**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. 1019/1/1/03
1020/1/1/03
1021/1/1/03
1022/1/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB.

19 January 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
BARRY COLGATE
RICHARD PROSSER OBE

BETWEEN:

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|---|---|
| UMBRO HOLDINGS LIMITED | Applicant |
| and | |
| THE DIRECTOR GENERAL OF FAIR TRADING | Respondent |
| MANCHESTER UNITED PLC | Applicant |
| and | |
| THE OFFICE OF FAIR TRADING | Respondent |
| ALLSPORTS LIMITED | Applicant |
| and | |
| THE OFFICE OF FAIR TRADING | Respondent |
| JJB SPORTS PLC | Applicant |
| and | |
| THE OFFICE OF FAIR TRADING | Respondent |

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# HEARING: PENALTY APPEAL
# DAY THREE

# APPEARANCES

Mr Nicholas Green QC and Miss Kelyn Bacon (instructed by Umbro Holdings Legal Department) appeared for Umbro Holdings Limited.

Mr Peter Roth QC and Paul Harris (instructed by James Chapman & Co) appeared for Manchester United PLC.

Mr George Peretz (instructed by Addleshaw Goddard) and Mr Adam Aldred (of Addleshaw Goddard) appeared for Allsports Limited.

Lord Grabiner QC and Mr Mark Hoskins (instructed by DLA Piper Rudnick Gray Cary UK LLP) appeared for JJB Sports PLC.

Mr Stephen Morris QC, Mr Jon Turner and Miss Anneli Howard (instructed by the Director of Legal Services, the Office of Fair Trading) appeared for the Respondent.

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THE PRESIDENT: Good morning.

MR GREEN: Good morning. I was taking the Tribunal yesterday through the relevant correspondence and I was about half way through dealing with the documents. I would like to complete that exercise. Two questions were posed to me yesterday and if I can I will deal with them at an appropriate moment. I have got answers to both of those matters.

The documents we were looking at were in the second Umbro file.

THE PRESIDENT: Yes.

MR GREEN: I need to do just a little bit of tidying up first to bring us up to where we were at the end of play last night, and I think the first document needed to do that is at p.24 of annex 2, which is a letter of 7th January 2002.

THE PRESIDENT: Yes.

MR GREEN: This was a letter from Miss Roseveare to Mr Walker-Smith at the OFT and it is in relation to the provisional offer of leniency, and the OFT's then assessment that a 20 per cent. reduction would be available and Miss Roseveare makes a number of points. You will see that the 20 per cent. is referred to in the second paragraph, and then there are two options referred to in the ensuing paragraphs under which Umbro would be entitled to get an increase in the percentage if, in the course of the leniency programme for example it transpired that there was further relevant information and/or Umbro were found not to be the prime mover.

THE PRESIDENT: The first step in this letter is for Umbro to say we are actually not going to tell you anything else until we have actually got the offer of 20 per cent. reduction – that is in the third paragraph, is it not?

MR GREEN: What she says is that she would like to be involved in the leniency programme. They wish to be open and co-operative.

"As we stated during our telephone conversation … we would like to formally secure the 20 per cent. reduction before providing any further information."

THE PRESIDENT: Yes.

MR GREEN: So in other words, before going further, can we have at least the 20 per cent. and can we enter the leniency programme?

THE PRESIDENT: Yes, well they have not provided much so far, have they?

MR GREEN: Well they have provided, for example, in the December letter fairly detailed particulars of the 8th June meeting and they had at this stage I think provided the draft witness statements – no, that was January the draft, and then they were resubmitted in February.

THE PRESIDENT: Yes, that is on p.8, they have talked about 8th June, and then they said they were caught between a rock and a hard place and it was all very difficult.

MR GREEN: You have had some flavour of how it progressed, but I am simply bringing you back in order to fill in any gaps. I do not want it to be suggested that the picture is incomplete. There are the two options referred to, then at the bottom of that letter there is reference to a discussion that Miss Roseveare had had with Mr Walker-Smith in respect of which he had said that Frances Barr from the OFT's legal department would draft an agreement including these options. She refers to the fact that the draft agreement did not include the two options. She also refers to the fact that the OFT had said, and indeed it was stated in the letter that they were not yet in a position to make a formal offer of leniency, and so Umbro's position at this point in time was that "we want to enter the leniency programme, and then we are going to provide the information but let us get the leniency arrangement cleared up." In the next paragraph she says:

> "I have previously mentioned the fact that Umbro has had to consider very carefully the long term impact of its relationship with retailers as a result of our application for leniency. We feel that there is a very real risk that we will face a severe adverse reaction in particular, from the "aggressive retailers" such as JJB. I hope that you appreciate that it would be difficult for Umbro to provide the information requested at this stage with the risk of leniency being withdrawn.
>
> "I ask, therefore, that the leniency agreement is amended to reflect the issues raised in this letter. If you require a list of witness statements to be provided upon completion of the agreement let me know."

That then takes us to a letter of 9th January from the OFT to Umbro in which the OFT say that the information obtained during the course of its investigation shows that Umbro had compelled others to participate. It had acted as an instigator and ring leader, and therefore it was not open to benefit from total immunity. Then he reiterates the points set out in the Director General's Guidance and says that he is waiting for the information which Umbro had available to it. He then refers to the possibility that there may be evidence in relation to separate cartel activities.

THE PRESIDENT: There is a chicken and egg haggle going on at the moment.

MR GREEN: There is a chicken and egg haggle going on at the moment. He emphasises that any information which Umbro wishes to provide can be provided in whatever form is considered appropriate. He says he is prepared to receive draft witness statements and if they advance the

Director's case beyond the stage it has already reached then a reduction in penalty greater than 20 per cent. may be available.

> "Once I have considered the information which Umbro has provided and discussed it with the case officers I will be in a position to make a formal offer of leniency. Before the formal leniency letter is signed, Umbro will of course remain free at any time to withdraw its application including any draft witness statements. If it did so, the Director would not then be able to rely on such witness statements against Umbro although obviously the Director would be able to rely on evidence already obtained as part of the investigation."

There is then a file note of a telephone conversation.

THE PRESIDENT: So he is saying he would not be able to rely on the witness statements if they were withdrawn?

MR GREEN: If they were withdrawn.

THE PRESIDENT: Yes.

MR GREEN: As you know they never were withdrawn. There is then an oral telephone conversation on 9th January which largely clarifies the nature of the previous correspondence. I think for the purposes of brevity the only point we need to look at is the last paragraph in the first section before "Options". The OFT's position appears to have been that they could not offer anything more than 20 per cent. at that stage until the information that had been provided could be viewed, so 20 per cent. was the starting point, the OFT was saying well if the information turns out to be of more value to us we will offer you more, but it is conditional upon that information being in some way valuable. Miss Roseveare says that this is where the confusion lay.

> "She thought that there may be a situation where Umbro would provide the information and end up with no reduction or less than 20 per cent. as the OFT changed their mind. Mr Walker-Smith confirmed there would <u>never</u> be a situation where Umbro was offered less than 20 per cent."

So there appears to have been some confusion which was then cleared up by that telephone conversation.

The draft witness statements were served under cover of a letter of 17th January – this is on page 29, and Miss Roseveare says that her understanding of the procedure going forward is that the OFT would review the statements in conjunction with the relevant case officers in order to determine whether the percentage of leniency could be increased. She refers to the

telephone conversation confirming that Umbro would not be offered less than 20 per cent. and that the percentage might increase on the basis either that the information advanced the Director's case beyond the stage it had reached and/or that it demonstrated that Umbro did not actively co-ordinate or facilitate price fixing between companies. She refers to the guidelines. She says at the top of the next page that the documents were provided in draft form. If the case officers require explanation or clarification they are to let her know.

She then says in the penultimate paragraph:

"It is of great significance to Umbro that the information contained in these witness statements remains confidential. I have mentioned in previous correspondence the concerns that Umbro had had in relation to the impact of the application for leniency on the future commercial relationships with business partners, in particular the "aggressive retailers". We feel strongly that if this information was disclosed it would significantly harm the legitimate business interests of Umbro and also the private affairs of the individuals who provided the witness statements. Can you confirm that the statements would be excluded from disclosure pursuant to section 56 … and 3.12 …?"

Now, as you know the position changed and Miss Roseveare made it clear once the leniency application had been rejected that the OFT was entitled to use the statements. But that is the position as of that date, 17th January.

THE PRESIDENT: So as of 17th January it is really being said that OFT cannot use these statements, without Umbro's agreement?

MR GREEN: What she is saying is that they are confidential, and not necessarily they cannot be used, because of course the OFT can obtain its information ----

THE PRESIDENT: Well they can use them but not disclose the fact of the statements.

MR GREEN: Yes. So there was a limited plea for non-use, but plainly the information in the statements was there for the OFT to use and develop.

THE PRESIDENT: But it would not be able to put it in a Rule 14 Notice without presumably saying what the source of the information was. It would not have been able to make an allegation.

MR GREEN: There may have been at that stage that limitation. Of course, that limitation was then later lifted.

THE PRESIDENT: Right, well let us go on with the story.

MR GREEN: The next letter is 29th January (p.31) and this is the OFT's reaction to the draft statements. The OFT state they have been in contact with Lovells with regard to the issue of confidentiality, but the OFT say that they have discussed the witness statements with the case

officers, and they remain of the view that Umbro at the very least compelled others to participate in relation to Umbro licensed replica football kit and therefore total immunity was not available to them. They say, and this is a matter we reject:

> "The draft witness statements do not materially advance the Director's case beyond the stage it has already reached."

Therefore, 20 per cent. did not appear to be anything other than appropriate. They refer to the draft leniency letter attached to 7th January letter, stating that:

> "Umbro had to comply with the conditions for leniency at the time the offer was made and, at the same time, must formally confirm its compliance with those conditions."

They refer to paras. 3-4 of the draft letter. They then say:

> "We have noted that the draft witness statements contain a number of material inaccuracies and inconsistencies as well as being in many instances extremely vague as o the nature of and/or outcome of discussions. In addition, Umbro has copies of the documents the Director obtained on 29th August [during course of the dawn raid]. In many instances these documents are not considered in the statements."

And then they give some examples of the alleged inconsistencies or confusions, and they refer to those throughout this page and these were then addressed in a separate letter and in the supplementary witness statements.

> Then at the bottom of page 32, pre-penultimate paragraph:
>
> "On the basis of the current draft witness statements which you have sent to me, I am minded to take the view that Umbro does not satisfy the conditions for leniency which are set out in the Director General's Guidance and at paragraph 3 of the draft leniency letter attached to my letter of 7 January. I would therefore be grateful if Umbro could confirm by 5 p.m. on 4th February whether the draft witness statements provided reflected the full extent of the information Umbro will be providing in respect of its application for leniency. If not, final witness statements and supporting evidence should be submitted by the same date."

In response to that Miss Roseveare writes a letter starting on p.35. She thanks Mr Walker-Smith for his letter. She expresses surprise. She says they are aware of the obligations for leniency. She says:

> "As I explained in my letter dated 17th January 2002 and during our previous telephone conversations, draft witness statements were provided at this stage for the specific purpose of granting the OFT the opportunity to ask for further explanations or

clarification where necessary. It was intended that Umbro would then supplement the draft witness statements as appropriate in order to allow final witness statements to be submitted at the time of entering into the leniency agreement.

"We understood that Umbro should provide draft witness statements and supporting documentation in relation to information available to Umbro regarding price fixing of replica football kit. It was explained to us that these documents were intended to provide an overview of Umbro's understanding of events which would also help establish whether Umbro was aware of any "new" information which would advance the Director General's case beyond the stage it had already reached. We only considered and exhibited those documents taken by or provided to the DGFT which we felt required particular explanation. If there are any further documents which require explanation or are considered inconsistent, please identify them and we will be happy to explain them and supplement the witness statements accordingly.

"Umbro wishes to continue to co-operate fully with the OFT. Accordingly, we intend to deal with the inconsistencies and inaccuracies listed in your letter dated 29th January 2002 by making amendments to the draft witness statements.

"You suggested in your letter dated 29th January 2002 that here maybe further inconsistencies, in accuracies or vague descriptions as to the nature of and/or outcome of discussions in the draft witness statements. Please let me know what these are so we candela with any specific instances which require explanation or clarification as quickly as possible."

She then says "If you want to discuss it with me, please do". Then in the final substantive paragraph:

"In view of the above, I ask that an extension of time until 5 p.m. on Monday 11th February is granted in order to deal with any further examples of inconsistency or inaccuracies that are raised so that full instructions can be taken and complete witness statements can be prepared and submitted."

THE PRESIDENT: Just pausing there, Mr Green, just as a matter of comment as we go through the chronology, I think you will be aware from our Judgment that dealing here, as we are, with what came to be known as "Ronnie 1", a great deal of time was spent in the hearing on the apparent inconsistencies and inaccuracies in Ronnie 1 as compared with later statements, and I think we did come to the conclusion that the OFT was right not to accept Ronnie 1.

MR GREEN: You came to the conclusion that Umbro had not misled the OFT during this sequence of events.

THE PRESIDENT: No, we did say that it was ----

MR GREEN: You found, and this is not part of our case, that it was perfect and accurate in every sense.

THE PRESIDENT: That is a bit of an understatement.

MR GREEN: Well I am going to show you the statement, and remind you, because when you look at the witness statements which were actually produced it is, it is quite clear that they provided detail of matters which ultimately became absolutely central both to the Decision and to the trial on liability.

THE PRESIDENT: Well some bits of those statements, which later resurfaced in the ----

MR GREEN: Re-submitted.

THE PRESIDENT: Re-submitted in the statements filed in answer to the Rule 14 Notice in relation to things like the Allsports Golf Day, as it were, survived more or less unchanged, I think, throughout the proceedings, and were largely accepted in the end by the Tribunal.

MR GREEN: We absolutely accept the criticisms the Tribunal made.

THE PRESIDENT: Other matters like the May 2000 MMR some of the explanations were not entirely consistent with later explanations. That caused a tremendous amount of difficulty in the course of the Tribunal hearing.

MR GREEN: The point that we make and make very forcefully, is that in a very complex, multipartite cartel involving (as here) a preponderance of oral evidence about what happened in telephone conversations, meetings, or at dinners, that in those circumstances it is quite unrealistic to expect a perfect picture to arise at point 1 in time, and that in order to operate a proper leniency exercise you have to work with a witness. You found that apart from Mr Ronnie, the other witnesses who gave evidence to the Tribunal were accurate in every respect.

THE PRESIDENT: When you say "you have to work with the witness" – the OFT has to work with the witness, or the company has to work with the witness?

MR GREEN: The OFT has to work with the witness in the course of a leniency programme, in conjunction with the company that has applied for leniency, in order to get the story straight.

THE PRESIDENT: Well is it not up to the company that is applying for leniency to get the story straight?

MR GREEN: Well it depends. If this were a case about an agreement in which the dispute was over the terms of the agreement and its effect, then the answer to that is probably "yes". If you are dealing with a set of facts where one person does not have 360 per cent. vision, because you do not know what was in the mind of a counterparty to your conversation, or you have no exact knowledge of what happened, for example at 8th June meeting because you were not there, there is a limit as to one's ability to be accurate. The OFT is in a better position than external lawyers because they have access to a wider range of information which arises in the course of an investigation and it is open to the OFT to say "Two months ago you gave us an explanation which was X. We have now received information from JJB or from Allsports or from Sports Soccer which casts a different light on it, can you help us clarify, or modify?" Now, you found as a fact that Mr Ronnie did not set out to mislead you, and you found as a fact that Umbro did not set out to mislead the OFT.

THE PRESIDENT: But even on those assumptions the resulting picture was, shall we say, pretty confused on some important questions.

MR GREEN: It was confused on some of the important questions, we do not deny that. But if you work out what happened in this case you can see what could have happened had Umbro been allowed into the leniency programme. Umbro was able to perfect its statements because it had time.

THE PRESIDENT: Let us go on with the story for the time being.

MR GREEN: Yes.

THE PRESIDENT: Yes. You were going on to 31st January.

MR GREEN: I was looking at 31st January.

THE PRESIDENT: She writes back on 31st, "can we have some more time?"

MR GREEN: She is saying that she explained in her letter of 17th January that:

> "During our previous conversations draft statements were provided for the purpose of granting the OFT the opportunity to ask for further explanations or clarifications where necessary. It was intended that Umbro would then supplement the draft witness statements as appropriate in order to allow final witness statements to be submitted at the time of entering into the leniency agreement.
>
> "We understood that Umbro should provide draft witness statements and supporting documentation in relation to information available to Umbro regarding price fixing of replica football kit. It was explained to us that these documents were intended to provide an overview of Umbro's understanding of events which would also help

establish whether Umbro was aware of any "new" information which would advance the Director General's case beyond the stage it had already reached. We only considered and exhibited those documents taken by or provided to the DGFT which we felt required particular explanation.

I think I have actually read that to you already.

THE PRESIDENT: Yes, I think we have seen the letter.

MR GREEN: Yes, indeed, she asks for an extension and really it was the reply to that on 1st January, in which it is emphasised that the company applying for leniency must provide the DG with all information available to it. It is only once the DG has such information that he can determine whether leniency is available.

He reiterates that in his earlier letter he made the point that such information can be provided in whatever form Umbro wishes, and they would be content to receive the information in draft form. He says it was clear from the letter of 7th January what was required.

THE PRESIDENT: That is on the Friday, if I remember rightly.

MR GREEN: Yes.

THE PRESIDENT: He is basically saying "You have to get it in by the Monday".

MR GREEN: You have to get it in by the Monday and that is in the very last paragraph. No extension of time was offered and therefore 5 p.m. on Monday 4th February was the deadline and in the absence of that no offer of leniency would be made. So as a result of that, the final witness statements had to be prepared to be submitted on the Monday, and they were so submitted, and that is the next letter, p.39, and there are a number of points which flow out of this.

First, the letter indicates that the signed witness statements and accompanying documents are provided. Miss Roseveare confirms that to the best of her knowledge and belief they have undertaken a full audit of their premises, disclosed all relevant documents, and information as regards the alleged price fixing of Umbro licensed replica kit, conducted extensive interviews with Umbro personnel, obtained explanations from Umbro personnel about the specific documents taken by the OFT. She states that they are in final form insofar as they provide explanations of the specific events detailed and they give an explanation of certain documents. She says:

"There may, of course, be some of those meetings, events or documents which require further explanation and Umbro will continue to co-operate and to provide further explanation through supplementary witness statements as is necessary to assist or as is

required by the Director General. Equally, during the course of the investigation, there may be other incidents or documents which require explanation, and again Umbro will co-operate as required."

So the offer from Umbro was not "This is all that we are able to provide you with", but "This is what we have managed to do in this time frame and if there is further information, or further statements you want, we will continue to co-operate."

She then sets out a reply to particular points which were referred to in the earlier letter and she gives the examples, and deals with them specifically in the following paragraphs. She says in the first full paragraph:

"Umbro has, in particular, attempted to address the purported material inaccuracies and inconsistencies which were identified by the Director General as appearing in the draft witness statement of Chris Ronnie as submitted on 7 January. We have made substantial revision to this witness statement, in an attempt to assist the DG with his understanding of Umbro's position. When the final witness statement is read it should be clear that the so-called inaccuracies and inconsistencies were nothing more than a result of Umbro making assumptions about the reader's knowledge of the events, and are easily cleared up when more detail is provided. To help understanding, we deal below specifically with the examples referred to in the draft witness statement …"

THE PRESIDENT: Yes.

MR GREEN: She then deals with various points, and if you go to the next page, she emphasises once again that if there are further documents the DG would like an explanation of Umbro will be happy to do this, and if the OFT would like to discuss the statements, or explanations, they should not hesitate to call. "The statements are complex, particularly Chris Ronnie's, I feel it would be beneficial to discuss these issues in a meeting …" She then offers a meeting.

If you turn to p.43 she reiterates the offer in a conversation with Mr Adrian Walker-Smith that Umbro would "walk through" the documents if that was considered to be helpful.

A reply from the OFT on 12th February – before looking at the reply, can I just ask you to look in overview and in brief only, at the witness statements to remind yourselves, you obviously have a good recollection of them, but I would like to just pick up the extent of the information which was provided even at this stage. This is in file 1, tab 3.

THE PRESIDENT: The main problem with the witness statements, in particular "Ronnie2" as it became known, was that it was still extremely "coy" shall we say, about the England agreement.

MR GREEN: We obviously have seen what the Tribunal said about that.

THE PRESIDENT: That was our finding.

MR GREEN: That was your finding, indeed, absolutely. The first hint of that did actually come in Mr Fellone's witness statement (para.10) that it was subsequent investigation by Umbro which then generated much more information which was included in a statement submitted in response to the Rule 14. Now, again this is an illustration of a problem which is going to arise in this sort of case. Umbro was perfectly prepared to work with its employees and with the OFT to produce information and investigate. There is an important point of principle which is what price must a company pay in order to get into a leniency agreement? Must the information that it provides be 100 per cent. perfect at the outset, or is the process of perfecting evidence one which occurs in the course of a leniency programme. You now know, Umbro had to produce these statements by 4th February, yet Umbro itself, without the assistance of the OFT's leniency programme still was able to perfect it further in the Reply to the Rule 14. That provided further information to the OFT. Documents were provided before the Rule14 which further advanced the OFT's case.

THE PRESIDENT: What is being said I think by the OFT , among other things, is that these new statements did provide quite a lot of information about the Golf Day and that sort of thing when it involved blaming other people for what had happened. When it actually came to Umbro saying what Umbro had done not very much was said in relation to the England agreement despite the May 2000 MMR, which was continually said to relate to MU and not to England – at this stage. That was the problem.

MR GREEN: At this stage. Again, it is no part of our case that Chris Ronnie's two statements were accurate or consistent in every respect. It remains the case, and indeed you so found in your Judgment that there were substantial parts, even of Mr Ronnie's statement, for example about the 8th June meeting which were very substantial. There was evidence about pressure which was vigorously contested by other parties which were set out in Mr Ronnie's statement which were very substantial. He got two things at least out of three right.

THE PRESIDENT: He is very happy to blame other people but not to cough up his own role.

MR GREEN: Well he did cough a great deal of his own culpability.

THE PRESIDENT: At this stage?

MR GREEN: Even at this stage, and one can see it both in his evidence he gave orally at 26th February meeting, and in the witness statement.

THE PRESIDENT: Well we will get on to the 26th February meeting, yes.

MR GREEN: Let us just take the statements, and one has to look not just at Mr Ronnie, but Mr McGuigan first of all. You will recollect nobody asked for him to be cross-examined though he was available. He was accepted even by Mr Whelan, who he had already crossed swords with, as honest. He gave evidence of a number of important matters including Umbro's relationship with Manchester United which he deals with at para.12 and onwards; his relationship with the Football Association, his relationship with Sports Soccer and with JJB.

He also gave a statement at a later stage but nobody ever challenged his evidence, it was treated as honest and accepted. I will come back and deal specifically with Chris Ronnie 2, but if we just look at the others first.

Mr Prothero (3C), again you accepted his evidence. He gave evidence of the relationship between Umbro and Manchester United (paras.3-18). He deals with what was actually a quite important letter to Manchester United at 13th July 2000, and it is worth dwelling on that for one moment. You will probably remember this – this is where Umbro took some credit in a discussion with Manchester United for setting up 8th June meeting. That letter was volunteered by Umbro, it was not found by the OFT, it was volunteered.

THE PRESIDENT: You have a solid point in relation to the documents that were provided.

