

This transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in conducting these appeals. It has been placed on the Tribunal website for readers to see how matters were conducted at the case management conference of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record

IN THE COMPETITION

APPEAL TRIBUNAL

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

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

12 December, 2003

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

BETWEEN:

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

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 Laurence West-Knights QC and Mr George Peretz (instructed by Messrs Addleshaw Goddard) appeared for Allsports Limited.

Lord Anthony Grabiner QC and Mr Mark Hoskins (instructed by DLA) appeared for JJB Sports PLC.

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

Transcribed of the Shorthand notes of
Harry Counsell & Co.,

Clifford's Inn, Fetter Lane, London EC4A.1LD
Telephone: 0207 269 0370

CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good morning ladies and gentlemen. The Tribunal is grateful for all the
2 hard work that has been done since we last met. We have quite a bit of work to get
3 through this morning, and what we would like to do is to deal with things in the
4 following order. I want to say a word about:

- 5 * the publication of transcripts of the Tribunal's Case Management Conferences,
- 6 * future dates,
- 7 * the structure of the hearing,
- 8 * bundles,
- 9 * confidentiality and disclosure issues
- 10 * a proposed interlocutory application for Allsports; and
- 11 * the situation regarding JJB's appeal and its Notice of Appeal in particular.

12 If I may first of all briefly say something about the transcripts of these case
13 management conferences. I think some confusion has arisen over the status of
14 transcripts of the Tribunal's Case Management Conferences. Our practice has been to
15 publish particular rulings but not the transcript as a whole in relation to Case
16 Management Conferences. We think it better in future to publish all the non-
17 confidential parts of the Case Management Conferences of the Tribunal, including the
18 transcript of this Case Management Conference, and previous Case Management
19 Conferences in this case, unless particular objection is taken. That, I think, will render
20 the Tribunal's proceedings more transparent and will also act as an antidote to any
21 potential mis-reporting of the proceedings that may arise.

22 In that latter connection our attention has been drawn to a recent Press article
23 arising out of the last Case Management Conference. The Tribunal, of course, knows
24 what it decided and goes on the basis of what it decided and not what may be reported
25 in the Press. We therefore propose to ignore that particular incident at this stage while
26 taking the opportunity to observe that legal disputes are, of course, to be fought out in
27 the courtroom and not in the media. Fair and accurate reporting of legal proceedings is
28 a long and honourable tradition in this Country which, in our view, applies as much to
29 this Tribunal as to any other, both as a matter of law and as a matter of public policy.
30 That is all we propose to say about that particular aspect.

31 I would like next, if I may, to signal the Tribunal's provisional thinking about
32 future dates in relation to this particular matter. We have provisionally set aside 22nd
33 January for a possible further Case Management Conference to sort out outstanding
34 issues - if any. We have further set aside provisionally 12th February for what would
35 be, I think, more effectively termed a "pre-hearing review" to make sure that all is
36 indeed in order for the hearing.

37 As far as the Tribunal itself is concerned, a major work of preparation will take
38 place in the week before the hearing, that is to say, the week beginning 1st March. It is,

1 therefore, going to be convenient for the Tribunal to have skeleton arguments as early
2 in that period, or indeed preferably just before that period if possible. I sketch that out
3 as a broad indication of where we are so that the parties can work around that.

4 Unless there are any observations arising out of what I have just said what we
5 would propose to do this morning is to try to sketch out in outline how we see things
6 proceeding under the various heads that I have indicated, and then leave it to the
7 parties, if we may, to see if they can work out more detailed arrangements.

8 So may we come straight away to think in general about the structure and
9 planning of this particular hearing. I will indicate the Tribunal's thinking on this and
10 then the parties can come back. It does seem to us, first that the OFT should open, all
11 be it briefly, when we commence at half past ten on 8th March, next. I don't know how
12 long an opening will be necessary - I don't want comments at this stage, I am going to
13 go through the whole thing and see where we are - but we have provisionally pencilled
14 in for something like an hour for the OFT's initial opening. We would then, I think,
15 come to the OFT witnesses and, as was said last time, we do attach importance to every
16 witness for any party being allowed a sufficient warm up period to situate themselves
17 in the case, to get used to the room, to find their way around the documents, to
18 remember what on earth it is all about, etc. etc. I would have thought some time should
19 probably be allowed for that for most if not all the witnesses on both sides.

