IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1014/1/1/03 - 1015/1/1/03

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27th January 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
THE HONOURABLE ANTONY LEWIS
MRS VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ARGOS LIMITED
(2) LITTLEWOODS LIMITED — Appellants

and

OFFICE OF FAIR TRADING — Respondent

Mr. Mark Brealey QC (instructed by Burges Salmon) appeared for Argos Limited.

Mr. Nicholas Green QC and Miss Marie Demetriou (instructed by DLA Piper Rudnick Gray Cary LLP) appeared for Littlewoods Limited.

Mr. Brian Doctor QC (instructed by the Director of Legal Services, the Office of Fair Trading) appeared for the Respondent.

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HEARING: PENALTY APPEAL

THE PRESIDENT: Good morning, Mr. Green.

MR. GREEN: I appear today with Miss Demetriou for Littlewoods; and Mr. Brealey QC appears for Argos, and Mr. Brian Doctor QC appears for the Office of Fair Trading.

Having discussed logistics with Mr. Brealey we propose to address you in the following way: I will deal with two core issues which cover both Littlewoods and Argos, namely non-discrimination, issue (a), and the appropriateness of the 10 per cent tariff, issue (b). Mr. Brealey is going to address you on product market but will only add such supplementary points as he sees fit in relation to the first two issues. Given time constraints and the fact that we have put other matters in writing, we will, save to answer questions from the Tribunal, leave other matters in writing.

THE PRESIDENT: That is very helpful, thank you.

MR. GREEN: There is one matter of clarification that I would like to state at the outset, which is that we are no longer pursuing one point in the Notice of Appeal. It is a submission set out in para.5.28 of the Notice of Appeal, and it relates to a submission that the OFT failed properly to differentiate between Littlewoods and Argos. We do not pursue that point.

With that introduction, I am going to develop what is going to take up the preponderant part of my submissions this morning, the submission that the Office of Fair Trading erred by discriminatory treatment between Hasbro on the one hand and Littlewoods and Argos on the other hand. It is, I think, important to identify the correct way to examine this issue. It is our submission that there are four analytical steps that one needs to go through to consider the problem. I have headed them A, B, C and D. A is as follows, and it is to ask the question, what is the source of the principle of non-discrimination? Issue B is a factual issue, whether there is, *prima facie*, differentiation between the penalties imposed on Hasbro on the one hand and on Littlewoods and Argos on the other hand. That is a factual issue, the answer to which is evident from the Decision itself. The third issue, issue C, is whether, if differentiation exists, its objectively justified. Issue D is to consider what flows in law from a finding that there is (a) a differentiation, which (b) is not objectively justified.

If I could start with the first part of the submission, which is A, the source of the principle. I would like to take you to the court of first instance's ruling in the *Tokai* case, which is tab 1 of our authorities bundle. This is the most illustration of a line of cases which makes the same point. It is useful because it sets out a number of different principles which bear upon the facts of this case. I would ask you to start, please, at para.219, which sets out the issue which the court at this stage of the case was concerned with, which was that the Commission, in deciding upon fines, had divided members of a cartel into several categories.

This had the consequence that a flat rate starting amount was fixed for all the undertakings in the same category. The court held that it was appropriate for the Commission to divide the applicants into categories, but the court then went on to say that, nonetheless, the Commission had to adhere to a principle of equal treatment or non-discrimination in the fine tuning of the allocation of undertakings into each category. This is the point which the court makes at para.219:

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

THE PRESIDENT: I do not think there is going to be much dispute on the existence of such a broad principle.

MR. GREEN: Indeed, it is the application of the principle. That was the broad principle, and it is apparent from para.220 of the judgment that the test which the Commission must also adhere to is that its delineation of the different categories or its treatment of the undertakings concerned must be coherent and objectively justified. Again, that is not a proposition which ought to be controversial.

The court applied those principles between paras.225 and 232 in deciding whether or not the treatment of individual undertakings was, according to the test in para.232, correct, coherent and non-discriminatory. Those were the three bench-marks against which the court assessed the approach of the European Commission. It follows therefore that we invite the Tribunal to take the same approach, which is to consider whether the approach of the Office of Fair Trading was (a) correct, (b) coherent and (c) non-discriminatory.

In this regard it is also important to see what the court said about reasons, as contained in the Decision under appeal. That is set out at para.250. There the court said – again, a proposition which I imagine is uncontroversial:

> "It is settled case-law that the statement of reasons on which an individual decision is based must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The assessment of the requirement to state reasons depends on the circumstances of each case. It is not necessary for the reasoning to go into all the relevant facts and points of law …"

THE PRESIDENT: This is still uncontroversial.

MR. GREEN: I imagine this is uncontroversial. I hope the following is uncontroversial, a proposition advanced at para.231 of the same judgment and, rather than read it to you, if I could summarise the proposition, which is that the Commission is not entitled to depart from its Guidelines if it purports to apply them, and it cannot depart from the reasoning in its Decision.

THE PRESIDENT: It says it is bound by the Rules in the Guidance, unless it provides express reasons for not following the Guidance.

MR. GREEN: Yes, if it wishes to depart from its Guidelines these need to be set out explicitly in the Decision. For your note, in the present case, the Office of Fair Trading purported to follow its Guidelines. That is set out in the Decision at para.375. Of course, they are statutorily bound to have regard to their Guidelines under s.38 of the Competition Act 1998. You will be aware that in this particular case the court reduced the fines of the Appellants so as to remove what the court perceived to be the element of discrimination; and they also did so in relation to the principle of proportionality.

I would like to, if I can, just hand up a document which the court saw last week which was prepared by Mr. Roth. I am handing it up now because other people will not have seen it. It is simply a summary of the *Tokai* case and the way in which the court in that case reduced the fines. This is unashamedly taken from Mr. Roth's summary of the case last week. I am handing it up and making it available because obviously the President has seen it before but no one else has. It demonstrates, on the facts of this particular case, how the court reduced fines very substantially by as much as 50 per cent on the facts of the case in order to eliminate discrimination.

As we have stated in our skeleton argument, the principle of non-discrimination applies not only at Community law level but it comes in under the Human Rights Act and it applies equally in the United Kingdom context. Again, we assume that is uncontroversial.

So much for the broad principle of non-discrimination. The next issue, issue B, is, was there *prima facie* discrimination or differentiation in treatment in the present case? Now, the Office of Fair Trading in the present case say that Hasbro on the one hand and Littlewoods and Argos on the other hand are not to be reviewed according to the principle of non-discrimination because they were not comparable companies at all, that they are apples and pears, and that, says the OFT, is because Hasbro was in a different category by virtue of it having been an applicant for leniency, where Argos and Littlewoods did not apply for leniency, and that is the differentiating factor.

THE PRESIDENT: I think it is a bit more than that, is it not? It is that Hasbro had given them the evidence that they needed to pursue the case to a successful conclusion.

MR. GREEN: Hasbro gave them some evidence, undoubtedly, because even under the leniency appeal they would have had to have satisfied those sorts of conditions in order to get any percentage reduction. The reason that is advanced in the skeleton argument as to why the parties are not comparable, and therefore not subject to the principle of non-discrimination, is because they say they are in a different category. Plainly, the advantage which Hasbro afforded to the OFT in the course of its investigation is something which they would have taken account of under mitigation or as part of leniency.

Just standing back from it and resorting to first principles, one needs to look at this question: was there differentiation of treatment? We know that outcome of the Decision was that Hasbro paid nothing, whereas they would have been paying £15.59 million in fines. Argos received a fine of £17.28 million, and Littlewoods a fine of £5.37 million. On the face of the Decision itself, Hasbro was treated differently to Littlewoods and Argos, and the difference, when you look at the logic of the Decision and the logic of the Decision alone, is that Hasbro was granted leniency as, in effect, a step six to the OFT's consideration of the question of fines.

THE PRESIDENT: Should we just see what they said in the Decision?

MR. GREEN: Yes. What I would like to do is to take the Decision and identify in relation to steps one through to six, as it were, where the OFT differentiated between the parties. In the bundles which the parties have prepared this is file 1, tab 8. This is the second Decision of 21st November. What I would like to do is to take you through each step and give you a summary. Step one, 10 per cent was imposed upon all three parties, so differentiation there. You will find that, for example, in para.387. Again, step two, which was duration, the same multiplier was applied in relation to all thee parties. I will give you the paragraph references, Hasbro, 396; Argos, 416; Littlewoods, 427 – a multiplier of 1.2 was applied to all three of the defendants. In relation to step three, which is adjustment for other factors, policies/deterrents, no increase was applied for any of the defendants. That is Hasbro, para.400; Argos, 418; and Littlewoods, 429. Differentiation occurred at step four aggravating the mitigating factors. For Hasbro the logic of the OFT's Decision is set out in 401 through to 408, and the position may be summarised as follows: Hasbro got an increase of 20 per cent for aggravating factors and a decrease of 10 per cent mitigating factors. They got an increase of 10 per cent for the involvement of senior executives, including directors, that is 402; they got a 10 per cent increase because they were an instigator, 403; they got a 10 per cent reduction because they

took swift remedial action, that is 405; and it is stated that they committed a breach intentionally, not negligently, 407.

So far as Argos is concerned, this is dealt with in paras.419 to 421. There were no aggravating factors, and there was a 10 per cent discount for co-operation during the investigation.

So far as Littlewoods is concerned, this 430 to 432, no aggravating factors; they were not an instigator, 430; no senior management involved, 430; co-operation during investigation leading to 10 per cent reduction, 431.

So it was at step four that the OFT differentiated between Hasbro on the one hand and Argos and Littlewoods on the other.

Step five is just the mathematical calculation of the statutory maximum, and the OFT simply applied that to all three.

Setting aside questions of leniency, on the OFT's own analysis, as set out in the Decision, both Argos and Littlewoods were on the less serious side of the assessment relative to Hasbro.

It also follows, as you know, because of the leniency consideration, Hasbro ended up on the less serious side to Argos and Littlewoods. But for the leniency position, Hasbro's fine, proportionately, relatively would have been higher because their infringement was more serious than that of Littlewoods and Argos.

When one looks at the logic of the OFT decision in relation to the steps applied one can see that they were being treated in a relative fashion step by step. The only differentiating factor was the grant of leniency to Hasbro. As to that, the only explanation of that in the Decision itself is set out in para.411. It simply says that Hasbro applied for and received 100 per cent leniency in respect of findings of infringement in its dealings with retailers. The penalty for Hasbro is therefore reduced to nil. That is therefore the sole paragraph in which the OFT describe the reduction of £15 million down to zero. So one concludes that there was differentiated treatment, and the differentiation was due to the leniency application and the grant leniency. But for that, Hasbro would have serious treatment than Littlewoods and Argos.

This brings me to issue C, which is whether or not the differentiation is objectively and properly justified. I set aside an analysis of what consequences in law are of a finding that there was no objective justification, that is issue D. In relation to this issue, was there objective justification, there are five main points that we make and, if I may, I will summarise them first of all. The first point is that Hasbro was the instigator, as set out in the Decision, and as such was not entitled to 100 per cent leniency on the basis of the ----

THE PRESIDENT: When you say "the instigator, as set out in the Decision", where do I find that?

MR. GREEN: Would you mind if I summarised them first and then take you to the paragraphs?

THE PRESIDENT: Fine, absolutely.

MR. GREEN: I emphasise the word "the" and not "an". Summary point two, Hasbro did not come forward before the investigation commenced. Point three, on the basis of the facts as set out in the Decision, Hasbro did not satisfy the condition of continuous and complete co-operation required for leniency of any sort. Point four, Hasbro did not admit liability in any material sense. Then, point five, the reasons given by the OFT are opaque, incorrect and inconsistent with the explanation now given the skeleton argument.

So the first point, Hasbro, the instigator. Let me show you what they said about all three parties. First of all, in no particular order, Littlewoods, para.430, sentence one:

"In its written representations Littlewoods claims that if there was an infringement it was not an instigator of the infringement."

Then there is a point about management level. Then the third sentence:

"The OFT accepts these arguments and therefore does not consider these aspects as aggravating factors."

That was the OFT's conclusion for Littlewoods.

For Argos, the paragraph of relevance is 419. They repeat what they say about Hasbro. At 419:

"The OFT finds that Hasbro was an instigator of the infringing agreements. While there is some evidence that Argos was an instigator there is no clear evidence against Argos in this respect and therefore it is not appropriate to make an adjustment to the penalty in respect of this aggravating factor."

One needs to analyse that obviously very closely, but before doing so can I just give you the Hasbro reference, 403:

"The OFT has considered the evidence regarding who should be considered to have been an instigator or the instigator of the infringing agreements. As noted in paragraph 296 above, it is the OFT's view that discussions between Hasbro and Argos and nobody and Littlewoods took place over a period of time and that there evolved an understanding (which the OFT can accept was partly influenced by a desire on the part of both Argos and Littlewoods to increase profitability on toys and games by moving towards RRPs) that both Argos and Littlewoods would agree to adhere to RRPs on Action Man and core games on the understanding that the other would do likewise. In the circumstances the OFT accepts it would be difficult to point to a

> particular meeting or discussion as the occasion when the infringing price-fixing agreements came into being. However, on any reading of the evidence the OFT believes that it is sufficiently persuasive for it to find that Hasbro acted as an instigator of the infringements. Therefore the OFT has decided to increase the amount of the penalty by 10 per cent."

So Hasbro is an instigator, Littlewoods is not, Argos is not an instigator on a proper analysis of 419. The most the OFT can say is that there was evidence that Argos instigated, but the OFT's clear conclusion is that there is no clear evidence against Argos in this respect.

You have seen that the OFT makes a point that they treated Hasbro as "an" instigator, not "the" instigator, and that is on the basis that Argos was also an instigator. That is not an analysis which is open to the OFT. The OFT at the stage of this decision had analysed each and every piece of the evidence in great detail, indeed twice. As of the date of the Decision the OFT was able to make detailed findings as to the existence of an infringement on the basis of evidence they had received from Hasbro employees, amongst others. As of the date of the Decision they were bound to conclude there was no clear evidence that Argos was an instigator. This is not a provisional finding, it is a definitive finding that the OFT could not in law find that Argos was an instigator. We submit that, as a matter of law, at the end of investigation if the OFT, perforce, must conclude that there is no clear evidence against Argos in this respect, then it is bound to conclude that it is not an instigator. It is not open to the OFT to say otherwise.

A finding at the culmination of an investigation that there is no probative evidence against Argos must translate into a finding of non-breach. By way of analogy, the same logic led the Tribunal to conclude, when analysing whether an OFT Decision was admissible as a decision in *Claymore*, that if the OFT comes to the end of an investigation and cannot prove that something exists then you draw a legal inference from that that in that case there was no infringement. The investigation is complete, the OFT cannot prove X, it follows that that is a finding of non-infringement.

The Office of Fair Trading relied upon this finding as a matter of law. They relied upon the finding that Argos was not an instigator and the OFT treated Argos in the same way as it did Littlewoods. It decided that there was no aggravating element and therefore no basis in law to increase the fine. So the finding by the OFT had legal consequences: no evidence proving that they were an instigator, therefore no legal basis for holding that you increase the fine. They differentiated in law between Hasbro and Argos in that regard.

In relation to this conclusion, it follows that they were not entitled to grant Hasbro 100 per cent immunity. I would like to invite you to look at the OFT Guidelines (file 2, tab 19). At the relevant time it was the old Guidance, OFT 423, March 2000. The relevant paragraphs are 3.4, 3.6 and 3.8. 3.4 is automatic entitlement to 100 per cent immunity, but in order to get 100 per cent automatic immunity you must come to the OFT first before an investigation is commenced, that is total immunity for the first to come forward before an investigation is commenced. It will probably save time if I highlight the salient conditions. The undertaking must be the first in. They must be the first in and also before the OFT has commenced an investigation, and can you please just note the words "of the undertakings involved", and moreover the undertaking must, and then there are four conditions set out. The first is to provide the Director with all information, documents and evidence available to it regarding the existence of the cartel; secondly, maintain continuous and complete co-operation throughout the investigation; thirdly, not have compelled another undertaking to take part in the cartel, and not have acted as the instigator or played the leading role in the cartel; then fourthly, refrained from further participation in the cartel from the time it discloses the cartel. So those are the conditions for automatic immunity. We submit in relation to "instigator", it cannot satisfy the condition because the Office of Fair Trading found that it was the instigator, though, as you know, the OFT says it was an instigator.

THE PRESIDENT: They found it was "an" instigator.

MR. GREEN: They found it was an instigator, but there were only three parties involved.

THE PRESIDENT: You are saying that if there are three people and you eliminate the other two, you are left with the singular and that means a "the" and not an "an"?

MR. GREEN: Absolutely, who else could it possibly be?

THE PRESIDENT: They saying, "Well, it is at least 'an' instigator, and we have not quite got the evidence against Argos".

MR. GREEN: No, it is not that they have not quite got the evidence, they have to come to the end of the investigation and they have no clear evidence.

THE PRESIDENT: Quite, no clear evidence, that is what they said.

MR. GREEN: At the end of investigation, if you have got no evidence you are not entitled to find that Argos is an instigator.

THE PRESIDENT: The fact that you cannot find that Argos is an instigator, it does not necessarily mean that you can find that Hasbro is "the" instigator.

MR. GREEN: I think that it necessarily follows that if there are only three parties in the frame and you exclude the other two, it is an exercise in semantics to say that they are "an" instigator.

They are "an" instigator, but they are also "the" instigator, because you have eliminated the other two and you cannot prove your case against them. It is not open to you to say, "At the end of the investigation we have not got any evidence, no clear evidence, none, against Argos, yet we are still going to hold in the back of our minds that they are an instigator for the purpose of" ----

THE PRESIDENT: You are not holding it against Argos, you are not making Hasbro's situation more difficult because of the lack of proof against Argos, put it that way.

MR. GREEN: The reason that we are here today is because Argos and Littlewoods consider they have been discriminated against. I am going to deal with the point, does it make any difference if they are "an" instigator as opposed to "the" instigator. The point is a very short one. If you are an instigator and you are an instigator in collusion with company B, and you are company A, it is not possible to say that that is a more benign situation than being a unilateral instigator. If you instigate in collusion, if A and B instigate and drag C in, that is worse than A unilaterally instigating and dragging B and C in. To do something in collusion with somebody else cannot logically be treated as a ground for differentiating A's position. One would have thought that A's position is worse because they do it in collusion rather than better. So the distinction between "the" and "an", we submit, if it is a distinction which could ever be justified on the basis of the Decision, is an incoherent and incorrect distinction to draw. If it was the OFT's finding, which we say it was not, that Argos was also an instigator, not only is it just inconsistent with Decision, but it cannot possibly make Hasbro's position any the better and cannot possibly entitle them to 100 per cent leniency. It is just not logical.

THE PRESIDENT: You say it is not logical anyway for the Guidance to place this emphasis on being "the" instigator?

MR. GREEN: We do not read the Guidance in that way. It certainly uses the definite article as opposed to the indefinite article, but they are still "an" instigator, and they are still "the" instigator, even if they are more than one. It is, we say, a stretched construction of the Guidelines and not one which makes common sense to read it as if you can suddenly give someone 100 per cent immunity because they instigate in collusion with somebody else, and that means they are one of two, that means they are okay, they can have 100 per cent immunity, whereas if they did it on their volition they cannot.

THE PRESIDENT: So we should read "the" as if it said "an"?

MR. GREEN: It can include "an", for purposive, common sense construction, bearing in mind what the Guidelines are intended to achieve, and even if the OFT was entitled, as a matter of pure language, to read a great deal into the use of the definitive article, guidelines are guidelines,

and the OFT, we would say, is not entitled, even if they found that Hasbro was only "an" instigator, to turn round and say, "Well, we can therefore give up on our Guidelines, we do not have to deny them 100 per cent immunity".

