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1 Tuesday, 16th March 2004

2 (10.30 am)

3 THE PRESIDENT: Mr Morris.

4 MR MORRIS: Good morning, sir. A couple of matters of
5 housekeeping. The first is that I have been provided
6 with a sheet of information from Umbro in relation to
7 figures. If I could hand that up, I apologise for not
8 having given it to the tribunal before. I have given
9 one each to my learned friends. I am a little bit
10 limited in numbers; it has been provided by Umbro.
11 I have a couple spare here.

12 I should say that Miss Roseveare is not going to be
13 here until 12.00/12.30.

14 Can I just give the information that has been given
15 to me about these figures. The first section --

16 THE PRESIDENT: I am just wondering about confidentiality.

17 LORD GRABINER: Do we have copies?

18 MR MORRIS: I gave one copy to Mr Rees and one to
19 Mr West-Knights. I have one here and I would like to
20 retain one for myself.

21 I will not read any figures out, sir.

22 The first section is "Physical Goods Sold, Umbro to
23 Sports Soccer"; the second heading is "Other Income".

24 The first of those headings, "Licence", I am instructed
25 to include I think it is invoices 1 and 2 on page 2 of

1 the Umbro document given in yesterday which I do not
2 have to hand.

3 Invoices 1 and 2 are likely to be the net figures of
4 those two invoices.

5 THE PRESIDENT: That would get you up to 6.6.

6 MR MORRIS: 6.6. As to the remainder, what I am instructed
7 is that that includes some of invoices 3-6. When I say
8 some, it is only because I do not precisely know because
9 the figures do not precisely match. They were included,
10 I am instructed, even though not paid until June 2001.

11 THE PRESIDENT: Invoiced but not paid.

12 MR MORRIS: Invoiced but not paid, but they were included as
13 income.

14 The second heading is "Royalty Income in Respect of
15 Umbro's Other Licences for its Worldwide Licensing
16 Business".

17 THE PRESIDENT: That is other existing licences.

18 MR MORRIS: I think manufacturing licences around the world.

19 THE PRESIDENT: But this is not to do with Sports Soccer
20 now.

21 MR MORRIS: Nothing to do with Sports Soccer. This is just
22 to make up the figure at the bottom there --

23 THE PRESIDENT: Which is the figure in the accounts, or
24 close to it.

25 MR MORRIS: So I understand. The third item is something in

1 relation to an item called the Umbro soccer league,
2 which is a football league in the United States which
3 Umbro sponsors.

4 And the fourth item I have marked against it "No
5 idea of the detail".

6 THE PRESIDENT: But it is rental income of some kind.

7 MR MORRIS: That is the position to that. If a further
8 explanation is required, Miss Roseveare might be able to
9 assist.

10 That deals with one matter. There is one further
11 matter that needs to be canvassed in relation to my
12 learned friend's Lord Grabiner's indication of yesterday
13 as to witnesses required. Could I ask that this be
14 heard in the absence of Mr Fellone, who is the next
15 witness in the trial.

16 THE PRESIDENT: Thank you, Mr Fellone. If you would retire
17 for a moment.

18 MR MORRIS: I am grateful. Can I say at the outset here
19 that we have a party, JJB, now seeking to withdraw
20 evidence which has been placed before the tribunal.
21 Those witness statements are in and they have been
22 referred to in their skeleton arguments amongst other
23 things. We would suggest it is not really the most
24 satisfactory way of proceeding in circumstances where
25 the tribunal is seeking to get to the truth. We would

1 remind the tribunal of its power to call a witness if it
2 thought it appropriate.

3 THE PRESIDENT: Yes.

4 MR MORRIS: As to the position of Mr Preston, his evidence
5 primarily goes to the meeting of 7th or 8th June -- let
6 us assume it was on the 8th for present purposes --
7 2001 in relation to the Manchester United Centenary Kit.
8 And the Office's position is that it cannot take a view
9 as to whether it would be appropriate for him to be
10 called as one of the three people available who were at
11 that meeting until after Mr Fellone has given his
12 evidence.

13 Now, I can explain that a little further --

14 THE PRESIDENT: Who was at that meeting apart from
15 Mr Preston?

16 MR MORRIS: Mr Ronnie, Mr Fellone, Mr Sharpe, and for
17 a small part Mr Russell, but only for a very small part.

18 I think Mr Russell actually himself says in his
19 witness statement that he was only there for a moment.

20 THE PRESIDENT: Thank you.

21 MR MORRIS: So we would say that he is a material witness to
22 what happened at that meeting. And we would suggest
23 that whether or not the Office considers it appropriate
24 for the tribunal to hear Mr Preston's account of that
25 meeting depends largely or to some extent upon what

1 Mr Fellone says.

2 THE PRESIDENT: Yes, go on.

3 MR MORRIS: So that is Mr Preston.

4 So far as Mr Bryant is concerned, we would say that
5 on balance -- well, Mr Bryant goes to three main points.
6 He is the author of the May 2001 monthly management
7 report which again goes to Centenary Kit, in which he
8 makes a point about the cancellation of the order and
9 makes reference to Sports Soccer's discounting in
10 the sector.

11 Secondly, he is relevant in relation to the Carlisle
12 store discount. And thirdly, he is important as regards
13 a conversation he had with Mr Russell in relation to
14 the 8th June 2000 meeting.

15 THE PRESIDENT: Yes.

16 MR MORRIS: He is also relevant more generally as being
17 the JJB account manager and therefore would be the first
18 port of call or first recipient of complaints from JJB.

19 The Office's position on this is that on balance it
20 does not need to cross-examine Mr Bryant. But we would
21 draw to your attention the fact that in paragraph 14 of
22 his witness statement which has been submitted there is
23 material which were it before the tribunal the Office
24 would seek to rely upon.

25 If, as I understand to be the position, JJB now seek

1 to withdraw Mr Bryant then that witness statement,
2 including the last paragraph of that witness statement,
3 would not technically be before the tribunal, and we
4 would suggest that actually in practice that is a rather
5 artificial exercise.

6 Nevertheless, if it were the case that by Mr Bryant
7 not being asked to give evidence the tribunal considered
8 that on that basis it could not look at the written
9 evidence at all then in those circumstances the OFT can
10 live with that because it considers that the same point
11 arises elsewhere and can be made in relation to other
12 evidence.

13 That, sir, is our position in relation to Mr Preston
14 and Mr Bryant.

15 THE PRESIDENT: Yes, what about Ms Charnock?

16 MR MORRIS: I think the position is that we are not as far
17 up the line on that. Essentially we would like
18 Ms Charnock to be called to be cross-examined.

19 THE PRESIDENT: As I understood it last night, there is now
20 a real difficulty in getting hold of Ms Charnock.

21 MR MORRIS: I understand that. Of course, if she cannot be
22 got hold of and the process does not work the process
23 does not work.

24 Unless I can assist further --

25 THE PRESIDENT: Let us see what Lord Gabor says about

1 this.

2 What is the effect of withdrawing the evidence?

3 LORD GRABINER: It happens all the time, it happens all
4 the time in my experience in Chancery court and
5 commercial litigation. The effect is that you simply do
6 not rely on that material.

7 THE PRESIDENT: You do not or we do not?

8 LORD GRABINER: I do not rely on the material. There are
9 mechanisms for adducing the evidence, for example under
10 the Evidence Act you can get the evidence in as
11 a hearsay statement.

12 Otherwise, if somebody says this is my appeal, I no
13 longer wish to rely upon this statement and I am
14 prepared to withdraw it, if it were a jury who had
15 already seen the evidence that might be another matter.
16 But when you have a tribunal of this quality, it is
17 perfectly easy for you to put out of your minds
18 the matter that might be the subject of that particular
19 witness statement.

20 So far as these two gentlemen are concerned, we are
21 very happy to wait until after the evidence of
22 Mr Fellone just to see how it sits then, so that is not
23 a problem. So far as Mr Bryant is concerned, I am happy
24 to do it any way which my friend wishes. If he would
25 like the statement in because he wants to refer or to

1 rely upon paragraph 14, fine. If he does not then it is
2 to be excluded. But if it is to be included, I can rely
3 on anything in it I want to.

4 That statement would be in exactly the same position
5 as any other statement put in by either side where
6 the other side had indicated that it did not want to
7 cross-examine the witness. In that case, all parties
8 can refer to the evidence and make whatever argument
9 they want off the back of it.

10 So far as Mr Bryant is concerned, our thinking in
11 relation to him is that he is essentially concerned with
12 the centenary kit debate. We are content to fight that
13 battle on the basis of the evidence that we have heard
14 from Mr Ronnie, for reasons which I suspect may be
15 obvious to the tribunal, and we will stand on that. As
16 far as Mr Preston is concerned, we are happy to wait and
17 see and maybe renew the debate when Mr Fellone has
18 concluded his evidence.

19 THE PRESIDENT: Mr Morris, I suggest we park this issue for
20 the time being.

21 MR MORRIS: Yes:

22 "If a party who has served a witness statement does
23 not (a) call the witness to give evidence at trial or
24 (b) put the witness statement in himself, any other
25 party may put in the witness statement as hearsay

1 evidence."

2 And I think there is a general discussion --

3 THE PRESIDENT: So you would want to put in Mr Bryant's
4 witness statement?

5 MR MORRIS: We will reserve on that as well. But that is
6 the position as far as what happens.

7 THE PRESIDENT: Let us get on with Mr Fellone.

8 MR WEST-KNIGHTS: Sir, before we do, at some stage I would
9 like just, as it were, to air one or two difficulties
10 that I have with this. (Indicating). But this may not
11 be the appropriate moment.

12 At some stage I think my learned friend is going to
13 be making an application -- perhaps you are not.

14 MR MORRIS: Not for the moment.

15 MR WEST-KNIGHTS: I think at some stage my learned friend
16 will be addressing you about some material that he wants
17 the tribunal to look at and that will be an appropriate
18 moment to pick up some other things that have been
19 mentioned.

20 But I just wanted to clarify the position about
21 Ms Charnock. It is not simply that she is spatially
22 interposed. Just for the note, the original witness
23 statement from Ms Charnock gave two pieces of evidence:
24 first, that in her view, for what it is worth, shirts
25 and socks -- it is shirts on the one hand and stuff on

1 the other -- are sold to different types of people.
2 She was making a point about the nature of the market.
3 That is not picked up or disputed in the defence.
4 The argument ranges on a rather wider basis. Frankly
5 the factual evidence from Ms Charnock on this is limited
6 and her opinion, with the greatest respect to a booking
7 clerk, might not be the most powerful to influence
8 the tribunal.

9 The second point she made and the purpose of her
10 witness statement was to do with a meeting she had had
11 with somebody at Umbro on 24th October 2000. I daresay
12 you have a distant memory of it. At any rate it has not
13 featured in these proceedings. The reason is that when
14 the Office produced its note specifying those matters
15 upon which it relied, for the purposes of improving
16 pressure on the part of Allsports it excluded any
17 reference to that event. So that has now fallen by
18 the wayside.

19 However, she went a little more widely in her
20 statement and as a result the Office sought to amend its
21 defence and place reliance on Mr May, whom we had not
22 seen before.

23 The short point is this: we do not need to rely upon
24 anything Ms Charnock has said now. Because unlike
25 the position when her first witness statement was served

1 we did not know what the status of
2 the 24th October meeting was and because there was some
3 suggestion that it might be adverse to Allsports it was
4 covered, but there is no suggestion now made.

5 Second, as I say, she gave factual evidence about
6 the kind of buying and selling that is well superseded
7 by other information.

8 THE PRESIDENT: So you do not need Ms Charnock?

9 MR WEST-KNIGHTS: I do not, sir. I go slightly further:
10 having asked questions of Mr May, I hope that
11 the tribunal shares the view that we have formed, which
12 is that he, as it were, disavowed the impression of
13 pressure, expressly disavowed the impression of pressure
14 which his statement might otherwise have given. He said
15 that in terms.

16 In those circumstances I do not need Charnock 2 to
17 rebut May 1. Is your Lordship with me?

18 THE PRESIDENT: You are saying I can rely on the evidence
19 that Mr May gave.

20 MR WEST-KNIGHTS: I am content to park Mr May's evidence.
21 Indeed we say it is favourable to us overall. But so
22 far as Ms Charnock is concerned, we do not need her
23 evidence and it is no longer material to any issue, we
24 say, before the tribunal. It is as simply as that. I
25 doubt very much whether my learned friend would want to

1 put in Ms Charnock's statement himself under
2 the equivalent jurisdiction under CPR part 32 but that
3 is really not the point. It does of course have the
4 additional advantage that it is less irrelevant material
5 for the tribunal to canvass and consider. Thank you.

6 THE PRESIDENT: I think we will just note that for the
7 moment, Mr Morris.

8 MR MORRIS: That is the way I would like it to be left, and
9 I will have a think about it.

10 THE PRESIDENT: Yes, and come back in due course.

11 MR WEST-KNIGHTS: Could I just enquire, sir --

12 THE PRESIDENT: Yes, the situation was we discussed, if you
13 remember, briefly, the question of serving a summons by
14 text message.

15 MR WEST-KNIGHTS: I think that is where we left it on Friday
16 evening.

17 THE PRESIDENT: Yes. We needed to be clear as to exactly
18 what date we were talking about so it could be an
19 effective service. In the meantime her mobile phone has
20 for some unexplained reason become inoperable or out of
21 service or unavailable or otherwise disconnected so that
22 particular avenue is not as available as it was.

23 MR WEST-KNIGHTS: If I could just complete the picture as
24 I understood it to be: I spoke to the referendaire, as
25 it were, channels on Friday and said it might be wise in

1 any event to park the question of doing something with a
2 very big stick until it had been resolved whether that
3 stick was required. However unsatisfactory
4 the position, there is no point in dragging her here
5 simply to tick her off for ignoring a summons when she
6 is then released.

7 THE PRESIDENT: It was a wise decision to park it --

8 MR WEST-KNIGHTS: In any event, the technology has not
9 resulted in the stick being made visible to her.

10 Just a tiny point which arises out of the Umbro new
11 piece of paper. We now have some surprisingly low
12 figures for Sports Soccer. I am not sure where that
13 fits in, but the other aspect of this has always been a
14 list of the top 10 accounts on the same basis and we
15 still do not have it.

16 THE PRESIDENT: See if you can pursue that, because I do not
17 think we have been asked about it.

18 MR WEST-KNIGHTS: I have mentioned it but I have not asked
19 you to help with it yet.

20 THE PRESIDENT: Very well, Mr Morris. Can we start with
21 Mr Fellone now?

22 MR MORRIS: Yes, indeed.

23 (10.50 am)

24 FILIPPO FELLONE (sworn)

25 THE PRESIDENT: Thank you very much, Mr Fellone. Do take

1 a seat. I am sorry you have been kept waiting last week
2 and yesterday. Thank you for coming.

3 Yes, Mr Morris.

4 Examination-in-chief by MR MORRIS

5 Q. Mr Fellone, your full name is Filippo Fellone but
6 everyone knows you as Phil?

7 A. Yes, correct.

8 Q. Can you tell the tribunal what your present position is
9 at Umbro?

10 A. I am the MD of Umbro UK.

11 Q. You have in front of you a file. In the course of
12 the OFT proceedings in July 2002 you provided a witness
13 statement to the Office of Fair Trading?

14 A. I did.

15 Q. Could you perhaps go to that file and turn to page 262.

16 A. Okay.

17 Q. Can you confirm that that is the witness statement that
18 you provided to the Office of Fair Trading in July 2002?

19 I think if you go to page 270 --

20 A. Yes, it is.

21 Q. Can you confirm that that is your signature at
22 the bottom of page 270?

23 A. It is.

24 Q. And would you confirm that the contents of that witness
25 statement are true to the best of your belief and

1 constitutes your evidence before this tribunal?

2 A. I do, I will.

3 THE PRESIDENT: Thank you.

4 MR MORRIS: I just want to ask you a couple of questions.

5 At paragraph 12 of that statement, on page 264, you say

6 that you had a close relationship with all the national

7 High Street accounts including JJB, Allsports, JD and

8 First Sport.

9 First of all, could you tell the tribunal who you

10 dealt with -- and I am talking now about the period from

11 2000/2001 -- who you dealt with at JJB and how often you

12 would speak to whoever you dealt with at JJB?

13 A. At JJB it was Mr Sharpe, my main contact at the top.

14 The replica buyer, Mr Colin Russell, who was the replica

15 buyer, as I said. There was then a Mr Parkin who was

16 head of footwear. I am trying to think ...

17 THE PRESIDENT: Those are probably the main ones, thank you

18 very much.

19 MR MORRIS: Can you give us some idea of roughly how often

20 you would be speaking to those individuals?

21 A. Mr Sharpe was not very often. It was probably once

22 a fortnight, once every few weeks, maybe. The replica

23 buyer, Mr Russell, it was probably at that stage

24 a couple of times a week.

25 THE PRESIDENT: Yes.

1 MR MORRIS: Thank you. Can I ask you about in relation to
2 Allsports. First of all, who was it that you --
3 A. My main contact was a Mr Guest. I would probably speak
4 to him on, again, once or twice a week. I did not have
5 much contact with the buyers below Mr Guest; he was
6 responsible for the buyers.
7 THE PRESIDENT: Yes.
8 MR MORRIS: Do you recall who the buyers below Mr Guest
9 were?
10 A. Ms Charnock I think at that time was the replica buyer.
11 Mr Hartgrave was the footwear buyer. Mr Wilson was
12 apparel and used to deal with the licensed buying as
13 well.
14 THE PRESIDENT: As far as you are concerned, it was mainly
15 Mr Guest.
16 A. My main contact was Mr Guest, yes.
17 MR MORRIS: Thank you very much. You also recall that you
18 provided earlier statements in connection with Umbro's
19 leniency application. You will find at page 245 of that
20 bundle, if you turn back two tabs to where the F is,
21 that is what has become known as your first draft
22 leniency statement. I think you will find at the end at
23 249 that it is unsigned.
24 A. Okay.
25 Q. Yes?

1 A. Yes.

2 Q. 245 is the beginning and 249 is the end, with
3 the unsigned bit.

4 Can you just read the top of the page, right from
5 the top, the "Strictly Private and Confidential", and
6 read down from there to the bit before the title? So in
7 other words the bit before it says, "I, Philipo
8 Fellone ..."

9 A. Okay. Yes.

10 Q. Can I ask you, who drafted that?

11 A. That was done by Miss Roseveare.

12 Q. Thank you. If you then go to 254, which is
13 the February version, this is your second statement
14 which you signed. Again you will see the signature,
15 I think you will find your signature at page 258.

16 Again, looking at the beginning of the statement at
17 254 and the heading and the statement as a whole, could
18 you tell the tribunal who drafted this document?

19 A. I think I -- well, I drafted it in conjunction with
20 Miss Roseveare.

21 THE PRESIDENT: Yes, thank you.

22 MR MORRIS: Again, at page 262, the one we have just been
23 dealing with, again could you perhaps describe
24 the drafting process there, how that would have
25 happened?

1 A. Again, it was the same process: I drafted it in
2 conjunction with Miss Roseveare in terms of the specific
3 areas, A-F.

