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1 Friday, 21st May 2004

2 (10.30 am)

3 THE CHAIRMAN: Good morning, Mr Green, ladies and gentlemen.

4 We have just circulated to the parties, by way of
5 background, two pages from the Monopolies and Mergers
6 Commission, as it then was, report on domestic
7 electrical goods of 1997, which remains, as far as we
8 know, the most authoritative study of the effect of
9 recommended retail prices.

10 The only reason we have done that is that yesterday
11 there was some discussion of the question of at what
12 point the "innocent practice" of recommended retail
13 prices might shade into an agreement which has, as its
14 object or effect, the prevention, restriction or
15 distortion of competition, and it was said I think, at
16 one point, on behalf of Argos, that a certain way of
17 looking at the matter might mean the end of recommended
18 retail prices.

19 In this particular report, that is precisely what
20 happened. The Commission found that recommended retail
21 prices were being used in a way that resulted in
22 substantial restriction, prevention or distortion of
23 competition, and suggested that in relation to brown
24 goods, such recommended retail prices should be
25 suppressed, which they duly were and are. So there are

1 no more recommended retail prices in that area.

2 None of this is part of the case, we hasten to add,
3 although we do have evidence, I think, that Mr McCulloch
4 of Hasbro was aware of this report, or had read it at
5 the time.

6 We simply draw your attention to it, because it is
7 part of the official background, if you put it like
8 that, that the tribunal is aware of in this particular
9 area. It is no more than that.

10 Mr Green, there is one other point I would like to
11 make now for the benefit of the parties, which is on the
12 question of the law in this case, which I think has
13 cropped up once or twice. There has been mention,
14 I think, in relation to the Bayer decision of the test
15 of a "concurrence of wills" when it comes to the making
16 of an agreement. On the other hand, the Dyestuffs case,
17 which has now stood for many years, talks of a concerted
18 practice as a form of practical co-operation, falling
19 short of an agreement properly so-called, from which we
20 wonder whether it may be inferred that as far as
21 a concerted practice is concerned, the test is not
22 a concurrence of wills as such, but the broader tests'
23 success out in the various cases, most of which are
24 referred to in the skeletons, and particularly the OFT
25 skeleton.

1 Sorry to have taken you out of your way.

2 MR GREEN: No, not at all. Perhaps I can very briefly just
3 address one or two of those issues. So far as the
4 domestic electrical goods report is concerned, I think
5 you are right, I think it was the report that
6 Mike McCulloch referred to when he went to see
7 Emma Wilson; I think it is referred to in her witness
8 statement.

9 Sir, of course, as you have observed, the legal
10 question which the MMC was addressing there is not the
11 legal question here.

12 The legal question here does come out of Bayer, and
13 this brings me to the point which was just made: we read
14 Bayer as expressly saying, in paragraph 175, that a
15 concurrence of wills is an integral part of agreement,
16 concerted practice and decision by associations of
17 undertakings, and we think that comes out of
18 paragraph 175 of Bayer. I was proposing to come back to
19 that later.

20 THE CHAIRMAN: Well, we had better look at that. So are you
21 saying that Bayer qualifies Dyestuffs, or that they
22 exist side by side, or what?

23 MR GREEN: If Bayer qualifies Dyestuffs, so be it, but if
24 you look at Dyestuffs, the notion of practical
25 co-operation was not elaborated upon. Practical

1 co-operation falling short of agreement properly
2 so-called; we say a concerted practice is simply a less
3 formal version of agreement. The purpose of introducing
4 the notion of a concerted practice was to ensure that
5 all species of concurrence of wills, from the least
6 formal to the most formal, whether expressed in a formal
7 contractual document or in an exchange of letters, or in
8 simply a nod and a wink, are caught, but all of those
9 various forms of co-operation will involve a concurrence
10 of wills.

11 The court was not addressing in Dyestuffs, which was
12 a very early case, precisely what was meant by the
13 practical co-operation falling short of agreement, and
14 what the lowest common denominator between all forms of
15 co-operation was. We say that Bayer actually addressed
16 that point: what was the lowest common denominator?
17 Paragraph 175 says all three of the categories of
18 arrangement caught by article 81(1) -- agreement,
19 concerted practice, decision by associations of
20 undertakings -- all have as a common denominator
21 a concurrence of wills between at least two parties.

22 THE CHAIRMAN: If we take a very simple example, just for
23 argument's sake, I am not speaking of this particular
24 case -- if we just take a very simple example, for
25 argument's sake, of a supplier, A, and two retailers, B

1 and C: supplier A rings up retailer B and says, "C has
2 told me that he is going to charge a retail price of X",
3 and B says, "Thank you very much" and puts the phone
4 down, and it later turns out that the prices charged by
5 the two retailers, B and C, are the same; does that, in
6 your submission, amount to a concerted practice or
7 a concurrence of wills?

8 MR GREEN: Not at all, not in itself. You would have to
9 prove more. Absolutely not in itself.

10 THE CHAIRMAN: So that sort of price information is not
11 caught, in your view?

12 MR GREEN: Not at all, it cannot be, for this reason:
13 retailer B could have formed the view of whether or not
14 to go out at that particular price entirely
15 unilaterally, and a critical element of all of these
16 cases is whether or not the reaction of the retailer is
17 a unilaterally arrived at decision.

18 If it were not the case, then a company that makes
19 an announcement to the Stock Exchange, whether directed
20 at a competitor or not, may risk bringing its competitor
21 into a concerted practice, because it throws out
22 information as to its future intentions, that is picked
23 up --

24 THE CHAIRMAN: There are not many Stock Exchange
25 announcements that deal with the prices of particular

1 products.

2 MR GREEN: Well, there can be.

3 THE CHAIRMAN: There may be general policy announcements.

4 MR GREEN: A number of announcements have just occurred to
5 me, in the last few weeks in the telecoms field about
6 the pricing of mobiles. There can be announcements.
7 But we are not just concerned here with prices: it could
8 be investment decisions, it could be production,
9 quantity decisions, capacity decisions --

10 THE CHAIRMAN: Let us confine the topic to prices of
11 individual products, for argument's sake.

12 MR GREEN: It still cannot possibly be a concerted practice,
13 because retailer B, on that hypothesis, may have
14 already, for entirely rational reasons, come to the view
15 that it will go out at the price that happens to have
16 been communicated to it.

17 THE CHAIRMAN: But he happens to be in possession of -- let
18 us assume for argument's sake -- highly confidential
19 commercial information about his competitor's
20 intentions.

21 MR GREEN: Let us assume that then, that he did not ask for
22 it, it was simply a stone cast into his pond, but it had
23 no impact whatever on his decision; he had already taken
24 the decision, or he had a policy document saying,
25 "I will take my pricing decisions in the following way".

1 That stone which was cast into his pond did not affect
2 the decision he took.

3 Let us assume also that he believed the information
4 was entirely credible and accurate, and had no doubt to
5 disbelieve it; again, it cannot be creative of
6 a concerted practice, because his decision was his and
7 his alone. There has to be some acceptance of that
8 information and acting upon it.

9 If it is simply the stone unilaterally cast into the
10 pond, however accurate and precise, then it cannot per
11 se give rise to a concerted practice. You may get very
12 close to it, but you would have to then establish that
13 retailer B, who received that information, positively
14 acted upon it, and I would go one step further, which is
15 that if retailer B has as his policy, let us say,
16 adherence to RRP, so there is an independent benchmark
17 which drives that policy, and the information, the stone
18 which is cast into his pond, has a de minimis effect, it
19 provides a modicum of reassurance, then that will still
20 not be causative of the decision which retailer B takes.

21 Retailer B is still saying, "Well, all right, I did
22 not ask for it, it was given to me, I cannot wipe it out
23 of my mind, it gives me a crumb of comfort, but frankly,
24 this is my policy".

25 THE CHAIRMAN: I think we are genuinely needing a bit of

1 help in this area, because it is clearly going to be
2 a very important question for this and for possibly
3 other cases.

4 MR GREEN: Yes.

5 THE CHAIRMAN: If the example we have been talking of was
6 not an isolated incident, but matured into something
7 that could reasonably be described as a practice,
8 whereby supplier A was regularly telling retailer B what
9 retailer C's prices were going to be, does that get
10 a bit nearer to the idea of concerted practice?

11 MR GREEN: Its only significance is evidential. If
12 a supplier passes on information about retailer C to
13 retailer B on a monthly basis, that is a periodic
14 casting of a stone into the pond; but if, as a matter of
15 fact, retailer B still simply follows its own policy,
16 there can never be a concurrence of wills, or even
17 practical co-operation.

18 THE CHAIRMAN: Who has to show what in that sort of case?
19 That approach may take one back into the burden of
20 proof, because I think the Cement case at least says at
21 one point that if you are shown to have received
22 information, and you have received it in circumstances
23 that the information is information of a competitive
24 nature, it is normally presumed to have had some
25 influence on your decision, because you have got it.

1 MR GREEN: Well, I think the facts of Cement -- as
2 I recollect the facts of Cement, I was for Blue Circle
3 in that case, Mr Brealey reminds me he was for the
4 Commission, but that case was a classic smoke-filled
5 room arrangement of bilateral cartels, buttressed by
6 arrangements within national trade associations,
7 buttressed with supra national trade associations, and
8 supra supra national trade associations, involving
9 exchanges of information about prices, quantities and so
10 on. It is very different when one is dealing with
11 a classic vertical case.

12 The only case I can think of, off the top of my
13 head, about burden of proof was an observation by
14 Advocate General Jacobs in an article 28 case involving
15 trademarks, Bristol-Myers Squibb, BMS, in which the
16 question of who had the burden of proving that if you
17 imported a parallel imported product, a drug, into
18 a member state, it was not harmful. The trademark
19 proprietor said it was the importer who had the burden
20 of proof, and the importer said the trademark proprietor
21 had the burden of proof.

22 Advocate General Jacobs analysed it as a broad
23 issue, and said there was such a notion in Community
24 law -- as I recollect he put it, the probatio diabolica,
25 the diabolical burden of proof, which he said was an

1 obligation to prove a negative. He said that Community
2 law would effectively set itself against an obligation
3 to prove a negative; in other words, an obligation on
4 the part of retailer B to prove that he was not
5 influenced to a material extent in his pricing by the
6 stone which had been cast into his pond.

7 It is almost impossible to prove; how do you prove
8 it? You simply say, "It was not, I did not, it cannot
9 have been". What more can you say?

10 THE CHAIRMAN: How would the competition authority prove it
11 if it was the other way round?

12 MR GREEN: They would have to show that the decision of
13 retailer B was not a decision taken unilaterally.

14 THE CHAIRMAN: But if we are talking about the nod and the
15 wink, if we just use that phrase as a test for concerted
16 practice, the very simple facts that we are discussing,
17 purely hypothetically, could be said to amount to the
18 classic nod and wink, especially if it happens more than
19 once, or over a period; you have a sort of wonderful
20 price signalling arrangement that on one view of the law
21 might not be caught, but on another view, probably is.

22 MR GREEN: I think the answer to that is an evidential one,
23 and I think one can look at it in two ways. I think
24 this is corroborated both by Dyestuffs and by Wood Pulp;
25 you have a situation whereby it is entirely credible, by

1 reference to external factors, that pricing may follow
2 a particular pattern, call it conscious parallelism,
3 then the burden is on the Commission to prove that that
4 is not the explanation. What does that mean in
5 evidential terms? It means that you look to see what is
6 the corroborating evidence. Is there a good reason for
7 conscious parallelism in the market?

8 In this case, we say unusually, there are very, very
9 powerful forces leading to conscious parallelism: the
10 GUS takeover -- I mean, we rely heavily on the fact that
11 we were externally advised as to precisely what we ought
12 to do in the light of the GUS takeover.

13 THE CHAIRMAN: I seem to remember in Wood Pulp -- you will
14 be able to correct me if I have misremembered it --
15 there was not much evidence of direct contact. The
16 Commission tried to prove it on the basis of economic
17 evidence really.

18 MR GREEN: I would have to check --

19 THE CHAIRMAN: We will need to go back and look at it, which
20 we will, of course.

21 MR GREEN: -- the precise facts. I think the point of
22 principle is the important one. It is an evidential
23 question. The OFT, the European Commission retains the
24 burden of proof. They may be able to say, "Your defence
25 is based upon conscious parallelism, ordinary market

1 forces, but when we analyse the ordinary market forces,
2 there is nothing in them, there is nothing to suggest
3 that prices would be parallel in the ordinary market",
4 in which case one deduces from that that the only
5 explanation is the alternative one, namely
6 an arrangement.

7 On the other hand, if there is credible evidence,
8 with documentary support that there are market forces
9 which will tend to bring prices together, then that ups
10 the burden on the OFT or the Commission to establish the
11 concerted practice. You must then differentiate
12 causally between the market forces and any contacts, and
13 you must say, "It was not the market forces, it can only
14 have been the contacts", and that is an evidential
15 burden.

16 THE CHAIRMAN: Does one necessarily have to exclude the
17 possibility that it may have been both? Because
18 although market forces may have been pulling in
19 a particular direction, it does not necessarily mean
20 that the result would have been exactly the same as in
21 a situation where you have contact.

22 MR GREEN: There would need to be some fairly cogent
23 evidence of that; it is again a question of proof. If,
24 on the balance of probabilities, we can establish, as
25 a defendant, that the reason for the coalescence of

1 pricing is market forces, then the burden is on the OFT
2 to disprove that; if there is a question of effect,
3 a degree of comfort -- if you ask yourself -- well,
4 Littlewoods and Argos were moving in that direction, we
5 had had spring/summer 1999, which is completely
6 untainted by any suggestion of unlawful conduct of any
7 description, that is a very, very powerful reason why
8 parties would coalesce in autumn/winter and thereafter
9 even more so; what impact causally, quantitatively,
10 could the throwing of the stone into the pond have on
11 that decision?

12 If it provided a crumb of comfort, or it was only
13 a crumb or a modicum of comfort, and absent that
14 comfort, the same decision would have been taken, then
15 one cannot conclude that there was an agreement.

16 We would go further and say that if there was
17 a modicum of comfort provided, that is not sufficient to
18 establish a cartel, and one comes --

19 THE CHAIRMAN: How much comfort do you say is sufficient?

20 MR GREEN: In the present case, none at all. So far as my
21 clients were concerned, they were absolutely adamant
22 that information provided to them about Argos was just
23 simply, as it were, putting --

24 THE CHAIRMAN: No, for argument's sake, having said that
25 a modicum of comfort would not be sufficient --

1 MR GREEN: Yes, I see. Well, I would rely on the words in
2 Cement, and the paragraph that was cited to us by the
3 tribunal; I thought that a phrase there was quite
4 important. It was about the reciprocated undertaking,
5 and what had to be established for a concerted practice
6 to arise. The court referred to conduct which either
7 eliminated risk or substantially eliminated risk, and if
8 one wants to find a reference in this case law to the
9 quantum of effect, it is either something which has
10 a causal effect, in other words 100 per cent, or
11 substantially impacts upon the decision of, in our
12 illustration, retailer B. So that is quite a high
13 burden, and that is quite a high threshold: eliminates
14 all risk, or eliminates substantially the risk. That
15 puts the threshold at a high level.

16 THE CHAIRMAN: We may come back to it, because I am very
17 conscious I have taken you out of your stride.

18 MR GREEN: Not at all.

19 Closing submissions by MR GREEN (continued)

20 MR GREEN: At the end of play yesterday I was making brief
21 submissions about the credibility of Ian Thomson's
22 evidence, and plainly, the tribunal will need to assess
23 the nature and content of the discussions and contacts
24 between Hasbro and Littlewoods/Index in the period after
25 the spring/summer 1999 catalogue.

1 This primarily focuses upon discussions which
2 Ian Thomson had with others, so it is unavoidable that
3 the tribunal will have to form a view as to the
4 credibility of witnesses. That is particularly the case
5 where the outcome of the case may turn on the nature and
6 content of discussions.

7 Now how does one therefore test credibility? The
8 principles, we submit, are the same in this case as in
9 any other. The eight examples I gave you yesterday
10 evening boil down to well-known tenets of assessment.
11 Number one, how well has a witness prepared his
12 evidence? I am not suggesting coaching, but have they
13 made efforts to try and verify facts, to do what they
14 need to do in order to assist a court or tribunal?

15 What efforts has that witness made to ensure
16 accuracy? We point to the remarkable volte face in
17 paragraph 144, which demonstrates that Ian Thomson,
18 however confident he was in June 2003, when he had
19 a chance even to check one fact against a document,
20 turned out to be completely inaccurate.

21 Consistency: is the witness consistent with other
22 documents or proven events? We submit that
23 Ian Thomson's evidence is inconsistent with a large
24 number of events and indeed documents, and I am going to
25 refer you to the 18th May e-mail as an illustration.

1 I gave you others yesterday.

2 Is Ian Thomson's evidence or any particular
3 witness's evidence consistent with other witnesses? We
4 say not only is he inconsistent with our witnesses, he
5 is inconsistent with Mike McCulloch, and he is
6 inconsistent with Neil Wilson. David Bottomley did not
7 really have very much to add, because when he was
8 questioned his view of life was no more than, "I got my
9 information from my juniors".

10 Is the evidence hearsay? In other words, how direct
11 is it? Was he the person who made the speech in
12 question, or is he simply recounting evidence which he
13 recollects that somebody else should have given?

14 What is the strength of the memory of the
15 individual? Does he admit that he cannot remember
16 details, how often, and in what respects?

17 Veracity: is there an indication that the witness is
18 being disingenuous? Are there any incidents that would
19 suggest that the witness is being economical with the
20 truth? Was the evidence given in a measured and fair
21 and transparent manner?

22 Now in all these various respects, we suggest that
23 Ian Thomson's evidence is unreliable, and I will give
24 you some additional examples as I go through.

25 What I would like to do is to contrast Ian Thomson's

1 evidence with the evidence of the Littlewoods and Index
2 witnesses. Littlewoods put forward 13 witnesses for
3 cross-examination; all of these witnesses were witnesses
4 who were put forward to the OFT, their statements were
5 prepared some two years ago, not for the purpose of this
6 litigation.

7 The OFT chose to cross-examine only about half of
8 them, but Littlewoods put forward every single person
9 who had contact with Hasbro, that was even remotely
10 relevant, from the senior managers downwards.
11 John McMahon was presented, and he was cross-examined;
12 Peter Edmonds, who was his successor, was presented, but
13 they chose not to cross-examine him, although he was
14 responsible for the buying decisions from September 2000
15 onwards. Lesley Paisley was presented, as were all the
16 buyers.

17 We also put forward witness statements from other
18 buyers and managers in relation to other goods, who also
19 said they were aware of the GUS takeover, and they
20 candidly explained how in their areas, that takeover
21 impacted upon their perception of Argos' pricing, and
22 how they responded to it.

23 Thirteen witnesses, therefore, were put forward to
24 the OFT in the administrative proceedings. If you
25 compare those statements with the notes of interviews,

1 there is a very high degree of consistency. The
2 witnesses have not changed their position in the course
3 of nearly three years. They all -- and I think this is
4 quite an important point -- put forward evidence which
5 is adverse at least prima facie to their case. We have
6 given a number of examples of this in paragraph 10 of
7 our closing.

8 This is evidence which they need not have put
9 forward, because it might have set a hare running, but
10 they chose to put forward.

11 We have given a number of examples in paragraph 10.
12 Alan Cowley, in paragraphs 8 and 9 of his statement --
13 he was the person who raised the question of the
14 Tweenies problem, and his discussions with John McMahon,
15 and his recollection that John McMahon had referred to
16 Mike McCulloch.

17 On the face of it, that is a dangerous thing to say,
18 if you are trying to conceal the truth, but he fairly
19 put the point forward.

20 Lesley Paisley, again, quite fairly, put forward
21 what she described as the unusual incident where
22 Mike McCulloch came into a room at Stockley Park and
23 said various things about recommending prices; she did
24 not have to say that. She put it forward knowing that
25 it would be potentially adverse to her case, but she put

1 it forward because it was her recollection.

2 Alan Burgess' statement in paragraph 19, where he
3 said he vaguely remembered Ian Thomson advising him that
4 he thought Argos might accept his retail prices; it
5 would have been very easy for Alan Burgess to simply
6 deny that those statements were made.

7 Indeed, I think it is also quite significant that
8 when he was cross-examined on this very point -- and we
9 have set out the cross-examination at paragraph 12 -- he
10 was asked whether or not his recollection or his
11 evidence was that certain discussions with Ian Thomson
12 had not taken place, or whether he did not recall them.
13 He was very measured, he thought for a long time; I was
14 sitting there thinking, "I wonder what he is going to
15 say", and he said, "I do not remember". He could very
16 easily have said, "They did not happen", but he gave
17 a quite candid answer which was potentially adverse to
18 the position he was trying to make, the position the
19 company was taking.

20 He then qualified and said, "Listen, if the
21 conversation had happened, I think I would have
22 remembered it", but he could have said, "It just did not
23 happen"; well, he did not say that.

24 THE CHAIRMAN: I think one of the things we will have to
25 consider in due course, Mr Green, is whether, in the

1 light of whatever comes out of the legal discussions,
2 some of these witnesses may unwittingly have crossed
3 a line that they had not appreciated they were crossing
4 at the time.

5 MR GREEN: Well, there is a legal issue there about what is
6 meant by a concurrence of wills, which I will come back
7 to, because we submit that negligence cannot possibly be
8 part of a subjective concurrence of wills.

9 THE CHAIRMAN: It is not a question of negligence. It may,
10 at the end of the day, be that on some parts of the
11 case, in a number of the areas you have just indicated,
12 the actual area of factual dispute is rather small.

13 MR GREEN: I will come back to what Ian Thomson said and did
14 not say, and what he was referring to, because I think
15 there are some very important distinctions which have to
16 be drawn about the different types of conversation that
17 would have occurred.

18 But the other example again in terms of credibility
19 which we have given in paragraph 10 is Phil Riley: he
20 recounted conversations with suppliers about retail
21 prices as part of the discussion he was having in order
22 to wrest greater discounts. He would say, "Listen,
23 I have seen the price in TRU, Woolworths or Argos, you
24 must have been giving them better prices, I want
25 a better discount from you".

1 He did not have to say in his evidence, "I have had
2 conversations with retailers"; all of these were
3 volunteered. The point I am making here is that
4 Littlewoods was quite clear that it had to put forward
5 the story, warts and all, to the OFT in the course of
6 the administrative proceedings, and that is a relevant
7 fact when one comes to test the credibility of
8 witnesses.

9 THE CHAIRMAN: Yes.

10 (11.00 am)

11 MR GREEN: The third part of the point on credibility goes
12 to concessions or admissions made, and we have listed,
13 in the time we have had available to review the
14 transcript, a number which Ian Thomson made, which we
15 have set out at paragraph 173 onwards. I am going to
16 come back to the things that Ian Thomson did and did not
17 say, but in paragraph 173, he accepts that he never
18 coerced buyers to go out at RRP, he accepts that he
19 never knew what Index's prices would be until the
20 catalogues were published, he can recall no occasion on
21 which a Littlewoods buyer ever came back to him to
22 complain that Argos had not priced at RRP.

23 He accepts that Hasbro's policy was to select strong
24 price points which were difficult for retailers to
25 break. He agreed that Hasbro had sufficient experience

1 and skill to know instinctively what the correct price
2 points were. He accepted that retailers had little room
3 for manoeuvre on price. He accepted that it would be
4 difficult to price toys at a price different to that
5 advertised on television. He accepts that certain
6 products such as core games -- that a market price would
7 have been established well before the time of the
8 alleged agreement. He accepts that the Littlewoods
9 buyers did not have authority to set prices themselves,
10 they had to justify them to Lesley Paisley, because of
11 the buying process within Littlewoods and Index. He
12 accepts that Index and Argos would have gained
13 confidence as to each other's pricing strategies from
14 their actual prices in past catalogues.

15 Those are the matters we say are relevant to
16 determining credibility. We do believe there are some
17 factual differences between Ian Thomson's account of
18 events -- because he is very vague as to what he did or
19 did not say, and when you review the transcript, one
20 finds he does refer to a number of matters which we say
21 are inevitably innocuous, and there are other areas
22 where he seems to be confused, but I will return to
23 that.

24 Before I got on to the question of credibility I had
25 been dealing with the spring/summer catalogue, and the

1 events which led up to it. One then moves past
2 spring/summer into autumn/winter, which I dealt with
3 yesterday, and the fact that there was price
4 commonality, we submit just simply following on from
5 spring/summer.

6 Then one moves to the issue of the extension of the
7 range, which brings one to two issues: first, the
8 18th May e-mail, and secondly, the nature of discussions
9 between Ian Thomson and the buyers.

10 Now before considering the 18th May e-mail, I want
11 to consider the market pressures which were operating
12 unilaterally on Littlewoods and Index at the time. We
13 submit that the gradual extension of adherence to RRP's
14 was inevitable, given the market forces.

15 We have seen that by this time, and we are now
16 looking at the first half of 2000, Littlewoods had
17 appreciated the implications of the GUS takeover, it had
18 had its external market advice for well over a year, it
19 had the experience of two catalogues, there was also
20 a change of management, as John McMahon said, and he
21 gave you evidence that the new management said Index had
22 to be turned around within a couple of years. And there
23 was the evidence that John McMahon was going for margin
24 in toys and I think he said two other departments; the
25 reference to that is Day 2, page 100, lines 9 to 13.

1 You will recollect that John McMahon was not
2 cross-examined on the external management report; the
3 implications of that are obvious. It was a powerful
4 point in Littlewoods' favour, and the OFT chose not to
5 touch it.

6 The policy of implementing the margin increase
7 through adherence to RRP's can only be implemented in
8 spurts; in effect, twice a year, spring/summer and
9 autumn/winter. There is limited opportunity to
10 implement a price change outside of that; there is
11 opportunity, but it is much more limited if you are
12 going to create the impact in the marketplace. You can
13 do it through leaflets, but in relative terms, it does
14 not create the same impression as getting the price
15 right in the two catalogues.

16 The evidence demonstrates that the policy was
17 implemented first on products where there were very low
18 margins and high advertising, for example core games and
19 Action Man. I will not go back to the debate we had
20 yesterday, but in relation to this question of increased
21 footfall, whether it was logical to apply it to those
22 sorts of products, there are three additional points
23 which we can make, and we have dug out the references
24 overnight on this.

25 The first, in relation to these must-have products,

1 is that Index customers did not spend very much at any
2 one time. Thus the benefit of footfall products to get
3 customers into the store was of limited value to Index;
4 that is Lesley Paisley's evidence, Day 2, page 132,
5 lines 1 to 6.

