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IN THE COMPETITION

Case No. 1019/1/1/03

APPEAL TRIBUNAL

1020/1/1/03

1021/1/1/03

1022/1/1/03

New Court,  
48 Carey Street,  
London WC2A 2JT.

5 November 2004

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

BETWEEN:

UMBRO HOLDINGS LIMITED	<u>Applicant</u>
and	
OFFICE OF FAIR TRADING	<u>Respondent</u>
MANCHESTER UNITED PLC	<u>Applicant</u>
and	
OFFICE OF FAIR TRADING	<u>Respondent</u>
ALLSPORTS LIMITED	<u>Applicant</u>
and	
OFFICE OF FAIR TRADING	<u>Respondent</u>
JJB SPORTS PLC	<u>Applicant</u>
and	
OFFICE OF FAIR TRADING	<u>Respondent</u>

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**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

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

Mr. Paul Harris (instructed by James Chapman) appeared for Manchester United PLC.

Mr. George Peretz (instructed by Messrs Addleshaw Goddard) appeared for Allsports Limited.

Mr. Mark Hoskins (instructed by DLA) appeared for JJB Sports PLC.

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

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1 THE PRESIDENT: Good afternoon, ladies and gentlemen. I think the principal business we have  
2 today is to discuss the procedure for the penalty stages of this case. When we have done that  
3 the Tribunal has one or two points it would like to raise itself to see whether those points need  
4 to be dealt with in the context of the penalty hearing. If I could start with what is perhaps the  
5 most important matter from the point of view of the timing of the hearing, that is to say the  
6 provisional date for the main hearing. We (the Tribunal) have pencilled in 19<sup>th</sup> and 20<sup>th</sup>  
7 January, with 21<sup>st</sup> in reserve, but in the hope that we would not need more than two days for  
8 the penalty hearing in that case. That is the thinking at the moment on that.

9 That then raises in our minds two points. We first of all bear in mind that at this  
10 stage, although they have to some extent in the recent past become somewhat mixed up  
11 together, these appeals now become separate appeals for separate parties and need to be  
12 addressed individually, so the question arises as to whether we do each appeal one after the  
13 other or whether in some sense the appellants go first and the OFT goes next, or whether there  
14 is some part that is joined to some part that is individual. That is one question.

15 The other question on which we would like some help if we may, Mr. Turner, from  
16 the OFT is that there is some as yet undeveloped hint in the correspondence about the  
17 possibility of the OFT raising some new considerations and if the OFT were to raise some new  
18 considerations the question arises as to whether or not those considerations should be put on  
19 the table first before anybody does finalise their skeleton arguments. That is the present state  
20 of our thinking. Is it convenient perhaps if I start with the OFT and then go round to the  
21 appellants in turn to see what their position is.

22 MR. TURNER: So far as the date is concerned that would suit the Office of Fair Trading. So far as  
23 the length of the hearing is concerned we also agree that two days with a third day built in as  
24 a safety margin is sensible. We have circulated an e-mail a little earlier which the Tribunal  
25 may have seen ----

26 THE PRESIDENT: I think we did actually see this a moment ago, yes.

27 MR. TURNER: -- with some suggestions; and if you look at point 4, the OFT's position is that  
28 because there are so many common issues of facts and, indeed, of submission – for example an  
29 obvious one relates to market definition in the way that the Office of Fair Trading calculated  
30 the amount of the penalty, that it does make sense for the appellants to go as a group; and that  
31 the appellants' cases might be collectively opened within one day. We think to confine it to  
32 less than a day would be tight, and would be dangerous, but they could then sort out between  
33 themselves who will make the principal submissions on, for example, the issue of market  
34 definition, and the order of batting.

1 THE PRESIDENT: Are there other points apart from market definition that are common, because  
2 I do not think, for example, Umbro raises market definition?

3 MR. TURNER: No, Umbro does not, but that is one of the major points.

4 MR. PERETZ: I can identify that now, it is the question of the treatment of duration of the  
5 agreement which we have in common, for example, with Manchester United.

6 MR. TURNER: And of course a third is the question of fairness as between one appellant and the  
7 other; issues of fairness between the different appellants has also arisen and they will all want  
8 to be involved in commenting on that. Miss Howard has also reminded me on issues of  
9 deterrence, and this does relate to fairness – the issue of the multiplier. There in particular  
10 some of them draw attention to the fact that they feel that others have received more  
11 favourable treatment, and possibly on issues of duration of the different agreements and the  
12 parties' role in that.

13 We would say that it does make sense for the appellants to go first and to conduct  
14 their cases within one day; that the Office should respond to that in, say, a further two-thirds of  
15 a day to a day, perhaps with a target of, say, 3 o'clock in the afternoon, and then the appellants  
16 could have between them one hour and twenty minutes or so for reply submissions, which  
17 works out at, on average, 20 minutes apiece. That may not be feasible and therefore it does  
18 make sense to hold the third day in reserve. But provisionally, at least, that would seem to the  
19 Office to be a sensible structure.

20 So far as consequential relating to the liability proceedings are concerned, I should  
21 just say that it seems to be common ground that it is sensible for those matters, the particular  
22 costs, including Sportsworld's recent application for costs, to be held over until after Judgment  
23 on the penalty appeals.

24 THE PRESIDENT: Yes. Costs and interest later.

25 MR. TURNER: Yes. Sir, so far as new arguments are concerned, it is true to say that there are  
26 points in the Judgment that the Office would wish to pick up on in relation to the penalty  
27 appeals. It is also true that the appellants have indicated that they will wish to raise additional  
28 arguments as  
29 a result of findings made in the liability Judgment, and you will have seen Umbro's draft  
30 supplementary Notice of Appeal in that regard.

31 THE PRESIDENT: Yes.

1 MR. TURNER: And Mr. Hoskins has also indicated that JJB has arguments, but has not yet  
2 elaborated what those are. Mr. Peretz may also have arguments so far as Allsports are  
3 concerned.

4 As regards the Office of Fair Trading we have not finally settled which these  
5 arguments are, but if it would assist the Tribunal I am in a position to give some examples.

6 THE PRESIDENT: Yes, I think it would help.

7 MR. TURNER: I should say that this is without prejudice as to how we finally settle on these  
8 arguments in relation to our case. As against Allsports at para. 742 of the Judgment, for  
9 example, the Tribunal that Allsports exerted pressure on Umbro to maintain resale prices.

10 THE PRESIDENT: Do you want us to follow this in the Judgment, Mr. Turner.

11 MR. TURNER: That may be a false reference. At all events, the Tribunal found that Allsports  
12 exerted pressure on Umbro to maintain resale prices. That point in relation to pressure the  
13 Tribunal has said can now be taken into account in relation to the Tribunal fixing the penalty.

14 THE PRESIDENT: Have we said that?

15 MR. TURNER: 742 at p.214 that was the reference I gave.

16 “... we can see no procedural objection to this matter now proceeding to the next  
17 stage as regards the England Agreement, and for the findings that we have made as  
18 regards the England Agreement to be taken into account in determining the penalty.”