4 Q. Yes, thank you. I would like to ask you one further
5 question arising out of these leniency statements, and
6 it is this: I would like you to cast your mind back to
7 the period we are talking about, which is
8 November 2001 to February 2002, when Umbro was making
9 its application. From your own point of view and that
10 of Umbro, what did you see as being the risks and
11 benefits of giving these statements to the OFT about who
12 was involved in price-fixing?

13 A. I think at that stage, as all the way through
14 the investigation, we had just been asked to tell
15 the truth as we recalled it.

16 Are you referring to the leniency ...?

17 Q. (Indicates assent).

18 A. Again, we were just asked to try to detail as much
19 information as we could recall at the time of the whole
20 process, what happens day-to-day.

21 I do not know if I am answering your question,
22 Mr Morris.

23 MR MORRIS: I was asking whether at the time that that
24 application was made you personally were aware of what
25 the factors were in Umbro's decision to apply for

1 leniency.

2 A. Yes.

3 Q. Could you perhaps elaborate on that?

4 A. My understanding was again, as I said, that we were
5 applying for leniency and we had to get our witness
6 statements in pretty quickly. It was just a case of
7 trying to remember the events of 1999 and 2000 as
8 clearly as possible, and on that basis telling
9 the truth.

10 That is as much as I --

11 THE PRESIDENT: That is as you remember it, yes, thank you.

12 MR MORRIS: Thank you very much. I have one final question
13 and it is this: can you tell the tribunal who the major
14 customers are that you now deal with in your position as
15 managing director, I believe, of UK.

16 A. Yes, I deal with JJB, Sports World, who were known as
17 Sports Soccer, Allsports, JD. They are our top sort
18 of -- our four main accounts that we deal with and
19 I have regular contact with.

20 Q. Have the people that you have contact with changed in
21 the light of your position now at Umbro or is it
22 broadly same people?

23 A. Pretty much the same people. The same people.

24 MR MORRIS: Thank you. Those are all the questions I have.

25 I am sure there will be more questions for you.

1 THE PRESIDENT: Lord Grabiner.

2 (11.00 am)

3 Cross-examination by LORD GRABINER

4 Q. Mr Fellone, I have a few questions for you. I think you
5 said a little while ago to the tribunal that you are now
6 the managing director of Umbro UK?

7 A. Correct.

8 Q. I think that at the relevant time that these proceedings
9 are concerned with you were the sales director?

10 A. Correct.

11 Q. How long had you held the position of sales director?

12 A. For approximately four years. Almost four years.

13 Q. Am I right in understanding that Mr McGuigan is
14 the chief executive of Umbro?

15 A. Correct.

16 Q. And that he was then your boss and is still your boss?

17 A. Yes, yes, correct.

18 Q. I know it is difficult for a managing director to
19 imagine that he has a boss, but you know what I mean?

20 A. I have lots of bosses.

21 Q. You report to him?

22 A. I do, yes.

23 Q. Looking back, if you would, to the period that we are
24 concerned with, would I be right in assuming that
25 you can recall conversations with retailers about other

1 retailers who discount?

2 A. Yes. Yes.

3 Q. I suppose that that kind of conversation must have taken

4 place quite frequently?

5 A. Yes, it did.

6 Q. And it would be or would have been a fairly typical

7 conversation between any manufacturer or supplier and

8 his retailer?

9 A. Yes, yes.

10 Q. Now I want to ask you about a few passages in your third

11 witness statement, which is the one you might still have

12 open. It starts at page 262; it is that one.

13 A. Okay.

14 Q. I want to look at a particular point where I think we

15 may have a disagreement, and I want to try to clarify it

16 with you.

17 Could you look at page 266, in particular at

18 paragraph 17.

19 A. Okay.

20 Q. If I can just read that to you:

21 "One example of the kind of pressure that they put

22 on us was in May 2001 relating to a repeat order for

23 the Manchester United centenary shirt. An initial order

24 had been placed for ..."

25 And it is blotted out but I think it is a known fact

1 and is ancient history that "40,000 shirts" should be
2 underneath the black mark:

3 "... and they had subsequently placed a repeat
4 order ..."

5 So there were two orders each of 40,000 for
6 Manchester United home shirts.

7 "At the time Sports Soccer were discounting
8 the England shirt."

9 And I emphasise that sentence:

10 "I received the cancellations which were reported in
11 the May 2001 trading report."

12 Now, you seem to have thought that JJB cancelled
13 the repeat order for the Manchester United centenary
14 shirt, so that seems to have been your view when you
15 prepared this paragraph?

16 A. Correct, yes.

17 Q. And you mention that Sports Soccer were discounting the
18 England shirt at the time?

19 A. Correct.

20 Q. Now, are you suggesting that there was some connection
21 between the cancellation of the 40,000 centenary shirts
22 and Sports Soccer's discounting of the England shirt?

23 And I emphasise the England shirt because I am going to
24 suggest to you that you are mistaken about that.

25 A. At the time of the cancellation I recall Sports World

1 were discounting the England shirt. My interpretation
2 of the cancellation was that it was because of
3 the England shirt being discounted. But I think this is
4 a point which I have raised with my legal counsel at
5 Umbro, that after reading the evidence from Mr Russell
6 and a few others from JJB quite recently, I can now
7 understand and appreciate JJB's reason for cancelling
8 the centenary jersey which in their statement is nothing
9 to do with the England shirt, it is in relation to
10 a clearance order we supplied to Sports World which
11 obviously frustrated JJB and caused them to make that
12 cancellation.

13 Now, at the time this was my feeling; I thought it
14 was to do with the England jersey. It is not until much
15 later when I have read everybody's documents that it now
16 makes sense what JJB was saying at the time.

17 I do not know if that answers your question?

18 Q. Yes, it is extremely helpful actually.

19 THE PRESIDENT: What JJB is now saying?

20 LORD GRABINER: No, was then saying. I think that is quite
21 an important point, actually.

22 THE PRESIDENT: Yes, but anyway the JJB account makes sense.

23 A. Yes.

24 LORD GRABINER: Perhaps I can go through that bit of
25 the story.

1 A. Okay.

2 Q. And you will forgive me going back over what you have
3 just been saying, but I want to get it absolutely clear.

4 Mr Ronnie's evidence and JJB's case is that JJB was
5 annoyed to discover that Umbro had sold to Sports Soccer
6 at knockdown prices a large quantity of MU home shirts.

7 Does that accord with your recollection?

8 A. Correct.

9 Q. And the result of the sale to Sports Soccer at knockdown
10 prices of the MU home shirts was to enable Sports Soccer
11 to retail at a huge discount?

12 A. Correct.

13 Q. I think they were selling the adult shirts at something
14 like £20 a go?

15 A. I think so, yes.

16 Q. Now, it is also the case that JJB responded by
17 cancelling the order for 40,000 of the MU shirts, and
18 I think that is common ground.

19 A. Yes.

20 Q. When Mr Ronnie gave evidence about this -- I think it
21 was last week some time. Were you in court for that?

22 A. It depends which day it was. I was not here on Friday.

23 Q. There have been some days when you have not been here?

24 A. Yes.

25 Q. Very good, very wise.

1 When he gave his evidence, and I do not know if you
2 were here when he gave it but perhaps you can tell me,
3 when he explained that he had -- he did not use the word
4 "neatly"; I think I did. He explained that he had
5 thought up a global commercial solution to the problem.
6 Were you in court when we had that discussion?

7 A. No, I was not.

8 Q. And the global deal that he had thought up and that was
9 done was that the rest of the Manchester United shirts
10 which were then held by Umbro were sold to JJB at
11 clearance prices, and as a result that lowered JJB's
12 average cost price for all the stock it then had of
13 Manchester United home shirts. Does that accord with
14 your recollection?

15 A. Not -- not directly. My recollection is that after
16 Mr Ronnie had sold the Manchester United home jerseys to
17 Sports Soccer, we then found that we had excess fabric
18 in the Far East to produce a further -- I think the
19 figure at the time in my head was -- well, it was quite
20 a large figure available, and it was on that basis that
21 Mr Ronnie went back to JJB.

22 Q. Absolutely. There is no disagreement between us.
23 I think I just meandered around.

24 THE PRESIDENT: You fill in the details when you want to, Mr
25 Fellone. That helps us.

1 LORD GRABINER: Essentially I think that I am not
2 disagreeing what you just said.

3 A. Okay.

4 Q. What I am suggesting is that Mr Ronnie -- as part of
5 the deal that was eventually done with JJB, that stock
6 was sold to JJB at a clearance price?

7 A. Correct.

8 Q. And that the effect of the clearance price acquisition
9 was to produce the result that JJB's then stock of
10 Manchester United shirts, including the fabric of shirts
11 for the moment, would be at an average lower cost than
12 was previously the case?

13 A. Correct.

14 Q. The result of that was that JJB could then sell this
15 "stuff", as my learned friend Mr West-Knights would put
16 it, in the marketplace --

17 MR WEST-KNIGHTS: No, they were shirts not other stuff.

18 LORD GRABINER: He would call them "socks" -- at a competing
19 price with Sports Soccer.

20 A. Correct.

21 Q. One of the factors here was that it had been announced
22 that Nike was about to replace Umbro as the main sponsor
23 for Manchester United?

24 A. Correct.

25 Q. So there was no future, if I can put it that way, in

1 Umbro shirts with a Manchester United connection?

2 A. Correct.

3 Q. As part of the global deal that was done JJB agreed to

4 restore the cancelled centenary shirts order?

5 A. That is my understanding, yes.

6 Q. And also to buy about £2 million worth of additional

7 goods from Umbro?

8 A. Correct.

9 Q. Now, in the light of that, do you agree that JJB's

10 cancellation of the order for the 40,000 MU centenary

11 shirts had nothing to do with the fact that

12 Sports Soccer were discounting the England shirt?

13 A. I think in the light of the evidence I have read over

14 the last three or four months I would agree; at the time

15 I have to stick by my statement that that was my view.

16 At this stage now having read the evidence from JJB,

17 I would agree with that comment.

18 Q. Do you also accept that the cancellation was prompted by

19 a genuine commercial concern on the part of JJB which

20 was later resolved by the commercial package devised by

21 Mr Ronnie that benefited everybody in the story?

22 A. Again, based on the information I have read, yes, I do

23 now. Yes.

24 Q. Could you look at paragraph 18, which is the following

25 paragraph after the one we have been talking about.

1 You say:

2 "We requested a meeting with JJB to understand why
3 such a big order had been cancelled. Duncan Sharpe,
4 Colin Russell and Steve Preston were present.
5 I attended the meeting with Chris Ronnie. The JJB
6 representatives asked us if we could guarantee the price
7 at which Sports Soccer would sell the centenary shirts
8 at launch. We said that we could not guarantee
9 the price [and I just want to emphasise those words] but
10 we were confident that Sports Soccer were not going to
11 discount the product at least for the first few weeks
12 after launch as Mike Ashley had told us that this was
13 his intention. JJB then reinstated the order. In fact
14 Sports Soccer did discount the kit one month after
15 launch, however, by that time JJB was selling its shirt
16 so well that it did not react."

17 Just looking at that paragraph can I ask you this:
18 you are not suggesting, I think, that it was an agreed
19 condition of the global settlement between Umbro and
20 JJB Sports that Sports Soccer would not discount
21 the Manchester United centenary shirts at least for
22 the first few weeks of the launch?

23 A. I do not quite understand the question.

24 THE PRESIDENT: Have you had a chance to re-read
25 the paragraph?

1 A. Yes, I have read that.

2 LORD GRABINER: What I am suggesting to you is that you are
3 not suggesting there, and you do not suggest, that there
4 was an agreed condition of the deal that was done
5 between JJB and Umbro that we have just been discussing,
6 you are not suggesting that it was a condition of that
7 deal that Sports Soccer would not discount the MU
8 centenary shirt?

9 A. No.

10 Q. Now, the position then was that JJB was concerned for
11 reasons that we have just been discussing that there
12 would not be a repeat performance of what had just
13 happened with the Manchester United home shirt. Is that
14 a fair summary of one of the concerns which was in
15 the mind of JJB at the time?

16 A. I think at the time I was not involved in any
17 conversations with JJB that told me at that stage that
18 their biggest concern was Umbro clearing the Manchester
19 United jersey to Sports Soccer at the time. As I said,
20 most of this has become known to me when I read
21 the statements. I do not think that was covered at
22 the meeting that I attended with Mr Ronnie; it was never
23 made clear at that point, which is why my evidence was
24 a little bit vague at that stage.

25 It was only later on when I read the statements that

1 it becomes clear why JJB were not happy with Umbro,
2 because of the clearing of the Manchester United
3 jerseys.

4 Q. Well, it may be -- I do not want you to speculate about
5 these things and it may be that you simply do not know.
6 But can I put a scenario to you, just to see if it rings
7 any bells with your knowledge at the time and your
8 understanding of the facts.

9 First of all, we have agreed that everybody knew
10 that Nike was due to take over from Umbro as the kit
11 manufacturer for Manchester United?

12 A. Correct.

13 Q. I think that had already been publicly announced?

14 A. I think so, I think so, yes.

15 Q. In those circumstances, JJB would have been concerned
16 that Umbro might actually sell the centenary shirts to
17 Sports Soccer at a clearance price, just as it had sold
18 the Manchester United home kit to Sports Soccer at
19 a clearance price; that would have been one of
20 the commercial concerns, would not it?

21 A. Maybe. Maybe.

22 Q. Do you have any recollection of any discussion along
23 these lines at the time?

24 A. No, no, I do not, I am sorry.

25 Q. But if you were sitting in JJB's position against

1 the background, is that the kind of commercial
2 consideration you might have had in mind?

3 A. Yes.

4 Q. So that JJB is looking at committing itself to buying
5 a large quantity, 80,000, and restoring the 40,000 to
6 make it 80,000 shirts, centenary shirts, and
7 the possible risk that having done so the bottom might
8 fall out of the market, for example, because they find
9 themselves confronted with a repeat performance from
10 Sports Soccer?

11 A. Yes, maybe.

12 Q. What I am suggesting to you is that that might have
13 been -- and I know it is a long time ago now -- that
14 might have been the thrust of what you say in
15 paragraph 18 of your witness statement.

16 A. Yes. Yes, I can accept that, yes.

17 Q. Now, if you leave aside the specific example that you
18 give in paragraph 17 -- and we looked at the specific
19 example in paragraph 17 of the cancellation of
20 the 40,000 shirts order -- if you leave that example out
21 of the picture completely on the basis that we have been
22 discussing, just forget about it. What is left,
23 I suggest, is what you called in paragraph 14 "implied
24 threats". Would you look at the first line of
25 paragraph 14 on page 265:

1 "Most of the time retailers gave me implied threats
2 as to what might happen if we do not help them to
3 control the retail price of replica products ..."

4 And you interpret the conversations as meaning what
5 you then set out.

6 Now, similar descriptions are used by other
7 witnesses in this case, sometimes with and sometimes
8 without the use of the word "implied". I just want to
9 show you some examples, and it may be actually that
10 you have read some of these; have you done so?

11 A. Yes, yes, I have.

12 Q. Could I just show you Mr Ronnie on this subject. If you
13 look at file 3 -- perhaps that can be shown to you.
14 Leave that one aside; it is a different bundle. Witness
15 statements file 3, page 239.

16 I want to show you two paragraphs from Mr Ronnie's
17 fourth witness statement. In paragraph 8 he says:

18 "When we received complaints from Allsports and JJB
19 about discounts offered by other retailers there was
20 an underlying threat that they would withdraw support
21 for Umbro as a brand in their stores if we did not do
22 something about it. This would have serious
23 re-percussions for the business."

24 In paragraph 9 he says:

25 "... also perceived pressure because nothing that

1 was explicitly stated came in the form of order
2 cancellations, a sudden reduction in the volume of
3 a particular product that had been ordered and
4 a perceived reluctance to place orders for Umbro
5 products in future. These actions were not limited to
6 replica kit, but extended to footwear, apparel and other
7 sports goods. Their timing would normally coincide with
8 the recent retail promotion by one of Allsports' or
9 JJB's competitors."

10 So that there the language that he uses is not
11 implied threat but underlying threat, he says that
12 the pressure was perceived and he says that nothing was
13 explicitly stated.

14 Now what I suggest is that he is making the same
15 point in very similar language to the one that you are
16 making in paragraph 14 that I showed you a moment ago.
17 You might just want to glance back at paragraph 14.

18 Before you answer that I want to show you another
19 example but just bear in mind what you said in
20 paragraph 14. Look then at Mr McGuigan's statement;
21 that is in file 2. You can put the other one aside now.

22 Page 253, paragraph 8. He says:

23 " I have received telephone calls from Dave Whelan
24 to discuss business in general. On several occasions he
25 would discuss Mike Ashley and the effect of

1 Sports Soccer's entrance into the replica market. He
2 would state that there was no need for Sports Soccer to
3 discount the products as they fly out of the store. He
4 did not like the fact that Sports Soccer's market share
5 was increasing and was having an impact on
6 the traditionally high profit margin that JJB made on
7 replica shirts."

8 What I want to suggest to you is that what you are
9 saying in paragraph 14 is much the same as is being said
10 both by Mr Ronnie in those two paragraphs I showed you
11 and by Mr McGuigan in that paragraph I just read to you?

12 A. Yes, yes, I agree.

13 Q. Can I ask you something else. If a retailer complained
14 about discounting by a competitor, did you ever react
15 sympathetically and do some sort of special deal with
16 the retailer to meet the retailer's complaint?

17 A. I think on occasion, yes. Yes, I think I did and
18 I would.

19 Q. I have an example I want to show you: if you look at
20 file 3, we will look at a bit from Mr Russell's witness
21 statement. File 3, page 371. Do you have that? It is
22 page 371, paragraph 6.

23 THE PRESIDENT: Can we put Mr McGuigan away now?

24 LORD GRABINER: I think you can, sir, yes. No guarantees,
25 but I think so.

1 THE PRESIDENT: I am sorry, I missed the last page
2 reference.

3 LORD GRABINER: Page 371, paragraph 6, the last paragraph on
4 the page. He says:

5 "Discounting was therefore a general argument in
6 favour of better deals. In some cases, however,
7 the argument would be related to discounting of
8 a particular shirt and used as a way of getting early
9 clearance deals from suppliers.

10 "For example, the Umbro Manchester United third
11 jersey was launched in September 2000 at normal trade
12 prices. Following discounting by Sports Soccer
13 I managed to buy 48,000 adult and children's shirts at
14 clearance prices of 9.75 for delivery from
15 13th December 2000. This was significant since
16 the delivery was due in the all-important period
17 immediately before Christmas when demand would be at its
18 peak. A similar case was when the Umbro Chelsea away
19 shirt launched in May 2000. Again following discounting
20 by Sports Soccer to £30 only 75 days after launch,
21 I managed to buy 20,000 adult and children's shirts at
22 prices of £6.50 and £5.50 on 15th December 2000. I used
23 the same strategy with all suppliers. For instance,
24 with a Nike Arsenal away shirt which was launched in
25 July 1999 I managed to obtain 13,000 at prices of £6.50

1 and £5.50 on 5th December 2000.

2 "I mention these because they demonstrate that I was
3 able to persuade Umbro and other suppliers to offer
4 specially advantageous terms to JJB by pointing to
5 discounting in the market. Similarly, I was able to
6 obtain improved terms from Reebok in 2001, FILA in
7 2000 and Le Coq in June 2000. In each of these cases,
8 terms had been agreed just a few months before. I was
9 making regular demands for improved terms and was using
10 discounting as a strong argument in favour of better
11 terms."