THE PRESIDENT: In a cartel case can you give me a theoretical example of someone who could properly be regarded as "the" instigator rather than "an" instigator? Is there ever going to be "the" instigator in a cartel case because it always takes two to tango on your argument?

MR. GREEN: You have a row of defendants in front of you, all of whom are guilty at this stage of full participation in a cartel which is serious. They are all naughty. There is no doubt about that. That is the position we are at. One of them will have started the ball rolling. The word "instigate" means to "initiate". Someone will have made the first phone call, someone will have organised it, someone will have been the driving force behind it, someone will have taken the initiative to set the ball rolling. The others, although guilty and naughty and deserving of punishment, followed suit, but the instigator deserves less sympathetic treatment because but for the instigator's instigation the cartel might never have risen. The facts of this case demonstrate that very starkly, because it was an initiative of a formal and structured nature by Hasbro which ultimately resulted in what became a crossing of the line from RRPs which are lawful into something which the Tribunal and the OFT found was unlawful.

We submit that, on the question of instigator, the OFT was not entitled to find that they were entitled to 100 per cent. That would go equally for the discretionary grant of immunity under para.3.6, because that is a parallel to 3.4, the only difference being where the applicant for leniency comes forward after an investigation has commenced. Other than that difference all the conditions for mandatory leniency have to be met, including that they are not either the instigator or played the leading role in the cartel. Playing the leading role is something which is intended to be commensurate with the word "instigator", and again we would submit that on the facts of this case Hasbro played the leading role. We submit there cannot be any doubt about that given the history and development and evolution of this unlawful agreement.

So on that basis and on the basis of the Decision as it is drafted, it was not open to the OFT to conclude that they were entitled to 100 immunity. The leniency programme on this limited basis cannot therefore be prayed in aid as an objective justification for the differentiated treatment between Argos and Littlewoods on the one hand and Hasbro on the other hand.

The next reason which we submit should have led the OFT to conclude that Hasbro was not entitled to immunity was that they did not come forward the investigation. This would

disentitle them from automatic leniency, but not discretionary leniency. It is the OFT's case that they were entitled to automatic leniency. This can be dealt with fairly briefly because it is really a question of fact and chronology. Hasbro came forward to the OFT after the OFT had conducted and commenced an investigation into retail price maintenance by Hasbro in relation to not only to its distributors but also to retailers. In order to accelerate my submissions I have done a short chronology of the dates with the reference in the bundle to the relevant proposition. (Same handed) I will take it by reference to the chronology and only show you such documents as I think are relevant to the point. The investigation started on 9th February 2001, and on 15th and 25th May 2001 the OFT carried out an on-site investigation under s.27 at Hasbro's premises in relation to both distributors and retailers and they sought information from Hasbro in relation not only to distributors but also to retailers. They then expanded their investigation and indeed in both Distribution Decision and in the two Decisions we are concerned with, they talk about their existing investigation being expanded to include other retailers.

THE PRESIDENT: Do we need to look at one or two of these documents?

MR. GREEN: I am going to show you one or two in a moment, yes, so you can see the trail. We, as you may have seen in correspondence, asked for copies for some of the documents which the OFT sent out. The OFT were good enough to remind us that, in fact, they had been available to us as they were on file ----

THE PRESIDENT: For a long time.

MR. GREEN: We only asked for copies of the request to Toys 'R Us, Woolworths and Tesco's – in other words, the major retailers, and rather than ask you to dig around in the files can I just show what the OFT has been good enough to provide us with overnight. (Same handed) What we have here are the 10th August statutory requests to Hasbro and to Tesco and to Toys 'R Us and to Woolworths. There is a longer list, but we thought the principal retailers were the most interesting. If one takes by way of example Toys 'R Us, who are towards the end of this bundle, this is a request of 10th August 2001, addressed to the Company Secretary. Under the heading "Subject matter and purpose of the investigation", the OFT state:

> "The Director General has reasonable grounds to suspect that the Chapter 1 prohibition has been informed by Hasbro UK Limited and certain of its distributors in the supply of toys and games in the United Kingdom. The purpose of this investigation is to obtain specified documents and specified information that relate to any matter relevant to the investigation in order to assist the Director General to determine whether the Chapter 1 prohibition has been infringed."

On the next page under the heading "Production of specified documents" they are asked to supply the Director General with copies specified or described below. The categories are two-fold:

> "1. Please supply any documents created in the last five years that relate to the pricing or discounting of Hasbro products (… [to include] agreements letters, memos, e-mails and notes of meetings and exclude invoices).
>
> "2. Please supply all documents created in the last five years that relate to discontinuing supplies of Hasbro products for any reason, whether at your instigation or by your supplier (… [to include] agreements, letters, memos, e-mails and notes of meetings …)."

Then the more specific information required was as to the details of the products sold by Toys 'R Us which were Hasbro products and those questions are listed in 3 through to 7.

Similar requests were sent to a range of other retailers including Tesco and Woolworths. The Decisions themselves refer to an investigation into distributors and others, and those are the references in the second box of our chronology. CB2 is core bundle 2, which is the Distribution Agreement Decision – tab 18 of file 2 of our core bundle. This is the bundle that we provided for the purposes of this hearing. At para.11 of this Decision, p.4 of the internal numbering, under the heading "Investigation", the OFT first record that they received a copy of a circular sent by Youngsters on 9th February 2001 which contained a particular term. It is then explained that this gave the Director reasonable grounds to suspect that Hasbro was engaged in RPM. They say that they carried out an investigation, and that the agreements between Hasbro and the distributors infringed Chapter 1. Following the receipt of the information the OFT carried out on site investigations under s.27(3) on 15th and 25th May at Hasbro's premises. An on the site investigation was also carried out at the premises of Youngsters on 15th May. During these visits relevant documents, including documents of relevant agreements between Hasbro and distributors were obtained using the powers under s.27. The Office sent notices under s.26 to Hasbro, the distributors and a number of retailers seeking information. Then on 17th September Hasbro made an application under the OFT leniency arrangement. On 20th September, three days later, partial leniency of 45 per cent was agreed in respect of any infringement arising from Hasbro's agreements with wholesalers. Between 10th and 15th October OFT officials interviewed 11 Hasbro employees. The interviews were given voluntarily by the employees concerned and were arranged by Hasbro as part of its commitment to co-operate.

THE PRESIDENT: I have a vague memory in the back of my mind, Mr. Green, from the Distributors' case, and I will be corrected if I am wrong, that what was going on here was that some of these wholesalers had started to supply some of these retailers, the Tesco's and Woolworths of this world, which was perhaps why the Distributors' investigation involved asking certain questions of certain retailers.

MR. GREEN: It is possible, I have not seen there was that spill-over, but that is possible. The investigation was expanded to include retailers, and as you have you seen the questions asked of the major retailers – for example, Toys 'R Us – were, "What is your relationship with Hasbro, not just in relation to agreements, but we want to see letters, emails", and so on and so forth.

The OFT also described the position in the decisions in issue in this case, in both of the Decisions, including the February Decision and the November Decision. It is also para.11 fortuitously – this is tab 7 of core bundle 1, para.11. At para.11 of the very first Decision, tab 7, the OFT state that they started an investigation into price-fixing by Hasbro in March 2001. They looked first into possible price-fixing and/or RPM by Hasbro and a number of distributors. Then in the next sentence:

> "As part of the process of investigating the distributors' case information was sought from Hasbro about its dealings with retailers."

Then if you look at the last sentence, after they got this information about retailers:

> "The investigation was then expanded to look at possible price-fixing agreements between Hasbro and retailers, in particular Argos and Littlewoods."

Then the same terminology – and of course if Mr. Doctor wishes you to read the intervening words, please do – is found in para.11 of the November Decision, which is tab 8, p.11 of the internal numbering. It is more or less identical wording. So Hasbro applied for leniency in September but only after the OFT had sent out formal requests for information about Hasbro's relationships with major retailers, including Toys 'R Us, Woolworths, Tesco. As you know, Toys 'R Us, for example, were major competitors of both Littlewoods and Argos.

We submit, therefore, that Hasbro was not entitled to automatic leniency. At the very most, it was entitled to discretionary leniency under 3.6, but it was not entitled to leniency under 3.4. Moreover, it is important that under 3.4 of the Guidelines the issue of timing is measured, according to the guidelines, by whether the OFT has commenced an investigation – and I am looking at lines 3 and 4 of para.3.4 – of the undertakings involved. Quite clearly, it is common ground that the OFT had commenced its investigation of Hasbro, and also clear that

they had commenced their investigation of Hasbro and retailers before the leniency application was made.

Finally on this point, the suggestion that Hasbro came forward before the retail investigation but after the distribution investigation had begun is a distinction without a difference. There is no clear distinction between the distribution and the retail cases. Both were concerned with the same products, both were concerned with attempts to control retail prices, the same individuals within Hasbro were concerned with both initiatives, the OFT investigation covered both retail and distribution, Hasbro's witnesses were interviewed about both at the same time. Economically and legally it is not a realistic distinction to draw between retail and distribution.

So that is the second reason why we submit that Hasbro was not entitled to leniency, and the second reason why we say that the differentiation was not objectively justified.

The third reason why we say that this differentiation was not objectively justified was because Hasbro did not, on the basis of the OFT's case, which I take as read, co-operate in a continuous and complete manner. As to this, the context is, as you have seen from the chronology, that the OFT granted access to the leniency programme almost immediately upon the application. There were no conditions attached to entry into the scheme, save only that the OFT recognised that Hasbro had provided some documents, a small clip of key emails. A small number of key emails were handed to the OFT. Hasbro did not have to provide anything else as a condition of entry. For example, they were not interviewed, their employees were not quizzed, they did not have to provide witness statements, they were allowed into the scheme in a matter of days. They therefore had to comply fully with the conditions for the leniency agreements. The leniency agreements themselves are included in the bundle at ----

THE PRESIDENT: At some point, Mr. Green – this is going back to a point you have just been making, but do not let me take you out of your stride, I will just say it in case anyone wants to come back to it – 3.10 and 3.11 of the old Guidance at tab 19 in your bundle clearly envisaged the possibility of an investigation by the Director of activities in one market leading to a separate cartel in another market.

MR. GREEN: Yes, that was not the basis of this Decision, and of course the Office of Fair Trading's of "product market" is in relation to the toys. So it would be the same. It is not suggested by the OFT that this was leniency plus in any way.

THE PRESIDENT: Thank you.

MR. GREEN: Could we go to tab 14 of bundle 2, sub-tab 2. This was the leniency agreement in the present case and the conditions which Hasbro had to adhere to under s.3(b) included

continuous and complete co-operation throughout the investigation. This includes, but is not limited to, and then there are six matters referred to. Those are illustrations of the duty to maintain continuous and complete co-operation throughout the investigation. It is relevant that in sub-para.(3) Hasbro is required to secure the complete and truthful of its current and former directors, officers, employees, agents, encouraging persons voluntarily to provide the OFT with information. You will see also in para.7 of the agreement that regardless of what happens in the course of the leniency investigation, if it is revoked, all information in the hands of the OFT remains available to the OFT and can be used to facilitate its investigation.

In the present case the point we make is that the OFT, when they came to adopt their first Decision, concluded that key employees of Hasbro had been misleading them and had not been truthful. The two most significant examples are Mr. McCullough and Mr. Cooper. One can pick up the OFT's position from their Defence, which replicates very much what is in the Decision. Their Defence is tab 23, paras.69 and 70, which are pp.38 and 41 of the internal numbering of the Defence. You will recollect that Mr. McCullough was a very senior employee within Hasbro. He was head of UK sales and marketing. He was, as the OFT put it in para.70, the author of the pricing initiative, and they make the point in para.70.1 through to 70.11 that Mr. McCullough made a number of statements which were designed to indicate that there was no agreement and the OFT rejected that. Their conclusion, which is the last part of 70.11, says:

> "The OFT has interviewed Mr. McCullough and they reject his evidence that there is no agreement or concerted practice."

They set out in these paragraphs the reasons why they rejected his evidence to them. He was one of the most senior of the Hasbro employees, a person who the OFT found had full and complete knowledge of the agreement from its inception, and yet they rejected his evidence. The same applies in relation to Mr. Cooper, which they deal with at para.69. He took over from Mr. Neil Wilson. He was Hasbro's account manager for Argos from October 2000, after the arrangements had come into force. He gave evidence that there was no agreement but the OFT then says, 69.3:

> "The OFT did not believe him when he said he had simply presented Hasbro's RRPs to Argos and then waited to see their catalogue three months later."

A proposition they describe in the next few words as, in effect, "absurd".

So two employees, therefore, one very senior and pivotal to the case, Mr. McCullough, and one less senior but important in relation to Argos, were as of the date of the Decision not believed. From the OFT's perspective the conflicting evidence which arose

on the part of senior Hasbro employees clearly engendered a clash of evidence and added to the complexity of the OFT's case. The OFT does not address in its Decision or anywhere where or how the spirit and intent or the conditions of leniency can be sustained in view of its clearly expressed position that it did not believe key Hasbro employees who, when they gave to the OFT, were clearly acting as employees of Hasbro with authority from Hasbro.

The fourth reason why we say that the differentiation of treatment was not objectively justified was because, contrary to the OFT's suggestion in the skeleton argument, it is very far from clear that Hasbro ever materially admitted liability or responsibility. One could see this from Hasbro's reply to Rule 14, which has to be viewed as their highest level statement on the matter. They did not elaborate upon this at the oral hearing. At the oral hearing they made submissions about the leniency programme but did not go what they admitted and what they did not admit. This is bundle 2, tab 15, and there is between paras.4.1 and 8.5 of this document – so over the course of eight pages of the document – a breakdown of what they admit and do not admit. I will pick up the highlights only because the conclusion that one arrives at is that, when one systematically reviews the extent of the admissions and the non-admissions, the non-admissions predominate. In 4.1 the high water mark of the admissions is set out, and if it had been left there then one might have accepted that it was a fairly candid admission, but what follows from 4.1 rose back very substantially. In 4.1 Hasbro says:

> "Hasbro accepts that it assisted Argos and Littlewoods to gain reassurance from each other that each intended to price certain Hasbro products at the recommended retail prices. Hasbro was to that extent only involved in a breach of the Chapter 1 prohibition. It does not accept the wider findings of the Director set out in the Notice."

It then goes on to explain what it means by that very qualified acceptance. They rely throughout on the evidence of Mr. McCullough and Mr. Cooper to deny the existence of an agreement or, at the very least, justify non-admission. Paragraph 5.1:

> "Hasbro does not accept that the Director can, on the evidence, conclude or can, from the facts infer that Hasbro entered into an overall agreement and/or concerted practice with Argos or Littlewoods to fix the price of Hasbro toys and games or that Hasbro entered into bilateral agreements with Argos or Littlewoods to do so."

They make a limited admission that they assisted:

> "… Argos and Littlewoods to gain reassurance from each other that each intended to price certain Hasbro products at RRP. Hasbro was, to that extent only, involved in a breach of the Chapter 1 prohibition. The representation set out by the Director is not

able to prove from the evidence or infer from the facts that (a) Hasbro's pricing initiative involved Hasbro in somehow fixing the RRPs of certain Hasbro with Argos or Littlewoods; (b) the calculation or setting of Hasbro's RRPs was unlawful. Hasbro at all times calculated and set its RRPs so as to ensure they were competitive and represented value for money for consumers. Hasbro's monitoring of the retail market in relation to its pricing initiative was unlawful. These representations considered the evidence relied on by the Director in making his proposed infringement finding in the order set out in the Notice and showed that the Director's finding is not proved by the evidence and cannot be inferred from the facts."

In section 6 they deal with the pricing initiative. They conclude – and I will not read it to you – in para.6.14 that the pricing initiative was lawful and the Director cannot, on the evidence, conclude or infer that the pricing initiative was other than lawful. They rely on the evidence of, amongst others, Mr. McCullough at paras.6.10 and 6.12.

In relation to the exchange of information they state in para.6.16 that there was an exchange of information but the Rule 14 is incorrect and misleading – that is in the second sentence. They deny in para.6.17 that Hasbro was an initiator or an instigator. Between 6.19 and 6.24 they deny the essential allegation contained in Rule 14, and in 6.24 they submit that there is no evidence on which the Director can rely from which he concluded that it was Hasbro's initiative to reassure Argos that Littlewoods was committed to RRPs.

In relation to extending arrangements in a limited products they admit in the last sentence of 6.26:

"On the basis of the evidence therefore the Director is entitled to conclude only that Hasbro had a facilitating role."

They infer throughout the whole of this document that in some way emanated from Littlewoods and Argos.

In relation to monitoring they make no admissions, and one sees that in 6.31:

"Accordingly, Hasbro submits that the issue of the monitoring by Hasbro of retail prices does not and should not form part of any proposed infringement decision."

In relation to an overall agreement there is what is properly construed as a denial in 7.2(a):

"As submitted above, the pricing initiative did not involve the maintenance of retail prices on Hasbro's products covered by the initiative."

Then their conclusion in 8.5:

"The only conclusion that can be drawn from the evidence in the Notice is that any breach of the Chapter 1 prohibition occurred when Argos and Littlewoods sought

reassurance on each other's pricing intentions in relation to products covered by Hasbro's pricing initiative."

The conclusion therefore is that Hasbro denied very substantial parts of the Rule 14. The admissions they made were very limited. This was not a case where the admission was substantial but they queried minor details. The denials went to the heart of the Rule 14. We submit – though I confess it is not explicit in the leniency programme – that it is implicit that an applicant for leniency must, at the very least, make a substantial admission. One can see that there may be details to be tied up. It is not stated that it is a condition of leniency that there must be even an admission, but on the facts of this case there was a substantial denial. That, we submit, is another reason why Hasbro's preferential treatment by way of 100 per cent immunity was not objectively justified.

The fifth and final reason why we say there was no objective justification concerns the inadequacy of the reasons behind the OFT Decision. From the chronology you will see that the Decision finding that Hasbro was an instigator was taken just under two weeks after the OFT had written to Hasbro informing it that it would get 100 per cent immunity. It is worth looking at the letter which the OFT sent to Hasbro, which is core bundle 2, tab 14, sub-tab 11. It is a letter of 6th February 2003. The letter states that it replaces a letter of 5th February, which is at the previous tab, 10. This previous letter – again, no reasons for the OFT's decision – simply states:

> "Further to my letter of 12th December 2002 acknowledging your letter of 27th November 2002 … the Director General has decided that he will not withdraw the full immunity from penalty contained in my letter of 18th September ..."

On 6th February they replace that letter with the following:

> "Further to my letter of 12th December 2002 acknowledging your letter of 27th November 2002, I am writing to inform you that the Director General has decided that he will not withdraw the full immunity from penalty contained in my letter of 18th September 2001 to you. For the avoidance of doubt, you should however be aware that the Director General has not yet made a final decision in relation to the alleged infringement. If he should make an infringement decision in this case, although no penalty will be imposed on your client, Hasbro, this confirmation of the grant of immunity from penalty does not alter the position of your client as regards any action for damages that may be brought against it based on the finding in any such decision."

So no reasons had been given in either of those two letters as to why there was a reversal of the OFT's earlier position which is that Hasbro was not entitled to 100 per cent, but was only entitled, at the maximum, to 50 per cent.

The reason given by the OFT in the skeleton argument in this case is that the Decision does not reveal the true reasons for the OFT's position.

THE PRESIDENT: Do you want to take us back to the previous letters where they say they are only entitled to 50 per cent?