19 THE PRESIDENT: That is not a remark that is directed against Allsports. That is a general  
20 comment to the effect that we are now going to deal with penalty in light of the fact we have  
21 found an infringement as regards the England Agreement.

22 MR. TURNER: Yes. On the other hand, the Tribunal has made findings in relation to the nature of  
23 the England Agreement but in some respects clarified, elaborated on what the Office of Fair  
24 Trading found in its decision.

25 THE PRESIDENT: So you may seek to submit that in approaching any penalty in relation to the  
26 England Agreement we should take into account our own findings that we have made in  
27 respect of that?

28 MR. TURNER: Yes. Similarly – and I hope this reference is right – at 758 the Tribunal has found  
29 that even prior to Mr. Hughes’ initiative regarding 8<sup>th</sup> June meeting:

30 “... the agreement or concerted practice involving Allsports ... extended to replica  
31 shirts generally.”

32 THE PRESIDENT: Yes.

1 MR. TURNER: There was a point as to whether it was specific shirts or replica shirts more  
2 generally.

3 THE PRESIDENT: Replica shirts generally but in that context specifically the MU shirt – 758, last  
4 sentence.

5 MR. TURNER: Yes, in that context. I will come on to that because the same point arises in relation  
6 to JJB. If you look at 753 to 754 – 754 in particular, again there is a parallel finding in relation  
7 to JJB.

8 THE PRESIDENT: Yes.

9 MR. TURNER: Coming back to Allsports there is this point. Allsports, the Tribunal may recall,  
10 received a 5 per cent. discount in respect of its co-operation with the investigation conducted  
11 by the Office and, as a result of the appeal proceedings, certain relevant findings emerged. It  
12 has emerged, for example, that Allsports to some extent misled the Office in its written  
13 representations and I have in mind here para.313 of the Judgment. What happened was that  
14 Allsports put in written representations on the supplementary Rule 14 Notice. Those  
15 representations said that Mr. Hughes' diary had no references to any follow-up after 8<sup>th</sup> June  
16 meeting in Mr. Hughes' house, and that this was important because Mr. Hughes is a man who  
17 lives by his diary. But it has turned out that the diary did have references to follow-up, those  
18 were – if you turn the page and look at p.93, including the entries that were scored out in black  
19 felt tip marker pen: “Phone Mike Ashley to review Man. United launch and other issues”, and  
20 matters of that kind, so that the representations were at least misleading in that material  
21 respect. The scoring out has a further consequences, it is also a failure of co-operation with the  
22 Tribunal in these Appeal proceedings and you find that at para.319 on p.94. The Office may  
23 wish to refer to these matters as aggravating factors.

24 THE PRESIDENT: Where does that line of argument take you, Mr. Turner? Are you inviting us to  
25 cancel the discount?

26 MR. TURNER: We are inviting you to cancel the discount insofar as it applied to co-operation with  
27 the Office of Fair Trading because that discount was based on a false premise. It may also be  
28 the case that in relation to the further proceedings before the Tribunal that these matters may  
29 count as aggravating factors for which we would contend that the fine may need to be  
30 increased, and the Tribunal has the jurisdiction to do that.

31 THE PRESIDENT: You would say that we have jurisdiction to increase?

32 MR. TURNER: Yes.

33 THE PRESIDENT: That is obviously a point we would need to be addressed on at some stage.

1 MR. TURNER: Yes. The power to increase as well as to decrease appears to be clear from the  
2 Statute. We apprehend that the appellants are going to make submissions to you that certain  
3 findings, or certain mistakes made by the Office should tend towards reducing. We would like  
4 to make submissions going the other way and would submit that you have a general power to  
5 increase as well as to decrease the level of the fine overall.

6 Sir, would it assist if I gave some further examples in relation ----

7 THE PRESIDENT: Yes, I think it would, Mr. Turner.

8 MR. TURNER: For JJB, and again I must preface this by saying that we have taken no final view,  
9 we are collecting our thoughts as to how these arguments are to be marshalled, but by way of  
10 example. The Tribunal has found that JJB's approach to its written pleadings was unhelpful.  
11 This is therefore within the context of the Appeal before the Tribunal and the co-operation  
12 with the Tribunal's procedures.

13 THE PRESIDENT: How would that be relevant to the original infringement?

14 MR. TURNER: The Tribunal in our submission will also have power to take into account the  
15 parties' conduct of the Appeal in setting the fine at the end of the day. In the *Aberdeen*  
16 *Journals'* case the Tribunal did find that it could take into account co-operation before the  
17 Tribunal as a further mitigating factor in the way that a party conducted itself at the Appeal  
18 stage. We would say that it could work the other way as well, if a party conducts the Appeal in  
19 an unhelpful fashion that that might also be a factor that would count in the overall setting of  
20 the penalty.

21 THE PRESIDENT: If I may say so, Mr. Turner, at first sight that would be quite a difficult  
22 submission to make I think, because one can well understand mitigating circumstances that go  
23 to a reduction of the Appeal, and we will have some comments about what those circumstances  
24 might be in a moment, but it would be difficult, I think, to say that the infringement was more  
25 serious than it appeared because of the way in which a particular appellant happened to contest  
26 the infringement that was alleged against it.

27 MR. TURNER: Sir, I understand that point, and one point to be considered is to what extent such  
28 arguments go to costs as opposed to the level of the fine. I understand that. On the other hand,  
29 certainly before the Office of Fair Trading, one of the factors that goes to the level of the fine,  
30 is the extent to which there has been co-operation with the investigation as opposed to the  
31 primary facts of the infringement themselves. At least provisionally our submission would be  
32 that that may also be capable of being translated across to the proceedings before the Tribunal,  
33 but we have that point.

1           Secondly, it has emerged, again in relation to JJB, that certain false information was  
2 provided to the Office – that was in November 2001 when JJB said that it could not produce  
3 pricing information on a store by store basis. At para.629 of the Judgment the Tribunal records  
4 that it now transpires that the answer was incorrect, since JJB’s computer system does hold  
5 such information at least for certain shirts. So there again it is an example of putting the Office  
6 of Fair Trading off the track, off the scent.

7           I have mentioned the point that as in relation to Allsports the Tribunal has found that  
8 the concerted practice or Agreement extends to replica shirts generally at a certain point and  
9 not just to the England and Manchester United shirts. So there are certain further issues, but  
10 they are inchoate and I leave it there for JJB by way of example, if I may.

11           So far as Umbro is concerned, I mention two matters only. Umbro’s primary case on  
12 the Appeal concerns the degree of co-operation that it gave to the Office at an early stage of  
13 the investigation. There are certain findings in the Judgment relating to the nature and degree  
14 of the co-operation given to the Office at an early stage and I mention two of these. At  
15 para.302 of the Judgment there is a reference to the fact that the Office sent questions in  
16 September 2002 to Umbro asking for further details of the telephone conversations that the  
17 Umbro representatives had with retailers about the England shirt, and the answer came back  
18 that no further details could be given. That turned out to be incorrect, Mr. Ronnie was readily  
19 able to recall details of the telephone conversations subsequently, and the Tribunal has  
20 commented there that this is possibly explained by Umbro’s fear of commercial repercussions.