20 So ladies and gentlemen, we are rather in your hands, but one might envisage
21 half an hour or so of warm up time per witness. That is a very broad estimate at this
22 stage, it may be more or less.

23 We then move into the details of the OFT witnesses and it looks as if it is fairly
24 clear that Mr Ashley, Mr Ronnie, and Mr Feloni will be needed as witnesses. Beyond
25 those witnesses it is not at the moment clear to us whether further witnesses will need
26 to be cross-examined and, if so, on what points. So if there are further witnesses
27 beyond the three I have just identified I think we will need some help from the parties
28 as to why and on what basis further witnesses are sought to be cross-examined. We
29 leave that matter, as it were, in the air.

30 Various estimates have been put forward as to the time that might be needed to
31 cross-examine the OFT's witnesses but at the moment it does not seem to us beyond the
32 bounds of possibility that the cross-examination of the OFT's witnesses could be
33 finished by the end of Wednesday 10th March, that is to say that gives us substantially
34 two and a half days for that particular exercise - that is a very broad exercise indeed.

35 It would appear that the next stage would be the cross-examination by the
36 Office of Fair Trading of the witnesses for the appellants JJB and Allsports. It would
37 appear to us provisionally that in general in this case JJB face the heavier penalty in
38 general the JJB case should go first, though of course we will hear submissions on that

1 point. At present the Office of Fair Trading has I think indicated that it wishes to cross-
2 examine Mr Whelan and Mr Russell on behalf of JJB, and that in relation to All Sports
3 it wishes to cross-examine Mr Hughes and Mr Guest.

4 There does arise the possibility of a point not yet explored in argument of cross-
5 examination as between the two principal appellants - we are not at this moment clear
6 whether anyone on behalf of Allsports or JJB would wish to cross-examine either of the
7 witnesses of the other, but that is perhaps an issue that we should explore at some point.

8 In relation to other potential witnesses for the appellants, the OFT in particular
9 has asked us to give some kind of ruling on to what extent cross-examination is strictly
10 necessary and without at this stage giving a Ruling I think we can indicate a provisional
11 view on that point along the following lines. The central contested issues in this case
12 concern the events directly surrounding the making of the alleged agreements, that is
13 notably the England Agreement, the Euro 2000, the MU Agreement, the MU
14 Continuation Agreement and the England Direct Agreement as seen in their full
15 context. Evidence which does not go directly to those events may still, however be
16 relevant if it is part of the general context. Anything that is of material relevance to a
17 party's case which is put in issue should, in principle, be cross-examined on - if only
18 briefly - in our view.

19 Other evidence, however, may be of only peripheral importance. If a party takes
20 the view that certain evidence is of peripheral importance and decides not to cross-
21 examine on that evidence that is a decision for that party. As far as the Tribunal is
22 concerned, at least as at present advised, there is no rule that cross-examination is
23 obligatory on matters of peripheral importance. Of course, another party may take a
24 different view as to what is peripheral and what is material so any decision not to
25 cross-examine does carry a certain risk.

26 The Tribunal cannot at this stage decide in advance what is of material
27 relevance and what is of peripheral importance. The general principle, however, is that
28 anything of material relevance needs, in fairness, to be put so that the witness has a fair
29 chance of dealing with it. As at present advised I think that is about as much as we can
30 say on that particular issue. Now, whether that throws light on how many witnesses the
31 OFT seek to cross-examine we do not know at this stage.

32 However, parking that issue for the moment and on the assumption that we are
33 dealing principally with four witnesses, that is to say two from JJB and two from
34 Allsports, we are thinking to ourselves that it may be possible to complete the cross-
35 examination of the witnesses in the first week of the hearing. That would seem, in
36 general, a target that we might all seek to aim for if it is agreed that it is a realistic
37 target. It may not be a realistic target but we would be pleased to have your views on
38 that.