MR. GREEN: Let me do that. I think possibly the starting point is at tab 4, which is a letter of 1st May 2002 from the OFT to Hasbro's solicitors, Denton Wilde Sapte. In paras.2 and 3 they refer to the fact that there is a condition of leniency which is that they are not an instigator or played the leading role. Then para.3:

> "I am writing to inform you that it is now the view of the DTFT that the applicant has not complied with condition (c). The evidence we have gathered points clearly to the applicant being the instigator being the instigator of and having played the leading role in the cartel activities in question and contains no suggestion that any other undertaking involved in these activities should be looked on as an instigator."

They, therefore, ask for written representations. The offer of written representations was taken up in the next letter, tab 7. We have a letter of 11th November 2002 ----

THE PRESIDENT: Still of the view.

MR. GREEN: Still of the view of the facts contains in the second and third. They then refer to various pieces of evidence which they propose to rely upon and they say in the final paragraph that they get 50 per cent.

Hasbro then make submissions which were submitted on 27th November at tab 9, and they then draw the distinction between "the" instigator and "an" instigator, which you will see is made in the fourth and fifth paragraphs on the first page.

THE PRESIDENT: Yes.

MR. GREEN: Miss Demetriou points out – perhaps I can give you this for your reference – that before this point Hasbro had already made the point that there was, in their view, a distinction between "the" and "an" at the oral hearing on 16th July 2002, tab 17, p.12 of the internal numbering, lines 22 through to 38. The OFT nonetheless, having heard that submission, have rejected it. They then reiterated that submission in this letter, there is a distinction between "the" and "an", and then on the next page they deny that Hasbro was the instigator of the cartel.

It is clear from the submissions made from Hasbro here that the OFT did not accept many of these submissions. The say in sub-para.(1) on the second page that all the evidence demonstrates is that Hasbro was the instigator of a pricing initiative for recommending retail prices but, in the second sentence, there is no evidence to suggest that this pricing initiative was unlawful, including no evidence on Hasbro's part to compel conduct, and no evidence to show Hasbro had any ability to make Argos or Littlewoods charge its recommended retail prices. It is not part of the DG's case on retail infringements set out in the Rule 14 Notice. Economic power was with Argos and Littlewoods and they say that Argos and Littlewoods have made representations to this effect. That was not a proposition with the OFT ultimately accepted. In relation to sub-para.(2) they say that with regard to the subsequent distinct and unlawful cartel involving exchange of pricing of Argos and Littlewoods the evidence identified in the letter simply does not show that Hasbro was the instigator of that cartel and that it is not possible to conclude from the evidence who originally suggested the information exchange, Hasbro, Argos or Littlewoods. The evidence lends itself, if anything, to the inference that Argos, as the party that publicly stated its concern to increase its margin on Hasbro and would have benefited financially from increase in margin was the instigator of the cartel, but equally it may simply not be correct on the evidence to describe any one parties as "the" instigator as opposed to "an" instigator, and as stated it is not sufficient for the Director General to find that Hasbro was the instigator on the basis that he cannot prove that anybody else was an instigator. He must have strong compelling evidence that Hasbro was "the" instigator, which he does not have. That was an argument which we submit, on the true construction of the Decision, does not wash and cannot be justified from the Decision as it is drafted, because the OFT found that there was no clear at the end of the investigation that Argos was even "an" instigator.

Then thirdly, even if, on the evidence, a party could fairly be identified as "the" instigator of the cartel much of the evidence on which the DG appears to rely relates to the period before the Act came into force. By definition, a party can only instigate an arrangement at the time of the introduction of that arrangement. They go on to develop that point which was a point which the OFT rejected.

THE PRESIDENT: When you say the OFT rejected it, what do you mean by that?

MR. GREEN: For the simple reason that if it was correct, the OFT could not have found that even Hasbro was an instigator because Hasbro's conduct would have pre-dated the coming into force of the Act, and they are taking a legal point that for that reason it would not be justified to make a finding under the Act that they were "an" instigator. By definition, since the OFT

found they were even "an" instigator they must have rejected the submission of law which is contained here. This, if it is correct, is a complete answer.

THE PRESIDENT: Yes, that does raise quite an interesting point, does it not, as to the time we are talking about. Can you deny somebody immunity for doing something that was lawful at the time he did it? If the facts upon which you rely for instigation occurred before the Act came into force can you take his leniency away for him for that reason? That is the first point. The second point is, in the particular light of the Tribunal's Judgment and the Decision, the second Decision, what exactly is "the cartel" we are talking about here?

MR. GREEN: Taking those in turn and dealing with the latter first, the cartel, the Tribunal has effectively upheld the OFT Decision without really much adumbration, and the "cartel" was the conduct by Hasbro, its initiative, to persuade retailers to adhere to its RRPs and then to extend the range of products.

THE PRESIDENT: That occurred at the end of 1998 the beginning of 1999.

MR. GREEN: The initiative was initiated in 1998 but it was continued throughout 1999, 2000 and 2001, so the OFT found and so the Tribunal found, not least, for example, the extension which was referred to as a great initiative. The famous emails demonstrate that the initiative was ----

THE PRESIDENT: The extension certainly took place afterwards.

MR. GREEN: Ongoing initiative and recognised as such within Hasbro after the cut-off date for the coming into force of the Act. Highlighting the extension of the product range demonstrated that Hasbro was the leading player. It was they who initiated that and sought to extend the initiative.

Those were the reasons advanced by Denton Wilde Sapte to the OFT. They included a fairly detailed annexe which included evidence from, amongst others, Mike McCullough. The OFT then, some two months later, two and a half months later, adopted the Decision that it did, though without giving any reasons and certainly not endorsing Denton Wilde Sapte's logic as set out in the Decision. Denton Wilde Sapte's logic was that Argos was an instigator, and you have seen that the OFT could not accept that because they formally recorded that there was no clear evidence against Argos in that respect.

The actual decision which was taken just a couple of weeks after the decision is contained in the 6th February letter – I have taken you to it already and you have seen what they have said about who was and who was not an instigator. We are left in the uncomfortable position of not having a clear statement of reasons from the OFT as to why they did what they did. The explanation given in the skeleton argument is effectively set out at para.72, p.35 of the skeleton argument, tab 3. They set out our submissions and in sub-para.(d) they say:

"The OFT's conclusions on the precise role of Hasbro as instigator or not as expressed in the Decision were not its final view on the subject of its role for the purpose of the leniency programme. Those views were formed at the Rule 14 stage."

Just pausing there, that, with respect, cannot be right. The Rule 14 was issued some seven or eight months before the Decision, and we have seen that the view which the OFT formed at that point was that Hasbro was an instigator and indeed was only entitled to 50 per cent. The view as set out in the Decision is now suggested not to be its final or definitive view. I have made submissions about the fact that you are bound by the Decision and really it is inappropriate to start looking at what or may not have occurred behind the formal position set out in the Decision. They then say:

"Subsequently there was correspondence between Hasbro and the OFT and submissions were made by counsel on its behalf, all of which the Appellants have seen, which shows there were further developments in the view of the OFT."

They then refer to the correspondence. They say:

"It can be seen from the correspondence that the OFT originally formed the view that Hasbro was 'the' instigator but it revised its opinion in the light of all the facts and submissions made by Hasbro."

Then they summarise the points made by Hasbro. It is stated there that they revised their opinion in the light of all the facts and the submissions made by Hasbro. We do not know that to be so because nowhere is that actually stated to be the case. The only place that we have any explanation of the OFT's position is in its Decision. The two letters that you have seen do not set out the OFT's thinking and we do submit that it is quite wrong for the OFT to invite you to go behind the logic in the Decision. It really is a very dangerous precedent to set. Ultimately the OFT decided that Hasbro did satisfy the conditions, including 3.4(c), on the basis that Hasbro was not shown by clear and compelling evidence to be "the" instigator. This is a matter for the Decision of the OFT. We submit that that is inconsistent with the proper reading of the Decision itself, that it is really an excessively nuance position to take about Argos which brings them to this conclusion and it is not a proposition about Argos which we say the OFT is entitled to arrive at when looked by reference to the language of the Decision.

THE PRESIDENT: Is any of this in the Defence, Mr. Green, or is this really the first time it has popped up?

MR. GREEN: This is the first time it has appeared. The Defence on this point ----

THE PRESIDENT: Can we see what the Defence says.

MR. GREEN: It is tab 23. There is a conclusion in paras.145 and 146. The deal with the grant of leniency to Hasbro at para.96 and following. There is no reference to the distinction between "the" and "an". They simply say that the Applicants and Hasbro are not in a comparable situation for the purpose of the principle of non-discrimination; and they simply say in para.105 that Hasbro applied for and received 100 per cent leniency in respect of findings of infringement in its dealings with retailers, see 347 of the Decision, the Applicants did not. There is no expression of the distinction between "the" or "an" whatsoever. They just do not deal with it.

We had raised in our Notice of Application what appeared to us to be a relevant point, namely that Hasbro was the instigator and was not entitled to immunity. It was raised in our Appeal at the outset.

We do also submit that the events which happened between Hasbro's submissions on "the" and "an" and the OFT Decision raised serious questions and give the appearance at the very least of the OFT having taken into consideration an irrelevant matter. You have seen from the skeleton argument that the OFT object to us making this point, but it is, in our submission, a valid point to make when there is no other reason set out in the Decision for the position adopted by the OFT. You will recollect that on 21st January 2003 Hasbro applied for an extension of time for appealing the Distribution Decision. It did so on the basis that the two Decisions were linked and that its internal commercial Decision whether to appeal the Distribution Penalty would be taken once it knew what level of fine it was going to get in the Retailer Decision.

THE PRESIDENT: You had better take us to that.

MR. GREEN: I will do that. The extension of time Judgment is in the authorities bundle at tab 3.

THE PRESIDENT: I think there was a transcript as well, was there not?

MR. GREEN: We have the transcript of the next hearing, but we do not have the transcript of the application to extend time. That is not on the website. We have your Judgment in relation to the application to extend time. There was then an application to withdraw the Appeal. We have the transcript of that, and we have the Judgment on that.

THE PRESIDENT: So the transcript of the hearing of the extension of time is not on the website?

MR. GREEN: It is not on the website.

THE PRESIDENT: That surprises me slightly.

MR. GREEN: It is possible, and I am speculating, that the question of confidentiality was raised because at the time Hasbro might have been sensitive about that, but I do not know if that is the reason. The important point is that you recorded in Judgment Hasbro's arguments, first

that the two investigations into retail and distribution were intimately intertwined. That is p.3, lines 9 to 26.

THE PRESIDENT: This looks like an *extempore* judgment.

MR. GREEN: Yes, I think it was. I think the oral argument was on the 24th and the Judgment was on the 24th. I will be corrected if I am wrong. You record on p.3 the argument that the two investigations were intertwined. As I have said, that is lines 9 through to 26.

THE PRESIDENT: This is summarising what their argument was.

MR. GREEN: Yes, that is right, you are summarising Hasbro's submission . You also record on page ----

THE PRESIDENT: I am just trying to orientate myself. I did this, did I not?

MR. GREEN: You did this on your own.

THE PRESIDENT: Right.

MR. GREEN: The other matter you record as being a Hasbro submission was that Hasbro had submitted that their decision on whether to appeal was at least in substantial part dependent upon the penalty and the content of the retail Decision. That is on p.4, and that was indeed a submission they reiterated in the later case, the second case, the second application. One finds that at lines 19 to 26.

THE PRESIDENT: This is 24th January. We have not got the letter of 6th February yet.

MR. GREEN: We have not got the letter of 6th February. You then the rejected the application on the basis that there was no exceptional circumstances.

THE PRESIDENT: Where is the argument that you were just telling us about?

MR. GREEN: Lines 19 to 26 on p.4, in particular Hasbro's submission that it would find difficulty in taking a final commercial decision on whether to appeal at all without knowing what might be in the second Decision. The overall suggestion is that time should be extended until some point after which the second Decision becomes available. Then there is an analysis of the law and a rejection of the application.

A second application was made on 3rd March.

THE PRESIDENT: I want to quickly skim-read this Judgment, it is some time since I looked at it. (After a pause) Yes?

MR. GREEN: There followed the second application following the date of the Decision on 3rd March. We have both the transcript and the Judgment of that, which is in file 2, tab 13. This was an application to withdraw the appeal in relation to penalty. It was not contested by the OFT. The principal issue was costs. There are two passages I would like to draw your

attention to. The first is on p.6 and then secondly on p.9. Could I invite you to read from line 14 through to line 31 on p.6?

THE PRESIDENT: (After a pause) Yes.

MR. GREEN: You will see that Hasbro in the penultimate line say that whether or not there was 100 per cent leniency it would have been a weighty matter in their commercial consideration as to whether or not to appeal. Then Hasbro also make the point in submission on p.9, which is, I think, an important point.

THE PRESIDENT: Now they have appealed. We made them appeal. They were trying not to appeal.

MR. GREEN: They were trying not to appeal. They had to appeal. They were saying, "If we had known that we were going to get 100 per cent leniency it would have been very obvious to us". Then they made the point on p.9, lines 4 to 13:

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

This is an argument about costs but he is saying that the OFT had been on notice since the last hearing in January, but whether Hasbro appealed the distribution agreement was dependent on the outcome of the retail decision. This was advanced explicitly and indeed it must be a correct statement. Since the date of the application to extend time the OFT had been on notice that the outcome of the leniency application was going to govern what Hasbro did about the distribution case. You then recognised that point in your Judgment on p.5 of the Judgment, which is at tab 12, and you summarised the position at lines 13 through to 29, and this was a Judgment of the full Tribunal.

The implications of this are as follows: the reasons now given by the OFT for the treatment of Hasbro, we submit, for reasons I will not re-rehearse, do not stack up. They are, to use the language of *Tokai*, and they lack coherence. It is not logical to say that if an undertaking of its own volition instigates a cartel and cannot get 100 per cent, but if it initiates a cartel in collusion with another it can, that, we submit, is not a proper reading of the Decision in any event.

The inconsistency which exits as between the Decision and the explanation in the skeleton argument is, we submit, just far too great. In the Decision the OFT found only one

instigator. In the skeleton argument it is said there were at least possibly two. This was not an explanation ever given to Hasbro and it is not in the letter of 6th February. As of the date of 6th February the OFT must have known that they had a fully drafted Decision in their hands which would find that Hasbro was "the" instigator and Argos was not, and it could not be proven that they were not. As of 24th January when Hasbro applied for the extension of time, the OFT did, however, also know that Hasbro's appetite for an appeal on distribution was inextricably bound up with whether they got 100 per cent.

We submit that it is crucially important that the OFT's Decisions give the appearance of fairness and transparency. The manner in which the OFT treated Hasbro's application leaves, we submit, acute unanswered questions. We have asked the OFT for disclosure of internal documents arising out of their Decision to state the position as it is in their skeleton argument. We were refused. We only saw their skeleton argument a couple of days ago. We made our application and we have been refused. We say that there is a strong inference to be drawn that the OFT took into account an irrelevant consideration, namely that to grant Hasbro 100 per cent would, as Hasbro submitted to the Tribunal in the course of its application to withdraw, mean that it took its medicine on the distribution agreement but not on the retail case. That was known to the OFT in January before they gave their unreasoned Decision in February and before they adopted their full Decision.

THE PRESIDENT: As I recall it – and we can check it and if you have not seen it we can perhaps cure that – the Appeal that was actually lodged on 29th January was an appeal on penalty only.

MR. GREEN: That is right, it was, that is clear from the Judgment, it was on penalty alone.

Can I draw together my conclusion as to why the different treatment of Hasbro on the one hand and Argos and Littlewoods on the other is not objectively justified, and this is really just bringing the threads of my submissions together. First, Hasbro was not entitled to 100 per cent leniency because they were "the" instigator and we extend our submission to cover the position even if they are only "an" instigator. Secondly, Hasbro did not seek leniency from the OFT before investigation into retail started, and certainly not before the investigation into "the undertaking", namely Hasbro, started. Thirdly, Hasbro did not co-operate fully during the investigation because the OFT found that they did not believe key Hasbro employees, and Hasbro, itself, relied upon those employees in its submissions to the OFT. Fourthly, Hasbro denied great swathes of the OFT's case. Fifthly, the OFT's reasoning is opaque and inconsistent. It leaves the undertakings which were fined heavily with a vivid impression that the OFT took account of special and irrelevant considerations. We therefore submit that the

OFT's treatment of Hasbro relative to its treatment of Littlewoods and Argos was not objectively justified.

That brings to my last issue in relation to non-discrimination. Just keeping an eye on the clock, the only other matter I am going to deal with after that is briefly deal with the 10 per cent point. I think I will probably be no more than another quarter of an hour.

Issue D, what flows from a finding of unlawful, non-objectively justified discrimination? We make a number of legal submissions here, which we say flow from not only the CFI's rulings in penalty cases but also from general case law. Once a court identifies a situation of discrimination, it has a duty to remove the discrimination. In the present case, this means that the bench-mark is Hasbro's position, because Hasbro got 100 per cent discount. Thirdly, it is not, however, the role of the court to calculate what, in its opinion, Hasbro ought to have been fined and then use that as a bench-mark. I will develop that argument a little bit more in a moment. Those are the three legal submissions and perhaps I can just develop each one of them a little bit.

First, the duty to remove discrimination. I have shown you the *Tokai* case at the outset of my submissions, and you will see that the court did re-calculate the fines of the Appellants so as to re-establish relativity. The court did not say that they would not reduce the fines because it was unfair and contrary to public policy to let the "bounders" get away with it, which is the gist of much of the OFT's submission. On the contrary the court found, and upheld, the fundamental principle of equality and non-discrimination and did what was necessary to remove that infringement. That principle is one which applies not only at Community level but at the national level because of the Human Rights Act, and we submit through the aegis of s.60 of the Act bringing into play general principles of Community law.

Can I very briefly show you some authorities outside the field of Competition law in our blue authorities bundle, and I will do this briefly because the relevant paragraphs stand by themselves. First of all, tab 6 of our authorities bundle, *Advel Systems Limited*. I can take you straight to the Judgment of the court, para.16 through to 18. This was an equal pay case for men and women and it concerned in particular occupational pensions and differing retirement ages, and precisely what had to occur in order to level out the discrimination. What is established by the cases is that the principle that a court applies to remove discrimination is that you confer upon the disadvantaged class the benefit given to the advantaged class. What you do not do is unravel the advantages which you conferred upon the advantaged class. In paras.16 through to 18 the court says, first, in para.16:

"Moreover, in paras.18 to 20 of its judgment in *Nintz*, the court held that a national court must set aside any discriminatory provision of national law without having to request or await its prior removal by collective bargaining or by any other constitutional procedure and to apply to members of the disadvantaged group the same arrangements as those enjoyed by other workers, arrangements which, failing correct implementation of Article 119 …"

– which of course was equal pay –

"… in national law remained the only valid point of reference. It follows that once the court has found a discrimination in relation to pay exists and so long as measures for bringing about equal treatment have not been adopted by the scheme, the only proper way of complying with Article 119 is to grant to the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class. Application of this principle to the present case means that as regards the period between 17th May 1990 …"

– the date of the *Barber* Judgment –

"… and 1st July 1991, the date on which the scheme adopted measures to achieve equality, the pension rights of men must be calculated on the basis of the same retirement age as that for women."

THE PRESIDENT: How do we do that in this particular case?

MR. GREEN: In the present case, because of, and directly because of, the conduct of the OFT, and I am assuming I am right on my submissions A, B and C, and that there is objective discrimination, non-objectively justified discrimination, Hasbro does not appear before you. It is not, therefore, open to the court to raise their find in order to create equality.

THE PRESIDENT: They could send it all back to the OFT.