21           Secondly, in the paragraphs above that (para.301 in particular) the Tribunal has also  
22 found that the witness statements prepared for the leniency application, Ronnie 1 and Ronnie 2  
23 were neither complete nor accurate and has referred specifically to two omissions in those. It  
24 is true that in the last sentence of para.301 the Tribunal concludes that in the circumstances it  
25 is not prepared to find that Umbro was seeking deliberately to mislead the Office. But what is  
26 true nevertheless is that in relation to Umbro’s submission that those early witness statements  
27 could be taken as full and complete co-operation as the company was able to give at the time,  
28 these sorts of findings are relevant.

29 THE PRESIDENT: Yes.

30 MR. TURNER: Sir, I hope that that will suffice. It is these sorts of considerations that the Office is  
31 picking out of the Judgment and is considering at least advancing in relation to the penalty  
32 Appeals. As I say, Mr. Hoskins has indicated that he will advance certain arguments but has  
33 not spelt those out. Umbro has very helpfully set out its further arguments in its draft notice.



1 Sir, unless there are further matters it may be appropriate to hear from the others.

2 THE PRESIDENT: Thank you very much. Yes, Mr. Peretz?

3 MR. PERETZ: I can start, perhaps unusually in this case, by agreeing with the OFT on some  
4 matters. First, the date is suitable for us and we agree with the proposed timetable, and we  
5 agree that it is suitable for us. We agree that it is suitable to hear all the appellants together.

6 THE PRESIDENT: When you say the “proposed timetable”, I just look across at Mr. Turner’s  
7 recent e-mail, that anticipated the appellants putting in skeletons by 22<sup>nd</sup> November; the OFT  
8 replying by 6<sup>th</sup> December, and the appellants having a final rejoinder by 13<sup>th</sup>.

9 MR. PERETZ: Yes, I was going to come to that because that final date puts me in a slight difficulty  
10 which is that, somewhat ironically in the circumstances, Mr. Turner and I are both due to put in  
11 a joint skeleton in *Claymore* with a deadline of 15<sup>th</sup>, so that date of 13<sup>th</sup> creates some difficulty  
12 for me.

13 THE PRESIDENT: Well, why do you not come to that – when you said you agreed the timetable  
14 you meant the timetable for the hearing.

15 MR. PERETZ: Yes. I think Mr. Hoskins was going to suggest a later date for the appellants’ reply,  
16 which might be one way through this. But it seems to us it would be sensible at the hearing for  
17 the appellants to develop their points and there will, I think, need to be a certain amount of  
18 discussion between us as to who will run points of common interest of which there are  
19 a number, of a somewhat complicated matrix, because some points apply to one, two or three  
20 of us - I am not sure that there are any points which apply to all four of us, but there are  
21 certainly a number that apply to three of us. So we will have to sort that out, and one can pick  
22 that up already in the pleadings. At one point, for example, we straightforwardly adopt  
23 submissions of Manchester United.

24 THE PRESIDENT: That is on market definition?

25 MR. PERETZ: On duration.

26 THE PRESIDENT: And on duration.

27 MR. PERETZ: On market definition I think our three submissions are essentially the same. I cannot  
28 now remember how far that issue applies to Manchester United, but there are a number of  
29 points on which we will need to sort out who argues what to avoid duplication. We think that  
30 is a sensible way forward.

31 THE PRESIDENT: And it is obviously desirable to avoid duplication, but it is also important that  
32 each individual appellant addresses individually their own case so far as it is necessary to do  
33 so.

1 MR. PERETZ: Yes, and indeed all of us have distinct points of our own ----

2 THE PRESIDENT: Yes.

3 MR. PERETZ: -- one of which I am going to quickly turn to. As far as we are concerned, our  
4 essential approach to the liability Judgment was, in essence, that it confirmed the finding of the  
5 Decision and essentially it did not appreciably extend the findings in the Decision. We say  
6 that partly because of the whole issue which gave rise to the interlocutory Judgment on the  
7 strike out application of whether the OFT had significantly changed its case; and to summarise  
8 fairly broadly the Tribunal's eventual finding on that was that in the end it was all part of the  
9 same story. So our essential starting point, in terms of liability, is not much has changed from  
10 the Decision.

11 THE PRESIDENT: We started with the Decision and effectively we finished with the Decision and  
12 that is where we are.

13 MR. PERETZ: Yes, indeed. Certainly, as far as we are concerned, that makes it all the more  
14 important that the OFT explain exactly what points it wishes to draw attention to if its case  
15 now is that factors have emerged which require an increase in penalty. Mr. Turner has started  
16 to do that but, of course, on a "without prejudice, we may change our position later" basis. We  
17 do think there will be something to be said for the OFT making it clear where we are on that.

18 THE PRESIDENT: How do you see the order of events -- to come back to the point that I made at  
19 the outset -- do you see the OFT's position emerging in their reply to your skeleton; or do you  
20 see the OFT's position emerging at some earlier stage?

21 MR. PERETZ: My thinking was that we would be perfectly happy to start the ball rolling, by  
22 pulling together the various points which are now scattered through a number of documents,  
23 into  
24 a consolidated skeleton argument, which would suit everybody's convenience -- ours, the  
25 OFT's and the Tribunal's -- by putting everything together in one place. However, at that  
26 stage, given our general attitude to the liability Judgment, at that stage we were going to say  
27 very little about that and, in a sense, wait and see what the OFT said when it has finally come  
28 off the fence on this and then we will look very carefully at what the OFT has actually said,  
29 and then reply.

30 THE PRESIDENT: So as to the order of events, you treat the liability Judgment in effect, according  
31 to you, as much the same as the findings in the Decision?

32 MR. PERETZ: Yes.

1 THE PRESIDENT: You will put in your skeleton on penalty on that basis. If they want to come  
2 back and say “It is actually much worse than you think”, that is up to them, but you will wait  
3 until they do it, and then you will reply to that?

4 MR. PERETZ: Indeed, in particular in relation to the issue of the history of Mr. Hughes’ diary, and  
5 one of the things we might want them to explain is how it can be regarded as an aggravating  
6 factor not to volunteer disclosure to the OFT of a document, the existence of which was  
7 revealed to the OFT at a fairly early stage in the administrative proceedings which the OFT  
8 never asked for.

9 THE PRESIDENT: Well we are going to have to have a bit of help, I think, from everybody on the  
10 relationship between the duration and gravity of the infringement, which is what we are  
11 primarily concerned with in penalty proceedings, and the conduct of respectively, the  
12 administrative procedure and the appellate stage, and whether there is a relationship between  
13 those matters and, if so, what?

14 MR. PERETZ: Yes. Yes, I think that is all I was proposing to say at the moment.

15 THE PRESIDENT: Thank you. Yes, Mr. Hoskins?

16 MR. HOSKINS: Sir, if I can begin with the date of the hearing. When the Judgment was handed  
17 down, and I am quoting from the transcript, it said that “...the Registry will be in touch with  
18 the parties through the usual channels to fix the appropriate dates.”