6 Secondly, it would have been counter-productive for
7 Index to have undercut Argos. The advantages suggested
8 by the OFT, had they occurred at all, would have lasted
9 for only one catalogue. In the next catalogue, Argos
10 would have reacted and undercut Index, and in that
11 context one has to remember that Index's external
12 consultants had advised it that it should not initiate
13 a price war, because Argos would win.

14 So any footfall benefits, even if they existed,
15 would be short lived, and the net dis-benefit of
16 initiating a price war would outweigh the benefits.

17 And the third point, again, as Lesley Paisley
18 recognised, any advantages gained from undercutting on
19 footfall products could easily be extinguished by the
20 losses of selling high volumes of loss-making items;
21 that is her evidence at Day 2, page 131, lines 23 to 25.
22 She said that there would have to be a weighed up
23 business decision to confirm that there was an outright
24 advantage, even with these prevailing factors; that is
25 Day 2, page 142, lines 12 to 15. Index could not afford

1 to sell on a continual basis loss-making products; that
2 was confirmed by John McMahon. He said that it needed
3 to increase margin quite considerably because, and I am
4 quoting from Day 2, page 101, line 23, through to
5 page 102, line 7:

6 "... Index was not making any money, and it could
7 not have carried on any longer, and the chief executive,
8 I think, had given it a year or two to be turned around,
9 which is why he brought in Management Horizons."

10 That is the external consultants. So the position
11 in relation to not just core games and Action Man was
12 that across the range they had to move to higher
13 margins, which meant RRP's, but it could not be done all
14 in one go. You started with very low margin/high
15 advertised products, and in October/November 1998 the
16 risk existed, but it was a reduced risk, because of the
17 spring/summer 1999 catalogue.

18 As you have seen, both Argos and Littlewoods took
19 the same view of the risk, in going out at higher RRP
20 related prices in spring/summer 1999.

21 Now in spring/summer 2000, it is quite plain that
22 Littlewoods had observed reduced risk in two previous
23 catalogues. The net effect of that was that even in
24 relation to products where margins were slightly higher,
25 but still low, which is the other toys, and where

1 otherwise there might have been scope for disparity, it
2 was still safer to go out at RRP, because you get more
3 margin.

4 So naturally and inevitably one would expect,
5 consistent with market forces, that there would be
6 an extension of the range.

7 Now the table that I brought to your attention
8 yesterday, attached to Lesley Paisley's second witness
9 statement, tab 52, demonstrates that, not just in
10 relation to the alleged games to which the so-called
11 undertaking or arrangement was applied, but in relation
12 to a large number of other games. One was naturally
13 seeing a coalescence of prices across an extended range
14 of products.

15 Peter Edmonds, who took over from John McMahon, and
16 whom the OFT decided not to cross-examine, explains that
17 he extended the policy from toys to electricals. So
18 there is evidence of an extension, a policy which was
19 applied across all products to increase margin, and for
20 Littlewoods and Index, so far as that company was
21 concerned, this meant going to RRPs.

22 It started with what might be described as the
23 inevitable products, branded low margin products, and it
24 spread outwards, from spring/summer 1999 onwards, until
25 autumn/winter 2000, and so on.

1 One might say ergo toys were in the first wave, but
2 core games and Action Man were at the front of the first
3 wave. And given the limited number of occasions for
4 price change, well, it makes it inevitable that you are
5 going to see coalescence at regular periodic intervals.

6 Now the final point, and indeed an important point,
7 is that the market pressures were underscored by
8 Hasbro's margin squeeze policy. This is quite
9 independent of any discussions, this is simply the
10 policy of increasing list prices, and providing a
11 greater range of retrospective rebates.

12 Neil Wilson has given uncontradicted evidence that
13 in relation to these other products, there was
14 an extension of the so-called price initiative, and at
15 that point, he was talking solely about the margin
16 squeeze, which Ian Thomson says rendered it inevitable,
17 paragraphs 41 and 42 of his statement, that there would
18 be adherence to RRP's.

19 If you extend that to an increased range, you are
20 going to get that same margin squeeze effect which will
21 further pressurise market forces; in fact, that price
22 can be seen as part of the market forces, because it is
23 not suggested that in and of itself, simply raising list
24 prices and granting retrospective rebates by
25 a non-dominant supplier is in any way unlawful.

1 It is not suggested by the OFT that in and of
2 itself, that was unlawful. What is suggested as being
3 improper were the surrounding discussions, debates and
4 alleged arrangements.

5 Now that is the context of the 18th May e-mail. We
6 deal with this in our closing submissions at
7 paragraphs 146 to 153, and I would like to summarise the
8 points that we make, rather than just read out those
9 paragraphs.

10 The first point is that no Littlewoods/Index buyer
11 sought the information on that e-mail. Ian Thomson was
12 quite categoric on that, it was not information which
13 was sought by any buyer.

14 Further, no Littlewoods or Index buyer responded to
15 it. The only person who responded was Lesley Paisley,
16 but only when she was phoned up, and I will come to that
17 shortly.

18 So the first point is: not solicited, not responded
19 to. The second point is the inconsistency between
20 Neil Wilson's evidence and Ian Thomson's evidence.
21 Neil Wilson denies he fed Ian Thomson the information;
22 there is therefore inconsistency between the two Hasbro
23 employees on the point.

24 Thirdly, Ian Thomson's information could, we submit,
25 not have come from Argos because it was materially

1 inaccurate. It is not enough to say that it was
2 inaccurate only in a small number, three or four items,
3 because these were crucial items on Hasbro's story, on
4 their case; they had to be accurate on everything. They
5 were, after all, if Ian Thomson is to be believed,
6 representing that on these crucial products, they were
7 committing that Argos had signed up; if they are wrong
8 on three or four of them, that is a very major margin of
9 error. It is not minor, it is not insignificant; given
10 the context, it is critical.

11 Error on a project like this reveals a very high
12 degree of inaccuracy, and in relation to that one has to
13 recollect that the prices on the e-mail were the RRP's,
14 which as Ian Thomson explained, were also the prices
15 which had already been notified to the buyers.

16 So there was no surprise in the buyers' minds that
17 these would be the prices, because they had been
18 notified already that these were the RRP's, which simply
19 meant that the only representation made in the external
20 e-mail was that there was some commitment by Argos to
21 these prices.

22 Now the fourth point is that the internal e-mail of
23 18th May, the one just after 10.00, involves quite
24 a high degree of bragging. Ian Thomson represents to
25 his colleagues and senior managers that he had

1 an agreement with, amongst others, Alan Cowley on
2 Tweenies. That is what he said to his management, he
3 had got agreement with the Index buyers, when he accepts
4 that he could not have had agreement; indeed, he accepts
5 in both his witness statement and in oral evidence that
6 Alan Cowley denied he knew anything about an
7 arrangement, and that every time he ever tried to
8 pressurise Alan Cowley, he had his head bitten off.

9 He was quite clear that he got no joy of whatever
10 sort, of whatever nature, from Alan Cowley; yet he still
11 represented internally that he had that understanding or
12 arrangement with Alan Cowley on the Tweenies products,
13 which plainly was not true.

14 He was taking credit, so it seems to us, for what he
15 claimed was the success of his price initiative, when in
16 reality, it was the market, as David Bottomley accepted
17 in his witness statement -- it was the market driving
18 forces. David Bottomley, you will recollect, I think it
19 is paragraphs 7 and 10, says that their initiative
20 occurred at a very propitious moment, because everybody
21 was moving to these prices anyway.

22 Now if one looks at the internal e-mail, which is in
23 quite a different form and language to the external
24 e-mail, he plainly was not telling the truth. And we
25 have Neil Wilson, who contradicts Ian Thomson's evidence

1 on that as well.

2 In his witness statement, Ian Thomson says that
3 Alan Cowley denied there was ever an arrangement, so how
4 could he have represented to internal management that
5 there was? The ineluctable conclusion is that either he
6 was very, very sorely mistaken, even at the time, in his
7 own recollection, or that he lied. He was taking credit
8 for market forces.

9 The fifth point is that in his e-mail to Index --

10 THE CHAIRMAN: So this is an example, in your view, of
11 dishonesty on the part of Ian Thomson?

12 MR GREEN: I cannot say it is dishonesty.

13 THE CHAIRMAN: You just said he lied.

14 (11.15 am)

15 MR GREEN: I said he either lied or he is very sorely
16 mistaken. One can look at the document, one can see he
17 made a representation to internal management, one can
18 see that is flatly contradicted by his own evidence
19 elsewhere, and in cross-examination. One draws
20 a conclusion that, at the very least, he was badly
21 mistaken and inaccurate; one could also infer that he
22 was misleading deliberately his internal colleagues.
23 Those, I think, are the only two alternatives.

24 I did not put to him that he was a liar, so I cannot
25 say, "He is a liar", but one can draw one's own

1 inferences.

2 The fifth point is that in his e-mail to Index, he
3 does not refer to an agreement. He uses different
4 language; again, one says: well, had there been
5 an agreement, there is no reason why he would not have
6 used that language, "Hi chaps, we have an understanding,
7 I have spoken to you all about this". What he says is,
8 "We have had discussions on price points"; he does not
9 refer to having discussion on agreement over RRP's. He
10 refers to something quite different. He does not say
11 that he had had an agreement with them, he uses quite
12 different language.

13 In the e-mail to Index, he said, "Argos have
14 committed to these prices"; well, you heard a good deal
15 of evidence that this sort of language is typical of
16 suppliers. Alan Burgess' evidence, which we have quoted
17 at paragraph 195 of our closing, in response to
18 a question from the tribunal, is characteristic, though
19 perhaps more articulate and graphic than some of the
20 other witnesses. He said:

21 "Never at any stage of my working life as a toy
22 buyer have I had any evidence whatsoever that any
23 national accounts manager from any company could, with
24 any certainty, give me information that I could rely on,
25 as regards prices that my major competitor would do.

1 "Many, many times -- Ian Thomson is really no
2 different, and I am not being disrespectful to anyone,
3 to any one of a number of a dozen Ian Thomsons from
4 other companies.

5 "The Chairman: So there are a dozen Ian Thomsons
6 telling you --

7 "Answer: They all want to be my best friend. They
8 need selections for their bonuses. The only way they
9 can get them is to be my best friend, in their eyes.

10 "The Chairman: And what are they telling you?

11 "Answer: They are telling me everything possible to
12 get me to select their items. They are telling me, 'You
13 can make good margin on our items. I do not think Argos
14 will be running this, you will be okay'. They are
15 telling me, 'I think Argos might go out at RRP's on this
16 because they did on a similar product two years ago', or
17 whatever. They will say anything that they think will
18 help them to get a listing. There are a million
19 different things they could say in that respect. I have
20 been in the trade for long enough, I have heard it all
21 before. Ian Thomson at Hasbro is no different to a lot
22 of people I deal with. It is their job, it is what they
23 do."

24 So that is precisely what they would have viewed and
25 did view the 18th May e-mail to be. They all accepted,

1 certainly when pressed by Mr Doctor, that it was
2 an extremely unusual form in which it was expressed, and
3 perhaps more extreme, but that was only after the event;
4 they all gave evidence, and I thought this was
5 interesting evidence -- their reaction to the questions
6 was not, "We did not believe it"; for most of them, it
7 was, "Well, it did not even cross our radar. We get so
8 many e-mails like this, we look at it for 5 seconds, we
9 delete it. I get hundreds of e-mails like this every
10 day, particularly at the time when we are setting
11 prices".

12 THE CHAIRMAN: That could lead to the inference that price
13 signalling of this kind is rife in this industry.

14 MR GREEN: I think price signalling may well be rife. You
15 had evidence from different witnesses that this sort of
16 information is rife, but it comes from suppliers, it
17 does not come from competitors --

18 THE CHAIRMAN: Well, suppliers using confidential
19 information to signal to others --

20 MR GREEN: Possibly confidential information, or just
21 gossip --

22 THE CHAIRMAN: I mean, if you take that e-mail, is not the
23 products -- without even getting as far as the prices,
24 are not the products that are going to appear in the
25 Argos catalogue highly confidential information?

1 MR GREEN: I think we had some evidence on listings, that
2 listings information are necessarily given to suppliers,
3 because, of course, they have to be, and they are given
4 at some time in advance.

5 THE CHAIRMAN: Yes, but they are not passed on by suppliers
6 to other retailers.

7 MR GREEN: This case, of course, is not about exchanging
8 listings information.

9 THE CHAIRMAN: No, but it is part of the factual situation
10 in this case.

11 MR GREEN: Yes, you may --

12 THE CHAIRMAN: This is highly confidential information that
13 is being passed to Littlewoods.

14 MR GREEN: You may be right that suppliers pass on this sort
15 of information, or they gossip about it, or they predict
16 what might be the information, or they simply mislead.
17 In any event, as we know, that information, even as
18 regards listings, was incorrect on Gardens Galore. It
19 was materially inaccurate in a number of different
20 respects.

21 But the most important thing was that the buyers,
22 through vast experience, say, "We have heard it all
23 before, to us it is just unbelievable". They were all
24 absolutely as one on this, that they get this sort of
25 information, particularly twice a year when the

1 catalogue prices are being set, from a variety of
2 suppliers, all of whom want them to go out at their
3 RRP's, and sometimes, with the benefit of hindsight, that
4 turns out to be accurate, sometimes it is inaccurate.

5 THE CHAIRMAN: So are we to proceed on the basis that it is
6 a regular practice for Littlewoods to receive from its
7 suppliers information as to the listings and prices
8 which its suppliers believe are going to be in the Argos
9 catalogue?

10 MR GREEN: There is evidence -- well, you have seen the
11 evidence of Alan Burgess -- which we rely on. I think
12 it was Phil Riley who said he thought it happened half
13 a dozen times a year.

14 THE CHAIRMAN: Well, you cannot quite have it both ways,
15 Mr Green, however charmingly it is put. You cannot say,
16 "This was the sort of thing that happened every day of
17 the week", and at the same time say, "This was
18 an unusual occurrence".

19 MR GREEN: On our case, it does not matter whether it was
20 once a year, ten times a year or 100 times a year.
21 Alan Burgess' evidence, which is the same as the other
22 buyers', is, "We did not believe it; in other words, we
23 would not act upon it. However many times we received
24 this sort of information, we did not react to it,
25 because we did not believe it to be credible".

1 They all said, and Lesley Paisley was very emphatic
2 on this, when she was questioned about her reaction,
3 when Ian Thomson phoned her; the reason she expressed
4 surprise was she did not think Argos would do it, and
5 she did not believe them, even if they could do it, or
6 did do it. She was surprised on both of those counts.

7 Everybody has expressed surprise at the e-mail,
8 insofar as they address their mind to it at all. Either
9 they just did not believe it, or it was the sort of
10 document which would not have registered, because it was
11 just someone trying to tell them RRP's again, and they
12 deleted it, and it just did not cross the radar.

13 That is consistent with the entirety of the
14 evidence. We have set out actually -- which I am going
15 to hand up shortly -- a note trying to cross-refer
16 a number of points which came out of yesterday and
17 respond to the OFT's comments; we have tried to meld
18 them together. We have put down for you as many as we
19 could find overnight, references to where the witnesses
20 say in their statements, the information they gave as
21 interviews to the OFT, and in transcripts, where they
22 say, "Listen, this happens, we just do not believe it,
23 we take our own decisions".

24 This is going to come down to, at the end of the
25 day: do you believe them? Do you believe them, who have

1 given consistent evidence over three or four years, and
2 who had their own internal policy of pursuing RRP's? Do
3 you believe them, or do you believe Ian Thomson? In
4 relation to an e-mail which turned out to be inaccurate,
5 which, had they addressed it at the time, which most of
6 them say they did not, would just have furthered their
7 scepticism.

8 Ian Thomson always says they were sceptical; in
9 relation to Katharine Runciman, he says she was always
10 expressing scepticism, "What does that mean?" If he
11 says, "Well, Argos are going out at something or other",
12 she says, "I do not believe you". Why does she say,
13 "I do not believe you"? Well, it is because she does
14 not believe him.

15 This case ultimately, one might say, boils down to
16 this, and I am jumping ahead, but it may boil down to
17 this: Ian Thomson thought buyers needed reassurance. He
18 thought they needed reassurance, because they expressed
19 scepticism, and they did not believe the information
20 they were being given. So he unilaterally may have set
21 out to provide a degree of reassurance.

22 The error in his thinking was that the buyers were
23 reassurable; they were not. Whatever Ian Thomson did,
24 the unequivocal, consistent evidence of all of the
25 Littlewoods and Index buyers is that they did not

1 believe the sort of information that Ian Thomson
2 provided them with. There were a dozen Ian Thomsons,
3 they were all trying to do their job, "We do not believe
4 him".

5 That may be the difference between Hasbro and
6 Littlewoods, but on the one part, Index had quite
7 deliberately taken their own advice, and were pursuing
8 a policy. They did not need Ian Thomson to tell them
9 how to do their job. If he thought that because they
10 were expressing scepticism, they needed reassurance,
11 well, that was his business. When he came back and cast
12 his stones into the pond, that did not have any effect,
13 because he was not credible, and the 18th May e-mail is
14 an example of why he was not credible.

15 Anyone who would have looked at it at the time, in
16 the light of the catalogue that came out, would have
17 seen that it was simply inaccurate. It was not
18 credible, accurate information.

19 THE CHAIRMAN: How are we doing for time, Mr Green?

20 MR GREEN: I have one point in relation to the decision,
21 then I am on to law, and I am doing pretty well.

22 THE CHAIRMAN: Mr Doctor, how much time do you feel you are
23 going to need? I do not want to squeeze you, as it
24 were. If we do not finish today, we do not finish
25 today; I do not know how long you --

1 MR DOCTOR: If Mr Green finishes soon, I hope to finish
2 today.

3 MR GREEN: We have summarised the reaction of the Index
4 buyers in our closing submission, and then we have
5 provided further references in the note which I will
6 hand up in a moment, at paragraph 152; I am just going
7 to rattle through a summary of the various responses
8 which the tribunal got from the various witnesses.

9 Paragraph 152, page 44. We make a number of broad
10 points in 152(a) and (b) about the inaccuracy of the
11 e-mail and Neil Wilson's evidence. We have got
12 Mike McCulloch's observations on the e-mail itself in
13 paragraph (c). He saw it as unilateral action on the
14 part of Ian Thomson.

15 In his interview, Mike McCulloch said Hasbro:

16 "... could not have had an agreement with Argos.
17 Argos price how they want ... Thomson could not
18 possibly guarantee to Index Argos' price. He must have
19 taken a major risk".

20 McCulloch stated that "the e-mails were worse than
21 they actually are. They are not evidence of
22 an agreement on pricing by retailers. An overzealous
23 approach by account managers."

24 His evidence, had he turned up, to you, would have
25 been: any information like that would have been

1 unreliable. Index would not have believed it. Why
2 would they not have believed it? Because everybody
3 knows Argos price how they please. "I know that", is
4 what he would have said to you, "and therefore Index
5 would have known that". That would have been his
6 evidence to you, and it is consistent with the evidence
7 he gave to the OFT.

8 Lesley Paisley is referred to at 152(e). As you
9 know, she had no real contact at all with Ian Thomson,
10 she had very little contact with David Bottomley, and
11 she had very little contact with Mike McCulloch. She
12 set out the contact she had with Mike McCulloch, she
13 knew the individuals, but she was concerned with a much
14 broader range of products, and on toys specifically, her
15 contacts necessarily were limited.

16 She explained to the OFT at the oral hearing in the
17 administrative procedure, "Listen, if there was
18 an arrangement, I would have had to have known about
19 it", and she would have done, because she ultimately
20 took the decisions on price. The buyers simply reported
21 to her, and they in conjunction took a decision on the
22 price in the catalogue. The buyers did not have
23 authority to set price, as Ian Thomson recognised in his
24 evidence.

25 When she was quizzed on her interview with the OFT,

1 she was pressed on the word "improper" which was, as
2 I intervened to make the point at the time, something of
3 an unfair point, because as she then explained, she
4 recollects the word "improper" was a question put to
5 her; it was not something she herself volunteered as
6 a phrase.

7 Her evidence was unequivocal: she was surprised (a)
8 because she did not think Argos would commit to those
9 prices, and (b) because she did not think they could
10 ever be accurate. That again is consistent with
11 Littlewoods and Index simply not believing the sort of
12 supplier's gossip which is circulated, and in this
13 instance, was circulated in a more formal structure than
14 before.

15 You will see from her interview with the OFT,
16 witness statements volume 2, page 342, that she was
17 quite clear there was no arrangement, no understanding;
18 Littlewoods priced as it saw fit.

19 And you have seen her caveat to the interview -- it
20 was not even an interview, it is described as
21 a discussion -- where she states her shock. She gave
22 evidence that she was frightened at that interview, and
23 she was in a state of shock, and she recorded the fact
24 at the time on the interview discussion note.

25 Alan Cowley is a very serious weakness in the OFT's

1 case. He was a very senior buyer, he had been in the
2 company for over 20 years, he was an influential man,
3 with a strong personality, to say the least.

4 Ian Thomson was extremely worried that any bad relations
5 he had with Alan Cowley would spread to other buyers,
6 and he was absolutely clear that there was no
7 understanding or no arrangement with Alan Cowley.

8 When pressed on the word "insist", which Alan Cowley
9 used in an e-mail back to Ian Thomson about the Tweenies
10 incident, and the £4,000 bill that he sent
11 Ian Thomson -- when Ian Thomson was asked about the word
12 "insist", he said he only ever insisted with
13 Alan Cowley, implying that he never did it with anybody
14 else, but when he was then further pressed on the word
15 "insist", it was plain that he did not use the word
16 "insist"; the words he actually used in the transcript
17 reflect a form of gentle encouragement, but even that
18 was a red rag to a bull to Alan Cowley.

19 He is a very serious weakness in their case. If
20 there had been an arrangement, it is inconceivable that
21 Alan Cowley would not have known about it. One of the
22 most senior buyers, in the company for over 20 years, he
23 had a Tweenies range, yet some six months after the
24 e-mail, he is still saying he did not know anything
25 about an arrangement; well, how could he not have known

1 about an arrangement? John McMahon or Lesley Paisley
2 would have told him about it.

3 If he did not know about it, the conclusion is that
4 there was no such arrangement.

5 Alan Burgess; his evidence was very clear. There
6 are ten Ian Thomsons, a dozen Ian Thomsons, he gets this
7 sort of thing all the time, he is vastly experienced, he
8 knows not to believe that sort of evidence.

9 (11.30 am)

10 We have set out in sub-paragraph (3) on page 46 his
11 evidence in relation to the e-mail itself, and it was
12 very convincing. You will have to decide whether you
13 believe it, but he explained that his assistant would
14 have looked at the file.

15 THE CHAIRMAN: He said it was either himself or his
16 assistant.

17 MR GREEN: Himself or his assistant, and he was explaining
18 why he does not remember it. Again, you will have to
19 decide whether you believe him, whether his evidence is
20 consistent with the evidence of the other buyers, and
21 with his view about suppliers generally.

22 Andrea Gornall; well, she was not there at the time,
23 even though she is mentioned on the e-mail. Ian Thomson
24 seems to recollect having a conversation with her.

25 Katharine Runciman does not remember the e-mail at

1 all. Phil Riley, he came in afterwards, so none of his
2 products were there.

3 So in summary on this point, before turning to the
4 law, Littlewoods' witnesses are emphatic that they did
5 not ask for the e-mail, nor did they respond, nor did
6 they believe it, nor did it register with them as
7 an important or significant event. All the witnesses
8 are inconsistent with Ian Thomson's version, so one
9 asks: what was Ian Thomson doing? He was doing what
10 other suppliers were doing, but in a more overt and less
11 subtle fashion. He was seeking to suggest that these
12 were prices, one might loosely call that reassurance,
13 but it was unilateral on this part.

14 In this, his evidence is inconsistent with
15 Neil Wilson, it is inconsistent with Mike McCulloch. We
16 do not have Mr Mike Brighty to assist the tribunal, but
17 his rather adjectival e-mail about, "This is thoroughly
18 illegal", with fifteen exclamation marks, was -- he
19 refers to it as "your initiative"; he does not say,
20 "This is something we have been discussing internally
21 for a very long period of time".

22 Mike McCulloch simply says he went too far, he was
23 taking a risk, he was not authorised and he was foolish.

24 Now the final point before dealing with the law is
25 a point arising out of the decision at paragraph 84, and

1 I can deal with this quite briefly. I wonder if I can
2 just ask you to turn the decision up?

3 THE CHAIRMAN: Yes.

4 MR GREEN: Paragraph 84, it is under the heading
5 "Monitoring". The short point here is that the OFT rely
6 upon what it says is monitoring, and between
7 paragraphs 84 and 91, examples are given; two of those
8 are said to relate to Index.

9 The first is Alan Cowley; how this is said to give
10 rise to any monitoring, I simply do not know. The
11 Alan Cowley incident has been canvassed with you in
12 cross-examination at great length, and in submissions.
13 Alan Cowley was not monitoring anything, he was giving
14 Ian Thomson --

15 THE CHAIRMAN: That is part of the Tweenies incident,
16 whatever one makes of it.

17 MR GREEN: Yes, it ended with Ian Thomson being called
18 foolishly incompetent, depending on how one adds in the
19 blanks after the F. Then the only other reference is
20 paragraph 89 to Littlewoods, where the OFT says:

21 "Argos and Littlewoods would also often inform
22 Hasbro if they intended to reduce the price of a Hasbro
23 product throughout the catalogue season.

24 "Footnote 104: witness statement of Ian Thomson,
25 paragraph 136."

1 When one looks at paragraph 136 of Ian Thomson, it
2 has absolutely nothing at all to do with monitoring. It
3 is concerned with an entirely different issue, which is
4 whether or not Hasbro would take back surplus stock.
5 Let me just read you 136, to save you the time of
6 turning it up:

7 "Prices did come down when Index or Argos would sell
8 off previous catalogue products that had been discounted
9 from their ranges, not necessarily ours. The buyers
10 from the respective businesses would usually phone Neil
11 for Argos, me for Index to tell us that they were
12 thinking of doing this. We would occasionally offer to
13 take product back if it was still in our range, to avoid
14 damaging the retail price point for the rest of the
15 trade. If the quantities were too small, and the
16 visibility of the product was low risk, it was allowed
17 to happen. When this situation arose with Index,
18 I usually talked it through with David Bottomley before
19 going back to Index for an answer."

20 What that has to do with monitoring is quite
21 unclear. Those are the only two references to
22 monitoring by Littlewoods.