12 Now, can I ask you this: does any of that come to
13 you as any surprise?

14 A. No.

15 Q. And did you do -- and I am not interested in details,
16 still less am I going to tax you of your memory of such
17 transactions -- did you do similar deals at the time?

18 A. I am sure I did, yes.

19 Q. And they would have been driven by complaints being made
20 to you by retailer X who says: you know that retailer Y
21 is discounting strongly in the market and you have to do
22 me a deal in order that I can respond accordingly?

23 A. Yes. Yes.

24 LORD GRABINER: Thank you very much indeed.

25 (11.25 am).

1 Cross-examination by MR WEST-KNIGHTS

2 Q. Mr Fellone, I hope that I will not be very long.

3 A. Fine.

4 Q. Your statement that we have been looking at, that is to
5 say what we rather carelessly called Fellone 3, if we
6 could turn to that, please, again, page 262 of
7 the bundle that has your evidence in it.

8 You describe at paragraph 6 the process of ordering
9 these replica kits; yes?

10 A. Yes, correct.

11 Q. I am going to try to describe the thing that goes over
12 the top part of a person's body as a jersey and to avoid
13 reference to anything else. If I say "stuff", I mean
14 the bits that go from the waist down.

15 A. Okay.

16 Q. In fact, I see that it was you, although we accidentally
17 ascribed it to Mr Ronnie yesterday, this estimate of
18 the shape, the curve of sales of statement product in
19 particular, ie very, very popular in the first immediate
20 launch, and you state something like 60 per cent sold
21 within the first four weeks?

22 A. I think at that time, yes, that was -- that was a rough
23 calculation.

24 Q. That is fine. It may be that the picture has changed,
25 but I am content with that at the time.

1 Do you remember -- and if you do not it does not
2 matter -- that obviously the Euro 2000 thing was
3 absolutely different because there was not, as it were,
4 a fixed launch date?

5 A. Correct.

6 Q. It was simply a period where certainly everybody was
7 expected to be very interested in the England shirt
8 immediately before Euro 2000 and during it, at least
9 until England did the usual; yes?

10 A. Yes.

11 Q. But people had been hoping that the shirt would pick up
12 really rather earlier than it did?

13 A. Yes, correct.

14 Q. You remember that?

15 A. Yes.

16 Q. And that unlike, curiously, other retailers Allsports
17 were actually selling the England shirt well in May?

18 A. Correct.

19 Q. Which was of course a period that we all now know was
20 during which Sports Soccer were discounting still
21 the England shirt; yes?

22 A. Yes.

23 Q. Just to remind you they put the price up, in fact,
24 exactly a week before the tournament started, which
25 everybody might have expected to be peak demand time;

1 yes?

2 A. Yes.

3 Q. By then at least certainly the newspapers, the kind of

4 newspapers that football supporters read, were full of

5 Euro 2000?

6 A. Yes.

7 Q. Of course the other people who were discounting at this

8 time were JD Sports. Do you remember, they had

9 an Admiral cap promotion?

10 A. Yes, I do.

11 Q. Just before we leave paragraph 6, the JD Sports

12 promotion was one that Umbro was, if I can put it this

13 way, quite independently of anybody else really quite

14 upset about?

15 A. Yes, correct.

16 Q. Partly because they felt that it was wholly

17 inappropriate for JD Sports to mix somebody else's

18 product with one of your two absolute premium products,

19 the England shirt?

20 A. Correct.

21 Q. And that was a concern that Umbro had quite, as it were,

22 for itself in terms of its statement product; yes?

23 A. Yes.

24 Q. And its brand image, frankly: Umbro is not Admiral?

25 A. Yes, correct.

1 Q. I do not want to ask you any questions about
2 the negotiation of wholesale prices, except this: how
3 much did you know in 2000 about the arrangement that had
4 been reached between Chris Ronnie and Michael Ashley
5 about the fixed dividing mechanism for working out
6 Mr Ashley's buying price?

7 Sorry if I sound elliptical. There came a time when
8 in relation to all product, including replica, he was
9 not, as it were, on a 1.88 less N per cent, but one
10 took -- in the case of replica it said 39.99 and divided
11 it by 2.5. How much did you know about that in the year
12 2000?

13 A. I cannot remember exactly how much. I knew of the 2.5
14 on branded product. On licensed my understanding was
15 that there was not 2.5.

16 Q. Okay, I understand. Let me tell you what our
17 understanding is and it may be that if you cannot
18 comment we can be put right in some other way.

19 We have seen an example of a credit invoice passing
20 between Sports Soccer and Umbro; I do not need to take
21 you to it. But we have derived from that and from other
22 evidence that there are, we have been told, two quite
23 distinct arrangements.

24 The first is that on stuff and indeed jerseys that
25 have nothing to do with licensed, just pure branded,

1 the formula would be that Mike Ashley would, as it were,
2 set his selling price and he would buy it from Umbro at
3 divide by 2.5 per cent on that?

4 A. Correct.

5 Q. So far as replica is concerned, we have been told that
6 the same mechanism applies in principle except that it
7 is not Mr Ashley who chooses the start point of
8 the calculation but that it is what has rather slackly
9 been called Umbro's retail price, but at any rate
10 the start point for replica jerseys is 39.99 and
11 the calculation is done back from that.

12 That is what we have been told is the difference
13 between branded and licensed on that deal. Am I right
14 about that? Or perhaps you cannot help.

15 A. I was not involved in the Sports Soccer account from
16 2000 -- actually, I was not welcome in Sports Soccer
17 until last March, so I was not involved in the meetings
18 with them, but I did get copied in on I think
19 the majority of the file notes.

20 My understanding at that time looking back to
21 2000 was that the 2.5 deal did not apply at that time.
22 I think they were requesting it on numerous occasions,
23 but to my knowledge I certainly was not aware that
24 we had agreed that principle.

25 Q. If you keep looking at the tribunal you will find it

1 less distracting than those people on the front row on
2 the left who are busily nodding.

3 THE PRESIDENT: They were requesting it but you were not
4 aware that Umbro had agreed it.

5 MR WEST-KNIGHTS: That is very helpful, Mr Fellone. We do
6 not have a handle on when some of these arrangements, to
7 use a colloquial expression, kicked in.

8 A. Okay.

9 Q. You deal with price information here and you talk at
10 paragraph 12, as you have already noted, that
11 Chris Ronnie, whatever the date was -- you say 1999
12 here, 2000 in an earlier statement; it does not
13 matter -- he, as it were, took over the Sports Soccer
14 account to avoid conflict?

15 A. Correct.

16 Q. I am chancing my arm slightly here, Mr Fellone. Is
17 there or was there at the time any disagreement as to
18 strategy between you and Chris Ronnie in terms of
19 dealing in large amounts of bulk sales with
20 Sports Soccer?

21 A. I think we constantly had conversations going back to
22 1999, 2000 and closer, in general about strategy, what
23 we should do, which direction we should take and so on.
24 So I would say that we were constantly not at
25 loggerheads but in conversation, yes.

1 Q. I understand that, that is one of the reasons why
2 companies employ people like you, because it contributes
3 something to the debate.

4 It strikes us as slightly odd, and perhaps you can
5 help with this, that Umbro is trying to do two things at
6 this time. First to establish itself -- I do not mean
7 to be rude when I say that -- more firmly as a brand;
8 yes?

9 A. Yes, correct.

10 Q. And we have done quite a lot on this and perhaps
11 you have listened to it. The advantage of being a known
12 brand, especially if you are a sexy brand or
13 a performance brand, is that people want your gear more?

14 A. Correct.

15 Q. And there comes a point where people, all things being
16 equal, will either buy more of or pay more for a thing
17 because it has Umbro on it; it is the ideal, is it not?

18 A. Yes, correct.

19 Q. And I think we see some moans in the monthly management
20 reports for the relevant period in this case where
21 people are saying: the public are buying the Nike
22 whatever it is, not because it is any better, simply
23 because it has the name Nike on it?

24 A. Yes, of course.

25 Q. Ideally of course Umbro would like to be in that

1 position, and for all I know today is? I am not asking
2 you to give away any trade secrets, Mr Fellone. You
3 would like to think so.

4 A. Yes, we would like to be in that position.

5 Q. You are aspiring if not actually there?

6 A. Correct.

7 Q. At the same time that Umbro is doing that, which
8 involves taking steps of course to preserve the image of
9 the brand?

10 A. Correct.

11 Q. At the same time an arrangement appears to be being
12 entered into which prospectively at least, that is to
13 say for the future, gives the capacity to a third party
14 not under Umbro's control to sell a huge quantity of
15 stuff with Umbro's badge on it at relatively low prices?

16 A. I think that point of outside of Umbro's control,
17 I would say there was a great level of control from
18 Umbro in terms of product development, designing,
19 authorising the product. It was controlled in our view.

20 Q. Certainly. I think the position was that the price at
21 which Mr Ashley could sell it, there was a limit on how
22 far he could go down; do you remember this?

23 A. Yes, yes.

24 Q. Obviously one of the dangers for Umbro would be that if,
25 for whatever reason, say Mr Ashley or somebody has got

1 an enormous contract with somebody else, they could
2 knock out Umbro product as a loss leader at £1 a go and
3 that would be bad news. So there is a formula I think
4 that limits the price Mr Ashley can go down to?

5 A. Correct.

6 Q. It is a certain percentage of -- the bottom line is that
7 it is a certain percentage below what Umbro would sell
8 things at, or the Umbro recommended retail price?

9 A. Correct.

10 Q. Right. But nonetheless is there not a conflict between,
11 as it were, having an aspirational aspect to the Umbro
12 product, particularly the statement product, where in
13 particular I think the clubs do not want the thing
14 discounted -- right?

15 A. Correct.

16 Q. -- and an arrangement which is more towards: sell a very
17 large quantity at relatively low prices?

18 A. Yes.

19 Q. Is there a conflict? I perceive there to be one.

20 A. Yes, there is, but I think the way we looked at it was
21 that we separated the licensed or the replica business
22 versus our -- the Umbro branded business, which was our
23 own business, let us say, and we almost looked at them
24 in two different ways. So we tried to maintain
25 the brand image on the licensed product because that was

1 very much in the consumers' face, whereas the branded
2 business, we were competing with a lot more brands and
3 we did not have any -- we did not have a particularly
4 high profile at that stage. So we were trying to treat
5 the two as almost separate businesses. That was my
6 understanding.

7 Q. That is very helpful. So in effect you have your
8 ordinary brand -- at that time certainly you had to be
9 realistic that you were just not yet a Nike back in
10 2000?

11 A. Correct.

12 Q. As far as the licensed is concerned that is rather
13 different, because it is on the backs -- indeed I think
14 your logo is only on the front. But I meant in terms of
15 the jerseys, it is being worn by some very popular
16 figures on occasions where tens of millions of people in
17 the country would be watching?

18 A. Correct.

19 Q. And in the case of clubs, of course, they have their
20 interest because they want their shirt to be regarded as
21 a premium product because it makes them feel good.

22 A. Correct. I think most -- my interpretation is that
23 the main reason ... that was one of the reasons.
24 The main reason is that most of the clubs, apart from
25 England, have their own retail arm to their business, so

1 at Allsports?

2 A. Correct.

3 Q. He tells us that you and he would meet really quite

4 frequently?

5 A. In work or out of work, sorry?

6 Q. Taking everything together.

7 A. Yes, yes.

8 Q. I think it is right that you are actually godfather to

9 Michael's son?

10 A. Yes, correct.

11 Q. He tells us that during the year in which we are

12 interested, 2000, that he, that is to say Allsports and

13 Umbro, and you were working pretty closely together to

14 develop the branded side of the relationship between

15 Allsports and Umbro?

16 A. Yes, correct.

17 Q. I think it is fair to say that both sides invested

18 a considerable amount of time, energy and indeed money

19 in developing some aspirational sub-brands, if I can put

20 it like that. Perhaps I can give you what I mean:

21 Choice of Champions?

22 A. Yes.

23 Q. And indeed the Pro-Training collection.

24 A. Correct.

25 Q. They were a joint effort by Allsports and Umbro

1 specifically to put products into those categories, you
2 hoped, into the Nike and Puma sort of league; yes?

3 A. Yes.

4 Q. And indeed I think it is fair to say, and it may not be
5 a commercial secret, that to a large degree you were
6 successful at that?

7 A. Yes. Yes.

8 Q. So, as it were, there was a considerable joint
9 investment between both companies working cooperatively
10 together on that aspect of branded product?

11 A. Correct.

12 Q. Although in the year 2000 we know that the turnover as
13 between Allsports and Umbro was pretty small in respect
14 of branded -- we have heard a figure of something under
15 a million and half all in?

16 A. Yes.

17 Q. That is something that both sides were working together
18 to increase?

19 A. Correct.

20 Q. Thank you. When you meet with Michael, what he says
21 about the question of discussions between you and him is
22 that they would be ... well, always friendly for
23 a start. Yes?

24 A. Yes.

25 Q. But that from time to time it was inevitable, the two of

1 you being so close and having a business relationship as
2 well, that the subject of other people discounting would
3 come up; that would be right, would it?

4 A. Yes.

5 Q. Just as part of general conversation. It would be daft
6 if you did not?

7 A. Yes.

8 Q. Unless you were both wearing a badge saying: cannot talk
9 about the market?

10 A. That is a good idea, I will try that one.

11 Q. In retrospect perhaps it may be right. But the
12 conversations with Mike were entirely innocent, were
13 they not? You were just exchanging information about
14 what was going on?

15 A. We kept that to a minimum. It was not a standard -- we
16 tried not to discuss outside of business -- we very
17 rarely spoke about business.

18 Q. Yes, I understand that, but in business, say when you
19 have lunch with Michael as you do from time to time I
20 think?

21 A. Yes.

22 Q. Working day type lunches?

23 A. Yes.

24 Q. That is business. But you do not meet for the purposes
25 of talking about price discounts, you meet for a lot of

1 reasons. There is an awful lot going on between you and
2 Allsports?

3 A. Yes.

4 Q. But from time to time conversation would turn to what
5 other people were doing?

6 A. Yes.

7 Q. And if, for instance, Allsports had ordered forward
8 a large quantity of dog leads, just to take a completely
9 irrelevant example, a wholesale price based upon
10 the retail selling price, which is the way it was done,
11 and it turns that the bottom has fallen out of
12 the market for dog leads when it came to delivery, in
13 quite a few situations they are actually entitled,
14 because they have to order forward, not to take delivery
15 of those things without penalty. In some cases?

16 A. The word "entitled" -- we do not ... we had a no
17 cancellation policy which was part of our trade terms.
18 So as far as we are concerned, and it is easy for me to
19 say this, there is a no cancellation policy. We do not
20 force retailers to place the orders; they place them and
21 it becomes their responsibility. That is the true
22 position from Umbro's point of view.

23 Q. But from time to time as part of the ordinary flow of
24 commerce between two companies that rely on each other
25 to a degree, people want stuff and arrangements are

1 made?

2 A. Of course, if we can help them in any way, from

3 a commercial point we do.

4 Q. And there is nothing sinister in that?

5 A. No.

6 Q. We know that the sales of the Celtic shirt were very

7 disappointing at one stage in early 2000 because Celtic

8 were doing -- as Celtic perceived it to be -- badly, and

9 their supporters were just not interested?

10 A. I cannot remember that specific example. But if that is

11 stated in one of the ...

12 THE PRESIDENT: Anyway, you have no memory about that.

13 A. No, I do not have a specific memory on that point.

14 MR WEST-KNIGHTS: Okay. Can we have a quick look at

15 paragraph 19 of your witness statement in these

16 proceedings.

17 A. Yes.

18 Q. Page 266.

19 A. Yes.

20 Q. If you take it in bite-sized lumps: when you say that

21 Allsports were one of the first customers to call us,

22 who would that be a reference to?

23 A. That would be Mr Guest most of the time if it was direct

24 to myself.

25 Q. But it would not be in any way hostile?

1 A. No. No.

2 Q. And of course your perception that he might be one of
3 the first people you might speak to about anything was
4 that you had the kind of relationship where you spoke to
5 each other a lot. If there was something of interest
6 going on you would not hesitate to speak to each other?

7 A. Yes.

8 Q. There is nothing sinister about the fact that Allsports
9 might be the first people to have conversations about
10 what was going on in the market?

11 A. No, I mean in fairness to Allsports they encouraged
12 their buyers to go out into store. They are probably
13 the most proactive, they go out once a week, so they are
14 probably more aware than some other retailers of what is
15 happening in the marketplace in terms of brands and
16 prices and so on.

17 Q. Particularly at the time that you were developing
18 Pro-Training and Choice of Champions, the key question
19 there is going to be are you going to be able to fight
20 in the marketplace with the big players like Adidas and
21 Nike?

22 A. Yes.

23 Q. And one of the things which you suggest is clear from
24 the monthly management reports is that Umbro, perhaps
25 with the assistance of people like Allsports, keeps

1 a pretty close eye on what Nike and Adidas are actually
2 achieving in the marketplace, and say: watch out,
3 they have a boot at £89.99 doing jolly well?

4 A. Yes.

5 Q. So that gives you an indication, and it is very helpful
6 for you to know that sort of thing because you would
7 have to think: dare we put out our Pro-Training kit at
8 that price or are we going to have to be realistic and
9 take a tenner off it, bearing in mind that Nike at the
10 moment is more sexy than us. That is the kind of thing.

11 A. Correct.

12 Q. So none of this information is unwelcome?

13 A. No.

14 Q. Can you help us with the expression "putting pressure on
15 us to resolve retail pricing issues".

16 What you said in your first two statements about
17 that was asking us to look into it. Can you remember
18 why that changed: instead of "putting pressure on us to
19 resolve retail pricing issues", why it does not appear
20 in the first two statements?

21 A. I think certainly the first one or maybe two statements
22 were put together quite quickly in terms of our
23 claim for leniency. I think in the later statements
24 I probably expanded a little more. That is the reason.

25 Q. Okay. But the relationship between you and Michael is

1 not one where he puts pressure on you, is it?

2 A. It is not, but it is. If you look at it from a business
3 point of view, and there were examples, whereas my
4 comment really relates to the fact that Allsports were
5 one of the first to call me and tell us of a particular
6 retailer discounting, because the pattern that we were
7 concerned with, and it has happened on a number of
8 occasions, is because Allsports place their orders, as
9 with other retailers, in advance, they place their
10 orders on the basis of what they see where
11 the marketplace will be in six months' time.

12 When we get to that period, because they place
13 multiple orders, an initial order and one, two or three
14 orders for a later date, it is quite possible that when
15 the initial order goes in the marketplace has changed,
16 and most of the time it is the price of the product in
17 the marketplace that has changed, because Allsports have
18 also retailed at the recommended retail price their
19 sales dip.

20 What happened, and it happened a few times, was that
21 when Michael Guest called me I saw it as an implied
22 threat that our sales are dipping now because of what is
23 going on in the marketplace. He did not carry on
24 the comment to say: if they continue to drop we will not
25 require the next delivery or the next delivery after

1 that, but history told me that that was usually
2 the case. He tried to tell me that the price had
3 dropped, their rate of sales had dropped, so they would
4 probably not need the repeats, which then put pressure
5 on Umbro to find an alternative home for those products.

