IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29th April 2005

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

Sitting as a Tribunal in England and Wales

BETWEEN:

ARGOS LIMITED
&
LITTLEWOODS LIMITED — Appellants

and

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

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

Miss Marie Demetriou (instructed by DLA LLP) appeared for Littlewoods Limited.

Mr. Brian Doctor QC and Miss Kassie Smith (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

PROCEEDINGS AFTER JUDGMENT

THE PRESIDENT: The Tribunal is handing down judgment today on the penalty aspect of the case of Argos Limited and Littlewoods Limited v Office of Fair Trading. For the reasons set out in our Judgment we fix the penalty on Argos at £15 million; we fix the penalty on Littlewoods at £4.5 million. To that extent the decision is set aside and varied. Subject to the foregoing the appeals of Argos and Littlewoods against the OFT's decision of 21 November 2003 are dismissed. There will be interest on the penalty to run, subject to any further submissions the parties wish to make, at 1 per cent above the Bank of England base rate from 21 November 2003 until payment or judgment under section 37(1) of the Act.

That, I think, unless there are other particular applications or observations anybody wishes to make, takes us to the question of costs. Mr. Doctor, when we said at the end of our judgment we wanted to hear argument on the issues of costs we did actually want to hear argument on the issues of costs because we have not yet had occasion to consider costs in a penalty case involving price fixing and previous judgments of the Tribunal have clearly left open the possibility of costs orders in a case such as the present. So I would be quite glad if you could enlighten us as to what exactly has been going on in that respect, bearing in mind that we are considering the taxpayers' money?

MR. DOCTOR: Yes, indeed. Sir, the decision regarding the question of costs has been subject to close consideration by the OFT for its part and, no doubt, by the appellants for theirs since this judgment was given in draft. The background against which the various decisions were made was the understanding of the OFT, and no doubt of the other side, that has arisen through various dicta of this Tribunal, in particular the dictum in *Napp*, which if I can remind you very briefly was in general we would lean against costs' orders against unsuccessful appellants in cases involving penalties unless there were particular exceptional circumstances justifying such orders.

> "The appellant in such cases has already suffered the penalty and possibly further directions, as well as having to bear its own costs. To make a further order for costs may well be excessive in many cases".

We also bore in mind that these remarks were qualified later on in *Aberdeen Journals* where the dictum appeared that experience showed that it might in future be appropriate to award costs against an unsuccessful appellant where the cases are not kept within what was described as "manageable bounds."

Against that background and also the fact that there is no case so far where the mere fact of success has led to the OFT obtaining its costs in a matter, there always being some additional element required which would lead to the Tribunal departing from these general principles, it was decided that the OFT could not submit that either the case had some

exceptional aspect to it which would require the appellants to pay the OFT's costs or indeed that any of the parties had abused the procedures or dragged the proceedings out or taken points that they ought not to have taken or anything of that kind, and so in the end consideration was given as to whether this was an appropriate case to try to persuade the Tribunal that it should resurrect the principle in these sort of cases that the loser pays. After taking both legal and policy considerations into account it was felt that this was not an appropriate case for that and accordingly in discussions between the parties an agreement was entered into that the parties would pay their own costs; and I might add, without wishing to disclose any privileged information at all, that amongst other things which did concern the OFT was the fact that this had been a case where it was said on several occasions that there was a certain amount of learning involved on the OFT's part. The OFT had asked for an indulgence at one stage that it should be allowed to put in additional evidence. That had been granted and whilst it was plain that that might have involved the other side in some additional costs which would not otherwise have been incurred with them that was one of the facts which made the OFT feel that this was not an appropriate case to simply rely on the proposition that we are the winner and therefore we should have our costs paid – there was something to be said going both ways.

Given all of that we entered into an agreement that, indeed, we would not ask for any order for costs. The question of cost would be disposed of by agreement between the parties. That being so, if the Tribunal was minded to do anything more in this case it would have to grapple with the fact that is now a fact, which is that first of all as between the parties the issue has fallen away and that there is an agreement between the parties which would have to be taken into account by the OFT in overriding. There is some authority in the High Court – if the Tribunal is interested I can show it to you. It is a decision of Mr. Justice Neuberger in *Centrehigh Limited (t/a Shono U.K.) v Amen & Ors* which deals with a slightly different problem. What happened there was a consent order was made so the case was settled and the parties had asked the court to make a consent order which included not only settlement of liability issues but also of the issue of costs, and so essentially the case is concerned – or the vast bulk of it – with the question of whether the court can go around is own consent order, questions of *functus officio* and estoppel arise. At p.6 of this decision, which is the only page which is really relevant to the point dealt with here, the court dealt with the underlying agreement that underlay the consent order. It is said there:

> "So far as the first argument is concerned, it is well established that a consent order does indeed embody a contract as well as being an order of the court. Save in exceptional circumstances at any rate, it seems to me that it is simply not open to the

court to add to or vary a consent order unless there are grounds which would justify re-opening or setting aside the contract embodied in the order ----"

THE PRESIDENT: This is when an order has already been made?

MR. DOCTOR: Yes.

THE PRESIDENT: Which is not our case.