23 THE CHAIRMAN: That evidence as evidence was not challenged,
24 if I remember rightly. Did you cross-examine on that
25 paragraph? I cannot remember.

1 MR GREEN: I do not think we thought it was even remotely
2 necessary. I mean, you have the evidence, it is there.
3 This is the OFT's interpretation of that paragraph; the
4 paragraph is there. He does not say anything about
5 monitoring, it is just about taking back surplus stock.

6 THE CHAIRMAN: Yes, I see.

7 MR GREEN: Those are the principal points arising out of the
8 facts. Can I at this stage just hand up our note which
9 is largely confined to further references? (Handed).
10 What we have tried to do is pick up some points arising
11 yesterday, and to cross-refer them to points in the
12 OFT's skeleton.

13 THE CHAIRMAN: Yes.

14 MR GREEN: Most of them are freestanding, and I think
15 obvious. We have tried to provide a list of references,
16 particularly in paragraph 9, and I am sure it is not
17 entirely exhaustive, but when of course, you review the
18 transcript, you may find others, about Littlewoods'
19 witnesses saying they never discussed retail prices with
20 their suppliers, and/or that they did not believe it,
21 and/or, also importantly, it was never part of their
22 understanding that discussions they had would ever be
23 passed on, and these are the references which cover
24 a number of pages.

25 We have also added in some references, if you jump

1 to paragraph 28, page 8, about what I would describe as
2 the footfall discussion we had yesterday, and I think
3 that is that; everything else is self-evident and
4 freestanding.

5 One point of clarification, in relation to
6 paragraph 3, which cross-refers to paragraph 56 of the
7 OFT's response; we are referring here to the meeting in
8 Liverpool at which the 1999 terms were presented, and
9 there is a reference in Ian Thomson's statement -- well,
10 the OFT say Hasbro representatives pointed out how
11 critical it was that Index would have to stick to the
12 price points in the plan, in order to make the same
13 profit level as the previous year.

14 Can you just note that in Ian Thomson's statement,
15 the expression of criticality was at a pre-meeting at
16 the hotel, between Bottomley, McCulloch and Thomson? It
17 is in that context that he uses the word "critical".
18 When I cross-examined him on the word "critical", he did
19 not say that he remembered using that word, it was one
20 of his ex post facto inventions. He was not certain of
21 what words he would or would not have used, but these
22 were not words which he says were expressed at the
23 meeting with Index, it was at the internal meeting at
24 a hotel in Liverpool.

25 It is relevant to the so-called deceit point,

1 about because Hasbro acted as a linking factor between
2 Argos and Littlewoods, and created some horizontal
3 arrangement.

4 THE CHAIRMAN: Yes.

5 MR GREEN: I think a first and very obvious point is that
6 the law does not condemn undertakings simply because
7 they are ad idem. I suspect that 80 per cent of the
8 people in this room are ad idem that a preferable way to
9 spend their time is to be at the cricket match,
10 New Zealand against England, particularly since it is
11 Friday, but we have no cartel to that effect. Whether
12 80 per cent is too high a percentage, I do not know.

13 THE CHAIRMAN: I do not know if I would have chosen that
14 particular example. Most of us would like to be
15 somewhere else.

16 MR GREEN: Maybe the pub! But simply because people share
17 the same belief does not mean to say they have committed
18 to each other that they would go down that line, or that
19 it is anything other than a unilaterally driven belief.
20 So the fact that you are ad idem is insufficient.

21 THE CHAIRMAN: Just to take a very simple case, if a
22 supplier says to a retailer, "Can I persuade you to go
23 to our RRP or price more closely to our RRP?", and the
24 retailer says, "Yes, all right, I will go along with
25 that", is that in itself enough to give rise to

1 a concerted practice?

2 MR GREEN: Well, I would accept this, that is getting fairly
3 close. I think one has to be very, very precise here.
4 Can I give you three questions and three answers which
5 might or might not give rise to concerted practice? And
6 I am concentrating on the vertical question, because
7 I think the answer may be very different if it was
8 horizontal, between two direct competitors.

9 A supplier asks a dealer in these terms, "Are you
10 going out at £19.99?", and the dealer thinks for
11 a moment and says, "Yes". He says yes because he has
12 already decided to go out at £19.99, so the question
13 does not impact at all on the decision as to price. It
14 is simply a question which bears not at all on the price
15 decision, and the answer is simply a reflection of
16 a decision which unilaterally has been taken. That, we
17 submit, does not come close to being a concurrence of
18 wills, because there is an entirely unilaterally decided
19 upon decision by the retailer, the purchaser, which was
20 not influenced by the supplier.

21 THE CHAIRMAN: Why is the supplier asking the question?

22 MR GREEN: Well, I will come to that in a moment. There
23 are, I think, a number of circumstances where questions
24 about retail prices are inevitable, or discussions about
25 them are inevitable, but entirely innocuous, and I can

1 think of three examples.

2 But can I give you the other two illustrations? The
3 supplier asks the dealer, not "Are you going", but,
4 "Will you go out at £19.99?" Now, this could either be
5 a request for confirmation as to the retailer's previous
6 unilateral decision, "Will you go out at £19.99?" "Yes,
7 because I have already so decided". Alternatively, it
8 could be a request to follow the supplier's policy. It
9 could be any of those two, and one would need to examine
10 the evidence to see which.

11 The third question and answer is, "Oh go on, go out
12 at RRP, won't you?" Answer, pause, "Okay then". Much
13 more likely to be an arrangement, because there is
14 a request to do something, the decision as to price is
15 taken at that point in time, and it is a fettering of
16 the discretion in the broadest possible sense, "I am
17 committing to you morally though not legally that I will
18 do that, because you have requested me".

19 THE CHAIRMAN: And it does not matter -- or does it, in that
20 particular example -- that he probably would have done
21 it anyway?

22 MR GREEN: If he would --

23 THE CHAIRMAN: Does that simply go to mitigation?

24 MR GREEN: My third question and answer assumes that the
25 question induced the answer. If the answer would have

1 been yes in any event, there can be no concerted
2 practice, because the decision causally was unilaterally
3 taken.

4 THE CHAIRMAN: It is very easy for the retailer in those
5 circumstances to always say, "Well, of course, that was
6 always what I intended to do anyway". Are we getting to
7 the whole evidential area here?

8 MR GREEN: That is the difference between the evidential
9 problems which arise and the legal definition of
10 agreement. There plainly is a problem improving things,
11 but that is a difficulty which we say the OFT face.

12 What I have sought to highlight is the fact that in
13 a vertical conversation, the precise words and the
14 precise context may be critical. Now in the present
15 case, there are a number of discussions of a vertical
16 nature which can occur, in which retail prices or even
17 RRPs will arise, in which it is, on any view, entirely
18 innocuous.

19 The first is when the supplier says to the
20 purchaser, "Look at the last catalogue of Argos, look,
21 they went out at RRP's, you are safe to go out at RRP's".
22 Ian Thomson says he had a number of discussions of this
23 nature, simply by saying, "Well, look at what happened
24 in the past, why did you not go out at my RRP?" This is
25 a statement of the blindingly obvious, to both Argos and

1 to Littlewoods and Index, who monitor the prices on
2 publication; whoever says that to them, you are teaching
3 grandmother to suck eggs. They take their own decision,
4 they monitor each other's catalogue and the High Street
5 prices, TRU or Woolworths; you do not need anybody to
6 say that to you. That is public domain information. It
7 is not information of a confidential or secret nature,
8 it is visible, public domain information, and it is
9 almost inconceivable that it could have any impact upon
10 the purchaser's prices, because --

11 THE CHAIRMAN: Let us just see, in this particular case
12 there is quite a lot of evidence that Hasbro was trying
13 to persuade both Argos and Littlewoods to stick to RRP's,
14 or various other mechanisms to bring that result about.

15 We know, in fact, that they did, in most relevant
16 respects -- both companies did actually go out at RRP's.
17 So where does that take one? Is that, as it were,
18 enough to get the OFT off the ground, or do they then
19 have to rebut the argument that -- this is the essential
20 argument -- this would have happened anyway?

21 MR GREEN: Emphatically the latter. It can only be the
22 latter, because you must remember that Ian Thomson also
23 repeatedly said, when asked about how he communicated
24 his recommended prices, "Through my Excel spreadsheet",
25 and that again, in and of itself, was lawful; he was

1 entitled to recommend, and he did so in a neutral form,
2 on a price sheet, giving certain projected information
3 about volume; no conversation, it was simply flat,
4 neutral, black and white information, with a
5 recommendation.

6 That may or may not have had an effect. The witness
7 evidence says, "Well, we did not really believe his
8 volumes, we could check our own volumes by reference to
9 our marketing department, it is up to us to take our
10 decision". But if the OFT is saying that over and above
11 that, some discussions, a bit of cajoling, persuasion,
12 casting of stones into the pond, causally led to
13 adherence to RRP's, then we submit that evidentially that
14 is complete and total nonsense. That simply ignores
15 every bit of evidence you have had about the previous
16 year/18 months' market force development, which
17 inevitably led, internally, Littlewoods to go out at
18 RRP's.

19 THE CHAIRMAN: What about the aspect which is highlighted in
20 Dyestuffs, and in the OFT's submission, of reducing
21 uncertainty? The question Mrs Smith-Hillman has just
22 been putting to me I will put to you: for how long can
23 you go on receiving information, the nature of which
24 tends to reduce uncertainty, before you become party to
25 a concerted practice? However much you assert that the

1 information is not having any effect on you, if you are
2 regularly receiving it, does there come a point when you
3 do find yourself party to a concerted practice?

4 MR GREEN: There is a number of very big questions begged
5 there. First of all, it is, as a matter of legal
6 analysis, a question of evidence, but there is --

7 THE CHAIRMAN: Well, if it is a practice, and if it is
8 concerted, is that not enough to produce a concerted
9 practice?

10 MR GREEN: No, because the conundrum here is that the more
11 information that is provided, the more it turns out to
12 be reliable, the less believable it becomes. So if
13 there are more stones cast into the pond -- this was
14 Alan Burgess' evidence, "I have been in the industry for
15 20 years [or however long] and I have seen this time and
16 time again, and I have learnt over time that this turns
17 out to be inaccurate", so that if there was an attempt
18 to cajole, persuade, provide comfort on a regular basis,
19 and it simply reinforces the belief that suppliers
20 provide inaccurate information, then the more repetitive
21 the nature of the disclosure, the more unreliable it
22 becomes, because you get a greater track record of
23 understanding that it is unreliable.

24 That is one of the points we make about the 18th May
25 e-mail: it was unreliable. Lesley Paisley, when she

1 came to produce her witness statement for the OFT,
2 analysed it and said, "Well, this confirms my view, it
3 is unreliable". It really depends upon the accuracy of
4 the information that is being provided on a periodic
5 basis.

6 If it was habitually accurate, then the evidential
7 burden might be slightly greater. If it is habitually
8 inaccurate, it does not have to be inaccurate all the
9 time, it only has to be inaccurate 20 or 30 per cent of
10 the time, then you come to learn that it is simply
11 something to be ignored, which is why I say it is
12 an evidential point, and the evidence is quite
13 unequivocal: it was inaccurate.

14 That begs a second question, which was: how often
15 was it done in this case? Well, we only have a very few
16 isolated incidents. We have Ian Thomson, who really
17 could not remember how many conversations he had, and
18 did not even remember who he had them with, and we have
19 this one e-mail. Then we have the 18th May e-mail, and
20 we have Alan Cowley recording an incident when he threw
21 the phone down on Ian Thomson, because he provided him
22 again with some inaccurate information.

23 So I think it is very important to ask about this
24 periodicity question: was it accurate information, how
25 often, and what evidence is there? In this case, there

1 is not a great deal of evidence of periodic casting of
2 stones into the pond, but there is evidence that in
3 general terms, that sort of information was inaccurate.

4 I think one also has to remember it is largely
5 one-way traffic. Argos is not very interested in what
6 Index does. We have 3 per cent of the market, they have
7 17 or 18. Toys R Us, Woolies, all the other retailers
8 are more interested in Argos.

9 If it turns out that this one-way traffic over
10 a period of years is not reliable, then the buyers are
11 bound to take their own counsel, as they did in this
12 case, which was, "We have been internally advised on
13 what our strategy is, and we will simply follow that".

14 That is the first category of information or
15 discussion where it could come up, which we say is
16 irrelevant. The second is where the buyer says, "Well,
17 I have looked in the High Street, I have looked in the
18 Argos catalogue, I have seen they have gone out at what
19 appears to be below the RRP", and Phil Riley, who gave
20 this evidence, said, "I ring up the supplier
21 [Andrew Needham gave similar evidence] and I give them
22 a rocket. I give them any information I possibly can,
23 I feed them false information, and what am I doing it
24 for? Well, two or three times out of ten, I will get
25 some money out of it".

1 What is that about? That is a discussion about
2 retail price, in which the buyer goes back and has
3 a discussion with the supplier, in order to wrest
4 a better wholesale price. It is not retail price
5 maintenance, it is conversation involving price which is
6 entirely innocuous.

7 THE CHAIRMAN: Well, it may or may not be. I am not now
8 commenting on the evidence in this case, but just in the
9 abstract, as the MMC report shows, those kinds of
10 discussion can easily lead to a situation in which one
11 retailer is saying to a supplier, "Will you please do
12 something about the other retailers' retail prices?"

13 MR GREEN: It can be. I think it is -- standing back from
14 it, a supplier may say, "It is cheaper for me to go and
15 sort out the price-cutter than actually to pay the
16 whinger".

17 THE CHAIRMAN: That would be a concerted practice, would it
18 not?

19 MR GREEN: Well, it depends whether or not the person who is
20 ringing up saying, "Give me some extra dosh" --

21 THE CHAIRMAN: "Sort out the price-cutter" would be
22 a classic --

23 MR GREEN: -- was actually trying to close the circle,
24 arguably -- but that is not the evidence here. The
25 evidence is, from Phil Riley, "I was just

1 opportunistically" --

2 THE CHAIRMAN: Everybody was trying to get prices up.

3 MR GREEN: And opportunistically, he was just simply saying,

4 "Listen, even if I got some benefit one out of ten
5 times, that is a benefit to me, I might get some page
6 proof benefits, I might get a bit of promotional
7 benefit, a bit of retro on X, Y or Z", and Phil Riley
8 quite clearly said, "Often, I would give them false
9 information". It was just a deal, it was a hagggle.

10 Again, legally, that is entirely innocuous. It is
11 based on a publicly observable fact that X has gone out
12 as such and such a price on the shelf or in the
13 catalogue. Now those are examples where you can have
14 retail discussions where there cannot be an issue of
15 illegality, or that the mere fact there is a discussion
16 in a case such as the present cannot actually add
17 anything to the analysis.

18 Now Ian Thomson gave evidence to the court --

19 THE CHAIRMAN: Is not a discussion of the kind that Mrs Wray
20 was talking about, where a retailer tries to find out if
21 another retailer has got a special deal, likely to lead
22 to some kind of infringement if, in response to that
23 enquiry, the supplier reassures the enquiring retailer
24 that the other retailer has not got a special deal, and
25 that it is just an end of line sale or something like

1 that?

2 MR GREEN: Well, there is no impact on prices, and there is
3 no concordance of wills as to what to do --

4 THE CHAIRMAN: Well, the impact on prices --

5 MR GREEN: -- because it may be --

6 THE CHAIRMAN: What that might imply is that there is no
7 need to react to that, because he is just getting rid of
8 some old stock.

9 MR GREEN: It is always after the event, one has to
10 remember. This is after the catalogue has been
11 published, or after the price is on the shelf, and you
12 simply say opportunistically "I am going to ring them
13 up, shoot them down in flames, and see what I get out of
14 it".

15 If Phil Riley had gone into the conversation saying,
16 "I am going to manipulate in order to try and get
17 Toys R Us to raise prices", and that had worked and
18 Toys R Us had said, "Oh, I see what Phil Riley is on
19 about, let us do it", then one may have gone beyond the
20 pale, but there is not a shred of evidence that that is
21 the case. Again, Phil Riley volunteered this
22 information. He said, "I do it opportunistically,
23 I have a haggle, and occasionally, I get something out
24 of it". He did not say he got something out of it with
25 Hasbro, he just gave it as an illustration of when

1 a retail price discussion might arise.

2 Now as to Ian Thomson in relation to this, the
3 evidence is quite clear that he could not distinguish in
4 his own mind, and in the evidence he gave to you,
5 between these different sorts of conversation.

6 He was asked, in response to a question from the
7 president, I will give you the reference, Day 1,
8 page 178, lines 11 to 21, whether or not he had
9 an implicit assumption that there was some reassurance
10 required.

11 He agreed that there was an implicit assumption that
12 there was to be some reassurance. Now set aside how you
13 measure that evidence against a lot of the other
14 evidence, which is inconsistent, but assume he accepts
15 that he had some implicit assumption; well, all he is
16 saying is, "I implied from my conversations that they
17 required some reassurance". That was his evidence. At
18 its highest, "I implied ...", he does not say, "It was
19 explicitly demanded from me that I go to Argos and get
20 reassurance".

21 In his witness statement, he says a very interesting
22 thing about Alan Burgess. He says, "Oh, he must have
23 given the consent because he did not prohibit me. He
24 puts it in the negative. The evidence of the
25 Littlewoods and Index buyers is quite emphatic. "We did

1 not ask him to do anything; we certainly would not have
2 asked him to pass on our prices to Argos, because we
3 have a policy of strategic undercutting and we could not
4 possibly believe that they would ever give us their
5 information, we disbelieved him", and they certainly all
6 say that it either never crossed his mind that he would
7 pass the information on, or they assumed he would treat
8 their information as confidential. Those are the only
9 two alternatives which the Littlewoods and Index buyers
10 contemplate. No evidence to the contrary.

11 Ian Thomson says, "Well, they did not prohibit me",
12 and in response to a question from the tribunal, "Well,
13 it was an implicit assumption", so nothing express, he
14 simply deduced it. That is the highest the evidence
15 goes. We have evidence from our people who emphatically
16 deny it, they have been emphatically denying it ever
17 since the OFT first investigated and interviewed them,
18 and you have vague, incoherent, inchoate, imprecise
19 recollection from Ian Thomson who is unable to
20 differentiate between different types of conversation,
21 different questions that he asked, different reactions
22 that he got. There is nothing precise.

23 The reason I gave you the three questions at the
24 outset was to highlight the importance of precision,
25 because the way in which a question is formulated and

1 the type of response you get may be absolutely critical,
2 and it shows that the accuracy of evidence is critical
3 as to what was said, and there is no accuracy, no
4 precision as to Ian Thomson's evidence. He is utterly
5 unclear.

6 When one looks at the transcript, he gives any
7 number of different answers, and virtually every one of
8 them is, "I would have said this ..."; with the benefit
9 of hindsight, he is saying, "I would have said ..." He
10 cannot give a specific instance.

11 That is the OFT's problem here. It is, we submit,
12 quite wrong for them to seek to prove a case on the
13 basis of vague, imprecise information, where precision
14 is critical. The burden of proof must remain on them.
15 We rely on Bayer in that regard. You can measure
16 Ian Thomson's evidence against all the criteria that
17 I have identified beforehand.

18 Now very finally, and then I will just take you to
19 Bayer on concerted --

20 THE CHAIRMAN: We have Bayer in your skeleton, do we not?

21 MR GREEN: You do not have paragraph 175; I will just make
22 the point, rather than spend a lot of time on it. On
23 horizontality, as opposed to verticality, the OFT have
24 to prove that Index and Argos were in a concurrence of
25 wills through a conduit pipe formed by Hasbro, and in

1 particular, Neil Wilson and Ian Thomson.

2 So there is quite a large number of limbs to that:
3 there is the vertical limb from Index to Hasbro, there
4 is a horizontal limb within Hasbro, Ian Thomson to
5 Neil Wilson, it has to go back to Argos, and then it has
6 to come back, because the square has to be finished off,
7 you have to get this reciprocity, or you have to get
8 some approval and consensus.

9 On the vertical limb from us to them, from us to
10 Hasbro, we have been through that, that is the vertical
11 evidence I have already given you: we did not believe
12 what we were told, we did not pass on information, and
13 certainly we did not know he was going to pass on
14 information, we believed it was confidential.

15 So far as Neil Wilson to Ian Thomson and vice versa
16 is concerned, there is a conflict of evidence between
17 Neil Wilson and Ian Thomson. Neil Wilson even says that
18 when he got bits of information from other buyers within
19 Hasbro, he never passed them on to Argos in anything
20 other than anonymous form. He was not challenged on
21 this, this is his uncontradicted evidence in his witness
22 statement. He was not passing on specific information,
23 he said he never did that.

24 He also said, "Argos price as they please, I was not
25 collecting information to transmit it in any systematic

1 way, such as is suggested". The evidence of Neil Wilson
2 to Argos has been dealt with by Mr Brealey. When the
3 information comes back, they say "We do not believe it".
4 There are ten or a dozen Ian Thomsons.

5 So on each one of those limbs, there is no evidence
6 that can be said to give rise to a horizontal
7 arrangement, and one measures that against all the other
8 evidence you have heard, which is hard evidence, in
9 documentary form, and provable evidence through
10 statistics, that there was a takeover, it was a seismic
11 event in the industry, and en passant, Peter Edmonds
12 said that it was even noticed in Hong Kong, when they
13 were out on the buyers' trips in the Far East, it was
14 a big issue even in Hong Kong and the Far East.

15 It was a seismic event, we took our internal advice,
16 that was documented, recorded, you have seen the
17 evidence of what happened in spring/summer, you have
18 seen the evidence of what happened in autumn/winter; why
19 would we not just simply continue with our own internal
20 policy?

21 In conclusion: Littlewoods and Index were involved
22 in no agreement or concerted practice. The OFT's
23 evidence is not remotely close, it is based on an inept
24 investigation, conducted three years ago, and pursued
25 here without proper evidence from Mike McCulloch,

1 Mike Brighty, Alistair Richards, Jonathan Evans and so
2 on. It rests upon, so far as Index is concerned,
3 virtually the single strand of Ian Thomson, in terms of
4 oral evidence.

5 If they are going to try and prove something at a
6 higher management level, they were bound to bring
7 Mike McCulloch here. We have set out our legal
8 submissions on the duty to produce evidence in our
9 closing. It is their responsibility to produce
10 evidence. In disclosure terms, we all know about ex
11 parte Huddleston, it is the duty of the OFT to come to
12 court with their cards laid face open.

13 In criminal procedure, so far as it is analogous, it
14 is the duty of the prosecution to call witnesses adverse
15 to their case.

16 And that brings me very finally to Bayer, and
17 paragraph 175, which is the paragraph referred to at the
18 outset.

19 THE CHAIRMAN: This is in the CFI judgment?

20 MR GREEN: In the CFI judgment, endorsed by the ECJ, yes.

21 I am sorry, it is 174, not 175, and I will read it and
22 comment on it as I go through:

23 "Moreover, in accordance with the general scheme of
24 the treaty, an undertaking may be penalised under
25 Community competition law only if it has infringed

1 prohibitions contained in article 85(1) or article 86 of
2 the treaty. In that respect, it should be noted that
3 the applicability of article 85(1) is based on a number
4 of conditions, namely that, (a) there must be
5 an agreement between at least two undertakings or
6 a similar arrangement, such as a decision of
7 an association of undertakings or a concerted practice
8 between undertakings".

9 Point one, that an arrangement is to be treated as
10 similar to an agreement; there is a correlation between
11 the two, as there is between agreement and decision of
12 association of undertakings:

13 "(b) that arrangement must be capable of affecting
14 trade within the Community, (c) that it must have as its
15 object or effect the restriction of competition to
16 an appreciable extent. It follows that, in the context
17 of that article, the effects of the conduct of an
18 undertaking on competition within the Common Market may
19 be examined only if the existence of an agreement,
20 a decision of an association of undertakings, or a
21 concerted practice within the meaning of article 85(1)
22 has already been established.

23 "It follows that the aim of that provision [and that
24 is Article 85 as a whole] is not to eliminate obstacles
25 to intra-Community trade altogether; it is more limited,

1 since only obstacles to competition set up as a result
2 of a concurrence of wills by at least two parties are
3 prohibited by that provision."

4 The provision is article 85, it contains the three
5 elements, and the court does not distinguish as between
6 those three elements, it treats them all as
7 incorporating the concurrence of wills, and that is why,
8 in sub-paragraph (a) of 174, the court treats agreement,
9 decision of an association of undertakings and concerted
10 practices as similar; they plainly do not differentiate
11 between any of those three in the basic requirement for
12 a concurrence of wills. And that, of course, was upheld
13 by the court.

14 So we submit that when the court comes to conclude
15 in general terms, it emphasises the need for concurrence
16 of wills.

17 The only other point I would make is at 175, the
18 court is saying, "Well, not all restrictions of
19 competition are caught by 85 or 86. There is
20 an interstices between them", and the tribunal may come
21 to the view that the mission of the retail sector to
22 recommend prices could potentially have restrictive
23 effects. That is not the legal question for this
24 tribunal.

25 It may be something for the OFT to consider

1 recommending should go to the CC, as a matter for
2 inquiry. This is a very limited issue: is there
3 an agreement? Not: are RRP's a good or bad thing? And
4 as a matter of law, whether RRP's standing alone are
5 a good or bad thing is simply not a legal issue which is
6 relevant to the court, provided the purchaser
7 unilaterally takes its decision, there can be no
8 agreement or concerted practice.

9 Thank you very much.

10 THE CHAIRMAN: Thank you, Mr Green.

11 Closing submissions by MR DOCTOR

12 MR DOCTOR: Sir, what I intend to do is to outline a few
13 points from our case briefly, not to really take you
14 through our closing submission in writing, since the
15 members of the tribunal can read that for themselves,
16 and we do not need to, as it were, read it to them; and
17 then briefly to respond to some of the points which have
18 been made by Mr Brealey and Mr Green.

19 In passing, I might give you references to our
20 closing submissions, and to some of the evidence.

21 THE CHAIRMAN: Yes, thank you.

22 MR DOCTOR: Perhaps I should just begin by saying this: when
23 I refer to an agreement in what I am about to say, I am
24 always referring to an agreement or a concerted
25 practice; you have our submissions on that, I do not

1 need to repeat them.

2 But we say that in considering whether any agreement
3 or concerted practice has been established, it is
4 important to look at the precise nature of the facts and
5 the background of what we are talking about, and we say
6 that there are some features here which are important,
7 and which would make the answers possibly different from
8 what they would be if one asked the same questions in
9 another situation.