MR GREEN: In relation to the witness statement, a lot of the matters referred to and described in the letters, for example, 8th June meeting here are reflected in the witness statements. There is no logical severance between the witness statements and the documents, because one describes the other. They are connected. The point I wish to make in terms of Umbro's good faith in this exercise is that Umbro was plainly aware that in submitting the Manchester United letter the inevitable inference would be drawn that it has instigated 8th June meeting, because that is what Mr Prothero said.

THE PRESIDENT: We have not found bad faith against Umbro.

MR GREEN: No, but we are measuring their good faith at this point in time, the risks they were taking, and they submitted voluntarily a letter which, in their own minds, the assumed would be misinterpreted. In the event it was not, somewhat surprisingly. Mr Ronnie gave an explanation of that letter in which it did say that it was not our responsibility and the letter was an exaggeration.

THE PRESIDENT: All this is shifting the responsibility on to other people.

MR GREEN: Well you accepted that that was correct, and the OFT accepted it was correct. Those were the facts, so Umbro was explaining correctly what happened, and so to say that it is shifting ----

THE PRESIDENT: Well, yes. Umbro was not completely uninvolved in the events leading up to 8th June.

MR GREEN: And those were explained in Mr Ronnie's statement. So Mr Prothero explains the relationship with Manchester United and with the Football Association. Mr Fellone whose evidence also you accepted gave detailed evidence of the relationship with JJD – not as detailed as with Mr Ronnie of course, but he gave evidence with relation to Allsports, JD and other retailers. His para.10 was the genesis of the evidence about the England ring around. You will see he said:

> "At around the same time (May and June 2000) I had similar discussions with Champion, First Sport and John Lewis regarding the retail price of replica product. Champion were putting England replica product into their blue cross day where every product in the store is discounted. Tim Ryman of Champion said to me that they could not withdraw this product as it applied across the board. John Lewis said to me that if Champion were discounting the product they would be obliged to match it as part of their "never knowingly undersold" promise. I wrote to Champion but they did not remove the product from the promotion. First Sport and John Lewis who had said they would go back to full price if everyone else did, then they went to full price after I explained Champion's position."

He refers to FF1. He also refers to the Sports Day.

THE PRESIDENT: Have we got FF1?

MR GREEN: Let me just try and find you a reference. We think there is a letter of 2nd and 8th June, can I come back to it in a moment once we have found the reference?

MR MORRIS: It is in tab 10, with "252" at the bottom of the page – witness bundle 1, tab F, p.252.

THE PRESIDENT: Are these documents the OFT already had?

MR GREEN: No, these were provided voluntarily by Umbro. They are actually in our bundle, annex 1, 45 and 46. I am sorry, they were in the same bundle, but these were volunteered and they were the genesis of the ring around. Now, were they attempting to suppress it? No, because you provided a description of the process and two documents, undoubtedly as you have found, and as we accept, Mr Ronnie was not accurate, nor complete in this regard.

THE PRESIDENT: Well they coughed up the documents.

MR GREEN: They coughed up the documents.

THE PRESIDENT: That is a fair point, but Mr Fellone did not go much further than saying "Look, these are the documents, and this is what happened." At this stage we do not have much disclosure of the ring around beyond these particular documents involving Champion ----

MR GREEN: Accepted. As you know, there were two aspects to the ring around, Mr Fellone's and Mr Ronnie's.

THE PRESIDENT: Yes.

MR GREEN: So it would not be fair to say that there was an attempt to suppress the event. We accept what you have found about Mr Ronnie's evidence. We are not challenging that.

Coming back to Mr Ronnie, with all its myriad imperfections, there is nonetheless a substantial amount of new information in it which retained its currency. It is a long witness statement, 149 paragraphs. He provides a summary of it in para.4, and without in any way diminishing its inaccuracies, inconsistencies and imperfections, it nonetheless provided factual information about such matters as the meeting with Mr Hughes on 2nd June, threats from Manchester United (para.56 onwards). 20 paragraphs were devoted to the 8th June meeting.

THE PRESIDENT: Just let us have a look – I am just glancing through.

MR GREEN: Yes. The first part deals with the May 2000 report. He then deals with the trading relationship between JJB and Umbro in section C, and pressure. I will remind you of your findings in relation to pressure later, and summarise them, but you have them in mind. He deals with the trading relationship between Allsports and Umbro in section D, and the Allsports Golf Day, between para.40 and 49. He deals with his meeting with David Hughes on 2nd June 2000, and he then deals with 8th June meeting six days later in just under 20 paragraphs, from para.58-76. That was on the basis of the information given to him by Mr Ashley as you know, because he had not attended the meeting, and he then goes on to deal with the Sports Soccer/Umbro relationship in some considerable detail, first in relation to England replica home shirt and kit, Manchester United home shirt and kit, the MU away shirt and kit, and then there is a section dealing with documents taken away by the OFT pursuant to s.28. That goes on until para.123; there is then a section on the trading relationship with JD Sports and Umbro. Paragraph 143 deals with the relationship with First Sport, and section J, 145 deals with Champion. Then there were two other stray documents he deals with at the end.

THE PRESIDENT: And the part of this statement that caused a great deal of time to be spent at the hearing was particularly para.22, among other paragraphs. This was a crucial issue as to what this MMR was referring to and at this stage Mr Ronnie was saying that this was just the

outcome of the meeting which he had not been present at between Mr Hughes, Mr Ashley and Mr Whelan. That was a problem.

MR GREEN: It was a problem, yes.

THE PRESIDENT: And that is a problem that the OFT picked up on.

MR GREEN: It is a problem they picked up on, but I can only go on the findings which the Tribunal arrived at. You set out very fully the limitations of Mr Ronnie's exercise, but you stated that he endeavoured to give you truthful evidence. You said he was not trying to mislead you. Now, he was not Einsteinian in his logic and his thought processes, but there we are. All witnesses have their own particular frailties, and you have made your findings about his evidence. You found that Umbro's good faith in this process was not to be impugned, and Mr Ronnie attempted to give the best evidence he could, but within that framework he undoubtedly was inaccurate and inconsistent at times, and you have found so.

THE PRESIDENT: Yes. Yes, let us go on with the story.

MR GREEN: Sir, those were the statements that were submitted at that time on 4th February, and we do submit that when you look at those statements in the round, they provided the OFT with a very substantial amount of information which they did not have before. They now had a substantial amount of information about 8th June meeting and its run up - the Golf Day and so on and so forth, relationships with individual retailers, the nature of the pressure. In relation to pressure, you accepted the evidence of the witnesses, including that of Mr Ronnie, and you made findings that JJB imposed substantial persistent pressure, which was probably greater than that of Allsports, and you accepted that Manchester United had imposed pressure. You found that there was a relationship between Allsports and Manchester United and that was relevant to pressure. You found as a fact that Umbro was in a weaker commercial position in relation to these events, that was all set out in these statements and was materially correct. It was not challenged. Indeed, as you know, the OFT tendered documents submitted by Umbro during the leniency programme as evidence, for example, as you found, to show that some of the matters which Mr Ronnie was talking about were not recent inventions, which was put to him in cross-examination. You said "No", it is not something he just dreamt up, he put the same points to the OFT, for example, at the meeting on 26 February. So that then brings one to the meeting of 26 February (vol.2, tab C, p.13).

It is clear from a review of this note, and again the Tribunal will be familiar with this because it arose as a document in the course of the Appeal hearing, that Umbro employees gave details of pressure imposed upon them by retailers and gave evidence of the nature of the

market. You will see there were various headings – "England kit around Euro 2000", contacts between Mr Ronnie and Mr Ashley. There are, I think, some key paragraphs if one wants to go through it fairly quickly given that you are familiar with it – it can be picked up. For example, para.11, Mr Ronnie gave evidence about his contacts with Mr Ashley. Mr Ronnie – was he being coy? Well he was giving evidence that he ordered a delivery of England shirts to Sports Soccer to be stopped. That was an incriminating statement that he gave against himself, admitting to responding to pressure, and punishing Sports Soccer by terminating a supply. That was an incriminating piece of evidence given by Mr Ronnie. Paras.17-19, Umbro's relationship with First Sport, and Mr Ronnie explaining that he had had dialogue with JD about prices. Paras.50-59 in relation to the relationship with Manchester United, and some discussion about 8th June meeting. Again you will see just from reading this that Mr Ronnie was, we submit, trying to be as accurate as he could. He gave evidence, for example, in 54 that he did not think he had been aware that the June meeting was taking place. He then corrected himself, and again he admits to his frailty of memory in para.59 he could not remember an exact date, but he was nonetheless giving evidence, the gist of which turned out with the benefit of hindsight to be correct.

He explained on a number of occasions to the OFT that he was uncertain of facts, and if I just give you the paragraph numbers from this record – 21, 24, 26, 54, 59 – occasions when either then note records he was not entirely certain or he would to clarify something. It is not at all our case that Mr Ronnie was correct in all respects – he was not. Our case is that the OFT should and could have worked with Umbro to get a better and more complete picture in the course of a leniency programme, and I will deal with the relevance of this to the Decision and the question of fines later.

THE PRESIDENT: OFT could and should have worked with Umbro to get a better picture.

MR GREEN: To get a better picture. Umbro's good faith was established by the fact that Umbro in splendid isolation kept on producing more documents and perfected witness statements. They never wavered in their continuing co-operation and they got 40 per cent. for that, but the OFT's position was that they only started doing so in any material way from the reply to the Rule 14.

I am just picking up one or two other paragraphs here. Paragraph 80 is a record of Mr Walker-Smith apparently explaining that the OFT was having some difficulty in believing Umbro's explanations of the documents, so that the OFT preferred to believe its interpretation

of what was written in the documents they had in their possession as opposed to Umbro's explanation of the documents.

> "He said that the OFT preferred to believe its interpretation of what was written in the documents they had in their possession, as opposed to Umbro's explanation of those documents. He said that the OFT believed that documents themselves provide a more logical explanation of what happens in the business. Mr Walker-Smith referred, in particular, to the Sports Soccer documents and the correspondence with Manchester United; in particular the fax dated 6th June 2000.
>
> "81 As a result, the OFT did not feel that it could proceed with Umbro's leniency application. This meant that all the witness statements provided by Umbro would not be used by the OFT and the OFT would not be able to rely on them. IN addition, any documents which had been provided which the OFT had not obtained as part of its investigation could not be used. AWS confirmed that no reference would be made to Umbro having made a leniency application in any documents or in the OFT Decision. If the fact that Umbro had applied for leniency became known to the press, the OFT would only confirm any announcement made by Umbro."

THE PRESIDENT: So they did not believe what they were being told.

MR GREEN: They did not believe what they were being told. Let us take one example which is correspondence with Manchester United, they give 6th June as an illustration, but take the Martin Prothero letter. Mr Prothero and Mr Ronnie say that although we claim to have set up the 8th June meeting it was not us. That is an example where one can well see that the OFT would say "We just do not believe you. After all, it is your letter to Manchester United. You have given us a very convenient explanation." On the other hand, in the fullness of time, the OFT came to accept that and, as you know, Mr Hughes has accepted that he instigated the meeting, and the Tribunal so found. Now, that is the sort of thing that can be clarified in the course of a leniency programme, and was in the event clarified.

THE PRESIDENT: If we take the Manchester United point specifically, what could be seen as a most unwise comment by Mr Marsh, recorded at para.78 of this note and he suggests that the fax of 26th June 2000 was "make believe".

MR GREEN: It says "they could be". It was Umbro going through a process, it is hard to know precisely what that meant, but he produced a witness statement. He was not called to give evidence. His witness statement was not challenged. He would have been available to give

evidence – he would have been available to help the OFT if they had asked, in the same way that he was available to assist the Tribunal.

THE PRESIDENT: Yes.

MR GREEN: That is the attendance note. There follows a letter, and we need to go back in order to bring the chronology up to date to p. 49 of annex 2. This is the rejection letter by the OFT. The first point to note is that there is no record of the meeting.

THE PRESIDENT: Just before we leave the meeting of 26th February, do you take any point on the fact that before the Tribunal the OFT relied at least some of the things that were said during this meeting?

MR GREEN: Absolutely. It is something that I was going to come to, that it is pretty rum of the OFT to say that we did not co-operate prior to July when they tendered all of this as evidence, and they put it to you that the witnesses were doing their best to tell the truth – inconsistencies, "warts and all". Umbro participated on the OFT's side, as you know, in a very substantial way as part of its exercise in co-operation, and the OFT's internal note - it is not their formal note because no note was kept – one of the notes which was produced to us suggests that one of the persons thought that there was dishonesty on the part of the Umbro employees, not a position which the OFT ever recorded in writing to us, or advanced to you.

THE PRESIDENT: Which note are we referring to?

MR GREEN: Perhaps I ought to just show you that reference.

THE PRESIDENT: Yes.

MR GREEN: Page 54 of this bundle, tab C, fourth line down:

> "AWS: Judgments made at the end. Condition of leniency is honesty, can't be selective in this it has to be across the board. Accepts that seems you were probably misled by your clients."

Now, that appears to be a suggestion of dishonesty by the OFT which is not a proposition which was ever put to us, which was not the reason for rejecting the leniency application, it was not a position advanced to the Tribunal on Appeal, and it is not something suggested, as I understand it from the skeletons, as the reason for the rejection. The reason for the rejection was a lack of consistency or inaccuracy which we do not deny.

Contrary to the understanding of Umbro, no formal note of the meeting was ever taken, but we have the Lovells' note which you see. No reasons are given in the letter of 28th February 2002 – going back to p.49 – simply that the conditions for leniency have not been met.

THE PRESIDENT: They were having difficulty in believing what they were being told across the table by the Umbro employees.

MR GREEN: That appears to be the irreducible minimum, that they did not accept the accuracy – whether or not one attributes a *mens rea* to that is another matter, but they did not accept the accuracy, that would appear to be the minimum, which is common ground, there were inaccuracies and again, we have your findings of that, and we do not challenge it.

THE PRESIDENT: Their position was well, we cannot really go any further with leniency unless there is across the board ----

MR GREEN: 100 per cent. accuracy I think is the ----

THE PRESIDENT: Well, 100 per cent. openness, it was not just accuracy, they just did not believe them at this stage.

MR GREEN: We do not know because we have never been given reasons.

THE PRESIDENT: AWS find it difficult to believe your clients.

MR GREEN: That is their note. It was not put to us as part of the reasons, and it is not actually reflected in our own attendance note, so we do not have a squared up agreed note of the meeting. There is a dispute between the parties. The OFT appeared to believe that we accepted that one was not necessary, but that is rejected by us and is inconsistent with our actually ringing and asking for a copy of the note, and I will come to that shortly. The reasons for rejecting the application are set out in the 28th February 2002 letter, on p.49 of annex 2. The reason is set out in para.2:

> "As you are aware from the Director General's Guidance as to the Appropriate Amount of a Penalty and as explained in our previous correspondence and at the meeting there are certain conditions which must be satisfied in order for a company to be able to benefit from leniency. These are also set out in the letter which any company would be expected to sign in order to obtain any level of immunity from financial penalty, a draft of which was enclosed with my letter of 7 January, at Umbro's request. These include the provision of all information available to the company and the maintenance of continuous and complete co-operation. On the basis of the information which you have provided, including the discussions at the meeting yesterday, we do not consider that Umbro has complied with these conditions for leniency. I cannot therefore offer you any level of immunity from any financial penalty which may be imposed."

So the reason given is that the information seems to be incomplete. No specific reason is given; it is simply that "you have not complied with the conditions." It is not suggested that we were

acting dishonestly, but they found the evidence incomplete and, I think it follows, inaccurate. They then go on to say:

> "As we discussed at the meeting, the Director will not use the witness statements which Umbro has provided to support any case the Director may bring for any infringement of the Chapter I prohibition of the Competition Act. No reference to the fact of Umbro's application for leniency or to the fact that it was not granted will be made during the course of this case. Any information which has been otherwise obtained as part of the investigation, however, and which may also be referred to in the witness statements can be relied on by the Director.
>
> "There will be an opportunity for Umbro to make representations on any issues which it considers appropriate, should the case proceed to Rule 14 Notice stage and also to put forward any information which it considers appropriate in relation to mitigation."

And I think the next point is not unimportant:

> "As we discussed, it is open to Umbro to co-operate voluntarily at any time with the investigation, outside the context of the leniency programme. Such co-operation, depending on its timing and its nature may be material in determining the level of any financial penalty that may subsequently be imposed."

So the OFT were saying all right, you are outside leniency now, but we will still give you credit for mitigation, and it will depend upon the timing and extent, and we know in 596 of the Decision the OFT said "no co-operation prior to response to the Rule 14, which was in July.

Just one or two points to sweep up. For the sake of completeness in relation to the note of the meeting it is important to understand what happened next, because the OFT says in relation to the witness statements, well even in relation to the witness statements we could not use them, and did not use them. We say on the other hand, we told you you could use them. There is a dispute as to what happened, and what relevance the OFT was entitled to make in that context.

You have seen in the OFT's letter that they will not use the witness statements, but it was open to Umbro to co-operate. Other documents relevant to that are first at p.56 of this tab. This s an attendance note of 26th January 2003, with Miss Roseveare calling John Ward of the OFT explaining that when going through the leniency files she could not find a copy of the minutes of the meeting of 26th January that were going to be produced by the OFT. "JW confirming that he would look into it and get back to me."

THE PRESIDENT: She means 26th February, does she not?

MR GREEN: She does mean 26th February, she is making the mistake I keep on making, yes.

> "KR returning to office and picking up voicemail messages. Call from Max Ditchfield at the OFT confirming that he had reviewed all the papers relating to the meeting and he could not find a copy of the minutes and he could only presume that no minutes were taken."

Now Miss Roseveare plainly thought that minutes were going to be produced by the OFT, otherwise she would not have called. Miss Kent, in her witness statement, which is a few tabs on at BB. At paras 5 thro' 7 it says as follows:

> "5. I remember that the meeting effectively turned into a cross-examination on key aspects of the witness statements. The witnesses from Umbro did not appear to want to give full explanations of the events mentioned in the documents, whether because of concerns about implicating colleagues or business partners in other organisations, or for other reasons. After about an hour, the OFT team withdrew from the meeting and Adrian Walker-Smith said that he did not think the Umbro witnesses were co-operating. We all agreed.
>
> "6. We then asked to speak to Umbro's lawyers only, and told them our position. They did not seem surprised given what had happened in the first part of the meeting. They then spoke to their clients, and the meeting resumed. We agreed that we would treat the application as never having been made, i.e. the OFT could not use anything they had given us which we did not already have. I seem to recall Adrian expressly saying that we would not make a note of the meeting because this was the position. There seemed no point. I am sure that the Umbro representatives agreed, or at least did not disagree."

She only says that she seems to recall, and her point about her certainty that either the Umbro representatives agreed or did not disagree, is rather odd. As we will see in a moment Miss Roseveare does not recollect anyone saying that no note would be taken. She says: "I confirm that Ms Roseveare of Umbro did not ask for a note of the meeting afterwards in any of my conversations with her, nor in any correspondence that I received. (I see from the Notice of Appeal … Ms Roseveare did call my successor John Ward to ask for a copy of the OFT's "minutes" …)

> "7 After that meeting, Ms Roseveare of Umbro wrote to me on 13 March 2002 emphasising her concerns about the confidentiality of the material which had been submitted in the context of the leniency application, but saying that we could use the

witness statements provided for the purposes of the investigation. I called her to discuss this issue. I made clear that to keep leniency confidential Umbro would have to resubmit evidence. The choice of evidence was entirely up to Umbro. I then wrote to Ms Roseveare … to say: 'Further to your letter of 13 March and our subsequent discussion I look forward to receiving the additional information Umbro wishes to provide as part of the Director's ongoing investigation into price fixing of replica football kit ...' The additional evidence Umbro chose to supply in the end was documentary rather than witness statements and their exhibits."

Copies of the correspondence are annexed to the Defence, and the evidence is annexed to the Defence as well.

Miss Roseveare's recollection is slightly different. File 2, tab C, p.83. She explains her position is general counsel to Umbro. She refers to the notes of the meeting. She explains in para.3 when her employment commenced, and that she was responsible for handling all aspects of the investigation thereafter. She wants to comment, as per para.5, on Umbro's involvement. She explains in para.6 that the events were complex. That the majority of the relevant events had taken place over a year previously.

"Many of the events turned on telephone calls, and other conversations of which no record had been kept, and the documents which did exist contained certain ambiguities. In certain cases this was due to poor drafting; in others due to the context of the document where the author was exaggerating what had occurred. In addition, until the OFT sent its first Rule 14 Notice, Umbro had only seen the documents and information which were supplied by or obtained from Umbro itself. It had not seen the information which had been supplied by any other party.

"7 These problems meant that, during the early stages of the investigation, while Umbro wished to cooperate fully with the OFT, it was not able immediately to supply the OFT with a complete and precise picture of the events under investigation. Nevertheless, Umbro made considerable efforts at all times to supply the information and supply the OFT with as much information as it could obtain. I did not encounter any reluctance on the part of any Umbro employees to cooperate either with me or the OFT. It was only to be expected however that they might initially have difficulties in recollecting the precise details of past events.

"8 Notwithstanding Umbro's efforts to cooperate the OFT's attitude to Umbro's leniency application was unenthusiastic, and the OFT had consistently failed to take any initiative to make Umbro's employees to obtain further information. It was only

> after a number of offers on Umbro's part that the OFT agreed to meet with Umbro on 26th February 2002. Even then, the OFT did not ask to speak to any specific Umbro employees other than suggesting it 'might be helpful if Mr Chris Ronnie were to attend'."

She explained that she attended the meeting with Mr McGuigan, Mr Ronnie and Mr Marsh, and external legal advisers. Se refers to the fact that Mr Walker-Smith stated that a note would be made of the meeting which would be agreed by both parties. Following the meeting a decision would be made by the OFT as to whether to proceed with Umbro's leniency application. Miss Kent is correct to say that the meeting turned into a cross-examination on certain key aspects of the witness statements which we proved.

"The Umbro employees gave full answers to the OFT's questions as best as they were able in the circumstances. I did not have the impression they were unwilling or reluctant to answer any of the questions. Quite the contrary they gave quite frank evidence of the events in question. This included, for example, Mr Ronnie admitting his personal involvement in compelling Sports Soccer to raise prices prior to the Euro 2000 tournament, as well as giving information regarding price discussions between himself and Phil Fellone at Umbro and a number of other retailers, including Blacks, Allsports, JJB, JD Sports, John Lewis and Champion Sports.

> "As Ms Kent explains, however, the meeting was terminated after a very short time by the OFT, who explained to Umbro's lawyers that they did not believe the accounts given by Umbro's employees, and preferred their own interpretation of the documents themselves. The OFT told us that they did not feel they could proceed with our leniency application in those circumstances.
>
> "It is correct that we were not surprised by this decision. This was not, however, because we understood the OFT's reasons for rejecting our application, but rather because, as I have explained above, the OFT's approach to our application had from the start been unenthusiastic. We remained, however, disappointed by this attitude. As both Mr Sheerin's and Ms Barr's notes make clear, I questioned why the OFT did not believe Umbro's account. Mr Walker-Smith's only response was to refer to one or two specific documents. We did not understand why the OFT were rejecting out of hand Umbro's offer of full cooperation in the leniency programme, on the basis that it did not believe Umbro's explanations regarding a few documents out of the large volume of evidence which had been supplied by Umbro alone, let alone other parties.

"The OFT confirmed that the fact of our leniency application would remain confidential. There was not, however, an "agreement" that documents supplied by Umbro (including witness statements) as part of the leniency application would not be used. We were simply told by the OFT that this would be the case. I also do not recollect any statement being made by Mr Walker-Smith to the effect that no note would be produced of the meeting.