MR. DOCTOR: No, it is not the case, but it is the end of this paragraph ----

THE PRESIDENT: Yes.

MR. DOCTOR: It goes on:

"… it seems to me that it is simply not open to the court to add to or vary a consent order unless there are grounds which would justify re-opening or setting aside the contract embodied in the order – for instance on the grounds of fraud, misrepresentation or mistake. It may be that, in exceptional circumstances, the court could nonetheless re-open a consent order given that the contract will have been entered into in the context of an action which itself is subject to the CPR, in the light of the overriding objective, with it public interest dimensions."

and then it points out that:

"In this case, the parties were engaged in commercial litigation, and they were all separately advised by solicitors and, it would appear, by counsel. The litigation was settled by agreement – i.e. by a contract, which on its face disposed of all issues …"

and so on. The point would be that to go around the agreement the court would need to have in itself a reason, if it is not to be found in ordinary contractual law principles, which obviously do not apply here at all, it may be that the court could get around that on the basis suggested by the learned Judge, namely, that the agreement will have been entered into under the regime of the CPR with its overriding objective and that would apply here as well. The agreement was entered into under the regime applicable in this Tribunal, which also refers to the overriding objective of speedy litigation reducing costs dealing with things appropriately and proportionately. So on that basis the Tribunal might feel itself entitled to override the agreement but it would have to do that in order to, as it were, reopen the issue, because as between the parties the matter is agreed and neither party could, unless it relied on these sort of issues, seek to persuade the court to undo the agreement that has been entered into.

May I just briefly say this, obviously the question of costs is always one which in so far as it affects the OFT does bring into account public money, as it were, because the OFT is publicly funded. Nevertheless it is plain that the OFT is ultimately the arbiter and controller of its own funds and of the funds available to it and the Tribunal is not, as it were, an upper guardian to see if these funds are properly handled. In the absence of any suggestion that

a wrong decision in principle has been made, or that the circumstances are such that no proper authority applying its mind to the facts could have decided to, as it were, enter into this agreement. I would suggest it would not be appropriate for the Tribunal to intervene in what has been agreed. I would also just mention that obviously one of the other factors that the Tribunal will take into account is precisely the desire that issues should be limited, including issues of costs which can sometimes take up a long time and can generate a lot of heat and light and additional costs in resolving. It is certainly in accordance with the overriding objective that the parties should be encouraged, where reasonable and where appropriate, where proportionate to agree sensible orders as to costs.

Finally, if it were the fact that the parties were asking the court to make an order regarding the costs by consent, there are provisions in the Rules which deal with consent orders and, although they do give to the Tribunal a discretion as to whether to make the consent order obviously, the nature of those rules shows that they are not directed to this sort of agreement which does not affect competition. Those rules allow them to specify the court would intervene and require certain amounts of assurance and so on where competition is affected. Where it is not, where it is simply a matter affecting this particular litigation we would submit that, unless there were some exceptional circumstances, the court would make the consent order. But, as I say, in this case we are not even asking for a consent order and, unless you wish to hear any more, I have set out the reasons why.

THE PRESIDENT: Are you in a position to help us at all on what you referred to a minute ago as "the policy considerations"?

MR. DOCTOR: Yes, as I understand it the OFT keeps under constant review this question of whether the regime which appears to be in force in the Tribunal, namely that costs do not just follow the result, should or should not be challenged. It accepts that that is the prevailing principle applied in the Tribunal and, as I understand it, whenever it wins a case it considers whether it is an appropriate case to seek to challenge that. Apart from the practical effect in any particular case and the amounts involved, what has happened in the case, all other things being equal, in other words where a case arises where it started and ended straightforwardly, there were no ups and downs, no hiccups, whether in those circumstances it may be appropriate to raise the issue before the Tribunal whereby it would be argued that on no other ground than the fact that it has won that principle should be reconsidered by the Tribunal. This was not considered ----

THE PRESIDENT: That case is not this case because?

MR. DOCTOR: Because of the two Rule 14s, because of the fact that the penalty was slightly reduced because of the fact that the case was handled, in everyone's view, as expeditiously as

possible – we do not believe there was any shilly-shallying on either side – and for those reasons it was felt that this was not a case to raise this issue. There was also the danger, of course, that we considered that if we applied for our costs there may be a counter application for the costs associated with the fact that there had been two Rule 14s and some consideration was given to the amounts involved in those two exercises and ultimately it was felt that this just was not the right case, that something could be said either way and this was not the case where this issue needed to be erased.

THE PRESIDENT: Thank you very much. Mr. Brealey, do you have any observations on the situation?

MR. BREALEY: No, Sir, basically I endorse what Mr. Doctor says. On costs I make just two points. First, as you know, Sir, you are performing a judicial function and, as such, the Tribunal's discretion is essentially based on a *lis*, an agreement or disagreement between the parties. If there is no disagreement between the OFT and Argos then really it is not the function of the Tribunal to be making a Ruling on something where there is no disagreement. That is the first point, there is just no *lis*, there is no application.