10 Indeed, I am thinking of my learned friend's
11 questions that he read out at the end, and tried to
12 answer, as to whether there would or would not be
13 a concerted practice, "Are you going out at £19.99?
14 Will you go out at £19.99?", and various answers.

15 In my respectful submission, none of that can be
16 answered in the abstract. Those questions simply do not
17 arise in the abstract. They may be wholly innocent in
18 one situation, and the answer completely innocent;
19 whereas in a different situation they may be highly
20 relevant, and highly significant that the question is
21 being asked, and the answer may therefore be
22 significant, in that context, whereas it is not in
23 another.

24 THE CHAIRMAN: Yes.

25 MR DOCTOR: Of course the first thing that we start with is

1 that we are dealing with catalogue retailing. We are
2 dealing with a situation which is absolutely crucial:
3 the catalogue is the be all and end all, it is the one
4 opportunity, twice a year, to set the prices for these
5 two businesses.

6 We have heard the evidence, the catalogues are
7 distributed to millions of homes, the minimum is
8 7 million, we have heard that Argos' catalogues go to
9 15 million homes. There are a huge number of people who
10 have both of these catalogues.

11 We have heard that you cannot easily change the
12 prices, let alone the perception of the prices, during
13 the season, because only about 15 or 20 per cent of the
14 persons to whom the catalogues are sent would ever get
15 to see a flyer, in which the price was changed.

16 If the person had looked at the catalogue and made
17 his decision to visit Argos rather than Index or the
18 other way round, he would not see that the rival had, in
19 the meantime, changed his price, because he is at the
20 wrong shop, having made his decision on the basis of the
21 catalogue.

22 We have also heard that pricing is everything here:
23 we have heard some attempts to persuade the tribunal,
24 perhaps, in my respectful submission, not too
25 successfully, that service is a great feature. When it

1 comes down to it, service in this area means being
2 served quickly. Anyone who has ever been into one of
3 these catalogue retailers knows the only point is how
4 long you wait for them to bring the item from the back
5 of the shop. You do not have a conversation with the
6 salesperson as to which of the items in the catalogue
7 are better or worse, or serve a particular purpose.

8 So pricing is everything, and indeed, that is what
9 the witnesses say. In our closing, the paragraph is
10 109, where we refer to the evidence about this.

11 THE CHAIRMAN: Yes.

12 MR DOCTOR: So pricing is everything, the catalogue is
13 everything; you are committing yourself, at an early
14 stage in the season, and you cannot easily change that.
15 So that is the background, one factor.

16 Another factor, of course, is that Argos is
17 traditionally the price setter in the market. It is not
18 simply in the catalogue market, but we have heard
19 evidence that the way in which it sets its prices,
20 particularly in the past, where it was following
21 a policy of trying to be the lowest, we are told, its
22 policy led to its prices being effectively the market
23 prices, because the other retailers would see that and
24 either try and meet it or undercut it.

25 Argos is big, but at the same time, although some

1 attempt has been made to suggest that Index is of no
2 consequence, the evidence is again clear from the Index
3 witnesses themselves, it is a serious rival, it may only
4 have 3 per cent, as opposed to 17 per cent, but
5 nevertheless, in all of the documents in which you see
6 Argos comparing itself, Index is always there. There
7 are also some documents which suggest it is not possible
8 to compare yourself with anyone else, because it is
9 difficult to compare the prices in the High Street
10 shops, which go up and down and can change any time in a
11 season, whereas Index has a catalogue which comes out on
12 the same day, and we know that both parties prepare
13 a win/lose schedule to see who has done better -- they
14 are not doing this to waste their time, they are doing
15 it in order to see whether they have gained an advantage
16 or not.

17 Now that is the crucial background. We say also
18 that of course the question of RRP's themselves is
19 something one needs to think about in this area. We
20 have heard evidence that the RRP's certainly in this area
21 of toys are set in collaboration with the industry. It
22 appears as if the actual setting of the RRP, where
23 should it be set, is decided between suppliers going
24 round and asking retailers, "What do you think of this
25 as an RRP?"

1 Now each of the retailers must be aware that his
2 opinion is being asked, that his opinion will be
3 considered, compared, taken to other retailers, and
4 indeed, this is what the witnesses say -- I will just
5 give you the references. Needham, tab 33, paragraph 7,
6 and tab 35, paragraph 16; Burgess, tab 5, paragraph 17;
7 Clarkson, tab 7, paragraph 14; Runciman, tab 57,
8 paragraph 13, and in the transcript, Mr Needham on
9 Day 5, page 28 -- there are two passages there.

10 Now this is what they say, that prices are set in
11 collaboration. No one suggests that in this discussion,
12 you are conveying something secret or private; indeed,
13 you cannot be. If you give your opinion as to where the
14 RRP should be, the chances are it might be accepted, and
15 the RRP would then be there. No doubt, the various
16 parties understand that others are being consulted, and
17 in that way, eventually, something approaching some sort
18 of consensual outcome happens; obviously it is no more
19 than an RRP at that stage, it is a recommended price.

20 But we are told one thing, which is that it is very
21 unlikely that anyone can charge more than that. The RRP
22 tends to set the upper limit on prices, because people
23 understand that nobody else will charge more than the
24 RRP, and therefore it forms some kind of upper limit.

25 Now in its decision, the OFT does say that this

1 consultation appears to be normal, "normal" meaning it
2 happens, and on its own, is probably not a breach.

3 But it is certainly the first step in what took
4 place here. Once the RRPs have been set for a season,
5 and we are always dealing in this case with the next six
6 month season, we know this, that Hasbro encourages these
7 retailers to go out at the RRP.

8 That phrase must not be underestimated. It is one
9 thing to say that Hasbro encourages Toys R Us to go out
10 at a price, because it can go out on Monday at one
11 price, and go out at another price on Tuesday, it is
12 just a case of sending them round the store and
13 relabelling the goods.

14 It is quite another thing to use that phrase in this
15 context, where it can only mean, "Will you price your
16 goods at that price in your first catalogue?" Not what
17 happens thereafter, "Will you do that in your catalogue,
18 which is published early in every season, and will you
19 therefore make it clear to the market that that is your
20 price?" So far, so good. The references to that again
21 are Burgess, tab 5, paragraph 15; Clarkson, tab 6,
22 paragraphs 11 and 21; Clarkson 2, tab 7, paragraph 4;
23 McMahon, tab 31, paragraph 5; Needham 2, tab 35,
24 paragraph 19; and there is quite a bit in the skeleton,
25 which we have actually quoted in our closing, so it is

1 our closing skeleton at paragraphs 58, 64 and 156.

2 There is also Maria Thompson at paragraph 68, and there
3 is more from Needham.

4 But in any event, when the witnesses therefore say
5 that Hasbro comes around and encourages these people to
6 go out at RRP, one has to think about what they are
7 saying. These words trip off the tongue, but one has to
8 think about what they are saying.

9 First of all, this is not out of the blue, because
10 we know this, that for years, Argos and Littlewoods have
11 been complaining about low margins in this area, and the
12 response of Hasbro has been, "Well, why do you not
13 charge RRPs?" Mr McMahon's evidence is clear to that
14 effect, so it is in response to this conversation, "We
15 are suffering from low margins; well, why do you not go
16 out at RRPs?"

17 Now when they say they encourage them to go out at
18 RRPs, they cannot mean they send us a list of their
19 RRPs, which contains the word "R", and therefore means
20 recommended. They mean something, some conversation is
21 taking place.

22 It was suggested in argument, though not by any
23 witness, that the encouragement might simply consist of
24 saying to Argos and Littlewoods, "If you go out at our
25 RRP of £9.99, your margin will be 6.5 per cent. If you

1 go out at £9.50, the margin will be 5.7 per cent". Are
2 they simply making a mathematical calculation for them?
3 The chances are that that is not what they are
4 discussing at all. To simply inform Argos and
5 Littlewoods that £9.99 is 7 per cent more than the cost
6 price, but £9.95 is 6.4 per cent and so on; this is
7 absurd. Nobody can suggest that this is what the
8 conversation is about.

9 (12.30 pm)

10 So it is not just pointing out obvious mathematical
11 equations. What they were saying was, "It is a good
12 idea to go out at RRP, it serves your interests, Argos,
13 for various reasons". For the moment, we will not go
14 into that. We suggest that one of the obvious possible
15 reasons why it would be a good reason to go out is
16 because it would be said, "Everybody is going out at the
17 RRP", so that is a good reason to go out.

18 We say essentially the case is about that, and we
19 say the evidence is here to support that.

20 Let us also say this: one must bear in mind the fact
21 that we have also heard evidence that Hasbro not only
22 says you should go out at the RRPs, but it makes
23 statements such as, "Your competitors are going out at
24 the RRPs, we know your competitors are going out at the
25 RRPs", and we are told that these statements are taken

1 with a pinch of salt, they are not believed. That is
2 what we are told.

3 But, of course, the implication of this is that if
4 you were to tell or discuss or indicate to your supplier
5 in any way that you were going out at a price of any
6 kind, be it at the RRP or any price, you could not be
7 surprised if your supplier were to use that information
8 and tell other people. After all, the case is that they
9 make this out, after they have sucked this out of their
10 thumbs, when they go around saying this sort of thing.

11 Therefore, it is inconceivable that if you actually
12 told or indicated or hinted to your supplier that you
13 were thinking of going out at the RRP, that that would
14 suddenly keep him quiet. In other words, he now would
15 have actually some basis, be it only a hint of what
16 Argos or Littlewoods is going to go out at; now it is
17 suggested, "Well, that would keep him quiet"; there is
18 a suggestion that if I ever told him anything, I thought
19 it would be completely confidential. That is obviously
20 absurd.

21 In a market where the suppliers are coming around,
22 and, according to Argos and Littlewoods, are making
23 things up about prices, about retail prices, they must
24 understand that should they give the slightest
25 indication, that will be seized on, as it were, to form

1 the basis of what would otherwise have been a rumour,
2 and used by the supplier in his dealings with other
3 retailers.

4 Now, let us bear one more thing in mind: this
5 information, about your intention as to what to go out
6 at, as I say, in the context of Toys R Us or a large
7 retailer of any kind, is no doubt secret information, my
8 pricing intention for the next season, but that does not
9 quite convey how sensitive and secret it is in the
10 context of the catalogue retailers, because in the case
11 of the ordinary retailers, they can always change their
12 minds, so if secret information slips out, they can, as
13 it were, counteract it quite easily.

14 In this sphere, the price in your next catalogue is
15 highly confidential. I put it, I think, to Mrs Paisley
16 that it was top secret, and she did not demur from that.
17 It is difficult, in fact, to convey how confidential
18 this must be to them, as to what is going to happen in
19 the next catalogue, because no matter how much one has
20 established in the past that a certain price has existed
21 in the market for so long, there is always the
22 possibility that in any given field, Argos or
23 Littlewoods, as catalogue retailers, might decide, for
24 whatever reason, to go out at a lower price or
25 a different price, and thereby steal a march on the

1 competition for the next season.

2 Of course, there are always new goods coming in, and
3 for these goods there is not an established and
4 well-known price for these things in the market, and we
5 are dealing here with some of these new goods; some of
6 these, we have heard, such as the Tweenies, were new
7 goods, which had just come on to the market.

8 So all of these facts must be borne in mind, we say,
9 when looking at what happened here, and the sort of
10 contact which happened, and just very briefly, if one
11 asked Toys R Us, "Are you going out at £19.99?", and
12 they said, "Yes", it probably might not have very much
13 meaning, whereas if you ask Argos, "Are you going out at
14 £19.99 on this highly new individual item which has
15 never been priced before in your next catalogue?", and
16 the answer is, "Yes", one would say: why have they given
17 this top secret information to their supplier, in an
18 industry where they know he is bound to go around
19 telling other people?

20 They could not have made a mistake, that is not
21 possible, that it just slipped out. They said yes;
22 there must have been a reason for saying yes. They said
23 yes because they were signalling to somebody something;
24 they knew that this was going to get out.

25 So that is what one would have to investigate, and

1 I am not saying you cannot answer these questions in the
2 abstract, as it were; you can only try to establish what
3 happened, and try to see whether there was signalling of
4 a kind going on here, which was in fact intended to
5 bring about a certain result which did in fact occur.

6 We say that this is what this information shows.
7 Now, can I then start at the beginning of the story,
8 trying to keep to what we know can be established by
9 documents and by evidence which either is not
10 controverted, or where it is controverted, I shall try
11 and deal with that.

12 We deal first of all with a fact which does not seem
13 to be in much dispute, that Hasbro came up with a
14 so-called pricing and listing initiative some time -- it
15 certainly came to fruition in the latter part of 1998.

16 And we know also that it was presented to Argos and
17 Littlewoods at the end of 1998, or some time around --
18 it may have been early 1999, but it looks as if it was
19 at the end of 1998, for various reasons.

20 It may have been too late, and probably was too
21 late, for the spring/summer 1999 catalogue, since it
22 seems as if the prices for that might have been fixed
23 earlier, though not necessarily all the prices, and we
24 have seen that prices can change, even as late as early
25 December, in the Tweenies episode. The catalogue only

1 comes out in January, so there is no suggestion that --
2 you may not be able to change the whole catalogue,
3 although you might be able to change some of the prices.

4 In any event, towards the end, we see the pricing
5 initiative; we see it is on two ranges of goods,
6 Action Man and something called core games. We have
7 heard the evidence, these contain many of the must-have
8 items; Action Man is a top selling toy, people want
9 that. The core games consist of many items which -- you
10 could not really sell toys if you did not sell Monopoly,
11 or whatever it is.

12 So we know that much. We know that the pricing
13 initiative involves higher cost prices and higher RRP's,
14 with a reward for listing a certain number or the whole
15 number of these goods.

16 Let us turn to Argos. There is a meeting in late
17 1998 at which it appears that the presentation in some
18 form was made to Argos. The reason we know this is
19 because there is a report from Maria Thompson, who says
20 that she got a report from Sue Porrit -- this is
21 Thompson, paragraphs 8 and 9 -- that Mike McCulloch had
22 said to her, "If you charge our RRP's, we will give you
23 a discount on this".

24 Now this conversation takes place in the latter part
25 of 1998. This in itself -- this is Mrs Thompson's

1 evidence about what Mrs Porrit told her she had heard at
2 this meeting -- this disposes of the entire suggestion
3 by my learned friends that Mr McCulloch would be
4 incapable of putting forward something improper, let us
5 put it no higher than that, in view of the legal advice
6 that he had received.

7 The legal advice he had received was in 1997, and
8 here we are at the end of 1998 in the context of this
9 pricing and listing initiative, Mr McCulloch is putting
10 forward a suggestion which Ms Porrit characterises as
11 improper.

12 If that evidence is correct, and it is not necessary
13 to decide for today whether it is correct or not, that
14 is not important; what is important is that it is being
15 discussed, this initiative. If it is correct, then that
16 is the end of the suggestion, and you can assume
17 therefore that Mr McCulloch could not possibly have made
18 an improper suggestion.

19 Whatever the point, and I will come back to this,
20 there is another point about Mr McCulloch as well, but
21 I will do that later -- so there is some contact, at
22 which this new initiative is discussed, towards the end
23 of 1998.

24 We do know that there is a meeting on 17th February.
25 Now there is no question about it, the OFT's evidence is

1 bitty, if I can put it that way, in the sense that we do
2 not have any documents about the earlier meeting. We
3 did not even know about the earlier meeting until it was
4 deposed to in, I think, the second witness statement of
5 Maria Thompson.

6 This is something to which we have addressed
7 ourselves in the closing submissions. The OFT is not
8 a party to this, it is necessarily dependent on what it
9 can find out, it cannot force people, though it has
10 powers to subpoena and get information, but it must
11 necessarily investigate, and present its
12 investigation -- come to conclusions on what it can find
13 out, and it can present its evidence to this tribunal.

14 That is in the nature of things; if the task is to
15 be approved as if this were civil litigation in the High
16 Court, the OFT would not stand a chance in any case
17 unless it had some video of what had gone on.

18 In this case, we can and must proceed on the
19 material which we have. Now we know that there was
20 a meeting on 17th February. We know that there is
21 a document at Hasbro which looks like an agenda for the
22 meeting, and it suggests that at that meeting, one of
23 the topics was, "Stabilise RRP's". Quite true, we do not
24 have any witness to that document, but what we do have
25 is that the witnesses do concede there was a meeting on

1 that day; it does relate to a real meeting held on that
2 day, attended by parties from Hasbro and parties from
3 Argos

4 (12.45 pm)

5 We do have one other important e-mail, and again,
6 this is something that happened at the time, it is
7 dependent on no-one's memory, it was generated without
8 any particular motive at the time, and it is the e-mail
9 of Ms Sue Porrit at CB/38, in which -- you will
10 appreciate the problem, the decision uses words like,
11 "We do not know whether this actually refers to the 17th
12 meeting, but by a matter of deduction, we can infer that
13 it does, because it is very close to it, and it refers
14 back to a meeting at which Mr Duddy was present", and
15 indeed it is confirmed subsequently, it is not disputed
16 that it does in fact refer to that meeting.

17 So this is a meeting at which -- again, it is very
18 indirect, because it is Sue Porrit, having information
19 from Maria Thompson, who was at the meeting, who
20 confirms that she was the source of this, and what it
21 says is:

22 "Pricing Strategy versus Rebate Pricing."

23 This is a message being sent out to the merchandise
24 toy teams, presumably the various buyers, who are told
25 this:

1 "Pricing Strategy versus Rebate Pricing."

2 Argos says this refers to their pricing, their new
3 pricing policy; the suggestion is that that is
4 a reference to the pricing initiative and the listing
5 initiative, but what is more important are the words
6 that come next:

7 "Maria Thompson indicated that we will react heavily
8 to being undercut, should it happen."

9 Now we say those words are highly, highly
10 significant. Firstly, this is obviously -- this is
11 something that Maria Thompson had indicated to the
12 Hasbro people at the meeting, and significant enough to
13 then report back to all the individual buyers.
14 Something is being undercut; what is being undercut? It
15 can only be the retail price. Nothing else was
16 suggested as to what is being undercut.

17 So the retail prices of toys, because it is going to
18 the toy buyers, are being discussed, because the
19 possibility of them being undercut is being discussed.
20 That is point number one.

21 It is stated here that if these retail prices of
22 ours, that is Argos', are undercut, we told them we
23 would react heavily. Now that cannot mean, "We will ask
24 for support". It could have meant that, if the word
25 "heavily" did not appear there. It could possibly have

1 meant that, if the word "heavily" did not appear there,
2 because, "We will react" is very wide, so it could cover
3 any response on earth. But, "We will ask for support"
4 is not "We will react heavily". It can only mean, "We
5 will react heavily, we will heavily cut our prices".

6 We can only ask the question, and suggest the
7 answer: why are the buyers being told, "We told Hasbro
8 that if we find our prices being undercut, if that
9 should happen, we will react heavily; we say it means we
10 will cut our prices after that". Then it goes on to
11 say:

12 "Hasbro will not put money on the table to support
13 this", that is the price cut. We will cut our prices,
14 that is the heavy reaction, but we will look at other
15 methods of support.

16 But what is most important is that they are being
17 told, "We will cut our prices". Now why are they
18 discussing this at all with Hasbro? There can only be
19 one explanation, and that is that they are discussing
20 the next autumn/winter catalogue, in which they have
21 talked about their prices, and of them being undercut.

22 If all they are talking about is the market price,
23 again, it makes no sense. Maria Thompson indicated
24 that, "We would be going out at the market price, but if
25 we found that the market price was lower than our price,

1 we would have to price at the market price"; that is not
2 what that sentence means.

3 We say this sentence indicates that they were
4 talking about the one thing which we know that Hasbro
5 wanted to talk about, from the initiative, which was the
6 initiative on core games and Action Man. That was what
7 was on Hasbro's mind. That is what they have come to
8 discuss. That is the one thing which has been plaguing
9 everybody, the low margins, for so long; they have
10 a meeting at which they discuss this, and they talk
11 about this.

12 So we say that this is highly significant, and the
13 attempts to explain it by saying that all they were
14 saying to them was if they were undercut, they would
15 look for support, they would reduce their price and look
16 for support, we say is highly unconvincing, because
17 first of all, there was no recorded instance of Hasbro
18 ever having cut its list prices during the season, in
19 other words retrospectively giving a discount; secondly,
20 why mention that now? It has never happened before, but
21 even if they had mentioned it, why mention it to the
22 individual buyers? We say it does not make sense.

23 But there is one other further confirmation of what
24 happened, and that is in Wilson's report back, which is
25 also in this bundle, page 41. He is referring to what

1 seems to have been a later meeting, a month later, when
2 again, at page 2; they are discussing trading terms and
3 so on and so forth, the "core brand rebates on
4 Action Man and games twice yearly in July and January".

5 So in the context of Action Man and games, plainly
6 stated on page 2, in the second bullet point -- the
7 third bullet point says:

8 "Hasbro's retail pricing strategy to increase trade
9 brought in margin was discussed. Sue understands our
10 strategy but categorically stated that Argos will react
11 to competitor pricing and 'may be forced to react on
12 prices if sales are sluggish later in the year'."

13 So at this point, they are undoubtedly discussing
14 the retail pricing strategy, which requires you to go
15 out at RRP in order to pay the list prices which they
16 are recommending, and in that context, the same
17 statement is made.

18 For some reason or other, Argos is categorically
19 stating, "Okay, we will react to competitor pricing".
20 It is the same idea, "If we find that in our catalogue
21 we are undercut, we will react", and "react" means not
22 "we will ask you for support", it means, "We will bring
23 our prices down", meaning, "We will not any longer go
24 along with your idea of pricing at RRP. We cannot in
25 those circumstances price at RRP, if we find that others

1 are not pricing at RRP".

2 Indeed, it goes on to say:

3 "... may be forced to react on price if sales are
4 sluggish later in the year."

5 In other words, "If we go out at the RRP, even if
6 everyone else goes out at the RRP, and we find
7 nevertheless sales are sluggish, because we are now the
8 same as everyone else, and we do not have the advantage
9 we used to have, we might have to cut the prices anyway,
10 and we would react", and she implied that this would be
11 out of her control.

12 So whatever she is agreeing here or indicating here,
13 we say she is conveying to Mr Wilson that the retail
14 pricing initiative is fine, they will go along with it,
15 but they will react to competitor pricing, meaning lower
16 prices, if that happens.

17 The only reason they can be telling that to Hasbro
18 is because they are agreeing to go along with it, the
19 retail price initiative, and they are saying to Hasbro,
20 "Of course, this depends on everyone else going out at
21 that price".

22 We say that they must have said to them -- because
23 Mr Thomson says, in the Littlewoods example, which I am
24 coming to, it was made clear that Hasbro would try to
25 get the others to all go out at the same price; we say

1 that same sort of conversation was taking place here.

2 Now because it is a warning of some kind, because it
3 is not just putting down a marker to claim some support
4 which has never been granted before, because it is
5 a statement of what Argos will do, ie respond heavily,
6 we say there is enough reciprocity here to make it clear
7 that whatever discussion is going on about the RRP's, or
8 about their prices, it is something which is mutually to
9 their benefit, and in which Hasbro understands that
10 something will happen, as long as something else does
11 not happen.

12 Whether Hasbro undertook to get the others to
13 actually go out at that price, or whether they said they
14 would try, or whether they said they would use their
15 best endeavours is not important; but they certainly
16 were made to understand that something unpleasant would
17 happen if another event happened, if Argos were
18 undercut.

19 Now I will come back to Argos' response, one further
20 bit of information about that, in a moment, but I just
21 want to move very quickly to Littlewoods. Here we have
22 direct evidence: if the tribunal accepts Mr Thomson's
23 evidence, there can be little doubt that some
24 arrangement of some kind was agreed at that meeting.

25 He says he was present when Mr McCulloch said,

1 "I have been speaking to others" -- first of all,
2 Mr McMahon said, "Well, if we go out at these prices, my
3 concern would be we would be undercut, if we go along
4 with your new pricing initiative", and McCulloch said,
5 "Well, I have been speaking to others, and I think I can
6 get them to do the same".

7 In fact, Mr Thomson goes further; he says
8 subsequently he was told to tell Littlewoods that Argos
9 had agreed. If that evidence is accepted, then we say
10 this is proved.

11 But we have to deal with very serious arguments
12 which have been put forward by Mr Green and Mr Brealey
13 that Mr Thomson's evidence is unreliable, and I will
14 come to that; I am not forgetting to deal with that at
15 all, I want to deal with it in detail, but I do want to
16 just deal now with the evidence of what we say happened.
17 However, I accept it depends on what Mr Thomson says
18 happened.

19 Perhaps I will just make one point at the moment,
20 because I just have it in my note, in case I do not come
21 back to the other points later. The point that
22 Mr Thomson's witness statement was not prepared by
23 a litigation solicitor: that is correct. As we have
24 made clear from the start of this, Mr Thomson refused to
25 meet the OFT in order to make his witness statement, he

1 insisted on seeing his own solicitor, and he put that
2 together. We were not able to take him through specific
3 documents, he was sent some documents, and he made of
4 them what he could. So you are getting the unvarnished
5 Mr Thomson.

6 We would say, actually, that makes his witness
7 statement even more reliable, provided you are satisfied
8 in what I am going to show you --

9 THE CHAIRMAN: His own solicitor is in Reading, I seem to
10 remember?

11 MR DOCTOR: Something like that, I believe. We would say
12 that makes it more reliable, because one knows that
13 witness statements often contain lawyers' spin; I am not
14 suggesting that is the case here in any other witness
15 statement, but certainly, it is not in itself
16 a criticism.

17 You have got the unvarnished Mr Thomson, and he did
18 sit in front of you, and you could make an assessment of
19 whether he was a man who was telling the truth to you or
20 not, and how good his memory was.

21 The rest of the criticisms I will come to later, but
22 that ties in with my point that we can only present what
23 we can present.

24 THE CHAIRMAN: When you reach a convenient moment,
25 Mr Doctor? It is up to you.

1 MR DOCTOR: It is as good a moment as any.

2 THE CHAIRMAN: Very well, thank you very much. 2.00 then.

3 (1.00 pm)

4 (The short adjournment)

5 (2.00 pm)

6 MR DOCTOR: I had come to the point where we were dealing
7 with Mr Thomson's version of the meeting with
8 Littlewoods. Just to give you the reference in our
9 closing submissions, it is paragraphs 55 to 64, where we
10 set out what Mr Thomson says, and I am going to return
11 later to the criticism made of Mr Thomson.

12 Mr McCulloch; it is pointed out that we have not
13 called Mr McCulloch, I am going to deal with that in due
14 course, but I am still dealing with the story.