6 So that is basically the --

7 Q. That is very helpful, Mr Fellone. On the other hand
8 that is a fact of life. If they had predicted a certain
9 level of sales and it did not look as if the sales were
10 going to come off, he is giving you the advance warning
11 that the repeat order might not come through?

12 A. Yes.

13 Q. Indeed, the earlier you know the better. Because he
14 knows that if the repeat order comes through in
15 circumstances where he is still entitled to cancel it
16 then that leaves you with a problem?

17 A. Correct.

18 Q. And it is best, especially if there is an amicable
19 relationship between you and Michael, for you to know
20 sooner rather than later?

21 A. Correct.

22 Q. Thank you. What we are talking about here, of course,
23 is the England shirt around Euro 2000 and the Man U
24 shirt. And there is no question of any order
25 cancellation, even having been briefed about it, in

1 respect of either of those two shirts?

2 A. No. No.

3 Q. Thank you very much. Just lastly, Mr Fellone, you talk

4 about the golf day at paragraphs 22-24 of your

5 statement?

6 A. Yes.

7 Q. I am just going to ask you two questions, really, two

8 groups of questions.

9 The first is David Hughes's recollection that any

10 reference to Man U came after a general sounding off by

11 him about brands generally. You do talk about that, but

12 you put them in the other order if you look at

13 paragraphs 23 and 24.

14 A. (Pause).

15 Q. If you cannot help, do not worry.

16 A. Paragraph 23, you say, sorry?

17 Q. Yes, paragraph 23 deals with a statement, you say David

18 raises the Man U shirt; and paragraph 24 deals with, as

19 it were, an across the brand type of discussion.

20 Can you help with that, the order of play, as it

21 were?

22 A. No. No, that is my recollection. I do not know if

23 there was any significance in that order at the time,

24 I really do not know.

25 Q. It just happens to be David's recollection. One of

1 the jobs I have is to put his case.

2 But it was a debate, was it not? It gave rise to
3 a discussion?

4 A. From my recollection it was not really a discussion
5 because the brands were very embarrassed and we kept it
6 very short. There was nothing we could do about it. It
7 was not a discussion as such.

8 Q. Okay. But there was a bit of a debate, was there not?

9 A. Again it depends what you determine a debate. It was
10 very closed answers, basically. We did not expand in
11 any one.

12 Q. The reason I ask, there is no trick in this, is in your
13 first and second statements you start the equivalent to
14 paragraph 24 by saying:

15 "The debate continued as David Hughes said ..."

16 Does that ring any bells?

17 A. No, it was obviously a word I used, but for no reason.

18 Q. The focus of what David was saying was that the Predator
19 boot -- do you remember that?

20 A. Yes, I do.

21 Q. -- for some reason one of the retailers was able to
22 knock it out at £40 off, as it were, the RRP that gave
23 rise to the wholesale price; does that ring a bell?

24 A. Yes.

25 Q. £80 as opposed to £120.

1 You say in paragraph 23 that you were embarrassed
2 first about David's blurting out the number of shirts
3 that he ordered from Umbro?

4 A. Yes, correct.

5 Q. I do not quite follow the second part of paragraph 24.
6 You said that all the brands together said: there is
7 nothing we can do, although I daresay you all shared
8 the regret that a super-product like the Predator boot
9 was not earning what it ought to be?

10 A. Again, I do not recall us actually having a discussion
11 about it. There were comments and we, from my
12 recollection, just cut it very short and did not expand.

13 Q. Okay. But you go on to say, and I have to deal with
14 this specifically, halfway through paragraph 24:

15 "The comments of David Hughes, however, put Umbro in
16 a difficult position as it was known to not only
17 David Hughes but also Umbro's competitors that Umbro was
18 at the time negotiating the renewal of its contract and
19 that other manufacturers were bidding for the deal."

20 Just stopping there, everybody else at this time --
21 and I will remind you that it is 25th May 2000 --
22 thought and say in their statements that as far as
23 they were concerned nobody knew about the negotiations
24 at that time except that they thought that David did
25 because he had made some comment about the outturn.

1 Just think about that. This is May. Umbro, if
2 I can remind you, were entitled in fact not to have, as
3 it were, to renegotiate until August 2001 unless Man U
4 opened the negotiations at an earlier stage, in which
5 case Man U could talk to Umbro and others. Does that
6 ring any bells, it all happened earlier than you thought
7 it did?

8 A. Yes, I am not aware of the actual -- I was never
9 involved with the contract, so I am not aware of
10 the actual timings.

11 Q. But why did you think when you wrote this statement --
12 and it might just be that you got some wrong
13 information; I am not going to criticise you for that --
14 that everybody knew in May 2000 about these negotiations
15 when everybody else's view is that it was very secret?

16 A. From my recollection it was, as does happen in this
17 industry, officially there are certain times when clubs
18 can negotiate a contract, but unofficially there are
19 conversations being had, and it is whispers from
20 retailers and brands that come to light. My
21 recollection here is that we were aware, and I am sure
22 other brands were aware, that there were conversations
23 going on behind the scenes.

24 THE PRESIDENT: Yes.

25 A. That is what I refer to in that paragraph.

1 MR WEST-KNIGHTS: But at worst this was, as it were,
2 a blurting out of something that you felt was
3 embarrassing, you felt embarrassed by it?

4 A. Yes.

5 Q. You thought this is a blast to everybody, but not now,
6 please, because of the Man U situation?

7 A. Yes. I think it was probably more embarrassing in
8 a bizarre kind of way. Because, I recall it, the figure
9 that David actually mentioned was considerably higher
10 than he --

11 Q. The numbers are out. You quote 50 and he quoted 80?

12 A. He quoted 80. The problem with that is that actually
13 would in my view at the time help the other brands.
14 Because the other brands did not really have a total
15 understanding of what the sales were.

16 Q. No, all information is power.

17 A. So that was even worse, the fact that he had
18 exaggerated, I am sure not intentionally.

19 Q. So of the two in the statement the one that embarrassed
20 him was the shirts number?

21 A. Yes.

22 Q. Whilst it may have embarrassed you in respect of Man U,
23 that is as far as it went; David had no power in that
24 matter, did he?

25 A. No.

1 MR WEST-KNIGHTS: No, okay, thank you.

2 I have no further questions for Mr Fellone.

3 Thank you very much.

4 THE PRESIDENT: I think Mr Prosser has a question.

5 Questions from the Tribunal

6 MR PROSSER: Before you leave, going back to what

7 Mr West-Knights asked you, you were talking about

8 working closely to develop these aspirational brands

9 with Allsports, and you said that it was successful and

10 that you had a joint investment with them.

11 Can you expand on the joint investment, was it time

12 or money or what?

13 A. I think the Choice of Champions, the specific example,

14 was an SMU, a special make-up programme, an exclusive we

15 did with Allsports at the time. The Pro-Training was

16 not, it was something available to all retailers, but

17 all worked closely with us to try to develop that.

18 When you say investment, I think that was not one of

19 my terms --

20 MR PROSSER: It was used by Mr West-Knights.

21 A. It was an investment in terms of certainly time,

22 a commitment in working together to try to develop

23 something that will work in retail, and a commitment to

24 space in reality from of Allsports: they gave us X

25 amount of space in their stores to hopefully try to sell

1 the product through.

2 So it was time and space, which all relates to money
3 in the end.

4 MR PROSSER: But no financial investment.

5 A. No, certainly there was no financial link there.

6 MR WEST-KNIGHTS: Just to make it clear that the purpose of
7 those questions was -- perhaps I --

8 THE PRESIDENT: No, we have the point, Mr West-Knights.

9 MR WEST-KNIGHTS: You have the point.

10 THE PRESIDENT: Yes. Mr Morris.

11 (12.20 pm)

12 Re-examination by MR MORRIS

13 Q. First of all, can I take you to paragraph 18 of your
14 witness statement which you were questioned on by
15 Lord Grabiner. I will ask you in a moment to read it,
16 but I signal that that is where we are going.

17 Could you actually read that paragraph again to
18 yourself, paragraph 18. (Pause).

19 A. Okay.

20 Q. Can I ask you first of all to leave aside what you have
21 heard since, what you have read since you made that
22 statement, and can you now tell the tribunal what is
23 your recollection of what happened at that meeting?

24 A. Well, it is as -- at the time it is as is stated in my
25 statement.

1 Q. What if anything sticks in your mind about that meeting?

2 A. I think that -- well, I think it was the question of
3 the centenary shirt, whether we could guarantee what
4 Sports Soccer would sell the centenary shirt at.
5 I remember the comment. What I cannot recall
6 unfortunately is who actually made that statement,
7 whether it was Mr Sharpe or Mr Preston, I really cannot
8 recall.

9 Q. And why does that particularly stick in your mind?

10 A. I think because not too long before Chris Ronnie had
11 informed me that Mike Ashley, he and Mike Ashley had
12 agreed that Sports Soccer at the time would not discount
13 the Manchester United Centenary jersey at launch, so it
14 was very close to the conversation that I had had with
15 Chris Ronnie. So I knew the answer to the question
16 very, very quickly, because we had talked about it
17 previously.

18 THE PRESIDENT: Yes.

19 MR MORRIS: Thank you, can I move on now.

20 Can you tell the tribunal, do you recall whether
21 you were involved in the preparation of Umbro's written
22 materials that it submitted to the Office of Fair
23 Trading during the course of its investigation. I am
24 not talking about the witness statements; I am talking
25 about its written representations?

1 A. Outside of my own statement?

2 Q. Yes, outside of your statement.

3 A. No.

4 Q. You did not provide any information?

5 A. Not that I am aware of, no.

6 Q. That is fine, thank you.

7 Can I ask you briefly about the JD promotion, which

8 was referred to by Mr West-Knights at page 38,

9 lines 15-24. He suggested to you -- I will read it:

10 "Just before we leave paragraph 6, the JD Sports

11 promotion was one that Umbro was, if I can put it this

12 way, quite independently of anybody else really quite

13 upset about?

14 "Answer: Yes, correct.

15 "Question: Partly because they felt that it was

16 wholly inappropriate for JD Sports to mix somebody

17 else's product with one of your two absolute premium

18 products, the England shirt?

19 "Answer: Correct.

20 "Question: And that was a concern that Umbro had

21 quite, as it were, for itself ..."

22 Can I ask you to look at paragraph 21 of your

23 statement, page 267, and perhaps read that to yourself

24 again. (Pause).

25 A. Okay.

1 Q. My question is: who was concerned about the JD
2 promotion?

3 A. Umbro were concerned and ... I am trying to recall.
4 I am aware that Allsports made a comment regarding
5 the promotion, but I cannot recall who I got this
6 information from, whether it was from Chris Ronnie or
7 whether it was from Anthony May, the account-handler,
8 I do not know. But there was certainly a reference from
9 Allsports.

10 I also think, and again I cannot guarantee, that
11 there was a comment from JJB. In what context I cannot
12 recall, but there was a comment regarding the JD
13 promotion, the cap promotion.

14 Q. What was the nature of that comment?

15 A. Again, it is how we interpreted or how I interpreted any
16 comment that we got from anybody in the industry: we
17 probably ... well, I certainly interpreted that in any
18 way whatsoever, if an Allsports or a JJB or any
19 retailers, if their margin was being affected or their
20 profit was being affected, they would not be very happy
21 with Umbro.

22 So we would always try to resolve a situation so as
23 to avoid any potential knock-on effect later. It was
24 standard procedure.

25 Q. Thank you. In response to a question from

1 Mr West-Knights you were talking about Allsports being
2 proactive in finding out about the price. I will just
3 read it back to you, page 51, line 20. He was asking
4 you about your discussions with Mr Guest. And you said:
5 "I mean, in fairness to Allsports they encouraged
6 their buyers to go out into stores. They are probably
7 the most proactive, they go out once a week, so they are
8 probably more aware than other retailers of what is
9 happening in the marketplace in terms of brands and
10 prices and so on."

11 A. Yes.

12 Q. As far as your understanding is concerned, why did they
13 do that?

14 A. I think it is very important for the retailers to be
15 aware of the competition, of who their competition are,
16 what product they may have, what brands were working or
17 not working. I think it is just being aware of
18 the competition. It is standard practice in business.

19 THE PRESIDENT: Yes.

20 MR MORRIS: Thank you. You were then at page 54 asked about
21 paragraph 19 of your statement by Mr West-Knights.

22 Could I ask you to re-read paragraph 19 of your witness
23 statement.

24 A. Yes.

25 Q. Is there any part of that paragraph upon which you would

1 wish to comment further?

2 A. No.

3 Q. Thank you. I have a further question. You were taken
4 by Lord Grabiner -- I think this is at page 31 -- to
5 paragraph 14 of your witness statement, which is over
6 the page at 265. Perhaps you would just like to read
7 that again to yourself. (Pause).

8 A. Yes.

9 Q. Could you then turn to page 255, paragraph 4, your
10 signed February statement. If you could read that.

11 LORD GRABINER: I did not cross-examine on this witness
12 statement or this passage. I do not know what is
13 coming.

14 THE PRESIDENT: Let us just see where we get to,
15 Lord Grabiner. It seems to me that ... yes.

16 A. Okay.

17 MR MORRIS: My question is: what can you now remember about
18 the last two sentences of that witness statement?

19 THE PRESIDENT: Well, I think ...

20 LORD GRABINER: I really do object in the strongest possible
21 way to that question.

22 THE PRESIDENT: Yes. The last sentence as I understand it,
23 Mr Morris -- the last two sentences of Fellone 2,
24 page 255, have not actually been put in issue.
25 They have certainly not been cross-examined on. That is

1 forward.

2 THE PRESIDENT: Yes, where are we on the various things that
3 were left in the air?

4 LORD GRABINER: There is one point that we need to deal with
5 at some stage, which is in relation to Mr Preston.
6 Secondly, I need to examine my first witness, Mr Whelan,
7 in chief on two points.

8 It would be very convenient for me and would not
9 affect my learned friend's preparation if that were
10 dealt with before we adjourn for lunch. So I would
11 respectfully suggest that that would be a convenient way
12 to proceed, because it would not involve my learned
13 friend being required to conduct any cross-examination
14 before we adjourned.

15 THE PRESIDENT: Yes, if we can get through Mr Whelan in
16 chief before lunch, we may take a little longer after
17 lunch --

18 MR MORRIS: Sir, I see the force of that. There is
19 a question as to whether Mr Preston is here today.

20 THE PRESIDENT: Shall we get Mr Preston out of the way
21 first?

22 MR MORRIS: We would like to consider what has taken place
23 this morning and consider that. That is the first
24 point.

25 LORD GRABINER: We can deal with that over lunch. He can

1 think about that between now and the course of lunch.

2 He and I, I am sure, can discuss this over lunch. I am

3 very happy to do that.

4 THE PRESIDENT: I think it is probably most convenient,

5 Mr Morris, is to get Mr Whelan in-chief done and then we

6 will have an extended lunch break today so that you have

7 time to consider everything. I do not see that that

8 prejudices you.

9 MR MORRIS: Sir, very well, that is the tribunal's view.

10 I would say this, though, and obviously I do not know

11 where it goes. No doubt my learned friend Lord Grabiner

12 will keep the matters short in the light of

13 the indications given. We have tried to stick with

14 the ruling of the examination-in-chief, obviously it is

15 a matter for the tribunal --

16 THE PRESIDENT: Let us see how it goes. I think that is

17 another reason for doing it now, so that we can see what

18 happens.

19 LORD GRABINER: Sir, I will call Mr Whelan, if I may.

20 THE PRESIDENT: Yes.

21 (12.35 pm)

22 DAVID WHELAN (sworn)

23 THE PRESIDENT: Thank you, Mr Whelan. Good morning, do take

24 a seat.

25 Examination-in-chief by LORD GRABINER

1 Q. Mr Whelan, you are David Whelan?

2 A. Yes.

3 Q. You are the Chairman of JJB Sports Plc?

4 A. Yes.

5 Q. I think in these proceedings you have made three witness
6 statements. Can you be shown file 3, witness statements
7 file 3. The first statement is at page 424, which I am
8 afraid is near the back of the bundle. Is that
9 the first statement of 15th August 2002?

10 A. Yes.

11 Q. If you go to page 430, is that your signature?

12 A. It is.

13 Q. And are the contents of that statement true?

14 A. Yes.

15 Q. Could you turn forward to the second statement, which
16 begins at page 437?

17 A. Yes.

18 Q. If you look at the signature on page 442, is that your
19 signature?

20 A. It is.

21 Q. And are the contents of that statement true?

22 A. They are.

23 Q. And then the third statement, which begins at page 443,
24 it is a very short statement, one page and a bit, is
25 that your signature on page 444?

1 A. It is.

2 Q. And are the contents of that statement true?

3 A. They are.

4 Q. Now I want you to be shown a copy of yesterday's
5 transcript.

6 Do you have a copy? I want you to look at the very
7 last exchange that took place between the witness,
8 Mr Ronnie, and counsel for the OFT, starting at
9 page 214.

10 THE PRESIDENT: I am sorry, Lord Grabiner, we are just
11 getting to where you are.

12 LORD GRABINER: Page 214.

13 A. Is this pages 213-216?

14 Q. Yes, you will see that the pages are split into four,
15 and I am going to ask you to start looking at page 214,
16 in the bottom left-hand corner. Mr Morris says to
17 the witness:

18 "My final question is this: is there anything else
19 that you would like to add about the circumstances of
20 your leaving Umbro?"

21 And then he gives a very long answer. I want you to
22 look at that answer, I know you have looked at it, but
23 I want you just to look through it and remind yourself
24 of it, and I want to ask you some questions about it.

25 For the tribunal's purposes, I specifically draw

1 attention to page 215, lines 4-9, and also to page 216,
2 lines 3-5.

3 A. Yes.

4 Q. Now the thrust -- and I am putting my gloss on it and it
5 will be the subject of submissions in due course -- but
6 my gloss on what is being said by the witness which
7 I invite your comment on is this: the suggestion is that
8 Mr McGuigan had decided to sack Mr Ronnie because
9 you had complained to Mr McGuigan about the fact that
10 he, Mr Ronnie, had made statements to the OFT in
11 connection with these proceedings; that is the thrust of
12 it.

13 Now, first of all I want your reaction to your end
14 of that story, and I appreciate that this is Mr Ronnie
15 telling the tribunal something that he says was told to
16 him by Mr McGuigan.

17 A. Well, if I can just say, I had two or three meetings
18 with Mr Peter McGuigan through the year 2002. What was
19 evident to me was that Sports Soccer had certain deals
20 with Umbro that we were not aware of and I do not think
21 the rest of the trade were aware of, ie that footballs
22 would appear in Sports Soccer at £3, T-shirts began to
23 appear at £3; sweatshirts began to appear at around £6.
24 Obviously I and probably the rest of the trade wanted to
25 buy those particular products from Umbro so that I could

1 at least compete on the price.

2 I had a meeting with Peter McGuigan and asked if he
3 would put his cards on the table and come clean and tell
4 me what the hell was going on.

5 Q. Just pause there for a second, roughly when was that?

6 A. This would be around August 2002. I am not absolutely
7 sure of the date, but it was around July/August 2002.

8 Q. Yes.

9 A. Peter McGuigan said that he would go away and have
10 a look at if there were any special arrangements or
11 anything going on that he thought he should disclose to
12 me personally.