The second point, which really picks up Mr. Doctor's point, is that the OFT has, for its own commercial and policy reasons, decided not to seek costs and, as such, the Tribunal really should not be second guessing those reasons. It is undoubtedly true that we did intend to seek or counterclaim for the costs that we wasted because of the two Rule 14s and we would have gone through the various case management conferences (and there were several of them) when we were trying to work out what to do, and had all that been done right at the beginning those case management conferences would never have taken place and we would have sought our costs wasted as a result of the two Rule 14 Notices. So obviously the OFT has taken that into consideration in deciding not to seek its costs from us. So that is essentially the second reason, that the OFT have their reasons – their commercial reasons and their policy reasons – and really if there is no application the Tribunal should not be second guessing ----

THE PRESIDENT: Does Rule 55 depend on there being an application?

MR. BREALEY: In my submission it does. Essentially the wide discretion as to costs depends on someone applying for their costs and, if that person is not applying, then that discretion does not arise.

THE PRESIDENT: Yes.

MR. BREALEY: It may well be that if it did come to a detailed assessment the OFT would have to pay some costs over to us and for its own reasons that is why it is not applying.

THE PRESIDENT: That pre-supposes that we would be minded to give you your costs of the earlier stage.

MR. BREALEY: Absolutely, yes, but you did in your earlier Judgment, I think on 30th July 2003, recognise that there might be some wasted costs which would have to be subject to an order because, as the Tribunal held, the original case has not been investigated properly – I think those were the Tribunal's words, and so there was a fair inference from 30th July 2003 Judgment that there would be some liability on OFT as regards costs to us.

Sir, those are my two submissions, first, no *lis*; and secondly, please do not second guess the reasons why.

THE PRESIDENT: Thank you. Miss Demetriou, do you want to follow?

MISS DEMETRIOU: I have nothing further to add, but we endorse the submissions made by both counsel.

THE PRESIDENT: The Tribunal will rise for a few moments.

(The hearing adjourned at 2.20 p.m. and resumed at 2.40 p.m.)

(For Ruling see separate transcript)

THE PRESIDENT: Unless there are any other applications I think that concludes our proceedings for this afternoon. Mr. Brealey?

MR. BREALEY: I am sorry, I think it is Rule 58 that says I can apply orally for permission to appeal.

THE PRESIDENT: Yes.

MR. BREALEY: I wonder if I can take this opportunity, I will not be very long, but ----

THE PRESIDENT: Do you wish to do so?

MR. BREALEY: Yes.

THE PRESIDENT: Yes?

MR. BREALEY: I have nothing in writing but I have three points of law that I would ask permission to appeal on. The first concerns the trilateral concerted practice. To a certain extent the Tribunal has already dealt with this, but this is at para.225 of the penalty Judgment.

THE PRESIDENT: Do we not need to go to the main Judgment?

MR. BREALEY: I will do but I can read it out:

"225. Nor do we accept that the Tribunal's reasoning as set out at paragraphs 778 to 790 of the Liability Judgment involves any new principle of law."

That is going back to a submission that we made about what I called the "A, B, C" point.

"The prohibition on *indirect* contacts between economic operators the object or effect of which is to influence the conduct on the market of an actual or potential competitor, or to disclose a future course of conduct, or reduce uncertainty on the market, has been established at least since *Suiker Unie*."

That then takes me to the liability Judgment at para.779. The point I was trying to make there was that this is an issue of law.

THE PRESIDENT: Do you not need to frame the question of law that arises? Perhaps you are going to but it is useful on an application for permission to appeal on a point of law to be able to see what the point of law is, as it were, framed or written down, or in some way encapsulated.

MR. BREALEY: I do apologise, I have not encapsulated it, but maybe if I can go to para.779 of the Liability Judgment and it is the paragraph from the Football Shirts case [659]. This is 779 of our Judgment and that refers to para.659.

THE PRESIDENT: Yes.

MR. BREALEY: This, as I understand it, is the principle that has been applied to Argos, Hasbro and Littlewoods in the concerted practice.

> "[659] Thus, for example, if one retailer A privately disclose to a supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The prohibition on direct or *indirect* contact between competitors on prices has been infringed."

Essentially the question of law is whether that statement is correct in law.

THE PRESIDENT: But it does not arise here, Mr. Brealey, because of the word "privately". We have to remind ourselves of what exactly we did find in the Judgment, but there is no doubt that at least on more than one occasion Littlewoods was expressly told that what it was getting was Argos's prices.

MR. BREALEY: This is essentially concerned with Argos, and there is no evidence as far as I am aware in the Judgment where there is anything other than just private communications between Argos and Hasbro.

THE PRESIDENT: We would take a lot of persuading that that was the case, I think.

MR. BREALEY: When we go on to look at the evidence in the later paragraphs really all the Tribunal is saying – this is on the concerted practice between A (Argos) and C (Littlewoods) that we were giving our pricing intentions to Hasbro and we should have known, or it was reasonably foreseeable that that would be passed on to Littlewoods. So the question of law is whether there is a sufficient consensus between Argos and Littlewoods.

THE PRESIDENT: Well I think it is between Argos, Hasbro and Littlewoods, to give rise to a trilateral concerted practice between the three.