"Following the meeting, Umbro remained concerned to continue to cooperate in full with the OFT, notwithstanding the rejection of its leniency application. That is why I wrote to the OFT on 13 March 2002 expressing that wish, and requesting that our witness statements submitted for the leniency application should be retained by the OFT and treated as having been submitted for the purpose of the ongoing investigation.

"Ms Kent called me the following day, stating that we would have to resubmit he evidence to the OFT in order to keep the leniency application confidential. I was left with the impression following that conversation, however, that the OFT considered it more appropriate for us to wait and resubmit the witness evidence *after* we had received the Rule 14 Notice, which we knew by then was imminent. That was the reason why, on 21 March 2002, I sent the OFT only the contemporaneous documents which had been attached to the statements, and why we did not submit the witness statements themselves until our response to the Rule 14 Notice.

"I regarded it as quite clear from my statement that 'despite the fact that Umbro can no longer continue with the leniency programme, Umbro still wants to cooperate fully with the Office of Fair Trading,' that the OFT could if it wished have interviewed Umbro's personnel at any time. The fact that the OFT did not do so does not reflect any lack of willingness on Umbro's part, but rather the fact that the OFT clearly (and wrongly, as it turned out) simply did not believe Umbro's evidence, and did not wish to take the time at t hat stage to get a better understanding of the facts.

That was her statement 30th January last year. That really adds the final pieces to the picture of what happened at or around the meeting time. I think, to be fair, the existence or non-existence of a note does not particularly add or subtract anything. It is clear that the OFT did not believe that the information was complete or accurate in all respects, and that was the reason ----

THE PRESIDENT: Well they thought that your clients were being uncooperative and holding back, and your case is that everybody was doing their best.

MR GREEN: Yes.

THE PRESIDENT: If you take a page like p.63, tab C of BB, which is the one that has the various notes in it – I am not quite sure whose notes these are.

MR GREEN: I think these are the OFT's notes – Mr Shearing.

THE PRESIDENT: Yes, if you just take something like p.63 at the top of that page there, Christiane Kent refers to the fax of 6th June which refers to discussions with Debenhams and Sports Soccer, and Mr Marsh's position, according to this note is that "Such discussions didn't take place, but were part of the 'supposed' discussions to placate MUFC". At that immediate point we then get a break and Mr Walker-Smith says he finds it difficult to believe it. It may be fair comment in the circumstances.

MR GREEN: The OFT had the document to which that related and Mr Marsh's comment would appear to be incorrect, but they had the document. Our submission remains that they were trying to co-operate. There was no deliberate attempt to mislead. There were undoubtedly inaccuracies and incomplete answers.

THE PRESIDENT: Yes.

MR GREEN: But what I will submit to you shortly when I stand back from it and make submissions about the events, is that one has to understand, there has to be a way in which a leniency scheme sensibly can operate. I will be submitting to you that the OFT do not operate in this way in relation to other cases.

THE PRESIDENT: Anyway, that is the meeting?

MR GREEN: That is the meeting. Now, following on from that, and we can take this relatively quickly because you have seen the documents already. There is Miss Roseveare's letter in which she says "I want to continue to co-operate, please use the documents that you have, the witness statements you have for your ongoing investigation." That is on p.53 of annex 2. "We want to co-operate fully". "Use the witness statements". It cannot, in our submission, be any clearer than that, p.53, letter of 14th March. At this stage Umbro are quite unequivocally saying that whatever position we may have taken, and you may have taken in the past in relation to these statements, and being aware of your position that you do not want to use them, well here is our consent to using them.

The OFT then says "We will not". It was an offer which the OFT effectively rejected and they seek to turn it back on us by saying that we did not re-submit them in relation to confidentiality.

THE PRESIDENT: If the OFT had used these witness statements in relation to the England agreement, they would have got into a fine old muddle.

MR GREEN: With respect "yes" and "no". We have seen Mr Fellone's evidence, for example, in relation to that. That was an advance on the OFT's position.

THE PRESIDENT: Well he deals with Champion and First Sport.

MR GREEN: And he exhibits two letters as you have seen. If they had relied on Mr Ronnie, yes, that might not have assisted, but at least they are moving down the line which they then had to move down some six months later. Let me put this in context. Umbro provided further information in the resubmitted witness statements, when Mr Ronnie moved to Sports Soccer the OFT had him in to produce Ronnie 4. The OFT put him up as a witness and he was able to provide you, after three days of fairly hostile cross-examination, with further information. There was then this question of the procedural issue where the OFT correct to try and withdraw part of their Decision and you said "No" they were not correct. The evidence has evolved in the course of the trial, and the ambiguities were understandable (para.740). Yes, Mr Ronnie was incorrect to start with but over a period of time a more accurate story was revealed.

THE PRESIDENT: Eventually.

MR GREEN: Eventually, yes, and I am not even suggesting had we gone into leniency you would have got a perfected story because this was a man with an imperfect memory, but you would have begun to make progress in a way that Umbro found it difficult to do as an outsider, outside a leniency programme, not being able to work with the OFT who had greater access to information.

It raises an important point of policy about what a leniency programme is there to do and what can be expected at the first hurdle, but this is the responsive letter. Can I just point out that in relation to confidentiality this is dealt with fully by Miss Roseveare and Ms Kent in subsequent correspondence? Confidentiality is irrelevant to this issue. Miss Roseveare is referring here to confidentiality as an outstanding issue. There is an exchange of correspondence and Umbro put in a schedule which makes it quite clear that what is being discussed is confidentiality of information within a document, not the document itself. One can see that not only from the context of this letter but also very fully from the letter at the beginning of annex 1, p.1, which is the confidentiality letter which deals in greater detail with this issue. It is dated 5th April 2002. Miss Roseveare refers to conversations on Wednesday, 27th March. She refers to Umbro having requested confidentiality for certain information taken or provided to the OFT. She identifies a number of particular documents with Sports Soccer, the licence arrangement – you will well remember that. She refers to sponsorship contract

structures on p.2, and in the last para. of that section 2, she says that disclosure of this arrangement will allow other brands to imitate the structure of the …deal.

THE PRESIDENT: This is separate issue.

MR GREEN: Separate issue, FA and supermarkets. Then if you look at the table attached to it, in relation to each document what is being asked to be deleted are trading figures, profit and loss accounts, costs, rebates, budgets, sales figures and so on. It is a different issue – not saying "do not use the documents", saying "Use the documents but there is a confidentiality question."

THE PRESIDENT: Yes.

MR GREEN: Before turning to submissions, and I will be able to accelerate because virtually everything else I want to say is not going to involve a lot of too-ing and fro-ing to documents. Could you go to the Notice of Application, please – at the beginning of file 1. There is an appendix and what we have endeavoured to do here is to draw a link between evidence submitted during the leniency application, so at an early stage prior to the Reply to Rule 14, and the reliance upon that information in the Decision. I will not take you through it paragraph by paragraph. It has been in the pleadings for a long time now, and so it is there to be seen. The OFT have not dealt with this in their Defence. There is no analysis of whether they agree or disagree with this. They say that apart from the documents which they accept gave them significant advantage, prior to the Rule 14 Reply, nothing did, but we can show, by reference to information prior to that point that it did find its way into the Decision, and it covers a large number of important issues which are plainly important both in the Decision and in the Appeal.

You asked yesterday, Sir, how much of this information found its way into the first Rule 14 in relation to 8th June meeting. Actually, two paragraphs in the first Rule 14 Notice were taken from Umbro's information provided to it – do you remember that document attached to the April letter where there was a chronology?

THE PRESIDENT: Yes.

MR GREEN: In fact, the OFT have incorrectly summarised that in the Decision – two paragraphs, 89 and 235 of the first Rule 14.

THE PRESIDENT: C1 tab2.

MR GREEN: Tab 5 of our bundle, but you may have it more conveniently placed. So the OFT begin to realise that there is an important meeting, 8th June Meeting, and they refer to it in paras. 89 and 235. One can take this meeting as an illustration of what we say the problem is. The OFT had now a considerable amount of information about the 8th June meeting from the various witness statements produced and, indeed, from a number of letters produced yet they

did not incorporate it in a substantial way in the first Rule 14, it came into its own later on. In para.89 the OFT says:

> "The Director also refers to the fax sent by Umbro to Debenhams on 2 June 2000 described at para.137 below referring to '*other retailers including John Lewis*' having agreed to Umbro's requests on retail pricing to take effect on 2 June 2000. Umbro has also confirmed that a meeting took place between Allsports, JJB and Sports Soccer on 8 June 2000 to discuss retail prices."

Now footnote 64, document 7 at 551 is the chronology. They only refer to the chronology as identifying retail prices. Of course, it was much more accurate and precise than that. It actually described it as the Manchester United home kit and again in para.235 they refer to the meeting:

> "Although at the meetings with OFT officials in March and August 2001, Sports Soccer did not mention an agreement relating to Manchester United FC, Umbro's May 2000 monthly report makes it clear that agreement was also reached covering the Manchester United FC replica kits to be launched later in the year. In its letters of 6 June and 13 July respectively Umbro confirms to Manchester United FC that 'a consensus to the price of the Manchester United jersey' had been reached between the major retailers."

So that is the Prothero letter voluntarily provided.

> "In addition, as described at para.89 above, Umbro has confirmed that Sports Soccer, Allsports and JJB met on 8 June 2000 to discuss retail prices for the Manchester United FC replica kits to be launched in 2000."

Again, we made it clear it was home, they have just referred to it as "replica". The chronology does refer to it as "home". They had at their disposal at this time a great deal of additional information about 8th June meeting, and the only evidence in the first Rule 14 is the limited information that we had provided. It was not truly fair of the OFT to say that our evidence did not advance matters. Even in relation to 8th June meeting, a year later almost, in August, this was still the only snippet they had of it, though we know – because we of course provided the witness statements – that they had much more detailed explanations of that in the witness statements. Had we gone into leniency, all of that would have been more available even for the first Rule 14.

MR COLGATE: Are we absolutely clear that that information has come solely from Umbro?

MR GREEN: There is the Martin Prothero letter, and then there is a reference to the chronology.

MR COLGATE: I ask that question because you do not know what went on with other meetings that the OFT had, for example – to pick one - Sports Soccer. I am not suggesting that it did, I am only trying to test whether you are correct in stating categorically ----

MR GREEN: We are pretty certain that we are. We are pretty certain, because when you look at the evidence given by the other parties as described in the Rule 14s, you get a very clear picture of what they had said to the OFT including the evidence of Mr Ashley, which would really have been the other source of the information, as to that meeting at the time. We pleaded that this was the first information, and it is not denied anywhere by the OFT that it was the first information of 8th June. So we put it up as a stalking horse to be knocked down if it could be knocked down.

MR COLGATE: No doubt we will hear further if that is appropriate.

MR GREEN: I would like to stand back, therefore, and make our submissions about why we submit that there was substantial co-operation prior to the service of the first Rule 14. First, what about the evidence which was submitted? You know the background, the OFT accepts that in para. 16 of its Defence that the Decision is incorrect in relation to the documents. Your Judgment focused on three big areas, and this is a simplification of course, but three big areas of fact were pretty pivotal to your Judgment.

One was 8th June meeting at Mr Hughes' house. Secondly, there was the England ring around; and thirdly, there was the evidence of pressure. Those were three central issues of fact arising on the Appeal. In relation to the primary evidence on those, the evidence was provided by Umbro. Take 8th June, we gave the first information as we understand it, and taking everything that we have seen of that meeting, we gave information of it at 4th December 2001 meeting, including dates, places, product, price, identities of people who were in attendance. The OFT at that time did not think there was a horizontal meeting at all.

We provided further details of the meeting in the letter of 5th December, names, attendees, details of products, prices, impact of the meeting. Mr Ronnie's witness statement submitted on 4th February gives extensive details of that, including the setting up of the meeting and what took place. As a result of Umbro's application being rejected, you have seen the first Rule 14 contained fairly slim evidence of that meeting, which turned out to be so important. Compare that with Umbro's resubmitted witness statements in relation to the subsequent Rule 14 Notice, and the Decision, and you see there is a huge reliance on what Umbro was able to provide. (Decision, paras.175-193, 365-372) The OFT ultimately relied very heavily upon evidence provided by Umbro of this meeting, and your Judgment, of course

(s.17, para.746 onwards) addresses this in summary. So that is a major issue that we provided evidence of at the outset.

Pressure. We provided evidence of pressure from retailers from the earliest stage. It was referred to at 4th December meeting, it was summarised in the letter of 5th December. It is stated in detail in the witness statements of Mr Ronnie, Mr Prothero, Mr Marsh and Mr Fellone. In setting aside questions relating to Mr Ronnie you accepted the evidence of the others and even in relation to Mr Ronnie, so far as pressure is concerned, a great deal of it turned out ultimately to be correct.

As a result of rejecting Umbro's application for leniency, the first Rule 14 Notice had very limited evidence of retailer pressure. It relied largely on indirect references, for example, para. 115, drawing inferences from a 1999 letter from Allsports to Umbro, and para.120 drawing inferences from JJB's discussions with Nike as to its likely attitude to Umbro. Again, compare this with the position following Umbro's resubmitted statements, and I will just give you the references because there is no time to take you through them now – Decision paras. 156 -160, 172, 173, 175, 416, 427, 439-440, 445, 447 and 463, and again generally, your Judgment 394-502. In relation to your Judgment I shall not wear you further by taking you back to it, but in relation to JJB you found as fact that JJB imposed pressure through threats. You found, this is para.423, that Umbro was extremely vulnerable to the pressure. You found at 424 pressure emanated through strong verbal complaints, and the pressure was considerable. Equally, in relation to Manchester United (para.426) pressure was exerted through the threat of non-renegotiation of the branding contract. In relation to Allsports (428-502) you found as fact that Allsports had material commercial bargaining power vis à vis Umbro (440 and 442), and you gave full reasons for that, it was a sizeable purchaser, it had a relationship with Manchester United, and you rejected their evidence that they did not exert pressure.

Your conclusions, 736 that Umbro's conduct ----

THE PRESIDENT: We remember the pressure.

MR GREEN: You remember them. And your conclusions 736 – so that is pressure.

THE PRESIDENT: Just a moment, Mr Green.

(The Tribunal confer)

THE PRESIDENT: Yes, Mr Green.

MR GREEN: Just for your note in relation to Sports Soccer's evidence of 8th June, can I ask you to look – not now – at para.91 of the first Rule 14 Notice and you will see that Mr Ashley first of all suggested that there was some sort of agreement about England kit. He then retracted ----

THE PRESIDENT: Yes, he had mis-remembered it.

MR GREEN: He mis-remembered, exactly. So those are two aspects of the evidence which were put in at an early stage. What about the England ring around? There is not a great deal to be said about that. You know that Mr Fellone provided evidence of that in his statements. You know the history of that, and you know the way the OFT decided to retract and then you decided the retraction was not necessary because you had heard much more detailed evidence, including from Mr Ronnie.

THE PRESIDENT: If the test for leniency is complete co-operation, there had not been full disclosure at this stage of the ring around.

MR GREEN: That brings me to really the legal submissions. Leniency is really only one aspect of a more broad question, which is did we co-operate at an earlier stage?

THE PRESIDENT: That raises the general question – the general question is this: you have 40 per cent. for co-operation, if you had leniency you would have got 20 per cent.

MR GREEN: No.

THE PRESIDENT: Are you saying you should get 40 plus 20, or what?

MR GREEN: No, we are saying that the OFT gave us 40 per cent. having calculated that that was what it was worth on the basis that we co-operated from the first Rule 14. They admit that that is incorrect, albeit only in relation to documents. We say not only is it incorrect in relation to documents, but we provided material evidence at an earlier stage, and the logic of their case is that had they at the time of the Decision said "Right, not only did you co-operate from the Rule 14, but we now accept you gave us some very valuable documents which analysed properly a whole series of additional events, but also you provided us with some witness statements. They were not accurate in every respect, but we got some very substantial guidance from you at an early stage, for example, in relation to 8th June, in relation to pressure, and in relation to some other events that we were not aware of, and we can give you some credit for that as well." I am going to take the Tribunal's findings on this - we accept that you did not deliberately set out to mislead us but they were inaccurate. So it is the logic of 596.

MR COLGATE: Just to test you on that, Mr Green. Supposing hypothetically leniency had been accepted and agreed, and so you had 20 per cent. that would have been for full co-operation. So at the end of the day when they were doing their sums you would have had 20 per cent. taken off?

MR GREEN: 20 minimum, because that was the starting point, and if we had gone into the agreement the evidence suggests that we would have done so on the basis that you got your

bare minimum, but if they then decided that there had been further co-operation with further valuable material coming out, it would have gone up.

MR COLGATE: There was that possibility, but the offer was 20 per cent.

MR GREEN: At that stage, and one knows from other cases that you get into the leniency and the quantity of leniency then becomes a fluctuating figure.

THE PRESIDENT: And if they had accepted your statements at that stage they would have been your final statements – they are said to be your final statements.

MR GREEN: Well no, at the earlier stage they were stated as being draft statements.

THE PRESIDENT: They were initially draft and then on 4th February, final.

MR GREEN: Because we were forced into that conundrum, but at that point we also said, and you have seen that from the letter, Miss Roseveare was quite clear, "we may have to work further with you, you may want supplementary statements, you may need further information." We were forced into producing final statements, but that was in a very compressed timescale, and Miss Roseveare made the offer "We will work further with you".

That does bring me to really one of the most important legal points, and it is really about leniency but my submission, as you will appreciate is much broader. It is about the logic of 596. What is the price to be paid to get into leniency? Is it that before you start the leniency programme you must prove with 100 per cent. accuracy that you have disgorged everything? If that is the case then it seems that the leniency programme defeats itself because you must do everything before you start the leniency programme. What is there left to do after that if you have produced every document, and every witness statement and that has to be 100 per cent. accurate? The logic of the leniency agreement is that you work with the OFT over a period of time to assist the OFT to obtain a perfected picture of a complex set of facts. That must mean that the evidence you give at the outset may not be as accurate as the evidence you are able to give as time progresses. It is hard to see how a leniency programme can work if there is not that logic to it and, indeed, taking the important statement made by the Tribunal about the vicissitudes of memory, the Tribunal itself said that not only can memory be jogged going forward, it can be defective going backwards and that is something you take into account when measuring a witness's credibility. So is it reasonable to impose 100 per cent. perfection as a requirement of getting into the programme, or do you say "Listen, we have a lot of work to do over the next 12 months, you will have to make yourself available on a frequent basis because we are going to be using you daily in order to perfect the story"? We say the difference between us is simply this ----

THE PRESIDENT: We are having a bit of trouble over the point about getting into the programme, because even if you got into the programme, as Mr Colgate points out, there is nothing to show that you would have got any more than you in fact got.

MR GREEN: Well judge that with the benefit of hindsight. Umbro managed in the course of the next six months to produce more information and a more extensive set of witness statements in reply to the first Rule 14.

THE PRESIDENT: They did that following the rejection of the initial witness statements.

MR GREEN: If the process of perfection had started at an earlier stage, one is entitled to put to you that Umbro would have assisted the OFT to get to a more perfected position ----

THE PRESIDENT: Anyway, up to the OFT to work with Umbro to perfect it.

MR GREEN: Yes.

THE PRESIDENT: Let us press on, Mr Green.

MR GREEN: Yes. The OFT's position was also wrong because they told us that our evidence added nothing. I have dealt with that, but that seems to us to have been an unfair conclusion. It was also an unfair approach because they imposed the obligation to produce the re-submitted witness statements in an unreasonably short timetable, and that was 4th February point. It was also unfair because it was inconsistent with the previous conduct of the OFT in relation to leniency. Mr Walker-Smith explained to us in his conversation with Miss Roseveare that in the past, for example, doubts that the OFT had, as to whether a company was prime mover or instigator did not prevent someone getting into a leniency programme. We do not know what that case that is, but that was referred to in the note of the meeting with Mr Walker-Smith in December and we know from other cases, not least *Hasbro* that they have not taken that approach in other cases.

To sum it up, prior to the July Reply to the Rule 14 we had provided substantial number of new documents which related to important events.

THE PRESIDENT: Yes, I think we have the point, Mr Green.

MR GREEN: I am going to move from that topic then to the question of subsequent co-operation in the course of an Appeal, and I will probably only need to spend 10 minutes or so on this and then I am pretty much finished. I do not need to take you back to *Aberdeen Journals*, you will remember the point. In *Aberdeen Journals* the court established a principle, that co-operation during an Appeal could increase mitigation. We have set out the quotations from the Judgment in para.61 of our skeleton. In that Judgment the Tribunal did not do any more than express the

principle, and this is the first occasion that I think anyone has come to you and said "We want to rely upon that principle.

Umbro is an Appellant in relation to penalty, it did not of course appeal liability. The *Aberdeen Journals*' principle contemplates that an undertaking which appeals on liability in a modest and limited way and which conducts itself reasonably before the Tribunal on liability can get, by virtue of that approach, some extra credit, if it is appropriate. The position would therefore be even stronger in relation to a company that does not challenge liability at all, accepts it on the chin, but simply raises ----

THE PRESIDENT: Well was that your position, because I thought at an earlier stage you told us that you did not accept it – you are not challenging it but you did not accept it.

MR GREEN: You will have seen from the reply to the first Rule 14 that stated that we had two positions. We accepted unequivocally, and we put it as the preponderant part of the evidence and we would not challenge it. We stated with regard to some of the rest in the Rule 14 there were areas that we simply did not have knowledge and we could give only limited information, for example, 8th June meeting because we were not in attendance.

THE PRESIDENT: I thought there was something you said at a case management conference quite recently.

MR GREEN: You need to look at the Reply to the Rule 14.

THE PRESIDENT: "Umbro does not accept each and every factual finding in the Decision." is what you say in your Notice of Appeal, para.1.

MR GREEN: There are inevitably minor points here and there which, as a matter of fact, a client may say "That is not how we recollect it" but the important point is it is not challenged. We have accepted everything on the chin. We have not come to you and said at all ----

THE PRESIDENT: A slightly half hearted sentence.

MR GREEN: No, it is only half hearted if we come to you and then we lose. The position which the Tribunal took in *Aberdeen Journals* is that you want parties to adopt a realistic approach, to say "We may not accept everything but frankly we will take two or three big points and we will leave it at that. We will not take every point." That was the philosophy and that is the policy underlying it. The subjective position within a client may be very different but, as a matter of policy in terms of bringing matters to the Tribunal, we did not bring a thing and that is a crucial point – we did not appeal anything apart from penalty.

What does that mean in terms of co-operation? There are some important policy considerations here. The Tribunal first has powers which exceed those of the OFT, for

example in relation to compulsion of cross-examination. The Tribunal can certainly be more pro-active than a national court.

THE PRESIDENT: Apart from not challenging liability what is it that you say Umbro has done that entitles them to a further discount?

MR GREEN: Umbro did a number of important things. First, we proffered and made available every witness that the OFT wished, or indeed anybody wished. You heard evidence from Mr Ronnie, who was not an employee at the time, but Mr Fellone, Mr Prothero, Mr May. You accepted their evidence unequivocally. They produced witness statements prior to the Rule 14 and they provided supplementary evidence. They gave their evidence without compulsion. This was despite, as you recognised, the invidious position that Umbro was in vis à vis giving against their customers. Mr McGuigan did not need to be called but was available. His evidence was accepted as honest by all concerned, and his witness statements were not challenged. He was available to the Tribunal, to the OFT, to anybody had it been required.