13 Around September time I heard a rumour in the trade
14 that Sports Soccer had done a very, very special deal
15 with Umbro on apparel -- which is clothing, sir -- and
16 equipment. So I immediately rang Peter McGuigan and
17 asked for a further meeting.

18 I said to Peter McGuigan: have you done a certain
19 deal or has Chris Ronnie done a special deal with
20 Sports Soccer? And he said: categorically no, we have
21 not done a special deal with Sports Soccer.

22 I repeated my claim that I had heard on
23 the grapevine that Chris Ronnie had done special deals
24 with Sports Soccer and had he or had he not reported
25 them to Peter McGuigan? Peter McGuigan informed me that

1 he would go away and investigate my comments.

2 I did not hear anything else from Peter McGuigan
3 until Chris Ronnie had left Umbro. This meeting, by
4 the way, the second one with Peter McGuigan was around
5 September/October time of 2002.

6 When I heard again on the grapevine that
7 Chris Ronnie had left Umbro to join Sports Soccer,
8 I then rang Peter McGuigan and said: I would like
9 another meeting just to clarify the air, please, as to
10 what the hell is going on.

11 I met with Peter McGuigan --

12 THE PRESIDENT: Where are we now in time, Mr Whelan?

13 A. We are now in March of 2003. I think I recall that
14 Chris Ronnie left in February to go on gardening leave.
15 So I met him in March, after Chris Ronnie had departed.

16 Mr McGuigan said to me: I investigated your
17 complaints and if you knew the full facts it would make
18 your hair curl.

19 So when he said that I immediately began to put two
20 and two together, and I said to him: can you give me any
21 more facts or can you give me any more information about
22 what deals had been done and where are we going when
23 we are going forward with our deals with Umbro? Because
24 at that time, as you can imagine, there was a large
25 amount of distrust between JJB and Umbro.

1 Peter McGuigan informed me that Chris Ronnie had
2 been before a board meeting and was asked
3 the straightforward question: have you done any deals
4 with Sports Soccer that have not been reported to
5 the main board? And Chris Ronnie said: I have not done
6 any deals with Sports Soccer.

7 Two or three days later Peter McGuigan informed me
8 that he entered Chris Ronnie's office, broke open his
9 file and pulled out certain deals that had obviously
10 been done with Sports Soccer and had not been disclosed
11 at the board meeting when he was asked the question.
12 That -- yesterday I heard Chris Ronnie talking about
13 dishonesty. To me that is where the dishonesty took
14 place.

15 THE PRESIDENT: That is as you understood it.

16 A. Yes.

17 Going on from there, Peter McGuigan also told me
18 that these deals had been done on the licence and that
19 Sports Soccer had got this licence, and basically with
20 Umbro's permission on style or whatever they could
21 virtually make what they liked and sell what they liked
22 through the stores, and that deal would end at the end
23 of this year. Those were facts that I was told
24 personally by Peter McGuigan.

25 LORD GRABINER: Just look for example at page 215, which is

1 the top right-hand quartile of that page, looking at
2 lines 4 onwards:

3 "Mr McGuigan had been to visit JJB Sports and
4 Mr Whelan had informed Mr McGuigan that he no longer
5 wanted me to -- I think the way that Mr McGuigan put it
6 was: Dave does not want you in the business any more, he
7 is not happy about the statement that you have made
8 regarding the OFT and he does not wish you to be in
9 the business any more."

10 Did you have any such conversation with Mr McGuigan?

11 A. Firstly, I should say that Mr McGuigan before would even
12 speak to me always said the following: I will not
13 discuss anything at all about the OFT investigation.
14 Which I thought was very fair, and we never discussed
15 anything at all about the OFT investigation.

16 If Mr McGuigan used me as an excuse to lever
17 Chris Ronnie out of the company I cannot say.
18 I definitely did not say anything about the OFT
19 investigation to Peter McGuigan.

20 Q. Did you put any pressure at all upon Mr McGuigan to sack
21 Mr Ronnie because of anything that he might have said or
22 not said to the OFT?

23 A. Firstly I think I put the seed in Mr McGuigan's mind
24 that all was not right between JJB and Umbro and
25 the deals that were being done by Chris Ronnie with

1 Sports Soccer. I think I put that into his mind. But
2 I never put any pressure -- I never even mentioned
3 the OFT at all; that was part of our agreement, that we
4 would never even mention it.

5 Q. Now I want to ask you about an entirely distinct matter
6 in connection with the circumstances surrounding
7 the cancellation of the Manchester United Centenary
8 shirt. I am not going to ask you about that
9 particularly, that is just to give you the context of
10 the question.

11 I think it is common ground that what had happened
12 here --

13 THE PRESIDENT: Are we going beyond the witness statement,
14 Lord Grabiner?

15 LORD GRABINER: We are not going beyond it. He is going to
16 deal with the specific circumstances involving
17 the clearance sale to Sports Soccer. You remember that
18 there was a clearance sale to Sports Soccer?

19 THE PRESIDENT: I do. But the basis upon which we are
20 supposed to be proceeding is that JJB's case is in its
21 existing witness statements.

22 LORD GRABINER: It is. This is not a significant aspect of
23 the story, it is something that the witness wants to get
24 off his chest, and this is a convenient moment to do it.
25 It is also not going to take anyone by surprise, it is

1 not going to go to the heart of the case, and if my
2 learned friend wants to ask questions about it he may do
3 so.

4 THE PRESIDENT: Let us see what the question is. Where do
5 you want us to go?

6 LORD GRABINER: I do not want you to go anywhere. I am
7 simply going to ask him a question about it.

8 It is common ground that there was a clearance
9 sale -- it is not a disputed issue -- a sale at
10 clearance prices to Sports Soccer of a large quantity of
11 Manchester United home shirts which led to Sports Soccer
12 having the ability, which they took advantage of, of
13 selling those shirts very cheaply in the market, so that
14 they were able significantly to undercut JJB; you
15 remember that?

16 A. Yes.

17 Q. Can you tell the tribunal, did you discover what that
18 price was and can you tell us the circumstances of that
19 discovery?

20 A. Yes, well, firstly when Manchester United announced that
21 they were going to change to Nike, Umbro still had two
22 years to run on their contract, and I must say I thought
23 it was most unfair of Manchester United to do that to
24 Umbro, because it devalued their shirts enormously.

25 Obviously we were sat on I think 60-70,000 shirts

1 that we bought at wholesale price less distinct. It was
2 a worry as to when the price would tumble, because we
3 all knew that the price would tumble.

4 Chris Ronnie came to see our buyer Colin Russell who
5 reported to me that he had offered him 40,000 shirts at
6 £10 and £11. This was not a proper clearance price, and
7 Colin came to me to report it and we refused that offer,
8 and said: that is not a real clearance price, please go
9 and consider it and come back and talk to us.

10 Four weeks later the price tumbled as we thought and
11 Sports Soccer and another company called Streetwise, who
12 had eight shops, both began to retail the Man United
13 shirt at £20 and £15. That obviously triggered things
14 in our minds and we knew that a clearance deal had been
15 done.

16 I again rang Peter McGuigan and said: Peter, what
17 the hell is going on? You have offered us some shirts
18 at £10 and £11 and obviously you have sold them shirts
19 to Sports Soccer and a small company called Streetwise
20 who I had never heard of at the time.

21 Peter McGuigan then rang me back and said: I have to
22 say this to you, I must be honest, Chris Ronnie has gone
23 to Sports Soccer and has sold them for £8 and £9 and has
24 sold exactly the same amount, 40,000, to Streetwise at
25 the same prices, £8 and £9.

1 We were very, very upset about that particular deal
2 because obviously we were sat on 60-70,000 shirts at
3 full wholesale price less discount.

4 I met with Duncan Sharpe and Colin Russell and said:
5 we must find a way of bringing Umbro back to
6 the table to negotiate; even if they give us a credit on
7 what we already have in stock, we must bring them back
8 to the table. So consequently I issued instruction to
9 Colin half of the 80,000 order of the Manchester United
10 Centenary kit and cancel the 40,000.

11 One week later I got a telephone call from
12 Mr Peter McGuigan who said: I have instructed
13 Chris Ronnie to come and see you and to offer you
14 a number of shirts at £8 and £9, which is exactly
15 the same price that Sports Soccer and Streetwise have
16 paid.

17 That duly took place; Chris Ronnie came to see me,
18 put the offer on the table, and I think it was for
19 80,000 shirts that they found in the end. And they also
20 said: I would also like a further order for £2 million
21 for clothing product around the Umbro theme, and this is
22 compensate us for the loss we are incurring in offering
23 you the shirts at £8 and £9.

24 Q. And that is what led to the settlement of the deal and
25 I think the restoration of the 80,000 --

1 THE PRESIDENT: You are not leading, are you, Lord Grabiner?

2 LORD GRABINER: I am leading him because it is common
3 ground. I am not saying anything that is a surprise to
4 anyone in the room. What happened then was that
5 the global settlement was done.

6 A. The global settlement was done. We were happy that
7 we got shirts that brought our price down and we could
8 compete. We actually ordered the extra apparel that he
9 was looking for and we reinstated the Manchester United
10 shirt at 40,000.

11 LORD GRABINER: That was Mr Ronnie's evidence and it was
12 Mr Fellone's evidence, sir, and it is our case.

13 Thank you very much indeed, those are all
14 the questions that I wanted to ask you. Obviously we do
15 not want to speaking to anybody at all about this case
16 for so long as you are giving evidence. Do
17 you understand?

18 A. I understand.

19 LORD GRABINER: This may be a convenient moment for you,
20 sir, to take the luncheon break.

21 THE PRESIDENT: Yes, I suggest that we start again at 2.30.

22 THE WITNESS: Excuse me, sir, does that mean that I cannot
23 have lunch with ...?

24 LORD GRABINER: We can, but we will talk about the weather.

25 THE PRESIDENT: You can, but you must not talk about

1 the case. Thank you very much.

2 (1.00 pm)

3 (The short adjournment)

4 (2.30 pm)

5 Submission by MR MORRIS

6 THE PRESIDENT: Yes, Mr Morris.

7 MR MORRIS: Sir, before I commence my re-examination with
8 Mr Whelan, there is a matter that I wish to raise with
9 the tribunal.

10 Sir, in the course of the hearing two issues have
11 arisen: first, Allsports' suggestion that Umbro was
12 motivated by a desire to blame other retailers in order
13 to get leniency or a bigger discount after leniency;
14 secondly, Mr Whelan's evidence this morning about not
15 having discussed the OFT's investigation with
16 Mr McGuigan.

17 On that can I take you back through the transcript
18 of this morning at page 76, sir.

19 THE PRESIDENT: Yes, we have it in our minds.

20 MR MORRIS: Sir, there is further material which in our
21 respectful submission is highly material to both of
22 those issues and is to be found in the transcript of
23 a private oral hearing between Umbro and the Office of
24 Fair Trading on 4th March 2003.

25 THE PRESIDENT: Yes.

1 MR MORRIS: This, sir, is the transcript which was
2 the subject of debate at the case management conference
3 on 22nd January.

4 THE PRESIDENT: Which at one time you included in your
5 Amended Defence and then abandoned.

6 MR MORRIS: I did. I will explain that in a moment if
7 I may. My immediate response is that it was included
8 for the issue of substantive pressures, ie 2000/2001.
9 I now say that this material in this transcript is
10 highly material to those two issues which I have just
11 identified, which are separate issues.

12 The Office, sir, is fully aware of the controversy
13 surrounding this transcript and will in due course deal
14 with the matters surrounding that if need be.

15 Nevertheless, the Office considers that because this
16 material is now so highly relevant, the tribunal must
17 consider this material.

18 THE PRESIDENT: In rebuttal of these two points.

19 MR MORRIS: In response to these two points, indeed. In
20 the very first place my application now is to invite
21 the tribunal to read this material now --

22 THE PRESIDENT: Do we have to read it now, this minute, or
23 can we complete Mr Whelan's evidence?

24 MR MORRIS: Possibly, possibly not. We would suggest that
25 there can be no objection to it being read by

1 the tribunal.

2 We would say that once read it is not only evidence
3 which the tribunal should consider but it might need to
4 be read now so as to enable what is said in that
5 transcript to be put to Mr Whelan in cross-examination.

6 I entirely understand, sir, that it is a matter for
7 you as to how you wish to proceed in relation to
8 the timing of it, but my initial application is that
9 the transcript must be read.

10 Can I add this final point. I raised this matter
11 with my learned friends over the weekend and indicated
12 the Office's intention to raise this transcript before
13 the tribunal.

14 At that stage, I did propose that certain further
15 redactions should be made from that transcript.
16 However, in the light of Mr Whelan's evidence this
17 morning we submit that the tribunal must read the whole
18 of the transcript subject to certain redactions that
19 have been made in relation to specific figures at
20 the behest of Umbro. The version that we have for
21 the tribunal is one with those figures omitted.

22 THE PRESIDENT: Yes.

23 MR MORRIS: Sir, that is my position, that is my
24 application, we do invite the tribunal to look at this
25 at this stage.

1 THE PRESIDENT: Yes. Lord Grabiner.

2 Submission by LORD GRABINER

3 LORD GRABINER: In my respectful submission that is
4 a scandalous application, and I will make good that
5 charge.

6 Can I begin first of all by giving you the
7 background which I think probably the tribunal has well
8 in mind.

9 What Mr Morris wants to do is to introduce into
10 evidence a transcript of a meeting between Umbro and
11 the OFT of 4th March last year. The procedural
12 background is convoluted but the facts are as follows.

13 First of all, at the first CMC on 23rd October last
14 year there was an in camera hearing attended only by
15 Umbro and the OFT. You may remember that we all left
16 and they continued with a private hearing.

17 In that hearing, Umbro applied for its notice of
18 appeal to be treated as confidential. And as a result
19 of certain comments which were made by Umbro's counsel
20 on that occasion, the OFT sought another in camera
21 hearing on 12th December. It was at that hearing that
22 the OFT first raised the issue of
23 the 4th March 2003 transcript.

24 THE PRESIDENT: Yes.

25 LORD GRABINER: Following that hearing the OFT indicated to

1 my clients and my learned friend Mr West-Knights's
2 clients that it wished to introduce the 4th March
3 transcript into evidence. This was vigorously opposed,
4 and prior to the next CMC, which was on 22nd January,
5 the OFT indicated that it would not pursue
6 the application.

7 Having said that, when we arrived at the hearing
8 Mr Morris was still not prepared to let it go.

9 THE PRESIDENT: This is the hearing of the 22nd?

10 LORD GRABINER: Exactly. At that hearing, if I may, can
11 I just read you an extract from the exchange that took
12 place on this subject: page 17, line 11. What my
13 learned friend said was this:

14 "Secondly, however, the OFT does not resile from its
15 position that there was material on the 4th March
16 transcript which gives rise to a reasonable concern."

17 And then you interrupted him, sir, and you said:

18 "It is very difficult to make that suggestion
19 without anybody knowing what is in the 4th March
20 transcript.

21 I agree, sir.

22 Either you shut up or you disclose it. The latter
23 course is perhaps fraught with various other problems.

24 There it is. I say no more than that other than
25 the fact that, if the criticism is that the OFT had no

1 basis whatsoever for pursuing this matter, that is
2 a criticism which is resisted. I say no more about it."

3 And then your Lordship quoted from Alexander Pope
4 entirely accurately and it was an entirely apposite
5 remark, if I may say so:

6 "Willing to wound but afraid to strike is a very
7 difficult situation for a public authority to get itself
8 into. It is probably the least said soonest mended, Mr
9 Morris, I think."

10 Then my friend said:

11 "I leave it there then, sir ...", and then he went
12 off on to another subject.

13 One might reasonably have assumed from that exchange
14 and that background that that was the end of the matter,
15 not least because the whole basis of this appeal, as my
16 learned friend has been anxious to point out at various
17 stages in the pretrial hearings and these hearings, and
18 he did it before the short adjournment today, is that
19 there should be no surprises, and all cards should be on
20 the table face upwards.

21 I may say that that is rich coming from the last
22 exchange between my learned friend and Mr Ronnie in
23 the course of re-examination yesterday. But I will come
24 to that at the appropriate moment.

25 On Sunday we received a round robin email from

1 Mr Morris telling us that he was once again seeking
2 permission from the tribunal to rely on the 4th March
3 transcript, and for the first time he also emailed the
4 transcript. And Mr Morris's intention --

5 THE PRESIDENT: So the transcript has been disclosed now?

6 LORD GRABINER: Yes.

7 THE PRESIDENT: It had not been previously disclosed?

8 LORD GRABINER: No, exactly. Mr Morris's intention was to
9 use it, as we understood it, in his re-examination of
10 Mr Ronnie. Mr West-Knights's reaction is not
11 repeatable. I must say that against the background that
12 I have outlined, my reaction was much the same.

13 In the event wiser counsels prevailed. And as
14 Mr Morris explained to the tribunal during yesterday's
15 hearing, the point had now gone away and he had no
16 application to make because we thought he was going to
17 make the application, if at all, yesterday, but he
18 specifically told you that he had no application to
19 make.

20 Again, we might be forgiven for having concluded
21 that the point had finally disappeared.

22 Following the end of the hearing Mr Morris raised
23 the point yet again with us last night, and apparently,
24 as he now says, he still wishes to raise the material.
25 It is true that it has been disclosed, but we strongly

1 object to his being allowed to introduce wholly new
2 material at this stage of the appeal.

3 Our objection can be shortly stated: having decided
4 before the substantive hearing not to pursue
5 the application, it is now inappropriate for Mr Morris
6 to seek to revive the application a long way into
7 the appeal and after the absolutely key witnesses for
8 the OFT have been cross-examined.

9 That is my substantive position. The point that he
10 makes, and I must say that I am completely appalled by
11 this, speaking as an advocate, of course, is that he
12 says that this is necessary to respond to new points
13 taken by Mr Whelan when I examined him in chief earlier
14 today.

15 THE PRESIDENT: He made two points. One was the suggestion,
16 by Allsports, that the leniency programme gave Umbro a
17 motive to blame others; and the second was what had been
18 discussed with Mr McGuigan.

19 LORD GRABINER: You are quite right. I am sure my learned
20 friend Mr West-Knights will address the first point,
21 concerning Allsports, particularly. I must say that
22 I would have thought it fairly basic and obvious in
23 a case of this kind that that kind of allegation is
24 implicit in the sort of case that we are concerned with.
25 We are talking about the agreement of retailers to fix

1 prices in conjunction with a wholesaler and
2 a manufacturing supplier. The idea that that sort of
3 allegation is not obviously on the table is a little bit
4 naive, to say the least, and the suggestion that this is
5 a brand new charge is, with respect, a little unfounded.
6 But put that to one side.

7 Yesterday -- and this is a very important point in
8 our submission, and I will make detailed submissions on
9 this in closing -- when I cross-examined Mr Ronnie
10 I gave him a very carefully worded on my part
11 opportunity to give a full explanation as to why it was
12 that he came to be sacked by Umbro. He told his version
13 of the story.

14 When my learned friend Mr West-Knights
15 cross-examined him he extracted a little bit more, and
16 you got the bit of evidence about a suggestion of
17 dishonesty on his part in his dealings with Mr McGuigan
18 and Sports Soccer, and we learned a little bit more
19 about it, and that was that.