MR. BREALEY: Yes. The only reason I hesitate – I make no admission – but there may be a concerted practice between Argos and Hasbro (A and B) but the question, and this is the question of law, is whether there is a sufficient consensus between the two competitors A and C.

THE PRESIDENT: And what is the argument then?

MR. BREALEY: The argument is in that example at 659 which has been applied, as far as we take it, to the facts of our case the argument is that Argos cannot be party in law to a concerted practice with C.

THE PRESIDENT: And you support that on what basis?

MR. BREALEY: The basis of that is that whether it is an agreement or a concerted practice there must always be a degree of consensus between A and C. In other words A knows that C knows, and C knows that A knows. Merely a situation where A is communicating information to B and it is reasonably foreseeable that that may be passed on to C is not sufficient in law for concerted practice.

THE PRESIDENT: And the authority for that is?

MR. BREALEY: The authority for that is *Bayer* which says there must be a concurrence of wills, not only for an agreement but also for a concerted practice. I do not know if the Tribunal wants me to set out the principle of law.

THE PRESIDENT: Well it is not very easy to decide on an application for permission to appeal on a point of law without having the point of law very clearly framed.

MR. BREALEY: I appreciate that but the Rules do say I can make the application orally.

THE PRESIDENT: Yes.

MR. BREALEY: That is the first principle of law, whether in that para.659, which is applied to Argos there is in law a concerted practice.

THE PRESIDENT: What is applied in this case is the facts in 780 to 790. Whether you have a concerted practice is a factual matter but that is the evidence.

MR. BREALEY: That is true but the evidence has to be applied to the legal principle and if the legal principle is wrong then it does not matter what the facts are. So if, for example, the facts support that legal principle set out in para.659 we would say that in law the facts do not support a conclusion of concerted practice because there is not sufficient ----

THE PRESIDENT: Well what you would have to argue, I think, is that the factual findings set out in para.780 through to 790 do not support the finding of a tripartite concerted practice.

MR. BREALEY: That is essentially what I am submitting.

THE PRESIDENT: Whether that is a question of fact or a question of law may be a slightly troublesome point, but that is probably what you are seeking to submit. Yes?

MR. BREALEY: For example, in this situation we are not trying to overturn any finding of fact.

THE PRESIDENT: No.

MR. BREALEY: Which is essentially what the Court of Appeal was concerned with in *Napp*. That is why I went to para.225 of the penalty Judgment when the Tribunal said you did not agree that it raised any new principle of law, and we submit when one looks at *Suiker Unie* and *Bayer* the principle of law is that you need consensus between A and C.

The second legal issue, and this is essentially a legal characterisation of facts, this relates to the exchange of information point. As the Tribunal knows we submitted – certainly in the penalty hearing – that when one looked at the evidence, and again we are not seeking to overturn the evidence, this is not a price fixing agreement in law but at its highest (although we do not accept it) an exchange of information. As the Tribunal knows, and the OFT know because it is in their Guidance (OFT 401) there is a distinction in law between a price fixing agreement and an exchange of price information.

THE PRESIDENT: Are we talking now about the trilateral concerted practice or about all three?

MR. BREALEY: We are talking about the bilateral and the trilateral?

THE PRESIDENT: So you are saying that, on the facts we have found, Argos is informing Hasbro that it is going to price at Hasbro's RRPs and not agreeing with Hasbro to do so?

MR. BREALEY: That is right, and then if one looks at the American jurisprudence, it does make a clear distinction, as the OFT appears to do in its guidance, between a price information exchange, communicating one's intentions and agreeing to go out at a certain price. Again, we say that when one looks at the evidence, and the evidence of the Autumn/Winter 1999 when there was the decision of the unilateral increase (so the Decision said) of prices, well that falls away because of the Spring/Summer 1999 catalogue. The evidence of the meetings was inconclusive so essentially we are left very much with the evidence of Mr. Wilson against Argos. When one looks at his evidence we would submit that the legal categorisation of that evidence is one of a price information exchange and not a price fixing agreement.

That is the second issue of law, and in my submission the test is whether our argument is fanciful on this. In the Court of Appeal permission is granted if there is a realistic prospect as opposed to a fanciful prospect and we would say what I am submitting to the Tribunal is not fanciful.

THE PRESIDENT: I am still grappling with what the point of law is – I am beginning to doubt whether it is actually useful to proceed with this orally because it is potentially from your point of view quite difficult for us to deal with this sort of thing without being taken back to the particular paragraphs in the Judgment and being directed to where we have allegedly made an error and all that sort of thing.

MR. BREALEY: Well it is not an error of fact, as such, you can take the facts as you have found them, the question is whether those facts in law amount to a price fixing agreement or should it be categorised, at its highest, as a price information exchange? I do not need necessarily to go to any particular paragraph. We are not seeking to overturn the facts on this. Obviously, comment would be made on certain findings of fact but we accept Mr. Wilson's evidence as it is subject to any cross-examination that the Tribunal ----

THE PRESIDENT: Whether it is an exchange of price information or an agreement on the prices to be charged is itself a question of fact, is it not? I am just trying to find the findings as against Argos.

MR. BREALEY: The easiest place to find it is right at the end of the Judgment, when we are looking at the concerted practice.