19 THE PRESIDENT: Yes.

20 MR. HOSKINS: It will not surprise you to hear me say that that is what we suggest should happen,  
21 the reason being that Lord Grabiner is not available on 19<sup>th</sup>/20<sup>th</sup>/21<sup>st</sup> January. The reason we  
22 say that it is important that JJB should have its choice of leading counsel is as follows.

23 THE PRESIDENT: What dates are you proposing, Mr. Hoskins.

24 MR. HOSKINS: According to his clerks he is available on 17<sup>th</sup>/18<sup>th</sup> January, and those are dates  
25 where I am also available. He is also certainly available the whole of the week beginning 7<sup>th</sup>  
26 February, and the whole of the week beginning 14<sup>th</sup> February. The first date was 17<sup>th</sup>/18<sup>th</sup>  
27 January. We say that on the basis that if the matter does go into a third day Lord Grabiner will  
28 not be available but I will, so we are prepared to live with those two days, if you like. But if  
29 not then in terms of Lord Grabiner’s availability we really start looking to February – it is the  
30 week beginning 7<sup>th</sup> and the week beginning 14<sup>th</sup>.

31 THE PRESIDENT: Yes.

32 MR. HOSKINS: The reason why we say it is important that our client should have Lord Grabiner  
33 there is, first of all, obviously there has been a lot of water gone under the bridge and we say it

1 is unfair to impose a date which Lord Grabiner cannot do on that basis – the clients are  
2 obviously very wedded to him. But that point applies generally to everybody’s availability,  
3 but there is also a particular point that applies to my client which does not apply to the others,  
4 which is that we have far more at stake than everyone else, because we were fined around £8  
5 million, which far exceeds the level of fine that everyone else will be contesting. So we say  
6 that if it comes down to a choice of who has availability, who should be preferred, we say  
7 clearly – and I include the OFT – we should be preferred over everyone else, and that includes  
8 the OFT in terms of having our choice of leading counsel. So I have indicated the dates that  
9 Lord Grabiner can do, but failing that consultation through the usual channels.

10 The next question, which I think is assumed, but I should raise it, is whether the next  
11 stage should be by way of amended Notice of Appeal or amended skeletons, and you have  
12 probably seen from the correspondence we suggest amended skeletons.

13 THE PRESIDENT: Yes, thank you for raising that, Mr. Hoskins. It might be technically on a strict  
14 interpretation of the Rules that there should be an amendment to the Notice of Appeal but it  
15 seems to us that an amended skeleton is a sensible way forward.

16 MR. HOSKINS: That was certainly our feeling as well, Sir. One then comes to the order of the  
17 skeletons. We are happy for ourselves to go first, followed by the OFT and then we are to  
18 have a reply.

19 THE PRESIDENT: When you say “ourselves” you mean the appellants collectively?

20 MR. HOSKINS: All the appellants, yes. The reason why we are happy with that, but subject to one  
21 caveat, is that if the OFT is going to raise new points, we should obviously have sufficient time  
22 to deal with them. That can be built in to the timetable for the skeletons, but so long as we  
23 have sufficient time to deal with new points.

24 THE PRESIDENT: Yes.

25 MR. HOSKINS: I note the sort of points that Mr. Turner has indicated might be raised are pretty  
26 detailed and may actually require some degree of scratching around and thought, so it is not  
27 simply an easy reply because everything has been raised, it is going to be necessary to allow  
28 some proper time to deal with them. Obviously it is difficult to know in advance how much  
29 time but if I can put that down as a point of principle.

30 Certainly, the timetable as currently suggested I do not think would work, which is  
31 22<sup>nd</sup> November, 6<sup>th</sup> December and 13<sup>th</sup> December. Given what Mr. Turner has indicated are the  
32 sorts of points that may be raised, giving us a week for replies is not going to be sufficient.

1 THE PRESIDENT: Just looking at that for a moment. In principle would you be happy with 22<sup>nd</sup> as  
2 a starting date?

3 MR. HOSKINS: Sir, can I suggest this, let us keep 22<sup>nd</sup> for us, 6<sup>th</sup> for the OFT and set 20<sup>th</sup> for the  
4 replies, with liberty to apply if we need more time, because then we may have to deal with the  
5 problem as and when it arises and it may not arise.

6 THE PRESIDENT: Yes.

7 MR. HOSKINS: Sir, the next item on my list is how the hearing will be conducted. Again, because  
8 of the degree of certain duplication – for example, market definition, duration, etc. it seems to  
9 us it is sensible for all of the appellants to go first, and then the OFT to respond to all the  
10 appellants and then there to be replies by each of the appellants.

11 THE PRESIDENT: Yes.

12 MR. HOSKINS: However, I think in relation to the structure of the hearing, I think we say at this  
13 stage it is not wise to actually set down how much time each person should have – the sensible  
14 time to do that is when the skeletons are in and the Tribunal has had a chance to see the  
15 skeletons. Then, as long as we know when the dates are and how much time is set aside, we  
16 can carve up the time depending on how much time is available, and people will have to live  
17 with that, but it seems premature to try and indulge in detailed engineering of the hearing.

18 The final point is an easy one, costs and interest later.

19 THE PRESIDENT: Yes.

20 MR. HOSKINS: Sir, I think that covers everything on the agenda.

21 THE PRESIDENT: On the question of how much time is available you may not have had a chance  
22 to think out whether one day for all the appellants together is enough, you may need to  
23 collaborate with others, but it might be a bit tight – I just think it might.

24 MR. HOSKINS: It may be. Our current thinking is very much as we presented our closing  
25 submissions, that we will put in our full written submissions, and we will just pick out the  
26 main points orally. So we certainly do not intend taking a great deal of time because the  
27 arguments will be there in writing and there is probably not going to be a great deal to be said.  
28 Obviously the Tribunal may have questions, but certainly that is our perspective. Lord  
29 Grabiner was suggesting it may only take an hour to put forward the arguments because we  
30 will have developed them in writing.

31 THE PRESIDENT: Well a hearing day is approximately five hours, and if we have four appellants,  
32 some appellants may need a bit less time than other appellants, because of the way they  
33 presented their case in writing, or because their case is less complicated, or something. I think

1 we will have to see, but we would be quite pleased to get it in within the two days overall if we  
2 can, without unfairness to anybody.

3 MR. HOSKINS: Sir, we will try and be as efficient and as helpful as possible, if it spills into a third  
4 day so be it.

5 THE PRESIDENT: Let us see where we get to.

6 MR. HOSKINS: Certainly. Thank you very much.

7 THE PRESIDENT: Yes, Mr. Green?

8 MR. GREEN: If I can start with the question of dates. It so happens we can do any date during that  
9 week. We have *Express* the week before, so we will be going back to back, but certainly we  
10 can do the Monday/Tuesday if that is convenient, and the Wednesday, so far as we are  
11 concerned.