THE PRESIDENT: So the witnesses were available without the Tribunal needed to have recourse to its compulsory powers.

MR GREEN: Indeed, and their conduct in the course of the trial, that you found that in relation to three I have mentioned you had no hesitation in accepting their evidence entirely, and you found that Mr Ronnie did not set out to mislead you.

THE PRESIDENT: Can you claim credit for Mr Ronnie when Mr Ronnie was then ----

MR GREEN: Mr Ronnie is neutral. He did not mislead you and you were able to rely on his evidence in a number of ways.

THE PRESIDENT: What I meant was by that stage he is an employee of Sports Soccer rather than an employee of Umbro.

MR GREEN: Yes, and I said a moment ago that he was an employee of Sports Soccer, absolutely. Production of documents. Could you just look briefly at our skeleton in relation to the production of documents?

THE PRESIDENT: Tab 5 in our bundle. This is your amended skeleton. It is tab D at the end of file 2. It is the amended skeleton, para.68. Umbro as, of course, a third party to the proceedings was on the receiving end of a very, very large number of requests for disclosure. The vast majority of these emanated from Allsports, but not Allsports exclusively. We set out some of the detail in footnote 61. There were approximately 15 letters and faxes relating to confidentiality and disclosure issues from Allsports' solicitors sent to the OFT and every one

of those related to Umbro and was passed by the OFT to Umbro to be processed. Umbro, wherever it conceivably could simply disclosed the information.

THE PRESIDENT: Well actually, Mr Green, it opposed all this disclosure ----

MR GREEN: No, it did not, no.

THE PRESIDENT: -- pretty vigorously.

MR GREEN: No, with respect, of course you saw the tip of the iceberg. You saw a dispute, for example, in relation to the licence agreement with Sports Soccer.

THE PRESIDENT: No, I am thinking of the earlier stages in the Case Management Conferences up to about Christmas, when first of all there was the issue of the witness statements, and the fact of the leniency application which was hotly contested. Then there were 80 or 100 documents which were also contested, which we had to finally rule on, so at the end of the day it was all disclosed, but there was quite a lot – I am not saying it was illegitimate at all to contest those matters, I can quite understand why it was, but you cannot really say that it went uncontested, because it was contested.

MR COLGATE: Furthermore, indeed, Umbro reserved their position on an appeal to our Decision as well.

MR GREEN: You will remember that Umbro wrote a letter saying that it was not going to appeal because it did not want to ----

THE PRESIDENT: I am not criticising Umbro's position at all, they were novel points and not entirely straightforward issues, but it cannot be said that Umbro just met every request that was made of it because it did not.

MR GREEN: I did not suggest it did. What is the Tribunal entitled to? It is entitled to a sensible approach when dealing with disclosure of information to rivals. As we have set out in footnote 61 Umbro received a very, very large number of faxes and requests which you did not see because they were processed without the Tribunal being engaged at all. You saw the tip of the iceberg where there real issues of commercial sensitivity on which the Tribunal was asked to rule.

THE PRESIDENT: I had the impression that almost nothing was agreed, but I may be wrong about that.

MR GREEN: No, with respect, there was a very large number of documents which were asked for, or bits of information which were asked for, and you did not see that, you saw the tip of the iceberg. Miss Roseveare was dealing on an almost daily basis with requests for ----

THE PRESIDENT: We do appreciate that Miss Roseveare in particular was put in a very difficult position in the whole of this case, and coped very well, if I may say so.

MR GREEN: And you will no doubt have picked up because it came into the press during the course of the Appeal that Umbro was going through an IPO at the time.

THE PRESIDENT: Yes.

MR GREEN: It was an added complication.

THE PRESIDENT: An added complication, yes.

MR GREEN: We have set out in para.68 a number of items where assistance was provided by someone who was effectively a non-party seeking to co-operate. We made the point at 67(a) thro (c) also that the point taken on Appeal, even on penalty, is a very narrow point. It is based upon a logical inference, which we say and we invite you to draw from an error in one paragraph of the OFT's Decision, 596, which the OFT itself accepts is in part – because of documents at least – incorrect. That is all I wish to say about the Appeal process and I think the other concluding remarks have been made in the course of my submissions.

Very finally, just to deal with two housekeeping points. First, compliance, you asked for details of compliance. We have sent it to the Tribunal in a letter of 7th January. For transcript purposes at this stage further details of the compliance system are set out in vol.1 at tab 6(b) which is the witness statement of Miss Roseveare and the annex documents. Then finally we have made one other point in paras.53 to 60 of the skeleton concerning scope of the infringements as found but, as I said in opening, I was going to leave that there.

THE PRESIDENT: Yes.

MR GREEN: I have taken up a lot of your time.

THE PRESIDENT: Thank you very much, Mr Green.

(The Tribunal confer)

THE PRESIDENT: Mr Morris, we will rise for a short break, and give you half an hour batting before lunch, if that is all right?

MR MORRIS: I am grateful for that indication, Sir.

(The hearing adjourned at 12.25 p.m. and resumed at 12.30 p.m.)

MR MORRIS: Sir, with your permission I propose to make my submissions in the following structure. First, I am going to make some general submissions about the approach to be adopted by the Tribunal to matters arising as to penalty, and about the salient features of the present case relevant to the assessment of penalties. Secondly, I am going to deal with the issue of market definition as a lump in the context of step 1. Thirdly, I will address in turn a number

of specific points made by specific Appellants – JJB, Manchester United and Allsports – other than market definition, but they will be dealt with in order of the Appellants rather than in order of step. Then finally, Mr Turner will address the Umbro issue.

THE PRESIDENT: Yes.

MR MORRIS: If I may say at the outset I am going to attempt to be relatively brief. I am conscious of time, and I am conscious of the time allotted. I am going to try and get through it reasonably quickly but with the proviso that obviously if there is an issue which I have left which the Tribunal is particularly exercised by no doubt you will raise it with me.

THE PRESIDENT: I have the impression we are unlikely to finish today?

MR MORRIS: I think that is right.

THE PRESIDENT: We may not go too far into tomorrow.

MR MORRIS: That is right, and I think what I am aiming to do is to see if we can finish today, and I am going to work with that in mind, but we will see how we go.

THE PRESIDENT: We will see how we go, because it is the Tribunal itself that messes up everybody's best intentions by interrupting.

MR MORRIS: I will say "no comment". Turning first to the general submissions. Although these points overlap I am going to deal with them under three headings. First, I am going to start with some observations about the facts of this case relevant to the penalty. Secondly, I am going to look more generally at the correct approach of the Tribunal to penalty as an exercise of the Tribunal, and then thirdly, look more specifically at the role of the guidance as far as the OFT is concerned both at the stage below and now.

Turning to the first of those. The task of the Tribunal here is to decide what are the appropriate penalties, bearing in mind the facts of the case and the objectives to be served by the imposition of penalties for infringements of the Competition Act. We submit in short that the conduct of the Appellants here gave rise to very serious infringements which called for substantial penalties in view of the need, not just for punishment but more importantly and overwhelmingly for deterrence, not only as regards these Appellants, but more generally to all. In these Appeals against penalty, each of the Appellants has raised a myriad of individual points made by the OFT in its Decision on penalties. Of course, we do not contest their entitlement to make those points, they are quite entitled to do so, but we do urge the Tribunal to maintain a correct perspective. The Tribunal should not allow the length and detail of some of these individual points to divert attention from the overall picture. One must not lose sight of the wood for the trees. In particular, for example, the extensive debate about relevant

product market, which I will deal with nevertheless, has to be seen in its proper context. The context of the relevant market point is that it is part of the starting point, and the starting point is just that, it is the beginning of the assessment of penalties and is not the end, or even half way through the story.

Similarly, various complaints are made by Manchester United, by JJB and Allsports about the issues of equality as between themselves, and also equality between themselves and with Umbro. Those complaints have to be seen against the context of the overall level of the fines imposed and the context of deterrence. I will come back to that point shortly in a moment. Of course, the bigger picture is this. First, the Tribunal has unlimited jurisdiction to assess penalty. Secondly, penalty must constitute a serious and effective deterrent. Thirdly, penalty is ultimately to be determined by reference to the total turnover of the company in question and not by reference to its turnover in the products affected by the infringement. The reason why that is, as I am sure the Tribunal is well aware, is that the total turnover is the measure by which one assesses the deterrent impact of a fine upon the company. The impact of a £1 million fine upon a small undertaking is bound to be significantly less in terms of deterrent than the same fine upon a major, large national plc.

THE PRESIDENT: The other way round, significantly more. We understand the point.

MR MORRIS: You have understood the point. The only constraint ultimately upon the amount of the penalty which this Tribunal can impose is the statutory maximum, and in order to achieve deterrence it may often be necessary to impose penalties well above 10 per cent. of turnover in the products affected. All these points which have been expressly made by the Tribunal in its Judgment in the Napp case, and I will in a moment be taking the Tribunal briefly to the relevant passages in that.

In the present case and, in particular, in the cases of JJB, Allsports and Manchester United the penalties imposed here represented a very small percentage of their total turnover, and a relatively small percentage of the statutory maximum, and I can give you those percentages now.

THE PRESIDENT: Yes, it would be helpful.

MR MORRIS: My Juniors will check that I have the figures right as I go through. JJB's fine represented 1.27 per cent. of total turnover, and 8.69 per cent. of the statutory maximum. Allsports' fine represented 0.97 per cent. of its total turnover, and 9.7 per cent. Manchester United 1.45 per cent. of total turnover, and 14.5 per cent. of the statutory maximum. Then,

I the case of Umbro 7.93 per cent. of total turnover, and 44.58 per cent. of statutory maximum. In addition to the point I make that these are still relatively small figures for the first three, of course that last figure demonstrates the substantially higher figure imposed upon Umbro by reference to a proportion of its total turnover. Umbro's fine as a proportion of total turnover was five times higher than that of the next nearest Appellant, even with a percentage rate of 8 and a multiplier of 2 and I believe a 60 per cent. total discount for mitigation. Indeed, the Decision itself records the fact that one of the reasons for the multiplier being reduced from 3 to 2 was to prevent that figure going even higher in proportion to the others. In many ways – I am getting ahead of myself – we would say that point deals very strongly with the suggestions of unequal treatment as between the other three and Umbro. Just one thing I can add, those figures we have in a table and how they are derived, and if the Tribunal would like to have that ----

THE PRESIDENT: Yes, that would be helpful if the Registry could have it – over the short adjournment.

MR MORRIS: Can I then turn to the particular circumstances of the infringements involved in the present case? These were serious infringements. The parties included major national retailers, a substantial national manufacturer, a famous football club and, indeed, one some would say is the most famous football club in the world, and a national body responsible for football in this country.

The relevant conduct involved the participation of senior executives and at least one high level private meeting. The product in question is a mass market consumer product, the purchasing patterns of which are inextricably tied to the Tribal loyalty of supporters for their own football team. The product is often purchased by or at the behest of children. The infringements found by this Tribunal involved the fixing of prices of the two flagship products at the relevant time – the Manchester United shirts and the England shirts – and as you, Sir, indicated in the course of argument in the view of some the launch of that particular Manchester United shirt was the most important launch in years. Those prices were fixed in respect of critically important sales' times.

These infringements were committed despite the giving to the Office of Fair Trading, or to the Director General, of non-statutory assurances a matter of months earlier by the clubs and the FA. Umbro was plainly aware of the assurances and indicated to its retailers that it had in fact given them. The retailers, including Allsports and JJB were also aware of their existence.

Since August 2001, this is the final Thatchell feature, prices for replica kit have fallen very substantially. The fixing of prices, we submit, for these products is likely to have had a huge impact upon consumers. By contrast, the shareholders of the companies involved can only have benefited from the activities covered by the infringement. These are matters which we submit are well familiar to the Tribunal and which, we submit, should be at the forefront of its consideration of the appropriate penalties. That is the factual background to the case, Sir.

Now I turn to the correct approach to penalty and much has been said both in writing and orally about what the Tribunal can and cannot do. Indeed, what arguments the Office of Fair Trading can and cannot now put forward. The OFT submits that the position is covered by the legislation and also to a large extent dealt with by the Tribunal in its Judgment in the *Napp* case, and to a lesser extent in *Aberdeen Journals*. To start with, can I give you three broad overriding propositions? The Tribunal has full and unlimited jurisdiction to assess for itself the penalty to be imposed and, if necessary, regardless of the way in which the OFT approached the matter. I will come back in a moment to the question of where the Guidance fits in.

Secondly, in reaching that assessment, the Tribunal must take account of all the facts found, including the facts before it, during the course of the Appeal proceedings, and the findings of fact it has made. My learned friend Lord Grabiner's point about matters not being raised at the administrative stage somehow disabling the Tribunal from taking account of matters which have been raised during the course of the hearing before the Tribunal on Appeal is, in our submission, not a good point as long as the relevant party has had the opportunity to respond to such prices as have arisen on Appeal.

Thirdly, the Tribunal should, in the final analysis, assess the penalty looking at the case as a whole, and taking account of the objective of penalties, namely effective deterrence and of the permitted maximum. Those submissions are drawn largely from the *Napp* case, and if I can take you, Sir, to ----

THE PRESIDENT: You may just give us the references.

MR MORRIS: The references are paras.497-503, and in particular 497-499 and 501. Then 535 and 537, and in particular 537 we emphasise, which refers to the question of the deterrence against the limits of the permitted overall maximum.

THE PRESIDENT: Yes.

MR MORRIS: Can I deal under this heading with three further points, and I will summarise the issues before I develop them.

First, what is the Tribunal to do with matters which the Office of Fair Trading did not take account of but which it could have done, or matters which the Office of Fair Trading attributed less significance than perhaps the Tribunal thinks should have been accorded. Secondly, matters which have arisen since the Decision; and thirdly, I am going to deal with the technical issue of whether there is power to increase the penalty.

On the first, we submit that the Tribunal can take account of a matter which the OFT could have taken account of but which it did not take account of. So, if the Tribunal were to find that the Office had erred on one particular point, but that such an error is counterbalanced by a factor which the Office of Fair Trading could have taken into account but did not, it is entirely proper for the Tribunal – and I emphasise the word "Tribunal" – to consider that point. That proposition arises in particular with the point about the USA which the Umbro sponsorship agreement in relation to Manchester United ----

THE PRESIDENT: The difficulty with that, Mr Morris, that specific point without going into the principle you set out, is that it is actually quite difficult for the Tribunal to go into how that particular calculation was made, and to decide whether it was wrong, or you could have done it differently and if you had done it differently how you would have done it, because certainly at this stage of the case it is not something we know anything about or a door we are particularly keen to open.

MR MORRIS: I understand that, and I obviously got that impression from the indication you gave to Mr Roth. I will, if I may, take a little time on that issue when I come to it – not very long but I will endeavour to persuade you as to what exactly we are saying. We are not saying that you need to do that exercise precisely, but we are saying that if you look at the facts of the case the figure that was given was the lowest possible figure and that a higher figure would have been permissible. In a nutshell that is the point. We are saying nevertheless you have the general proposition and it does arise in other contexts as well which, for example ----

THE PRESIDENT: The general proposition, it is implicit probably, in the general proposition that we have to look at the case as a whole at the end of the day, that we look at all the factors, and there may be a factor that was not given particular emphasis in the Decision which counterbalances another factor upon which weight is now placed, and may be relevant. If I may say so – and you can reflect on it over lunch – I am not sure it is going to be very profitable for you to further develop the very full submissions we have in writing about calculation of licence fees.

MR MORRIS: I hear what you say, Sir, and I shall take that into consideration.

MR COLGATE: Particularly bearing in mind that the Decision says it is impossible to put an accurate figure on the value of advertising and sponsorship rights, and we have not moved away from that.

THE PRESIDENT: Yes, and the broad brush approach that you are suggesting may not, in any event, entirely fit in to a very detailed calculation of licensing income, and the different ways of doing it. If you are going to have a broad brush you might as well have a broad brush.

MR MORRIS: I see the point that is made.

THE PRESIDENT: Anyway, let us press on.

MR MORRIS: I will come back to it in due course. My next point was the point that you just indicated, take a point that was not ignored by the Office of Fair Trading but which in fact the Tribunal takes more seriously or considers was not given sufficient weight. That is something which we say you are entitled to reach your own view on, and I raise that particularly, for example, in relation to the significance and importance of the giving of the non-statutory assurances. You may take a more serious view of it than the OFT appears to have done, and all I say on that is that you are entitled to do so, because effectively this is not a one-way process. It is not a matter of knocking down all the points, but you cannot put anything in the balance.

Moving on to the question of the Tribunal's power to take account of matters arising subsequent to the Decision, para.499 of *Napp* says that in general the Tribunal is entitled and indeed bound to take into account the facts as it has found them. That raises the question which you raised in the course of argument, which I will deal with now: what about unhelpful conduct on the part of an Appellant which has been disclosed for the first time in the course of the Tribunal proceedings?

THE PRESIDENT: You mean unhelpful conduct at the administrative stage?

MR MORRIS: You are ahead of me, I was just about to say I am going to distinguish two different cases. The first case is where the relevant conduct takes place during the course of the administrative stage, which is only revealed to have taken place during the Tribunal hearing. We say this: if the Appellant has been given a reduction for co-operation in the Decision then the subsequent revelation of unhelpful conduct should be taken into account by the Tribunal in considering whether that reduction, given by the Office of Fair Trading should stand. Now, that point arises specifically in connection with the discount given to Allsports for co-operation and the disclosure of the diary. The second subset within this set is if the Appellant has not been given any reduction for co-operation by the Office of Fair Trading, then in the light of the

Tribunal's remarks earlier the OFT can see the force of the suggestion that subsequent disclosure of unhelpful conduct is not grounds for the Tribunal to increase the penalty. That is a matter which may be the subject of other sanctions under the legislation, but I think in the light of the remarks made by the Tribunal we revisited at that point and we said before in the Tribunal that that is not a matter that the Tribunal ----

THE PRESIDENT: So they have not got a discount?

MR MORRIS: If they have not got a discount below. For example, this is the thrust of some of the JJB points, the store by store point.

THE PRESIDENT: The store by store point which is hotly disputed anyway. The most that could be done would be some kind of action under the OFT statutory powers rather than it being a matter for penalty by the Tribunal as regards the infringement.

MR MORRIS: If I may add, it may have been hotly disputed by Lord Grabiner, but ----

THE PRESIDENT: It is not disputed by you?

MR MORRIS: No, the proposition is that the underlying concept, the Tribunal was absolutely right in the substance of its findings – I can go there if I need to – we stand by both the points made by the Tribunal and the submissions we made based on those points, namely, that there was an unhelpful answer given in a letter plainly proven not to be correct and, despite the protestations of JJB, that was a serious matter, and the Tribunal may wish to express its displeasure about that. But on the specific point about whether it goes to penalty, I think the answer is that we cannot say that it does. It may come in at the question of costs, it is a matter for you, it is conduct generally, but we say it does not go to penalty.

The next question is: what about relevant conduct before the Tribunal - misleading or incomplete answers are given by an Appellant, either in correspondence leading up to the Tribunal proceedings or in the course of giving evidence? But this is a more difficult issue we submit. We ask rhetorically what should the Tribunal do about this? We say that it is entirely appropriate that the Tribunal should mark its disapproval of such conduct, not only for its own sake, but also in such a way as to deter such conduct in the future by parties coming before this Tribunal. Again, this is Mr Hughes' conduct in relation to the blacking out of the diary and the Tribunal's remarks in the Judgment on that. If the Tribunal is with me thus far, that it should mark its disapproval, the question is, how should it do that? One option would obviously be to reflect such conduct in costs. However, that may not be a sanction in circumstances where the Tribunal in any event concludes that the losing party should pay the costs. An alternative option would be for it to be taken into account in the penalty on the basis that such conduct

might affect the Tribunal's appreciation of what is needed in any particular case by way of effective deterrence. In other words, cavalier conduct by a party in front of the Tribunal may be such as to indicate perhaps a reluctance to take on board the seriousness of both the proceedings and the underlying matters which are the subject of those proceedings.

THE PRESIDENT: I think I have a little difficulty with that submission, conceptually speaking.

MR MORRIS: I understand you do, and my next point was going to be this, that we are fully aware and accept the principle that in criminal proceedings the manner in which a defence is conducted is not to be treated as an aggravating factor in determining sentence. We understand the Tribunal's hesitation on this issue. Nevertheless, the approach to setting penalties here is not quite the same as the approach in a criminal court where you start with guideline tariff sentences as the starting point and then you work down from that, from the guideline sentence. Here, there is an individual assessment of what is required by way of deterrence in a particular case, and we put it no higher than this, Sir, that the Tribunal may wish to express a sanction, or the need for a sanction, and we invite you to consider whether, the conduct of the particular party in question is such that it might be relevant to its consideration of deterrence. I cannot put it any higher than that. I am aware of the Tribunal's difficulty in some way, but on the other hand it is one thing to defend your position as an Appellant to your fullest ability, and not to co-operate. It is another thing to go one step further and to take steps which would have resulted – in the particular case of the diary – in material evidence not coming before the Tribunal.

THE PRESIDENT: The penalty is the penalty for the infringement, not for an attempt to pervert the course of justice, as it were, which is a separate matter.

MR MORRIS: I understand that matter, Sir.

THE PRESIDENT: Is there any specific example that you are asking us to take into account on this particular point?

MR MORRIS: That submission goes to our second point in relation to Mr Hughes's diary, which we make ----

THE PRESIDENT: I can understand that you might well say "We can review whether there really was co-operation, or sufficient co-operation or open and complete co-operation" or not, that is a separate point.

MR MORRIS: I understand that, but I am beyond that.

THE PRESIDENT: No, I know.

MR MORRIS: That is a failure to disclose the diary in the first place.

THE PRESIDENT: But you are now talking about the blacking out.

MR MORRIS: The blacking out and the remarks of the Tribunal in the Judgment – the paragraph number I cannot immediately bring to mind, but I will turn up in a moment. That is the clearest example we would say – it is para.319.

THE PRESIDENT: Yes, I am there.

MR MORRIS: To a lesser extent a couple of the JJB points go to this rather than to the investigative stage. The question for the Tribunal really is, should we be applying a sanction for what it found in para.319? That is the question, and we say the answer is, is a sanction in costs going to be adequate; and is this a matter which we ought to be taking into account in considering the question of contempt.

THE PRESIDENT: This is something that happened four years after the alleged infringement.

MR MORRIS: Well, I see that.

THE PRESIDENT: As far as we know.

MR MORRIS: I see that. That is my submission on the point. I recognise the difficulty and I put it before the Tribunal ----

THE PRESIDENT: I can understand why you make that submission.

MR MORRIS: These are serious matters, and serious as far as the conduct of proceedings in this Tribunal are concerned.

THE PRESIDENT: Are you inviting us to take any other action about that particular incident?

MR MORRIS: Not at this stage, I may wish to mull that over in the light of the indication you have given, but at the moment I am not – unless I have instructions otherwise the answer is "no".

There is then a further issue which, in fact, I will come back to if I may, but I just want to flag it now, and it is this: what, if anything, is the relevance of compliance programmes put in place after a Decision? I raise that partly because the Tribunal has asked the question. I am not going to make my submission ----

THE PRESIDENT: After a Decision?

MR MORRIS: After the Decision, that is JJB. Submissions were made by Lord Grabiner on the compliance programme. There was a suggestion, I think it was expressly made that some discount should be given or some mitigation should be taken account of because of a compliance programme after the Decision, and I will come back to that, if I may.

THE PRESIDENT: Just on that point, I have JJB in mind, we have MU in mind, I think I have Umbro in mind – what is the Allsports' position?