THE PRESIDENT: This is the bilateral one that I am interested in at the moment. If you take para.671:

> "In our judgment the evidence amply establishes that at least from the A/W 1999 catalogue onwards until mid-2001 there was an "agreement" within the meaning of the Chapter 1 prohibition between Hasbro and Argos to the effect that Argos would sell Hasbro's Action Man and Core Games ranges at the retail prices recommended by Hasbro."

MR. BREALEY: Yes, Sir.

THE PRESIDENT: And that is a finding of fact that the agreement is ----

MR. BREALEY: It is a mixed finding of fact and law.

THE PRESIDENT: -- to that effect, that they would do it, not that they are simply giving information that what they are going to do, but they would actually do it which, in fact, they did.

MR. BREALEY: It is mixed fact and law. The Tribunal has found the fact but then the Tribunal has said that evidence, those facts, amount to – and this is the question of law – an agreement within the meaning of the Chapter I prohibition.

THE PRESIDENT: But it is not whether there is an agreement, you are not saying there was no exchange between the parties, you are saying they were simply giving information. This is a finding that there was an agreement to the effect that Argos would sell Hasbro's Action Man and Core Games ranges at those prices. That is a factual finding.

MR. BREALEY: In my respectful submission it is mixed fact and law because it is a legal characterisation of the facts. If one looks at the OFT's guidelines, the guidelines say that there is a price fixing agreement, there is something in law amounting to a price fixing agreement,

and there is something in law amounting to an exchange of price information – the two are distinct.

THE PRESIDENT: They would both be caught by the Act probably, would they not?

MR. BREALEY: They are both caught by the Act but then there are differences between price information exchange and price fixing agreement. For example, one has to look at the nature of the information exchanged in price information exchanges to determine whether there is distortion of competition and that is not the same in a price fixing agreement. In a price fixing agreement, as the Tribunal knows, *per se* it has as its object the distortion of competition. It is a price information exchange. One looks at the quality of the information exchanged and the impact that it has on the market and that is why they are treated differently.

THE PRESIDENT: That is a completely different scenario. That is the kind of trade association collecting/circulating statistics type of scenario, it is not this sort of agreement at all.

MR. BREALEY: With respect, no, Sir, because there is no doubt if one looks at US jurisprudence you can have an exchange of price information between two competitors, it does not have to be through a trade association. But it is a question of fact and law because let us assume that all the evidence stands and the Tribunal say "In our judgment the evidence amply establishes that there was an agreement not to export the products. One would say that that, as a legal characterisation of the facts, is incorrect. Again, we are not seeking to overturn the facts as such just what in law they amount to. To take a criminal context one establishes the facts, is it a s.14 – if that is the right Act? Is it actual bodily harm or grievous bodily harm. It is a legal characterisation of the facts as found.

THE PRESIDENT: Section 18 I think you mean.

MR. BREALEY: 18. So that is the question of law, whether when one looks at the evidence it is a price information exchange within the meaning of para.320 of the guidelines, or whether it is a price fixing agreement within the meaning of 3.4 of the guidance. We would say if one accepts the evidence of Mr. Wilson it does not amount in law to an agreement to fix prices. That is the second question of law.

THE PRESIDENT: Well there is no magic in the words "agreement to fix prices", the question is whether it is an agreement that restricts or distorts competition, and the agreement that restricts or distorts competition as found by us at 671 was an agreement to the effect that they would sell at certain prices. That is the finding on the evidence and there it is. It goes much further than some suggestion that they were simply informing each other about their respective intentions as to price.

MR. BREALEY: The first sentence of para. 671 is a conclusion that, in law, there was an agreement to fix prices.

THE PRESIDENT: Yes, and then it goes on to say all the evidence that that is based on – over several pages.

MR. BREALEY: We would say that when one looks at the evidence there was no agreement to fix prices. At the highest there was an exchange of information.

THE PRESIDENT: You say that would not have been in the circumstances an infringement of the Act?

MR. BREALEY: First of all that is not what the Decision says. The OFT's Decision said there was an agreement to fix prices and any exchange of information merely facilitated that. Again, one goes back to US jurisprudence that an exchange of price information is not *per se* unlawful, one has to go further and prove that a price information exchange has a distorting impact on the market. As we know in the Decision there has never been a finding that there was a distortion of competition. That is why there was no market definition, because if one looks at Volkswagen one does not have to go through that process if there is a price fixing agreement. So in law the two do have different consequences.

The third legal point is the question of fine and definition of "market". As the Tribunal knows it has held that it is not necessary to define an economic market as such and that the OFT did depart from its guidelines. The question is what are the implications of that departure? That raises an issue of interpretation of s.38 ----

THE PRESIDENT: I do not think we said they departed from their guidelines, did we?

MR. BREALEY: Well they certainly did not comply with their own guidelines in defining a market in accordance with market definition.

THE PRESIDENT: I think what we said was they were not obliged to do that.