1 It seems to us that the stage the appeal next moves to after, if appropriate, a
2 certain pause for regrouping, is submissions by the principal appellants, JJB and
3 Allsports. At the moment we would envisage something of the order of a day each for
4 each of the principal appellants, that is to say, a day for JJB and a day for Allsports.
5 That, if all went according to plan, would take us to the end of the Tuesday of the
6 following week. There would then, I think, be the OFT's opportunity to reply to those
7 submissions. They have to deal with two cases, not one, so it is possible that something
8 approaching a day for the OFT may be necessary at that stage. We should then move, I
9 think, to final replies by JJB and Allsports so that those two parties have the last word
10 on liability.

11 By the reply stage it seems to us that issues should be fairly defined so that one
12 would not be thinking in terms of more than hour for each of those replies. I emphasise
13 again this is only a general outline to help the discussion along.

14 We are then at that stage faced with the question of what happens next in
15 relation to the appeals on penalty. One suggestion that has been made is that the
16 appeals on penalty should not proceed until the Judgment on the main appeals is
17 available. We are not particularly keen on that suggestion at the moment because it
18 would involve a major delay before we proceed to the penalty stage while the Judgment
19 on liability is written.

20 It seems to us that a number of potential hypotheses arise which we cannot
21 really pre-judge at this stage. One is that it is clear by that stage of the case that the
22 appeals have substantially succeeded, or are very likely to. That might involve at that
23 stage a decision by the Tribunal to put off the submissions on penalties, at least for the
24 time being. It might similarly involve the Tribunal in considering eventually
25 complicated questions as to the position of Manchester United and Umbro if those
26 circumstances were to arise.

27 On the other hand, it may be that by that stage the main outcome of the case is
28 fairly clear, in which case it would not seem to us inconvenient to proceed to
29 submissions on penalties made in the alternative by JJB and Allsports and as part of
30 their main appeals by Manchester United and Umbro.

31 We bear in mind that the penalty appeal is only on the amount of the penalty.
32 We are not in the position of the criminal court deciding as between various different
33 kinds of sanction, and we already have the advantage of written submissions on the
34 penalty. I think in general our present feeling is that the parties should be prepared to
35 argue the penalty appeals shortly after the close of the liability appeals, but we are not
36 prepared at this stage to take a final decision on that because of the various
37 combinations of circumstances that may or may not arise, but I think the parties should
38 be prepared to proceed on that basis in case that arises.

1 As far as we can see at the moment, a great deal of what will have emerged
2 from the JJB and Allsports' liability case in so far as it remained relevant to any further
3 mitigation that may be put forward in addition to the written material, that could
4 probably be put before the Tribunal fairly shortly. We would not ourselves see the
5 penalty side of JJB and Allsports' appeals taking a great deal of time, although we have
6 not formed a very clear estimate of how much time at this stage.

7 As far as Manchester United and Umbro are concerned, it may well be that both
8 appeals could be dealt with in half a day. They have both been fully argued in writing
9 and are relatively short, but certainly a half to one day for those two appeals would
10 seem to us to be sufficient.

11 The overall conclusion to which we have provisionally come is that it may be
12 possible to complete this case in the two weeks that have been allotted, but it might be
13 quite a squeeze to try to do so, so it may be that we may well spill over to a third week.
14 There are obvious advantages in trying to complete it in the two weeks that have been
15 allotted.

16 We also need to build in other possibilities. Sportsworld International, for
17 example, is with the Tribunal's permission present at today's Case Management
18 Conference with, as it were, observer status. Whether that aspect needs to be built in is
19 a bridge that may have to be crossed at some point. That in general, however is the
20 state of our thinking if I could share it with you. Now, you may want a little bit of time
21 to reflect on that. What we had thought about was that within that framework, unless
22 there are radical objections we might invite the parties amongst themselves to work up
23 something that is a little bit more precise so that we all have a clear plan.