MR PERETZ: If I can just clarify the position? Allsports did put a compliance policy in force after the Decision. The Tribunal has a copy of that compliance policy. I have made no submissions about it, and the OFT have made no submissions about it either.

MR MORRIS: My understanding is that there was one in place, in fact, before the Decision.

THE PRESIDENT: Perhaps you can just clarify that over the short adjournment.

MR MORRIS: And the Decision refers to it but it was regarded as late.

THE PRESIDENT: Well come back to it after lunch, Mr Morris.

MR MORRIS: Yes. The next point I was going to deal with was the power to increase the penalty.

THE PRESIDENT: Yes, perhaps that is a convenient moment – it is not necessarily a short point. 2 o'clock.

(The hearing adjourned at 1.05 p.m. and resumed at 2.00 p.m.)

MR MORRIS: Sir, I was going to turn next to the question of the power to increase. The provisions of Schedule 8, para.3 will be familiar to you.

THE PRESIDENT: Yes.

MR MORRIS: Our submission is that under para.3(2) there is statutory power to increase arising from three separate sets of words.

THE PRESIDENT: Where are we?

MR MORRIS: Schedule 8 of the Competition Act, para.3 – 117 of the purple book – the Addleshaw Goddard's purple book, I was invited to draw to the Tribunal's attention. Paragraph 3: "Decisions of the Tribunal".

> "3 – (1) The tribunal must determine the appeal on the merits by reference to the grounds of the appeal set out in the notice of appeal."

I will come back to those words in a moment because I know they are words which you have raised, but we say the power is in the next paragraph where it says:

> "(2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –
>
> > "(a) remit the matter to the Director,
> >
> > "(b) impose or revoke, or vary the amount of, a penalty."

Can we start with the setting aside? You can set aside the Decision in the little bit before the (a) and (b), and then following setting aside the decision you can (b) impose a penalty. The words "vary the amount of" are within commas, so that it would read "set aside and impose a penalty" So that is starting *de novo* and we would submit that if your assessment of the penalty came up higher than the Office of Fair Trading's then that would be in the power.

The alternative wording in (b) is you may "vary" the amount of the penalty. That might arise by setting aside part of the Decision and varying the amount of the penalty and we submit the words "vary" must, as a matter of construction, cover vary upwards as well as vary downwards. You then have the power in 2(e), which is the third way, namely to "make any other decision which the OFT could itself have made." That, we say, is the power to increase the penalty. Can I just draw to your attention the fact that you can also remit, if you set aside. If you remit the matter can be reconsidered *de novo* by the Office of Fair Trading and it could increase the penalty taking in to account everything else. We would submit it follows that having decided that you want to set it aside, let us say, wholly, and you have the choice between remitting and dealing with it yourself, if you have the power to remit, and on remission it could be increased, we would submit that keeping it here, and dealing with it here there would equally be the power to increase.

THE PRESIDENT: But we are not in setting aside in this case, are we? We are in confirming, at the moment – we have confirmed the Decision.

MR MORRIS: Well, you might be setting aside part of the Decision in relation to penalties. Let us say that for one reason or another you do not agree with the final figure for one party, whether you think it should go lower or higher, we would submit that you would to that extent be setting aside that part of the Decision insofar as that part of the Decision imposed a penalty of £X million on company A. So in those circumstances you set aside part and vary either upwards or downwards.

On the point about the words by reference to the grounds of appeal, we submit that those words do not, as a matter of construction, affect a result which we say is arrived at on the true construction of 3 – (2). First of all the words are "by reference to the grounds of appeal" and are not "shall determine the issues raised in the grounds of appeal". As you pointed out in the course of argument, the Tribunal is plainly entitled to consider matters as the arise during the course of the Appeal and to find a more serious infringement as disclosed by the course of a full hearing of matters before the Tribunal, particularly in circumstances where, of course, this Tribunal has the power to test that evidence through oral examination and cross-examination, subject always of course to the point about the Appellant being able to deal with points and having its rights of defence respected.

If it is the case that the Tribunal is entitled to find in the end a more serious infringement, it cannot be right that having somebody has engaged in a more serious infringement – we do say that in some respects this case has gone further in that the Judgment

has gone further and I will come back to that later – but take the case as posited in the course of argument of something substantially more serious having been disclosed during the course of a liability hearing and a liability Judgment which makes such a finding. It cannot be the case, we would submit, that that Appellant can escape the appropriate penalty for that infringement as disclosed by the Tribunal's Judgment, merely because he did not ask for an increase in penalty in his grounds of appeal. We would submit that it would be an absurd result to construe the words in (1) to that effect.

If one were minded to view the words by reference to the grounds of appeal as limiting then the only alternative in those circumstances, because there is nothing in the Notice of Appeal about increasing the penalty, you would have to then remit, we would submit, and of course we would say that would be a wholly impractical and nonsensical result. We do say that the words in 3 – (1) are not limiting of whether or not the penalty can be increased. What those words are there for is to place a limitation on the Appellant as to the scope of the grounds of his Appeal. His Appeal is to be confined to the four corners of his Notice of Appeal subject, of course, to an application by him to amend the Notice of Appeal. Lord Grabiner, in his submissions, recognised that and made reference to the ability to widen the Appeal by reference to amending the Notice of Appeal, but what he failed to point out was that of course you would not expect an Appellant to amend his Notice of Appeal to say "and in addition please increase my penalty". We say that is how 3 – (1) and 3 – (2) marry, and we say in those circumstances there is plainly power to increase the penalty. This may not be that case – it may be – but on the question of construction we submit there is plainly power.

Can I move on to the Director's Guidance?

THE PRESIDENT: Before we just leave that, are you going to tell us how we should exercise that power – assuming that there is power?

MR MORRIS: I can move on to that now if you would prefer?

THE PRESIDENT: Just in general one might say that the structure of the Act is such that the Tribunal is there, as it were, to see fair play and it is rather undesirable that the Tribunal should turn itself into a sort of prosecutor by taking on the mantle of the public authority and imposing all sorts of penalties that the public authority, for one reason or another had not seen fit to impose, at least in a complex case where it might involve applying the Director's Guidance, and all the rest of it, which does not apply to the Tribunal. So if there is a power perhaps it should be very sparingly exercised. That is the first point, I suppose.

The second point is does this approach fit in with the jurisdiction of the Court of Appeal in criminal cases where there is no jurisdiction to increase the penalty - it specifically said there was no jurisdiction to increase the sentence – there is a power to rebalance it under the 1968 Act, but there is no power to ----

MR MORRIS: Attorney General's references.

THE PRESIDENT: You have an Attorney General's reference, yes, but that involves an Attorney General's reference – you cannot just do it off your own bat. The Court of Appeal does not say somebody has appealed this case and far from him having been punished too heavily he has got off very lightly and we are going to shove it up, that is not a risk you run in the criminal process.

MR MORRIS: My immediate response to that question is this, the analogy with the Court of Appeal; this is not a pure appeal court in the same sense.

THE PRESIDENT: Yes. It may apply the next stage up but not at this stage.

MR MORRIS: Absolutely. We have been uphill and down dale in this case about what it is that we have been doing, and the Appellants have effectively been submitting for most of it that this is a re-trial. In fact, this is the first trial, and the OFT has become the prosecutor, and that this is a full trial on the facts. Both as far as the Statute is concerned and as far as *Napp* is concerned, the reason you have full jurisdiction is that this is a full adversarial trial subject to the wrinkles about it has to within the date of Appeal, and the OFT must stay within the scope of the Decision and all those limitations. We have been through, we have had an administrative stage which is inquisitorial, and we are now at a different level of adversarial trail. It is a hybrid, and in our submission analogies are not particularly helpful, and you have to look a the particular powers.

We do say that if you come before this Tribunal as an Appellant and you wish to contest the matter you require the Office of Fair Trading to establish its case *de novo*, then if that is right the Tribunal should consider the matters *de novo* and it should have the ability to exercise its powers as it sees fit. Your first question, is it appropriate for this Tribunal to turn itself into a prosecutor seen in the light of the answer I have just given is the wrong question. You are the Adjudicator. At the inquisitorial stage, of course, the Office of Fair Trading is the prosecutor, but when it takes its Decision it is also the Adjudicator, or quasi-judicial body because of its dual function.

THE PRESIDENT: What point are we adjudicating on? The point we have been asked to adjudicate on is whether the penalty is too high, not whether the penalty is too low.

MR MORRIS: You have been asked to adjudicate in the round on whether these infringements took place as a matter of fact.

THE PRESIDENT: Yes.

MR MORRIS: And that is why it is a difficult exercise when we come to the penalty. Is your exercise to assess the penalty for the infringements as you have found, or is it merely to review the penalties imposed by the Office of Fair Trading, and we say actually it has to go beyond the latter. I will come in a moment to the question of Guidance – it cannot be that we are stuck within the confines of the OFT's Decision on penalty, particularly in circumstances where I would submit that the Tribunal has already held that you are entitled to take into account the facts as you have now found them. That is our response. Of course it is a hybrid, and of course there are wrinkles. Some reference has to be given to what the Office of Fair Trading has done and what the Guidance says, and I will come to that in a moment. To suggest that you start from scratch and you throw the Guidance and the Decision out of the window would be going too far, and I do not think I can suggest that. The outcome of my submission is "yes" if you come before this Tribunal and you appeal liability, or indeed appeal penalty alone, you do run the risk of a higher penalty being imposed.

I am not going to suggest to you "throw the Guidance out of the window", look at the statutory maximum, and take a nice broad brush figure and increase the fine for that reason, because it is a mis-match between what goes on a the administrative stage and what goes on now. But I am going to submit, and I do submit that if facts have arisen, and I am thinking in particular – I will come later to the point about a finding that the agreement covered more shirts than the England and Manchester United agreement – if you find those as facts you are entitled, we would submit, to take that into account in fixing the penalty. If that increases the turnover under the Guidance that may be something, and is something which you are entitled to take account of.

Can I deal with the Guidance, because it follows on?

THE PRESIDENT: Yes.

MR MORRIS: The statutory position is common ground. Can I deal first of all with what is the Office of Fair Trading's duty in respect of the Guidance at the administrative stage and then turn to what the position is as far as the Tribunal is concerned? The Office of Fair Trading's statutory duty is to have regard to the Guidance not to follow it, but the Office accepts that in any particular case it may wish to depart, or it can depart from the Guidance, but there should be reasons for doing so – we do not dispute that.

THE PRESIDENT: They should give their reasons.

MR MORRIS: I cannot step back from that proposition, yes, they should give their reasons for not following the guidance if that is what they do. In general, of course, they should have regard to it.

The position of the Tribunal on Appeal is that the Tribunal is not even required as a matter of statutory obligation even to have regard to the Guidance. You will recall at one stage in the course of argument when we got, I think, to the question of duration, Lord Grabiner went so far as to suggest to the Tribunal that it should not be too hung up on the Guidance. We say further that because of the role of the Tribunal on an Appeal is not merely to review the correctness of the OFT's approach, then if the Tribunal were to conclude that the Office of Fair Trading did not apply its own Guidance correctly then strictly, as a matter of statutory obligation, the Tribunal is not bound to set aside the penalty and remit it, nor is it bound itself to apply the Guidance.

However, the Office does recognise that the Tribunal cannot sensibly ignore the Guidance, nor can it sensibly ignore the Office of Fair Trading's application of the Guidance. We say the correct approach of the Tribunal is that the Tribunal should in general apply the steps in the Guidance unless it, the Tribunal, considers that in a particular case or on a particular aspect of a particular case, there is reason not to apply it. We say it would be wholly artificial for the Tribunal to confine itself to the Office of Fair Trading's application of the Guidance alone. For example, if the Tribunal considered that the Office had not applied the Guidance or had not justified its departure, the answer is not then just to uphold the Appeal, but it is for the Tribunal itself to make its own assessment, including taking into account the Guidance.

THE PRESIDENT: So we could say, on something like market definition – speaking hypothetically – "It is true that this approach leaves something to be desired", and we make it clear that in our view no material injustice has been caused.

MR MORRIS: Indeed that is right, but there is a further wrinkle to that – I am coming in a moment to market definition – if you were to conclude, for example, that the market definition in fact was right because of what we call "spill over", and if you were to conclude, although I do not ask you to do so, that in fact spill over is not spelt out in the Decision, but if you felt that on the evidence both in the Decision and elsewhere it was the right answer, then your answer would not be to set aside the Decision for that reason, but in the application by yourself of the Guidance you would reach the same result.

That does neatly take me into market definition, and in a moment I am going to summarise our submissions on market definition and step 1, by which I mean both relevant market and the 10, 9 percentage. Before I do so I would like to start by just posing a question: What is the purpose behind ascertaining the relevant turnover at step 1? We suggest that the answer is, in fact, common ground between the Office of Fair Trading and Manchester United at least, and it is this: the rationale of ascertaining the relevant turnover is that it presents a broad financial measure of the extent of the undertaking's activity which – and these are the important words: has been affected by the infringement. The key concept is the question of the activity – and I use the word "activity" neutrally so we do not use the word "product market", affected by the infringement.

Now if you look at Manchester United's Notice of Appeal, which I have at tab 2B, vol.1.

THE PRESIDENT: MU Amended Notice of Appeal.

MR MORRIS: If you go to para.10 ----

THE PRESIDENT: They accept that.

MR MORRIS: They accept that. Second sentence:

> "The reason for assessment of this turnover seems clearly to be that it provides a financial measure of the extent of that undertaking's activities that were affected by the infringement."

Now, with that context at the centre of one's thoughts can I just give you four submissions on this topic from the OFT which I will develop in a moment. The OFT's first submission and primary position is that the relevant product market affected by the infringement is all kit, taking account of the nature of the products as being an integrated whole – by which I mean shirts, shorts and socks – in general, and in more particularly of the spill over effect of the prices of shirts on the prices of shorts and socks.

Secondly, if this is correct then in fact the reduction of the relevant percentage from 10 to 9 given by the Office of Fair Trading in the Decision to I think all the Appellants, and I will take you to the relevant paragraphs on that in a moment, on the basis that the infringements did not affect all the products in the relevant product market, was in fact unnecessary and on the side of generosity, and I will explain in a moment why that is the case.

THE PRESIDENT: Yes, you cannot argue – perhaps the light has only just dawned – that these should have been included because they are products affected by the infringement, and at the

same time argue you have gone down to 9 per cent. because certain products are not affected by the infringement.

MR MORRIS: That is precisely the point, and I cannot express it any better and ----

THE PRESIDENT: I am sorry - a blinding flash of insight.

MR MORRIS: No, it has taken a while for the penny to drop for me, certainly. We say the Office of Fair Trading could have applied the full percentage, and on this hypothesis the Tribunal can, but we do not press you to do so.

The third point is this: if you disagree, and you accept the Appellant's arguments that the relevant product market is confined to all shirts because only shirts were "affected by the infringement", then we are now in the situation where we are wrong, and assuming the Tribunal then continues to follow the Guidance there would be no grounds at all to do what the OFT in fact did, which was to reduce the percentage from 10 to 9, and in those circumstances having held that the product market is all shirts the percentage should stay at 10.

THE PRESIDENT: Well, we should put it up to 10.

MR MORRIS: Yes, you should put it up to 10, or you should not make the allowance that the Office of Fair Trading made in its Decision. That is the slightly swings and roundabouts' point because we say, broadly, it will come to the outcome as we have come to. That was the third point, this is on the hypothesis that the relevant product market is all shirts.

The fourth point deals with Manchester United on what we call the further point, the cheese pare, which is to do with adult home shirts.

THE PRESIDENT: When you say we should put it up to 10, you mean we should put it up to 10 in relation to Allsports, MU, and JJB, you do not mean we should put it up to 9 for Umbro?

MR MORRIS: I am not sure ----

THE PRESIDENT: Or even 10?

MR MORRIS: From 8 to 9?

THE PRESIDENT: Well, 8 to 9, or 10. That is the logic, I think, is it not?

MR MORRIS: Yes. Can I come back on that point?

THE PRESIDENT: Which we are not going to do, I hasten to say, as far as I can see at the moment in relation to an Appellant in Umbro's position.

MR MORRIS: Yes, well I can see that, Sir. It is really illustrating the logic of our argument. It is swings and roundabouts, if it came down to shirts then there would be no reason for the 10 to 9 – that is the essential point. The further point from Manchester United that within shirts only the adult home shirts were affected by the infringement, and so they would say the percentage

should stay at 9, even if the market is narrowed to all shirts. We say that proposition is based on a false notion and a false understanding of the basis of a 10 to 9 reduction, and refuses the product "covered by the infringement", namely the shirt, and the product affected by the infringement, namely all shirts. The notion that there is this further subdivision below products affected by the infringement is one for which there is no justification either in the guidance or in principle.

THE PRESIDENT: But you would still have to show at least some evidence that the agreement on the MU adult home shirt had some spill over effect on the price of the junior shirt and the infant shirts and so forth?

MR MORRIS: Well we would for the purpose of product market ----

THE PRESIDENT: To show they were affected by the infringement.

MR MORRIS: Yes, but of course Mr Roth accepts that the relevant product market is all shirts. This is something that I think we were confused about, and no doubt he will clarify in reply.

THE PRESIDENT: That is what MU says, but I do not think the other two say that.

MR MORRIS: No, it is certainly the case that Mr Peretz for Allsports submits, and we are not on the cheese pare argument, we are on the argument above about what the relevant product market is. Mr Roth says it is all shirts, Mr Peretz says it is all shirts minus junior, or it is just adult shirts in fact; and Lord Grabiner says it is all shirts minus goalkeepers'. That is a spill over point and we would submit that even if you are not with us on spill over from shirts to shorts and socks there is strong grounds for spill over from adult to junior.

Going back to the first proposition then about whether the relevant product market is all kit and the question of spill over. We would suggest there are two aspects. The first is the nature of the product.

THE PRESIDENT: Should we start with what the Decision says?

MR MORRIS: Yes, I was about to take you to it, if I may? Can I take you through certain paragraphs in the Decision from the beginning?

THE PRESIDENT: Yes.

MR MORRIS: I was going to take you first of all, Sir, to para.55.

> "Replica football kit consists of authentic reproductions of the short-and-long-sleeved shirts, socks to which a football club or national football team's logo or trademark and those of the manufacturer and any sponsors are applied and which are worn by the relevant team's players when competing in football tournaments."

Now I think at one stage Mr Roth suggested that we had added a gloss about "on the pitch", but in fact the fact that they are worn on the pitch, or playing in tournaments is in the Decision.

> "Replica football kit is produced by or on behalf of most football clubs in adult, junior and infant sizes. Infant replica football kit is usually sold as a single product whereas the shirts, socks and shorts of the junior and adult replica kits generally can be bought separately."

So we recognise they can be bought separately but a key feature is that they are worn by the team when competing in football tournaments.

If you would then go to para.59 you then have the feature about kit launches and the cycle. 59 talks about the annual new kit launch – "kit" being the three elements:

> "A club will normally wear the same home kit for two consecutive football seasons before changing to a new home kit. The same applies to the club's away kit, but the changes are staggered and take place at the start of consecutive football seasons."

THE PRESIDENT: And there is some suggestion that we are concerned with particular shirts rather than the launch of new kit in relation to the England shirt and the MU home shirt?

MR MORRIS: You mean the agreements were about the launch of a particular ----

THE PRESIDENT: Well, first of all that the new MU home shirt did not involve the launch of a new kit, as I understood his submission to be. It is a question of fact.

MR MORRIS: I am going to give you my immediate reaction, somebody will correct me. My understanding is when you launch a new shirt you launch new shorts and new socks at the same time.

THE PRESIDENT: Well, we might just try and get to the bottom of that, it is a matter of fact.

MR MORRIS: I am pretty sure as a matter of fact that is the case.

MR ROTH: If I can perhaps help on that?

THE PRESIDENT: I may have misunderstood you, Mr Roth.

MR ROTH: I think possibly I did not make it very clear. When we launched the new home shirt there were home shorts and home socks launched as well.

THE PRESIDENT: I am sorry, I misunderstood.

MR ROTH: The point I was making was there was a total product launch at the time, it was not just ----

THE PRESIDENT: I am sorry, yes, it is my mistake.

MR ROTH: Of course there were shorts and socks, because there was a new hat, new scarf and new everything.

MR MORRIS: If that becomes a contested issue I do not think ----

THE PRESIDENT: It is not contested.

MR MORRIS: I do not think we would accept that there is a general launch of all licensed merchandise.

THE PRESIDENT: Anyway we have no evidence.

MR ROTH: We are talking about specifically Manchester United August 2000 and that is a fact.

THE PRESIDENT: You say that was the launch of a whole lot of stuff?

MR ROTH: Yes, the reason being we changed our sponsor – Sharp I think was the old one, and it was then all Vodafone.

MR MORRIS: But that is a one-off and our position will be that this cycle that I am referring to is a cycle in relation to kit and is not related to shin pads, nighties, dressing-gowns or anything else. The team does not change its nightie every two years and have a home nightie and an away nightie – but perhaps I am getting carried away.

The point is, if you look a para.57 of the Decision it records that:

"The shorts and socks were designed to match the shirt of the relevant kit and, like the shirt, are changed with each new kit launched".

So it is in the Decision at 57.

THE PRESIDENT: Thank you, yes.

MR MORRIS: Then para.60 we have the one year interval between changing their home kit and changing their away kit.

"… teams can ensure that at least one new football kit (either home or way depending upon which has reached the end of its two year shelf life and which is only one year old) can be launched by the club immediately prior to the start of each new football season. England kits are usually launched on or around St George's day…"

That sort of detail we know already. But the essential point we are making here is that they are designed, marketed, launched together in the same cycle, and they are effectively, we say, an integrated product. We do not deny that they are bought separately, but that is a slightly different point.

Then in para.62 we have the point that we define precisely what we mean by "Replica Kit", and you have read that sentence before, but in the last line of 62 we draw to your attention the point again that the key feature is that they are worn by the relevant team's players when competing in football tournaments, and so a lot of the other materials in the Manchester United brochure would not meet that condition. We accept, of course, that

footballer may wear shin pads, and I will come to that in a moment, but for a lot of the other materials in the brochure they are not worn by the team when competing in football tournaments.

Then at 63 we have the ratio of sales, but you will notice also in footnote 56, the ratio in terms of turnover, and that is 23:2:1. I am instructed that that represents a figure of 88 per cent. of turnover – shirts. So that is the background.

Then I go to the penalty section of the Decision. Paragraph 545 recognises the other licensed merchandise, and in fact makes the nightie and bedwear point, more eloquently than I put it. Paragraph 545:

> "All the relevant clubs also had further ranges of clothing manufactured by Umbro and by other manufacturers bearing the club's logo and those of Umbro where applicable. Such clothing was not generally worn by the team's players and ranged from T-shirts through to scarves, hats, babywear, bathrobes and pyjamas. In addition to clothing, the clubs also have extensive ranges of Other Licensed Merchandise including bags, footballs, mugs …etc."
>
> "The OFT takes the view that Other Licensed Merchandise is unlikely to be substitutable with Replica Kit even when it is a similar item of clothing. The importance and key distinguishing feature of the Replica Kit compared to Other Licensed Merchandise is that it is more or less identical to the kit worn by the supported team's players when competing in tournaments. It is seen as a prime means of showing support for the current team including individual players. The on-going success of the market demonstrates to the OFT that a significant number of consumers of Replica Kit must routinely replace their Replica Kit or purchase Replica Kit for the first time when a new season's Replica Kit is released. These characteristics set Replica Kit apart from Other Licensed Merchandise."
>
> "Moreover, Other Licensed Merchandise is not subject to the same predictable demand cycles as Replica Kit, usually only being replaced due to changes of sponsor or manufacturer rather than seasonally."

and that meets the point that Mr Roth has just made about the launch of the Manchester United shirt in 2000 which was the change of sponsor from Sharp to Vodafone.