20 When he got to cross-examine the witness yesterday,
21 in what can only be described as a grand finale and
22 an obvious piece of theatre, he said to the witness:

23 "My final question is this: is there anything else
24 you would like to add about the circumstances of your
25 leaving Umbro?"

1 This had obviously been an orchestrated exchange, in
2 my respectful submission, and I will make that
3 contention fully and firmly when I get to final
4 submissions.

5 He then gave an answer, which was obviously
6 pre-planned, and for the first time told us this story
7 about his conversation with Mr McGuigan and about what
8 Mr McGuigan had supposedly told him had passed between
9 Mr McGuigan and Mr Whelan.

10 It involved an exceedingly serious charge. It may
11 be that Mr Ronnie was telling the truth; I do not know.
12 It may be that Mr McGuigan was simply telling Mr Ronnie
13 a story to justify sacking him. It is interesting in
14 the exchange that in two or three places Mr Ronnie says
15 that he asked Mr McGuigan if he could speak to
16 Mr Whelan, and he was told: no, you cannot. Which is
17 quite interesting as well, because it might suggest that
18 Mr McGuigan did not want any direct contact between
19 Mr Ronnie and Mr Whelan in case the cat was then out of
20 the bag.

21 Whatever be the truth of all that, and the rights
22 and wrongs of it, and of course you will bear in mind
23 that it is hearsay material, one thing is plain, that it
24 contains an exceedingly poisonous allegation: that
25 Mr Whelan had procured the dismissal of Mr Ronnie

1 basically on the grounds that he was interfering with
2 the course of justice, let us put it bluntly.
3 The suggestion is that in order to punish Mr Ronnie for
4 having given evidence to the OFT he was now going to
5 lose his job. That was a very poisonous charge, never
6 previously made or referred to in any scrap of evidence
7 anywhere.

8 So I believed it to be my duty when I called
9 Mr Whelan to get his response to that charge, which bear
10 in mind that we have not had a single opportunity to
11 meet it until now. I called him, he has given his
12 testimony, and in due course we will have submissions
13 about that, and it may well be that my learned friend
14 may want to cross-examine Mr Whelan on those matters to
15 see if he can secure any further or different or better
16 story from him.

17 Now, the suggestion against that background that he
18 should be entitled to produce the 4th March transcript
19 is an abuse of any system of justice and is, in my
20 submission, entirely inappropriate.

21 THE PRESIDENT: Because ...?

22 LORD GRABINER: Because apart from anything else they have
23 raised this subject for the first time. The subject
24 comes in not because of something that I have said; what
25 my witness has said was to respond to a charge lately

1 made, a charge which was never on the table, a charge
2 which was never, ever mentioned at any stage of these
3 proceedings, and you have sat in on all the CMCs. It is
4 not in the witness statements. My friend is the first
5 to come along to tell us and to have the gall to say
6 through you to me that I must not lead new material, and
7 in the very last question in re-examination he leads the
8 witness to an answer which is plainly outwith all
9 the material that you have so far seen, is a brand new
10 card on the table, face upwards now for the first time.

11 The fact is that there is nothing in
12 the 4th March transcript that tells us a single thing
13 about any conversation between Mr McGuigan and
14 Mr Ronnie. There is no reference to any such
15 conversation or its content.

16 THE PRESIDENT: I must say I had the opposite impression.

17 LORD GRABINER: Of course you did, you were supposed to;
18 that is the point. That is why I am appalled.

19 My friend ought to know better.

20 In my respectful submission this is an entirely
21 misconceived application, it is absolutely disgraceful.
22 The reason that this issue is now on the table is
23 because of what Mr Ronnie said at the end of his
24 testimony, and it is put there with a view to try to
25 poison the mind of the tribunal against my clients. It

1 is not an issue in this case. In so far as it has been
2 put in issue by Mr Ronnie's evidence, it has been
3 challenged by Mr Whelan, and my learned friend has a
4 full opportunity to challenge Mr Whelan and no doubt he
5 will do so.

6 I object in the strongest possible terms of
7 the introduction into these proceedings of
8 the 4th March transcript.

9 My friend has had every possible opportunity,
10 including direct invitations from this tribunal, to
11 produce that material many, many weeks before this case
12 began. We have been told throughout these proceeding,
13 face upwards, no surprises, no ambush. I was the victim
14 of an ambush yesterday on a knowing basis and I make
15 that charge without any hesitation at all given
16 the background and the way that the question yesterday
17 was formulated and the occasion on which it came out.

18 I am deeply unimpressed and I do respectfully urge
19 the court to reject this application.

20 THE PRESIDENT: Are you saying that we should not look at
21 it?

22 LORD GRABINER: Yes, I do, I do say that it is entirely
23 inappropriate for you to look at it.

24 One of the reasons incidentally -- you will remember
25 this probably -- why you were so concerned about not

1 dealing with it last time was that you had actually been
2 told things or you were concerned that things might have
3 been said privately to the tribunal in the absence of
4 the interested parties, leading to the risk that you
5 might be in possession of information that we ought to
6 have. That is all history now, it is in the past.

7 THE PRESIDENT: That would not apply in quite the same way
8 now?

9 LORD GRABINER: It does not apply in quite the same way now,
10 but I certainly object to the production of this
11 material against that background. It is completely
12 unjustified.

13 Let them play on the playing field they have set.
14 We are the appellants, they have a decision; let us
15 fight on that ground.

16 THE PRESIDENT: Mr West-Knights.

17 Submission by MR WEST-KNIGHTS

18 MR WEST-KNIGHTS: So far as Allsports is concerned
19 the matter strikes less deeply in terms of the anger,
20 and I will not address you in terms of anger but of
21 sorrow. But I utterly sympathise with the position that
22 my learned friend Lord Grabiner takes in so far as it
23 affects his clients.

24 May I just take this in bite-sized lumps, and I may
25 be ten minutes over this but this is a matter of some

1 importance.

2 THE PRESIDENT: I would be quite pleased to be directed to
3 any earlier indications in your pleadings --

4 MR WEST-KNIGHTS: I am going to come to that. The first
5 question that I would like to address with you for about
6 a minute is the whole difficulty of re-examination.

7 There is inevitably an inference to be drawn that
8 when people such as those in the position of
9 Lord Grabiner and myself object to re-examination it is
10 because we have something to hide.

11 Now, the way that evidence emerges in
12 the High Court -- this is nothing to do with juries,
13 this is nothing that anybody needs to be patronising
14 about -- is that the evidence that gives rise to
15 a judgment in the High Court is tested. It is not
16 a game; it is because people say things in witness
17 statements and sometimes they say them and get them
18 wrong and sometimes they say them and they are seeking
19 to deceive.

20 The disadvantage of re-examination is manifold.
21 The first is that usually it gives rise to an answer --
22 sorry, I am talking about improper re-examination.
23 Usually it gives rise to an answer which has no value;
24 and the second is that it gives rise, as has been
25 demonstrated in this case, to blurring by witnesses who

1 perceive themselves to be beyond the rubicon of being
2 challenged again, who then help themselves to a blast
3 which is frequently at odds with the evidence that they
4 have given when being tested. That either results in no
5 further cross-examination which is unsatisfactory, or
6 more usually when an error of that kind is made and
7 allowed to continue to be made, further
8 cross-examination. It is a dreadful pickle.

9 In a case such as this where if I may say, with
10 respect, that at least two members of the tribunal are
11 not experienced fact-finders as the result of a factual
12 adversarial dispute, is that one looks through
13 the transcripts for answers, and one may find an answer
14 and think: ah, yes, that is what Mr Ronnie said about
15 that without necessarily it being desperately and
16 crystal clear that the answer is given in re-examination
17 and therefore needs to be treated with the greatest of
18 caution.

19 Judges of the High Court do take great care to
20 observe the Rules of Evidence, and they do uphold
21 objections to improper re-examination every day for all
22 of the reasons which I have expressed. It is not
23 because the information is necessarily harmful to
24 the objector but because it is an improper way of
25 dealing with evidence and gives rise to the vices which

1 I have mentioned.

2 If I may now turn to the notice which we received on
3 Sunday of this week. I, as indeed did my learned friend
4 Lord Grabiner, received at 4.20 on Sunday an e-mail from
5 Mr Morris:

6 "Dear Tony and Laurie. By reason of my
7 cross-examination of Mr Ronnie much emphasis has been
8 laid on the suggestion that Umbro was motivated by
9 the desire to blame other retailers."

10 In those circumstances he suggested at that stage
11 that the transcript should be put to Mr Ronnie. It was
12 that that I described as the improper wheeze which I was
13 pleased to see was not being pursued --

14 THE PRESIDENT: Transcript put to Mr Ronnie in
15 re-examination?

16 MR WEST-KNIGHTS: In purported re-examination. But
17 antecedently to that the suggestion was that
18 the tribunal be invited to read the transcript before
19 the re-examination of Mr Ronnie so that it was, if you
20 like, ready, or as we would say pre-poisoned.

21 My response at 17/18:

22 "Receipt of S Morris email and attachment timed at
23 16.21 is acknowledged. As at the moment of writing
24 I have just read your email. Whether I regard absorbing
25 and understanding the implications of these documents as

1 a greater priority than continuing to prepare
2 cross-examination of Ronnie and Fellone is a matter on
3 which I am currently undecided. Please do not assume
4 that I will have done by any time tomorrow.

5 "On any view, the matter would appear, if the OFT
6 seriously considers that what appears to be afoot is an
7 appropriate and proper course to be one which may take
8 some time to sort out."

9 A few minutes later I received another email from
10 Mr Morris saying:

11 "Dear Laurie. Thank you for your messages. Would
12 you be able to give us an indication of your position or
13 are you still considering it? It would be useful if we
14 could at least agree how this matter should be canvassed
15 with the tribunal in the first instance ... all
16 the best, Steve."

17 To which I responded:

18 "I have just said this: the way forward on this
19 issue is for you to make whatever proper application
20 you have at whatever moment you think it is appropriate.
21 I am sorry if that is not clear to you. You must decide
22 what you want to do and how. Say for the avoidance of
23 doubt that you are to take no steps to put anything
24 before the tribunal, be it documents or information,
25 otherwise than in the ordinary and proper processes of

1 litigation."

2 That is where it was left at that stage.

3 I am just going to take you to what you said on
4 22nd January about the value of this kind of material in
5 general.

6 We have made ourselves a transcript bundle but
7 I think it is an unofficial one.

8 THE PRESIDENT: Yes, I have a transcript. We were all
9 there --

10 MR WEST-KNIGHTS: Yes, I appreciate that, but the nuances
11 will have slithered.

12 You picked it up, sir, at page 13, if we have
13 the same transcript. At line 31, the chairman:

14 "Now we come to the imbroglio that has arisen as
15 regards the disclosure of the various in camera matters.

16 "Are there any particular submissions the parties
17 wish to make ..."

18 THE PRESIDENT: Sorry, you are where?

19 MR WEST-KNIGHTS: "... are there any particular submissions
20 the parties wish to make further to the ones they have
21 made in writing?

22 "LORD GRABINER: I just want to say one thing. The
23 reason I want to say it is because it is in response to
24 something we received last night from the OFT ..."

25 And this is where they had effectively almost

1 apologised to Allsports for the slur that had been made:

2 "They make no apology for the irresistible inference
3 that was intended to be conveyed to this tribunal,
4 namely, that my clients had interfered with witnesses in
5 advance of the hearing. That was if I may say so a
6 disgraceful episode. It was disgraceful for a couple of
7 reasons ..."

8 A sentiment I entirely echo.

9 Down at line 26 you say -- no, this is

10 Lord Grabiner:

11 "We do not even get a half apology."

12 Over the page at 5 I say:

13 "One does not want to make too much of what occurred
14 on that occasion but by the same token it would be wrong
15 to make too little of it."

16 And I did submit at lines 10-13 that:

17 "At the very best for the OFT this episode betrays
18 a profound lack of judgment which we say permeates
19 aspects of these proceedings going beyond that which
20 occurred on 12th December."

21 You, sir -- oh, I think it came again. At page 16,
22 line 13:

23 "I detect in the submissions no apology to
24 Allsports, merely a withdrawal; but it is a withdrawal
25 of something that did not exist in the first place and

1 ought not to have been mentioned in the first place.

2 "Assuming in my learned friend Mr Morris's favour
3 that this was not a deliberate attempt to taint the
4 tribunal it represents a profound want of judgment."

5 Of course we had not finished even then because at
6 that stage the OFT or at least Mr Morris was saying
7 that:

8 "If you or Allsports or even it is said JJB remain
9 unhappy then the Office would wish the tribunal to see
10 the transcript."

11 Even then they found this an irresistible
12 proposition.

13 Over the page, sir, at page 17, if I may pick it up
14 at the top:

15 "THE CHAIRMAN: Do you want to respond?"

16 "MR MORRIS: Yes ... the OFT at no time has meant to
17 suggest that it is in possession of evidence that
18 particular witnesses have been tampered with. We do not
19 make that allegation. We have never had such material
20 in our possession and to that extent we accept that if
21 that was not clear it should have been made clear.

22 "Secondly, however, the OFT does not resile from its
23 position that there was material in the 4th March
24 transcript which gave rise to a reasonable concern -- it
25 is very difficult to make that suggestion without

1 anybody knowing what is in the 4th March transcript."

2 I imagine that that is still the position, that
3 the tribunal has not read the transcript of 4th March?

4 THE PRESIDENT: Yes, we have no idea what anybody is talking
5 about at the moment.

6 MR WEST-KNIGHTS: Well, you got some idea from this
7 argument. We did not see that transcript until it came
8 under cover of Mr Morris's email at 4.20, Sunday
9 afternoon, the day before yesterday. We certainly were
10 not asking to see it.

11 But you do go on to say, sir, if I may. This
12 exchange, now putting it in its context, the Parthian
13 shot:

14 "THE CHAIRMAN: Willing to wound but afraid to strike
15 is a very difficult situation for a public authority to
16 get itself into. It is probably the least said soonest
17 mended, I think, Mr Morris."

18 And then you make the reassuring observation at
19 page 18, line 26:

20 "As far as what was actually said to us is
21 concerned ..."

22 And this is a reference to another in camera
23 hearing, but it may equally apply here:

24 "... contrary to popular belief a tribunal does not
25 actually go on what is said to it at the bar by counsel

1 but what it has by way of evidence. We have absolutely
2 no evidence of any kind in support of any of
3 the allegations that may or may not have been made in
4 the course of the proceedings with which we are
5 concerned."

6 Before I leave this transcript I would ask you to
7 look at page 19, starting at line 18. This is you
8 again, sir:

9 "Does anybody want to make any further applications
10 in the light of that indication of how the tribunal sees
11 the position?"

12 "MR WEST-KNIGHTS: Sir, no, for my part. The marker
13 was properly made and we regard the line as having been
14 drawn under that, but our eyes and ears are open."

15 "THE CHAIRMAN: What does that mean exactly? I hope
16 they always are."

17 "MR WEST-KNIGHTS: The person responsible for this
18 imbroglio, as you put it, will regard this as a warning
19 shot so that this does not happen again."

20 And my clear recollection and that of my junior was
21 that at that moment Mr Morris thought it fit to last.

22 The history of the issue as to whether Umbro are
23 motivated by a desire dishonestly to lay the blame on
24 the retailers starts with the oral representations of
25 Allsports made on 3rd March 2003, and that is a highly

1 significant date because, of course, it is the very
2 statement which give rise to Umbro whining to the OFT in
3 public on 4th March. And I should say --

4 THE PRESIDENT: What was the phrase you used,
5 Mr West-Knights?

6 MR WEST-KNIGHTS: Whining, W-H-I-N-I-N-G.

7 THE PRESIDENT: I think I would invite everybody to avoid
8 language that is apt to raise the temperature.

9 MR WEST-KNIGHTS: I will use a neutral expression.

10 What you do not know about 4th March is that this
11 was not evidence. These were submissions being made on
12 behalf of Umbro not by way of evidence but by way of
13 submission.

14 THE PRESIDENT: Are we allowed to know whether these were
15 being made by legal representatives?

16 MR WEST-KNIGHTS: Yes.

17 THE PRESIDENT: They were being made by Umbro's legal
18 representatives.

19 MR WEST-KNIGHTS: Yes, there may or may not have been one or
20 more persons from Umbro present, I cannot remember.

21 Allsports' oral representations of 3rd March were of
22 course in public session. The material that Mr Morris
23 seeks to introduce was in private session, and that is
24 why I used the pejorative term because Umbro decided
25 that it wanted to have, as it were, a private word with

1 the OFT expressing the matters in that transcript.
2 I apologise for the use of the word, but I do not, as it
3 were, dissent from the sentiment.

4 What Mr Peretz said on 3rd March 2003 --

5 THE PRESIDENT: I think we ought to look at it.

6 MR WEST-KNIGHTS: It is in your bundle C5, which is the blue
7 bundle set, tab 70.

8 The page to which I am asking you to go is
9 page 1971. Mr Peretz is addressing himself at lines 27
10 onwards in the following terms:

11 "The main evidence against Allsports comes from two
12 companies, from Umbro and Sports Soccer, and I want to
13 make some general observations about how the Office of
14 Fair Trading should approach the evidence of these
15 entities.

16 "Looking first at Umbro, the Office of Fair Trading
17 should treat what Umbro says with considerable
18 circumspection. We do not propose to go through the
19 evidence against Umbro here, it is not really any of
20 Allsports' business. But it is fair to say that Umbro
21 was probably well advised in the light of the evidence
22 against it to confess to, putting the matter broadly,
23 an entirely improper degree of pressure on Sports Soccer
24 to increase its retail prices.

25 "In short, much of the mud that the OFT threw at

1 Umbro in its first notice appears to have stuck. Once
2 it saw the original notice, and one notes that its
3 current line of blaming the retailers was taken after it
4 received as far as we can tell that original notice .."

5 Of course, at that stage Mr Peretz, as was everybody
6 else, was blissfully unaware of the whole of
7 the leniency process and you remember we remained
8 unaware of it until well into this appeal. Line 5:

9 "It obviously became in Umbro's interests, bearing
10 in mind the likely penalties it faces, to do its best to
11 argue that it was the unwilling victim of pressure from
12 others. 'It was them others what made me do it' is
13 really the oldest dodge in the criminal book. By that
14 tactic they can hope to draw the OFT's file away from
15 itself, reduce the heinousness of its own offence and
16 hope to get a discount from the OFT for shopping the
17 retailers."

18 This event, which is the exculpatory, as far as
19 Umbro is concerned, private hearing on 4th March of
20 which we were wholly unaware and certainly then not
21 privy.

22 Just moving swiftly on:

23 "In our notice of appeal we raised the issue fair
24 and square at paragraph 6.2."

25 Again I do not think you need to turn it up; it is

1 not a long passage.

2 "By that stage ..."

3 THE PRESIDENT: I just want to look at it.

4 MR WEST-KNIGHTS: It is in fact A1, tab A, sir, if you are
5 going to pick it up, page 23 internally. The next
6 heading of Umbro at paragraph 6.2.

7 "Umbro's written representations including all its
8 employee witness statements on which reliance was placed
9 by the OFT were made after receipt of the first Rule 14
10 notice. At that stage it would have been plain to Umbro
11 that the OFT was very likely to be able to prove its
12 case but put broadly Umbro put a considerable degree of
13 pressure on some of its retailers, in particular
14 Sports Soccer and JD, to increase their retail prices.