24 Now, would you like us to rise for a few minutes while you consider it or do
25 you feel in the position to react, as it were, fairly instantaneously?

26 MR HARRIS: Sir, if I may, by agreement with the other parties represented, there are
27 certain issues that are in common to all four appellants that could conceivably be dealt
28 with right at the beginning, and that may have the advantage of enabling some or other
29 appellants to withdraw later on from the CMC---

30 THE PRESIDENT: You want to get away, Mr Harris!

31 MR HARRIS: With the greatest respect to the Tribunal the helpful outline thinking that
32 deals with, if you like, the first stage of the appeal, of course does not bear upon United
33 or, as I understand it, Umbro at all, whereas the penalty side does.

34 THE PRESIDENT: Yes.

35 MR HARRIS: If I could just address those briefly. Unless I am treading on anyone's toes
36 who wants time to consider what has just been said - certainly I do not.

37 So turning then to the penalty issue, Manchester United would seek to persuade
38 the Tribunal, as I understand it in common with all the other appellants, that there be a

1 separate penalty hearing divorced entirely from the liability hearing. However, I am
2 pleased to say that that need not necessarily be argued out today, at least not from my
3 perspective, for this reason: what you have invited the appellants to do is to be prepared
4 for an immediate penalty hearing. Manchester United could be prepared for such a
5 hearing. So I am just laying down a marker. The reasons we say are obvious and I
6 gather they are echoed by my learned friends, which is the actual outcome of the
7 liability hearing may have a material bearing upon the state of the penalty.

8 The second point as regards penalty would be this, that Manchester United's
9 only real concern is that we hear everything that Umbro has to say at the beginning,
10 and I understand that does not cause any other party any difficulties. Indeed, Umbro, as
11 I understand it are more than content to have their say on penalty completely and
12 utterly, and then if needs be withdraw, but it has a bearing on timetable in this sense,
13 that I understand Umbro's estimate is half a day or a day for their penalty appeal. That
14 could be either immediately after liability or at some other stage, but there may be a
15 slight difference between the Tribunal's thinking and my client's thinking on the
16 interplay between our appeal and the JJB and Allsports. There are certain issues of
17 principal in common. They are most notably - just to pick one - the issue of relevant
18 market. I gather we all take that so our thinking was that all other penalty appeals
19 should go together and that may be a slightly longer time estimate than you had in
20 mind, it may be a couple of days.

21 THE PRESIDENT: Your suggestion is that Umbro could go first, effectively, on penalty?

22 MR HARRIS: Whenever that may be, and they could go first and be finished, and then a
23 joint hearing on a penalty for all the other appellants, and we can discuss time estimate-
24 --

25 THE PRESIDENT: So when you say "relevant market", you mean what is the relevant
26 turnover to take into account?

27 MR HARRIS: Well, no, more relevant product market, you know the issue about whether
28 shirts and socks and what have you, and that is just one of the issues of commonality.
29 As I said a moment ago I understand that the other appellants all take the view that that
30 ought to be separate from and after the Judgment of liability, but not an issue we need
31 actually to decide today, probably.

32 THE PRESIDENT: Yes.

33 MR HARRIS: In so far as we are now going to seek to deal with penalty as a discrete issue
34 and the hearing thereof, one ought to make provision for skeleton arguments. We are
35 fairly relaxed about that, some sensible time two weeks, or a week before, we could be
36 prepared for a penalty hearing at the end of the two weeks currently set down. We can
37 leave that one until that issue is decided. But there is only one particularly germane
38 aspect of deciding whether or not to divorce the hearings altogether, and that is if they

1 are to be divorced that would rather some of the urgency out of preparatory steps
2 between now and then on the Umbro and United appeals, but I have heard what the
3 Tribunal has to say, we are quite content---

4 THE PRESIDENT: Well I think on the precautionary principle, if you are in a position to be
5 prepared to argue, we can defer until a later date the decision as to when and if those
6 arguments take place, what shape it should take in the light of the way the liability
7 appeal has gone.