MR. BREALEY: We would say in law they were obliged to do that. It is a matter of EC law and a matter of administrative law and public law that they were obliged. If in their guidelines they say they are going to carry out the penalty assessment in accordance with the market definition ----

THE PRESIDENT: It is putting a lot of weight on a single footnote. The guidance is in a slight muddle on this point, that is true – in fact, that is probably putting it a bit high – the guidance has not really thought out the relationship between what is said in 403 and what is said in the penalties guidance. Our view is that they are not particularly closely related and that is fairly clear from the circumstances.

MR. BREALEY: Well the question is a matter of law.

THE PRESIDENT: Anyway you say they have to do a full market analysis on the penalty.

MR. BREALEY: Yes, if you are asking the question, yes, then that is a question of law and it is not limited to abuse type cases, it does extend to Chapter I cases.

THE PRESIDENT: Can you just take me to the test we should apply on deciding on permission to appeal?

MR. BREALEY: In the White Book it is Part 52 – this is the 2005 Edition – p.1459. Part 52.3.6.

THE PRESIDENT: Yes. "…real prospect of success" and "some other compelling reason".

MR. BREALEY: Yes, and that is the summary judgment test, so if your claim is fanciful then the defendant will get summary judgment, but if you have a realistic prospect of success then your claim can go forward. So the Court of Appeal's threshold is the same for summary Judgment, one asks the question "does it have some realistic prospect of success? Could a court come to a different view? Is what I am submitting to the Tribunal fanciful?"

THE PRESIDENT: Yes.

MR. BREALEY: Those are the three points.

THE PRESIDENT: Thank you.

MISS DEMETRIOU: Littlewoods also seeks permission to appeal. Would you like me first of all to deal with our application or do you want to hear Mr. Doctor first?

THE PRESIDENT: I think we will deal with them both if we may, Miss Demetriou. If you want to make an application to appeal you should make it now.

MISS DEMETRIOU: We seek permission to appeal on the same grounds as those advanced by Mr. Brealey, and also for an additional reason, namely, the application by the Tribunal of the principle of non-discrimination in the context of setting penalties, and we say that the Tribunal made an error of law for three reasons.

First, we say that the Tribunal mis-interpreted the *JFE Engineering* case, and that there is nothing in that Judgment which indicates that the Ruling of the Court of First Instance is limited to the position where both the Appellant and the comparator are both before the court. So we say it is broader than interpreted by the Tribunal at para.97 of its penalty Judgment.

THE PRESIDENT: But we have gone into it anyway so it does not matter – in the alternative, whatever view we took of *JFE Engineering* we went into at all.

MISS DEMETRIOU: Well, perhaps I could come to that when I deal with my next two reasons. Secondly, we do not accept the Tribunal's conclusions that Littlewoods and Hasbro are in a relevantly different position. The Tribunal appears to have found at para.103 that Littlewoods and Hasbro were in a different position and therefore there can be no issue of discrimination. We do not accept that, we say that the OFT itself treated them as being in a relevantly similar position when it set the fines, and so the starting point for the discrimination analysis is to say that they were in the same position and any difference in treatment had to be objectively justified.

Thirdly, we say that the Tribunal took the wrong approach to objective justification in finding that somehow there had to be a manifest injustice to Littlewoods in order for the OFT to be under an obligation to treat them similarly in imposing the fines. We say that is not the test. The test of objective justification requires closer scrutiny by the Tribunal.

THE PRESIDENT: What do you say we should have done then?

MISS DEMETRIOU: We say that the Tribunal found, in effect, in its Judgment that Hasbro was the instigator, that is the outcome of the finding of fact by the Tribunal in its Judgment.

THE PRESIDENT: We have not made any such finding, Miss Demetriou.

MISS DEMETRIOU: Well we say on a proper interpretation of the Judgment it is clear that the Tribunal found that Hasbro was the instigator of the concerted practice, of the agreement, and we say that the ----

THE PRESIDENT: Well we expressly disavow that in our Judgment.

MISS DEMETRIOU: Well you expressly disavow it to the extent that you say you were not looking at it for the purposes of the guidance, so we accept that the Tribunal was not, at that stage, assessing the issue for the purposes of applying the guidance, but we say that the effect of the Tribunal's findings is tantamount to a finding that Hasbro was the instigator. So we say it follows from that that the OFT did not apply its guidance properly when granting leniency and therefore the difference in treatment accorded to Littlewoods and Hasbro is not objectively justified, and we say that that is the consequence of the CFI case law. So that is the additional reason that we advance in favour of our application.

THE PRESIDENT: Yes, Mr. Doctor?

MR. DOCTOR: It is on a point of law that ----

THE PRESIDENT: Yes, we had just better look at the section, I think.

MR. DOCTOR: Yes, s.49(1)(c) – An appeal lies to the appropriate court on a point of law arising from any other decision of the Tribunal on an appeal under s.46 or 47. Perhaps one should just notice s.49(1)(a) from a decision of the Tribunal as to the amount of the penalty, but none of the grounds put forward here are as to the amount of the penalty.

THE PRESIDENT: Whether there should have been a penalty.

MR. DOCTOR: Whether there should have been a penalty at all. So the principles of how the penalty is to be set and so on, that is obviously covered under (c), so that also requires some point of law.