> "It is also not subject to the same marketing arrangements, being primarily sold through the team's own retail operations and in much lower volumes. The launch of a Replica Kit is seen as a major event for a team and it will be subject of a highly

advertised launch date with competitions, advanced orders being taken and frequently extended retail opening hours."

So that all goes to the point we make about you have one integrated product which is kit, and you have other stuff but the kit itself is an integrated product.

Then we go to para.553, which is the conclusion, where it is stated that:

"First, the OFT is satisfied that all but one of the agreements covered by this decision had as their object the price-fixing of various Umbro licensed replica Shirts. The England Direct Agreements went wider than this and extended to other A Licensed Merchandise. In each case, sales of Replica Shirts are the most important item of Replica Kit and drive sales of replica shorts and socks. Therefore, whilst a Replica Kit is comprised of several products (adult and junior shirt, shorts, socks and infant kits) which are sold separately and whilst a fan who wants to wear a pair of shorts cannot substitute this for a Replica Shirt …"

Pausing there for a moment, Sir, that is recognition that there is not demand side substitutability, so we have not said that there was.

"This does not necessarily mean that each kind of product is a distinct relevant product market. A Replica Kit is designed and marketed at launch as a single product and with the same purpose of showing visible support for a particular club or team by distinguishing itself from the Replica Kits of other clubs or teams. The home, away, third and goalkeeper's Replica Kits have the same characteristics, prices and intended use as each other."

THE PRESIDENT: What are we to make of the words "sales of Replica Shirts drive sales of Replica shorts and socks"?

MR MORRIS: It is meant to be a reflection, I would submit, first of all of the volumes, the larger volume of course it is the shirt that is sold. On the whole, whilst you might buy a shirt separately, and I know there has been a suggestion that shorts will be bought separately, but on the whole it would be the sale of the shirt which would drive the sale of the shorts and socks.

THE PRESIDENT: Well that is the proposition that is disputed, I think. We do not know what the evidence is on that.

MR MORRIS: I accept that, but that is the way we would suggest. We would also suggest in terms of pricing, and I will come to that in a moment, the pricing of the shirt does drive the pricing of the shorts and the socks, and I will deal with that in a moment in terms of spill over. In terms of the wording there it is sales that is referred to rather than price. But we do submit that there

is a relationship and it is there intended effectively to reflect the shirt is the most important item.

THE PRESIDENT: I suppose it is a bit unlikely to imagine Replica shorts and socks without there being a Replica shirt?

MR MORRIS: Yes.

THE PRESIDENT: You would not just make some shorts and socks, presumably?

MR MORRIS: Yes. The temptation always in this sort of question is to give one's own anecdotal view, and it is very difficult to resist doing that, of course, it is not evidence. But everybody comes up with examples "Well, you would not walk into the pub with a pair of shorts on" but then the evidence of buying Replica shorts on their own rather than ordinary shorts is pretty thin as well. So it is difficult.

MR COLGATE: But there is no direct evidence of the sale of shirts driving i.e. pushing the sale of socks and shorts, particularly in mind of the ratios of 5:1:1?

MR MORRIS: At the moment I cannot refer you to such evidence. If there is some I will dig it out, but this word "drive" - that is why the President asked the question, no doubt, but ----

MR COLGATE: "Linkage" then. Is there a linkage between the volume sales of shirts with the volume sales of socks and shorts?

MR MORRIS: I do not think I can say that there is such evidence.

THE PRESIDENT: I suppose if you found that those ratios that you gave us, 5:1:1 were more or less constant, that that was a typical pattern, that in a typical launch you would sell 5 shirts, 1 socks and 1 shorts you would say "Well, there is some kind of relationship", if that were the evidence.

MR MORRIS: If it were the case that that stayed relatively constant.

THE PRESIDENT: I do not know, Mr Colgate probably disagrees with me and we will argue amongst ourselves.

MR COLGATE: No, no, I was going to say Mr Roth yesterday was actually I think trying to show the reverse.

THE PRESIDENT: Yes, he was.

MR COLGATE: That actually there was not that significant linkage between shirts and socks and shorts.

THE PRESIDENT: But that would raise the question of where that 5:1:1 figures comes from? Whether it is an across the board figure.

MR MORRIS: The central point is that they are plainly, we submit, designed and marketed as

a package. They are not unrelated products. The design of the shirt, and no doubt people from Umbro and the like will correct me, but the design of the shirt is the central feature of a new product. The shirt is the big item. The change, whether you have a white stripe across your red, or you have black markings on the bottom, and you then design the shorts and the socks, as an adjunct to the shirts. So if you look at the brochure – which I have not done – but when Manchester United changed, certain features in the design that are on the shirt will be reflected in the shorts, possibly – the design of the Umbro diamond, or the Manchester United badge, and again this is anecdotal ----

THE PRESIDENT: And you have a bit of evidence in footnote 56, I think, on the ratio, p.27. I suppose if you could say to yourself as a manufacturer or retailer, "Well I more or less know that for every five shirts I sell I will sell a pair of shorts and a pair of socks", there would be some loose sense in which you could say the sales of the shirts were driving the shorts and the socks.

MR MORRIS: Yes, and if that were the case then what you would say, presumably, is "Right, we are going to design a shirt" – the home kit when it was held up by Mr Hughes – "This is a fantastic design, this is a new product, it is made of the best material". It would follow that if you have a great product in terms of shirt and that ratio happens, then it would drive the sales of shorts and socks, but of course that assumes that the ratio is in some way predictable.

THE PRESIDENT: We are a bit stuck on the evidence, but Mr Hughes might have said "I know there was some dispute over the figure but he said at one point "I have ordered 50,000 shirts". If the evidence was that when you ordered 50,000 shirts you ordered 5,000 shorts and 3,000 socks you would get a rough idea of what the relationship between the sales' volume was.

MR MORRIS: But everybody talked in terms of the ship because that is the lead item.

THE PRESIDENT: It is the "lead item", yes, in a sense.

MR MORRIS: As Mr Turner says, it is the lead item of the uniform, it is part of a uniform. You do not just put any shorts on, and it is no good having the Manchester United 2000 red shirt, with the Manchester United 1998 white shorts, because that is not the current Replica Kit.

THE PRESIDENT: So at least you could probably infer, could you – I just do not know – that at least some sales of shorts and socks must go with the shirt.

MR MORRIS: I do not think the Appellants are saying any more than when they say, assert or give evidence, and I think perhaps Ms Charnock is the only evidence, that sometimes shorts are bought on their own. I do not think they are going on to say that in all circumstances shorts and socks are bought on their own and not with a shirt. They could not say that and it must be,

I would submit, the minority of cases, but that is my guess and I cannot do more than that, but it cannot be the case that they are never sold as part of the package.

Can I then just look at the question of spill over on price, and the price relationship, and make a number of points here? What I would like to do first of all is to show you the evidence that is in the Decision, which is pertinent to this point, and there are three paragraphs in the Decision. If I may I would like to start at para.139 which is an Umbro file note prepared by Mr Attfield of 1st March 2000, following a meeting with Mr Nevitt of Sports Soccer on 22nd February. There he says that he has discussed with Mr Nevitt the prices of England jerseys, shorts and socks. "Indications from Mr Nevitt are that the kit will be" and then he gives prices for all three items. So there is an indication of the pricing being set. This is not a launch period, but Sports Soccer's pricing for England shirts being set together with their prices for England shorts and socks.

Then at para.173 we have an extract from Ronnie3 about the Golf Day, where he says: "During the dinner David Hughes [of Allsports] said words to the effect of 'I bet that you are wondering why you are all sat the same table!' David Hughes stated that he was concerned about licensed products i.e. replica shirts, shorts and socks and the price at hic they ware sold. He wanted to know what the 'brands' who were represented by the people around the table could do about the situation."

THE PRESIDENT: I doubt whether that means that Mr Hughes says "I am very concerned about licensed products", i.e. replica shirts, shorts and socks. That is probably just an explanation, is it not, so the reader knows what he is talking about?

MR MORRIS: And even if this is Mr Ronnie's take on what Mr Hughes said – in other words, even if he did not say those words, but that was Mr Ronnie's interpretation of it, the very fact it is Mr Ronnie's interpretation that he sees what was in issue was the pricing of the products together – the pricing of all the products is itself relevant evidence, we suggest, of the pricing relationship between the shirts socks and shorts.

Then at para.232 of the Decision – we are now in April 2001 – we are now talking about a launch price for the next England home shirt. At 232 this is an Umbro internal email of April 2001 from Mr Attfield to Mr Ronnie's PA. Mr Attfield says:

"Please find below the pricing structure for the forthcoming England Home Kit."

Then he gives figures again for all items and for infant kit. We say that is strong evidence of a pricing relationship between shirts and shorts and socks, and – and I will come to this point in a moment, a point which the Tribunal made in argument – an added relevance of this evidence

is this is talking about a launch price and I will submit in a moment that at launch there is tracking, there is a parallel line and the price at launch of the shirt will have a very direct correlation over the price of the shorts and socks at launch.

MR COLGATE: Mr Morris, you emphasise launch.

MR MORRIS: Yes.

MR COLGATE: Are you saying that there is not a correlation post-launch?

MR MORRIS: No, I am saying there is a correlation, but I am saying the correlation is particularly strong. We have seen the tracking graphs and there are instances, and I cannot get away from the fact, where the shirt is discounted and the shorts and the socks are not. But there are also instances where they do follow the parallel line, either together or there is a drop together. What I am saying is when you look at launch, the cases where they are out of sync. you will not find very many – if any – because at launch they are tracked. Put it this way, the price at launch of a shirt will very much dictate the price at launch of the shorts and socks.

THE PRESIDENT: That, I think, is what we are just trying to see what the evidence is.

MR MORRIS: I will try and help you with that as much as I can.

THE PRESIDENT: Just as you were saying that there is an overall ratio in volume 5:1:1 you might, if you looked at those charts, see that the price of the shirt, the price of the shorts and the price of the socks follows a ratio of 3:1.5:1 or something.

MR MORRIS: I am not sure that my maths is good enough to do the ratio but in absolute terms there is a sort of parallel tracking. If I may come to that very shortly. We say there is the evidence in the Decision.

What we say about those cases where shirts come down and shorts do not come down – I am talking about other than launch – is that that does not indicate that there is not a spill over effect. We say you look at it the other way and we say if there are a substantial number of cases where shorts do come down when shirts come down, then the price fixing of a shirt would, in those cases, have the effect of preventing discounting of the shorts, and so generally if there are a substantial number of cases where there is a parallel step down, if you fix the price of a shirt and prevented the step down of the shirt alone under your agreement, we say that you would prevent the step down in relation to the shorts and socks.

THE PRESIDENT: You say even if there are some price changes where there is no obvious relationship or indeed there are some sales of shorts and socks individually without the shirt, if you can reasonably assume on the evidence that to at least a substantial extent there are price changes that are related to each other, or to a substantial extent that the kit is in fact sold as

a unit you do not have to go so far as to say that that happens in every case.

MR MORRIS: Yes, and we say that the fixing of the price of the shirt alone will affect the prices of shorts and socks, and therefore going back to applying our test those are products affected by the infringement.

Dealing particularly with the launch price point, can I just take you to table 4, to show the tracking at launch.

THE PRESIDENT: Table 4 of the Decision.

MR MORRIS: Yes, and it is the Manchester United 2000 home kit, and I am going to try and explain it as best I can – I sometimes find these tables difficult to read. This is a table over two pages, and the first page has JJB's and Allsports's prices. Before we go to it, the proposition is we say that at launch the pattern is that the shirt is set at the High Street price, which is the price lower than RRP, and the shorts and socks are set at RRP. So if you look for the home shirt 2000 at 1st August, you will see that at launch the RRP is £42.99 and JJB's sell at launch at £39.99. The shorts are at RRP £21.99 and the socks RRP is £8.99. You will see that JJB sold at launch the shorts and the socks at RRP. If you go over to the far right hand column, Allsports, you will see exactly the same, that Allsports sold the shirt at High Street price, £39.99 and the shorts and the socks at RRP.

You then go down to the away shirt and the same applies, in fact, if you go down the whole of this table for the away shirt, the third shirt and then you go in fact into junior shirts, which repeats the same, "home", "away" and "third", you will see in all instances at launch the shorts and socks are launched at the RRP, and track in parallel the launch of the shirt at what has become known as the High Street price, which is below RRP. Mr Turner reminds me, of course, that in 2001 RRP of the shirt came down to match the High Street price. Then over the page you will see the same applies - Sports Soccer does not, but that is Sports Soccer being Sports Soccer in relation to the shorts and socks, but JD and Blacks do the same with one exception. In a way the exception slightly illustrates the point, that JD for the MU shorts launches for the shorts at £19.99 rather than £21.99.

I think we can say the same again for the centenary kit in 2001, except that there you have Allsports in fact the socks are slightly above RRP. We say that that evidence shows that at launch, and the reason of course that at launch is critical is because that is what the agreements were about – launch or key selling periods as far as England is concerned, but at Manchester United it was about launch.

We would submit that it is a fair assumption that, absent the price fixing and if the shirt had been discounted, assuming that absent price fixing that was what it was designed to produce, that the shorts and socks would also have been discounted or would have tracked down. This is a question you have asked about in terms of evidence. Can I tell you what we do know and what we do not know? We do know, for example, that in April 2003, when the 2003 home shirt was launched, that it was launched by JJB at £25 and we say that figure is quite important ----

MR HOSKINS: Can Mr Morris please tell us where this evidence is taken from.

MR MORRIS: It is in Russell cross-examination.

MR HOSKINS: Can you just give me the reference?

MR MORRIS: I think it was put in cross-examination at one stage.

THE PRESIDENT: I think it is in the Judgment somewhere, but I cannot put my finger on it.

MR MORRIS: We will just dig up the reference in a moment. You will have plenty of time to respond, Mr Hoskins, I am sure. It was launched at £25 and Sports Soccer in fact undercut it overnight, and I am sure that came out in evidence somewhere, and went out at £24. We also know, I believe, that at the launch of the England Red Shirt, which happened about the time of the hearing last March, again the Red England Shirt was being sold at about £25. But let us leave that example to one side, and let us look at the England home shirt that we do know about.

THE PRESIDENT: What we would very much like to know is what was the price of the shorts at the time?

MR MORRIS: That is what we have been trying to find out, and we, the OFT, have not come up with an answer to that, but I am going to suggest to you, Sir – we will obviously keep trying and no doubt the Appellants can help as to what they were selling the shorts at at the time they were selling the shirts at £25 – if you look at the price for shorts in table 4 that we have just been looking at for the Manchester United home shirts in 2000, and I do not know what the England shorts' price was. It was £21.99. We would submit that it is highly unlikely that those shorts would still have been being sold at almost £22 if the shirts moved down to £25. Now, that is as high as a we can put it at the moment, Sir, I am afraid, subject to one other piece of information.

THE PRESIDENT: If you just – this is very rough and ready, somebody can probably do it more car carefully overnight – but if you just flick through these charts, just as a matter of visual

impression, at launch where you are dealing with the High Street price, or RRP, the ratio of price in relation to the shirt, the shorts and the socks, looks to be very broadly 4:2:1 ----

MR MORRIS: 40:20:10.

THE PRESIDENT: 40:20:10, give or take £1 here and there and rounding up and all the rest of it, it is not quite right, but just to put it in round figures, which would suggest that if the price at launch was not 40 but 30 the shorts would be 15 and not 20. Whether we can draw that inference or get that far I have no idea.

MR MORRIS: Whether you need to go that far is another matter. We would submit you do not need to go that far. We would submit that even if the ratio slightly changed ----

THE PRESIDENT: There would be some downward ----

MR MORRIS: It dropped, because obviously if you keep going down there must be a cost base, you cannot drive shorts or socks to nothing, or £1. It may be that the ratio changes but broadly the steps at launch we would submit on this evidence are likely.

THE PRESIDENT: But it is reasonable to assume, you say, that a lower shirt price at launch would put downward pressure on the prices of shorts and socks?

MR MORRIS: Yes. The reference on the price of the shirts is in cross-examination of Mr Russell at day 9, p.111-112 and carrying on to 113 and 114, where the question of the England April 2003 shirt was discussed. Sir, that is the position, we say, on spill over.

Can I just take you to the 10, 9 reduction ----

THE PRESIDENT: Yes. Would it be fair to say that spill over as such is not relied on in the Decision?

MR MORRIS: It is fair to say that the concept of spill over in the terms in which we have now expressed is not put that way. There is evidence, however, of a relationship and there is certainly the material in the Decision, and that in a way was the point I was making. If you were to consider that while the OFT did not put it that way, applying ourselves the Guidance, and applying the arguments of the parties, we conclude that the words "product affected by the infringements" include this concept of spill over and there is adequate material to satisfy us that that is the case, and you would be entitled to reach that conclusion.

There is one other piece of information that we have which was that somebody – I think Mr Roth – indicated that the price of the MU shirt currently ---

MR COLGATE: I asked the question because of the 04/05 brochure indicated the retail price was £39.99 and then I checked that with counsel.

MR MORRIS: That is the brochure price. Can I just give you some information that we have which goes both to that and to the point about shorts? My instructions are that in JJB's Oxford Street store today the adult home red shirt is being sold at £30 – of course this is not a launch time so one has to bear that in mind, but the adult home shirt is being sold at £30 – the junior home shirt is being sold at £24, and the adult shorts are being sold at £16, and the junior shorts are being sold at £13-£15 depending on size. I do not have figures for socks.

MR COLGATE: This is MU?

MR MORRIS: This is Manchester United home red shirts currently in JJB's Oxford Street store.

THE PRESIDENT: Well you are not far off a similar ratio as between the shirt and the shorts, if that is right, and/or admissible. [Laughter] This may be a point where it is possible to reach some kind of agreement with the Appellants, I do not know.

MR MORRIS: On the facts.

THE PRESIDENT: On the facts, yes.

MR MORRIS: It may be. Mr Turner points out the questions of admissibility – I am sure we can get evidence if need be, but I am sure the Tribunal – well, I am not sure but I would hope ----

THE PRESIDENT: Well we can always if necessary ask ourselves for information on prices of socks and shirts.

MR MORRIS: On the 10 to 9 reduction, can I just take you to the Decision on this?

THE PRESIDENT: Yes.

MR MORRIS: Because I do not think you were shown all the relevant paragraphs on it. The general position, of course, as you know is that having considered that the product market was all kit there was a reduction to take account of the fact that the agreement affected only shirts. I would say, before I take you to the passages, that it is our submission that that reduction was to take account of the difference between all shirts and all kit, and not to take account of any further subdivision within shirts. I think you can get that from 578, where the point is first raised with relation to Umbro.

Paragraph 578, under Umbro's heading:

"Due to markets being defined relatively narrowly and exclusive licences being granted for the manufacture and sale of the Replica Kit, Umbro has 100 per cent of each market between licence contracts. The infringements affected around 35 per cent of Umbro's business. The infringements (other than the England Direct Agreements) …"

and that is worth bearing in mind, Sir, that England Direct did include all kit and not just shirts – the agreement.

THE PRESIDENT: Well the only Appellant now affected by that agreement is Umbro, and Umbro has not taken a point on that.

MR MORRIS: I am using that for illustrative purposes to lead into the reasoning for why the 10 to 9 reduction was made, and the point that I make is that what is in the OFT's reasoning indirectly speaking is excluded from the reasoning,

> "The infringements (other than England Direct Agreements) are limited to Replica Shirts within the relevant markets, but this is the largest selling item of Replica Kit with approximately five shirts sold for every pair of shorts and pair of socks."

Footnote 686, which takes you back to the 5:1:1 and the 23:2:1.

THE PRESIDENT: Yes, I see.

MR MORRIS: So that is the general background to the change. Then if you go to 581 you will see the first application of the 10 to 9 reduction, although in the case of Umbro it was not 10 to 9 ----

THE PRESIDENT: That raises quite an important point, because it does not actually say "We would have fixed it at 10 per cent. but for this", it says that it does not include all products in the relevant market, and then says the percentage rate is 8.

MR MORRIS: No, it does not, Sir.

THE PRESIDENT: So how do we work out that it has come down from 10 to 8 because you have left something out of the relevant market?

MR MORRIS: Well it obviously has not come down from 10 to 8 for that reason, because of course we are into the vertical and horizontal ----

THE PRESIDENT: Well what has it come down from?

MR COLGATE: And also why 8? Why not 7, or 9? I mean it is understanding the logical thinking behind that figure?

MR MORRIS: I think the best way one can explain it is by saying as far as this factor was concerned, it was a factor which brought the percentage rate down – not in the case of Umbro but in the case of Allsports, JJB and Manchester United – it was a factor which brought it down, and since they had got 9 in any event we would submit that in their case it must have been a factor, if not the factor which brought it down from 10 to 9. In Umbro's case, it is more complex than that because there are other considerations which led to Umbro getting 8 rather than 9. I am not suggesting that ----

THE PRESIDENT: Yes, but this is quite difficult in terms of *ex post facto* rationalisation, as it were.

MR MORRIS: Of course.

THE PRESIDENT: If, as you tell us, that shirts in any event account for 88 per cent. of the relevant market how is a reduction of 1 per cent., which is quite a substantial reduction, justified on the basis that you have left out of account these somewhat less important sales? I do not know what the logic is; it is not clear what the logic is.

MR MORRIS: I do not think we are suggesting it is a precise mathematical formula.

THE PRESIDENT: I thought the point was that if you took the year ended 31st July 2000 as the basis of your turnover, although that is technically the year you have to take for the basis of the calculation for MU, notwithstanding that the new MU shirt is only launched on 1st August, which is the day after the end of that year, in that turnover figure you have a whole lot of shirts which were not affected by the infringement. I thought that was the point – not that you had left out shorts and socks?

MR HOSKINS: Sir, can I make a point on this, because ----

THE PRESIDENT: In a moment, Mr Hoskins.

MR MORRIS: I will stand correct but I do not think that is what I was suggesting.

THE PRESIDENT: No, that is what the Appellants are suggesting.

MR MORRIS: This is Mr Roth's additional point. Mr Roth is saying that what is not affected by the infringement is anything beyond the home shirt which was the subject matter of the agreement.

MR ROTH: We are not saying that.

MR MORRIS: Mr Roth, I would appreciate it ----

MR ROTH: Well if you are trying to say what I was saying, can I just explain what I was saying?

MR MORRIS: Perhaps you can deal with it in reply.

THE PRESIDENT: Just a moment, Mr Morris, I think we will just regroup for a moment ----

MR MORRIS: Very well.

THE PRESIDENT: And hear Mr Roth and Mr Hoskins.

MR ROTH: Just to clarify, it is an assumption, I agree, because it is not explained. It was exactly the assumption that you have articulated, Sir.

THE PRESIDENT: That was your submission?

MR ROTH: Yes, we made the assumption that it is not the shorts and socks because they are such a small part of it and that would not explain 10 to 9, that does not make sense, and it was that the home shirt is ----

THE PRESIDENT: So there must be something else, and you supposed that must be the other shirts that were pre the infringement.

MR ROTH: Because otherwise we could not see how it made sense.