8 MR HARRIS: Sir, I am very grateful. Those are the comments that I wish to make, the
9 submissions as regards penalty, timetabling and mechanics. There is a miscellany of
10 other relatively minor discrete points that I would like to deal with and then seek
11 permission to withdraw, if I can put it like that.

12 THE PRESIDENT: Well, let's stay on the hearing points first, Mr Harris, if we may.

13 MR HARRIS: Yes, I am very grateful.

14 THE PRESIDENT: Let's start with the appellants and see what they say. Lord Grabiner?

15 LORD GRABINER: May it please you, Sir, this is in relation to the matters that you very
16 helpfully set out a few moments ago, just to see our reaction.

17 THE PRESIDENT: Just to get a very first reaction.

18 LORD GRABINER: First of all, thank you very much indeed, because it does save a lot of
19 bickering at this side of the room, so to speak, for you to have looked at it and given us
20 your prima facie indications.

21 May I just comment on the matters that I want to react to, and if I don't then you
22 can assume that we are content. I am slightly concerned about this warm up concept. I
23 used to call it "examination-in-chief". [Laughter] I am not bothered about the use of
24 the description, it is probably a more realistic description, actually, these days.

25 My only concern is that it might be used as an opportunity to introduce material
26 that comes, so to speak, for the first time, or with a new nuance, that would be entirely
27 inappropriate.

28 THE PRESIDENT: Yes, well that is something upon which the Tribunal would agree with
29 you.

30 LORD GRABINER: So if it is to ask the person his/her name, and address several times
31 over...[Laughter] to take up half an hour, that would be fine. But it is difficult to see
32 what more might be engaged in that, it may be that half an hour is too long.

33 THE PRESIDENT: This is a point that we see as common to all parties, because it affects
34 your witnesses as much as anybody else's witnesses.

35 LORD GRABINER: Absolutely.

36 THE PRESIDENT: A witness coming into a hearing like this, presented with a great many
37 files, needs to have a short period to orientate himself so that he can find where
38 everything is, and be reminded that he is about to talk about something that happened at

1 a certain date, he is taken to his statement and all that - that is all we have in mind.
2 LORD GRABINER: Very good, well I am sure we are all happy with that, and we all
3 understand it. As far as the OFT witnesses are concerned, we agree that the three you
4 have named are the critical characters - Ashley, Ronnie and Feloni. The others are
5 Messrs. McGuigan, Atfield, Marsh, Hadfield, Prothero and Smith.
6 We would like to look back at the Prothero statement so as we come to a final
7 view about that. Can I just be clear what the status of their statements would be on the
8 hypothesis that none of them are called as witnesses. I should make it clear that we do
9 not admit what is in the statements, but there are passages in those statements that we
10 certainly know that we will want to be relying upon, for example, in the course of our
11 closing submissions. I do not think it is necessary to identify what those are now and,
12 indeed, we may not know until in the light of the evidence that is given and cross-
13 examined, but we just want to be clear as to the status of those statements.
14 THE PRESIDENT: Well on a provisional view, without having heard any argument about
15 it, a witness's statement which is not cross-examined on simply bears such weight as it
16 has. It's difficult to be more precise than that.
17 LORD GRABINER: Absolutely, we are content with that as well, but we are not admitting
18 what is in them, but we agree with what you've just said.
19 THE PRESIDENT: Yes.
20 LORD GRABINER: Then so far as the extent of cross-examination is concerned, well one
21 ought reasonably be able to trust the judgment of the advocates in question.
22 THE PRESIDENT: Yes.
23 LORD GRABINER: Essentially they have to put their case fairly and squarely.
24 THE PRESIDENT: Of course.
25 LORD GRABINER: and if there is a hot factual dispute and there are witnesses who can shed
26 light upon the answer to the debate they should be cross-examined about it and if it is
27 an issue that is on the side and not a central issue, and it has already been cross-
28 questioned then there is no need to waste time on it.
29 THE PRESIDENT: Yes.
30 LORD GRABINER: Other witnesses that we have---
31 THE PRESIDENT: So do I just take it from that, Lord Grabiner, that subject to further
32 reflection about Mr Prothero, it is the first three witnesses that you have just mentioned
33 that you want to cross-examine.
34 LORD GRABINER: Absolutely, and we do want to. As far as our witnesses are concerned,
35 the OFT has indicated that they just want to cross-examine Messrs Whelan and Russell.
36 There are also statements from our side from Messrs Bryan, Preston, Lanesmith and
37 Beaver, and of course we rely upon those statements, notwithstanding the fact that the
38 OFT has indicated helpfully that they do not want to cross-examine.