MR. GREEN: I do not think the OFT would have jurisdiction to open its Decision after an limitation period and re-fine Hasbro. I think there would then be an appeal by Hasbro on an entirely different basis. We are in the situation whereby there might have been two options: the one which I would describe as "acute Schadenfreude" by my clients, which was nonetheless heavy in the pocket, which was seeing Hasbro fined but not getting any benefit itself. That is not something which is available to, we submit, either the court or the OFT at this stage. The alternative is to level down, remove the discrimination by bringing Littlewoods and Argos's fines to the level Hasbro. That means removing the fine. That is the only way to avoid discrimination. There is a strong public policy at stake here. The OFT, understandably, refer in their skeleton argument to the public policy of fining infringing companies, but explicitly in

their Guidance they state that there is a trumping or superior public policy in the operation of a leniency programme. They state quite explicitly that the public interest in operating a leniency programme is of greater public interest than that of fining the defaulting company. We say that it is an integral part of that baggage that the leniency programme and the system for granting co-operation and mitigation, leading to reductions of fines, is done so fairly, equitably and transparently and according to proper principles. It goes with the territory. It is not open to the OFT to say, "Well, there is a strong public interest in fining these wicked companies, when it, itself, recognises that there is a strong public interest in expunging fines for good reason.

THE PRESIDENT: We are basically, you say, in an all or nothing situation, the only way to do is to just quash the fine?

MR. GREEN: We say that is the appropriate remedy. We would not say there was nothing in between because plainly ----

THE PRESIDENT: What could there be in between on your logic?

MR. GREEN: I do not think there is an in between. We would not submit it was fair you said, "Well, we can see there is grave discrimination but for various reasons we do not think we are going to give 100 per cent". I think my clients would then be entitled to feel somewhat aggrieved that you had identified discrimination but in effect said, for whatever reason, "We will not do anything about it". CFI does not do nothing about it. If it identifies discrimination it does not say in *Tokai*, "Well, we are going to reduce the fines of these naughty companies by half, what a windfall to them", it says, "We do what is necessary to remove the discrimination". It may be a consequence that it means expunging the fines altogether.

Very briefly, can I show you – I do not need to go to *Tokai*, I have shown you *Advel Systems*. The same points are made in *Kowalska*, tab 5, paras.17 to 20. The gist of paras.17 to 20 is really very much the same as in *Advel*, which is that one has to remove the discrimination, it does not matter if the discrimination is indirect as against direct, and the rule applies equally to discrimination in collective agreements. Then in para.20:

> "It must therefore be stated in reply to the second question that where there is indirect discrimination in a clause in a collective wage agreement the class of persons placed at a disadvantage by reason of that discrimination must be treated in the same way and made subject to the same scheme proportionately to the number of hours worked as other workers, such scheme remaining for want of correct transposition of Article 119 of the EEC Treaty, international law, the only valid point of reference."

So you have got to take your only valid point of reference as being that which reflects the benefited class.

In the interests of time I will not take you in detail to *Hochenjos* at tab 7, which was a Decision of the Court of Appeal on 21st December of last year, Lord Justice Ward, Lady Justice Arden and Lord Justice Scott Baker, but very much the same points are made at paras.84 through to 89, and then 181 to 195. It is a more elaborate analysis of the cases but to the same effect.

The only other matter in relation to this point that I wish to address is the OFT's argument that if they are wrong on instigator Hasbro was entitled to 50 per cent, and that might be, I think it is inferentially suggested, an appropriate basis for the Tribunal to work with. We submit that that is a flawed argument for this reason. If you follow the OFT's suggestion you will not be addressing the legal issue which arises. If you, for example, decide that Hasbro should only have been granted a 50 per cent discount, and you adjust Littlewoods and Argos's penalty to remove the discrimination you still leave discrimination because Hasbro do have 100 per cent discount, and you will simply have removed Argos's and Littlewoods' by the tune of 50 per cent.

THE PRESIDENT: It is perhaps a bit difficult to decide what Hasbro should have got or might have got in Hasbro's absence.

MR. GREEN: Undoubtedly so, unless you were to do as, as it were, a hypothetical exercise without prejudice to Hasbro's position, but nonetheless the logic of the submission, we suggest, is not right. It does not remove such discrimination as exists.

In conclusion, we submit there is clear discrimination. Littlewoods and Argos are aggrieved at the unfairness and the discrimination for reasons which are not obvious. We submit that they are, in law, entitled to equal treatment. There is a very fundamental principle of law. Hasbro got 100 per cent discount. That is now the bench-mark and the only way to eradicate discrimination is to remove the penalty. That is an approach which the court of first instance has adopted in the past and we invite the Tribunal to do so.

That is non-discrimination. Briefly, and it will take me ten minutes, ground two, the 10 per cent is excessive point. We deal with this in our skeleton argument at paras.32 to 40. The OFT's reason for concluding that 10 per cent is appropriate is set out in two paragraphs of the Decision, 426 and 424, and you will find anything in those paragraphs other than a statement that price fixing is very serious. No other reasons are given. We submit that the legal error in the approach is to fail to recognise that there exists a multitude of different ranges of severity. Undoubtedly, price fixing is accepted as a serious infringement of the Competition Rules, but, an importantly, it is also accepted and well-established as being the sort of

agreement for which exemption is, in principle, possible. A very well known illustration of that is the block exemption on liner conferences. I will, if I may, just hand it up so you ----

THE PRESIDENT: You are not seriously suggesting that this would fall within s.9 of the Act, are you, Mr. Green?

MR. GREEN: No, I am not. All that I am suggesting is that, as a matter of policy ----

THE PRESIDENT: I do not think a case on liner conferences is going to help us.

MR. GREEN: No, I am not going to cite it to you, I am simply showing you the block exemption. It illustrates a point, and the only point is that it is recognised that even within price fixing there is a range. That is the only point. If I can show you an authority or a case which says price fixing is exempted then one has to accept that there is a range of severity even applicable to price fixing. That is the sole relevance of this. As you know, President, the block exemption says that it is a condition of block exemption that the shipping companies fix prices. That is a gate which you have to pass through to get exemption. There is a range, and that is the only significance of this.

The error of the OFT's position is that they have imposed 10 per cent in this case regardless of any consideration of the range. There are, we submit, obvious facts evident in this case which, when you consider the range of severity for price fixing, placed this at the less serious end of the sliding scale. Can I just summarise the facts which we say should have been taken into account by the OFT.

THE PRESIDENT: Is this in the skeleton argument?

MR. GREEN: It is basically in the skeleton argument, paras.32 to 40, but rather than read that out to you, I think it would be quicker if I just summarised the points. First, this is not a classic horizontal price fixing case. There were no covert meetings between competitors in smoke-filled rooms or even in private dwellings. This was a vertical price fixing arrangement which involved a supplier persuading a retailer to adhere to RRPs because of a perception of what others might do in the market. That is a very long way from a classic smoke-filled room, horizontal cartel.

Secondly, the infringement was at the margin. It is the OFT's case, as set out in the Decision, that RRPs are, themselves, lawful, but that over a period legality can slip into illegality. Indeed, we have set out in our skeleton argument a quotation from the Judgment in *Allsports*. That is para.36 of our skeleton argument, which is paras.659 to 666 of the Tribunal's Judgment in *JJB* and *Allsports*. We have quoted a paragraph:

"If a retailer complains to a supplier about the prices of another retailer and the supplier approaches the retailer with a view to persuading that retailer to raise his

prices and the retailer in fact does so, then a concerted practice within the meaning of the Chapter 1 prohibition may have come into being provided there is a relationship of cause and effect between the original retailer's complaint and the other retailer's decision to raise prices."

The cause and effect which arises in a vertical case, as illustrated by the present facts, is a difficult one. It is never going to be obvious when that agreement comes into being, and in the present case it required a refined and systematic analysis of what people said to whom in the course of conversations to determine that an agreement came into being. Where does that fit on the scale of things? It is quite different to the sorts of cartels one sees in the European Commission Decisions of exchanges of memo, of secretariats being set up, of systematic, deliberate mechanisms to enforce price. It remains the case that RRPs, recommended prices, are lawful. Your Judgment has made it clear that they are lawful, but they can be very dangerous.

The third point we would emphasise is that we did not have formality. There was no systematic structure – no protocols, no secretariat. It involved, so far as Littlewoods was concerned, on a day by day basis Mr. Thompson phoning sales staff and passing on information. The timing of the calls, their nature, was infrequent, not systematic.

Fourthly, the products were only part of a much wider product range sold by retailers. There is no policy on the part of retailers generally to fix prices. We have covered only one brand.

Fifthly, we rely upon the OFT's finding in the Decision. No directors of Littlewoods were involved, no one on the executive board below the board of directors was involved. The communications with Hasbro were of the predominantly lowest level of employee with two levels above that, Miss Paisley and Mr. McMahon, but they were nowhere near board level.

Conclusion, therefore, on this point: the OFT failed to distinguish between categories of price fixing. There is a scale of price fixing and severity. To impose 10 per cent in a case such as the present marks a condemnation which is disproportionate. It means that the OFT cannot mark their condemnation of more severe cartels with higher starting points. We know that the OFT does not treat all price fixing as warranting 10 per cent because, as is clear from the replica football kit case, percentages of less than 10 per cent were imposed. That fact is in the public domain. We would suggest that the starting point should have been considerably lower for a case such as this.

Those are my submissions unless I can assist further.

THE PRESIDENT: Thank you, Mr. Green. This is relevant market, Mr. Brealey?

MR. BREALEY: Yes. (Document handed) My task is the relevant product market, and what I will try to do to save time is just to set out the submissions which essentially encapsulate everything in our skeleton argument and to try and reply to Mr. Doctor.

THE PRESIDENT: How do you want to proceed? Do you want us to read this, or do you want to take us through it?

MR. BREALEY: Perhaps I can take you through it because there are various documents that I would like to refer you to. If you do want to read it by all means do so, but I would like just to take you through it.

THE PRESIDENT: Yes.

MR. BREALEY: The difference in relevant turnover – this is para.2, just to give the Tribunal an idea of how the fine would be reduced – in the Hasbro product subject to the agreement and the total turnover in broad categories is considerable. It is just over £20 million, compared to £180 million. What I would like to do is go to the Decision. I do not know whether the Tribunal has seen the relevant paragraph in the Decision. It is actually para.412 and not 413. It is tab 8 of the core bundle. Essentially my submissions are limited to this step one, starting point. At para.412 we can see the £181 million figure. Then at footnote 206 we see how that figures is made up. As I will be submitting boys' toys of £39 million is far too high a figure.

Again, just to give a sense of the impact on Argos, we refer to this in an annexe to the skeleton argument. I do not know whether the Tribunal has our skeleton argument, but we put an annexe to the skeleton argument, and that essentially just makes the point that the turnover in the relevant Hasbro products for the relevant financial year was just £20 million. The margin, and that is just the net margin, no distribution costs, is £2 million. So when one is looking at a fine of £17 million, it is several times the profit, if any, on the Hasbro products.

The next section, the OFT published approach to relevant product market, I have tried to set out where we agree and where we disagree with the OFT in its skeleton argument. If we have got these submissions in one hand and then the OFT's skeleton argument in the hand, the first point we make is that there is no apparent disagreement between Argos and the OFT as to the correct approach. The relevant approach is set out in the OFT's skeleton argument in para.11 onwards. In para.15 it says that under step one you take the relevant turnover. The relevant turnover is a turnover by the undertaking in a relevant product market, and it refers to para.2.3 of the OFT Guidelines on penalties. We have that. I think it is important to note, and I do this in para.6, that the Penalty Guidelines refer in terms to the OFT's notice on market definition. We say, and I think the OFT do not disagree with this, that the correct approach is that set out in the Guidelines on the market definition.

Then we say we also agree with the Office of Fair Trading's rationale for choosing the relevant product market. It is a sensible and reasonable approach. It is a concept well known and it provides a link between the infringement and the effects of the infringement. In other words, it gives an indication of the scale of the infringement. The products subject to the agreement may have been affected. Substitutes may also have been affected by the distortion of competition.

We also agree, this is para.8, with the OFT's para.17(f) where it says that all these Guidelines are there to create an element of certainty and to encourage reasonable and predictable consequences of the infringement. We submit that that appears to be some sort of endorsement of what we have been talking about this morning. I have referred to the *Hercules* Judgment, and one can add para.231 of the *Tokai* Judgment to that. The OFT will comply with its Guidelines unless it gives a specific and express reason why it is going to depart from them.

Then where we disagree, and I am still on the approach here, at para.18 of the skeleton argument, the OFT says essentially that when it comes to fines it can define the relevant product market in a less extensive way.

THE PRESIDENT: It does not have to go into the same degree of detail, I think is what it is trying to say.

MR. BREALEY: That is essentially what it is say. We say that is wrong, that is incorrect, it is an incorrect approach. It is an incorrect approach for the considerations we have just been referring to, the reference to the market definition guidelines, you are either going to follow the guidelines or you are not. It is incorrect because it cuts across the rational and sensible approach of the link between the infringement and the effect of the infringement. it would also cut across the principle of legal certainty to say, "Well, I am going to comply with Guidelines on market definition", and then merely say in the skeleton argument, "We do not have to do it in such a precise way".

Importantly, and I refer to this at para.10, the imposition of fines is just as important as the decision of infringement. The imposition of fines is the reason really why the Competition law process is defined as penal, is defined as *quasi* criminal, and gives rise to the tight procedural rights that companies like Argos and Littlewoods have. It would be illogical to treat the fining part of the Decision as something which deserves less care. We say that it would be wholly illogical for the OFT to do a proper exercise, a detailed exercise, when it comes to infringement and yet a less detailed exercise when it comes to market definition for penalties. Otherwise, the logic is that you arrive at two different markets.

So, para.11, we say the correct approach is that the Tribunal should determine whether the OFT has properly carried out the task of defining the relevant product market as set out in the Guidelines on market definition.

We say, going on to para.12, that the OFT has failed to prove – whether you call it the balance of probabilities, strong compelling evidence – that the relevant market consists of all toys in the ten categories referred to at paras.23 to 36 of the Decision. I would like to take the Tribunal to para.26 to see exactly how they approach and then I can make my submissions as to why the approach is flawed. I should note that in the Defence, which we saw at tab 23, para.131, the OFT is saying that it is applying a demand side and a supply side test in these paragraphs. Paragraph 24 refers to a US Court of Appeal Judgment in *Toys 'R Us*, and there are certain aspects of para.24 that I would like to emphasise. The first is that toys are highly differentiated products, but also the Office of Fair Trading is saying that the nature of consumer demand is aptly summed up in this Judgment. When one looks at the quote we see that the toys customers seek in all these stores are highly differentiated products. The little girl who wants a Malibu Barbie is not likely to be satisfied with My First Barbie. So even there the US court is drawing a distinction between two types of dolls. The US court goes on to say that toys are a very faddish product.

We then have para.25 where the OFT appears to rely on the French case, which again would define a market no wider than fashion dolls when you are looking at Barbie and Sindy, certainly not authority for the proposition that you take all girls' toys.

Then there is a reference to a Mintel Market Intelligence report. Then we have para.27 which essentially gives the basis for the OFT taking the ten categories of toys:

> "The OFT believes that the relevant market is certainly not as wide as all toys and games. The most commonly used broad categories are as follows …"

Then we have those following categories.

> "There is also support for this categorisation amongst manufacturers and retailers. Hasbro's organisational structure for its marketing department shows these divisions. Argos adopts a similar structure ..."

When one actually looks at the evidence that the OFT relies on to support these ten categories, you only find it in paras.27 and 28.

THE PRESIDENT: Paragraph 28 as such is right, is it, that those are the categories that Hasbro and Argos in fact use?

MR. BREALEY: Certainly Mr. Needham was a buyer for boys' toys. I think he also bought girls' toys.

THE PRESIDENT: Mrs. Clarkson, I think, was girls' toys.

MR. BREALEY: I would note that the OFT does not refer to Littlewoods or Woolworths or Toys 'R Us.

THE PRESIDENT: I think Mr. Burgess bought a very wide range of things. We had quite a lot of evidence as to who bought what, I think, who was buying games and puzzles, who was buying boys' toys, and all the rest of it.

MR. BREALEY: We make this point in the written submissions, just because Mr. Needham is a buyer for boys' toys, it does not really give any clue as to what toys in that boys' toys category compete with each other.

THE PRESIDENT: It might give a clue.

MR. BREALEY: A clue is not on the balance of probabilities.

THE PRESIDENT: Right.

MR. BREALEY: Then we have the market research by Hasbro, which focuses of individual categories or individual grounds. It is something that crops up again and again and again, that even on the OFT's own Decision there is an emphasis on brands.

> Then we have the supply side substitution. Again, the second sentence says:
>
> "The intrinsic differences between the toys within the different categories listed above would indicate that there is little overlap in production and assembly, also the need to meet the various safety regulations and the need to promote new brands heavily to establish them in the market all add the time for a toy to enter the market."

This is the extent of the OFT's analysis on product market definition. I submit that it is inherently inconsistent and does not support the ten categories of toys listed in para.27.

> At para.13 of the submissions I have just handed up, I start to say why the OFT approach is flawed in this respect. We have referred to the ten categories of toys and the organisational structure, but this says absolutely nothing about whether these categories are in a relevant product market. You may say it gives some clue. It does not even establish whether Argos considers a particular toy to be in competition with another. Merely because Mr. Needham is a buyer for toys does not really give proper compelling evidence that the toys within that very wide category compete with each other. Even if one can say, "Well, it is a clue as to a market", as I set out there, the EC Commission's Guidelines state:
>
> "The concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs."

So if we apply that statement by the EC Commission that the concept of the relevant economic market is different to how companies may see the market, these reference to these categories being commonly used, in my submission, is not sufficient evidence to support a fine of £17 million. That is the first point.

The second point – and this is para.14 – is that no economic analysis whatsoever is made to determine whether a product in terms of price and/or characteristics is substitutable. The OFT purports to apply notice on market definition. The starting part, as the Tribunal will know, is essentially at para.3.1 of that notice. One looks at the demand side, and the process starts by looking at a relatively narrow potential definition, which – and this is quite important for the present case – is normally the products produced by the parties. One takes the products produced by the parties, or subject to the complaint, and then works outwards. On an economic analysis if one is applying the Guidelines on market definition one would have expected at least some attempt to apply the SNIPP test. Again, I do not need to rehearse this, the Tribunal knows it well, it involves assessing whether a supplier could have increased profits by a sustained raising of the prices by 5 and 10 per cent. Once you have identified that category of products they are seen as constituting the relevant economic market as their prices are not substantially constrained by those of other products. One asks the question: where is the economic analysis in paras.23 to 30? The only conclusion is that there is none whatsoever. When one looks at the Guidelines on market definition, that essential is the very first thing that the OFT says should happen.

The third point that I would make, and I have already alluded to, is that even the Decision, when you look at it as a whole, does not support or provide compelling evidence for the ten categories. I have set out the paragraphs. Paragraph 24 certainly does not support that there is a category called "girls' toys". It supports the argument that within girls toys there may be different products which do not compete with one another. The Malibu Barbie may not be substitutable with First Barbie because of this faddish product element.

Paragraph 25, fashion dolls. This is the relevant to the Baby All Gone that I will come to. If one looks at para.25 one sees that the French court said no wider than fashion dolls, and yet we have a category at para.27 of all girls' toys. Argos has been fined in respect of its turnover in all girls' toys, even though there is only one product, the Baby All Gone, one doll of a particular type in the famous email of 18th May. So for the sake of that one doll of a particular type Argos has been fined the turnover of all girls' toys.

Paragraph 29 I have referred to. It mentions individual grounds. Paragraph 30 again quite clearly shows that the Office of Fair Trading acknowledges that there are intrinsic differences between the toys within those ten different categories.