12 THE PRESIDENT: Yes.

13 MR. GREEN: Listening to my learned friend, Mr. Turner, we think that three days is likely to be  
14 realistic. In particular, Mr. Turner has identified a number of points out of the Judgment which  
15 raise factual issues, which will require the Tribunal to look into documents and consider the  
16 question of timing and so on - two have been raised in particular in relation to ourselves.  
17 These are going to be added complications, and they may involve additional time being taken.  
18 So we think two days will be tight, three days should suffice. The total number of issues  
19 between the parties is probably six or seven, very roughly. We are slightly different, we do  
20 not emphasise many of the points that the others emphasise, and our arguments will be  
21 somewhat different to those raised by the principal appellants during the liability hearing. So  
22 again we think with six or seven principal issues, plus a number of smaller points which the  
23 OFT rely on, three days is more likely to be realistic.

24 So far as timing is concerned, it seems to us that there are two ways of dealing with it.  
25 We think that the OFT now having identified paragraphs of the Judgment that they are  
26 proposing to rely upon, even provisionally, should notify us within seven days. If that is done  
27 and we get a proper particularisation of the paragraphs they seek to rely upon, and the reason  
28 for that, then we have no objection to putting our amended skeleton in first. Alternatively the  
29 sense is that the OFT should put their skeleton in first so we know the new points which are  
30 going to be raised, and we can respond to them. We have put the points which we rely upon so  
31 far as Umbro is concerned into an amended document.

32 THE PRESIDENT: I am under the impression that basically we have already got your case.

1 MR. GREEN: We have outlined it. We thought that it was sensible to outline the additional points  
2 in the Judgment we relied upon and then we will elaborate upon them in an amended skeleton,  
3 but we really feel we now need to know what the OFT says in response to that. There is not  
4 much point in us putting in our single compendious skeleton which deals with everything  
5 without knowing what the OFT is going to say. So one way to deal with it is for the OFT  
6 simply to particularise the points they now wish to identify and to tell everybody in advance.  
7 On that basis there is no problem with the appellants putting in their skeletons.

8           Alternatively, having put in an amended Notice of Appeal we would now like to  
9 know what the OFT have to say to that. We are in a slightly different position to everybody  
10 else, but one way around that is simply to ask the OFT to provide particulars of the paragraphs  
11 of the Judgment they rely upon and why.

12 THE PRESIDENT: Yes.

13 MR. GREEN: Over and above that we are happy for all the appellants to go first. We can see the  
14 sense in that. I suppose technically the Tribunal would consolidate the appeals for hearing but  
15 not join them, and we would then make our submissions first of all – I do not see any difficulty  
16 with that so far as timing is concerned. I suspect it will take more than one day for all four  
17 parties to make submissions, but that should be accommodated easily within three days. Other  
18 than that I do not think there is much more we need to comment upon – costs, we can lay as  
19 suggested.

20 THE PRESIDENT: Yes. Mr. Harris?

21 MR. HARRIS: Sir, may I begin with the hearing date? Alongside Mr. Hoskins we had rather  
22 thought that there may be some consultation with clerks, and the suggested dates as I  
23 understand them in this week beginning Monday 17<sup>th</sup> January do not suit my learned leader,  
24 Mr. Roth – 17<sup>th</sup>/18<sup>th</sup>/19<sup>th</sup> he cannot do. On the other hand, we are both in the position of being  
25 able to attend, along with Mr. Hoskins and his leading counsel, at any stage during the week  
26 beginning Monday 7<sup>th</sup> February, or Monday 14<sup>th</sup> February. I would respectfully suggest that  
27 the week be not set in stone now for week beginning 17<sup>th</sup> January, but we try and arrange one  
28 of those other weeks and, if needs be, via liaison with clerks. I would suggest that in the case  
29 of Manchester United Mr. Roth has been involved since the inception, indeed during all the  
30 administrative stage, let alone during the appeal procedure, and there are some difficult issues  
31 of law to be submitted there, and I would contend that it would be fair for him to be able to be  
32 present on a date when they are run, particularly if, as is being intimated, Manchester United

1 might take the running on some of the key points such as market definition, or such as  
2 duration. So of course everything then depends upon where one sets the date.

3 Turning back to the other matters that are raised in Mr. Turner's recent e-mail and  
4 that have been ventilated today, we do not have a particular problem with the appellants going  
5 first in terms of the skeleton but we actually do agree with the submission just made by Mr.  
6 Green that, insofar as the fining authority – in this case the OFT – is seeking to rely upon new  
7 and additional matters we would contend that, as a matter of principle, it should at least  
8 identify clearly what they are. I say that not because we were singularly absent – that is to say  
9 my client, insofar as Mr. Turner raised matters emerging from the decision and that is, I hope,  
10 the way it will remain. In our case, therefore, the letter would be: “We do not propose to rely  
11 upon anything specific” – that would be no burden upon the OFT, but of course our case  
12 depends to some extent upon direct comparison in a number of respects with the others. We  
13 say it just gets everything out there, above board, in the open and, after all, they are the fining  
14 authority. We see no particular difficulty in building a provision whereby they identify against  
15 people “These are the new matters”. But whether or not that is taken up, the only other  
16 comment I would have relates to the actual dates proposed.

17 To a degree it depends obviously on the final hearing date. If it is to be the week  
18 beginning 7<sup>th</sup> or 14<sup>th</sup> February, then one could stretch out the timetable. I would respectfully  
19 suggest that if it is to be at any stage during the week beginning 17<sup>th</sup> January, we would need at  
20 least an additional week beyond that which is contemplated in the e-mail, so at least to 20<sup>th</sup>  
21 December. My own submission is that there is actually no reason why it should be done by  
22 then. It could be done by first week of January and I do bear in mind, of course, holiday  
23 periods, they are not to be wholly discounted. I would respectfully suggest that if it is to go  
24 into the week beginning 7<sup>th</sup> February, or 14<sup>th</sup>, then there is absolutely no reason why the reply  
25 skeletons, which it looks as though may be the most important documents from the point of  
26 view of the appellants, should not be until the end of the first week in January – I think there is  
27 Friday 7<sup>th</sup> or Monday 10<sup>th</sup>. That would still give plenty of time before the hearing. I do bear in  
28 mind in that regard from my client's perspective the reply is almost certain to be the most  
29 important. If nothing happens by way of a letter to us from the OFT “We do not rely on  
30 anything else” then our existing skeleton will remain as it is. It is a possibility that we would  
31 want to amend the way in which we put things by reference to the appellants' skeletons but  
32 most of the work is likely to generate out of the way the fining authority then says it is going to



1 approach the issue of fine. So I would say a very considerable extension to that date for reply  
2 plainly depending upon the exact end date.

3 I would chime with Mr. Hoskins as regards the detailed engineering of the hearing,  
4 and see no need for it. Of course, we do not yet know quite how this is all going to pan out  
5 because we have not seen the skeletons. It seems to me that that is a little premature.

6 As regards the other points – costs and interest – obviously no difficulty.

7 THE PRESIDENT: I would just like to know what other parties' position is on the dates for the  
8 hearing and then the Tribunal will retire.

9 MR. PERETZ: I can make the week beginning 7<sup>th</sup> February, but not the week beginning 14<sup>th</sup>. My  
10 clients are going to be represented by me at the hearing; that is partly because my clients are  
11 conscious of cost and partly because I happen to have dealt with the penalty aspect of this case  
12 throughout anyway. It obviously makes no sense at all for them to get different counsel and,  
13 of course, our fine is by far the smallest of the four here today.