15 Then we get Mr McMahon: he was at the meeting, and
16 in our skeleton at paragraphs 58 to 59, we set out what
17 he says was mentioned:

18 "As witnesses have said earlier, there was not
19 a massive amount of margin in the toy industry, so I was
20 forever talking to Mike McCulloch about how we could
21 improve margins and he often said to me, 'Would you sell
22 at recommended retail price? Then you could improve
23 your margin'.

24 "The Chairman: 'He often said to me, "Will you sell
25 at recommended retail price?'"

1 "Answer: He said to me, 'If you want extra margin,
2 sell at recommended retail price'.

3 "Mr Doctor: Presumably those sort of comments were
4 also made at the meeting that I have just described,
5 late 1998/early 1999?

6 "Answer: Yes, Mike would have talked to me about if
7 I wanted extra margin, sell at RRP."

8 Then he also confirmed that he would have expressed
9 concern about undercutting by other retailers:

10 "The question that is being asked is, I think, at
11 the moment is: if Mr McCulloch had suggested to you that
12 you should go out at RRPs, would you have said anything
13 back to him about your concern about what other
14 retailers would do if you were to try to move to RRP?

15 "Answer: If he had said, 'Go out at RRP',
16 I certainly would have said to him, 'Well, if I go out
17 at RRP as a good opportunity, I will be beaten by the
18 competition', yes."

19 We also point out, at paragraphs 140 to 147 of our
20 skeleton, a year later, one must bear in mind that
21 Mr Cowley has described an incident where he reported to
22 McMahon that he was reluctant to go out at a certain
23 price, for fear of being undercut by Argos, and McMahon
24 said he had spoken to Mr McCulloch, and that Mr Cowley
25 should in fact go out at the RRP price that had been

1 suggested to him by Mr Thomson.

2 We say that this is yet another reference to what
3 was plainly being discussed by everybody, which was the
4 new pricing initiative, with its recommended retail
5 prices, and the idea that if everybody went along with
6 these, then everyone could afford to do that, but if
7 they were undercut, obviously they would have to
8 respond.

9 Mr Burgess at some stage mentioned that he felt
10 fooled and deceived at this meeting, because the
11 question of the higher prices was not mentioned. This,
12 in itself, is not of any great relevance -- in fact, if
13 one thinks about it, at the time the meeting is said to
14 have taken place, which seems to have been any time from
15 mid-November onwards, we are told that by that time, the
16 prices for the spring/summer had been set, or were in
17 the process of being finalised, and the annex to the
18 presentation which was made at that meeting, which
19 contains a list of the 1999 prices, was apparently the
20 RRP's for spring/summer 1999.

21 So they would have had it anyway, before the
22 meeting, because they would have had the RRP's for
23 spring/summer 1999; we are told that that annexure,
24 which I put to Mr Burgess, was the prices for
25 spring/summer 1999. One can see that, because those are

1 the prices which then appear, some of them, in the
2 spring/summer 1999 catalogue.

3 It is Mrs Paisley who says that that annexure deals
4 with those prices.

5 Now just going back very briefly to these initial
6 contacts, of course, Mr Thomson says that after this
7 meeting he was told that Argos had agreed, and he went
8 back and told Littlewoods that Argos had agreed to go
9 along with it. That is in his witness statement.

10 Now what we know is that the prices in autumn/winter
11 1999 are the same on core games and Action Man, but not
12 on additional toys, and I am going to come back to that
13 as well. I just want to deal with the narrative at the
14 moment.

15 We also have, as evidence of what we say was the
16 arrangement, agreement, concerted practice, the e-mail
17 of 18th May 2000, which expressly refers to earlier
18 agreements on core games and Action Man, and seeks to
19 extend the agreement. That is the internal e-mails and
20 the e-mail going to Littlewoods.

21 Plainly, the original agreement continued -- if we
22 establish it, it continued beyond 1st April 2000, which
23 is the critical date for the purposes of the present
24 Act. We say that the contacts were ongoing, there
25 continued to be discussions about RRP's which were

1 ongoing, and we refer to our closing submissions at
2 paragraph 156, where we set out a quotation from the
3 transcript of Mr Burgess, in which he made it clear that
4 Mr Thomson would have been trying to influence them on
5 going out on RRP's on more items within the portfolio.

6 So we know from Mr Burgess at least that that
7 corroborates what Mr Thomson says.

8 We then have set out, and I will just give you the
9 references, I will not go into these individual items,
10 because I basically want to answer, rather than to set
11 out our case again: the evidence that we have, that has
12 come to our notice, and which we have dealt with. There
13 is the Tweenies incident, at the end of 1999, which is
14 dealt with in our closing at 140 to 147, that is the
15 Cowley/McMahon/McCulloch episode. There is Gardens
16 Galore, which is dealt with in our closing at 171 to
17 173. There is the Interactive Pikachu, where the price
18 was brought down to £23.75; our closing at 207 to 214.
19 There is the Tweenies Plush, that is that interesting
20 exchange at the end of 1999, ending up with the
21 statement, "Especially when you were so insistent that
22 we all went out ..."

23 It is not just the word "insistent" that Mr Cowley
24 uses, but it is "insistent that we all went out at that
25 price", that is dealt with at paragraphs 227 to 228 of

1 our closing submissions.

2 There is Ferris Wheel, dealt with at paragraph 232
3 to 238; the Dinghy, 239 to 243, and finally the
4 Jackie Wray incident at 246 to 249.

5 That is, we say, evidence which must all of it be
6 looked at as a whole, on which, from time to time, light
7 is shed, we say, against a background in which the
8 parties appear to be exchanging information of this
9 type, relating to the prices in the catalogues; we say
10 it is all consistent with an overall agreement,
11 understanding, concerted practice that prices are to be
12 kept at certain levels.

13 Now in addition to that, we have the evidence of
14 Mr Bottomley and Mr Wilson, both of whom were hardly
15 challenged at all in cross-examination. I will return
16 to both of them as well, insofar as it has been
17 suggested that they made certain concessions, or that
18 they agreed with certain things, which we say they did
19 not.

20 Our case is that this move towards parity of pricing
21 was brought about by this agreement or concerted action,
22 there was some form of collusion which continued until
23 May to September 2001. That is our case.

24 Now, I want to deal with the answer that Argos and
25 Littlewoods put up as a matter of positive case, as well

1 as some of the important criticisms they make of our
2 case. They deny, of course, they say there was no
3 collusion, and they say their witnesses deny there was
4 any coercion or reward in these exchanges, no coercion
5 threatened or reward offered.

6 I understood Mr Brealey to be saying that unless we
7 could establish some form of coercion or reward, we
8 could not establish a concerted practice; I do not
9 believe that is in accordance with any of the
10 authorities, and indeed, the reward would be whatever it
11 was that the parties thought they were deriving from
12 such an agreement. It may not in fact have done them
13 much good in the long run, but that is no concern of
14 ours.

15 The witnesses certainly -- we do not suggest they
16 took bribes, or that they personally benefitted in any
17 way. They may not have perceived that they were offered
18 rewards, they all stressed to a great degree that there
19 was no way that Hasbro could force them to do anything,
20 no one is suggesting that Hasbro could force them to do
21 anything. They all say that Hasbro could not force the
22 other to do anything; no one is suggesting that Hasbro
23 could force anyone.

24 Indeed, if one carefully reads many of the passages
25 where they deal with agreements, and our witnesses as

1 well, that is the OFT's witnesses, they say, "Well, yes,
2 there was no guarantee", meaning they have some idea
3 that an agreement is not an agreement unless it is
4 binding in some way, and can be guaranteed to produce
5 a result.

6 Well, this may be their view of what an agreement
7 is; their views are of no concern to anyone, certainly
8 not the tribunal, as to what constitutes an agreement in
9 this field, or whether certain conduct is or is not in
10 breach of the law. They do not have to be conscious
11 that they are breaking the law. None of this is really
12 relevant.

13 Indeed, insofar as it is put to a witness, "Do you
14 agree that there was any agreement?", it is a question
15 which is really of no interest -- certainly they deny
16 there was what a layman would understand as a formal
17 agreement, whatever one understands by a contract
18 binding in law, a layman might well understand that,
19 that contracts can be enforced in the courts; they will
20 deny there was such an agreement, and plainly there was
21 not any such agreement at any stage, no one suggests
22 that.

23 So that was what goes for the general denials. They
24 do not, however, deny these ongoing contacts; they
25 cannot. They have suggested a few more that happened,

1 and certainly it is to the credit of the witnesses, who
2 bring that to the notice of the tribunal, that these
3 events took place, but it does not mean because a man
4 tells you that something happened, therefore that is
5 proof that it was not in breach of the law overall.
6 That is neither here nor there.

7 But in the end, this is a trial, evidence has been
8 produced and the tribunal will eventually make its
9 decision on all the facts it feels have been properly
10 established before it.

11 Now the positive case that they put forward is this,
12 it is that in 1998 Argos introduced a new policy, after
13 it was taken over by GUS; that policy led to both Argos
14 and Littlewoods charging RRP's on Action Man and core
15 games toys, and that the charging of the RRP's occurred
16 already in the catalogue of spring/summer 1999, and
17 therefore, they say that shows the policy led to the
18 RRP's, and it is therefore -- it is put in two ways:
19 autumn/winter 1999 is merely a development of that, or
20 alternatively, it proves that you do not need the
21 agreement in order to produce the parity of pricing
22 which we see in spring/summer 1999

23 (2.15 pm)

24 Now, the first thing we say is that one has to look
25 at the new policy, and we set this out in our skeleton,

1 there has been what one may call some developments along
2 these lines.

3 A fair reading, we would say, of the original
4 witness statements which were produced -- and I will
5 just give you now the references -- would indicate that
6 what was being conveyed to the OFT originally was that
7 there had been a policy to charge RRP's. It was either
8 put that way, or it was put as a market policy which
9 meant that we would charge RRP's. No distinction was
10 made as to any particular products, it was presumably to
11 apply across the board, toys, irons, it was not specific
12 to any particular kind of item, still less to toys
13 manufactured by Hasbro. It was said to apply to
14 everything.

15 Maria Thompson, in tab 62, paragraphs 9, 18 and 22,
16 spoke about it; in paragraph 9 she referred to a new
17 pricing policy of moving towards market pricing on all
18 product categories:

19 "The pricing policy meant that Argos would go out
20 close to recommended retail prices, or at least would
21 not reduce the last catalogue's prices unnecessarily."

22 Mr Needham, tab 33, in various places, 16 and 17:

23 "In or around the autumn of 1998, Argos made
24 an internal policy decision to move to market pricing,
25 generally to improve margins, along with increasing our

1 direct import programme and negotiating improved trading
2 terms. Essentially, this meant that Argos would cease
3 its strategy of pre-emptive pricing against other
4 retailers, and instead would price generally closer to
5 suppliers' suggested retail prices."

6 Mr Needham is the man who has this formula which he
7 goes through:

8 "When Argos' policy changed to market pricing, the
9 buyers indicated to Hasbro that they were thinking of
10 moving to market pricing and/or RRP's (if RRP's was the
11 market price)."

12 So there is this continuous reference to RRP's.
13 Vanessa Clarkson, in paragraph 9:

14 "One of the ways to improve margins was to move to
15 market pricing, ie non-discounted prices, although
16 I personally moved to recommended retail prices."

17 Paragraph 15:

18 "The discussions within Argos were about moving to
19 market prices (ie closer to RRP's)."

20 The Littlewoods witnesses said exactly the same.
21 Mr Cowley:

22 "The new Argos policy meant that it was now very
23 likely to go out at recommended retail prices."

24 Mr Burgess:

25 "We were in a competitive market ..."

1 Well, the date was changed, but he says:

2 "Prior to the year 1999, we were in a competitive
3 market, where recommended retail prices were a guide,
4 and we felt that it was dangerous to adhere to them on
5 key value lines, because we knew it was quite likely
6 that our competitors, particularly Argos, would undercut
7 us. The takeover of Argos by GUS was in April 1998.
8 Naturally it took some time for the policy to be
9 apparent from the Argos catalogue, however towards the
10 end of 1999/start of 2000, that is for the autumn/winter
11 1999 catalogue, it was apparent that the market was not
12 as price-sensitive as it had been. This was because of
13 Argos' change of policy. We decided it was much safer
14 to adhere to recommended retail prices, and this became
15 our general practice."

16 Mrs Paisley, pretty much the same:

17 "Following the change of policy, everybody in
18 Littlewoods' buying team expected Argos to be very much
19 more inclined to adopt recommended retail prices."

20 Now one can go on and on. The thrust of this was
21 that there had been a change which either meant or led
22 to or simply implied that things would go out at
23 recommended retail prices. There was no suggestion that
24 this was limited to toys, it was stated as across the
25 board, not particularly Hasbro's toys, nothing of that

1 kind.

2 Indeed, the decision should be read in that way, the
3 original decision, which said, "We can find no support
4 of any decision to change to a policy of charging RRP's".
5 It was after that that the first witness statement of
6 Mr Duddy was produced, and in Mr Duddy's first witness
7 statement he was somewhat clearer about -- he does not
8 mention RRP's, but he does make it clear that it was
9 a general policy of pricing upwards, and indeed, the
10 passages which have been quoted by Mr Brealey, the pages
11 you have been shown of his papers, in which he mentioned
12 that there was a general policy of increasing prices, we
13 say is wrong.

14 In the end, his evidence is quite clear; actually,
15 it was a policy of seeking to obtain margin in various
16 different ways, some of which would include increasing
17 prices, some of which would include decreasing prices,
18 some of which would be a new mix; there were all sorts
19 of elements to it.

20 Indeed, the documents which he attaches to his
21 second witness statement show that. I had intended
22 actually to go through his documents with him, but since
23 he conceded it straight away, it did not seem necessary
24 to show him that his documents did not say what his
25 witness statement was saying.

1 The best place is tab 19, in his witness statement;
2 I do not think it is necessary to go there, I will just
3 refer you to it. Page 172 as a reference; at page 172,
4 he says there were three elements to this, improving the
5 gross margin, "Catalogue pricing strategy, direct
6 import, terms improvements", and on the next page, the
7 catalogue pricing strategy is then divided up, and it
8 consists of:

9 "Match key competitors, including Index; selective
10 selling price increases; selective price cutting on
11 high-profile products."

12 So this document in itself is interesting, because
13 some of the witnesses have tended to suggest that Index
14 was of no importance to Argos; there are plenty of
15 documents which show that Index is the one they are
16 always watching, and this is one of them. It is
17 page 173 which is, as I say, the explanation of 172; the
18 one element of the policy is catalogue pricing strategy.

19 Perhaps it is worth having a look at it, 172 is in
20 the middle of the page, not at the side of the page.

21 THE CHAIRMAN: Yes.

22 MR DOCTOR: 172 is:

23 "Margin management; improve the gross margin rate."

24 And the three elements to the strategy are as set
25 out there:

1 "Catalogue pricing strategy; direct import; terms
2 improvements."

3 And then on the next page, catalogue pricing
4 strategy is described as:

5 "Match key competitors, including Index; selective
6 selling price increases; selective price cutting ..."

7 This catalogue pricing strategy, he concedes in
8 previous documents, is what is -- for example, if you go
9 to 106 in that bundle, at the bottom there, you see:

10 "Margin improvement: increased pricing ..."

11 That reference, "increased pricing", is actually
12 a reference to what he calls the catalogue pricing
13 strategy, which is not just increased pricing, it is
14 actually pricing up, pricing down:

15 "Matching key competitors including Index; selective
16 price cutting on high-profile products."

17 Just the sort of thing which many of these toys are.
18 So his evidence was quite clear, there was never any
19 suggestion that there was a policy of increasing prices.
20 It may have had that effect on certain items, but there
21 was no policy ever announced to anybody, or indeed in
22 fact, of simply increasing prices. It was a policy
23 better known as catalogue pricing strategy.

24 The policy is therefore one where you price
25 strategically. There was some reference made -- perhaps

1 I had just better deal with this, because it was a point
2 only made after -- tab 42, page 334, in that same
3 volume. Oh yes, this is an internal paper of -- it is
4 an Argos paper, dated 28/1/2000. Maria Thompson gave
5 evidence about this -- no, it is referred to in her
6 witness statement at paragraph 26.

7 It is being relied on; there is a reference in
8 here -- on page 334, there is a reference down at the
9 bottom to this phrase "on the market"; it is in the
10 middle of the page:

11 "Our current policy is to be on the market, in other
12 words, we do not aim to drive down market prices
13 aggressively, but we do aim to achieve a position where
14 our customers will not get a better price elsewhere.
15 However, exactly what this means in terms of when we
16 respond to competitors and reduce prices will mean
17 sometimes we do, sometimes we do not. If we have
18 decided not to reduce prices, we do not have a price
19 matching refund policy."

20 This is a document at a much later stage, and what
21 it appears to be saying is that it is not entirely clear
22 what their policy in relation to being undercut is;
23 whether they undercut or whether they offer a price
24 matching policy to those customers who are quick enough
25 to spot that they are not the lowest.

1 They then say that to operate a proactive price
2 checking policy across the market is probably
3 impractical for a retailer like Argos, with such a huge
4 number of competitors. It is practical to check the
5 Index, but to take it beyond this gets increasingly
6 burdensome; it is plainly in the context of some promise
7 that they are making, they will offer to their customers
8 or seek to create the impression that the customers will
9 not get a better deal elsewhere. So it is much more --
10 perhaps the best phrase is the one used here, the woolly
11 term; it is not any idea of a policy of increasing
12 prices, it is a policy in which it is important that
13 customers should feel that no one is cheaper than Argos.
14 How they actually achieve it is difficult.

15 (2.30 pm)

16 The applicants say that this new policy caused the
17 prices to go to RRP in the spring/summer 1999 catalogue.
18 We say that -- if the policy came into effect -- well,
19 there is another problem. Mr Duddy's policy was only
20 approved in January, or thereabouts, of 2000, because
21 his draft paper that you have seen was only produced in
22 December, and the prices for the spring/summer were set
23 in probably November/December of 1999, one does not
24 know.

25 But they did say that when he arrived there, he

1 found that Maria Thompson already had a policy which was
2 much the same, she had spoken to Lord Wolfson, and she
3 had already introduced some kind of draft of this
4 policy, whereby they were not going to always be the
5 lowest in the market, they were not going to pre-empt
6 prices.

7 Now how that policy, whatever it is -- this woolly
8 policy, let us put it that way; how that causes the
9 prices to go to RRP we say is not a self-evident matter.
10 There is a lot of space between a policy whereby you are
11 the lowest by far in the market and the RRP,
12 particularly at a time when it appears the RRPs have
13 jumped, because Hasbro, on these items, have put the
14 RRPs up.

15 But, they say, it does show that, that the prices
16 did go up to RRP.

17 Now we say that even if that is correct, and I am
18 going to come back to that in a moment, but even if it
19 is correct that the prices were caused by this in some
20 way, that the new policy caused the prices to go to RRP
21 in spring/summer 2000, it is not self-evidently so that
22 they will cause the prices to be at RRP in
23 autumn/winter, which is a different kettle of fish.
24 Here we are talking about a catalogue which deals with,
25 I think somebody said, 80 per cent of the sales, being

1 around the Christmas or second half of the year, so
2 there is no reason why that should simply cause it to go
3 there.

4 And it certainly would not be inconsistent with the
5 evidence, if you accept it -- it is certainly maybe
6 correct that they have a policy, which is to price not
7 as low as in the past, and along comes Hasbro and
8 suggests a neat way of doing it, and they go along with
9 it; so it may be that the first catalogue was just what
10 they wanted, and the second catalogue, the
11 autumn/winter, was nevertheless influenced by what we
12 say happened, these contacts between Argos, Littlewoods
13 and Hasbro.

14 One of the points they make is that they were
15 somehow forced to go to RRP's, and I think we should just
16 discard that one, no one is forced to go to anything.
17 When Mr Thomson says in his witness statement, "We
18 raised the prices so that they would have no alternative
19 but to go to RRP", he does not mean that it is
20 compulsory, or anything like that; it just means if you
21 want to make 6.5 per cent margin, you have to charge the
22 RRP. If you want to make 6.3 per cent, you come down by
23 5p. He is using it in a certain sense.

24 Let us, however, look at this catalogue.

25 THE CHAIRMAN: The spring/summer catalogue?

1 MR DOCTOR: The spring/summer catalogue, yes. We must go to
2 the pricing analysis. If one looks at the prices in
3 tab 1, on the second page, in the left-hand column are
4 the prices of Argos and Littlewoods in comparison with
5 the RRP's for spring/summer.

6 Now the first thing one has to notice is that -- we
7 have to accept the assumption, first of all, that .95 is
8 the same as .99, and that is an assumption which we are
9 not in a position to challenge. They say they have
10 evidence, it came out at a fairly late stage, that it is
11 the same price. It does not appear on the face of it to
12 be the same thing, and we have been told elsewhere that
13 small differences can have a dramatic impact, but for
14 the moment, let us just accept -- accepting that they
15 are the same, .95 and .99, one sees this in core games:
16 insofar as we are dealing with the core, there are six
17 and possibly seven items which are the same between
18 Argos and Littlewoods.

19 There are five items which are different --

20 THE CHAIRMAN: I am sorry, we are in spring/summer 1999?

21 MR DOCTOR: Yes, different from the RRP.

22 THE CHAIRMAN: The same as each other, on this assumption.

23 MR DOCTOR: Yes, they are the same as each other, but they
24 are different on the RRP. Guess Who is at £13.99 or
25 £14.99.

1 THE CHAIRMAN: So that is above RRP.

2 MR DOCTOR: Yes, that appears to be above RRP. Twister was
3 at £12.49, and they are both at £12.95.

4 THE CHAIRMAN: So that is again above RRP.

5 MR DOCTOR: Yes. Kerplunk, one above, is different; and
6 Frustration, £8.49 and £8.95; Operation, £12.49 and
7 £12.95.

8 THE CHAIRMAN: So those are all above RRP?

9 MR DOCTOR: They appear to be above RRP. As between the two
10 of them, it is noticeable that Littlewoods' prices are
11 at the .95 point, and Argos' prices are at
12 the .99 point.

13 Now if we go to Action Man, I think they are all at
14 RRP, except for one. It is on the fourth page. I think
15 the one which is different is -- I think I have noticed
16 one. (Pause). Well, Photo Mission, Argos has it at
17 £19.49, which is different from the RRP; otherwise,
18 Argos' prices -- well, again, on .95 and .99 being
19 equal, they are the same.

20 There again, Argos is at .99, Littlewoods is at .95,
21 and if one goes, just for the moment, to the additional
22 toys for 1999, the second page, there are only two
23 common ones, and they are the same. Oh no, they are
24 not, they are different. Yes, they are different.
25 Argos is at .99, at the RRP, for Spirograph, but

1 Littlewoods is below that, and not within the .95.

2 The position that is being suggested is that Argos
3 therefore went up to RRP in spring/summer, without being
4 influenced in any way by Hasbro's pricing initiative, or
5 any form of collusion, and so they say therefore, "Look,
6 it can happen", so there is no reason why it should not
7 have happened again in autumn/winter 1999. Logically,
8 that must be right, there is no reason in logic why it
9 cannot happen. The question is, firstly, we say there
10 is evidence that there was collusion, and that is not
11 inconsistent with this.

12 But there is one pointer which is interesting, we
13 say, and which has not really been dealt with, and that
14 is that if the policy, as it were, were to go straight
15 to RRP, you just go to RRP the moment you have the new
16 policy. What is interesting to trek through here is the
17 other toys, they should surely also have gone to RRP.

18 Indeed, on the Argos list, they did go to RRP in
19 spring/summer, but in autumn/winter they appear to have
20 come down again, whereas they should be -- because do
21 not forget, on the logic of what we are being told,
22 spring/summer, Action Man and core games are at RRP,
23 therefore they are at RRP in autumn/winter; additional
24 toys, we should see the same pattern. They also go up
25 to RRP, and therefore they stay up at RRP, but they do

1 not.

2 THE CHAIRMAN: I think we just ought to look at the figures.

3 MR DOCTOR: Yes, indeed, this is --

4 THE CHAIRMAN: What page are we on?

5 MR DOCTOR: Well, it is not necessary to look at the figures
6 for Action Man and core games.

7 THE CHAIRMAN: Yes, but the other toys?

8 MR DOCTOR: It is the same page. I should just add this:
9 Action Man and core games is certainly a much wider
10 range of goods at this stage for spring/summer, and,
11 secondly, there is no longer any distinction between .95
12 and .99. Even the stupidest customer could see that
13 they are the same, there is nothing different there.

14 If you go to the autumn/winter additional toys, the
15 RRP for Monopoly is £29.99. Argos have it at £28.99;
16 according to the policy, they should have it at £29.99.

17 THE CHAIRMAN: Sorry, I have lost the page.

18 MR DOCTOR: In tab 3, the second page, sir, on the
19 right-hand side. B3, the second page.

20 THE CHAIRMAN: In terms of Hand Held Electronic games?

21 MR DOCTOR: Yes. Monopoly, they did not have in
22 spring/summer, but if the policy is working, it should
23 be at RRP, but it is not, it is £28.99. Littlewoods
24 have it at £29.99. Bop It too, yes, that is all at
25 £19.99.

1 Girls' toys, Baby All Gone, £19.99; but it is
2 £19.50. The price is lower, although it should be
3 £19.99, because we know that it automatically goes to
4 RRP, and the fact that it previously went there proves
5 that you do not need any agreement.

6 Get Set Chocolate Factory, £19.99 -- spring/summer
7 £19.99; autumn/winter, £18.99, and Littlewoods at
8 £19.50. What is interesting is that Littlewoods were at
9 £19.45, and have taken it up by 5p. Then we have Get
10 Set Mastering Mosaics, £19.99; again, £19.49 and £19.50,
11 so it is not at RRP.

12 Then we get £14.99 for Spirograph, £13.85 and
13 £14.75. And Super Sticker Factory, we get £17.99,
14 £17.90 and £18.50.

15 So of the seven common products, six of them are
16 different from the RRP. But if the change of policy has
17 the effect that it just produces RRP's for these
18 must-have toys, it is not working

19 (2.45 pm)

20 Now if you go to spring/summer of the following
21 year, we see the same thing. Again, it still does not
22 produce the result that is said to flow directly from
23 the change of policy.