I also refer to para.379 of the Decision where the OFT says that the goods are very familiar, branded toys and games that are aimed directly at children, and that parents are under pressure to accede to the growing demands of children for the latest fad or trend. We pick up the word "fad". That is similar to the US court in *Toys 'R Us*:

> "The heavy promotion and advertising of many such toys means that non-branded cheap alternatives are not viable substitutes for many parents."

So we actually have the OFT saying that within the categories that they have identified many toys are not substitutable. It gives an example of Monopoly.

We are criticised, if I can just summarise the Decision for three reasons, before I come on to the RBB Economics. The first is that just picking up the organisational structure of Argos, they say it is a clue, but it certainly is not the sort of evidence that is needed to fine a company £17 million. Secondly the OFT has attempted no economic analysis whatsoever. Thirdly, the Decision itself is inherently inconsistent and does not support the ten categories at para.27 because it consistently acknowledges that toys are faddish products and emphasises the importance of brands which are not substitutable.

THE PRESIDENT: Is that a convenient moment, Mr. Brealey?

MR. BREALEY: It is.

THE PRESIDENT: Two o'clock.

(Adjourned for a short time)

THE PRESIDENT: Yes, Mr. Brealey, you were going to go to the RBB Economics paper next?

MR. BREALEY: Yes, that is at tab 11 of this new core bundle. The critique is at p.57. It is annexe C, p.57. I will just highlight some passages. It is a critique of the approach of the product market definition. C1, "Absence of any systematic framework for the market definition assessment": there the report is criticising the fact that there is essentially no economic analysis carried out, no attempt to apply the SNIPP test. That is C1.

In C2, which is headed "Differential in the toys games sector does not mean that each product is a separate market", it refers to Malibu Barbie and My First Barbie. I emphasise the last paragraph in this section, which is p.58, which begins "The question", "The question is what is the next best substitute?" So you take the product in question, the Barbie Doll, and then you say, "What is the next substitute?" If there was compelling evidence that it is other

girls' fashion dolls then this would form the basis for a market to define this as product category, as in the French decision.

THE PRESIDENT: There is no evidence.

MR. BREALEY: Yes. There the economists are saying, "The question is", and the OFT never asked that question. They never asked the question at all. They never asked, "What is the next best substitute for Action Man, what is the next best substitute for Baby All Gone?" This leads to the result that I have set out in para.17. It is said in the OFT's skeleton argument that there is a degree of common sense, but if one looks at boys' toys, the main toy here was Action Man. Common sense does not dictate that Scalextric, price £28.99, manufactured by Hornby, or other electric racing sets, is in competition with Action Man, yet we have been fined in respect of the turnover in that product. Lego, is that a substitute for Action Man? We say that common sense says it is not.

If one then takes the approach of the US judgment in *Toys 'R Us*, and indeed the Commission's own stance, for example, at para.379 of the Decision, and this issue of faddish nature of toys, can it be said that Thunderbirds, Chicken Run, which is the Wallace and Grommit film, Toy Story, WWF, the wrestlers, are substitutes for Action Man? The OFT never asked the question, "What is the next best substitute?"

If one looks at girls' toys, this is a particularly serious category because the turnover was £48 million – that is from the footnote that I referred to earlier on – and the only product on which we were found guilty of price fixing was the Baby All Gone, which is para.20 of this note. This is a large doll, which is a feeding doll. You put the dummy in and you actually feed it, hence the phrase "all gone", as I understand it. The feature of this Baby All Gone is that it is an eating doll. In respect of the fine the OFT has taken all the turnover in all girls' toys. That is large dolls, mini dolls, collectable dolls, everything, even fashion dolls. So all the turnover, for example, on Sindy and Barbie have been taken into account as if that was a substitute for this Baby All Gone. We say that when one is looking at the link between the infringement and the effects of the infringement, which the OFT says is the appropriate and sensible course, the OFT have not even begun to show that there is a link between the Baby All Gone type doll and Barbie and Sindy. The significance of that is substantial. It is one product of all the turnover in the wide category of girls' toys.

We then have core games. Monopoly is referred to in para.379 of the Decision as being a heavily branded product. Is that substitutable for the Who Wants to be a Millionaire game which the RBB refer to in the note at p.59, section C3? Who Wants to be a Millionaire was a pop product at the time. We would say that common sense would dictate that that was

not a substitute at the time for Monopoly, and yet Who Wants to be a Millionaire turnover has been calculated in the final calculation.

So there are many, many products which are different to the Hasbro products, the turnover of which have been included in the fine.

The last example we give is the Tweenies. That is very, very brand specific, the evidence on that, substitutable with Winnie the Pooh, Bob the Builder, the Teletubbies? The question was never asked by the OFT.

At para.23 we say what conclusion can we draw from that? We would submit that it is quite clear from the paragraphs in the Decision that the relevant product analysis has not been carried out properly and to a standard that one would expect, certainly not in a precise fashion, and we say there is absolutely no reason why it should be any less precise when fining someone £70 million as forming the basis for the fine in the first place, the infringement part of the Decision.

THE PRESIDENT: Could you help me on a couple of points, one of which is a point of considerable principle. The first point is if there was something in these arguments, would it not be open to us to simply remit the question of penalty to the OFT to have another go? That is the first point. Secondly, what is the relationship between the way the OFT has done it and the way in which the Tribunal, as a Tribunal, should approach the question of setting a penalty? It might be, in theory, the case that the Tribunal felt that there were aspects of the OFT's approach that were not ideal, but nonetheless, in the exercise of its own broad jurisdiction, the ultimate result might not be so different from the result that the OFT came to.

MR. BREALEY: Taking the first point, let us assume that it is defective, what are the consequences of it being defective. First of all, we would say please do not remit, they have had one bite at the cherry. At some point a Notice of Appeal ceases to be a Notice of Appeal.

THE PRESIDENT: You cannot go on with the ping-pong match indefinitely.

MR. BREALEY: Exactly. What then happens? Either the Tribunal quashes the fine completely saying it is not sufficient; or, and we are not inviting the Tribunal to do so, but we have given this route, which is that the Tribunal in the exercise of its discretion could take the starting point in the market definition notice and say at 3.1, "We will start with the products", which are ----

THE PRESIDENT: Why should we even do that? Why should we not just start where we think we should start, start with the figure they actually arrived at, and say to ourselves, "Is this the right sort of figure?" What is the conceptual relationship between what the OFT does – I am genuinely asking for help here – and how the Tribunal should approach the question. To put

that a bit more precisely, how far can one see in the statutory scheme the idea that even if the Tribunal thinks that the OFT's way of doing it, the way the OFT thinks it should be done, was not necessarily perfect, is it still not open to the Tribunal to say, "Look, come on, we have heard all the arguments, we have heard all the considerations, and we think the penalty should be X?

MR. BREALEY: The first thing I would say to that is that, although you do have the wide discretion, it would, first of all, be appropriate to follow the OFT's own Guidelines so that you are not making something up from scratch with a completely different test. It would be an appropriate exercise of the Tribunal's discretion to say, "I am going to carry out the five steps that the OFT should have carried out but do it in a proper manner".

THE PRESIDENT: So a sort of cross-check on the way they did it?

MR. BREALEY: Yes. That then has the advantage of the legal certainty and everyone knows where we are until any guidance was published by the Tribunal as to how it would consider imposing a ----

THE PRESIDENT: I do not think we are going to publish any guidance somehow, Mr. Brealey, except in terms of the decisions we take in individual cases.

MR. BREALEY: Then I think one is left with one of two alternatives: either the Tribunal follows the OFT's Guidelines, which are the ones that are in the market place which creates the certainty, or the Tribunal has to apply at least the principle of proportionality and the principle of proportionality would certainly dictate that Argos should not be fined in respect of products on which the infringement had no effect. So to take the Scalextric point, it would be disproportionate to fine Argos in respect of turnover of Scalextric or Sindy or Barbie, when no link has been proved between infringement and the effect of infringement. If the Tribunal is looking for assistance as to what it should do, my submission is that, first of all, it should confine itself, in the absence of any principles laid down by the Tribunal, to the Guidelines and principles set down by the OFT.

THE PRESIDENT: Let me articulate it a little further so that Mr. Doctor can deal with it in due course. These Guidelines represent a no doubt laudable effort to give a certain amount of precision and order to an exercise that might be regarded as intrinsically an exercise of judgment rather than an exercise of the application of mathematical formulae. In laying down those Guidelines there is perhaps a sense in which the system runs the risk of making a certain rod for its own back in getting into very complicated questions on what a market definition is, and getting into relatively complex calculations as to putting some arithmetical figure up by a certain percentage for certain factors, and then down by another percentage for other factors,

and you feel sometimes that you have arrived at the number you first thought of and doubled it. The result that you arrive at appears to be objectively calculated but is, in fact, susceptible to a certain amount of adjustment depending on what starting point you took, what percentages you took, what multiplier you applied, and all that sort of thing.

From the Tribunal's point of view how far would it be appropriate in a series of Guideline sentencing cases, to put it in terms of the criminal jurisdiction, to say, "Well, look, the upper limit is the statutory turnover, that is at least one starting point, in this particular case however it was calculated, whether we agree with that or not, you get to a certain percentage of the statutory turnover, we have taken into account the following list of features and we see that there is this mitigating circumstance and that mitigating circumstance and we have looked at the nature of the infringement, and one can think of other infringements that are worse than this one, et cetera, et cetera, and we take all those matters in the round and have arrived at a figure of X". Why should we not do that?

MR. BREALEY: I think the simple answer to that is that it is clear – certainly as a matter of EC law – that if a penalty is going to imposed on an individual the criteria by which the penalty is imposed will have to be clear and precise. There cannot be a system where someone just has the ability to impose a penalty without reference to clear and precise criteria.

THE PRESIDENT: How does that stack up in terms of the way the criminal justice system operates? In that context you start with the statutory maximum and you work down, as it were, "This case is not as bad as that", and, of course, you have the advantage that you have had quite a long period of cases and a lot of cases. We have not had that advantage. Although it is true that quite recently the Commission has introduced, in the context particularly of its leniency programme, a certain guidance we managed for many years without any guidance at all and the court just fixed a figure. Nobody said that was illegal.

MR. BREALEY: It does not mean to say it was legal. I do not mean to be flippant. There are still various rumblings as to whether what happens in the CFI is compliant with the Convention. I still maintain that if a penalty is going to be imposed, and there is clear European Court judgment and jurisprudence on this, the person who is penalised ----

THE PRESIDENT: I can see that it can be proportionate and non-discriminate, that is clear enough as a principle, but beyond that, apart from saying you take into account duration, you take into account gravity, you take into account relative culpability, you take into account the size of the company, you take into account a whole list of fairly self-evident things, it may be a bit more difficult to arrive at anything that resembles a mathematical criteria as distinct from a series of rather broader criteria.

MR. BREALEY: There has to be a certain mathematical criteria because one has to end up with a sum at the end of the day. What criteria may apply is a matter of debate. We obviously appeal against the OFT Decision which purports to apply certain criteria. It reaches a result. We say, "Well, if you apply that criteria correctly it does not reach that result". The question you are now asking me is, "Can the Tribunal just disregard the OFT's Guidelines completely?"

THE PRESIDENT: It is not quite that. It is saying, "Well, look, supposing the OFT did not apply its own Guidelines" – this is purely hypothetical, I am not saying for a minute that it did not – supposing that it did not, suppose just for the sake of argument, why can the Tribunal not say, "Okay, they did not apply their own Guidelines, but nonetheless we have heard this case and we think that it would be quite wrong to reduce this penalty", or the other way round, "it would be quite right to reduce this penalty", not because the OFT did not have regard to its Guidelines but because the penalty is simply too high or too low, or whatever it is, "and that is the judgment we reach for the following reasons". We are not tied into the Guidelines particularly, but it is a broad brush judgment. Over time there will be a body of case law developed that will show that if you do this, that or the other, this is the sort of figure that you have got to expect.

MR. BREALEY: One of the difficulties is that we are still in a developing area. What should happen, in my respectful submission, is that the Tribunal should follow the approach in the Guidelines, because the OFT has to have regard to its own Guidelines under the Act, deal with us in accordance with the Guidelines, and say, "Has it done its homework on product definition?" and then give indications for the future as to the sort of criteria that the Tribunal may be expected to apply. That at least would begin to comply with what I have called the duty for there to be at least some clear and precise criteria according to which people, before they commit an infringement, will know what the punishment is. Essentially it would be completely up in the air. If one goes back to spring/summer 2000 or autumn/winter 2000, when these catalogues come out, one is almost retroactively applying criteria which no one actually knows about, save the fact that the Tribunal has a wide discretion to levy a fine.

The rod for the OFT's own back, maybe it is, but that is the criteria ----

THE PRESIDENT: That is the system that we have got.

MR. BREALEY: That is the system that we have got.

THE PRESIDENT: Yes, thank you. I was just looking at the fines as a proportion of the statutory maximum and as a proportion of total UK turnover and, expressed as a percentage, they are not that high expressed in that way.

MR. BREALEY: As a percentage of Argos's total turnover?

THE PRESIDENT: As a percentage of the UK turnover and as a percentage of the statutory maximum, which is, I think, based on the UK turnover, without correcting myself.

MR. BREALEY: Obviously there is always the cap of 10 per cent. The cap of 10 per cent does not mean that you should be fined 10 per cent of your overall turnover, because if that is the case then one really does lose sight of the objective of the fine, which is that the OFT says the punishment has got to meet the crime.

THE PRESIDENT: I am not saying that one does, but I am saying that the only concrete thing you have got to go by as a matter of statute is the statutory maximum.

MR. BREALEY: If one is to say, "That is the statutory maximum, then it is a fair fine to have £18 million", because that is the 10 per cent of the turnover, we would be fined for white goods, jewellery, all sorts of products that have absolutely no link or relationship with an Action Man. Therefore, if this is the road the Tribunal may see itself going down, the principle of proportionality, the principle of proportionality must draw back the fine so as to have some relationship with the products which are subject to the price fixing.

THE PRESIDENT: Yes.

MR. BREALEY: I am not sure I have necessarily answered in any concrete terms the two points.

THE PRESIDENT: No, thank you, that has been helpful.

MR. BREALEY: The first one was, "Please do not remit, enough is enough"; and secondly, it is acknowledged that the Tribunal does have a discretion to impose a fine, the question is by what criteria? We would say, particularly in this case, one should apply the OFT's own criteria and at least see whether the OFT has defined the product market in the way that it says it should, but always have regard to the principle of proportionality and the link between price fixing on Action Man and the impact on fridges and hoovers, and so on.

THE PRESIDENT: Yes.

MR. BREALEY: I think that exchange came as a result of para.23. We have only taken Hasbro toys and we took Hasbro toys to be the market because that was the starting point. Because there was no further analysis, nor has the OFT ever asked itself the further question, "What is a substitute for Action Man toys", that was the product.

Finally, I do not want to repeat what Mr. Green says – this is the relevant percentage – in stage one we have the relevant turnover and then the relevant percentage. We just set out there some aspects of this case which we say do not take it to the highest range of price fixing. I do not intend to repeat those. I could add a further one, a fifth one, which is in the Guidelines to the OFT's Chapter I infringement we have price fixing, then we have market sharing and

then we have price information exchange as a separate category. We would submit that a price information exchange of this nature is not a class price fixing which would attract 10 per cent.

Lastly, at para.26, I know the Tribunal is well aware, the point of law at para.659 of *JJB*, which concerns A, B and C. A communicated to B its pricing intentions with the reasonable foreseeability that it would be passed on to C, can you make the relevant connection between A and C, the consensus for a concerted practice? In our submission, it certainly was not as clear as it now appears as a result of the Tribunal's Judgment. That is a further factor which should be taken into consideration.

THE PRESIDENT: Thank you very much, Mr. Brealey. Yes, Mr. Doctor? I think it is just the issues that have been canvassed this morning that you need to deal with.

MR. DOCTOR: Yes, I will try and do that in the order in which it has been done. I will start with Mr. Green's submissions on the unfairness ----

THE PRESIDENT: "Discrimination" he calls it.

MR. DOCTOR: ---- that they have been subjected to.

THE PRESIDENT: We will rise for a few minutes.

(Short break)

MR. BREALEY: Sir, could I just have 20 seconds. If the Tribunal remembers the *Tokai* judgment that Mr. Green referred to this morning – this is essentially going to the point, "What should the Tribunal do it is unlimited jurisdiction?" – at para.233, this is something that Mr. Doctor may want to deal with, after the passage where the court says that the Commission should stick within its own Guidelines unless it gives reason, the court says:

> "It follows from the foregoing that Tokai cannot be classified in the same category … In the exercise of its unlimited jurisdiction, the Court considers that it is indeed appropriate to remain within the general logic of the Commission …"

The court is there saying, "We are not going to completely depart from what the Commission has said, we are going to remain with the general logic of the Commission".

THE PRESIDENT: Thank you. Yes, Mr. Doctor?

MR. DOCTOR: If I can start with the discrimination point in principle, and then deal with each of the alleged factual bases for the argument. This part of our argument is set out from para.60 onwards. Of course, there is no distinction between us as to the general principle that like should be treated with like and different situations are not to be treated alike unless there is some objective justification. The short answer to the entire argument is that however the detail of the leniency programme turned out, the Appellants, Argos and Littlewoods, are not like, in the same category, akin to, the position of Hasbro for the simple reason that Hasbro applied for

leniency under a programme developed to encourage just that, and thereafter assisted the OFT in various ways, providing information, encouraging its employees to come forward, assisting with the proceedings themselves by making employees available to give evidence, and so on.

THE PRESIDENT: You mean these proceedings?

MR. DOCTOR: Yes.

THE PRESIDENT: Is that relevant?

MR. DOCTOR: It is part of what happened. At the end of the day, Hasbro was in a completely different category. As Mr. Green, himself, conceded when he went through steps one to five, until the point of the application of the penalty itself, up to that point, they had no complaint. They concede that all the parties were treated alike in so far as they are similar. There were a few minor differences, and those differences, attention was paid to them. At the end of that, the fact is that Hasbro had applied for leniency. Hasbro had come forward and had been granted leniency. Whether it was entitled to 100 per cent or 50 per cent leniency, it is just in a completely different position from that of Argos and Littlewoods. That in the end is the short answer and the end of the answer to the argument.

The real complaint is that the leniency programme works in a way which has dramatic consequences. The fine which Hasbro was subjected to, which in the context they accept was perfectly reasonable and there is nothing different in the way the fine was worked out, was £15 or £16 million, and it was reduced to nothing. Compared to the fine to which Argos and Littlewoods have been subjected to, there is now, as a result of that, a big difference. So the effect is dramatic. That is the effect of the leniency programme. It does have dramatic effects. I can take you to the reasons for the leniency programme which are set out in our skeleton argument and also in the leniency guidance of the OFT. It is a programme designed to bring people forward so that they come forward and confess, as it were – in some cases they do not confess, they just give us information – and it has dramatic consequences. It could have been designed differently, it might have provided for lesser or greater leniency, it might have provided for rewards. Anything might have been thought up, but the fact is that this is the system and if you make use of it you get dramatic rewards.

There was nothing – let us be quite frank – to prevent either Argos or Littlewoods themselves coming forward and making use of the leniency programme. There is no discrimination there, they could at any time have come forward either before Hasbro, in which they would have been first, or even after Hasbro came forward. They could have come forward, either one of them, and sought to apply for leniency and they, too, would have been treated that programme. That would have had a result which would have made that party

different from the other parties. That is the short answer to the argument. It is not possible to take it any further.