15 "Umbro at that stage and subsequently has had every
16 interest in blaming its retail customers for its conduct
17 in order to reduce the penalty, and in that it appears
18 to have succeeded ... obtaining reductions in its
19 penalty to an extent to which Allsports were not
20 aware ... on the basis that it was pressurised by JJB
21 and MU that it had cooperated with the OFT."

22 Of course this was in the heady days before
23 the pressure against us was revived:

24 "The OFT expresses at 33.8 the view that it was not
25 in Umbro's commercial interests to admit anything that

1 might implicate its customers since it might damage
2 relationships with them [so this is dealt with in the
3 decision itself] but that is simply speculation. No
4 basis is given for the proposition that Umbro customers
5 would seek to or be commercially able to punish it in
6 any way. It is the monopoly supplier of that replica
7 kit for which it is licensed."

8 Paragraph 6.4:

9 "Umbro' enthusiasm to blame its retail customers is
10 illustrated in the vague and particularised assertions
11 of retail pressure made against Allsports in Umbro's
12 employees' witness statements essentially as
13 an afterthought to allegations made against JJB.
14 Similar vague assertions are made against retailers in
15 its written representations. It appears that the OFT
16 has little faith in these allegations as regards
17 Allsports as no attempt is now made to rely on them."

18 Paragraph 6.5 starts:

19 "In spite of Umbro's attempts to blame its retail
20 customers ..."

21 So it is in the decision, it was in the oral
22 representations, it was in our skeleton for the appeal,
23 which is in tab C of the same bundle, page 12.

24 Lastly, you will recall that there was an attempt by
25 the OFT specifically to amend in reference to

1 4th March in the most extraordinary draft amendment
2 which I have ever seen. You do not have a copy of it
3 now because it was withdrawn. You do plainly, but it
4 will not be in the bundles.

5 THE PRESIDENT: We will have it somewhere.

6 MR WEST-KNIGHTS: It was this:

7 "At paragraph 46 of the defence" --

8 THE PRESIDENT: Can I just turn it up?

9 MR WEST-KNIGHTS: If you have the original defence I will
10 tell you what the proposed amendment was.

11 MR MORRIS: Sir, we have copies here. We think it is
12 paragraph 46 that my learned friend is referring to.

13 MR WEST-KNIGHTS: In part, but you had better pass the whole
14 of it up.

15 MR MORRIS: We have passed the whole of it up.

16 MR WEST-KNIGHTS: Paragraph 46, page 23 of the internal
17 numbering of the document.

18 Paragraph 46 is in the proposed amended form -- it
19 had no proposed alterations to the text. But it was
20 proposed to tag something on to the end of paragraph 47.
21 This raises one of the two questions raised by
22 Allsports, the first of which was the capacity of
23 retailers such as Allsports to exert pressure on Umbro.

24 And the proposed amendment is in addition to relying
25 upon a passage in Ronnie 3, transcript of OFT oral

1 hearing, 4th March 2003, pages 8-12.

2 Now, the obvious point was made amongst other things
3 before we arrived at the hearing, which was that this is
4 an astonishing purported amendment because at that stage
5 the Office was not in a position to disclose
6 the transcript of 4th March to us at all. So there it
7 was. And indeed we were invited to agree this
8 amendment, save the bother of having an argument about
9 it. But that would be on the footing that we did not
10 know what the document was.

11 If I can ask you to turn forward to page 30, or at
12 least paragraph 64.

13 This is a defence which the OFT were already seeking
14 to amend, let us remind ourselves:

15 "As to Allsports' comments on Umbro, although
16 Allsports were not aware of this, its employees well
17 before receipt of the Rule 14 notice in the course of
18 its leniency application ..."

19 That is a sentence which did not make any sense then
20 and I do not know whether we have been freshly served
21 with a copy that makes it good but I suspect that
22 they were trying to say: had already rubbished
23 the retailers, or words to that effect.

24 The next sentence:

25 "Moreover, at all times Umbro has expressed its

1 concern not to blame its retail customers. It has had
2 every incentive not to do so. JJB and Allsports were
3 and are in a position to put commercial pressure on
4 Umbro, see paragraph 46 above."

5 Now, the reference there to Umbro's expression of
6 concern not to blame its retail customers is, to say
7 the least, not the transcript of 4th March.
8 Notwithstanding that it was being amended in elsewhere.
9 But if it was going to be amended in by reference here,
10 the application to amend it in was eventually abandoned.

11 THE PRESIDENT: What I would just like to pin down,
12 Mr West-Knights, is the abandonment of that application.

13 MR WEST-KNIGHTS: Yes, it is in writing and I am just about
14 to take you to it.

15 THE PRESIDENT: Thank you very much. Then I am jumping
16 ahead and taking you out of your stride.

17 MR WEST-KNIGHTS: Where the tribunal will find it is another
18 question, but it is a document called "OFT's Response to
19 Allsports and JJB As Regards the Private Hearing on
20 12th December 2003".

21 MR MORRIS: Sir, we have copies of that if you would like to
22 see it.

23 THE PRESIDENT: It is not your skeleton argument for
24 12th December?

25 MR MORRIS: It was a supplemental skeleton because

1 the issue about this transcript has arisen. I have here
2 a number of copies.

3 MR WEST-KNIGHTS: And we had done a separate skeleton on
4 the application to amend and indeed so had JJB, and
5 there was a confidentiality skeleton as well.

6 MR MORRIS: Just for your information, you will find
7 attached to this the two prior skeletons. I hand those
8 up. (Handed).

9 This is dated 21st, the date before the hearing.

10 THE PRESIDENT: This was effectively the occasion when
11 the strikeout was argued.

12 MR WEST-KNIGHTS: Yes, we had a lot of things on the book,
13 I think the amendment came almost as a PS.

14 At paragraph 3 the OFT say -- no, let us deal
15 with ... I invite the tribunal to read all of paragraphs
16 1, 2 and 3, but I will pick it up at 3.

17 These, if you will recall -- the annexes to my
18 submission in question was a document which I had
19 entitled "The Emergence of the Slur", and it took you
20 through the correspondence and the letter. You will
21 recall that the OFT were requiring Umbro to write to me
22 and JJB saying: have you be nobbling witnesses?

23 At any rate, picking it up at paragraph 3:

24 "In order to prevent these matters from causing
25 unnecessary complication and confusion, the OFT will not

1 seek to rely substantively upon the transcript of the
2 private hearing of 4th march in these appeal proceeding.
3 Accordingly the OFT will not seek permission to amend
4 its defences to Allsports' and JJB's Notice of Appeal.
5 As regards the 4th March transcript, subject to
6 paragraph 7C below, the OFT does not invite the tribunal
7 to consider the contents of the 4th March transcript."

8 And then there is an exculpation in respect of
9 the conduct of the Office's counsel at paragraphs 4, 5
10 and 6.

11 You will recall that you were addressed on
12 12th December in camera by the Office on the basis that
13 it had concerns as to witness nobbling moments after
14 Mr Morris had discussed going into camera, and I recall
15 saying: I have objection so long as you are not going to
16 be nasty about me. To which the response was: I promise
17 to be nice about you, and eight minutes later the slur
18 was made against my clients, and in their absence, that
19 they may have been engaged in improper conduct.

20 I am very grateful to my learned friend Mr Peretz,
21 I had skipped paragraph 4, substantive:

22 "In so far as concerns Allsports, the OFT does not
23 make any suggestion or allegation that any witness in
24 these proceedings might feel constrained in the evidence
25 he or she gives as a result of any commercial sanctions

1 which may have in the past or may in future be imposed
2 by Allsports."

3 How that squares with the application to amend I am
4 bound to say we did not pursue.

5 I made the observation that even at this stage
6 the Office was trying any which way to get
7 the transcript under the noses of the tribunal, and that
8 is made good by paragraph 7C of this skeleton.

9 This was a question of recusal, which of course was
10 not pursued, and quite properly so:

11 "If there is any concern on the part of the tribunal
12 or Allsports or indeed JJB that the references by
13 the OFT at the 12th December hearing to the 4th March
14 transcript could be thought to have unfairly sown doubt
15 in the minds of the tribunal on Allsports' or JJB's
16 conduct on the basis of material which has not been seen
17 or the subject of argument then the tribunal may wish to
18 resolve that concern by considering the contents of
19 the 4th March transcript and allowing Allsports and JJB
20 to make submissions on it."

21 I am sorry to take time on this, sir, but --

22 THE PRESIDENT: No, it is background.

23 MR WEST-KNIGHTS: -- it is right to make good the submission
24 in detail that this is a matter of the most profound
25 misjudgment. This is why I premised this by saying that

1 it appears that there is nothing in this transcript
2 which could be adverse to Allsports anyway, so it is not
3 the basis of the objection.

4 The basis of the objection is that evidence should
5 be put in properly, at the appropriate moment, and there
6 are very good reasons for that.

7 The issue of Umbro telling lies to exculpate
8 themselves and inculpate the retailers has been in
9 dispute in these proceedings since long before
10 the decision. It is in the decision, it is in
11 the notice of appeal, it is in the skeletons and
12 the defence.

13 Last but by no means least, Mr Ronnie, although he
14 would never commit himself to which parts of our notice
15 of appeal or witness statements he had read, he said --
16 in so far as he allowed himself to be pinned down at
17 all -- that he had read unspecified paragraphs which he
18 regarded as relevant to Umbro.

19 THE PRESIDENT: To Allsports?

20 MR WEST-KNIGHTS: No, to Umbro. He read my notice of appeal
21 for matters relevant to Umbro. He is not likely to have
22 missed the heading "Submissions on the Credibility of
23 (a) Umbro and (b) Sports Soccer". And yet it was after
24 that that Ronnie 4 came into existence. That was
25 the moment if there is any evidential basis for anything

1 in the transcript of 4th March to have been led
2 in-chief.

3 THE PRESIDENT: Thank you.

4 MR WEST-KNIGHTS: This is wrong from start to finish, for
5 every reason imaginable, and it cannot be said that
6 Mr Morris has not had fair warning as to the course
7 which is likely to result from further attempts to
8 behave in this way.

9 THE PRESIDENT: Yes, Mr Morris.

10 Reply submissions by MR MORRIS

11 MR MORRIS: I have a number of points, sir.

12 THE PRESIDENT: The impression that I have at the moment is
13 that the Allsports' suggestion that Umbro was motivated
14 by a desire to blame other retailers has been in
15 the case from a very early moment, and since at least
16 the hearing before the OFT and certainly in Umbro's
17 pleadings.

18 As regards the second point, we are told by
19 Lord Grabiner that there is not actually in
20 the transcript anything about what Mr Whelan may or may
21 not have discussed with Mr McGuigan.

22 MR MORRIS: No, I think what Lord Grabiner said was that
23 there was nothing in this about conversations between
24 Mr Ronnie and Mr McGuigan. Because at this stage we are
25 arguing about whether you should even look at it, we

1 would suggest that there are references to exchanges
2 between Mr McGuigan and JJB. That is the first
3 proposition.

4 In relation to the --

5 THE PRESIDENT: Hang on. References to exchanges between
6 Mr McGuigan and JJB. Is Mr McGuigan present at this
7 time?

8 MR MORRIS: He is present. Again, without giving too much
9 away since I cannot --

10 LORD GRABINER: Be very careful.

11 MR MORRIS: I was asked a question by the tribunal which
12 I am endeavouring to answer.

13 THE PRESIDENT: We do not want to go into things which we
14 are not supposed to know.

15 MR MORRIS: Mr McGuigan was present, submissions were made
16 by counsel, questions were asked and those present other
17 than counsel gave answers.

18 THE PRESIDENT: Yes.

19 MR MORRIS: Can I come back to Allsports in a moment?

20 THE PRESIDENT: Yes.

21 MR MORRIS: We suggest at first it is wholly wrong of
22 the tribunal at this stage not even to look at it. If
23 it decides not to look at it we would submit that there
24 is a risk that justice will not be done because the full
25 picture would not be seen.

1 THE PRESIDENT: Why would it be wholly wrong for us not to
2 look at it if you have expressly said in an earlier
3 document that you would not rely on it?

4 MR MORRIS: Because things have moved on since then. We
5 said in that document that we would not rely upon it
6 substantively in relation to substantive pressure, by
7 which I mean the allegation that pressure was being put
8 on Umbro by other retailers in 2002 --

9 THE PRESIDENT: It is not qualified. You say that you do
10 not seek to rely substantively upon the transcript.

11 MR MORRIS: That is right, sir. It is the case and
12 I entirely accept that the motivation point had been
13 raised by Allsports in their pleadings. However, things
14 moved on in the pleadings because at that stage
15 Allsports did not know that there had been a leniency
16 application. Part of the suggestion that was put for
17 the first time in Allsports' skeleton for this hearing
18 was that they were motivated in seeking leniency to
19 blame the other retailers.

20 But the further point which has now arisen is
21 the point of the evidence which was given this morning
22 by Mr Whelan.

23 THE PRESIDENT: This was in response to evidence Mr Ronnie
24 gave.

25 MR MORRIS: Sir, if I may explain. First, I must entirely

1 reject the suggestion that the evidence Mr Ronnie gave
2 in re-examination was given as a result of any
3 orchestration on the part of anybody on the part of
4 the Office of Fair Trading.

5 It was not.

6 We were very conscious of the direction given by
7 the tribunal not to discuss evidence with Mr Ronnie, and
8 we did not do so.

9 Sir, the assertion that I was personally party to
10 some knowing attempt to elicit this material in
11 re-examination is entirely rejected.

12 When I came to that question, I raised that question
13 only because it had been raised in cross-examination by
14 both counsel, in circumstances where an allegation of
15 dishonesty was being put to Mr Ronnie.

16 THE PRESIDENT: Yes.

17 MR MORRIS: I then deliberately tried to the best of my
18 ability to answer that question in the most non-leading
19 fashion I possibly could. To be perfectly honest I did
20 not know what he was going to say.

21 This matter, the material that Mr Ronnie has raised,
22 is not a new matter raised by the Office of Fair
23 Trading; it was raised entirely --

24 THE PRESIDENT: It has been raised by Mr Ronnie.

25 MR MORRIS: It has been raised by Mr Ronnie and I entirely

1 accept that, it having been raised, Mr Whelan would wish
2 to respond to it in his evidence.

3 THE PRESIDENT: Yes.

4 MR MORRIS: There is no quibble about that at all, sir.

5 But having then gone on to say what he went on to
6 say this morning, explaining the nature of his absence
7 of discussion about the OFT investigation, the OFT feels
8 as a public authority that it has no option but to draw
9 to this tribunal's attention material which goes to that
10 assertion, and the evidence given by Mr Whelan is
11 designed to refute what Mr Ronnie has said. That
12 material is now in the tribunal's record and it is now
13 public.

14 We would strongly urge the tribunal in those
15 circumstances that it cannot let this matter proceed in
16 circumstances where there will be submissions about
17 the credibility of witnesses without seeing the full
18 picture.

19 Sir, I can tell you that this is not a matter that
20 has been raised lightly, this is not a matter which is
21 raised as part of the forensic game.

22 THE PRESIDENT: Yes.

23 MR MORRIS: On Sunday I sent an email which you do not have
24 a copy of but I can show you if need be; it has been
25 read.

1 First of all, again, the thrust of that email was to
2 suggest that the material be placed before the tribunal;
3 and that it be placed before the tribunal before
4 Mr Ronnie concluded giving evidence in the event that
5 the tribunal might wish to ask questions. There was no
6 attempt not to raise it until he had finished being
7 cross-examined so that I could wheedle it in in
8 re-examination. I was trying to raise it as openly as
9 I possibly could, particularly in the light of
10 the criticisms that had been made about our conduct
11 earlier of not having our cards on the table.

12 We do suggest, sir, that at this stage there is
13 absolutely no possible reason why this tribunal should
14 not read this material and then take a view as to where
15 we go with it.

16 I should remind you, sir, that these are oral
17 representations given at a formal oral hearing. This is
18 not a scrappy piece of paper; this is a transcript.

19 Sir, can I deal with a point of detail about
20 the sequence of events in relation to Allsports.

21 The point was raised in paragraphs 6.2 and 6.3 of
22 their notice of appeal.

23 We riposted in paragraph 46 of our defence by
24 reference to the tribunal's judgment on Umbro's
25 confidentiality application in October 2003.

1 The reason we did that was because that at that
2 stage was the only public recognition of the point in
3 circumstances where the Umbro transcript was still
4 regarded as confidential.

5 I understand that an indication was given by
6 the tribunal that what you said at that hearing in that
7 judgment was not particularly pertinent in terms of
8 timing.

9 THE PRESIDENT: I have lost you, I am afraid, Mr Morris. We
10 need to go into the judgment now if you want to make
11 a point on it.

12 MR MORRIS: Sir, I am not going to go into the detail.

13 As at that stage, as I said earlier, the issue of
14 Umbro's having applied for leniency was not around. We
15 then applied to amend; when we did so in paragraph 46
16 that was to rely substantively, by which I mean not by
17 reference to Umbro's motivation but by reference to
18 the question of whether there had been pressure earlier.

19 The transcript in our submission at that stage went
20 to two different issues. It was only in the course
21 of -- and I entirely accept the issue in the round had
22 been raised earlier, but it was only in the course of
23 Allsports' final skeleton for this hearing, served about
24 a week before, that the express reference was made to
25 Umbro's motivation in leniency.

1 It was at that stage that we thought it appropriate
2 to refer the tribunal to those matters. That is why we
3 raised it on Sunday because of the course of
4 cross-examination and because of what had been in
5 the skeleton on liability. The paragraph number I think
6 is 3.2 or 3 or 4, it is in my email, of the Allsports
7 skeleton on liability.

8 So where we had reached on Sunday was that we wished
9 to refer the tribunal to it, and we were at that stage
10 seeking to put in a less extensive version. We then
11 have what has happened since, which is Mr Whelan's
12 evidence. That is where we are now, sir.

13 We do say that it is of the greatest importance that
14 the tribunal should see this material, at least to read
15 it. The tribunal is a mature tribunal. If the tribunal
16 feels that it is not relevant or the weight is not
17 sufficient, then that is a matter we can deal with. But
18 not even to read it we submit at this stage is really
19 not the right way forward.

20 LORD GRABINER: I wonder if I might add --

21 MR MORRIS: May I finish?

22 LORD GRABINER: I thought you had finished, I am sorry.

23 MR MORRIS: I have one further point. As far as JJB is
24 concerned, as I understand my learned friend
25 Lord Grabiner's point, I think in the course of his

1 submission a few minutes ago he did suggest that he is
2 adopting -- and he will clarify if I have misheard him I
3 am sure -- adopting the suggestion as to Umbro's
4 motivation in the course of leniency and thereafter. If
5 that suggestion is being adopted by JJB then this
6 material is also relevant to that. He will say whether
7 or not that is the case.

8 Thank you, sir.

9 Reply submissions by LORD GRABINER

10 LORD GRABINER: I am not adopting anything that I am not
11 happy to put forward myself, so that argument at
12 the moment as I understand it is between Mr Morris and
13 Allsports. Whatever I come to do in my closing
14 submissions will depend upon the material that is
15 available for everybody to comment on.