24 MR BREALEY: It is a distortion of the evidence, sir.

25 I hate to interrupt, but on the one hand, he says there

1 is no policy to go to RRPs, and now he is submitting --

2 THE CHAIRMAN: Well, just at the moment he is taking us
3 through the figures.

4 MR BREALEY: But at the same time saying there is this
5 policy, and it is contrary to the policy of going to
6 RRPs.

7 THE CHAIRMAN: All I am concentrating on is what --

8 MR DOCTOR: Mr Brealey can detect the irony as much in my
9 voice as anyone else can. He knows what I am
10 submitting, but he will get his chance later.

11 That is my point, there is no policy to go to RRPs.
12 I am dripping with irony at this point.

13 The first point, £4.99; Argos goes out at £4.99 for
14 Pokemon Battle Figures Two Pack, but Littlewoods is at
15 £4.75. On the Pokeball Blaster, the RRP is £7.99, but
16 Argos is at £6.99, and Littlewoods is at £6.95.
17 Interactive Pikachu, £24.99, £23.99 and £23.75. So
18 there is no correlation with the RRP.

19 And the bottom one, the Tweenies All Standard Plush,
20 they are all at £14.99, and the RRP is £14.99. The Get
21 Set Chocolate Factory Argos is not running, and
22 Littlewoods is a pound under RRP, £18.99. And indeed,
23 it is below the RRPs on all the Get Set factories.

24 Then we say that in the next catalogue, we get the
25 e-mail of 18th May, and we then get the outcome on the

1 autumn/winter 2000 catalogue, and we get £4.99, £4.99 --
2 £4.99 is the RRP, and they all go out at £4.99.

3 The next one is Pokeball Blaster. The RRP is £6.99,
4 and Argos goes out at £6.95 and £6.99. By the way, this
5 is one of the four which are alleged to be different,
6 but what is good for the goose is good for the gander.
7 If .95 is the same as .99, then it is not different at
8 all, it is the same. So that eliminates the one of the
9 four differences.

10 The next one, we have £23.99 for RRP, and we have
11 the two at £23.75. That is the other one where we are
12 told there is a difference between the e-mail and the
13 price. We know why that is different, because there was
14 a subsequent exchange in which they were told that Argos
15 was going to go out at £23.75, and not at £23.99, and if
16 any price was ever fixed by collusion, certainly that
17 price was.

18 Then we have the Transforming Team Truck, there is
19 a difference there, that is one difference: £29.99 is
20 the recommended price, and Argos undercut it by £1.
21 Rally Race Track 1999, they undercut that by £1. But
22 for the rest, they are all at RRP: Monopoly, Bop It
23 Extreme, Baby All Gone and so on down the list, they are
24 all now the same.

25 We say this is what is interesting, that if the

1 policy was to produce RRP's, why did it not produce them
2 before the 18th May e-mail, but after the 18th May
3 e-mail it did produce them on additional games?

4 THE CHAIRMAN: What, if anything, do you say about the two
5 that seem to have remained different, the Transforming
6 Team Truck and the Rally Race Track?

7 MR DOCTOR: We say, sir, as the witnesses themselves have
8 said, there were never any guarantees. Nobody suggested
9 that there was a binding commitment to go out at
10 anything; that until you actually saw it, you could not
11 be sure that they were going to actually do it. When
12 Mr Wilson confirmed to Mr Thomson that Argos was going
13 to go out at that price, he believed that to be the
14 case; that Argos subsequently changed their minds, or
15 had not told him of that particular change beforehand is
16 neither inconsistent with what he is saying nor
17 inconsistent with the arrangement generally.

18 It is not a binding agreement, one is seeing
19 a pattern happening, in which on the whole, the
20 prices -- more than just on the whole, almost without
21 exception, with two exceptions, the prices go to the
22 RRP's or to the other agreed price of £23.75, and on two
23 of them, we do not know why they do not. It may be that
24 those two totally destroy our case, and the tribunal
25 will conclude that unless you see this across the board,

1 the two that are not the same are so inconsistent with
2 what we are saying that it cannot be that there ever was
3 an agreement.

4 We say the two that are inconsistent are fully
5 explained by what the witnesses are saying, that you
6 could never be absolutely certain, that nobody would
7 give you that kind of guarantee, that they did not
8 regard themselves as formally bound to do that, that
9 they may not have had an interest in changing the prices
10 even after they had given a general impression that they
11 would on the whole go out at RRP.

12 We say, therefore, that that is what the tribunal
13 should conclude, that this is consistent with collusion,
14 and the other evidence all points in that direction.

15 What it does do, in our respectful submission, is it
16 does provide an answer to the suggestion that the
17 spring/summer 1999 catalogue is a complete answer to our
18 case. It is not an answer, because the policy was never
19 confined to core games and Action Man, that has never
20 been suggested, that Argos changed its policy for core
21 games and Action Man. In fact, the way it was put
22 forward was that it changed its policy across the board,
23 for all prices, all products. We say that it does not
24 even apply within the category of Hasbro's own toys, let
25 alone toys generally.

1 Now we say that spring/summer is in any event
2 a relatively unimportant catalogue. The reference to
3 the percentage of toys sold in the second catalogue is
4 Thomson, paragraphs 8 and 9, page 662.

5 Now in our skeleton, if I can just refer you to
6 paragraphs 25 and 27 -- I beg your pardon, in Argos'
7 skeleton, its closing submissions; they just have two
8 quotations which make it clear that the policy made no
9 distinction between different types of toys. In fact,
10 there is a better -- it is McMahon, Day 2, page 100,
11 lines 9 to 13, which makes it clear there was never any
12 distinction in the policy between different products,
13 let alone different toys, let alone different toys of
14 Hasbro.

15 We say it is highly significant that this change
16 occurred on the very items which the Hasbro initiative
17 was directed to, core games and Action Man, and we say
18 that the fact that it did not even affect the other toys
19 suggests that what the witnesses say is true: when the
20 Hasbro initiative came to be extended to the other toys,
21 that is when you see the similarity of pricing.

22 Now can I move very quickly on to the e-mails of
23 2000? I do not want to repeat anything I have said
24 already, I just want to deal with the attack on them,
25 and try and deal with this.

1 Our submissions are in paragraphs 174 to 206 of our
2 closing. Can I also just add this? I want to give two
3 references to where the witnesses describe them as
4 extremely unusual, never seen before: that is Day 7,
5 page 34 -- sorry, no, that is a quotation from my
6 learned friend Mr Green -- this is in answer to his
7 submission that we get many e-mails like this, this
8 morning.

9 No, Mrs Paisley said at Day 3, page 13, line 12 that
10 she had never seen an e-mail like this before; and at
11 Day 2, page 145, she agreed it was extremely uncommon,
12 and she had never seen anything like that before.

13 Mr Cowley conceded that an e-mail which sets out the
14 sort of information which this e-mail set out was
15 extremely out of the ordinary; that was at Day 4,
16 page 24, lines 8 to 11.

17 So that is the background to this e-mail. Now the
18 first point -- the applicants argue that Mr Wilson
19 retracted his evidence in relation to this e-mail, in
20 that he conceded that the word "agreed" in the e-mail to
21 Littlewoods, that is that Argos had agreed to these
22 prices, was incorrect.

23 With great respect, that is not what Mr Wilson said
24 at all. It is at Day 2 -- perhaps we should get that
25 out. Day 2, page 37 -- well, I will just read it.

1 THE CHAIRMAN: I think we remember the exchange.

2 MR DOCTOR: He was asked whether he agreed it was
3 inaccurate. He said:

4 "It is, yes. There was no guarantee and no formal
5 agreement that prices that were given by Argos would be
6 the actual prices in their forthcoming catalogue."

7 This is the point -- he was not disagreeing with the
8 use of the word "agree", it is just that he is trying to
9 convey that there is no formal agreement. He seems to
10 think, as lay people do all the time, that unless
11 an agreement is a binding contract it is not
12 an agreement. People often say, "Did you have
13 an agreement?" "No, we only shook hands on it." "Did
14 you have an agreement?" "No, it was not in writing".
15 In this case, it goes even further than that, because it
16 does not even have to be the kind of agreement which is
17 normally under offer and acceptance. So he did not
18 withdraw that at all, he simply said it was not
19 a guarantee.

20 We say that these are contemporaneous documents, and
21 they therefore carry extra weight. It is not only the
22 e-mail to Littlewoods, but the internal e-mails that
23 were circulated around Hasbro. Whatever Hasbro's
24 officials later contended, Mr McCulloch, for example,
25 who was the recipient of one of these, made no objection

1 to it, and indeed, the whole basis of Mr Brighty's
2 objection was not to the contents, but the fact that it
3 was in writing.

4 (3.00 pm)

5 We do stress the fact that it goes to Littlewoods,
6 they concede it is most unusual, "We have never seen
7 anything like this before"; it is completely startling,
8 and actually it contains on the fact of it top secret
9 information from their competitor, Argos. It does not
10 refer to RRP's. It says, "These are the prices that
11 Argos have agreed to on specific items". They give
12 various explanations, ranging from a yawn, to,
13 "I thought nothing of it". We say that is for the
14 tribunal to decide.

15 In fact, we say that it does seem to have been all
16 in a day's work, in the sense that nobody thought it was
17 in the least bit surprising that they would be told
18 that. There are not hundreds of these e-mails, as
19 submitted this morning; they had never got an e-mail
20 like this. The surprise that Mrs Paisley expressed when
21 she spoke to Mr Thomson was that it had been in writing.
22 We also know, and there is no getting away from this,
23 that Mr Burgess or his assistant actually took the
24 e-mail and ticked it off against their own prices, which
25 rather suggests that any evidence that it was not

1 believed, thought to be nonsense, and so on, is not
2 really credible.

3 Just very briefly, in passing, if I refer to the
4 Cement case in this context, which talks about willing
5 receipt: we do accept, as my learned friends submit,
6 that of course there must be some element of
7 reciprocity. If somebody sends you something in the
8 post which you have never asked for or called for -- it
9 depends on what it is, but it may or may not amount to
10 a concerted practice. One would have to closely look at
11 the facts.

12 If a solicitor receives a document from his
13 opponent, he understands perfectly well that he is not
14 allowed to read it, he has to return it immediately.

15 If a catalogue retailer was to receive the proofs of
16 their opponent's catalogue -- I make no submissions
17 today as to what the law would require him to do,
18 assuming Argos was sent an unauthorised copy of
19 Index's -- I make no submissions about it, because it is
20 not the case, but one can see that that fact may be
21 different from an e-mail or simply an indication from
22 Argos that it is intending to price all its prices or
23 most of them or, God willing, some of them, at RRP.

24 It all depends on the facts. If a salesman comes
25 along to Argos and says, "Oh, I know what is in

1 Littlewoods' catalogue, it is all RRP" -- they have
2 never asked for it, they did not call for it, he has
3 just blurted this out at a meeting; nobody would require
4 Argos to cancel their entire catalogue, on the basis
5 that they cannot but be influenced by the information,
6 they cannot eliminate it from their minds.

7 What would happen if he turned up with the proofs of
8 Index's catalogue? I have made my submissions about
9 that. It all depends.

10 But what we are looking for is some element of
11 something going beyond simply receiving something
12 without having asked for it, whether it is called
13 an element of reciprocity, or whether it is called
14 an element of collusion, it is for the tribunal to
15 determine.

16 We say that in this case, the receipt of that
17 e-mail, and the way in which it was handled, suggests
18 that it was used, that the parties understood that the
19 information in it was not something they were not
20 expecting to receive; that whilst it was surprising it
21 came in writing, it was nevertheless used, put on a file
22 somewhere, and filed away.

23 We say that subsequently, Mrs Paisley destroyed her
24 copy, at the request of Mr Thomson, because he had asked
25 her to do that, and all of that goes into the pot, and

1 indicates that there was some form of concerted practice
2 relative to these facts.

3 Argos was no longer simply operating as
4 an independent competitor in the market, it was
5 operating with the benefit of information which, if it
6 had not actually asked for it, it obviously did not say,
7 "Please give us their prices on this", we say it went no
8 further than, "We want to be sure that no one will
9 undercut us", then it was getting the sort of
10 reassurance or comfort or whatever word one wants to use
11 which would enable them to comfortably price these items
12 in their next catalogue not in a competitive way, but in
13 a way which significantly reduced the risk that they
14 might be undercut at these prices.

15 I have dealt with this point that the information
16 was incorrect; if it was incorrect in any sense, it
17 simply means that two of the prices were not adhered to
18 subsequently, and that, we say, does not matter.

19 Mr Cowley's response we have dealt with in
20 paragraph 195, I will not deal with it, but I would like
21 to just mention the involvement of Argos, which is shown
22 one week later by the Interactive Pikachu. There
23 Mr Needham did concede that he might have told Wilson
24 that Argos would price at the same price as Littlewoods
25 had priced in the last catalogue.

1 It is an interesting point, it is used as
2 a criticism of Mr Wilson, but actually, it is rather
3 a support for what Mr Wilson said.

4 Mr Wilson says in his statement that he was not
5 sure -- that is when he made his witness statement --
6 whether Mr Needham had told him that the price -- or
7 whether he understood from something that Needham said
8 what the price was going to be, but he did get the idea
9 that they were going to price at £23.75.

10 Indeed, if Mr Needham had said to him, "We are going
11 to price at the price in the last Littlewoods
12 catalogue", which is what Needham says he might well
13 have told him, then it supports Mr Wilson's recollection
14 that he may not have been given the actual price, but
15 may have been given a clue to it, in the way that he
16 was, which is he was told to look in Littlewoods' last
17 catalogue to see what the price would be -- what Argos'
18 price was going to be.

19 So there is a complete echo between Wilson in
20 paragraph 67 and what Mr Needham says in his evidence.
21 We say that does not undermine Mr Wilson's evidence, it
22 only supports it.

23 The applicants make the point this was only one
24 example in which Mr Needham passed on information, and
25 does not show a campaign or a pattern of passing on

1 information. Well, the real question is: why would
2 Mr Needham pass on any information in this field? Its
3 particular importance is that Mr Wilson says he had
4 previously been told it was going to be £23.99, and he
5 was then in a discussion with Mr Needham, it came up
6 again, and he felt it needed to be corrected.

7 So that certainly shows that again, Argos was
8 involved in this passing of information from one to the
9 other.

10 I want to move on, for the rest, to the 2000 e-mail.
11 I refer to our skeleton argument. There is just one
12 point that I want to mention, which I noticed this
13 morning: the e-mail of 2000 to Littlewoods is actually
14 headed, "Re: Pricing Initiative", so it does refer back
15 to the pricing initiative itself.

16 THE CHAIRMAN: Yes.

17 MR DOCTOR: Moving on swiftly to some of the other points
18 that have been made against us --

19 THE CHAIRMAN: Is that a natural moment to take a short
20 break?

21 MR DOCTOR: Yes.

22 THE CHAIRMAN: We will just rise for five minutes.

23 (3.08 pm)

24 (A short break)

25 (3.20 pm)

1 MR DOCTOR: Can I move very quickly on to Mr Green's
2 complaint that we had failed to call the Hasbro senior
3 management, as part of a wider complaint that this court
4 has accepted that these are quasi criminal proceedings,
5 certainly for the purposes of article 6, but we make the
6 submission that they are certainly not criminal
7 proceedings in the sense in which the rules of criminal
8 proceedings in Archbold apply to the proceedings here.
9 These detailed rules of criminal evidence have nothing
10 to do with this.

11 With regard to the specific witnesses, all the
12 interview notes that were conducted have been made
13 available. Mr Green has complained that we did not lay
14 our cards fully on the table; we have laid all our cards
15 on the table. The rules are that we have to make full
16 disclosure, we have disclosed everything; insofar as we
17 have conducted interviews which did not contain evidence
18 which we accepted, those have been made available, and
19 the applicants are fully entitled to do what they like.

20 As it happens, it is one of those cases where it is
21 not even, under the civil rules of evidence -- the
22 senior management of Hasbro are not even our natural
23 witnesses, because the OFT does not have natural
24 witnesses.

25 The applicants are fully entitled to have approached

1 Mr McCulloch, who is a good supplier of theirs, they are
2 very good customers, and to have asked him to come to
3 testify for them, if they thought he could be of
4 assistance to the tribunal, and they have not.

5 With regard to Mr McCulloch, we say this, that the
6 OFT did not accept his evidence that he gave during his
7 interview, that much is clear, it is stated as such.
8 Much has been made about the legal advice he took; we
9 have already referred to the one incident where he
10 appears not to have paid any attention to it. There are
11 two more incidents, both of them also deposed to by
12 Argos.

13 Mrs Thompson at paragraph 19 says she spoke to him
14 at some time after the 17th February meeting, when she
15 complained about the poor margin on Hasbro's products,
16 and he said that Hasbro could make sure other retailers
17 would go out at the RRP. So there he is again saying
18 that he can do this.

19 And then she also deposes to some meeting where he
20 came in, this was in early May 2000, and he referred to
21 these prices working, or something like that.

22 THE CHAIRMAN: If I just might interject a comment at that
23 stage, Mr Doctor, the tribunal also has at the back of
24 its mind the fact that there is a second decision
25 regarding Hasbro which, although not directly concerning

1 Mr McCulloch he is mentioned in it, does seem to suggest
2 that whatever else Hasbro did at the time, it was not
3 taking much notice of any legal advice that it might
4 have had; that is one possible inference from that
5 decision.

6 MR DOCTOR: Indeed, these proceedings arise out of, as you
7 will be aware, a previous investigation of Hasbro for
8 something unconnected, on which Hasbro management
9 reported the company themselves; they came across this.

10 So the OFT did not accept Mr McCulloch's evidence,
11 and does not call him as a witness. I have dealt with
12 that.

13 Now let me deal with the criticism of Mr Thomson,
14 because this is a substantial criticism, and I would
15 like to go through the Littlewoods closing submissions
16 to deal with these points one by one.

17 THE CHAIRMAN: Yes.

18 MR DOCTOR: It begins at paragraph 29, where the criticism
19 begins. The first part of it is merely the use of the
20 word -- it says his evidence is "indirect"; well, his
21 evidence is direct in the sense that if you see
22 something happening, you can give evidence about it.

23 At paragraph 29, these are the specific criticisms
24 made, and it is here suggested, in paragraphs 29 to 32,
25 that because he wished to correct something in his

1 witness statement at paragraph 144, this shows that his
2 evidence was generally unreliable in some way, because
3 he had made a mistake.

4 This is really without any foundation whatsoever.
5 The statement that he wished to correct is not important
6 in the impact of the evidence. What happened was this:
7 he originally said that Mr Cooper had told him that
8 Argos were not listing this particular item, this Ferris
9 Wheel, for autumn/winter 2001, and on that basis, he
10 passed on the intelligence that Littlewoods could go out
11 with safety -- it was safe to list it at £49.99, because
12 Argos were not listing it.

13 THE CHAIRMAN: £49.99?

14 MR DOCTOR: £49.99, yes. So that was the thrust of it; his
15 memory was, "I was told that they were not going out at
16 £49.99, and therefore it could be listed with safety".

17 He made it clear in his evidence that he had
18 recently discovered a diary entry which he wanted to
19 testify about; he did then say, having looked at that
20 diary entry, that he realised he had been given the
21 price, but what in fact had happened is that Argos were
22 going to list it at £49.99, and that was why it was safe
23 for Littlewoods go out at £49.99.

24 Either way, the impact of the evidence is that it is
25 safe for Littlewoods to go out, because Argos are either

1 not listing it or they are listing it at £49.99, and
2 therefore, it is safe for Littlewoods to go out at
3 £49.99. That is the important point.

4 Whether it is the one recollection or the other,
5 what was conveyed was that it would be safe for
6 Littlewoods to go out at £49.99, and therefore,
7 whichever way you look at it, the central thrust of his
8 evidence remains the same, that he previously thought he
9 had been told that they were not listing it, and he now
10 realises from his diary entry that he was told that they
11 were, but at £49.99; that means that his recollection is
12 correct, but the detail of why he thought it was safe,
13 why he passed that on, is not.

14 We say that does not detract from his reliability at
15 all. He did not have the catalogue with him when he
16 made the statement, and therefore, that, we say, is not
17 a valid criticism.

18 The next paragraph is 33; this is about the position
19 of the legal evidence. It is said that he questioned
20 Mike Brighty as to the legality of the £19.99 terms, and
21 then it says:

22 "Contrary to all the other evidence, including that
23 of Neil Wilson, Maria Thompson and Emma Wilson, his
24 account is that he specifically asked Hasbro senior
25 management whether withholding the rebates was illegal,

1 and was told that it was not. However, in
2 cross-examination he was at pains to emphasise he knew
3 nothing of the legal position."

4 Now if one goes to the transcript at Day 1, page 92,
5 the evidence is very ambiguous as to what he was saying.
6 He was asked:

7 "You do not remember anything of that?

8 "Answer: No, my recollection was, as I said in my
9 statement, at the meeting, the terms meeting, I had
10 heard rumours that someone had said that withholding
11 rebates was illegal. I asked the question at the
12 meeting, and I was told no, it was not."

13 It is not clear. If you go back to his statement,
14 what he is clearly referring to in his statement is the
15 listings initiative, which he calls the core rebate,
16 because if you listed a core of goods, you got
17 a discount. In the witness statement, at paragraphs 38
18 onwards, he makes it clear that that is what he is
19 talking about. He asked about whether the core rebate
20 was legal, the listings initiative.

21 When he talks here, he says:

22 "As I said in my statement, at the meeting, the
23 terms meeting, I had heard rumours that someone had said
24 that withholding rebates was illegal."

25 It is very unclear whether he is simply referring

1 back to the core rebates of the meeting, or whether he
2 is referring to the alternative suggestion which is that
3 you get a discount if you charge an RRP. It is not at
4 all clear from this that his mind was directed to that
5 problem, and we say that is not therefore a major
6 criticism of his evidence. It certainly was not
7 explored in the detail sufficient to show that he had
8 been lying about this.

9 (3.30 pm)

10 Then paragraph 34 of the skeleton contains a lot of
11 examples of what is called imprecision. Now my
12 respectful submission is -- I will not go through all of
13 them, but what is described as imprecision here is
14 because Mr Thomson is being asked again and again, in
15 connection with words that occurred more than now three
16 years ago, such things as, "Do you remember the exact
17 words you used?", and he would say, "Well, no, not
18 exactly, but it was something like that". It was picked
19 up, "Did he say he would play ball? Well, he may not
20 have used the words 'play ball', but he certainly agreed
21 he would go along with it".

22 He may well be a witness who describes a meeting and
23 uses words to describe what happened, and recounts it in
24 a form of narrative, whereby the words are used, "He
25 said he would play ball", whereas the witness did not

1 himself say, "I will play ball", he said, "I will
2 agree", and the witness says he said he would play ball,
3 but we respectfully submit that this is not a case where
4 it is necessary for the witness to remember precise
5 words, because that is not what is being debated here.

6 The witness is conveying essentially the incident at
7 one meeting, and a long range of contacts between
8 parties, where it is unlikely he would remember the
9 precise words that are used. There is nothing to
10 suggest that he is trying to convey an exact memory of
11 exact words. He may be saying it in words which
12 convey -- that people used certain words, but it is not
13 being suggested that those were the precise words that
14 were being used.

15 We say a fair reading of his evidence is that he is
16 quite prepared to accept that his recollection of the
17 exact words may not be correct, but the thrust of what
18 he is saying he stands by.

19 In a way, it does not matter to the outcome of the
20 case, because nothing depends on precise words that were
21 used.

22 The skeleton, paragraph 36; a notable feature of his
23 evidence was his assertion that he had no awareness at
24 the time of the implications of the GUS takeover of
25 Argos. I think this must be a wrong reference, because

1 at Day 1, page 36, the witness simply says -- yes, the
2 question is, beginning on page 35:

3 "Now, when GUS took over Argos, it would have been
4 widely assumed that GUS would therefore change the
5 direction of Argos from volume to margin. Would that
6 have been your perception, or at least that of Hasbro at
7 the time?

8 "Answer: It was something that we talked about at
9 the time, but I think we also thought that although that
10 would apply to the home shopping side of the business,
11 the mail order side of the business, it would not
12 particularly happen within the Index and Argos sector,
13 because they were highly competitive."

14 That is not a denial that he had ever heard of the
15 takeover; it is a perception he had at the time, and he
16 says that others had, that the takeover would not affect
17 them -- the part of Argos they were dealing with. Well,
18 they were dealing with both parts, but it would not
19 affect the catalogue part of Argos, it would affect the
20 home shopping side of the business.

21 The next criticism is at 206 to 207, it is connected
22 with Andrea Gornall. The suggestion is that he could
23 not have said all these things to her, because she was
24 away at the time. I would urge you to read those pages
25 that are given there, which is Day 1, page 185 to 190.

1 What you will see is that Mrs Gornall's witness
2 statement, in which she recounts her conversations with
3 Mr Thomson, was read to and put to Thomson, he was asked
4 to comment on it, and in very general terms, he would
5 say, "Yes, I agree with that; I do not agree with that".

6 How it could be suggested that he was deposing to
7 a time when she was not there, when he was in fact
8 responding to a submission that he had made, that she
9 had spoken to him, I do not follow, but it certainly was
10 never put to Mr Thomson, "Well, now, having put all of
11 that to you, I tell you that it is all a pack of lies,
12 because although Mrs Gornall says she spoke to you, that
13 is all wrong, she was away on maternity leave at the
14 time". There is no suggestion made to Mr Thomson that
15 that is so, and all the questions directed to him were
16 in the context of putting to him what Mrs Gornall says
17 she said to him.

18 THE CHAIRMAN: Well, if she says she said it to him,
19 presumably she was there to say it to him.

20 MR DOCTOR: It must have been at a time when she was there,
21 because he said he agreed with some and did not agree
22 with others.

23 THE CHAIRMAN: Can I just have look at that transcript?

24 MR DOCTOR: Yes, it is at Day 1, page 185. It starts at
25 page 184. About line 10:

1 "I want to deal finally with the position of
2 Andrea Gornall."

3 Sir, I will not read it aloud, but it goes up to
4 page 190, and it is never put to him that they are
5 discussing a conversation at a time when she was not
6 there. The thrust of it is they are discussing what
7 Mrs Gornall says.

8 THE CHAIRMAN: Yes, I see.

9 MR DOCTOR: At page 187, they make a special reference to
10 the point that is in one of his answers. He says:

11 "Given the fact that I also had to add to that
12 confidence, to say that negotiations were still going
13 foward, we were still trying to extend the range of
14 products, because it is in everyone's interests to do
15 that because it was bringing more profit back into the
16 business."

17 The extension took place for the catalogue of
18 autumn/winter 2000, and she was away from December 1999
19 to September 2000, so she was not there during that
20 period. But exactly what he was thinking of is not
21 clear, and certainly it was never put to him that he
22 could not have been discussing that, because she was not
23 there at the time that the extension he was talking
24 about had happened.