14 THE PRESIDENT: What is your position as regards 17<sup>th</sup>/18<sup>th</sup> January, Mr. Peretz?

15 MR. PERETZ: Those dates are fine subject to the wrinkle that affects Mr. Turner, Mr. Green and  
16 indeed, I think, yourself, which is that we will all just be straight out of the Claymore hearing  
17 the week before and we may all welcome a bit of a breathing space, but at a pinch it is doable.

18 THE PRESIDENT: Yes, thank you. Mr. Turner?

19 MR. TURNER: Sir, I should just say that in relation to the dates for the hearing, Miss Howard has  
20 just left the room to check Mr. Morris's diary. One thing I do know is that he is not free in the  
21 first week of February if that was a consideration for the Tribunal. He is free throughout the  
22 month of January but cannot do the first week of February. She has just gone to check his  
23 further availability.

24 MR. COLGATE: Is that 7<sup>th</sup> February, or 31<sup>st</sup> January.

25 MR. TURNER: 31<sup>st</sup> January.

26 THE PRESIDENT: Well at the moment what about the week beginning 7<sup>th</sup>?

27 MR. TURNER: Miss Howard has just gone to check that. We had not anticipated that we would be  
28 looking into February.

29 THE PRESIDENT: Well I am not sure that we are at the moment but we will have to see. What  
30 about 17<sup>th</sup>/18<sup>th</sup> January.

31 MR. TURNER: Those are, in principle, fine for the Office of Fair Trading. I have the same personal  
32 difficulty as Mr. Peretz, but that can be managed. Sir, is it appropriate to make certain

1 comments in relation to the order of submissions, which I believe is the only contentious  
2 matter that I need to pick up on.

3 THE PRESIDENT: Yes. What is going through my mind, Mr. Turner, is whether it would not  
4 really be appropriate for you to at least write to the appellants, before their skeleton is due,  
5 really particularising the paragraphs in the Judgment that you would wish to rely on and stating  
6 what conclusions you would wish to advance in that regard?

7 MR. TURNER: Sir, in relation to order we would submit that it is better for the appellants still to go  
8 first. Let us not forget that although I have elaborated certain paragraphs and points that the  
9 Office would wish to rely upon it is not one way. Mr. Hoskins has points which he has not so  
10 far elaborated, but which he also wishes to rely on. Umbro has spelled out its points but there  
11 are points which go the other way in circumstances where this is an Appeal against penalty in  
12 relation to the Decision and it would make sense, in my submission, for the appellants to go  
13 first, and for the Office thereafter to point out the circumstances that it has picked out of the  
14 liability Judgment on which it additionally wishes to rely. Thereafter they can respond to that  
15 and they are talking about a fairly extended timescale for doing so which will therefore lead to  
16 no prejudice so far as the appellants are concerned, and ample time before a final hearing.  
17 I must say, Sir, I say that as a submission of principle. There are also certain practical  
18 difficulties that we face for our part in relation to collecting that material together and finally  
19 putting it down within the rather compressed timescale that I imagine would be needed. In  
20 particular, Mr. Morris is sitting in the latter part of November, and to the extent that he will  
21 also need to have an input into this that may create certain difficulties so far as we are  
22 concerned.

23 Miss Howard has just found out that Mr. Morris is available, if you are thinking of  
24 February for the final hearing, from 7<sup>th</sup> February. He is away the week beforehand and so  
25 preparation will be difficult if we begin bang on the 7<sup>th</sup>.

26 Sir, in relation to the order of the hearings and the structure of it our submission  
27 would be the appellants put in their material by 22<sup>nd</sup> November. So far as Umbro is concerned  
28 I understand that it may take the view that it has already done that effectively. But so far as  
29 JJB is concerned, it has additional points that it wishes to make in addition to its penalty  
30 arising from the liability Judgment, and it makes good sense that it should do so by that date.

31 The Office does then need a certain amount of time in which to respond, and I say this  
32 with some feeling after the experience of the liability proceedings, we find ourselves in the  
33 position of needing to respond to effectively four sets of submissions, sometimes making

1 different points and we will need at least two weeks in order to be able to do that effectively.  
2 Thereafter 6<sup>th</sup> December is a reasonable time frame. As far as the appellants' reply documents  
3 are concerned, we do not mind if those come in, let us say, by the end of term, before the  
4 Christmas break, by 20<sup>th</sup> or 21<sup>st</sup> December. That then leaves ample time, in our submission,  
5 for the appellants to respond to any additional points that the Office may take as a result of the  
6 findings in the liability Judgment. The Office will have had two weeks within which to  
7 respond to collectively all of the individual points that that appellants will wish to make as  
8 a result of anything lying in the liability Judgment. In our submission that is the fair way to  
9 proceed.

10 THE PRESIDENT: Yes, thank you.

11 MR. HOSKINS: Sir, may I just deal with one point, because there is a separate conflict between the  
12 appellants on whether the OFT should go first or not in raising its new points. If I could just  
13 add something on that? We are not attracted by the prospect of getting a letter from the OFT.  
14 We would much rather actually see the arguments fully formed in a skeleton, as long as we  
15 have sufficient time to respond to them, But the halfway house of a letter saying "Here are the  
16 paragraphs we are going to rely on", and then we are stuck with doing our skeleton and  
17 wondering how far we have to go is not actually very attractive, so we would rather just do our  
18 skeleton with our new points, see their arguments fully formed and as long as we have  
19 sufficient time to respond we are perfectly happy with that.

20 THE PRESIDENT: Thank you. Can I just recap – because I think the Tribunal will then need to  
21 retire just to think about timetable in particular – where we seem to be on dates. As far as the  
22 OFT is concerned, the week beginning 17<sup>th</sup> January, in particular 17<sup>th</sup>/18<sup>th</sup> and/or 19<sup>th</sup>/20<sup>th</sup>/21<sup>st</sup>  
23 seem to be available, as does apparently the week beginning 7<sup>th</sup> February. That seems to be the  
24 OFT's point of view.

25 As far as JJB is concerned, there is availability for Lord Grabiner on 17<sup>th</sup>/18<sup>th</sup> but not,  
26 apparently on 19<sup>th</sup>/20<sup>th</sup>, but there is availability from 7<sup>th</sup> February onwards, and 14<sup>th</sup> February  
27 onwards. That is JJB's position. As far as Allsports is concerned – I did not gather there were  
28 any particular problems.

29 MR. PERETZ: Our position is exactly the same as the OFT – either week beginning 17<sup>th</sup> or week  
30 beginning 7<sup>th</sup> February.

31 THE PRESIDENT: Yes, that is right. As far as Manchester United are concerned, I gather there  
32 were difficulties as far as Mr. Roth on 17<sup>th</sup>/18<sup>th</sup>/19<sup>th</sup> January – query 20<sup>th</sup>/21<sup>st</sup>, but not in the  
33 week beginning Monday 7<sup>th</sup> February, or week beginning Monday 14<sup>th</sup> February.

1 MR. HARRIS: Yes, that is correct, and in fact we could both make Thursday 20<sup>th</sup> January, or Friday  
2 21<sup>st</sup> January.