MR MORRIS: I understand the point now being made.
THE PRESIDENT: Now let what Mr Hoskins was trying to say. Can it keep, Mr Hoskins, or is it something that you are burning to tell us?
MR HOSKINS: Sir, simply, and I think the Tribunal is getting there, and I think Mr Morris, to be fair to him, is being very careful. One of the points we made was that the reasoning is defective ----
THE PRESIDENT: Yes, we have got that point.
MR HOSKINS: Mr Morris has to be very careful not to give *ex poste* reasons because that certainly is not admissible.
THE PRESIDENT: We have that.
MR MORRIS: I understand now that Mr Roth's understanding of the further reduction, the 10 to 9, was to reflect the difference between on the one hand adult home shirts as the subcategory, and all shirts as the comparator, all kit.
MR ROTH: All kit.
MR MORRIS: Okay, all kit. So his top line and bottom line, if you are doing the equation, the ratio, as I understand it, is adult home shirts being he says what is covered by the agreement, and all kit. My submission is if you read 578 and following that assumption is wrong and it is to reflect the difference between all shirts and all kit. Because of the words in 578 the infringement, other than the England Direct Agreement and I will explain Umbro's particular position, but 578 is the first time this point arises, it is limited to replica shirts within the relevant markets, but this is the largest selling item of replica kit with approximately five shirts sold for every pair of shorts and pair of socks.
MR ROTH: Umbro?
MR MORRIS: 578 this is the first reference in the Decision to this concept, and it is of course dealing specifically with Umbro, but the comments later on in the Decision, where this issue is dealt with have to be seen in the context of introducing this 10 to 9 or, in the case of Umbro, 9 to 8 or however you put it, and I will deal with Umbro in a moment if I may. We suggest that it is a reflection of the difference within the product market as a whole, that if you have turnover of X in all kit, your turnover in shirts, all shirts, will be likely to be 88 per cent. of, as we all know, but that is what it is reflecting. We submit that the suggestion that this is an intention to reflect the ratio between home shirts in the case of MU, or the shirts the subject of the agreement – the particular shirts – and all kit, is not a correct interpretation of that paragraph.

MR COLGATE: I am slightly concerned here that we are trying to generalise and you are looking at it in relation to Umbro, but I feel that we should be looking at it in relation to each of the companies in turn. I suspect the answer might be slightly different in each case.

MR MORRIS: Sir, I understand that point and, if I may, I was proposing to take you through where this point arises.

THE PRESIDENT: Let us go on.

MR MORRIS: Can I just answer your point about the ratios, I think it is right that when we get to 10 to 9 that does reflect the difference between the 23:2:1, that you are reducing it by 10 per cent.

THE PRESIDENT: Well you are saying it is 90:10 so instead of going for 10 per cent. it could be an argument for going for 9 per cent. That is not quite spelt out like that.

MR MORRIS: It is not spelt out, I accept that. I am not suggesting, and I hope that I am not attempting to give a justification *ex poste facto*. We have said all along that this point is a point which goes to balancing out the difference, and effectively what we are saying is if you think we are wrong on the product market then it all came out in the wash broadly because some people lose and some people gain by the reduction in the percentage rate, and we are saying no more than that. I think it is permissible and legitimate for the Office to put the matter that way.

So you have 578. 581 – Sir, you asked me a question "Well how can you go for 10 to 8 for the reduction of this case?" The fact of the matter in 581 is that there are two factors ----

THE PRESIDENT: Just before we go to that, I am just struggling with 580, second sentence:

> "… the Replica Shirts Agreements damage is likely to have been much more significant than for either of the other infringements because it involved more retailers and covered a wider range of Replica Kit products."

That sounds to me as if that has just contradicted what we have just said.

MR MORRIS: I think that means different shirts. That means Manchester United, England, Celtic, Notts. Forrest, Chelsea, the other agreements being England Direct and Sports Connection, and England Direct affected only the England shirts, and Sports Connection Agreement I think affected only the Celtic shirts.

THE PRESIDENT: It would have been logical for it to say it covered a wide range of replica shirts.

MR MORRIS: It would.

THE PRESIDENT: Yes.

MR MORRIS: Then at 581, the point you were asking about "Well how can you have gone to 8 here and 9 for the others?" The difference is because there were two factors here. One is that it was vertical price fixing with facilitation of horizontal, and that is one factor. Sentence 3:

"Although the market definition is relatively narrow the Replica Shirts Agreements and the Umbro/Sports Connection Celtic Agreement did not include all products in the relevant market."

And it is those words "did not include all products in the relevant market" where there is an argument of construction between Mr Roth and I, but we suggest that what is meant in the context of 578 is that what was not included was the shorts and the socks, and not the shorts, socks and all the other shirts sold in that year other than the shirts covered by the Agreement.

THE PRESIDENT: Yes.

MR MORRIS: Then I am going to take you to para.608, where we deal with it so far as Allsports are concerned.

THE PRESIDENT: I think when we have got through the references, Mr Morris, we are going to take a short break.

MR MORRIS: I am grateful. I hope I am not making too heavy weather of it.

THE PRESIDENT: No, it has to be gone over.

MR MORRIS: 608 ----

THE PRESIDENT: Yes, 608 in some ways is a bit clearer, is it not?

MR MORRIS: Yes, it is clear.

"The infringements were limited to Replica Shirts within the relevant markets, but this is the largest selling product with approximately five shirts sold for every pair of shorts and pair of socks."

That is the point we made.

THE PRESIDENT: That is spelling it out.

MR MORRIS: That is spelling it out. JJB the point is made at 666, and that is also interesting because that makes the point which is also made in respect of Umbro.

"The infringements (other than the England Direct Agreements) are limited to Replica shirts within the relevant markets".

and it makes the point again that this is the largest selling element.

THE PRESIDENT: Yes.

MR MORRIS: Then you get to MU where the point is made at 710 is it?

MR ROTH: Well it is 706.

THE PRESIDENT: Yes, the same point again at 706.

MR MORRIS: 710 is the one that Mr Roth relied on and sought to apply, and we would submit that the words "The infringements did not include all products in the relevant markets" in 710 has to be seen in the light of everything which I have just taken you to.

THE PRESIDENT: Read back to 706.

MR MORRIS: And back also in context to the JJB point that what is being compared is all shirts with all kit and not adult home shirt with all kit.

THE PRESIDENT: Yes.

MR MORRIS: Is that a good moment?

THE PRESIDENT: That is a good moment, we will just rise for ten minutes or so.

(The hearing adjourned at 3.25 p.m. and resumed at 3.35 p.m.)

MR MORRIS: I am still really in the market definition point, and I think you have got the point we are making.

THE PRESIDENT: Yes.

MR MORRIS: Just a couple of points, just to illustrate in figures, if you had a turnover in kit of 100 and you applied a 9 per cent. percentage that gives you 9. If you have a turnover in shirts of 88 – shirts represent 88 of the 100 and you apply 10 – you get 0.8. Then we do say, as I have said before, that if you consider that the relevant product market is just all shirts then we do say that the OFT could have applied and, indeed, on the analysis of the material I have just taken you through would have applied a 10 per cent. rate in the case of Allsports, JJB and Manchester United. More importantly the Tribunal, if you are going down that route, and assuming everybody else is equal, and assuming applying the steps in the Guidance, we would submit in those circumstances you should apply ----

THE PRESIDENT: How can we assume that you would have applied 10 per cent.? Why is 10 per cent. the right rate to apply?

MR MORRIS: You can assume from the reasoning in the Decision that we would not have reduced the percentage rate from 10 to 9 because the rationale for us having done so would not have been there, because of the explanation of the reasons. So the first point I make is that this not *ex poste* justification, these materials are in the Decision.

The second point is let us get away a little bit from beating the OFT over the head and let us look at what you, the Tribunal, should do if you are against me on what the relevant product market is. We say in those circumstances there would be no reason for you to apply

a multiplier or percentage rate of 9 as the OFT had done, but that you could, and should – all other things being equal, depending on what you think the appropriate percentage rate is – apply a percentage rate of 10.

THE PRESIDENT: To shirts' turnover?

MR MORRIS: To shirts' turnover, yes.

THE PRESIDENT: Instead of applying 9 to shirts, shorts and socks.

MR MORRIS: Mr Turner points out that in the Guidance at para.2.4 talking in the context of the percentage rate, and a serious percentage rate – I do not know if you want to look at this, it is probably worth it, para. 2.4 refers to the percentage rate, the second sentence:

> "The more serious and widespread the infringement, the higher the starting point is likely to be. Price-fixing or market sharing agreements and other cartel activities are amongst the most serious infringements …"

caught under the Chapter I prohibition.

> "Conduct which infringes Article 82 and/or the Chapter II prohibition … is likely to have a particularly serious effect on competition, for example, predatory pricing …"

the starting point for such activities and conduct will be calculated by applying a percentage likely to be at or near the 10 per cent. relevant turnover. So there is something in the Guidance which indicates price fixing you are starting at or near 10 per cent., and in this case that is what happened, and then there was a step down to 9 in the case of the three Appellants on this issue to take account of this subdivision within the product market – the subdivision being all shirts.

THE PRESIDENT: Since we are on it, can you help me on the question how you are supposed to distinguish between price-fixing agreements of different gravity if you always start at the top of the range, as it were? Supposing this agreement had lasted for 20 years and had a secretariat and had controlled the whole United Kingdom sales of a certain product – I use a very, very serious case – if that is 10 per cent. and this one is 10 per cent., are you treating like cases alike? How does it work?

MR MORRIS: The first point is over 20 years we would say would be reflected in duration. The second point ----

THE PRESIDENT: I mean the intrinsic gravity of price fixing cases may vary from product to product – you may say that this is a particularly serious one ----

MR MORRIS: Well I do.

THE PRESIDENT: -- but you may have other cases that are more serious and it is always a general problem with the legal system that if you always impose the maximum sentence you do not have anything left to do when you get a more serious case than the last one you had.

MR MORRIS: I understand that. The suggestion that in some way this was less serious because it did not have a secretariat or it was not a particularly ----

THE PRESIDENT: I am not suggesting that, it is a question of principle – how do you know that this was the most serious case that anyone could possibly imagine? Or perhaps it is taken into account at some other step in the Guidance, I do not know?

MR MORRIS: It must work through in some ways in terms of the product affected and the geographical coverage, that presumably might be reflected in the turnover figures, it would be reflected in duration. I suppose the short answer is that it is difficult to know, but in this case we submit that this would be at the top end of the scale. I gave you all the factors of the case. It is horizontal price fixing. It is price fixing involving a consumer product sold in large quantities, members of the public involved. It is price fixing at the highest level within companies involving bodies of – I have been through the factors, Sir, I do not need to go through them again. We say that this is a very serious case. The answer to how do you slice it up in individual cases is difficult and I could not, I do not think, go so far as to say that all price fixing cases must start from 10. It would be an unreasonable and unrealistic submission for me to make.

I think I need to deal finally with Mr Roth's point which links on, which is what we have described as the additional cheese pare, and I think he would say to you that even if you include that it is all shirts and not all kit that the reduction from 10 to 9 should stay the same. He says that is because there is a further subset of adult home shirts, and we say to that effectively that he is mixing up the concepts of the shirt covered by the Agreement, and the shirt ----

THE PRESIDENT: I think this is Lord Grabiner rather than Mr Roth.

MR MORRIS: No, this is Mr Roth. I think Mr Roth will no doubt explain his position ----

THE PRESIDENT: Maybe there was no difference between adult and junior.

MR MORRIS: No, no, my understanding is that Mr Roth accepts and proffers the relevant product market to be all shirts – the relevant product market.

THE PRESIDENT: Yes.

MR MORRIS: That is the turnover figure. But he does not accept my argument that in those circumstances you can go back up to 10, because he says that within all shirts the infringement – and I will use the word ----

THE PRESIDENT: Only affects adult/

MR MORRIS: Only adult home shirts.

THE PRESIDENT: Yes, so you have to stay at 9.

MR MORRIS: In other words, once you have got down to shirts as the product market he says there is a further subcategory within that category of the relevant product market, namely, the agreement covered by the infringement which are adult home shirts, and he says for that reason you should keep it at 9. We say to that, first, as I have just said the 10 to 9 reduction was not based on adult home shirts versus all kit, but it was based on all shirts versus kit, so he has misunderstood the rationale. Secondly, there is no justification for a further slicing down to reflect the category of shirts or product which is "covered by the infringement" rather than as opposed to the category of product affected by the infringement. On this hypothesis that we are at at the moment, the product affected by the infringement is all shirts, and he says "No, no, you must go lower, you must reflect the fact that the agreement or the infringement covered only a subset of the product that was affected by the infringement." We say, as a matter of logic and as a matter of the Guidance, there is nothing to support the proposition that you should, whilst defining the market by reference to the product affected by the infringement, which is adult home plus other shirts, which he must accept because of his definition of the relevant product market, there is no justification for going to a narrower subset which reflects products covered by, or the subject of the actual agreement.

THE PRESIDENT: This part of the argument, maybe I am getting a little bit lost, whereas the shirts, shorts and socks fitted the argument, which involves questions of substitutability and whether they are sold together and whether the sales of one drive the sales of the other. As I understood the shirts' argument, included in the relevant turnover are quite a lot of shirts that were actually launched in 1998 and 1999, i.e. well before the infringement started, so it is a bit hard to see how those products are in any sense affected by the infringement, although they may constitute the relevant turnover for the technical job of determining what the relevant turnover is.

MR MORRIS: If one has applied the test in getting to the relevant turnover then it is inherent in that answer that they are, but that is not an answer to your question. I think an answer would be, if you take in a year adult home, and other kit of the same shirt so you have the junior and the shorts and socks – there is no dispute there that that would be affected by the infringement.

THE PRESIDENT: I am talking about the Sharp shirts sold before the Vodafone shirt, which are not in any sense alleged to be affected by the infringement, but are included in relevant turnover because that is the way the calculation works.

MR MORRIS: I am not sure of the immediate answer to the question, and if I may I would like to come back to it. One point is that we would submit that if there is price-fixing even in relation to the new shirt it might have an effect on the prices even of other shirts being sold in that year. If you reduce the price of the new shirt to £29 we would say for reasons similar to the reasons we have given in the relationship between other shirts in other aspects - either junior shirts or shorts and socks – we would say that it would have the same spill over effect.

THE PRESIDENT: You cannot have a backwards spill over effect.

MR MORRIS: Well no, it is not a backwards spill over.

THE PRESIDENT: It cannot affect things that happened before the infringement took place. Anyway that is why he said it would be unfair to go back up to 10.

MR MORRIS: Well again he will explain his case, but I do not know what the figures are and we will try and look at this, but if, let us say ----

THE PRESIDENT: I think they are in the skeleton.

MR MORRIS: They are. I think he is saying that it should reflect the fact that the Agreement covered only the adult shirt, it did not cover other shirts sold later in the year of any sort, and it did not cover shorts and socks. He was not just confining it to that rump of the old kit that was being sold. As I understood it, it was not "Oh well yes, you take the whole of shirts shorts and socks" – on this view it is shirts only. He was not saying that you just exclude the rump of the old Sharp's shirts.

THE PRESIDENT: I think we can leave it there, Mr Morris. [Laughter]

MR MORRIS: I am grateful. I think I did "Sharp's shirts" rather well there! One point I would add if in any way you are concerned about this point, and it is a point of detail, there is the suggestion that the adult home shirt only represented 38 per cent. of the relevant turnover. That figure as we understand it does not include – and we say should have included – the pre-ordered product for that ----

MR ROTH: I am sorry, it does.

THE PRESIDENT: I think pre-ordered had been conceded. I do not know whether it is right or not.

MR MORRIS: No, no, the fact that it had on our figures – we will come back on that – we thought the 38 per cent. does not include the pre-ordered. No doubt Mr Roth will jump up, we will get to the bottom of it overnight.

THE PRESIDENT: There may be a limit to the amount of detail that one can go into on a point like this, otherwise we would never fix a penalty for anything.

MR MORRIS: There we are. Can I deal with product clusters very briefly and the two cases – *Grinnell* and *Leclerc*? *Grinnell* – American case, Supreme Court, Mr Roth did not take you to it and I would like to take you to it briefly. Mr Roth said, and indeed in his skeleton says, that this case was all about what competed with the cluster product. That is a wholly separate point from the point for which we rely on this decision, and we imagine it is the point for which the Tribunal drew it to everybody's attention. If I could just take you to 563, and take you through the headnote. It is a civil action brought by the US Government against Grinnell Corporation and three affiliated companies.

THE PRESIDENT: Well why do you not just give us the references, or take us to the particular paragraphs.

MR MORRIS: I will give you the references. The headnote and then on p.564, holdings 2(a)(b) and (c), and it is holding 2(a) which we rely on and holding 2(c) which was the one which Mr Roth effectively referred you to by reference. The relevant paragraphs for you to read at your leisure are paras.570, 571 and 572, and then you get to 573 onwards to 575 is the second issue, which is whether there are substitutes for accredited central service stations. The particular paragraph on which we rely is para.572 in the left hand column – "Here there is a single use…" I can leave it there in the interests of time.

THE PRESIDENT: We will read it to ourselves.

MR MORRIS: Essentially the point there was whether or not the products which made up the accredited central station services should themselves be treated as individual product market or whether because they were supplied together more often than not meant that that was itself a cluster of products, and they held it was a cluster of products. We say, as we have said in our skeleton, that that reasoning would apply in the present case, and it is worth noting that in that case it was pointed out that some times not all the products were supplied together, just as in this case not all the products are supplied together and certainly in the case of JD they do not supply the socks.

On *Leclerc*, I am not going to take you to *Leclerc,* our submission on *Leclerc* is that the relevant passage cited and to which you were taken makes clear that the market definition exercise there was carried out for the specific purpose of ascertaining whether there was workable competition in the context of the 85(1) issue which arose there, and there was an acceptance that the Commission had been justified in other aspects of the case in looking for

other purposes at the wider group of luxury cosmetics rather than just perfume. We say, as we have said all along, market definition does depend on the purpose for which you are doing it, and we know the purpose for which we are doing it in this case which is for ascertaining the activities affected by the infringement.

Can I pick up on a couple of other market definition points? This is an Allsports' point on junior shirts. Mr Peretz says that the product market is adult shirts only in contrast to Mr Roth. I think it is fair to say that Mr Roth went so far as to accept that junior shirts could not be excluded and we would say that is right. We submit that whatever one says about the relationship between the prices between shirts and shorts and socks, there must be a relationship between the price of adult shirts and junior shirts and if you look at the tables that is borne out. That concludes my points on market definition, Sir.

THE PRESIDENT: Thank you.

MR MORRIS: And I am going to move now to individual points made each of the individual Appellants. JJB. The first point is just a point of detail and it is a point that was picked up on by JJB and Manchester United where there was a suggestion that there had been a double count of the deterrent element because we, the OFT had taken the deterrent element into account not only later, but in the context of defining the relevant markets. That suggestion was made by picking up on some drafting in our skeleton – the OFT amended skeleton which might, I suppose, be said to be ambiguous. We would submit that there is nothing either in the wording, or certainly nothing in the Decision, which suggests there was any element of deterrence taken specifically into consideration and starting point. What was intended to be conveyed by that passage in the skeleton, and I can at least I think speak to that, was that it was a reference to the purpose of the penalty being to deter not the purpose specifically of the starting point.

THE PRESIDENT: Yes, the way it seems to work is that the starting point is linked to what is regarded as the inherent seriousness of the type of infringement in question, and you get on to deterrence and so forth in step 3.

MR MORRIS: The next point was a very specific point about England Direct, and the percentage rate. If you go to paras.665-669 of the Decision. This is JJB and the considerations leading to the percentage rate. You will see there enumerated from 665 onwards a large number of factors that all go to the percentage rate. Not only are there a large number of factors listed in 665, 666 and 667 but there is also substantial cross reference to 605, 606, 607 and 609, which were factors in relation to Allsports. I do not propose to take you to them, Sir.

The point that is made is that para.667 includes in one sentence reference to the particular facts of the Sportsetail agreement:

"JJB's stance in relation to supplies to Sportsetail initially prevented Sportsetail from beginning its operations and then restricted its ability to compete."

The next paragraph goes on to a different point altogether. Lord Grabiner says that because there is now no infringement in relation to that aspect there should be a reduction in the 9 per cent. rate to reflect that fact. We submit that that factor was one of many factors leading to the 9 per cent., that many others – Allsports and Manchester United – got 9 per cent. without that additional factor, and the fact that there is no finding of infringement in respect of the England Direct Agreement is not a reason to reduce the 9 per cent. rate because it was one of many and the others did not have that factor. We would add on top of that that of course there will be some reflection for the – perhaps I can use the word – "acquittal" or the finding of no infringement in relation to England Direct, certainly in respect of the no repeated infringements aspect which we have in fact conceded. So we would suggest that to take the rate down for that reason alone would be over compensating.

MR COLGATE: What you have just enumerated, where does that feature in the Decision?

MR MORRIS: Where does?

MR COLGATE: The fact that there were many factors.

MR MORRIS: These are the paragraphs here that I have just – if you read ----

MR COLGATE: I know, I have read them but it does not actually say that, does it?

MR MORRIS: It says it to the extent that if you are looking at 8.2, that section: "Starting Point", you start with 664, which is the turnover, and then you have to reach a conclusion to get to what the starting point is at 669. I think that it follows that these factors **here** are all factors that go to, once you have decided what the turnover is, what percentage you are going to apply. It is certainly the case that Lord Grabiner and JJB suggest that the sentence in 667 goes to the question of the appropriate percentage rate, and it would be arguing that that was one of the reasons why that was 9 per cent. I do not think we can demur from that, it was one of the reasons but we say when looked at in the context of everything else, and the Allsports' paragraphs have to be read in, obviously it is not *de minimis* but it is not a reason to go down lower than 9.

The specific answer to Mr Colgate's question also is that the headings which are given in this section in fact specifically reflect para.2.5 of the Guidance, which says that it is the

Director's assessment of the seriousness of the infringement which will determine the percentage of relevant turnover which is chosen.

> "When making his assessment the Director will consider a number of factors, including the nature of the product [8.2.1] the structure of the market [8.2.1] the market shares of the undertakings involved in the infringement, entry conditions [8.2.2] and the effect on competitors and third parties [8.2.3]"

Damage caused to consumers is 8.2.4. So we are following the Guidance there and those are the relevant factors that have been taken into consideration.

THE PRESIDENT: Could I ask you to consider a different point, but in the same area, Mr. Morris. If you look at 666 you see that:

> "JJB is the biggest sports goods retailer in the UK with nearly twice the number of stores as Allsports and Blacks…." etc.

Its turnover is considerably more than Sports Soccer, Blacks, JD and more than that of Allsports. Infringements counted for only 2 per cent. of business, etc. For various reasons they get 9 per cent. If you then compare that with what is said about Allsports, particularly at 608:

> "Allsports is a relatively small national sports goods retailer. By UK turnover it was the 5th largest …etc. and the 2nd largest by number of stores. The infringement affected only 3 per cent. of its business" etc.

What is the basis for saying that 608 justifies a rate of 9 per cent. and 666 also justifies a rate of 9 per cent. where one is much bigger than the other.

MR MORRIS: I see the point you are making, Sir. Of course, in some way the size would be reflected ultimately in the relevant turnover in any event. It is very difficult to be precise with all the factors with all the parties at all times. It is certainly the case that the rest of the factors are common and there are numerous of them. It may be that in the balancing exercise when you come to size and you are considering this, that actually if you are weighing up, are you going for 7, 8 or 9. You say on the one hand actually Allsports is smaller as a national retailer than JJB and that would be a factor that weighs in their favour, but there are lots of other factors and taking all those factors together there is no justification to single out that specific factor as a reason for giving Allsports a lower percentage rate than JJB.