Unless the Tribunal is going to knock down the leniency system – I do not understand these proceedings to be that sort of judicial review where the regulations, the programme, the existence of it are in question – the only basis on which they seek to, as it were, get a toehold into the argument is because they say the leniency programme was not properly administered. They are not, I do not think, at least in this part of the case, suggesting any bad faith on the part of the OFT but for one allegation which I will deal with later, but if we simply look at the main thrust of the argument, the question of whether Hasbro was the instigator or not, and can I briefly refer to the leniency regulations and in particular the ----

THE PRESIDENT: We have got them in our total core bundle, tab 19.

MR. DOCTOR: What it says at 3.4 is that the undertaking must be the first to provide the Director with evidence of the existence and activities of the cartel before he has commenced an investigation of the undertakings involved. Just pausing there for a moment, Mr. Green places some stress on the words "of the undertakings involved" to suggest, I think, that if any kind of investigation into the undertaking itself is being conducted then it cannot be first. If, for example, the undertaking is being investigated for one kind of infringement in one field, then the fact that it comes forward in a completely different field means that it cannot be before the investigation has commenced because those words must mean "any investigation of the undertaking". Plainly that cannot be right. What it is referring to is "the investigation of the undertaking and its subject matter presently being conducted". If, even while one organisation is being investigated for a particular infringement, it comes forward and applies for leniency in relation to another infringement, plainly it is a different investigation which will then take place into that infringement and consequently it would have been done before that investigation commenced. That must be the case because that is exactly what happened here. An investigation, as we know, was taking place into distributors, certain questions were asked, as a result of which senior management came to know of the particular emails which the Tribunal has seen. They felt that this might indicate another infringement which was not being then investigated – that is the relationship with these distributors – but the relationship between Hasbro and its direct customers, the big people like Argos and Littlewoods, and they came forward with that.

THE PRESIDENT: But Toys 'R Us and Woolworths are also direct customers.

MR. DOCTOR: They were, but the suggestion that is made, that the letters to Toys 'R Us and Woolworths that were sent out as part of the distributors' case was in fact an investigation into

this infringement is not correct at all. The OFT had sent out the letters on 10th August to Toys 'R Us and Woolworths, significantly not to Argos and Littlewoods, in connection with the distributors' case because, as you, Mr. President, have recalled correctly and as appears in the Judgment that was given, there was an indication that because of the agreement that had been entered into between Hasbro and its distributors, this was having a spill-off into the rest of the market. That was the reason why they were being investigated. What was not known at that stage was that this infringement, this cartel, which was quite separate from the distributors' case, was being conducted at the same time. That is why Woolworths and Toys 'R Us were approached, with a view to finding out how distributors' cartel had impinged on or was working out in relation to the rest of the market. That is referred to in the Decision.

THE PRESIDENT: You say there were two separate investigations, there were two separate Rule 14 Notices, there were two separate Decisions, and they are not ----

MR. DOCTOR: Yes. There is just no question about any of that. This is ----

THE PRESIDENT: ---- mixed up with each other.

MR. DOCTOR: They are not mixed up with each other at all. Perhaps I can deal with it now. I have got slightly waylaid into this aspect.

Were it not the case, the proceedings which took place in front of the Tribunal the following year must have been a complete and utter charade in which you are being asked to believe that the representatives of the OFT appeared in front of this Tribunal asking for costs in a matter where they knew that the Decision to withdraw the Appeal was going to be made, and that is why they have given leniency in the other proceedings and that nobody here thought fit to tell you about that or to explain that when ----

THE PRESIDENT: No doubt we will come to that point in due course.

MR. DOCTOR: We are back on the principle. You have got to come forward first. It is before an investigation into that infringement, not into that particular undertaking, has commenced and provided the Director has not already had sufficient information to establish the existence of the alleged cartel. That also has to be met and then there are four points: the undertaking must provide information; two, must continuously maintain and give complete co-operation throughout the investigation; three, must not have compelled another undertaking to take part in the cartel, not have acted as the instigator or played a leading; and four, refrained from further participation. The one that is in different in kind is three, because that refers to something that happened in the past. The others deal with undertakings as to future conduct, co-operation, information and refraining.

The question of whether something has happened in the past is different from whether somebody promises to do something in the future. Whether something has happened in the past is something, therefore, which the OFT has to be satisfied about. At the time when these proceedings took place you will recall that the test was that there had to be clear and compelling evidence of infringements and therefore the OFT would have understood that was the argument put to it. There had to be clear and compelling evidence that there had been an infringement in the past. Arguments were put to it that the instigation, if it had taken place at all, took place before the date the Act came into force. There was the argument about "the" instigator and "an" instigator, and the OFT had taken the view that "the" instigator meant that there was only one instigator.

THE PRESIDENT: When you say "the OFT had taken the view", how we do ascertain that?

MR. DOCTOR: Because there is a certain amount of evidence in the submissions from Hasbro.

THE PRESIDENT: We know about Hasbro's submissions, but we do not actually have any reasoning on this point in the Decision or in the two letters of 5th and 6th February.

MR. DOCTOR: We have the previous documentation that it was "the" instigator and then it changed to ----

THE PRESIDENT: We can infer that there was change of position, but that is all we have got basically.

MR. DOCTOR: Yes. That turned on the question of whether it could be shown to be "the" instigator or "an" instigator, and it was only if it was "the" instigator that it could have its 100 per cent immunity.

All of that was the subject of communication between Hasbro and the OFT and would not normally be the subject of any communication between any of the other parties, particularly not those who had not applied for leniency. If one of them had applied for leniency as well, which they could have done, there may have been some argument that they would, as between each other, be interested in how the other was treated for leniency and that would be a relevant consideration, but this was not relevant to them. Knowing that they could apply, they chose not to apply, knowing that Hasbro had applied.

THE PRESIDENT: They knew that Hasbro had applied, did they?

MR. DOCTOR: Yes, they did know. Knowing the decision was then made, and the decision is said to be unreasoned because you have seen the letter of 6th February which simply says that the OFT has decided not to withdraw the immunity. In the letter there are no reasons, that is correct. Hasbro did not ask for any reasons, no doubt because it was given what it wanted and therefore did not ask for any reasons. Nothing can be drawn from that. When it came to the

publication of the Decision – and there is a mistake in my skeleton argument which has been pointed out by Mr. Green – the original Rule 14 Notice had said that it was "the" instigator. They were allowed to make representations, both oral and written, and it then became "an" instigator. It says it is "an" instigator, but when it deals with leniency it just says in passing that ----

THE PRESIDENT: What is the mistake in the skeleton argument, Mr. Doctor, I think we had better just note it?

MR. DOCTOR: It is para.72(d). Instead of the "Decision" it should be the "Rule 14 Notice" in the second or third line. The sense is clear.

THE PRESIDENT: That is a good correction to make because otherwise it does not really add up, that sentence.

MR. DOCTOR: It then goes on to say "After the Rule 14 Notice the representations were made", as indeed they were invited.

THE PRESIDENT: I suppose what all that leads up to is how we know – I am not suggesting that anyone is trying to mislead us, but as a matter of good order, as it were, future cases and considerations like that – that the OFT's reason, and I am at (f) now, did satisfy the position on the basis that Hasbro was not shown by clear and compelling evidence to be "the" instigator. How do we know that as distinct from, "Well, it is before the Act came into force", or something?

MR. DOCTOR: All that is taken from is the terms of the letter, so it is really doing more than ----

THE PRESIDENT: It is a deduction from the correspondence?

MR. DOCTOR: Yes, it is not intending to give you a statement of the ----

THE PRESIDENT: Of the actual reasons?

MR. DOCTOR: Well, not of the actual reasons, but of the internal documents or discussions that took place.

THE PRESIDENT: You simply ask us to infer that, having had these arguments which covered a range of matters, the OFT decided that Hasbro could have 100 per cent?

MR. DOCTOR: Yes, because that is the way that this process would have worked. Indeed, one knows that this was not a judicial decision that had to be made. An application was made. A decision was made, representations were called for. This was the subject of internal discussion obviously between the various parties who are involved us, including undoubtedly legal representatives within the OFT, and ultimately a decision is made.

May I say this: if anybody wants to challenge that decision there are well established procedures in our law for judicially reviewing that sort of thing. If you can show that you are

affected in some way by that then you can commence proceedings to show that OFT has exceeded its powers in a way which has an effect on you.

THE PRESIDENT: They have effectively done that by appealing.

MR. DOCTOR: That is where we come to the next point. What they have done in the Appeal is simply to attack the Decision on the basis that Hasbro was not "the" instigator but "an" instigator ----

THE PRESIDENT: The other way round.

MR. DOCTOR: Was not "an" instigator.

THE PRESIDENT: They were "the" instigator, so they say.

MR. DOCTOR: They do that on the basis of inference, not by referring to any particular facts or anything, but by a process of deduction by which they say because there was no evidence that Argos was "the" instigator, and the OFT said in its Decision that it could not find that it was "an" instigator by clear and compelling evidence, therefore the Decision must have been that it was not "an" instigator, and therefore that only leaves one instigator and that means that it must have been "the" instigator. Apart from everything else the reasoning is flawed because it would be like taking a group of schoolboys in a class. If the teacher was to turn to one of them – his back was turned and somebody has caused a rumpus – and say, "Smith, you are a ringleader of the goings on here", it does not mean to say that there are not other ringleaders or there are not other people involved, but the teacher happened to turn round just as Smith was urging on or throwing the chalk at the teacher and comes to the conclusion that Smith is a ringleader of the naughtiness that is going on in the class.

THE PRESIDENT: I do not think there is any chalk in the classroom these days, Mr. Doctor!

MR. DOCTOR: That dates me! The point is that to find that somebody is a ringleader does not necessarily mean – certainly the fact that you cannot identify any other ringleaders although you have a suspicion was not acting on his own – you cannot, it is true, say that Smith is the only ringleader, because the words "the" instigator mean "the only" – you can conclude that Smith undoubtedly is "a" ringleader, and that is what the OFT has in effect said here, that Hasbro was "an" instigator but it cannot say for certain, whatever tests it applied, that it was the only ringleader. You know that because it has not come to that conclusion. If it had ----

THE PRESIDENT: How relevant to all this point would the evidence that we heard in the Tribunal, which, on the whole, broadly speaking, did show that Hasbro played the leading role, or a role that was in the lead anyway?

MR. DOCTOR: I can answer it by saying that we also know from the correspondence which is before the Tribunal that the OFT came to the conclusion that it was not "the" leader or "a

leading role". They excluded that and were concentrating on this. My answer would, therefore, be that it does not really matter what the CAT Tribunal's mind was about this, because it is not a matter for the Tribunal, it is a matter for the Director to have been satisfied about one way or the other on what was available to him. Do not forget, he is not carrying out a judicial function, he does not have the benefit, as the Tribunal had, of witnesses, of cross-examination and arguments, he has to do with submissions made, he deals through officials all of whom have input and express their views. They are civil servants who take a view on this thing and do the best they can, and the come in the end to a decision on the part of the OFT which the Director makes and therefore it becomes his Decision. These are not the correct proceedings to, as it were, judicially review that. First of all, there are all sorts of safeguards in judicial review, there are rules about what can be made available and what cannot be made available. In particular, you cannot raise things the night before, raise allegations of bad faith the night before the hearing as a sort of make-weight to add to all the other points you have got.

We would say that the Tribunal ought to approach this on a simple basis which is that the OFT purported to act on the basis that Hasbro was a leniency applicant. It undoubtedly was a leniency applicant. The OFT has laid down certain conditions. I can come to the letter in a moment. The OFT was satisfied that those conditions were met. There is nothing to suggest bad faith in this Decision – as I say, I will deal with that one element which has been raised – and on the face of it, therefore, whether the leniency programme was technically correctly applied or not does not make any difference because Hasbro was in a different category from Argos and Littlewoods, and there is no discrimination against Argos and Littlewoods by treating somebody – even if you make a mistake in the way in which you treat that other party – there is no discrimination against Argos and Littlewoods because they are clearly in a different category. They are just not applicants for leniency. They could have been but they chose not to do it. The outcome of all of this – in a sense it is the best test – because in the end they say the result is they are let off entirely from their penalty, even though they provided nothing in the way of support, even though they did not apply for leniency, even though they did not co-operate or do anything which would put them into the category of a leniency candidate.

Can I just deal briefly with this point which has arisen in the last few days which may give rise to an allegation of bad faith, and that is ----

MR. GREEN: I am sorry, I have not made an allegation of bad faith.

THE PRESIDENT: You came pretty close to it. You said there were surprising circumstances and one the factors that affected their decision on leniency was the idea that Hasbro was going to abandon its distributors' appeal.

MR. GREEN: We have said there was a strong inference that they paid attention to an irrelevant consideration. I would not want it to be suggested that they went out deliberately to manipulate. They either did or they did not. We asked for the internal documents. They have not been provided. If they had been provided they may have disproved the allegation. We simply say that there was an inference that they took account of an irrelevant consideration. I think there is a difference between that and an allegation of bad faith, which is a very serious allegation to make and I would not wish to make it.

MR. DOCTOR: I am pleased to hear from my learned friend that the inference or the hint at improper conduct is not persisted in and not made, although to say that something is surprising, I think Mr. Green will accept that the OFT read that to mean that there was an imputation on its *bona fides*, which was then denied expressly through me in the skeleton argument, and in their own letter. If the proposition is simply that they took into account something that was irrelevant, let us see what it is. Again, I make the point that this has been raised only at the very last moment. The point is that they took into account the fact that Hasbro might withdraw its Appeal if they granted Hasbro 100 per cent leniency in the other case. The basis on which they say that is that a statement by Mr. Tatton, I think it is, in the hearing of 23rd who says that in asking for an extension of time to put in their Notice of Appeal in the distributors' case, says to the Tribunal, "Well, it is all tied up with that because, depending on what they find, that may either make us just go on with the Appeal or it may clarify some of the issues and influence the nature of what we say in our Appeal". The whole argument put forward to you, Mr. President, was that somehow or other what they were going to read in the Decision was going to influence them in some way in the way in which they treated the distributors' case, whether it was by way of legal argument or some other way. It was very vague and indeed the Tribunal rejected all of that anyway and said, "There is no reason why you should not put in your Notice of Appeal in the distributors' case".

Now because apparently the OFT knew, that is all they are saying now, Hasbro might withdraw their Appeal in the distributors' case, they therefore decided to take that into account in deciding to give them 100 per cent leniency. Well, they might have, but then, if you put that way, they might not have, so one could easily formulate the same accusation as by saying the OFT knew that Hasbro might not withdraw their Appeal if they gave them 100 per cent

leniency. It would be absolutely meaningless. There is no basis whatsoever to suggest that the withdrawal of the Appeal played any part whatsoever in the thinking of the OFT.

I can objectively point out the following: at that time £4.95 million was the highest fine that had been imposed on anybody. Other people who were fighting their way through the Tribunal on fines lower that and to simply know that someone might or might not, for various reasons, withdraw their Appeal would hardly constitute a reason at all. In fact, it makes no sense whatsoever, if one thinks about it. The OFT might have concluded, "If we back down on this one, they may think we are an easy touch and it might encourage their Appeal". I would simply submit that there is no basis for the submission, other than the fact that everything is possible, and that is not the way to erase of such seriousness.

We also know from the letter that was written yesterday in reply to the request for all documentation supporting this Decision that the OFT confirms, without any intention to waive privilege, that there is no reference to the issue of the withdrawal of Hasbro's Appeal in the distributors' case in any of the internal documents which preceded and led up to the OFT's decision on leniency in this case. They may say, "We need to cross-examine all of he OFT people to see whether they may have had it in mind". This is simply ----

THE PRESIDENT: Has some member of the Legal Division had a look at these documents?

MR. DOCTOR: Mr. President, somebody has certainly checked through that before they wrote this letter.

THE PRESIDENT: A member of the Legal Division?

MR. DOCTOR: Yes.

This point, as I say, is not a point of bad faith, but just taking irrelevant into consideration and it not a point at all.

Being the instigator, I have dealt with. I have dealt briefly with coming first. I do not think I need to say anything more about that. They are not the same investigations, they are completely separate investigations. The OFT has told you, and there is nothing to gainsay it, they did not know about this until they were told about it by the production of the emails by Hasbro.

Then co-operation: the basis on which it is said that co-operation is not given is an argument based on the terms of the actual letter of leniency, which is in volume 2, tab 14, p.95. The conditions are set out there. The applicant must have provided all information. There is no suggestion that they did not give us information. Then reference is made to the co-operation which will be expected, which will include Hasbro using its best efforts to secure the complete and truthful co-operation of its current and former directors, officers, employees and

agents, encouraging such persons voluntarily to provide the DGFT with an information, facilitating the ability of current and former directors, employees, and so on, to attend for interview.

THE PRESIDENT: So it is a best efforts obligation.

MR. DOCTOR: Yes, using its best efforts to ensure that current and former directors provide information, respond completely and truthfully, and so on. There is no suggestion that Hasbro has not complied with any of this. They say that the OFT has rejected the evidence of two of the people who gave evidence. Well, what has that got to do with it? Hasbro is not a guarantor of the truthfulness of its employees. Indeed, the employees may be truthful according to their lights and the way that they see it. The OFT has just rejected their versions. There may be all sorts of reasons for that. In any event, if they were being consciously dishonest, that is not to be held against Hasbro, which has done its best to get people to co-operate. We have no complaints about the co-operation we have had from Hasbro, including the connection – this is limited to the investigation, it does not necessarily continue after this – indeed we have, in locating the witnesses for these proceedings, we have had further co-operation from Hasbro. We also have the fact that they did not Appeal, we have not gone to the trouble and expense of that. They have certainly co-operated fully. There is not much I can add to that factually.

THE PRESIDENT: They also say the fell short of continuous, complete co-operation because they deny ----

MR. DOCTOR: Yes. Mr. Green ultimately said that it was implicit in his submission that there was an unexpressed term of the leniency programme which was that you had to essentially admit your guilt in some form or another. That would drive a coach and horses through any leniency programme. The whole about these programmes is to encourage people to come forward knowing that they do not have to admit guilt. They have to give us full information on which the OFT can then decide whether they are guilty or not. Ultimately the Tribunal will make a decision on that. There is absolutely no requirement, and there could not be, that you have to admit guilt. Apart from anything else, it would probably be contrary to Human Rights Act to incriminate yourself in that form. Indeed it does not work that way because the programme works in cases where people are genuinely in two minds: they think it is lawful but they report the facts to the OFT. That is what Hasbro did here. They thought that it was unlawful in a different way from the way we concluded. Nothing turns on that.

The inadequacy of the reasons was the fifth point. I think I have dealt with that.

THE PRESIDENT: To some extent, these sorts of allegations that have been flying around at the last minute are more easily pre-empted if there is some reasoning in the Decision or in the covering letters that shows what was in people's minds at the time.

MR. DOCTOR: Yes, Mr. President, it was anticipated that the grant of leniency would be seen in this way. Obviously, in future it may be necessary, in case there is a complaint along these lines, to say a few words about whether leniency was granted. It will probably not go much further than simply stating that the OFT is satisfied because, as I understand it, the OFT is not keen to have its leniency negotiations, which, after all, are confidential and lead up to a conclusion and may contain admissions and all sorts of things which were made without prejudice, generally known to the world at large. Secondly, it is not a judgment or a judicial process so it may not be capable of being summarised in that way. It may be possible certainly to include a few brief sentences as to the basis on which ----

THE PRESIDENT: It is probably – and I am not speaking at the moment in a considered way – desirable, is it not, that leniency does not operate in some sort of random fashion and that at least to some extent, if it becomes necessary, there is some procedure to check – it may not necessarily need to be fully set out in the Decision but it ought to be somewhere – that, broadly speaking, guidelines have been followed and that like cases have been treated alike, otherwise it becomes simply arbitrary.

MR. DOCTOR: That is inadequacy of the reasons.

I think I have dealt with all the points made on the discrimination other than the consequences.