3 THE PRESIDENT: There are two difficulties for the Tribunal. The first is that we have to manage  
4 quite a heavy Tribunal calendar and secondly, we have to manage our own dates as a Tribunal,  
5 so this is not a very easy exercise. Unless there are any particular comments I think at this  
6 stage we ought to withdraw as a Tribunal and have a look at our diaries and have a chat.

7 MR. GREEN: You did not mention us.

8 THE PRESIDENT: I am sorry, Mr. Green, what was I thinking of.

9 MR. GREEN: That is all right. We are fine during the week of 17<sup>th</sup>, as we have explained, we can  
10 manage any time during that week regardless of what goes on the week before. I do have a  
11 problem in February. I have a two week hearing outside the Country starting on 11<sup>th</sup> – and  
12 indeed, I thought Mr. Roth was against me, but maybe he is not. Maybe he has better things to  
13 do – or maybe he knows something that I do not know! But at the moment there are two  
14 weeks fixed for the resumed trial we have been doing in Hong Kong starting on 11<sup>th</sup>.

15 THE PRESIDENT: Which, at least in theory, might enable us to do something on 7<sup>th</sup>/8<sup>th</sup> perhaps –  
16 or do you want to get to Hong Kong?

17 MR. GREEN: Well not necessarily want to get to Hong Kong, it is just with jet lag, you really need  
18 to leave two to three days before to be able to get there and start on 11<sup>th</sup>. It would be pushing it  
19 very tight, one would have to leave at the latest on the evening of the 8<sup>th</sup>.

20 THE PRESIDENT: Yes. I must say even despite everything that has been said residually I am  
21 slightly uncomfortable about treating all these appeals too collectively, there are separate cases  
22 and yours is particularly separate from the others. It would not necessarily be right to muddle  
23 them all up, although having said that of course, from the point of view of general  
24 comparability and equity as between the appellants you need to see the picture as a whole.

25 MR. GREEN: There are obviously some overlapping points. For example, we have said that if and  
26 insofar as the Tribunal takes account of the fact that the overall cartel was not as wide in scope  
27 as it was found in the OFT's Decision, then that should sound by way of mitigation for all  
28 parties. That is something we would rely upon, and that is largely an argument that other  
29 parties will advance, but we will then trade upon it. We would then have quite discrete and  
30 separate arguments which we are advancing about the nature of our co-operation during the  
31 administrative stages usually, which are separate. But there is an element of overlap.

32 THE PRESIDENT: The shape of some of those latter arguments may have been affected by various  
33 findings in the Judgment.

1 MR. GREEN: Indeed we would rely upon many of the findings of the Tribunal.

2 THE PRESIDENT: So your preference is really to stick to the original idea, which is 17<sup>th</sup> ----

3 MR. GREEN: Some time during that week. We can accommodate any time during that week, we do  
4 not mind starting on the Monday or some time during that week.

5 THE PRESIDENT: Yes. We will withdraw and have a discussion. We will not take a final view  
6 until we have further discussed our provisional view, but whether or not we are going to be  
7 able to please everybody I am not completely sure at the moment. We will see.

8 (Short break)

9 THE PRESIDENT: Fixing a date for the hearing of the penalty stage of these Appeals has been  
10 somewhat intractable. The position is that the Tribunal is not able to do the week beginning 7<sup>th</sup>  
11 February itself. That week does in any event raise difficulties for at least two of the parties in  
12 that their leading counsel are due to do a case outside the jurisdiction towards the end of that  
13 week which, as we understand it, also affects the following week which was also mentioned.

14 The Tribunal's position is that the Tribunal is available to sit from 2 o'clock on 17<sup>th</sup>  
15 January and on 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup>. Since all parties have at least some availability in  
16 some parts of that week what we would invite the parties to do is to work within those  
17 parameters and present us with a timetable for dealing with these various appeals during that  
18 week as best we can, so that everybody can feel they are as represented as far as possible in the  
19 circumstances. We would, I think, in view of the availability of JJB's counsel, give priority to  
20 JJB to start on 17<sup>th</sup> and go over to 18<sup>th</sup>, and we will fit in other parties round that. It may be that  
21 junior counsel for JJB, Mr. Hoskins, may have to field the closing parts of those appellate  
22 proceedings but in view of the fact that in relation to all four Appeals we will already have had  
23 extremely extensive written arguments, as far as we can see at the moment that is the least  
24 unsatisfactory of the various alternatives with which we are presented. So I think we will just  
25 leave it, if we may, at the moment to invite the parties to collaborate with each other and see if  
26 you can come up with a structure to deal with the Appeals during that week if necessary as  
27 a last resort, simply dealing with the four appeals as four separate appeals.

28 If we therefore leave it that these appeals will start at 2 o'clock on 17<sup>th</sup> January 2005,  
29 and be heard in an order yet to be determined, and completed by 21<sup>st</sup> January at the latest, that  
30 takes us on, I think, to the pre-hearing timetable. In general, at the moment we lean towards  
31 the suggestion preferred by JJB and the OFT that the appellants' skeleton should be in first. So  
32 as at present advised the appellants should produce their skeletons by 22<sup>nd</sup> November, with the  
33 OFT replying on 6<sup>th</sup> December. It does seem to us possible, however, to allow the appellants

1 further time to put in their reply skeletons which Manchester United in particular has  
2 emphasised are important, and we had in mind Friday 7<sup>th</sup> January for that, if the parties wanted  
3 to take that amount of time for that last stage with the Tribunal commencing the hearing, as  
4 I have said, on 17<sup>th</sup>. If that time is taken, the Tribunal would like those skeletons to be in by  
5 midday on 7<sup>th</sup> January, because that gives at least some chance to distribute the skeletons in the  
6 various parts of the country to which they have to go before the weekend – if they come in at 5  
7 o'clock we cannot do anything with them until Monday. That, I think, is broadly the best we  
8 can do at the moment as far as timetable is concerned. If, of course it turns out for one reason  
9 or another that personal diaries change then maybe can be re-sorted, but that is how we see it at  
10 the moment.

11 If that deals with timing, I wonder perhaps if the Tribunal could leave the parties with  
12 certain thoughts that they may or may not wish to take into account when considering the  
13 presentation of these appeals. At this stage these are questions that may or may not be  
14 relevant, but it seems appropriate to put them on the table.

15 The first point concerns only Manchester United and Umbro. The question is what  
16 approach should the Tribunal adopt at the penalty stage of an appeal in respect of an appellant  
17 who states that it does not accept the findings of the Decision, albeit that there has been no  
18 appeal on the findings of infringement. In particular, is the Tribunal in those circumstances is  
19 bound to assume that the findings in the Decision, as modified and/or elaborated in the  
20 Judgment on liability as the case may be are not put in issue. If any specific findings were to be  
21 put in issue, for the purposes of the penalty Appeal, would it be appropriate for the Tribunal to  
22 hold what in other contexts would be called a *Newton* hearing, in order to determine on what  
23 factual basis the penalty Appeal should be decided? Does that question arise in the present  
24 case? That is the first point.