25 MR GREEN: That is not quite fair. What the witness was

1 saying -- he raised the question of extending the range
2 of products. That can only have been in May 2000. Not
3 the witness statement; that led on to the question,
4 "What were you having the conversation with
5 Andrea Gornall about?" But he raised the question of
6 extending the range, and that can only put the
7 conversation into around May 2000; that was the point.

8 MR DOCTOR: The fact is, in the context of these discussions
9 with Andrea Gornall taking place, it was not put to him,
10 his mind was not focused on having to deal with the fact
11 that she was not there. We do not know what he would
12 have said if it had been put to him. He may have
13 explained it satisfactorily. His evidence cannot be
14 rejected in the terms in which it is suggested on that
15 basis.

16 There is only one additional criticism of his
17 evidence, and it is in the Argos skeleton ... (Pause).
18 It has also been pointed out to me that at 186, line 19,
19 Mr Thomson was talking about, as he put it, the
20 conversations to try and persuade Andrea or anyone else.
21 When he was talking about that, he may not at that
22 moment have been thinking of Andrea, but she obviously
23 was replaced by somebody, and the thrust of it was not
24 in any event what Andrea said, the thrust of it was the
25 Hasbro individual, whoever was dealing with the

1 extension at the time.

2 In fact, at 186, he does, in his mind, say "Andrea
3 or anyone else", "I was trying to persuade Andrea or
4 anyone else".

5 Now the final criticism of Argos in the skeleton is
6 at paragraph 131 of their skeleton, which is that
7 Mr Thomson accepted that his evidence on the statement
8 attributed to Mr McCulloch was incorrect. 131 of their
9 closing submissions.

10 THE CHAIRMAN: Yes, Day 2, page 10.

11 MR DOCTOR: Yes. What happened at this particular page --
12 it was said to him:

13 "It was at this point that Mike McCulloch intimated
14 to John McMahon that he was having discussions with the
15 major opposition, Argos, and they were of the same
16 opinion, ie they could not agree to the new pricing
17 structure for fear of being undercut. It did need the
18 agreement of both parties in order for the plan to work.

19 "Now in light of the evidence we have just seen, are
20 you certain this is what Mike McCulloch said?"

21 The evidence we had just seen was a reference to
22 various prices which were charged in the spring/summer
23 catalogue. He is asked then, "Well, do you stand by
24 your statement?", and he says yes:

25 "Question: If he said that, would you agree that

1 the statement is inaccurate", the statement of McCulloch
2 that he had been having discussions about with Argos, to
3 which the witness says:

4 "Answer: Having seen what I see here, yes, but that
5 is what was said at the meeting, and I can only report
6 what was said at the meeting and my recollection at the
7 time."

8 In other words he is saying, quite fairly, "The
9 logic of what you are saying is that McCulloch was
10 inaccurate when he said he had been speaking to Argos,
11 and they could not do it unless Littlewoods put up their
12 prices", to which he says, "Well, it may be that
13 Mr McCulloch may have been inaccurate, but that is what
14 he said".

15 That McCulloch was trying to persuade Littlewoods
16 that he had been having conversations with Argos is not
17 at all inaccurate, but what McCulloch said of what Argos
18 was saying may or may not have been accurate. But that
19 he said it is undoubtedly reiterated, and in no way does
20 Mr Thomson withdraw the fact that he said it.

21 All he is conceding is that McCulloch, when he said
22 it, may have been wrong. So he does not withdraw what
23 McCulloch said, and no doubt we would say that whatever
24 McCulloch said is fully consistent with him trying to
25 get the parties to go to RRP.

1 (3.45 pm)

2 If I can then move on very briefly to the
3 13th March 1998 board minute, I will just deal with this
4 very briefly, this is a minute which was added to the
5 bundle at a very late stage. No one gave any evidence
6 about it, it is at 18A of the core bundle.

7 It is suggested that this shows that even before
8 Argos was taken over by GUS, it was perceived that Argos
9 would cease its previous policy, and would seek more
10 margin. In fact, all it says is, in relation to
11 personal care products:

12 "Personal care in Argos is performing very badly,
13 but no figures quoted. There is talk that the pricing
14 will not be cut as deep ..."

15 Not that they are not going to be price discounters,
16 or indeed go anywhere near RRP, but they just may not be
17 as deep in personal care as they have previously been,
18 because they cannot afford it:

19 "... in the light of GUS ..."

20 Whatever that may mean. Even if it does mean that
21 the Littlewoods board knew, even before GUS took over
22 Argos, that it was going to have all these effects; all
23 that they could have looked forward to is that Argos
24 would not cut as deep. That rather supports our case,
25 which is: how do you get from a policy of simply being

1 the lowest to being the highest when there is
2 an alternative, which is that you do not cut as deep?
3 You still cut, you still want to be low, but instead of
4 cutting by £2, you cut by £1. That certainly suggests
5 that that is what Littlewoods might well have been aware
6 of. They could never have anticipated, from what they
7 were reading in the newspapers, that Argos was going
8 straight to RRP. That has never appeared anywhere, and
9 that rather suggests that even that was only confined to
10 one area, and not the other five areas mentioned on the
11 note.

12 I think I have come now to the final point I want to
13 make, which is a point which Mr Green has referred to on
14 many occasions, which is the Management Horizons report.
15 Now I would ask you to go to the second volume of
16 witness statements, tab 48. In January of this year, we
17 received this witness statement from Lesley Paisley, who
18 said:

19 "I make this statement ...

20 "The purpose of [it] is to draw the tribunal's
21 attention to several documents recently found or
22 produced at Littlewoods, which I believe may be of
23 relevance to the amended decision, and to the issues
24 before the tribunal."

25 Annex A is the business plan, we have heard about

1 that, that is the one that was presented; that is
2 referred to in Ian Thomson's witness statement.

3 Then we go to annex B at paragraph 6, which is
4 an Index line plan; this is similar to the earlier
5 profit analysis, but this relates to autumn/winter and
6 not to spring/summer. I said earlier that the annex to
7 that business plan related to spring/summer 1999, and
8 there it is. Annex C is the Management Horizons report,
9 this is what Mrs Paisley, a very senior person in
10 Littlewoods says:

11 "Annex C contains a copy of a strategic review of
12 the Index business carried out by Management Horizons
13 and dated September 1998. I located this document
14 amongst unrelated papers only recently."

15 Meaning she had never seen it before:

16 "I believe it may be of some relevance to the issues
17 before the tribunal."

18 That is it. We actually, as it happens, wrote to
19 ask Littlewoods if they would be so kind as to tell us
20 what the relevance of these documents was going to be in
21 the tribunal, why were they being produced? We were
22 told that they were thought to be of some relevance, but
23 it was not taken any further.

24 The only reference to this is in the evidence of
25 Mr McMahon, who I now point out was sitting here

1 throughout the introduction of the case, and heard
2 Mr Green describe this document with great importance in
3 the opening, although at that stage it had never been
4 referred to by any witness, and at page 101, transcript
5 Day 2; he had never previously referred to this
6 document, and he says this, at page 97 --

7 THE CHAIRMAN: I am not sure Mr McMahon had heard anything
8 from Mr Green by this point, had he?

9 MR GREEN: Well, I did not open.

10 MR DOCTOR: Yes, at some stage there was a reference to this
11 document --

12 MR GREEN: I put my case to Mr Thomson. It was put squarely
13 to Mr Thomson --

14 MR DOCTOR: You are absolutely right -- and it is even more
15 peculiar. At the time I thought, "Why is this
16 document" -- a document which, of course, no Littlewoods
17 witness had ever mentioned, except for Mrs Paisley,
18 "This may be of relevance, I found it recently",
19 meaning, "I have never read it, never heard of it, never
20 seen it".

21 Mr Thomson, the account manager for Littlewoods, is
22 asked whether he had ever seen this document. How he
23 could have seen it if Mrs Paisley had never seen it is
24 a complete mystery. Of course, he said he had never
25 seen or heard of --

1 MR GREEN: He was not asked about it. None of our
2 witnesses --

3 THE CHAIRMAN: I am just trying to establish the sequence.

4 MR DOCTOR: The sequence is that it is put for the first
5 time -- we have asked, "What is the relevance of this
6 and the other three documents?" We are not told
7 anything.

8 The first time it is mentioned in these proceedings
9 is when Mr Thomson gives evidence -- he is not a natural
10 witness for this document, because it has nothing to do
11 with him. He is asked if he knows anything about it, he
12 says, "Absolutely not, never heard of it, never seen
13 it". That is the only reference to this document that
14 has ever been made in these proceedings, until we get --
15 now Mr McMahon was here when that exchange took place.

16 Now we get to Mr McMahon's evidence. At that
17 point -- I think Mr Green's evidence suggests this was
18 a document acted upon by Littlewoods, et cetera,
19 et cetera. This is what he says --

20 THE CHAIRMAN: We are on Day 2 now, are we?

21 MR DOCTOR: Yes, Day 2, page 97, line 24. (Pause). I may
22 have the wrong reference. Sorry, page 98, at the bottom
23 of the page:

24 "I took the risk because I needed extra margin. The
25 reality of it is that Index is a loss-making business.

1 We had been pushing for extra margin since I joined in
2 1995. It gained some momentum when Barry Gibson, the
3 new chief executive, started in October 1997. It was
4 highlighted in the Management Horizons report that we
5 really needed to get some extra margin. I was targeted
6 with significantly extra margin on an ongoing basis,
7 season by season, and I needed some extra margin."

8 The other reference to it is on pages 100 to 101.

9 THE CHAIRMAN: On page 102 there is a short passage.

10 MR DOCTOR: 101 to 102, all the references seem to be one
11 page back, one can read it. It goes on to the next
12 page:

13 "At the same time, we had just changed the business,
14 and we had actually amalgamated the business into
15 Littlewoods retail, and we were looking to try and, as
16 a business, overall, in all departments, to increase the
17 margins quite considerably, because the business was not
18 making the money and Index was not making any money, and
19 it could not have carried on any longer, and the chief
20 executive, I think, had given it a year or two to be
21 turned around, which is why he brought in Management
22 Horizons."

23 Now that is, as I understand it, in autumn/winter
24 1999 that he appears to be talking about; that would be
25 about the middle of 1999. He does not say when the

1 business was amalgamated and they had changed it. Then
2 he says, "That is why they brought in Management
3 Horizons", whether it was a reference to that report or
4 another report, we do not know. But the only reference
5 to this report -- he does not say he read it at the
6 time, that he knew about it, that anybody read it, that
7 the company had accepted it, that it was acted upon,
8 that it became company policy, or anything of the kind.
9 There is simply a reference in passing to this document,
10 which at some earlier stage had been suggested to
11 Mr Thomson, inappropriately, that this was a document of
12 some importance within Littlewoods, and that is all that
13 is said about it. We say there is no evidence here that
14 this document either influenced Littlewoods, or that
15 they accepted it, or that it has any importance within
16 the Littlewoods organisation at all.

17 Sorry, there is one final point I just want to deal
18 with, and I will certainly do that in one minute. There
19 is a passage in Mr Wilson's evidence which is referred
20 to on a number of occasions in the Argos written
21 closings, at paragraph 71, and again at paragraph 116.

22 In fact, I should put out that the reference at the
23 bottom of paragraph 71 in Mr Brealey's skeleton is
24 wrong. The real reference is at 116, which is correct.
25 The true reference to that passage is at Day 2, page 17,

1 not Day 2, page 56. At the bottom of page 20, that
2 reference is wrong, it should be page 17.

3 This is said to be a concession by Mr Wilson that he
4 already saw the outcome of the Argos policy reflected in
5 the spring/summer catalogue of 1999. We say that a true
6 reading of that passage is very ambiguous, and whether
7 or not he concedes the causation -- there are two
8 elements in the question, one is the causation element,
9 and the other is whether there is a manifestation of the
10 policy. Whether he is conceding both of them is not at
11 all clear, because the question is not clear. It is
12 certainly being put to him that the policy manifested
13 itself in the spring/summer catalogue. What is not
14 clear is whether he is conceding that there is
15 a causation link there.

16 Nevertheless, whether he makes the concession or not
17 is neither here nor there, because he does give clear
18 evidence that subsequent to that there was collusion
19 between the parties, and that evidence was not
20 challenged. That therefore was after he noticed this,
21 or is alleged to have -- he may have noticed it. So it
22 would not affect the thrust of his evidence in any
23 event.

24 Unless the tribunal wishes to hear me any further,
25 those are my submissions.

1 THE CHAIRMAN: Thank you very much, Mr Doctor.

2 THE CHAIRMAN: Mr Brealey, if we observe normal hours today,
3 we have about half an hour left.

4 MR BREALEY: We will take 15 minutes each.

5 THE CHAIRMAN: Is that reasonable? Are you both happy with
6 that?

7 MR GREEN: That should be fine.

8 THE CHAIRMAN: The shorthand writers have very kindly said
9 they will sit a bit later if we need to.

10 For our part, we still have, I think, just one
11 question which goes back to the legal issues we have
12 been discussing, which I think can be put this way: in
13 the OFT's closing submissions, they set out the law on
14 concerted practice; they set out Dyestuffs, they set out
15 Sugar, and they refer to Cement, Tate & Lyle, and
16 various other very well-known cases. Is it your
17 submission that all that case law is in some way
18 qualified by the decision in Bayer, or to put it another
19 way, what, if any, is the impact of the decision in
20 Bayer on that case law?

21 Reply submissions by MR BREALEY

22 MR BREALEY: The first point, just before I answer that, is
23 that looking at the closing submissions, paragraph 13 of
24 the OFT's closing submissions, the last sentence, where
25 they say there is no need for consensus, we say that is

1 wrong in law. And we say that is wrong in law for four
2 reasons; the first is Bayer, and that is the CFI
3 judgment, but it has been confirmed by the OCJ, and as
4 Mr Green said earlier on, if one looks at paragraphs 174
5 to 176, 174 quite clearly refers to agreement, concerted
6 practice and decisions by associated undertakings, and
7 176 refers to concurrence of wills. The CFI is making
8 no distinction between concerted practice and agreement
9 when it refers to concurrence of wills, the consensus.
10 So that is the first reason we say that paragraph 13 is
11 wrong.

12 Secondly, and this begins to answer the tribunal's
13 question, we would say that that last sentence is
14 contrary to the definition of concerted practice in
15 Dyestuffs, which is at paragraph 14.

16 THE CHAIRMAN: Yes.

17 MR BREALEY: There has got to be co-ordination,
18 co-operation, and it has to be done knowingly.

19 The third reason is one that we have alluded to,
20 which is Professor Whish in his competition law book,
21 and we have put this in our legal analysis, but he does
22 refer to the requirement for a mental consensus.

23 THE CHAIRMAN: Just remind me where he gets that from.

24 MR BREALEY: That is the fifth edition, page 100.

25 THE CHAIRMAN: Yes, but in reaching that conclusion, what is

1 he citing?

2 MR BREALEY: The answer to that is, I think, my fourth
3 point, which is that the treaty in article 81 talks
4 about concerted practice, and concerted practice does
5 not mean unilateral practice. I think from memory, when
6 he is referring to this mental consensus, he is not only
7 referring to the cases, but he is also looking at the
8 scheme of the treaty.

9 Article 82 is unilateral; article 81 is consensus.
10 And that is actually the theme that you get from Bayer
11 as well.

12 If we then go to the Cement case, which is set out
13 at paragraph 16 of their skeleton, and ask the question,
14 "Well, has Bayer qualified that in any sense, or is that
15 correct?" We would say when you actually look at
16 Cement, that paragraph there, it has got to be viewed in
17 its proper context. The two paragraphs before, from
18 memory, refer to reciprocity, and this concept of
19 reciprocity, we say, carries with it an element of
20 consensus, so that in other words, when one looks at
21 paragraph 16 of the skeleton, the OFT's skeleton, and
22 looks at the words in italics:

23 "It is sufficient that by its statement of
24 intention, a competitor should have eliminated or, at
25 the very least, substantially reduced uncertainty ..."

1 If one asks the question, "Well, is that
2 it?", firstly, no, because that sentence has to be
3 viewed in the context of a mental consensus.

4 Secondly, if it is correct, if it is correct -- and
5 as Mr Doctor says, all you need is for someone to blurt
6 out to Argos Littlewoods' prices, and that means Argos
7 cannot publish its catalogue, we would say that that is
8 just contrary to the ECJ case law, and the CFI have got
9 it wrong. We say they have not got it wrong, there is
10 something more to it than just that pure sentence,
11 otherwise you do lead to the absurd results that
12 Mr Doctor referred to.

13 But if they did intend to have that rather bizarre
14 conclusion, they have just got it wrong, and it is
15 contrary to the European Court of Justice.

16 THE CHAIRMAN: Well, if we just trace that back,
17 a substantial part of the citation from Cement that you
18 have just been looking at is derived, I think, probably,
19 from Sugar, which is cited just above that, in
20 paragraph 15 of the skeleton, and Sugar says, in a very
21 well-known passage, that the concept of concerted
22 practice:

23 "... does, however, strictly preclude any direct or
24 indirect contact between such operators, the object or
25 effect whereof is either to influence the conduct on the

1 market of an actual or potential competitor or to
2 disclose to such a competitor the course of conduct
3 which they themselves have decided to adopt or
4 contemplate adopting on the market."

5 Is that, in your submission, still an accurate
6 statement of the law?

7 MR BREALEY: It is, but it has to be looked at in the
8 context of a consensus, and we can actually see that
9 from the very first line on the page, which is that the
10 operator must determine independently the policy. We
11 have seen from the brown goods MMC report that the
12 nature of an RRP, a recommended price, is such as to
13 influence or attempt to influence someone's conduct.
14 That is why they had to abolish the RRP's in domestic
15 electrical goods.

16 THE CHAIRMAN: What about the problem of direct or indirect
17 contact between economic operators? Sugar seems -- and
18 Sugar itself was based on Dyestuffs, of course, but it
19 seems to be saying that the only real way you can stay
20 on the right side of the line is to make sure there is
21 no contact.

22 I mean, the applicants' case seems to be that there
23 is a sort of area -- and I am not saying it is right or
24 wrong, I am just trying to understand what the case is:
25 there is a sort of area where you can have some sort of

1 contact, but so long as that contact does not amount to
2 something called a consensus, you are still all right.

3 MR BREALEY: I think it has to be some sort of co-operation
4 where you cease to determine independently your conduct
5 on the market, so it cannot be any contact; to use
6 Mr Green's analogy, if you phone up and say, "Do you
7 want to go to the cricket?", obviously that is not going
8 to have any influence on your independent conduct on the
9 market.

10 THE CHAIRMAN: Well, it is contact, according to Sugar, the
11 object or effect whereof is either to influence conduct
12 or to disclose a course of conduct; either influence or
13 disclosure, those are the two things.

14 MR BREALEY: Again, I think that has to be viewed in the
15 context of mental consensus or co-operation, because
16 otherwise you will come to the bizarre result that if
17 Argos -- the day before its final pricing, if it picks
18 up the phone and a competitor says, "We are going out at
19 these prices", so there is contact, the competitor has
20 now imparted confidential information to Argos, what on
21 earth does Argos do, if you just take that literally?

22 THE CHAIRMAN: Well, it may depend on how often it happens.

23 MR BREALEY: Absolutely.

24 THE CHAIRMAN: It may depend -- I mean, a classic compliance
25 programme might say that Argos puts the phone down,

1 makes a memorandum of the phone call, reports it to the
2 legal department, who then decide whether they are going
3 to tell the OFT or not, for example.

4 MR BREALEY: But the important point of the discussion we
5 have just had is that one cannot take that italics
6 literally. As Mr Doctor rightly says, it has to be
7 looked at in its economic context.

8 If I could, for example, then answer the question
9 the tribunal posed to Mr Green this morning, supplier A
10 phones retailer B and says, "Well, retailer C is going
11 out at £9.99", and retailer B says, "Thank you"; is that
12 a concerted practice?

13 We would say no, because B may have already decided
14 to go out at that price, that is the first reason, for
15 example. Secondly, B may laugh and think supplier A is
16 a mad man. Thirdly, B may not even care about what C's
17 price is. Quite importantly, C may sue A for breach of
18 confidence.

19 So this is why it is important to show some sort of
20 consensus between retailer B and retailer C. It cannot
21 be the law that for article 81 to apply, just because
22 you are the passive recipient of information, and you
23 have not requested it, then you are somehow guilty of
24 a concerted practice. It has to be looked at, as the
25 tribunal knows, always in its economic and legal

1 context, to see whether the receipt of this information
2 is part of a concensus whereby the recipient is not
3 determining independently its policy on the market.

4 I hope that is helpful on the law.

5 We did just have a short written reply which will
6 speed things up, if I can just hand those up. (Handed).

7 There are just two points here: first is the change
8 of policy, and secondly -- we have done this because
9 obviously, from yesterday, there was an exchange, if
10 I can use the word, as to the exchange of information,
11 and I will deal with that very quickly.

12 Can I just deal with the first point, the first bit
13 should say "Argos' change of policy", on the first page.

14 THE CHAIRMAN: Yes.

15 MR BREALEY: We have set down there four points. I will not
16 go through those, but paragraph 1 talks about the
17 general level, and then how that applied to Action Man
18 and core games, which is the specific case here.

19 Can I make three further points on the Argos change
20 of policy? So point number 5 is that the witnesses from
21 Argos and Littlewoods are of the view that they would
22 not go above the RRP, so that when Mr Doctor is going
23 through spring/summer 1999 and saying, "Well, Argos
24 priced above the RRP", and is trying to draw inferences
25 from that, we can only go on the information we have

1 got. All we know is we would not normally go above RRP;
2 that is on the evidence of Andrew Needham and
3 Lesley Paisley.

4 THE CHAIRMAN: But the catalogue shows you above RRP at that
5 stage, on some of the prices.

6 MR BREALEY: Well, the RRP's change, and all we have in our
7 analysis -- if I can go very quickly to the skeleton
8 pricing analysis -- is the RRP's sent by Hasbro to the
9 OFT in 2003, and we know that they can be different;
10 they may be different from the range and price form that
11 we have seen, and they may go up and down as the year
12 goes on.

13 The OFT have not put the RRP's to us, we have had to
14 try and work it out, but all we know is that the RRP's on
15 the left-hand side may not always be accurate if Argos
16 is pricing above the RRP, because both retailers said
17 that they would not price above the RRP. That is the
18 fifth point. We have explained it at paragraph 3 of the
19 pricing analysis.

20 THE CHAIRMAN: Yes.

21 (4.15 pm)

22 MR BREALEY: The sixth point on Argos' reply is that I would
23 ask the tribunal, on other toys, to remember
24 Vanessa Clarkson's second witness statement,
25 paragraphs 8 to 11, at volume 1 of the witness bundle,

1 tab 7. There she gives her reason why, in autumn/winter
2 2000, she priced nearly every single product at RRP.

3 The seventh point on the change of policy, and this
4 picks up something that Mr Doctor said, is that I would
5 ask the tribunal, when it comes to look at the other
6 toys pricing analysis, when it is looking at
7 Andrew Needham's toys, that is Pokemon, the Pokeball
8 Blaster, the Interactive Pikachu, the Micro Machines,
9 that all the pricing is consistent with competitive
10 pricing, and it is not consistent with the alleged price
11 fixing agreement.

12 So in other words, if one compares spring/summer
13 2000, autumn/winter 2000 and spring/summer 2001, you see
14 the retailers reacting to the previous price, and that
15 is not evidence of collusion, it is an example of, as
16 Neil Wilson said, the retailers reacting to the pricing.

17 So very quickly on the second part of the reply, if
18 I can just explain what we have tried to do, we are
19 meeting a case -- we set this out at paragraph 5, that
20 there was an understanding with Hasbro and Argos that
21 Argos would price at or near RRP's, and we only did
22 this -- and this is very important -- on the
23 understanding with Hasbro that Littlewoods would enter
24 into a similar arrangement with Hasbro.

25 We have tried in this reply to pick up on this very

1 crucial point, which is that we only agreed to adhere to
2 RRP's on the understanding that Littlewoods would do.

3 What we have done is we have gone through the
4 relevant parts of the decision, and we have taken the
5 evidence, and we have tried to show that nowhere does
6 the evidence support this interlinking of the two
7 agreements.

8 We wholly reject Mr Doctor's suggestion that
9 Neil Wilson's evidence suggests any sort of collusion.
10 So at paragraphs 7 to 10, we are dealing with basically
11 the meetings -- so we have taken the paragraphs of the
12 decision and dealt with them. Then at paragraphs 11 to
13 16, we have dealt with the communication of supposed
14 pricing intentions, and we have gone through the
15 evidence on that.

16 If I could just end with paragraph 16, then Mr Green
17 can begin, one has to remember that we are being accused
18 of a price fixing agreement which is contingent on
19 Littlewoods doing the same thing; we say that if
20 Neil Wilson had no systematic plan, so that Needham
21 could not; if the information said to have been imparted
22 by Needham was unreliable, which it was on that e-mail,
23 one out of five prices was incorrect; and if any
24 exchange was unspecific about any retailer or any
25 retailer's price, in other words Wilson himself did not

1 expect anyone in Hasbro to be specific about Argos, and
2 information Wilson gave to Needham was also unspecific;
3 we would say quite clearly this gives support to
4 Andrew Needham's evidence, "I certainly did not have the
5 impression that Hasbro was eliciting my price intentions
6 with a view to passing these on to third parties and
7 then reverting back to me with third party pricing
8 intentions", and it cannot be evidence of an agreement
9 by Argos to price at RRP provided that Littlewoods did
10 the same.

11 It is really trying to get to grips with the
12 decision, the allegation against us, which was that
13 there were two bilateral price fixing agreements,
14 contingent on each other. We say that the evidence in
15 this case just does not support that very specific
16 allegation. Thank you.

17 THE CHAIRMAN: Thank you very much.

18 Reply submissions by MR GREEN

19 MR GREEN: First point, the law. I will start with the gist
20 of Sugar. Sugar makes it clear that the essence of
21 article 81(1) is independence, and an agreement or
22 concerted practice is something which eliminates that
23 independence; a fortiori --

24 THE CHAIRMAN: Or substantially reduces uncertainty.

25 MR GREEN: Well, that would be a diminution of independence,

1 yes.

2 THE CHAIRMAN: It might not eliminate it.

3 MR GREEN: Eliminate or substantially reduce, yes. That
4 comes from Cement. I will deal with Bayer, because
5 I think Bayer may very well change the position, and
6 I will explain why, but the essence of Sugar is that
7 each operator must act independently.