When provisions such as this arise litigants and their lawyers spend a long time trying to persuade the court that matters which were, on the face of it, matters of evidence and fact, in fact give rise to deep questions of law. This is done by using words like "characterise" and "principle" and so on. In fact, this case must be as clear an example of a case which went off

purely on its facts, there was almost no legal argument at all which was not agreed between the parties. Everybody agreed what the principles were, everyone agreed – if one goes back to the submissions made – I cannot recall a single issue that was controversial as regards the law. The whole question was these facts. The facts were complicated and difficult, and it depended on how you saw things, it depended on evidence, the witnesses' recollection of events in the past, their demeanour in the witness box, their understandings, their expectations, all of that was ultimately what this Tribunal was set up to decide, i.e. to consider these complicated issues in the light of experience and practice and to come up with answers. That is what happened.

My learned friend says as regards the first two issues that there is firstly a principle as to whether in law an indirect communication, such as there was here, could in law amount to a concerted practice. If he was saying to the Tribunal that the question of law he wants to argue is that indirect communication as such cannot constitute concerted practice, that concerted practice means in the law which ought to be applied here direct contact only and indirect contact is not good enough, then that would be a question of law, undoubtedly. But that question of law does not arise because he accepts – he is really bound to, there is plenty of authority – that a concerted practice can consist of both direct and indirect contact and communication. As to whether there was sufficient evidence before the Tribunal that there was indirect communication that is a matter of fact. One cannot say that is a matter of law because whether the evidence could constitute indirect contact is a matter of law, is simply to stand things on their head. The court heard the evidence and concluded that on those facts there was indirect communication and indirect contact with the necessary object or effect and those facts make up the indirect contact that is required in order to establish a concerted practice.

If my learned friend's argument were correct any conclusion that the court came to could be characterised as a question of law by saying that some other court might take a different view of the evidence. He did not suggest that there was no evidence at all, that the Tribunal's conclusions as to indirect contact could not be maintained, what he said was that the findings that were made do not amount in law to the indirect contact. But the finding that was made was a finding of indirect contact based on the facts that were put forward and the characterisation of those facts, whether they constitute indirect contact or not, is a matter of fact which this Tribunal has to decide and it simply is not a question of law.

Likewise the second ground that in fact the facts which were proven give rise to a conclusion that there was an exchange of information and not a price fixing agreement. Perhaps the facts do give rise to the conclusion – if that is what the Tribunal was looking at;

that in addition to whatever the Tribunal found they also would have grounded a finding that there was an exchange of pricing information which had an effect on the market such as to constitute a breach of the prohibition in Chapter I. That may be so. But that does not deal at all with the problem before the appellants which is that this Tribunal has found that the facts proven proved that there was a concerted practice or agreement on price fixing. The evidence (all of it) that the Tribunal heard led it to that conclusion. There is no question that it has led to that conclusion because it says so in the Judgment. Again, no argument has been put up to you that your judgment was based on a complete absence of any evidence to that effect, which might give rise to some legal issue – not the one that is being argued, but another legal issue, and in the light of that again this is just a matter of fact. What they are effectively asking is that the Court of Appeal should reconsider the facts and see whether your decision on the facts was right. The Court of Appeal will not accept such an invitation because the whole purpose of setting up this Tribunal is that the Tribunal, with its expertise, decides those issues. So there is nothing at all in this question of trying to re-characterise what happened – a decision on the facts – as in fact decisions on the law.

As regards the question relating to the penalty, it is suggested that there is some legal issue on the question of whether the Tribunal should have held that it was obligatory on the OFT in view of the guidance to conduct a proper market survey. The Tribunal held that the guidance is guidance, that the guidance was not directed to this particular question anyway, its very terms show that it was guidance more properly directed at the question of market abuse, and whether it went too far or not one has to adopt a practical approach to this and bear in mind that we are involved in a case regarding price fixing where there would have been no purpose served for the liability aspects of this case in conducting the sort of exercise which the appellants require.

Again, to characterise whether the OFT's guidance has turned into a question of law by virtue of its existence so that it must be applied irrespective of whether it makes sense to do so, whether there is any practical purpose in doing so, is really to elevate a matter of practice and commonsense into an issue of law. There is no issue of law here as to whether the guidance has to be applied in every circumstance. If that were the principle that my learned friend is seeking to have the Court of Appeal lay down, that the guidance is to be applied as if it were binding law in every case irrespective of practicality, cost appropriateness, proportionality, or anything else, one can say now that that proposition has no prospect of success whatsoever, and the Court of Appeal is most unlikely, highly unlikely to lay down any such rule. So we would say first that this is not a matter of law, but even if that was the question of law it would have no prospect of success whatsoever – not even a fanciful one.

The guidance is, as the Tribunal held, guidance. The only question as to when it should guide and when it should not guide, and plainly there must be examples where the guidance does not have to be applied, where it is plainly inappropriate to do so. Those are the questions raised by Argos.