16 THE PRESIDENT: Yes.

17 LORD GRABINER: All I want to say is that you are simply as
18 a tribunal being subjected to forensic tactics here.
19 A decision was taken on a number of different occasions,
20 on each occasion a decision was taken not to adduce this
21 material by the OFT. And you have seen a number of
22 examples. The matter was on the table and was quickly
23 removed from the table. They decided that they would
24 not use the material.

25 It now suits their book to seek to use the material

1 for the first time, and I suggest that that is simply
2 a tactical exercise that is being undertaken. It should
3 be borne in mind that I have actually concluded my
4 cross-examination of the two key witnesses for the other
5 side; in fact the case has closed, we have already
6 started to call witnesses on the other side.

7 The idea that they should be able to blow hot and
8 cold and at the same time to insinuate to you in very
9 plain terms pure smear against my clients, because that
10 is all that my friend is doing. It may be that he is
11 unconscious of what he is doing, but every time he tells
12 you, first of all threatening you with the big stick of
13 the OFT, that they are a public authority and they have
14 material in their possession --

15 THE PRESIDENT: We do not feel threatened by any party.

16 LORD GRABINER: I am sure you do not but I do not know why
17 he says that.

18 Secondly, that he should think it proper to
19 insinuate to you that they have material which might
20 have a big impact on your view of this case and you
21 should look at it because it is your duty to do so,
22 notwithstanding the fact that although they have had
23 many occasions on which they could have produced it
24 they have failed to do so, that suddenly it has become
25 critically important because we have chosen to

1 respond -- fairly, I would suggest -- to a charge lately
2 made against us in the course of these proceedings.

3 The idea that that is not a tactical exercise or
4 that that tactic should succeed is in my submission
5 something that the tribunal should reject and reject
6 firmly.

7 MR WEST-KNIGHTS: Can I just respond quickly, sir.

8 THE PRESIDENT: Yes. I am not quite sure why everybody
9 thinks they have a second round on this.

10 Reply submissions by MR WEST-KNIGHTS

11 MR WEST-KNIGHTS: What I said to Mr Morris on Sunday was
12 this. This is my second on this subject today. It has
13 taken some time, in fact wasted three and a half hours
14 of our pressure time, marking up these submissions
15 bundles which you now see.

16 It has not assisted us to shorten Mr Ronnie, in
17 fact. The timing is astonishing, but perhaps I should
18 have lost the capacity for surprise. In the light of
19 the warning shots that have been placed across the bows
20 of Mr Morris I submit to you that his conduct is utterly
21 improper.

22 THE PRESIDENT: I think I have everybody's submissions.

23 We will take the afternoon break now and give a ruling
24 after the break.

25 (3.40 pm)

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(A short break)

(4.15 pm)

RULING

THE PRESIDENT: The stage this matter has reached is that the tribunal is halfway through hearing evidence in JJB's and Allsports' appeals against the decision of the OFT in the replica football kits case.

The appellants have already cross-examined those witnesses on behalf of the OFT that they expressed a desire to cross-examine. Cross-examination of witnesses for JJB and Allsports, notably in this case Mr Whelan of JJB, is about to commence.

Counsel for the OFT now applies to the tribunal to admit into evidence, or at least as a first step to read, the transcript of a private hearing of Umbro that took place before the OFT on 4th March 2003, not previously relied on by the OFT. I will revert to that in a moment.

It is said that this document is relevant to two issues. The first suggestion is that it is relevant to the case made by Allsports that Umbro was motivated by a desire to blame other retailers in order to obtain leniency. Although it is conceded that Allsports had all along put in issue Umbro's motivation, it is only recently that reliance specifically on leniency has, as

1 it were, come more into focus.

2 The second round advanced is that this transcript is
3 relevant to a statement made this morning by Mr Whelan
4 in examination-in-chief to the effect that he,
5 Mr Whelan, and Mr McGuigan, the chief executive of
6 Umbro, had never discussed the OFT investigation. That
7 last issue has arisen because Mr Ronnie, the former COO
8 for Umbro, said in his evidence right at the end of
9 re-examination that he had been told by Mr McGuigan that
10 Mr Whelan had said to Mr McGuigan that Mr Ronnie was no
11 longer acceptable to JJB because of a witness statement
12 that Mr Ronnie had given to the OFT. Or words to that
13 effect.

14 Mr Whelan in evidence today has effectively denied
15 that suggestion, stating that he has never discussed
16 the OFT investigation with Mr McGuigan.

17 The matter has a somewhat tangled history which we
18 mention only in outline.

19 This case began with a large number of matters being
20 covered by a cloak of confidentiality which initially
21 extended to the fact that Umbro had applied to the OFT
22 for leniency in the course of the administrative
23 proceedings. As a result of a number of judgments of
24 the tribunal at or following case management conferences
25 in this matter, that confidentiality has progressively

1 been lifted.

2 It is not now necessary to go over matters in
3 detail. Suffice it to say that on various occasions
4 the OFT has referred to the existence of the transcript
5 of the hearing of 4th March 2003, and in a proposed
6 Draft Amended Defence presented to the tribunal at
7 the end of December 2003 the OFT proposed to rely on
8 that document.

9 In its submissions of 24th January 2004, however,
10 the OFT said at paragraph 3:

11 "Secondly, in order to prevent these matters from
12 causing unnecessary complication and confusion, the OFT
13 will not seek to rely substantively upon the transcript
14 of the private hearing of 4th March 2003 (the 4th March
15 transcript) in these appeal proceedings.

16 Accordingly, the OFT does not seek permission to
17 amend its defences to Allsports' and JJB's notices of
18 appeal as regards the 4th March transcript. Subject to
19 paragraph C below, the OFT does not invite the tribunal
20 to consider the contents of the 4th March transcript."

21 Paragraph C below in that document referred to
22 the possibility of there being a concern on the part of
23 the tribunal or Allsports and indeed JJB that references
24 that the OFT had made at the hearing on 12th December to
25 the 4th March document may have sown doubt in the minds

1 of the tribunal as regards Allsports' or JJB's conduct
2 at an antecedent stage in the case. The suggestion was
3 that the tribunal might wish to resolve that concern by
4 considering the contents of the 4th March transcript,
5 and allowing Allsports and JJB to make submissions on
6 it.

7 The approach the tribunal took at that stage was
8 that it was for the OFT to decide either to rely on this
9 document or not to rely on it. If the position was that
10 it was not going to be relied on, that was the position;
11 and as far as the tribunal was concerned there was no
12 evidence whatever before the tribunal of any conduct or
13 other behaviour which might in any way sow any doubt in
14 the mind of the tribunal as regards any aspect of
15 Allsports' or JJB's conduct.

16 That is where the matter remained at least as far as
17 the tribunal was concerned until this afternoon when
18 an express reference was made to the 4th March
19 transcript and an application was made to introduce that
20 document before the tribunal or at least that
21 the tribunal should read it.

22 As far as the two grounds put forward are concerned,
23 the argument put forward by Allsports that Umbro may
24 have had a motivation to blame retailers, notably in
25 order to secure more lenient treatment from the OFT, has

1 in our judgment been a foreseeable issue in the case
2 since the early days; it is referred to in Allsports'
3 pleadings and skeleton arguments, and although it may
4 have come into focus more recently, we do not regard
5 that particular ground as a good reason for now
6 introducing the 4th March transcript at the late stage
7 that this application is now being made.

8 As to the second reason, the suggestion is as we
9 understand it that there may be something in
10 the 4th March transcript that may or may not throw
11 further light on conversations that may or may not have
12 taken place between Mr Whelan and Mr McGuigan about
13 the position of Mr Ronnie.

14 That may or may not turn out to be a relevant
15 issue in the case. But it is very late now to introduce
16 a new document, reliance on which has already been
17 expressly disavowed at an earlier stage.

18 Our approach at the moment is that this issue, if it
19 becomes relevant, should in the first instance be
20 canvassed in cross-examination. If there is ultimately
21 an issue about what Mr Whelan said to Mr McGuigan, and
22 if that is an issue which is relevant to the case and if
23 it is an issue which the tribunal needs to resolve, we
24 think it somewhat unlikely that at this stage of
25 the proceedings it can properly be resolved by referring

1 to a transcript of what may or may not have been said by
2 counsel on a previous occasion at a hearing before
3 the OFT, or by persons present at that hearing, without
4 the benefit of hearing from the witnesses in person, if
5 the matter remains in dispute.

6 The transcript itself would in any event be hearsay
7 of what passed on that particular occasion and hearsay
8 as regards the underlying matters referred to.

9 In our judgment, therefore, the proper approach at
10 this stage is for the tribunal not to look at this
11 transcript but to proceed with the cross-examination.
12 If there is an issue that remains or arises, it seems to
13 us that if it is a matter that we need to resolve it is
14 likely to be a matter that may not be capable of being
15 fairly resolved unless the tribunal were to hear direct
16 witness evidence, in particular from Mr McGuigan, on
17 what was or what was not said by way of rebuttal
18 evidence as to the evidence that may be given on behalf
19 in particular of JJB.

20 Whether we would or might contemplate rebuttal
21 evidence it is far too early to say, and we are not
22 ruling in any way at this stage as to whether we would
23 permit such an application; whether the issue would or
24 might be relevant to any issue we have to determine or
25 what the further course of the proceedings should be.

1 All we are saying is that we are not at this stage
2 closing the door to that possibility of witness evidence
3 in rebuttal, whether by witness summons or otherwise, at
4 a later stage of these proceedings.

5 We are not, however, minded for the reasons that
6 we have given to look at the transcript at this stage.

7 LORD GRABINER: Well, thank you very much indeed, sir.

8 I certainly understand precisely what you are saying.

9 Perhaps we can then proceed to -- now is probably
10 rather an inopportune moment -- but perhaps we can deal
11 with the question of Mr Preston --

12 MR MORRIS: Sir, before we go on to that, in the light of
13 your ruling may I just indicate that the Office would
14 like to reserve its position on any application for
15 permission to appeal. That is something on which we
16 might want to address you tomorrow morning, about
17 the timing of such an application and/or whether it is
18 a matter that we think needs to be dealt with sooner
19 rather than later.

20 THE PRESIDENT: Basically, Mr Morris, the message is that if
21 this becomes important we think it has to be sorted out
22 in the, witness-box and not through underlying
23 documents.

24 MR MORRIS: I hear what you say, sir.

25 THE PRESIDENT: Yes, in case there should be

1 misunderstanding about it.

2 MR MORRIS: No, I heard that.

3 LORD GRABINER: I am not aware that there is any point of
4 law, but no doubt my learned friend will have overnight
5 to devise one.

6 THE PRESIDENT: We are anxious to get on with the evidence.

7 LORD GRABINER: Well, you cannot blame me about that.

8 THE PRESIDENT: I know that.

9 LORD GRABINER: We have wasted the whole of the afternoon,
10 actually.

11 So far as Mr Preston is concerned, as I indicated
12 earlier today -- and I did not get any communication
13 from my learned friend over the lunch break or since,
14 and we have had plenty of opportunity to hear what his
15 position is. My position is as it was this morning,
16 namely that in the light of the evidence that has been
17 given, in particular by Mr Fellone and Mr Ronnie, I am
18 not proposing to call Mr Preston. He would have been my
19 witness, and in particular in relation to the centenary
20 shirt charge, but I am content not to call him.

21 I am content either on the basis that his statement
22 should not go in or, if my friend wants to rely upon any
23 passage in the statement, I am content that
24 the statement should stay in. If it stays in, all sides
25 should be entitled to rely upon it what whatever purpose

1 they choose; if it goes out, no one can rely upon it.

2 I personally cannot see a problem; if the tribunal
3 has read the document and it is not to go in, they will
4 simply put it aside and out of their minds, and I have
5 not difficulty with that.

6 To be fair to Mr Preston's personal position, he has
7 been here all afternoon. He is, as you know,
8 a travelling person -- he is not a traveller, so to
9 speak, but he is a travelling person. He is based in
10 Holland and has a 7 o'clock flight back from Heathrow
11 night to Holland. Last Thursday and today were the only
12 opportunities he had of being here. That is his present
13 situation.

14 In my submission, in those circumstances,
15 the practical solution is that he should be free to go,
16 and I do respectfully urge in any event that I should
17 not have to call him as a witness.

18 THE PRESIDENT: Can we deal with Mr Preston, Mr Morris?

19 MR MORRIS: Can I just have 30 seconds, sir. (Pause).

20 Sir, we have considered the matter, we were
21 considering it over the adjournment, obviously we were
22 considering other things too.

23 Our position is that the OFT does not wish to
24 cross-examine Mr Preston. We accept entirely my learned
25 friend Lord Grabiner's proposition in relation to

1 the witness statement, that if it goes in each party can
2 rely on which bits it wants. We are at present of
3 the view that it should remain in as a document.

4 THE PRESIDENT: That resolves that.

5 LORD GRABINER: I am grateful.

6 THE PRESIDENT: Mr Preston ... oh, he is outside. I just
7 wanted to apologise to him personally for the trouble to
8 which he has been put and to express the tribunal's
9 compliments to him.

10 MR MORRIS: Can I deal with Mr Bryant? We do not wish to
11 cross-examine Mr Bryant. As far as Mr Bryant is
12 concerned, nor do we wish his statement to go in.

13 THE PRESIDENT: Well, I think unless -- what do you say
14 about that?

15 LORD GRABINER: It is a matter for the tribunal.

16 THE PRESIDENT: Well, I think it is there, I think we will
17 leave it there in the file unless anybody invites us to
18 take it out of the file.

19 LORD GRABINER: And the result of that will be that all
20 parties can rely upon it.

21 THE PRESIDENT: Yes.

22 MR MORRIS: Well, on that basis my learned friend
23 Lord Grabiner's proposition yesterday was that he did
24 not wish to rely upon Mr Bryant and on that basis we did
25 not want to cross-examine him.

1 THE PRESIDENT: I understood him to say that there was one
2 particular paragraph in Mr Bryant's statement --
3 MR MORRIS: That was the paragraph that I was wishing to
4 rely upon, and I am now saying that you do not need to
5 look at it.
6 THE PRESIDENT: If no one is relying on it, it is somewhat
7 unlikely that the tribunal is going to look at it.
8 I suggest we leave it there for the time being.
9 LORD GRABINER: For the avoidance of doubt, my position was
10 very simple: it either stays in or goes out. I have
11 said that I am content for it to be in or out, but
12 I have said that it is a matter for the tribunal if you
13 prefer to keep it there. If it stays there I am free to
14 make submissions on it, as is my friend. He can rely on
15 paragraph 14 and I will look it through and decide if
16 I want to make any point on it in due course.
17 That seems to be a sensible solution, cards on
18 the table.
19 THE PRESIDENT: I think we will leave it there for the time
20 being, because we have not had an opportunity of
21 refreshing our memory of what is in it and it is
22 unsatisfactory to rule on it without having done so.
23 LORD GRABINER: On that basis, I suspect that you are going
24 to suggest that we should simply adjourn and that
25 the cross-examination of Mr Whelan should proceed

1 tomorrow morning.

2 THE PRESIDENT: I think so, yes. I think Mr West-Knights
3 has Ms Charnock to deal with.

4 MR WEST-KNIGHTS: How come it is always me standing here at
5 4.40 ...

6 I have not heard from my learned friend; I do not
7 know what his position is in relation to Ms Charnock.

8 MR MORRIS: I think our position on Ms Charnock at the
9 moment is that we would want her.

10 THE PRESIDENT: We are not sure, as far as the tribunal is
11 concerned, that it is going to be particularly helpful
12 evidence. There is first of all a major difficulty in
13 finding this lady and serving her.

14 MR MORRIS: Of course I understand that.

15 THE PRESIDENT: Even leaving that aside, at least
16 provisionally, we are of the view that this case largely
17 turns on the evidence of the principals, Messrs Ronnie,
18 Ashley, Whelan and Hughes, and possibly Mr Guest, and
19 the evidence of, as it were, the next tier down may be
20 less relevant than the principals' evidence.

21 So unless there is a real need to cross-examine --
22 after all, Ms Charnock's evidence is not evidence that
23 was relied on in the decision, which is basically what
24 this case is supposed to be about, evidence from
25 the decision -- and nobody has taken us to the decision

1 yet despite the fact that we have been going for eight
2 days now.

3 It was produced by Allsports at a certain stage.
4 Mr May's evidence was then produced in rebuttal.
5 Mr May has been cross-examined, and Allsports does not
6 any longer want to rely on it, on Ms Charnock.

7 So I would have thought there are advantages for all
8 sides just to leave it there. I suppose if you wanted
9 it to come out altogether it could come out altogether,
10 I do not know.

11 MR WEST-KNIGHTS: There is some sense, if I may respectfully
12 say so, in Charnock 2 coming out. But Charnock 1 is
13 part of our submissions, it was witness evidence that we
14 put in. As I say, the only material parts of it were
15 for the avoidance of doubt --

16 THE PRESIDENT: I do not want the penalty side of things.

17 MR WEST-KNIGHTS: I am not interested in the penalty side of
18 it. The reason why she went in was because -- not we
19 did not get the OFT's particulars on pressure until very
20 late -- she explained a reference to a meeting in
21 October which had been the object of adverse comment by
22 the Office at an earlier stage. She gives some
23 generally helpful background to the mechanical process
24 of the buying clerks' side of life at Allsports. There
25 is no harm in it. It may be some useful background

1 stuff for the tribunal, that is all.

2 THE PRESIDENT: Do you want to think about it? We are not
3 keen on it, frankly.

4 MR MORRIS: I got the message your are not keen on it. We
5 may slightly differ from your position.

6 THE PRESIDENT: I understand that.

7 MR MORRIS: And the point about the conduit for
8 the exchanges between the companies. It is not quite as
9 simple as the top level.

10 We will consider it overnight, I have on board
11 entirely what you say, sir, and we will review it
12 tomorrow.

13 THE PRESIDENT: Thank you very much.

14 MR WEST-KNIGHTS: On that footing, then, we will take no
15 further steps to contact. So the only question now is
16 whether the statement or statements stay in or out.
17 We will not pursue Ms Charnock further.

18 THE PRESIDENT: Very well, yes.

19 MR WEST-KNIGHTS: I am not going to have Mr Hughes ready to
20 give evidence until Thursday morning; I imagine that
21 that will not be a problem for anyone. There is
22 Mr Whelan and Mr Russell; I imagine that is a day's
23 worth at least.

24 THE PRESIDENT: Do you want to start early?

25 MR WEST-KNIGHTS: My position at the moment is that David

1 Hughes has managed quite well to be here. You have seen
2 that he has a number of problems. Perhaps I can come
3 back to you first thing in the morning. We will find
4 out what his movements are. It is a question of
5 logistics. I understand that business requirements are
6 such that he needs to come down on the train first thing
7 Thursday morning. How early that is, I do not know.
8 We will come back to you first thing tomorrow.

9 THE PRESIDENT: Very well. 10.30 tomorrow, is that all
10 right?

11 MR MORRIS: I think 10.30 is all right.

12 MR WEST-KNIGHTS: Well, we lost the afternoon today.

13 LORD GRABINER: We might be in the Court of Appeal tomorrow
14 morning, I do not know.

15 MR MORRIS: Sounds exciting!

16 THE PRESIDENT: Well, let us say 10.15, because it lets us
17 do a bit of housekeeping without cutting into the day.
18 . Very well.

19 (4.45 pm)

20 (The hearing adjourned until 10.15 am the following day)

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