THE PRESIDENT: I do not know if you would accept what might be implicit in the *Tokai* case that has been cited to us that it would be open to the OFT in any event to depart from the Guidance if it gave a reason for doing so, provided the reason was a proper reason.

MR. DOCTOR: One of the things one must bear in mind here is that, of course, the leniency programme, the way in which it was then formulated, has a paragraph which suggests that you are entitled to leniency under 3.4, which undoubtedly the Applicant would regard as an entitlement.

THE PRESIDENT: You could not take it away but you might perhaps add to it.

MR. DOCTOR: Then there is 3.6 which deals with a discretionary situation where you may have to give reasons, and indeed it may be more appropriate in that sort of case that reasons may be necessary there.

THE PRESIDENT: One of the problems with guidance of this kind, prepared very much in good faith and with every good intention, is that at the time you prepare it you cannot actually foresee the rather complicated situations that you are going to be faced with in practice.

MR. DOCTOR: Indeed the new Guidance has dropped the question of the instigator because it is a problem obviously.

THE PRESIDENT: Yes.

MR. DOCTOR: In any event, it is guidance. What one can say is that undoubtedly, but for the query, which ultimately is up to the OFT to decide as to whether it was "the" or "an" instigator, for the rest of it there was substantial compliance with the provisions of the leniency programme, such that whether or not it was technically correct, for the purposes of a discrimination argument which does not depend on technical questions, it is ultimately the judgment of the person who is making that decision, "Were they in the same category?" one would say that there is no comparison between the two categories.

THE PRESIDENT: Yes.

MR. DOCTOR: The consequence, if the argument is correct that you technically comply with the leniency programme or you do not, if you make a mistake or take a wrong view, then apparently the only result is that the other parties are let off their penalty completely. That conclusion must be revolting to common sense. It cannot possibly be the result of a European principle of non-discrimination that that outcome should result. The cases on sex discrimination in wage settlements are completely and utterly irrelevant to what we are talking about. There may be some retrospective effect, but for the future you re-arrange people's pay differentials in pay settlements so that you no longer discriminate between different sexes. That has absolutely nothing to do with the question of a one-off penalty for wrongdoing, which has nothing to do with people's wages going into the future.

Unless there is anything else you would like me to address on the question of discrimination perhaps I can move on to the 10 per cent.

THE PRESIDENT: Is that perhaps a moment where we could have a five minute break.

(Short break)

MR. DOCTOR: Moving on to the starting point of 10 per cent on the turnover – we will come to that in a moment, but before I do that can I just mention one other point which is really at the same part of the document that I want to go to in relation to the 10 per cent. Would you look at the Decision itself, para.403, this is really the last point on the discrimination about instigator. I think I agreed perhaps wrongly with the Tribunal's comment that there was nothing in the Decision which dealt with the leniency point. Indeed, in para.403 there is a discussion on the

OFT's thinking on the question of instigator which explains how it comes to the view that Hasbro is an instigator. Then in para.419 there is the reference to Argos being the instigator.

THE PRESIDENT: There is some evidence that Argos was, but there is no clear evidence.

MR. DOCTOR: Yes.

THE PRESIDENT: I think what you are saying is that it is implicit from the Decision and the OFT's view that there is some evidence that Argos was an instigator, though it is not clear, and it was not clear the other way either.

MR. DOCTOR: Yes, and it cannot be said with the sort of certainty that was not going to invoke an immediate Appeal ----

THE PRESIDENT: … that is the opposite argument.

MR. DOCTOR: In the Decision on leniency it just says that leniency has been granted, but it is plain from the correspondence, and so on, which they have seen, that this question of "the" and "an" instigator was one of the topics that was raised by Hasbro. Indeed, the fact that it was given 100 per cent, you start with the assumption that the Director must therefore have come to the conclusion that it was not "the" instigator. If one was genuinely interested in this rather than just raising it as an argumentative and forensic point one would have seen that he had applied his mind to that and come to the conclusion that it was not "the" instigator but "an" instigator, and that obviously formed the decision as to why it should get 100 per cent.

THE PRESIDENT: One point that does arise from para.403, albeit indirectly, and it may not in the end be a point that is one we need to address, is the question of whether you could be deprived of full leniency on the basis that you were "the" instigator when your instigation took place before the Act came into force. That seems to me rather a difficult question.

MR. DOCTOR: Ultimately, as one knows, because Hasbro would have been going under the provision which said that it was entitled to it, plainly the decision was crucial one way or the other and would have been subject to ----

THE PRESIDENT: Yes, you may say that where is an entitlement the Director has to be pretty sure that he is on strong ground to refuse the *prima facie* entitlement.

MR. DOCTOR: It is not a matter of discretion, should this person have it or not; it is a matter of am I legally justified in withdrawing it, a right they would otherwise be entitled to. The OFT came to – there is no bad faith alleged, we know - a decision in a matter which is entirely for the OFT.

I should also add that the question of penalty, as we read the Act, is not one which a third party has an appeal against under s.46. Only the person affected by the penalty has an

appeal against it. This sort of point, if you are a third party who feels a decision has been made and you need to judicially review that decision ----

THE PRESIDENT: Our opposite numbers in Spain have just taken a decision to the contrary effect, but there it is, this is the new devolved world in which we live.

MR. DOCTOR: With this open at para.424, moving on to the 10 per cent point, it was submitted that the only basis on which the OFT had found 10 per cent was because it thought price fixing was very serious. In fact, that is not a correct representation of what the Decision itself says. Paragraph 424 refers, firstly, to paras.376 to 387 where the OFT generally sets out its views on the seriousness, and then says in specific regard to Littlewoods, and the same thing is said in regard to the others:

> "… the OFT takes into account the very serious nature of the infringement (price-fixing) and its comments in those paragraphs regarding the nature of the products [children's toys] entry conditions, damage to consumers and the effects on competitors. Although the position of Littlewoods in the retail toy sector is less important than the position of Argos, Littlewoods' share of the retail of traditional toys and games is significant. Littlewoods is a substantial and well known [player]."

The same point is made in relation to Argos at para.413, the very serious nature of the infringement, its comments in those paragraphs, and those paragraphs deal with the fact that it is children's toys.

THE PRESIDENT: What they come down to arguing is to say if this is price fixing you can imagine many more serious kinds of price fixing than this.

MR. DOCTOR: No doubt you can, but where two of the major players in a high profile in which children are involved and the pressures parents come under from their children, where the prices are fixed in this way in what was, as has been held, a first foray into the market, when that seemed to work an extension to other fields, and had there been no intervention at that stage by the OFT who knows where we might be today. Therefore, we would say that there may be lesser degrees of seriousness, but it is difficult to think of more serious cases of price fixing where you actually fix the prices of retail goods in the market directly. We would point this out as well: the purpose of doing this, the starting point, is not just the justice towards the particular people involved, but of course the deterrents which this sort of case must have on others. All of those facts can be taken into account and would have been taken into account in deciding that 10 per cent is the appropriate figure here.

It was argued that this was not an express horizontal agreement, a classic smoke-filled room. No, that is true. In fact, some may say this was more serious, a rather underhand set of

arrangements which were not openly agreed between the parties, but which the parties involved in were keen to keep confidential, if not secret, where documents came into existence which they understood should never have come into existence and where instructions were given to destroy them. It was very difficult to prove. One of the points made was that the proof had to be achieved by analysing evidence in depth. Far from making that less serious, if anything it is more serious because the parties involved knew that they should not of course enter into a written agreement in a smoke-filled or other kind of room signed by all the parties saying, "We will all be going out at RRP in the next catalogue, is that okay", they did it in a different way which had an effect which would have been the same, but we say there is nothing in this case which would distinguish it from a blatant attempt to do this.

There is an arcane in one of the skeleton arguments which is that in the Decision there is a reference in one paragraph to the penalty being imposed for the overall agreement rather than the bilateral agreements. If one looks at that paragraph – perhaps I can find the paragraph, it is para.373 of the Decision – it says:

> "The OFT intends to impose a penalty on Hasbro, Argos and Littlewoods. There are a number of agreements identified in part IV of this Decision. The overall agreement identified is based on the existence of the two bilateral agreements."

It is not absolutely clear if a distinction is being made – in fact, it does not appear to be – between the trilateral arrangement and the bilateral agreement, because it says that:

> "… the overall agreement identified is based on the existence of the two bilateral agreements. In this case the OFT has decided, since the overall agreement and the two bilateral agreements are based on the same set of facts, to impose only one penalty on each party and to base it on the overall agreement rather than impose separate penalties in respect of the separate agreements."

What that is really trying to get at is to say that instead of fining Hasbro twice, once for entering into that agreement and once for entering into that agreement and then all the parties for entering into the overall agreement, it is going to treat the whole thing as one. It may not be very felicitously expressed, but the sentiment behind it is entirely proper, which is that there is going to be one fine for everybody based on the arrangements in full.

I think the argument that is put up against this is that if you are basing it on the trilateral agreement that was only found to exist by virtue of the reasoning in the *JJB* case, which was a modern development which was not in existence at the time when this happened. Therefore, it shows that the penalty should reflect that it was not the law at the time and the parties could be excused for not knowing that what they were doing was wrong. Unfortunately

the parties did not know that they were not supposed to know because they all knew that what was they were doing was wrong, and that was because it was plain that it was wrong. They were fixing the prices. They concede that. That is a very formalistic argument to meet what the OFT has claimed to have done which is to fine them for price fixing.

The Judgment of the Tribunal makes it quite clear that there has been not just concerted practices but actual findings of actual express agreements, not in writing, but quite definite agreements reached between these parties to go out at RRP. There could not be anything clearer than that, everybody understood that that was what they were doing. That is the only explanation for all of this document which one sees. On that basis one can say that this was price fixing of the most serious kind. Everybody knew what was going on and what they were involved in and it was not some archaic form of new kind of development in the law where certain conduct previously accepted is now suddenly unacceptable.

Finally, it was said that no directors were involved and no executives. I am not sure that no directors were involved, but in any event fairly senior staff were involved here. The people who were responsible in this market – no doubt the directors – meet from time to time. This was not, however, just one salesman on his rounds trying to get his bonus by entering into some agreement with a local customer, this was a company policy, the people responsible for the company, performing these particular tasks were responsible, and the fact that the board did not know about it makes it, in a sense, worse. If they had gone to the board and asked them if this was legal, or it was proper that they should be doing this, they would no doubt have been told to take legal advice and at that stage they would have been stopped from doing it.

THE PRESIDENT: Could you help me on two points, Mr. Doctor. The 10 per cent starting point: in other areas of the law it is sometimes said that one should not always go straight to the statutory maximum for any particular offence because you never quite know whether there is going to be one that is going to be more serious in which you are going to need the statutory maximum. In this particular case we know what the Tribunal's findings are, that there is an agreement to observe RRPs, but for the sake of example I do not think we have got an agreement as to what the RRP should be, as it were – i.e. Hasbro decided its RRPs and then persuaded the others to follow them.

MR. DOCTOR: There was some evidence that it was done in collaboration with whether they thought the market would bear that.

THE PRESIDENT: There is some evidence, but it is more a case that, "We will follow the RRPs", and not "we will get together and decide that the RRP is going to be whatever it is", which

might be a worse case. Is it, in principle, if you like, right to start at the top of the range? That is the first part of the question. The second part of the question – which is as I hope I have already said is not intended to be hypothetical because one sees what these Guidelines are trying to get at – does the present system not give rise to a certain degree of complexity and a certain degree of "spurious certainty", because, depending on what starting point you start at, you might not make an adjustment for deterrents and then you make some further adjustments up or down down the line. In this case, in fact, there is no adjustment for deterrents, but you might have started at a smaller starting point, but had an adjustment upwards for deterrents or something. It is all a bit squashy, you push one end of the balloon and it goes out the other side. I do not know you have any observation of how it all works.

MR. DOCTOR: If I can deal with the first point ----

THE PRESIDENT: The first point was should you always start at the top of the range and give yourself some headroom?

MR. DOCTOR: I would not say you should always start at the top of the range. The justification in this case is that in any event the 10 per cent is the starting point.

THE PRESIDENT: You could still have put it up if you thought the figure you arrived at was not enough, as it were.

MR. DOCTOR: It can still go up and it can still go down. Really whether one assesses something at 8 per cent or 9 per cent or 10 per cent is really a matter ultimately for the OFT to decide a sensible basis in these cases, which may be that 10 per cent is the starting point anyway for most cases but the figure below that, 5 per cent, would be for the more trivial cases, such as the single Englishman who has been entering into infringing agreements or something of that kind. In any event, one can go up from there and go down. It is just a starting point and its arbitrary.

If one tries to fine-tune that very beginning point, indeed one may be doing the very thing that you, Mr. President, have just adverted to, which is to impose a too formalistic set of rules, and one would just be adding to the formalism. First, you have to carefully assess the exact range between one and ten where the seriousness of the penalty had come into.

It has just been pointed out to me that at step three one can adjust quite a lot upwards.

THE PRESIDENT: The Guidance does say that you are going to start at or near 10 per cent for price fixing.

MR. DOCTOR: Ten per cent in itself is a fairly low figure of whatever the turnover is. It is an attempt to relate it to the relevant market. They may have said 50 per cent, they may have said anything. I have to say if it was a 50 per cent figure one would be more requiring a more specific objective and a definite criteria for taking 50 rather than 25. When you are down to

somewhere between ten and one it is a matter of assessment really. It is difficult to criticise it one way or other. The OFT obviously bears the whole exercise in mind when doing this.

THE PRESIDENT: Yes, they bear in mind the series of steps.

MR. DOCTOR: Yes.

If I can move on to your next question before coming to some more detail of product market. It is s.38(1) which requires them to have published Guidance anyway, and the OFT must prepare and publish Guidance as to the appropriate amount, but it can alter it any time which rather suggests that it has a rather free hand. It must be approved by the Secretary of State, so there is that requirement, the Guidance has to meet with the political input of the ----

THE PRESIDENT: If they were entitled to disregard it that would slightly neuter the need to get the approval of the Secretary of State.

MR. DOCTOR: Yes, they have to have regard to it. It does not mean apply, it does not mean apply slavishly, it means have regard to, meaning that in most cases you would apply it, but there may be circumstances where you simply cannot apply every particular step in the guidance.

To be contrasted with that is the Tribunal's powers which are unlimited, subject only to the 10 per cent of total turnover. The only constraint on the court is the composition of the court itself. There is no question about it, Parliament has given this Tribunal a completely free hand. It could have said "shall also have regard to the Guidance published by the Director as approved by the Secretary of State", but it did not even do that. The expectation no doubt is that the Tribunal will, through the nature of its composition, bring to bear on these questions the jurisprudence which will ultimately set the limits one way or the other. If there is going to be an initial period in which there are not that many cases or not that many examples, so be it. If you are a would be infringer thinking of infringing better if you found that disconcerting that the penalty might be in the hands of the Tribunal, better not to commit the infringement, then you will not have anything to complain about. Parliament has thought about and has given the Tribunal a free hand. Obviously the Tribunal knows that this is an Appeal from the OFT's Decision and therefore it does not come as a blank slate. It may be that, as the Tribunal said in *Napp*, it would also have regard to the Guidance and no doubt have regard to what the OFT has done, but that is up to the Tribunal.

THE PRESIDENT: I think in *Napp*, the judgment partly took the view that if it was not open to the Tribunal to disregard or depart from the Guidance there would be some doubt as to the independence and impartiality of the Tribunal from an Article 6 point of view.

MR. DOCTOR: Yes, but the significant thing is that Parliament, which it could have done, chose not to fetter the discretion of the Tribunal.

The question then is the Decision made by the OFT and I turn to this question of the product market. The first thing to note is that although the OFT at 423 in a footnote where it talks about step one of the relevant product market, it refers back to the other Guidance on market definition. That Guidance, which is OFT 403, expressly says in para.1.5 that the approach described in this Guideline is not mechanical, it is a conceptual framework within which evidence can be organised:

> "The Director General will not follow every step described below in every case, instead he will look at the areas of evidence which are relevant to the case in question and will often be constrained by the extent to which evidence is available. Market Definition is not an end in itself but rather a step which helps in the process of determining whether undertakings possess or will possess market power."

I will not go through it, but just beginning at 2.1, the thrust of these definitions is really directed towards establishing market definition in infringement and in particular Chapter II cases where the crux of the whole exercise is to establish the relevant market first. That is in 2.1, for example:

> "The prohibitions in the Act are designed primarily to prevent undertakings from exploiting market power …"

and so on, and then on it goes.

The SNIPP test that is here described is plainly one way of doing it, and it is plainly relevant when one is trying to establish an abuse situation from a dominant position in a market, but it has lesser relevance in the situation such as we find ourselves in today.

The thrust of the complaint is that the OFT did not conduct a SNIPP exercise and did not commission economic analysis which would have taken Action Man and then assumed you put up the prices by 5 per cent and then seen which products were substitutable and then done that again, and so on and so forth. All of that would have been quite inappropriate in the present exercise, because what the OFT was confronted with was, first of all, it is not abuse situation but a cartel in which there appeared to be a foray into this sphere of activity by two of the leading players, expanded in the following year into fresh products, and it then was required to set some relevant and appropriate penalty. The way it approached the market was not on the basis set out in the SNIPP test, in so far as that it is set out although the Guide itself says that will not always be applied, but what it did was simply to take the categories into which these products fell as defined by the parties themselves. Those categories were stated to be – as one has seen, there are ten of them – boys' toys, girls' toys, games, and so on and so forth, and those categories were taken to be the relevant market.

It is fairly arbitrary – there is no question about that – except in the sense that the parties themselves, certainly Argos, which is the party that makes this complaint – Littlewoods does not make this complaint in its Notice of Appeal or in its skeleton argument – uses those categories. The category is then taken on turnover because there is an idea that if this particular items falls within that category and if you are buying a boys' toy or a girls' toy and you find that the price of Action Man or Baby All Gone, or whatever it is, has gone through the roof you would buy something else. It is true children like to have that, but there would be something else that you could buy.

They did it on this basis. They did it on the basis that plainly there is no monopoly in each of these particular lines in the sense that are completely unsubstitutable, people are bound to buy whatever you sell, there is nothing you can do about it. If you came into the shop and found that Action Man now costs £28 instead of £16 you might consider something else. There may be differences, even at much lower levels. So you would go and you would buy something else. The reasoning therefore is that it naturally forms part of a wider market. It is not really possible to do this SNIPP test so you just take the wider group.

The fact that there are such very low margins in this area rather suggests that these toys are competitive in the sense that if they could not be substituted you would expect to find much larger margins because if, in fact, each one of these products or all of them together formed one market, one relevant market product, you would expect therefore that they could have whatever margins they liked because nobody would be substituting or buying anything else. It is not possible to say what else people buy because the decision on that is conceptually difficult to see, "If I do not want an Action Man I will have something else".

What is very significant in all of this criticism is that Argos and Littlewoods, and Hasbro as well, have never come up with – apart from criticising that we have not done the SNIPP – an alternative or a suggestion that, "Look, it is very straightforward, we have plenty of our own market research which shows that if you put up the price of Action Man people will buy X, or they do not buy anything else", in which case we would said, "Well, that is funny, why are your margins so low if you can just put up the price?" The argument is purely theoretical, "Yes, we have not done the SNIPP test, we do not think it is possible to do it in this field, in any event, we are taking something which you have put forward, if you have got something better than that why do you not come and tell us about it". It is true that they do not have to prove anything, they do not have to prove things, but that is a different question from if you raise an objection you should come forward with the evidence. There is no reason why they should not do that. They got 10 per cent for co-operation, they may have got a little bit if

they had co-operated a bit more and told us what it was that they say the market consists of. We have taken that point, we took the product market.