The additional argument raised on behalf of Littlewoods, we simply say that these are again questions in which the Tribunal has given reasons for its decision. These are matters of how the penalties are to be applied, they are not points of law in the sense in which an appeal is raised. It is not the sort of thing which the Court of Appeal was intended to hear. As the Tribunal made clear in the course of its Judgment, the Tribunal has a fairly wide remit to decide what penalty should be imposed and how it should be imposed and various arguments were dealt with in the course of that. But these arguments, insofar as they were put up by Littlewoods, were rejected and these do not give rise to issues of law. Alternatively, if it is considered that these individual points are in fact legal issues, that they give rise to points of law, we would say that there is no prospect of success on any of these. The *JFE Engineering* case, as you have pointed out, a view has been taken on that but, in any event, the Tribunal went on to decide the matter on the alternative basis anyway, so that in itself would not justify an appeal.

As for the question of whether Littlewoods and Argos are in the same position as Hasbro or not, that is purely a matter again of applying the facts before the Tribunal to the legal principle. The legal principle is not in dispute, nobody suggests that like should be treated with unlike. The question was whether they were sufficiently distinct from Hasbro to justify on some reasonable basis the difference in treatment by the OFT. Certainly, the facts are not in dispute, none of that is in dispute. The application of those facts to the question before the Tribunal, were they different in kind, is not a matter of law, it is a matter for the decision of the Tribunal as a matter of fact. They did not apply for leniency, they did not assist the OFT, they opposed these applications. Those differences of fact have been applied by the OFT to the conclusion that this is not a matter of law.

Finally, this question of whether there had to be shown a manifest injustice before the OFT could treat Littlewoods and Argos differently from Hasbro. Again, this is not a matter of law, this is a matter of applying the facts to the case and, in any event, even if it were a matter of law it is not a matter on which there could be any prospect of success, because on that issue it is quite plain that the Tribunal's decision is the only conceivable one. The alternative conclusion – one only has to think for a moment about what the implications of the Appellants' arguments would have been. They would have been that the Appellants got off Scott Free out of all of this for the simple reason that, according to the Appellants, the OFT

made some error in applying its own leniency programme to one of the parties in the programme. Such a conclusion would have been revolting to commonsense, and the Court of Appeal would not uphold any kind of conclusion of that sort.

May I say finally that if the Court of Appeal takes a different view of any of this the Appellants have their remedies there, but the Court of Appeal would be assisted, we say, by an indication from this Tribunal that there is no basis for any appeal. Thank you.

MR. BREALEY: One short point, just replying to Mr. Doctor's "cannot remember the point of law", the nub of this case was essentially about the extent to which retailers can communicate pricing intentions to suppliers and, in the Penalties Judgment the Tribunal has said if and to the extent the parties themselves submit the discussions about retail selling prices are common place between suppliers and High Street retailers there is need for a clear message that they will get heavy sanctions.

THE PRESIDENT: If they make an agreement, the nub of the case is whether they had made an agreement, not how far they can chat around amongst themselves.

MR. BREALEY: Very important to the agreement, as the Tribunal has found, is the extent to which they can communicate between themselves. The Tribunal has held that pricing intention is very confidential and should not ordinarily be communicated ----

THE PRESIDENT: We had three witnesses who came into the witness box, who were not cross-examined, who said there had been an agreement.

MR. BREALEY: Can I just remind the Tribunal ----

THE PRESIDENT: We just have to keep our focus on what the case was about and not try to cloud it with suggestions that it has some wider import. It does not; it is about whether these particular people made a particular agreement at a particular time.

MR. BREALEY: With that in mind can I just make one last submission on the point of law. This is at para.666 of the liability Judgment where the Tribunal does raise this issue of law.

" 666. Contrary to the submissions of the Appellants it does not seem to us that the Judgments in *Bayer* are intended to qualify the principles of *Suiker Unie* and many subsequent cases."

So that was the issue of law that Mr. Doctor with respect cannot remember, and it is an important issue of law because it does raise the issue as to whether there is a need for consensus between what I have called A and C. If one goes just two paragraphs up, to para. 664, where *Suiker Unie* is cited, again we get the A, B, C point.

"664 Moreover, a concerted practice may arise if undertaking A complains to undertaking B abut the activities of a third undertaking C, and undertaking B acts on those complaints in such a way as to leads to conditions of competition which do not

correspond to normal conditions in the market, for example by prevailing upon C to limit its competitive activities. In those circumstances A, B, and C may all be guilty of a concerted practice."

The legal issue is whether in that situation C can be guilty of a concerted practice with A, and when one goes back to the *Suiker Unie* at paras. 282, 283, that is at para.156 of the Judgment, we see there that all that paras. 282, 283 are concerned with is A and B. My simple legal point is that paras. 282 and 283 concern a complaint by A to B essentially about B, so you have the two competitors one complaining and the other acting on it. It does not go as far as to support, with the greatest respect, the conclusion in the later paragraph at 664 that A and C may be guilty of a concerted practice, and that is the legal issue which, in my respectful submission does arise in this case.

THE PRESIDENT: On the trilateral one?

MR. BREALEY: On the trilateral one. That is the only point of reply that I wish to make.

THE PRESIDENT: Thank you. Very well, we will rise for a few moments.

(For Ruling see separate transcript)

THE PRESIDENT: Any other applications, Mr. Doctor?

MR. DOCTOR: No, thank you.

THE PRESIDENT: Thank you very much indeed.

(The hearing concluded at 4.15 p.m.)