25 The second point is the general question as to whether it would (or might be) relevant  
26 to mitigation in an Appeal against penalty, that the appellant in question had made some  
27 suggestion of recompense – either directly or indirectly – to those consumers (or class of  
28 consumers) who may have suffered from the infringement in question? That is a general  
29 question that has general significance for the Tribunal in hearing penalty Appeals.

30 The third question is to what extent, if any, should the Tribunal when assessing the  
31 penalty, take judicial notice of the standing in the community, and thus the example that may  
32 be expected to be set by the appellant in question. For example, is the leading position (and in

1 some quarters possibly icon status) of Manchester United in any way relevant to our decision  
2 by way of example?

3 Fourthly, what weight, if any, should we give to such evidence as we have, and any  
4 other evidence that may be forthcoming as to compliance programmes, or the absence thereof  
5 either (a) at the time of the infringements; or (b) introduced or not, as the case may be, since  
6 the events of this case.

7 Fifthly, and lastly, what relevance for the purposes of the penalty Appeal are the 1999  
8 undertakings given to the OFT, and although not directly relevant to the instant Appeal of  
9 general relevance to the Tribunal, is the procedure followed in this case for the acceptance of  
10 such undertakings, an optimal procedure from the point of view of enforcing this legislation.  
11 We bear in mind that those particular undertakings in this particular case were given before the  
12 Act came into force.

13 Those, I think, are the main points that we wanted to put before the parties. I would  
14 for myself just add one point in case it is of relevance to the arguments that may hereafter be  
15 advanced, particularly in relation to the question of the market definition, and the question of  
16 shirts, shorts, socks, goalkeeper kits and so forth, one does from time to time come across in  
17 the competition cases the question or situation of what I think is called in the books a “product  
18 cluster”. One European case which concerned perfumes where, typically speaking, perfume,  
19 lipstick, eye shadow, powder and so forth were all sold together is one example, but there are  
20 others in the book. One question may well be whether we are in the presence of that sort of  
21 situation in this particular case.

22 Those are our points, and we leave it entirely to you whether you wish to pursue  
23 them, comment on them, or make any observations about them or not. Are there any other  
24 points that anyone would like to raise this afternoon?

25 MR. HOSKINS: Sir, I have one very minor point which is the OFT wrote a letter to the Tribunal on  
26 1<sup>st</sup> November suggesting certain amendments to the Judgment. I do not know if you have seen  
27 that letter?

28 THE PRESIDENT: We have seen the letter, yes.

29 MR. HOSKINS: It seemed that most of the suggestions, all the ones that are “bulleted”, if you like,  
30 seem uncontroversial, but the final paragraph we are not certain is correct from our  
31 perspective. We would simply suggest that maybe the best way to deal with it is we will look  
32 into the matter and if we think it is incorrect we will simply send a letter to the Tribunal  
33 explaining our position.

1 THE PRESIDENT: These matters have been copied to you and so I think you should write to us as  
2 necessary. It seemed to us that that final comment went beyond the concept of editorial  
3 corrections, as we understand it.

4 MR. HOSKINS: Well, Sir, if that is the Tribunal's position, if you can tell us that.

5 THE PRESIDENT: But you are fully welcome to write to us if you wish to. This is a letter which  
6 has not necessarily been circulated fully internally yet in the Tribunal's procedures. Yes,  
7 Mr. Turner?

8 MR. TURNER: Sir, if I could conclude with two points? First, in relation to the appellants'  
9 submissions at the latest to be served by 7<sup>th</sup> January, obviously the culture of the Tribunal is  
10 that a case should be set out, as far as possible, fully in writing. The Tribunal will, of course,  
11 be aware that for the liability hearing there were full penalty skeletons.

12 THE PRESIDENT: Yes, we have re-read them too.

13 MR. TURNER: That remains the case, therefore what we apprehend will happen is that the  
14 appellants will put in submissions that are directed to matters arising from the liability  
15 Judgment. That is the scope of these submission and, in turn ----

16 THE PRESIDENT: Those submissions – that last round of submissions – will reply to your  
17 submissions of 6<sup>th</sup> December presumably?

18 MR. TURNER: That will be the case.

19 THE PRESIDENT: So it slightly depends on what shape those submissions take.

20 MR. TURNER: Yes. I should say all of this is directed to the consequences of the liability  
21 Judgment, and I had in mind, perhaps in relation to the first round of submissions from the  
22 Appellants, Mr. Green's comment that the draft supplemental Notice of Appeal is more of an  
23 outline.

24 THE PRESIDENT: What I think is going to help us most – if it is not too difficult for the parties – is  
25 if in the first round of submissions due on 22<sup>nd</sup> November the parties could draw together the  
26 threads that were outlined in their first set of penalty submissions and as now elaborated in the  
27 Judgment, which in the case of Manchester United – for example – might or might not involve  
28 hardly any change at all, I just do not know. In the case of JJB it may well involve fairly  
29 substantial new points, and in the case of Umbro and Allsports you may be somewhere in the  
30 middle, I just do not know. You would then respond to that, as it were, collectively and we  
31 hope with a fairly comprehensive skeleton so that we do not have to go back to the March  
32 skeletons ----

33 MR. TURNER: Absolutely.



1 THE PRESIDENT: -- and then they would reply to that.

2 MR. TURNER: Yes, absolutely. So far as the Office is concerned, because we have only a two  
3 week period which I do not try to get away from, it would be particularly helpful if changes in  
4 that event were to be clear from the documents.

5 THE PRESIDENT: I am sure it will be.

6 MR. TURNER: The second point that I decided to make arose from the comments and questions  
7 from the Tribunal at the end. The Office did notice certain reactions of the parties to the  
8 handing down of the liability Judgment, and in particular that JJB commented, I believe, that it  
9 might not have accepted the findings of price fixing. That may also be a matter that the Office  
10 would raise in relation to the hearing of the penalty appeal for JJB. I say that only for good  
11 order so that there is no doubt about it in the event that we come to raise it later on.

12 THE PRESIDENT: Well it is a matter one would have thought so blindingly obvious, that one did  
13 not need to mention it, but there is in other contexts obviously a difference between a plea in  
14 mitigation in which the "offence" is accepted and explanations are put forward, and a situation  
15 in which the offence is not accepted. In the latter situation there is absolutely no question of  
16 increasing the penalty, but in the former situation it goes to such mitigation and that very much  
17 depends at what stage of the proceedings it occurs.

18 MR. TURNER: Sir, I leave it there.

19 MR. HARRIS: May I just raise one housekeeping point. I am proceeding on the basis that there will  
20 be a transcript of today.

21 THE PRESIDENT: Yes.

22 MR. HARRIS: I am just mindful of the Tribunal's comments at the end, would it be the Tribunal's  
23 general inclination that in so far as parties are going specifically to pick up on one or other of  
24 five points that they would seek to do so as best they are able by the first round of skeletons.

25 THE PRESIDENT: If you can, yes.

26 MR. HARRIS: I am very grateful.

27 THE PRESIDENT: Very well. Thank you all very much indeed.

28 (The hearing adjourned at 3.40 p.m.)