1 Then I think as far as other matters are concerned, there is nothing that I want to
2 say.

3 THE PRESIDENT: Thank you very much, Lord Grabiner. Yes, Mr West-Knights, good
4 morning.

5 MR WEST-KNIGHTS: Good morning, Sir, gentlemen. So far as the question of the cross-
6 examination of witnesses, may I say simply that we concur entirely with your view as
7 provisionally expressed. It is very clear, it is very helpful, and it will leave the
8 judgment to those responsible on the days for the matters in question.

9 So far as the Office's witnesses are concerned, they are listed at paragraph 27 of
10 the Office's skeleton, the names of those witnesses on whom they propose to rely in
11 both of the appeals. The first three names are not controversial, Messrs Ashley, Ronnie,
12 and Feloni. There is listed, with no subtext, i.e. this person is relied upon in respect of
13 both appeals, Martin Prothero.

14 THE PRESIDENT: Yes.

15 MR WEST-KNIGHTS: I understand that there is some discussion, as it were, Junior to
16 Junior, as to the status of Mr Prothero. I cannot at the moment tell the Tribunal whether
17 it will be necessary for us to cross-examine him. The short point about him is that,
18 although on the face of it there is material which appears to be material - if I can use
19 that inelegant expression - the fact is that that material was not relied upon in the
20 decision.

21 THE PRESIDENT: Yes.

22 MR WEST-KNIGHTS: So I understand that there is possible movement in either direction
23 which may resolve that. The next name to witnesses, Atfield and Smith are marked
24 "JJB Appeal only". We may wish to cross-examine Mr Atfield, but that will be entirely
25 dependent upon the outcome of the preliminary ruling which Allsports will be asking
26 the Tribunal to make in respect of the scope of the issues in the England agreement.

27 The timetable specific matter as regards----

28 THE PRESIDENT: We have a query over Prothero and a query over Atfield?

29 MR WEST-KNIGHTS: Yes. Certainly as regards Prothero any cross-examination of him
30 would be relatively brief. As regards Atfield that will be non-existent or relatively not,
31 depending on the outcome of the application.

32 THE PRESIDENT: I see.

33 [Excised at request of counsel]
34 [Excised at request of counsel]
35 [Excised at request of counsel]
36 [Excised at request of counsel]
37 [Excised at request of counsel]
38 [Excised at request of counsel]

1 [Excised at request of counsel]

2 MR WEST-KNIGHTS: Sir, if I can just look at the reality of this schedule that you have
3 sketched out with your colleagues. The position we have reached at the moment is
4 week two - if I can call it that - we have only actually factored in stuff until lunch time
5 Thursday on the basis of the provisional timetable outlined. We have also, as it were,
6 crossed the rubicon of the possibility of going in to week three, so it would appear that
7 the world isn't going to come to an end if this timetable that is provisionally laid out
8 were extended by a day, because at the moment that would take us until lunch time
9 Friday and plainly in that event the appeals, if they immediately follow the hearing on
10 liability will spill over into the following week.

11 My own view, and I can say this by reputation for myself and experience, is that
12 neither Lord Grabiner nor I will be gratuitously prolix in our cross-examination----

13 LORD GRABINER: Just prolix! [Laughter]

14 MR WEST-KNIGHTS: He said it, I didn't! But you will know, as well as anyone else, Sir,
15 that there are some kinds of cases where one doesn't merely put one's case. This is a
16 case where, subject to certain risks, one is going to have to take one or two of these
17 witnesses for a walk and see where they go.

