it impacts on his reliability and credibility as a witness.

The fifth point is this: his evidence was littered with imprecision. We have given some examples at paragraph 35 of our closing. We have set out there 16 examples from the evidence and from his witness statements of areas where he either did not know or he was vague or he could not remember; these covered key events.

As Ms Demetriou reminds me, these 16 imprecisions relate only to that part of his evidence concerning the 1999 or late 1998 meeting.

Even in relation to that, he really could not pinpoint who said what, to whom, why, who initiated a conversation, what the reaction was. It was all after the event supposition.

This is important, since the notion of an agreement or a concerted practice rests upon a concurrence of wills, or the precise words said and the precise reaction given. That is the point I want to come back to, in terms of dangerous discussions, tomorrow. But in a case where legal consequences turn upon exactly what was said, and to whom and what the ramifications were, precision is critical.

The sixth point is that his evidence is completely uncorroborated. Mike McCulloch has not been called, yet

Mike McCulloch was critical to this case, for reasons which we have set out in detail in our closing at paragraphs 16 and 17.

Moreover, his evidence is in fact contradicted by Mike McCulloch. We submit that the OFT have not called Mike McCulloch, because his evidence would be unhelpful to their case. He said, "I did not discuss retail prices on legal advice", and we submit that is entirely credible and consistent.

The seventh point is that Ian Thomson's evidence is contradicted by all of the Littlewoods and Index witnesses. Their evidence was consistent throughout. It is an important part of our case when it comes to credibility that we put forward some 13 or 14 witness statements to the OFT as part of the administrative procedure; not a single one of our statements has been generated for this appeal.

The statements have stood the test of time, they have not been altered, and our witnesses have advanced the same point from the day upon which they were interviewed by the OFT to the date they went into the witness box.

Their evidence, and I will deal with that in greater detail tomorrow, is consistent, and it emphatically rejects Ian Thomson's evidence. Our evidence is consistent with the internal board minute that the tribunal saw of April 1998, with the external consultants' advice, with the results of the spring/summer 1999 catalogue.

The last two points are as follows, this is point 8 --

THE CHAIRMAN: You had better just give us the points, and then we will rise.

MR GREEN: The eighth point is that Ian Thomson's evidence is inconsistent with key documents and key events, and the three I would like to highlight are: his presentation to the Hasbro/Index team, whenever it was, late 1998/early 1999, in which he says he referred to retails; we say it is just incredible he could refer to retails. It is inconsistent with his own presentation, which does not refer to retails, it refers only to rebates, and inconsistent with the Stockley Park presentation.

Secondly, it is inconsistent with the position of Mike McCulloch in relation to legal advice, and the clear evidence that Mike McCulloch and Hasbro wanted to stay within the law.

Thirdly, and we think this is one of the more remarkable aspects of his evidence, was his disavowal of knowledge of the implications of the GUS takeover.

I mean, he must have been the only person in the industry who either did not notice it or who had not appreciated its significance.

The final point, and I will finish, if I may, with this final point, is that Ian Thomson says there was great nervousness in July 1999, when the autumn/winter catalogue was published, and you will see this from his witness statement, paragraphs 63 to 72. If you have five minutes overnight, if you would look at that, you will see there are some quite remarkable howlers.

The entire premise of Ian Thomson's statement is that there was a huge risk for autumn/winter 1999, but as you have seen, the risk had already been taken in autumn 1998, and both Argos and Index saw that it had been a worthwhile risk in January the following year, when the spring/summer catalogue came out.

So in terms of risk, the risk had been taken; so either Ian Thomson had a faulty recollection, or he had the most remarkably myopic view of life, because he was the only person who was oblivious to the implications of the spring/summer 1999 catalogue.

It is quite remarkable that he refers to the meeting in late 1998/early 1999 as giving rise to a risk as to the autumn/winter 1999 catalogue. It is simply impossible, because the discussions on any view preceded the spring/summer 1999 catalogue.

Again, when one looks at it, it just does not stack up. Those are the nine broad points about his evidence which I would like to make. That has certainly taken me --

THE CHAIRMAN: Thank you very much, Mr Green, for that. If you want to come back to any of those points in the morning, please do come back to them. 10.30 tomorrow.

(4.35 pm)

(Hearing adjourned until 10.30 am the following day)

INDEX