8 What that means in the present case is that the OFT
9 must show that by whatever means Hasbro adopted, that
10 impacted on either eliminating Littlewoods' independence
11 or substantially reducing it.

12 The OFT have not set out to establish that at all,
13 they did not set out in the rule 14 and it is not set
14 out in the decision. They set out to establish the
15 existence of contacts, but they did not set out to
16 establish and have not established whether any such
17 contacts as took place diminished the independence of
18 Littlewoods or Index. That is a fatal failing in the
19 decision, because even if they can establish the
20 existence of some contacts, they must go the further
21 step and establish that it eliminated or substantially
22 reduced Littlewoods' independence, unilateralism, when
23 it came to decision-making.

24 THE CHAIRMAN: How does that work with the words "object or
25 effect"?

1 MR GREEN: Well, put it in the context of Bayer --

2 THE CHAIRMAN: Ie, an exchange -- would an exchange that had
3 as its object the reducing of uncertainty be enough,
4 without showing any effect?

5 MR GREEN: No, because you would have to ask yourself
6 whether that object could exert any effect. In deciding
7 whether something has the object, one looks to see
8 whether the -- sometimes this is the confusion about
9 object and effect, they are interlinked concepts.

10 If I have the object of doing something -- it is
11 foreseeable that if I do something, it will have that
12 effect. I do not then have to show effect.

13 THE CHAIRMAN: If the object is to give a degree of comfort
14 on what a competitor is doing on retail prices, and you
15 exchange information with that object, is that enough?

16 MR GREEN: No, and the reason for that is Bayer. Think of
17 the facts of Bayer. In Bayer, the supplier not only
18 communicated information to a wholesaler, as to its
19 policy, namely, "We will supply you with Adalat, but
20 only in such quantities as you are able to use on the
21 domestic market, and the reason for that is we do not
22 want you exporting"; moreover, they took steps to
23 enforce the communication by reducing volumes on a year
24 by year basis, in order to seek to establish that, and
25 the purchasers were perfectly aware of that.

1 If one looks at the facts of Bayer, and the
2 arguments which were advanced by the Commission to
3 establish the agreement, the court said:

4 "No, it is not enough for a supplier to take steps
5 to restrict competition, and even not enough for the
6 supplier to take those steps and communicate its policy,
7 or for its policy to be known to the purchaser, and for
8 the purchaser to continue in contractual relations,
9 thereby reluctantly [in brackets] acquiescing, because
10 you simply do not walk away"; that is not sufficient.
11 That does not result in the poor benighted purchaser
12 being punished for falling into a concerted practice.

13 The court said in paragraphs 174 and 175, "Yes, this
14 was a restriction of competition, but it is not one
15 which technically falls within article 81, because
16 article 81 has limits".

17 They may be good limits or bad limits, it may be
18 that there is a lacuna between 81 and 82, but there are
19 limits, and it is dependent upon the concurrence of
20 wills. So the mere fact that Bayer cast its stones into
21 the pond, that they caused substantial ripples, that the
22 wholesalers were aware of those ripples and were forced
23 to acquiesce in them, did not result in the wholesalers
24 being implemented in a concerted practice.

25 Now to the extent that that amends Sugar, then so be

1 it. If it clarifies Sugar, again, so be it. This is
2 an evolving area of law, and it is not unimportant that
3 the Commission did not understand Bayer at first
4 instance to be correct; it was not the Commission's
5 understanding of the previous case law on the meaning of
6 agreement or concerted practice, which is why the
7 Commission (a) lost, (b) went to appeal, and (c) lost on
8 appeal. The Commission had a very different view of the
9 standard notion of an agreement, and advanced it in its
10 decision, and it lost.

11 So if it turns out that Bayer is a revolutionary
12 case, and I think many people, certainly after
13 AEG Telefunken, thought it probably was, the European
14 Court has endorsed it, and has said there are clear
15 limits as to article 81, the consequences are profound
16 and very serious for companies, and legal certainty
17 requires that there should be a concurrence of wills.

18 The facts situation in Bayer is very important,
19 because on those facts, which are more extreme, I would
20 submit, than the facts here, there was still no
21 agreement.

22 If the court had thought there was a concerted
23 practice, of course, it could have said so, because it
24 has long been the court's case law that the distinction
25 between agreement and concerted practice is not one

1 which has to be pleaded. The court could say, "There is
2 no agreement here, but there was a concerted practice",
3 yet the court did not say that, and in paragraph 174
4 made it clear, we submit, that concurrence of wills is
5 required.

6 The essential factual point, therefore, is whether
7 there was anything in the communications which
8 substantially or totally eliminated the independence of
9 action which Littlewoods and Index pursued.

10 As to that, that is an evidential question. This is
11 not a case where the parties come to the court and say,
12 "This is an oligopolistic market, we are just
13 intelligent observers". In this case, there is
14 documentary evidence of a series of events which support
15 and corroborate the conscious parallelism.

16 The GUS takeover is obviously an important point,
17 and everything which followed. My learned friend this
18 afternoon accepted, as indeed he had to, that they could
19 not prove that the spring/summer catalogues were in any
20 way tainted by illegality; he recognises that on the
21 basis of the evidence as to dates, there is not
22 something where the OFT can say, "Well, the price
23 setting for spring/summer 1999 was affected by any
24 agreement".

25 I want to deal with one point in relation to that in

1 a moment. But this is a case, coming back to the
2 general legal point, where there is very strong and
3 powerful evidence of market forces leading to
4 coalescence of price. It runs in parallel, it was
5 accepted by all the Hasbro witnesses, David Bottomley
6 said that their price initiative came at the propitious
7 moment, because the market was moving in that direction.
8 There really can be no doubt about it.

9 It is not one of those cases where the witnesses
10 simply say, "Oh well, we can just watch and learn"; this
11 is a case where there were concrete events causing
12 concrete changes.

13 Now generally, therefore, the OFT's case, as
14 presented today, avoids anything which is difficult. It
15 avoids the evidence as to the impression of the GUS
16 takeover, it deals with that extremely slightly. I will
17 deal with the management report in a moment, because
18 this is one of the most astonishing aspects of the OFT's
19 case. It avoids, for example, the change of management
20 in 1998 in Argos, and the indication that Index had to
21 be turned around in one or two years.

22 My learned friend did accept that it was all
23 dependent on the facts. He accepted right at the outset
24 of his closing that it depended upon the contents of
25 conversations and their context. He said to you that

1 the standard of proof must be less than the civil
2 standard, because otherwise the OFT would never win;
3 that is page 85 of today, lines 15 to 19. He said that
4 if they had to meet anything other than the civil case,
5 in these sorts of cases, they would never win. You can
6 check the transcript, page 85, lines 15 to 19.

7 Well, if that is their perception of the case, it is
8 wrong. This is a case where my clients were fined
9 substantially, and Argos were fined even more
10 substantially.

11 This brings me to the question of the failure to
12 call witnesses. The OFT had the power to compel the
13 production of proper witness statements during the
14 administrative procedure.

15 THE CHAIRMAN: Did they?

16 MR GREEN: Yes.

17 THE CHAIRMAN: Where does that come from?

18 MR GREEN: £18 million worth of concession to Hasbro, and
19 a compliance agreement, whereby they could get the
20 witnesses in, and they could have squeezed the pips out
21 of them until they had got detailed evidence and
22 detailed witness statements. They have powers under the
23 Act to require people to answer questions in any event;
24 that is a person they can require under the Act. But in
25 the context of a compliance programme, Hasbro were being

1 let off a fine to the tune of £18 million, and they were
2 co-operating with the OFT.

3 It would have been the most sensible thing for the
4 OFT to have got the witnesses in, however many times it
5 took, to squeeze out of them the maximum amount of
6 information, and to produce detailed statements. We
7 would then all have known what the truth was.

8 Hasbro would have done anything for £18 million.
9 They would have co-operated, they had a co-operation
10 agreement which required them to co-operate. The terms
11 of co-operation agreements require utmost co-operation.

12 If they had needed to, they could have used
13 statutory powers to require production of documents,
14 minutes, board minutes, anything they had liked, to put
15 to those witnesses and get out of them the true story,
16 but they did not do that. In the event, we have had no
17 evidence to this tribunal from Mr McCulloch, and I will
18 deal with him in a moment, or Mr Brighty, Evans,
19 Richards, Virani, Charles Cooper; all people who would
20 have given detailed evidence about events relevant to
21 this case.

22 We submit the OFT has a public role, it should not
23 be out to convict at all costs; that the interviews were
24 adverse to the OFT. It is said they do not rely upon
25 Mike McCulloch, but they do, in paragraph 55 of the

1 decision, the amended decision, they still rely upon
2 him. They should not be coming to court and saying, "We
3 are not going to call the witnesses, but we know that it
4 is very much more difficult for you, the appellants, to
5 get hold of these people".

6 Mr McCulloch has not been employed by Hasbro for
7 a long period of time; only Mr Thomson is employed. All
8 the rest were either sacked or resigned a long time ago.

9 THE CHAIRMAN: How would they have got hold of Mr McCulloch
10 then, in the context of the co-operation agreement?

11 MR GREEN: If you had a witness statement from him at the
12 time, they would have come to the tribunal and said, "We
13 want a witness summons", and they would have had
14 a statement, and he would have been compelled to turn
15 up.

16 THE CHAIRMAN: Do we know when Mr McCulloch ceased to be
17 employed by Hasbro?

18 MR GREEN: I think it was shortly after -- I think the
19 details are in fact in the record of the OFT oral
20 hearing with Hasbro, because the OFT were asking for
21 contact details. They had it within their power -- and
22 they plainly can do it if they so wish, as part of
23 a leniency programme, to get the details: they can say
24 to Hasbro, "We expect your people to co-operate in
25 producing detailed statements, and we will not finish

1 this process until we have got the statements, because
2 plainly we cannot even go to rule 14 or to a decision
3 until we have got that".

4 Then the evidence is there, they can find out the
5 addresses, they can keep track of them, Hasbro can keep
6 track of them, and it is not beyond the wit of the OFT
7 then to compel them to turn up.

8 One cannot exclude the theoretical possibility that
9 you might not find them, but frankly, that is remote.

10 (4.30 pm)

11 As a result, we have been substantially prejudiced;
12 these are not people who are going to co-operate with
13 us. The process and the thought of turning up to give
14 evidence is a deeply stressful experience for all the
15 witnesses, and it is not something they would relish or
16 wish to co-operate with us about, so we lose the
17 opportunity to cross-examine them, even though the OFT
18 conceded this afternoon that half of these witnesses are
19 adverse to their case, they do not believe them.

20 Mike McCulloch is key; he has been pivotal to this. If
21 he is adverse to their case, then he is for our case,
22 and yet he is not here.

23 There are other indications --

24 THE CHAIRMAN: Do we know where he is? Does anybody know
25 where he is?

1 MR GREEN: I mean, it is not just him. It is Mr Richards,
2 Mr Brighty, Mr Evans, Mr Charles Cooper and so on. We
3 would submit as a general point in the public interest
4 that if the OFT is going to advance cases which may turn
5 upon oral evidence, and who said what to whom, that it
6 is the responsibility of the prosecutor, if I can use
7 that term in inverted commas, to produce the evidence to
8 the tribunal, good or bad.

9 I will move from that, because in a sense the point,
10 I think, is an obvious one. Credibility of Ian Thomson,
11 some short points just dealing with that.

12 Point number one, paragraph 144, this does
13 illustrate unreliability. My learned friend this
14 afternoon puts a gloss upon the evidence, which is not
15 in the evidence. He did change his mind on a matter
16 that hitherto he seemed quite confident of, and he
17 changed his mind on a critical issue. That is why we
18 say that his evidence is all the more unreliable,
19 because it was not produced with documents. This was an
20 example of one illustration where he was able to
21 convince himself, by reference to a document, that he
22 was wrong; how much more accurate might his statement
23 have been if he had been properly appraised of the
24 documents, but he was not.

25 Legal advice: the only thing I will say about that

1 is Neil Wilson -- the reference is Day 2, pages 48 and
2 49:

3 "Ian Thomson would have known the rebates were
4 illegal, senior management told them."

5 That is Neil Wilson's evidence.

6 Three, reliability of memory: he is extremely vague
7 about what happened. On at least three occasions, he
8 said that the conversations which led to the so-called
9 agreements or arrangements were along the following
10 lines: he said he would construe as an agreement
11 a comment from Index that they had their own policy of
12 going to RRP's, and they agreed it might be a good thing.

13 So if my client simply says, "Yes, we have got our
14 own policy, and we are going to RRP's", and Ian Thomson
15 says, "Well, I agree", he construes that as the sort of
16 agreement he was talking about. References, Day 1,
17 page 146, lines 8 to 22; page 147, lines 2 to 8 and 14
18 to 20. Further, on the same point, he then conceded he
19 really could not remember who in fact he actually spoke
20 to; Day 1, page 148, lines 3 to 6.

21 The GUS takeover point: the point that we were
22 making was that Ian Thomson said it would apply to home
23 shopping. Perhaps I did not make this clear enough in
24 my closing, but he said it would apply to home shopping;
25 the only person who thought it would apply only to home

1 shopping and not to retail. The reference to that is
2 Day 1, page 36, lines 1 to 6.

3 Andrea Gornall, well, I made my point this
4 afternoon. The conversation was in relation to
5 an extension of the range; Day 1, page 185, line 9 and
6 following. Our point was that he was vague and confused
7 as to whom he spoke to, and our point is that the OFT
8 now say that Littlewoods and Index should be convicted
9 on the evidence of a man who had no precise memory of
10 events, and at best, gave what my friend says is
11 sufficient, a broad thrust, but in a case where
12 discussions on prices are said to be unlawful, this is,
13 with respect, simply not good enough.

14 In his criticisms -- or in his support and defence
15 of Mr Thomson, he ignored the inaccuracy of the 18th May
16 e-mail, the misrepresentation to the internal management
17 about Alan Cowley, the inconsistency with
18 Mike McCulloch -- it is not enough to say he is
19 inconsistent. If that is going to be an important
20 matter, McCulloch should have been called.

21 The reasons why he sent the 18th May e-mail to
22 Andrea Gornall when she had been on maternity leave for
23 six months, and the very large number of instances which
24 we have identified in our closings where he says he
25 cannot remember; nor do we have any explanation of the

1 inconsistency between the Stockley Park presentation and
2 the presentation to Hasbro.

3 As to Management Horizons, with respect, my friend's
4 submissions must have been dripping with irony. This
5 was a document which Mr McMahon is referred to
6 specifically in. Mr McMahon has not been employed by
7 Index for some years, so we have had very limited
8 contact with him indeed. A document was discovered, we
9 did not have a chance to talk to him about it. Once he
10 was shown it, he was able to explain about it to us, and
11 he was not cross-examined on it at all.

12 I put it to Mr Thomson, because I wanted a Hasbro
13 witness to express their views on the market forces at
14 the time, and I only had three witnesses. Mr Thomson
15 was their first witness, and he was the only person who
16 really knew about Index; I did not have any other
17 opportunity to put the case to a witness.

18 The points came out in cross-examination of
19 Mr Thomson, and when cross-examined very briefly,
20 Mr McMahon said, "Yes, management had instructed the
21 external consultants, and it was part of my thinking",
22 and he was not cross-examined on it at all. Nor was
23 Lesley Paisley.

24 To then say that it cannot be relied upon, when on
25 its face it is tremendously supportive of Index's case,

1 when it was not put to him that it was inaccurate, or it
2 was not relied upon, is just simply unacceptable.

3 The OFT cannot say that this was an irrelevant
4 document when manifestly, it is an important document;
5 when the document was put to Ian Thomson, when therefore
6 it was blindingly obvious it had to be put to
7 Mr McMahon, and a deliberate, and it can only be
8 deliberate, decision of a forensic nature was taken not
9 to put it to Mr McMahon, or not to put it to
10 Mrs Paisley. If they have concerns about it, it cannot
11 be raised for the first time in closing, it must be put
12 to the witnesses.

13 Mr McMahon is named in it, he worked on it -- this
14 is not in evidence, but he worked on it with the
15 consultants. He could have given cogent evidence upon
16 it. I could not open it up in re-examination, because
17 it had not been cross-examined on.

18 On the face of the document --

19 THE CHAIRMAN: You could have presumably got some sort of
20 supplementary statement from Mr McMahon if you had
21 wanted to.

22 MR GREEN: The document is a disclosed document. It is put
23 to Mr Thomson. On its face, it is highly relevant. If
24 the OFT choose not to cross-examine on it, then I am
25 entitled to say to you it is an unchallenged document;

1 on its face it is relevant, and Mr McMahon did say he
2 relied upon it. That is sufficient. The external
3 consultants were instructed by management to advise them
4 on the GUS takeover what Index should do; he has
5 endorsed it. Without being cross-examined, I am
6 entitled to say that is sufficient.

7 A number of stray points, and I am three quarters of
8 the way through now. It was suggested that the retail
9 prices were set in collaboration -- this was one of the
10 first points Mr Doctor made.

11 Can I just simply remind you of Mr Thomson's
12 cross-examination by me, Day 1, pages 65 to 67? He set
13 out the internal and complex price setting mechanism for
14 the price points at the RRP's, and as we pointed out in
15 our closing, paragraph 176, he did not need any help
16 from anybody else.

17 Suppliers' tales: Mr Doctor says that our case, in
18 other words Index's case, is -- and I am quoting from
19 him, I think, accurately: "They make this up, after they
20 had sucked this out of their thumbs"; in other words,
21 suppliers' tales, you know, it is just an incredible
22 story.

23 Well, that was not the way we put it, that was not
24 the way we advanced the case to you. Our case is that
25 long experience of buyers demonstrates that it is

1 sometimes accurate and sometimes inaccurate, ie it is
2 simply unreliable. We do not know when it is accurate
3 or inaccurate; we know that it is unreliable, not that
4 it is always false. But that is a very important point,
5 because the longer that unreliability goes on, the less
6 credible those sorts of suppliers' tales become, and
7 that was Mr Burgess' evidence, and indeed the evidence
8 of others.

9 He then says, without having put this proposition to
10 any witness, that it is absurd to suggest that
11 Littlewoods and Index did not believe that their
12 discussions would not be confidential.

13 Well, the witnesses have said either that it did not
14 cross their minds as to whether it was going to be
15 disseminated, or they thought it was confidential. If
16 they are going to challenge that, they must put it to
17 the witnesses, and they must persuade the tribunal that
18 the evidence of those witnesses is unreliable. It
19 really is not fair to raise that for the first time in
20 closing. The witness evidence is quite unequivocal on
21 this.

22 The proof of the pudding is in the eating; the
23 18th May e-mail was inaccurate. Why would we believe
24 that Argos would provide that sort of information to us?
25 Why would we believe that other people would be passing

1 on anything other than unreliable gossip?

2 Next point, and there are only a few more: Tweenies.
3 My learned friend made great play on the word
4 "insistent". Can I simply give you the references to
5 what Mr Thomson said? First of all, he said he only
6 insisted in relation to Alan Cowley, nobody else,
7 because he thought Alan Cowley was resistant.

8 When he was asked what "insistent" meant, he gave an
9 answer which was really, "Oh well, Alan, you ought to go
10 out at my RRP's, because you can see the previous
11 catalogues". It was not insistence at all, it was
12 recommendation, and the references are Day 1, page 127,
13 lines 13 to 22, and pages 131 and 132, that is 131,
14 line 21 through to 132, line 7.

15 Briefly, Mike McCulloch and relevant legal advice.
16 It was suggested that the only advice he received was
17 the 1997 advice on the dos and don'ts. The point we
18 were making was quite different: the legal advice which
19 preceded the meeting under which the 1999 terms were
20 presented to us was Hasbro's slap on the wrist just
21 a week or so earlier, or however long it was earlier, to
22 Mike McCulloch about the conditional rebates, so it has
23 been part of our case that Hasbro made their
24 presentation to Argos before us, and it is part of our
25 case, because all the witnesses say it is --

1 THE CHAIRMAN: Sorry, that their presentation?

2 MR GREEN: To Argos.

3 THE CHAIRMAN: Was before their presentation to you?

4 MR GREEN: Yes. That seems to be clear from the Argos
5 witnesses and our own witnesses indeed; that seems to be
6 logical. Certainly you will have to look at the
7 statement -- the first presentation, not the February
8 one. There is a reference, I think, in Maria Thompson's
9 statement to an earlier discussion, but all we know is
10 that Mike McCulloch never presented conditional rebates
11 to us.

12 We do not have Mr McCulloch, so we cannot ask him,
13 but it seems to us -- and I may be wrong on this, but he
14 did not present conditional rebates to us. He did to
15 Argos, Argos said, "That is illegal", he went back to
16 his legal department, they said, "No, you cannot do
17 this", and that, from our perception at least, with the
18 benefit of hindsight, would appear to be logical,
19 because he never presented them to us.

20 If the Argos meeting was before, then that would
21 make sense, simply because Mike McCulloch had his wrists
22 slapped by his own legal department, and then he came
23 into our meeting. It may be that the evidence of the
24 timing is not entirely clear.

25 THE CHAIRMAN: When you say the first presentation, you are

1 referring to an occasion when Mr McCulloch was talking
2 to Maria Thompson about the conditional rebate?

3 MR GREEN: Sue Porrit.

4 THE CHAIRMAN: Sue Porrit about the conditional rebate being
5 linked to RRP's?

6 MR GREEN: Yes. All I can deduce is it was never put to
7 us -- it is not in our presentation, it was never
8 suggested to us, but we know he got his wrists slapped.

9 If it was beforehand, then it is quite logical that
10 he came into our meeting thinking, "I have just had my
11 wrists slapped, I do not want to get into trouble
12 again", and he did say to the OFT in his evidence in
13 October, maybe they do not accept it, "I did not talk
14 about retails on legal advice"

15 Mr McMahon gave you evidence that they had -- he
16 would say, "Mike, I want bought-in margin, I want extra
17 margin", and McCulloch would say, "Well, go out at our
18 RRP's".

19 Those very high level haggles are completely
20 irrelevant, they are just part of the haggling process.
21 "I have got an RRP; go out at them; I want margin".
22 John McMahon never said he agreed on RRP's with
23 Mike McCulloch, he simply said, "I had a high level
24 haggle". It is completely different to having
25 a detailed discussion about an RRP policy which

1 incorporates Argos, and you know, because he has told
2 you so, that he said he never indicated his policy to
3 Mike McCulloch, he never signalled his policy, he kept
4 his own counsel; in fact, Mr Thomson says that McMahon
5 expressed scepticism about RRP's.

6 Well, if he is expressing scepticism, he cannot be
7 agreeing to them. In this regard, Mr Doctor suggests to
8 you that very broadbrush comments are in fact detailed
9 discussions about retail prices, and there is simply no
10 evidence of that. Again, if it were ever to be
11 a relevant matter, they should have called McCulloch.

12 On spring/summer 1999, just a couple of points. In
13 our closing, paragraph 64, we have set out what we
14 believe are the correct RRP's. I do not know if it has
15 been appreciated by the tribunal, but there are a number
16 of sets of RRP's. Hasbro produced RRP's in compendious
17 form to the OFT last year in response to a request.

18 Index had on their files RRP's sent to them
19 contemporaneously in 1998 by Littlewoods. Our figures
20 are based upon the documents we had sent to us at the
21 time, and they are sourced in the document. There is
22 not a great deal of difference between them, but if
23 anything really does turn upon them, we would suggest
24 the contemporaneous documents are more likely to be
25 accurate than the ones subsequently produced. We have

1 not been able to find out why they are in any way
2 different; there are no major differences between them,
3 but there are one or two differences.

4 Our closing paragraph 64 is therefore based on the
5 documents sent to us at the time, they are
6 contemporaneous. Mr Doctor's reliance this afternoon --

7 THE CHAIRMAN: And we have them in our papers, do we?

8 MR GREEN: You do have them in your papers. They are
9 referenced in the footnotes.

10 THE CHAIRMAN: Yes.

11 MR GREEN: I just want to make that point, that in
12 spring/summer 1999, there was a very, very high degree
13 of correlation, through entirely natural market forces.

14 As to other toys, my learned friend made submissions
15 this afternoon about that. He did not take you to
16 tab 52 which I did take you to yesterday, the additional
17 20 plus products, which are not suggested to be part of
18 any agreement or understanding, yet were at common
19 prices:

20 "These 20 plus constitute a really quite substantial
21 proportion of the residual games, ie those not said to
22 be subject to an agreement. The OFT just do not deal
23 with this. Why did 20 plus of the residual products
24 coalesce?

25 "Answer: Market forces.

1 "Why did the so-called other toys coalesce?

2 "Answer: Well, because naturally, after two
3 catalogues where prices had moved to RRP, the products
4 where there were slightly bigger margins would move to
5 RRP. That is also perfectly consistent with market
6 forces and it is consistent with the other 20 that are
7 not said to be subject."

8 It was said this afternoon that spring/summer 1999
9 was unimportant; yes, precisely, that is our point.
10 Argos and Index did test the water in spring/summer
11 1999, in readiness for autumn/winter. They took
12 a smaller risk, they watched the reaction, and they took
13 another risk in autumn/winter 1999. As I have said,
14 Mr Doctor accepts that the OFT cannot prove it was
15 affected by any agreement. We rely upon the relative
16 importance of spring/summer 1999 as against
17 autumn/winter. The risk of going to near RRP's is less,
18 and both companies could judge whether, in
19 autumn/winter, it would be safe also to go out at RRP's.

20 Two very final points: a reference, Lesley Paisley,
21 it was suggested, destroyed the e-mail at the
22 instigation of Ian Thomson; she utterly rejects that:
23 Day 3, page 23, lines 2 to 13. She did not delete due
24 to the conversation, she deleted because she had limited
25 memory on her computer. She has a huge number of

1 e-mails, and she has a regular deletion policy. She
2 deleted it because it was not relevant.

3 Very finally, the 18th May e-mail, a small point:
4 Baby All Gone, there is no price for Baby All Gone on
5 the e-mail, but both went out at the RRP. Again, that
6 says something about natural market forces.

7 Unless I can assist further?

8 THE CHAIRMAN: Thank you very much, Mr Green.

9 Unless there are any questions from the tribunal,
10 I think that brings these hearings to a close. We are
11 extremely grateful to everybody, we are extremely
12 grateful particularly to our shorthand writers, and to
13 the teams on all three sides who have helped us
14 enormously with the argument.

15 We shall reserve our judgment and give judgment at
16 a later date. Thank you very much.

17 (4.50 pm)

18 (Hearing adjourned)

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