It cannot be an exact equation. You cannot set out factors and do a flow chart and come to a conclusion in circumstances where your scope for paring down the percentage rate is necessarily limited. If 10 per cent. is the top and you are working within a range then we would

submit it would be very hard unless you are going to give percentages by decimal points to have an accurate scoring system.

THE PRESIDENT: We are not being critical, we are just trying to understand how it works, because this is the first time we have had to consider, as it were, comparative cases. The way this has worked in this particular case is that the smaller retailers, and though they are not before us I am also thinking of Blacks and JD, and one or two others, have also got 9 per cent. although they were much smaller.

MR MORRIS: Blacks and JD, they were above Allsports, were they not, in the pecking order I think. Certainly I remember Mr West-Knights ----

MR PERETZ: The position, as I recollect it, JD's overall turnover is £171 million.

THE PRESIDENT: They are bigger in overall size.

MR PERETZ: In total size, I think we have been through it fairly recently, Allsports is the fifth largest.

MR MORRIS: Yes, well that is what it said in the Decision.

THE PRESIDENT: Yes, all right well let us take Allsports.

MR MORRIS: The bottom of that range. Remember, this is under market share, and I think we had quite a lot of evidence, and this may be an answer. Much was made in the liability hearing of Allsports relative unimportance.

THE PRESIDENT: They are Umbro's third largest customer, it is true – there was some dispute as to whether they were second or third.

MR MORRIS: Relative to JJB they were significantly smaller, but relative to the rest of the retailers in the market you are talking about the top five retailers and, if you will recall, I think some of the evidence had this long table of retailers where there was a whole tail of small retailers and I think the point that is being made here is that they are still a national retailer, and they are still one of the five big players. To that extent they are a significant player on the market. Yes, they are significantly smaller than JJB, but we are still talking about price fixing, serious infringement, between the top retailers, and if I may put it that is one answer to this point. You have my other point that in the whole scheme of things it is not a precise matrix of scoring, but these factors have to be taken into account and it was not seen as a reason to go lower than 9.

THE PRESIDENT: Yes

MR MORRIS: Duration. Two points on duration. The first concerns the starting point, to which we submit the starting point is the date of the agreement. A short answer to the examples given by Lord Grabiner is the case where an agreement is made and never implemented. On the logic of

his argument you do not have any penalty at all, you would have a factor of nought, and it is short answer. It is the object or effect. His point about the consumer damage is that consumer damage is not the relevant factor to be taken into account when considering duration. It has already been taken into account. The other point is that when he gave you particular dates for starting dates one has to bear in mind that there is pre-ordering, and the evidence on pre-ordering, so it does not start from the day of launch, it starts before the date of launch. Those are the points we would make on starting point.

On duration, so far as the span of JJB's duration. This is quite a complicated point ----

THE PRESIDENT: It is.

MR MORRIS: -- and if I may take a moment over it. JJB say that you should break down their infringement, as now found, into three agreements each of which is a few months long – I think it was 2, 2 and 2, or with our starting point it was slightly different. On his starting point it would give a total duration, when you added the three periods together, of six months and, on our starting point it would give a total duration of 9 months. So he says you should apply 0.5 or 0.75 instead of a multiplier of 1.5.

Before I expand upon what our position is, can I just take you to paras 670 and 671 of the Decision?

THE PRESIDENT: Yes.

MR MORRIS: It was a paragraph that we went to before. 670:

> "JJB's involvement in the Replica Shirts Agreement lasted for one year and four months and the England Direct Agreements lasted in total for one year and six months."

Just pausing there for a moment. On that basis you would apply 1.5 for England Direct and also 1.5 for Replica Shirts, because one year and four months is rounded up to the next quarter, which makes it 1.5. So for both those two elements you get 1.5. Then it says:

> "In order to encourage undertakings to terminate infringements as quickly as possible, the OFT has decided, where necessary, to round-up duration in the second year to the nearest quarter."

That is the 1.5. The next sentence is important:

> "The OFT does not propose to treat the infringements separately for the purpose of calculating penalties. Therefore, the starting point is multiplied by 1.5 giving a revised figure of £1.994 million."

And you should also bear in mind on top of that, that at para.675:

> "Although the OFT regards the Replica Shirts Agreements as distinct infringements, there is a good deal of overlap between them. Conservatively, the OFT has decided to count them together when assessing whether any party has engaged in repeated infringements. JJB was involved in the Replica Shirts Agreements and the England Direct Agreements and regards these two (so counted) repeated infringements as an aggravating factor. The OFT therefore increases the basic amount of the penalty by 10 per cent."

What you have there is 1.5 plus 10 per cent. taking into account what was there found, which was the replica shirts agreements and the England Direct. I think it is fair to say that analytically the OFT could have given (but did not) 1.5 for the replica shirts agreements, as one infringement, and 1.5 for the England direct agreement and given a top-up for repeat infringements.

THE PRESIDENT: You mean they could have imposed separate penalties?

MR MORRIS: Separate penalties, yes, but it was not done. On the analysis of what is an infringement then the replica shirts was counted as one infringement, and the England Direct agreement was counted as a separate infringement. But they did not impose separate penalties for the two.

THE PRESIDENT: You would have had to have worked out some separate turnover, presumably, for the England Direct.

MR MORRIS: Presumably, yes.

THE PRESIDENT: It was a pretty minimal turnover, if I remember rightly.

MR MORRIS: It would have been turnover in the England kit as a whole, it would not just have been the turnover in that. I can explain that further if you would like, but I ----

THE PRESIDENT: It is a rather complicated idea – anyway, you did not do it.

MR MORRIS: So, what has changed since then? Two things have changed. The England Direct agreement has gone and, within the replica shirts agreement, which was treated as one infringement, we accept there were three elements to that – England, Manchester United and continuation, and that the continuation bit of the third has gone and you are left with Manchester United centenary kit. Our case, and this is our primary case, is that those three agreements represent one overall infringement and that one overall infringement effectively lasted for one year and four months, and thus you are left with a 1.5 duration as you were

before, and the change that comes about is the England Direct is dropped and you do not get the repeat infringement.

The alternative is this, and this is something you canvassed in argument. You treat England and Manchester United as one infringement, and you treat centenary kit as a separate infringement. We would say that in those circumstances those are separate infringements which would justify separate fines and that logically leads to the conclusion that Mr Colgate put to Lord Grabiner of 1 plus 1 plus 10 per cent. for a repeat infringement for the centenary kit. That might put them in a worse position.

What we do say is that JJB cannot have it both ways. They cannot say that you can maintain a single overall infringement which they say it is (para.27 of their skeleton), but that it only lasted for the periods of two months or three months within that when the infringement had an agreement operating. We entirely accept, Sir, that this is not an easy issue and, in some ways, what we submit is that the Tribunal needs to find way to recognise that continuity did not exist between whenever the first two agreements terminated and the Manchester United centenary kit.

We submit that there is absolutely no reason for the Tribunal to give less than a factor of one for the England and the Manchester United agreements, and that links into the other points about duration which Mr Roth takes as well, namely, "they only lasted for three months therefore we should have a pro-rata reduction". I can deal with that point in a moment. We say, and I think you have the point, that this is a launch period. This is not a special circumstance. There is no reason to go below 1.

So you have to have a factor of 1 for the England and Manchester United in 2000, then the only question is what, in terms of duration, do you give to reflect the further element of duration or the further period of the Manchester United centenary kit. We would say, taking the best approach one can, that actually one should leave it at 1.5, and that we should be accumulating for the separate infringements but on the other hand you cannot really safely go lower than 1.5 because you need to reflect - the infringement did continue in the sense that it might not have been continuous but it was continual. It was not an unbroken period, but it was a period over two years where there were infringements of the Act. It is difficult, I have thought quite hard about what the best route is. We recognise that you have to reflect the fact that the Direct agreement has gone and the fact that continuation is ----

THE PRESIDENT: You have to make a reduction, there is no doubt about that.

MR MORRIS: Yes, well, we suggest that actually in the round you should not reduce below 1.5. The reduction should be for England Direct. But if the Tribunal feels that it is necessary to reflect the break in time – we say as a matter of analysis actually you do not need to, and should not, because it is a single infringement, which is accepted by JJB as being a single infringement, and that you should reflect the fact that that single infringement started in April 2000 – which has now been found – and continued to the end of the termination of the Manchester United centenary kit.

THE PRESIDENT: That might be quite difficult to do on the evidence we have, Mr Morris, because there is a big gap between the end of September 2000 and June 2001. There is absolutely no evidence of pressure in that period. There is quite a lot of evidence of price cutting going on. There is the January sales' period, all sorts of things are going on but there nothing really to show that there is infringement going on.

MR MORRIS: Mr Colgate put that there would be some justification for treating them as separate infringements in that case.

THE PRESIDENT: Yes.

MR MORRIS: And then you get 1 plus 1 – the turnover would be Manchester United kit for the second year and not England and Manchester United kit. No doubt if you wish we can provide the relevant figures for that exercise.

THE PRESIDENT: But the product affected by the infringement 2001 is the MU centenary kit from the time the agreement was made until the OFT intervened quite a short time afterwards, it lasted about a month, I think.

MR MORRIS: I am sorry, what was the turnover?

THE PRESIDENT: No, the MU centenary kit ----

MR MORRIS: I think it lasted two months – anyway, the point I am making is if you go down the breaking it up route you logically get to the two separate infringements and we are not suggesting you should do that. We are saying that actually the best way round is to leave it where it is because, in fact, there was generosity in the figure below in not imposing two penalties, and leave it where it is because actually it would reflect adequately the break in the continuation. Obviously, if the Tribunal wish to be more specific about that and wish to have figures and look at those figures, that is something I am sure we can do to assist the Tribunal.

THE PRESIDENT: Yes.

MR MORRIS: That is what we say about that. On the point of less than one year I think I have adequately covered that. We say there is no justification for reducing for parts of the first year

and, indeed, the short answer whilst I am on that point, to deal with Mr Roth's point about half a launch period – half a key selling period – we say that the proportion of sales within a key selling period take place within the first month, or the first two months of launch. I gave you the reference to the "four weeks" evidence, I think it was Mr Ronnie's evidence.

MR ROTH: Well I am sorry to rise at this late point but I do object – it is not a reply it is an objection – to evidence from a liability hearing that we were not part of ----

THE PRESIDENT: I am sorry, Mr Roth, if it is a finding that we have made in our liability Judgment we are entitled, I think, to have regard to it at this stage of the proceedings.

MR ROTH: If it is in the Judgment, I thought you were being told it was in the transcript.

THE PRESIDENT: It is in the record, put it that way.

MR ROTH: Well we do not even have the record.

THE PRESIDENT: There is reference in the Judgment to that bit of the record, if I remember rightly.

MR ROTH: We do not even have it. We did not get the transcript.

THE PRESIDENT: The transcripts are on the website, you can read them.

MR ROTH: And we were not able to challenge it at the time because we were not part of the case.

THE PRESIDENT: Well challenge it now if you would like to.

MR MORRIS: I will leave the point there, I will wait – perhaps if Mr Roth wishes to produce evidence he can do so.

Multiplier of three, JJB say it is disproportionate, but did not say disproportionate to what. We submit there is nothing in this point. It fails to take into account the importance of the question of overall turnover. The starting point is the starting point. The aim is to get to a figure which is adequate to deter and that is the purpose of the deterrence, and to suggest that it is disproportionately high in circumstances where the ultimate figures give 1.27 per cent. of total turnover, we would suggest that that would be an unsustainable submission. The multiplier is there to move from the turnover in the products to reflect adequate deterrence upon the company as a whole, and there is nothing to suggest that the multiplier of 3 applied to JJB was disproportionate, either by reference to any general measure or by reference to anybody else's multiplier. No explanation was given as to why it should be 50 per cent. – you remember Lord Grabiner said it should be 1.5. There was no reasoning given. There was one further point he made about the FA and the multiplier, and that they only got a multiplier of 2.

THE PRESIDENT: Yes, he made the Umbro point as well, that Umbro only got a multiplier of 2.

MR MORRIS: Yes.

THE PRESIDENT: Well that point is made anyway.

MR MORRIS: I have made the point about why Umbro got a multiplier of 2 and that is because the impact otherwise would have been grossly out of sync. with everybody else.

THE PRESIDENT: It was sufficient for deterrent purposes for Umbro to make it 2 because of the high proportion of their turnover.

MR MORRIS: Yes, precisely. On the FA point could I, again for your note, just ask you to cross refer to para. 779 of the Decision and para.29(c) of the OFT amended skeleton, I do not have the reference in your bundle, but it is our only recent skeleton that deals with the point. There is a raft of reasons why the FA only got a multiplier of 2 that are adequately set out in 779.

This is an important point which, if I may, I would quite like to deal with before we rise.

THE PRESIDENT: Yes, carry on, we are anxious to get as far as we can.

MR MORRIS: The question of a wider infringement having been found. This is the point about the Tribunal having found that the agreements covered shirts other than Manchester United and England and, in particular, Celtic and Chelsea. On that, Sir, it is paras.748-754 of your Judgment.

THE PRESIDENT: Yes, we need to be a bit careful here, I think, because although I mention Chelsea and Celtic that was actually the earlier agreement with Sports Soccer to which JJB was not a party.

MR MORRIS: Well there is a finding.

THE PRESIDENT: Just remind me where ----

MR MORRIS: 754 is the finding.

THE PRESIDENT: Yes, but I think it is in relation to a period from 24th May onwards.

MR MORRIS: It says:

> "…. we conclude that, even prior to the meeting on 8 June, the agreement or concerted practice involving JJB …"

I put a comma in then:

> "… which we have already found in section XIV above [comma] extended to replica shirts generally".

And 758 is the same finding in relation to Allsports.

THE PRESIDENT: What this is saying, and I may not have it completely right, but I think what it is saying is that there was, as it were, a sort of embryonic MU agreement, even before 8th June, because even before that date JJB at least had given Umbro indications that it would price at

£39.99 and it was those indications that Mr Ronnie used in order to persuade Sports Soccer to make its agreement of 24th May 2000. I am not sure we have any evidence that here was an agreement affecting JJB any earlier than 24th May 2000. This is all under the heading "Umbro's efforts prior to the beginning of June 2000 to prevent discounting of the MU shirt".

MR MORRIS: Yes, but as I read it what was the 24th May agreement, which had been brought about by JJB, or to which JJB had effectively participated, that that covered more than England and MU, and that that is reflected in 748 – "the note indicates … two distinct elements".

THE PRESIDENT: Yes, but as it happens the Chelsea and Celtic launches were, from memory, I think before 24th May, and as it happens there were no other agreements between 24th May and after 24th May that we are aware of. It is a bit of an empty point, I think – except it may go a bit to the duration of an agreement affecting the MU shirt.

MR MORRIS: Those shirts were being sold, they may have been launched earlier but those shirts were being sold in that period.

THE PRESIDENT: Well there is an agreement referring to all adult replica shirts, but there is no other shirt launch at this stage.

MR MORRIS: 11th and 19th May, Chelsea away and Celtic away.

THE PRESIDENT: Well I do not think we have direct evidence ----

MR MORRIS: It is in the Decision at para.64.

THE PRESIDENT: -- of JJB being party to an agreement in relation to the launch of Chelsea or Celtic. We have Sports Soccer, that was your case, but I do not think we have anything else.

MR MORRIS: Sir, can I reflect on the point?

THE PRESIDENT: Yes.

MR MORRIS: Because we had read that in the way that it appears on its face that it had extended more widely. We will reflect on that to see if there is material to support the proposition – plainly there is the finding that JJB were party to an agreement that extended to replica shirts generally, with effect that agreement, I think you said earlier, started in April.

THE PRESIDENT: This is all under the heading "The MU Agreement". What it is directed to doing is to establish that there was an agreement that extended apparently to the MU shirt before the meeting of 8th June. That is what that is all about. It does not find at all clearly that that agreement extended backwards to Chelsea and Celtic shirts. There is no evidence about that.

MR MORRIS: Paragraph 748: "That note indicates … to maintain High Street prices on *all* Replica Kit for a period of 60 days from launch."

THE PRESIDENT: Yes, that is 24th May.

MR MORRIS: Yes.

THE PRESIDENT: That is when they reached that agreement, not before that date.

MR MORRIS: No, but in that period there will have been a product being sold. We have an example here of the Chelsea goal keeper's shirt launched on 25th July 2000.

THE PRESIDENT: Well they certainly did not have the Chelsea goal keeper's shirt ----

MR MORRIS: Yes, I understand that, of course you did not, but there was a finding of what was the scope of that agreement.

THE PRESIDENT: The Sports Soccer agreement referred to in 748 was first of all to put up the price of the England shirts, and secondly to observe the 60 day rule, and the 60 day rule starts from the launch of the kit - forward looking agreement. It is not an agreement to put up the price of the Chelsea or Celtic shirts if they were already being sold below which they were not, in fact they were already covered by an early agreement with Sports Soccer.

MR MORRIS: Well, we are arguing now over what you found in your Judgment, I am trying to explain why we are putting forward the point. We would suggest that the phrase "maintain price on all Replica Kit for a period of 60 days from launch" would cover the Chelsea shirt that had been launched.

THE PRESIDENT: That was already covered by an earlier agreement. It is a forward looking thing this 24th May, it is "from now on we will observe the 60 day period".

MR MORRIS: There is it is, there are two points I was going to make, if I can just make them briefly, on that. Let us assume this is something you will consider. First, we do have the relevant figures for the relevant turnover in those shirts – Celtic and Chelsea – and we have them here to hand if the Tribunal is interested, and we have all the material. The reason we have the material is because it was provided both by JJB and Allsports and we have the letters in respect of which they provided that information. So the information is available and, if it were to be taken into account as a wider infringement, if the Tribunal thought that was the appropriate thing to do then it would be no bar to say that we have not got the evidence of the relevant turnover. That is the first point.

Secondly, these allegations were put in the Rule 14 procedure, they were in the Rule 14 Notice and they were responded to, so they were not new points, they were matters which were the subject of the investigation. I cannot really take that point much further other than to take on board your observations there and perhaps look at it overnight. Of course, I understand the Tribunal's reluctance in some ways to widen it, but we say there is a finding there.

THE PRESIDENT: How much more have you got to do now, Mr Morris?

MR MORRIS: I do not have that much. I have a couple more points on JJB and then a few points on each of Manchester United and Allsports. I will probably be half an hour at least, I would have thought and then Mr Turner will be probably 45 minutes.

THE PRESIDENT: Why do we not just do a couple of points on JJB and see where we are, and possibly Allsports too?

MR PERETZ: No, I was just going to say before Mr Morris moves off this point, he said he was going away to think about a paragraph relating to JJB, I would remind him para.758 also relates to Allsports. As so often in this case I have to remind people that Allsports exists.

MR MORRIS: I could not possibly forget that! There were really only two points and I think I have already dealt with one. One was the three specific points that arose from the Judgment that Lord Grabiner dealt with towards the end, the store by store and the like, and I have dealt with the position in principle there, so I do not really need to take you further.

THE PRESIDENT: I do not think we are going to do anything about the penalty in relation to those.

MR MORRIS: I am grateful, but for the record we would submit that the points that are made are good and that the responses given by JJB in fact do not meet those points, but I wanted to state that merely for the record.

The final point was the question of the compliance programme, and this takes me back to my general question about compliance programmes. The position on compliance programmes as a matter of fact, as I understand it, is that JJB's compliance programme was introduced some time in 2003, but not implemented until 5th March 2004, which is three days before the main trial started – so some six months after the Decision. Just by way of comparison, the Umbro compliance programme was put in place before the Decision and was taken into account in the Decision and a discount of 5 per cent. I think was given.

The Manchester United compliance programme came first – as Mr Harris reminds me – which I will have a little bit more to say about their attitude towards that compliance programme tomorrow, that happened before the infringement and Mr Roth took you through various steps in chronology of what has happened since. There was one further piece of activity, and then there has been activity since the decision.

THE PRESIDENT: They at least had it in place before the Decision?

MR MORRIS: Manchester United? No, they had it in place before the infringements.

THE PRESIDENT: It started before the infringements – so they say.

MR MORRIS: So they say. But it was May/June 2000 – June 2000 the board meeting, May 2000 it was discussed and we will deal with that in a moment. I am just trying to set it by reference to before the section 26, after the section 26, how soon after the section 26, before the Decision, after the Decision.

THE PRESIDENT: Yes.

MR MORRIS: Allsports was a case of before the Decision but rather belatedly in the course of the investigation.

THE PRESIDENT: Yes, too late to be taken into account if I remember rightly?

MR MORRIS: Exactly, para.616. So they did not get anything for introducing a compliance programme, because it was too late. It was not done promptly. No issue is raised by Allsports on that point.

JJB have a compliance programme which is only put in place after the Decision and in fact very close to the commencement of the hearing. That in a way, we would submit, may enable you to take a view as to whether what they have done has been adequate. The big point is this, what do you do? What happens when a compliance programme is put into place after the Decision in time for this hearing? We would submit that even if it is adequate and effective it does not give grounds for a further reduction in penalty on the Appeal, and so the suggestion that because it (JJB) put in place a programme in March 2004 that it should be given a further discount, should not be accepted.

If this principle were accepted it would raise the possibility of a party appealing against penalty on the sole ground that although it had not put in place a compliance programme by the time of the Decision it could seek a reduction in fine on that ground. This cannot be right because we submit that it runs counter to the terms of the OFT's booklet on compliance which is intended to encourage people to put a compliance programme in immediately, or early in the investigation rather than later in the investigation and is, I would hazard to say, a reason why Allsports has no particular complaint as to the fact that it was not given a reduction by the OFT because it did it before the Decision, but rather late.

The Tribunal has asked the parties about this issue, and we say "What is the purpose of that question?" We would submit that in these circumstances the position is that if no compliance programme has been put in place, or if one has been put in place which is not perhaps adequate, or is certainly inadequate, then that is a matter which could count against an Appellant on the hearing of his Appeal against penalty. So there should be a presumption and an expectation that a company found to have infringed should put in place an adequate

compliance programme and if it has no done at all or inadequately then that should be reflected in the Tribunals' considerations on penalty as, I suppose, an "aggravating" factor – and I do not like to use the word "aggravating" but it is certainly something which raises questions about the level of penalty and the overall need for deterrence. That is the way we would put it. On that basis we say no more than in the case of JJB that the putting into place of a compliance programme, whatever view the Tribunal thinks of the time at which it has done so, and the time at which it has responded to the letter is not a reason to give a reduction in penalty.

That, I think, concludes my submissions on JJB. If I may flick through my notes, I am not sure how much more I have on Manchester United – it depends on how long you would like to go on, Sir? I am happy to break there, I am happy to carry on.

THE PRESIDENT: We have to deal with the MU compliance point.

MR MORRIS: Yes, that is a point that might take a little while.

THE PRESIDENT: It may be sensible to stop now.

MR MORRIS: In the light of your indication about the Umbro sponsorship agreement, and the fact that I think I have dealt with duration, that will be my next point anyway.

THE PRESIDENT: Yes. I had the impression that we are not going to go beyond lunch time tomorrow? We certainly would not want to go beyond lunch time tomorrow, if that is convenient to the parties.

MR MORRIS: I am very grateful, Sir.

MR PERETZ: Before we rise, just one further point. My learned Junior, Mr Aldred, has professional commitments tomorrow and will be unable to be here. I shall do my best to struggle on alone!

THE PRESIDENT: Thank you, Mr Peretz. Yes, thank you – tomorrow at 10.30.

(The hearing adjourned at 4.45 p.m. until 10.30 a.m. on Thursday, 20th January 2005)