The unfairness is said to be that we did not do anything else, although they do not suggest what the else might have been or whether the else would have shown anything else, but they say, therefore, they are being fined for the whole market, so even though it was only Action Man they are also being fined for boys' toys as a whole, including Meccano sets.

This is completely without foundation because they are not being fined on that basis at all. What this is is the starting point of a five step exercise, it is a rough and ready starting point. It is not intended to fine them for precisely what they did in relation to the toys on which they entered into a price fixing agreement because it is also intended to act as a kind of deterrent to others. The fine must be substantial so that others will see that this is not worth entering into.

If the Tribunal adopted the argument that they put forward, which is that in the absence of the OFT being able to prove that buy economic surveys, and so on, that there is, in fact, a wider market according to the SNIPP test, what we would almost always have is, "Well, you just look at whatever it is that they have agreed on, they have agreed on Action Man and a few other things". Now by the time they were caught they had agreed on 23 goods, 46 goods, or whatever it was, and they would know that the Tribunal has said, "In the absence of anything else you just take 10 per cent of whatever it is that they agreed on, the turnover in that". If your profit is 20 per cent it might be quite a good thing to do to take a chance on rigging the market, because if you are caught you come up with an argument which says the most they can take is the 10 per cent of the goods which you have been price fixing, the turnover of that. So it may be something you could factor into your prices, the possibility of being caught. That is just to miss the whole point of the exercise. The exercise is for the Direct to start somewhere, a not irrational figure which he starts at. He is not saying that that is everything that was subject to the price fixing agreement, but it is 10 per cent of the category, and then to move up and down from there. It is as good or bad a place to start. It is what he said he would do.

The significant point is that when he said he would do it in the Rule 14 proceedings Hasbro came back with an RBD analysis. The RBD says, "This is wrong", it does not say what is right, it is the same sort of criticism. Argos never made that point, Littlewoods has never made that point in any of its submissions, and the OFT went on to adjust it from there. That was the time to come back and say, "No, it is Action Man and various other things which form a market and we can easily show that", or, "Here is some evidence which shows it is

Action Man and two other toys and the turnover is X". The chances are, if that had been narrow and it turned out the total penalty for doing this was some derisory figure, it might in fact have led to a necessary increase.

THE PRESIDENT: You might have had to say, "We will multiply it by five in order to have the necessary deterrent".

MR. DOCTOR: Yes. We say that the OFT has obviously acted in good faith on the basis that it has not ignored anything that Argos has said. It did not ignore anything that Hasbro through RBD said. They took it into account – "It is all very well to criticise it but you do not offer any other thing, and we are not undertaking a vast economic analysis at costs of hundreds of thousands to the public, when you are the ones with the information, you could supply us in five minutes if you really thought there was anything in it". We then came to our calculation in the absence of any better suggestion. The only suggestion they come up with is that you take 10 per cent of the actual goods. That is not what the regulations say. It is plain that it says 10 per cent of the relevant market, it is plain that it definitely does not say 10 per cent of the goods which were the subject of the price fixing agreement.

THE PRESIDENT: Could I just identified a point at which a certain amount of confusion may have crept into the system. I happen to be on the *Butterworths Handbook*, because that has got 403 in it and I am not sure that we have got 403 in our documents. It is perfectly apparent that 403 is about identifying market power and about identifying who is a monopolist and who is not. Indeed, 2.2 of 403, which is on p.3027 in *Butterworths*, specifically says that price fixing might be prohibited even if the undertakings involved did not possess market power. This price fixing case does not depend on whether they have got market power or not. One has borrowed a criteria that is there for market power and applied it to a situation where only in a very subsidiary sense are you trying to identify the market. When you go back to 423, Guidance as to the Penalty, and I am looking at footnote 7, it just says:

> "See the Competition Act guideline *Market Definition* for further information on the relevant product market …"

Then it goes on to say:

> "The relevant product market and relevant geographic market will be determined as part of the Director's decision that an infringement has taken place."

That is actually an assumption that has not actually borne out by subsequent experience.

MR. DOCTOR: Because plainly the Guidelines apply to Chapter I and II.

THE PRESIDENT: I can see what has happened, I think.

MR. DOCTOR: You will get information on the relevant product market in this Guideline if you are a member of the public or ----

THE PRESIDENT: But it does not follow, so you submit, that you have to go through all the steps in the other Guideline?

MR. DOCTOR: No, you cannot. You are not required to.

THE PRESIDENT: You are there for a different purpose.

MR. DOCTOR: Those submissions are contained in my skeleton argument, it is a completely different purpose and it would be unduly formalistic to base the cases on long footnotes in guidance. The footnote in any event is ambiguous.

As I say, this is pre-eminently the sort of point where the Tribunal would be the right sort of Tribunal to decide substantive points between the parties if there was a genuine point between our choice of these product markets and another choice. This is pre-eminently the sort of matter which the Tribunal could decide. It has expertise available to it which would enable it to decide questions of economic as well as legal importance. If a proposition was being put from the other side that the product market is not this, it is something else in this sphere, the Tribunal could decide. All that is being taken is a purely formalistic submission, which is, "The OFT has not proved something in the way in which it is required to prove it and therefore we et off our penalty". That is not the way this system is intended to work. The system would degenerate into a box ticking exercise which is not what was intended at all.

Those are my submissions.

THE PRESIDENT: Thank you, Mr. Doctor. Since Mr. Doctor has essentially been replying to your submissions there may not be a great deal more to reply to the reply, if you see what I mean, Mr. Green. I am not suggesting that you should ----

MR. GREEN: I will not be very long, I do not have that much to say to you.

THE PRESIDENT: ---- reduce the cut of the coat, but I suspect a lot of ground has been covered.

MR. GREEN: It has indeed and I have got a relatively small number of points I want to make and I will just take them in sequence, if I may.

THE PRESIDENT: Yes, thank you.

MR. GREEN: First, what is meant by "discrimination". Mr. Doctor says that there is a short answer to this. He says that Argos and Littlewoods are not in the same category because Hasbro applied for leniency. At the end of the day Hasbro is in a different category. It must, therefore, that if the OFT is wrong in its approach then the only point which the OFT, itself, relies upon to differentiate between the companies falls away. If you set up as leniency as the differentiating ground and you wrongly grant it so that that ground falls away then you have

not got a basis for differentiating it. If, as here, the OFT, as we submit, wrongly applies the leniency criteria and this leads to discrimination then the mere fact that Hasbro applied for leniency does not alter the discrimination. If you think about it sensibly, if this were not the case, the OFT could misapply its leniency rules, it could then rely on that misapplication to say that the defendants are not comparable, and then rely upon it again to immunise itself from the principle of non-discrimination. The point just simply does not stack it, it is just not sensible.

Point two, instigation: the inference which the OFT invites you to draw is, quite plainly, we submit inconsistent with the Decision. Notwithstanding Denton Wilde Sapte's submission that Argos was an instigator the OFT was not able to so find when push came to shove. It had to record formally in the Decision at the culmination of the investigation that there was no clear probative relevant evidence that Argos was an instigator. The OFT's suggestion that Hasbro was "an" instigator because Argos might have been is not open to them if the OFT cannot, at the end of the investigation, put their hands on their hearts and say, "We have got evidence that Argos is even 'an' instigator". They cannot do that. There must be legal finality at some point. They have to go firm on their conclusion in law and they did in the Decision.

As to the schoolboy analogy, this simply does not add up. There are three players in this case, Argos, Littlewoods and Hasbro. It cannot be Littlewoods because they found it cannot be Littlewoods. It can be Hasbro because they found Hasbro is an instigator. Therefore, the only other candidate is Argos. It is not a matter of not knowing who the crowd is and which one threw the chalk. You know there are only three and, by a process of elimination which is what Denton Wilde Sapte did in their letter, you can determine who the culprits are.

More importantly perhaps, are the Tribunal's own findings. We submit that you must take account of your own findings which confirm the decision that Hasbro was the instigator or the leading player. As Mr. Doctor was speaking, I was reminded of paras.585 and onwards of your judgment in relation to Hasbro's position post-May 2000, in which you expressly found, summarising the effect of those provisions, in 585 that the extension of 18th May was internally discussed within Hasbro at some considerable length; in 586 that Hasbro then went out to engage in talks to persuade Littlewoods and Argos to agree, which you defined as, or described as, "a definite strategy on Hasbro's part", and I am looking in the middle of 586, "to persuade both Argos and Littlewoods to agree to sell at RRPs those specific products as well as continuing with a previous arrangement on Action Man and core games". You defined that as "a definite strategy on Hasbro's part both to extend the initiative and to continue with the

initiative", and this is conduct, definite strategy, after the date on which the Competition Act came into force.

You found also in 592 that these were Hasbro's attempts to extend the pricing initiative. The description of the exercise, "Hasbro's attempt to extend", makes it plain that it was their initiative, they were instigators. In 597 you set out your conclusion that Mr. Thompson and Mr. Wilson had, and I am quoting the verb, "secured" a verbal agreement from both companies. That was them securing agreement. When you came to conclude in relation to these matters, paras.713 and 727 and following, it is quite clear that you were of the view, and you so found, that this was Hasbro's initiative which it engendered and pursued deliberately, persistently, and that it was a strategy targeted at Littlewoods and Argos. We submit – and I have concentrated on those paragraphs because they concern the position after May 2000 and therefore they overcome any question as to whether or not they were an instigator before that date – you found in your Judgment that they were the instigator and the ringleaders after that date.

THE PRESIDENT: That evidence was not available to the OFT at the time.

MR. GREEN: With respect, that evidence was pretty much the evidence ----

THE PRESIDENT: The witness statements were not available, put it that way.

MR. GREEN: The witness statements were available for the second Decision, not the first Decision, and the witness statements corroborated the ----

THE PRESIDENT: The OFT could hardly have changed its position regarding Hasbro in the second Decision.

MR. GREEN: No, it did not. It found they were an instigator in Decision one and in Decision two. They had the emails. In relation to the extension of the agreement vis-à-vis products we submit there is no material difference between Decision one and Decision two.

That is important because your Judgment was to the effect, even setting aside anything to do with the OFT Decision, that Hasbro was both the instigator and the ringleader. Assume for the sake of the argument that that was not definitive of the issue, the court at first instance in a passage I should have read to you earlier but I would ask you to look at it now in *Tokai* effectively addresses this point. It is *Tokai*, para.301. The court there is dealing with the question of one or more ringleaders and the court says:

> "In that regard, the Court recalls that, according to a well-established line of decisions, where an infringement has been committed by a number of undertakings, it is necessary, in determining the amount of the fines, to establish their respective roles in the infringement throughout the duration of their participation …"

Then they cite *Anic* and *Enichem*.

> "It follows, in particular, that the role of 'ringleader' played by one or more undertakings in a cartel …"

– and then they use the word "must" in a mandatory sense:

> "… must be taken into account for the purposes of calculating the amount of the fine, in so far as the undertakings which played such a role must therefore bear special responsibility in comparison with the other undertakings."

The court there contemplates that the ringleader may be one or more undertakings, but if it is found that there is more than one undertaking that role as ringleader must be reflected more severely because those undertakings bear special responsibility.

So if Hasbro is only "an" instigator policy dictates that Hasbro cannot have favourable treatment. The Office of Fair Trading should have applied its Guidelines in that sense. Hasbro could then have appealed and I would hazard a guess that they would have failed on their appeal if they had said, "We are an instigator, Argos is as well, we did it in collusion with Argos, can we then have 100 per cent immunity please?" Hasbro cannot sensibly have any expectation that if it is the only instigator it gets no immunity but if it does it in collusion it gets 100 per cent. So on the basis at the very least of the Tribunal's Judgment there is discrimination because the OFT, whether with the benefit of hindsight, new evidence or whatever, has now placed Hasbro in a different position, unfairly we submit, to the other defendants.

Can I come back to a discussion you had with Mr. Brealey earlier about the Tribunal's power to depart from the OFT Guidelines. When one is dealing with the principle of non-discrimination it is a binding principle which binds both the OFT and the Tribunal, because both are subject to the Human Rights Act and the principle of non-discrimination. This would mean that Tribunal, when dealing with the principle of non-discrimination as to, for example, a principle flowing from the Guidelines, has no power at large to depart from the principle. There may be, for the sake of arguments, different considerations when the question is whether the Tribunal should follow the OFT Guidelines which are not strictly binding on the OFT and it is not stated in the Act that they bind the Tribunal. There is a question of policy, which Mr. Brealey has addressed you on, as to whether you should broadly follow the Guidelines.

As at the appeal stage there is no blank canvas. it is not as if there is an open-ended book that you can write in. Hasbro has 100 per cent immunity and there is no appeal from Hasbro. That is a new fact which cannot be changed. It is nonetheless the fact which then has to be taken account of by the Tribunal.

The OFT say there are two points why you should not adhere to the principle of non-discrimination. First it revolts common sense. It did not revolt the common sense of the CFI in *Tokai* to reduce the fines by 50 per cent, though no doubt the argument could have been advanced that they were wicked companies who deserved bigger fines. It is not a proper response to a fundamental principle which is advanced by way of argument.

Secondly, the wages cases are irrelevant. With respect, they are not irrelevant. They are consistent with *Tokai*. They embrace the same wide principle of non-discrimination which comes out of the European Convention on Human Rights and Human Rights Act and the CFI of course respects the principles set out in ECHR.

The next point, co-operation and denials, whether this is relevant: with respect, the facts speak for themselves. First, an employer, says the OFT, is not a guarantor of the truth or honesty of its employees; secondly, if the employees lie or are inaccurate or conceal evidence then this remains full continuous co-operation; thirdly, the company does not have to admit its guilty; fourthly, if the company denies guilt and puts forward its employees' evidence who have lied or are misleading, the OFT says that is okay. In this case the OFT did not believe certain key Hasbro employees, the company denied guilt and the company advanced the evidence of those employees found not to be truthful. This entitled Hasbro to 100 per cent. This is a very strained interpretation of the notion of continuous and complete co-operation. Indeed, if Hasbro had co-operated fully the OFT would have known that Hasbro was "the" instigator and the ringleader and would not have been misled by Hasbro's submissions to the effect that Argos was "an" instigator. Hasbro has therefore benefited vastly by its employees not being candid and/or truthful and/or accurate. Hasbro has then recited that evidence back to the OFT, tried to attach blame to Argos and, as a result, has acquired for itself 100 per immunity.

The last two points. First, did they come at the right time? First of all, the s.26 letters of 10th August were requests addressed to retailers in very broad terms. It is quite clear that they would have ensnared precisely the sort of arrangement and agreement that the OFT was concerned in the Littlewoods, Hasbro, Argos case. The Guidelines which the OFT has engendered refer to a company coming to the OFT before that undertaking is investigated. Thirdly, it is said by Mr. Doctor that there were two Rules 14s, there were two separate Decisions, they were not mixed up. The fact that the OFT internally adopts an administrative structure is neither here nor there. They were precisely the same product market, the same toys, the same customers, the same product.

Finally, 10 per cent: Mr. Doctor's submissions were inconsistent. On the one hand he said he could not think of a more serious case and on the other hand he said he could. He agrees this is not a classic price fixing case in a smoke-filled room, but it is quite plain from the CFI's rulings that the CFI, itself, differentiated between different types of price fixing agreement. We have included, though we have not taken you to this, the *CMA* judgment. It perhaps suffices just to give you the reference. This is tab 2 of our authorities, paras.262 and 263 where the CFI go into considerable detail about the facts of a horizontal price fixing agreement to see where on the scale of seriousness it actually is to be located. It is quite plain from this judgment that the CFI does believe that there are shades of wickedness, and if one starts with 10 per cent one has nowhere else to go.

The OFT's reasoning in the Decision was simply, "This is very, very serious and it warrants 10 per cent". We say that is a legal error because it fails to acknowledge that there shades within this particular wickedness.

Then finally, dealing with a couple of points made by Mr. Doctor applicable to the facts of this case, he spent a great deal of time a moments ago telling you how wicked in fact this was. When one sees the internal emails of Hasbro one realises that they had an entirely different *mens rea*, if I can use that term, to Littlewoods and Argos. They knew that it was illegal and they used colourful language to describe the conduct of their deliberate strategy. We know that they had detailed legal advice. You found that individuals such as Mr. McCullough and others were aware it and apparently disregarded it. Internally within Hasbro there is an entirely different flavour and picture to be painted than any of the evidence suggests is true of Littlewoods or Argos.

So far as individuals are concerned, there was an attempt to suggest that individuals at a certain level with Littlewoods were involved. The OFT has never resiled from its decision where it accepted that the level of management involved within Littlewoods was not high. The highest person was Mr. McMahon, the vast majority of individuals were simply account managers. None of those individuals, even at the highest, were anywhere close to the board.

It is not suggested by the OFT that there was a policy within Littlewoods of engaging in this sort of practice. Indeed, Mr. Doctor says that had it come to the attention he assumes it would have been stamped upon immediately. That is not true of Hasbro, but it is certainly true of Littlewoods and there is nothing to suggest that it is untrue of Argos.

Those are my submissions unless I can assist you further.

THE PRESIDENT: No, thank you, Mr. Green.

MR. BREALEY: Three points on market definition. The first relates to the timing. It is said that Argos did not raise this until a late stage. I just want to emphasise the fact that we raised this in our Notice of Appeal, so that when the matter was remitted and the OFT amended the Rule 14, they had plenty of chance then to deal with the point. So it was on express notice as from April 2003 that we were taking this point.

The second point relates to the burden and standard of proof. It is clear from the Tribunal's Judgment, and I think Mr. Doctor concedes, that the burden of proof is on the OFT. As to the standard of proof, this continues into the penalty section of the Decision, and one can see this from the OFT's own skeleton argument at para.72(f), where it is referring to Hasbro being "the" instigator or "an" instigator. I can read it, but it says that ultimately the OFT decided that Hasbro did satisfy the conditions, including 3.4(c) on the basis that Hasbro was not shown by clear and compelling evidence to be "the" instigator. That is a clear recognition that the clear and compelling standard of proof applies to the penalties section just as much as to the infringement section. So, in my submission, the OFT in the penalties section still has to show by clear and compelling evidence that they have identified the relevant product market. We say that when one looks at the relevant paragraphs it falls far short of the required standard.

The third point relates to why the Market Definition Guideline is relevant. Why is their Guideline relevant? It is relevant for two reasons. It is relevant first because, on a fair reading of the two Guidelines combined, that is the approach that the OFT says it will adopt. Admittedly in the Penalties Guidelines it is referred to in the footnote, but on any fair reading someone who is trying to get guidance, a company that is trying to get guidance, will see the Penalties Guideline and see the reference to the Market Definition Guideline. So it is a "stick with the Guidelines" issue, that is the first point.

The second and probably the more important point as to why the Market Definition Guideline is relevant is because it indicates, the relevant economic product market indicates the scale of infringement. We call that the "scale of infringement" point. The OFT, before it penalises someone, has to, on a rational basis, identify the scale of infringement. That involves ascertaining which market, or what market, has been affected by the conduct in question. It would be irrational to take, say, 10 per cent of all the company's turnover, hoovers, kettles, lawnmowers. Why would it be irrational? Because there is no link between the infringement and the effect on the market. Once one has accepted that, that it would be irrational just to take 10 per cent of the turnover as a starting point, it is similarly irrational to form a link between, say, Action Man and Scalextric. One has to identify the market affected. You may then

increase it for deterrent effect, for seriousness, but the 10 per cent then reflects the seriousness of the infringement. Stage three, you may then have a percentage for deterrent effect. The starting point – the starting point – is the scale of infringement and the market. That is why the Market Definition Guideline is relevant.

THE PRESIDENT: Thank you. That concludes our hearing for today and we will reserve judgment.