18 THE PRESIDENT: It may take some time. Obviously we have the usual difficulty of
19 compromising between the fair opportunity to not only put but develop, as it were,
20 cross-examination and the need not to go on for days and days if it can be avoided.

21 MR WEST-KNIGHTS: Absolutely not, but my immediate instinct on hearing the first
22 week schedule was that we might overdo that by a day in all. But if that were the case,
23 then the overall effect, apart from losing the apparent symmetry of starting the
24 appellant's case the following Monday, that would still only take us until Monday
25 lunchtime of the following week and, as I say, if we crossed the mental rubicon of
26 going into week three. So I would suggest if I might, tentatively, that it would be
27 prudent to, as it were - by osmosis rather than by actually assigning to anything -
28 another day for week one and a further day for week two in respect of Mr Hughes's
29 position. Anything else I have to say goes beyond matters of timetable.

30 THE PRESIDENT: Yes, very well. Thank you very much, Mr West-Knights. Yes, Miss
31 Bacon?

32 MISS BACON: Our position is very similar to that of Manchester United. As with
33 Manchester United we do believe that if there is any bearing on Umbro and Manchester
34 United's penalty appeals from the liability hearings then we are entitled to know the
35 outcome of those hearings - indeed, it would compromise not only our position but that
36 of the OFT if the hearings were to go ahead without having had judgment on the
37 liability issues. But we are content for that issue to be parked, as I believe you wish to
38 do at the moment.

1 THE PRESIDENT: Yes.

2 MISS BACON: Regarding the timing of our appeals, we are concerned that we do not wish
3 to be drawn into protracted hearings which do not concern us. Umbro has raised
4 discrete issues---

5 THE PRESIDENT: Well you have one point---

6 MISS BACON: We have one point which has no bearing on the appeals of the other parties.
7 There is no cross-over, so we are quite happy to go first for the OFT and Umbro's
8 submissions on Umbro's one point to be dealt with first, and then for us to move out of
9 the picture while the penalty appeals for the other parties take place.

10 THE PRESIDENT: Yes, thank you very much, Miss Bacon. Can we assume that the Umbro
11 appeal, self-contained as it is, can be comfortably dealt with in a morning?

12 MISS BACON: I think so. Mr Green, who will actually conducting the hearing as I will be
13 otherwise engaged at the time, has estimated half a day to a day, but I am sure half a
14 day would be sufficient.

15 MR WEST-KNIGHTS: I am sorry, Sir, I am not asking for another bite at the cherry, but I
16 have forgotten two cherries. The first is the question of cross-examination as between
17 the appellants. It may arise - certainly, speaking for myself I could not fall into the trap
18 of trying to lead from a friendly witness evidence that I think is helpful to me because it
19 carries no weight at all. In other words, the friendly "...and it is right, isn't it, they're all
20 innocent" question---

21 THE PRESIDENT: No, but there is a particular situation regarding the meeting that took
22 place in Mr Hughes's house that could give rise to that.

23 MR WEST-KNIGHTS: Plainly if there is a difference in evidence between witnesses it
24 will be a matter between the advocates concerned to what extent ----

25 THE PRESIDENT: We will just have to cross that bridge when we get to it, I think.

26 MR WEST-KNIGHTS: But the fact is it is liable to occur as a matter of principle, it may
27 occur as a matter of fact.

28 THE PRESIDENT: Yes.

29 MR WEST-KNIGHTS: The other thing which I stood up to mention was that in the event
30 that my application, provisionally scheduled application, is successful then plainly the
31 time that we will spend cross-examining people, will be greatly shortened, because the
32 issue in respect of the Manchester United agreement, what happened on 8th June, is
33 relatively narrow. It is broadly speaking what happened on the day. There is no
34 question of anybody needing to lead evidence as to Mr Hughes's propensity to behave
35 in an anti-competitive way because he very frankly admits to you that that was his
36 motive for calling that meeting. So that would, in fact, make that a very small---

37 THE PRESIDENT: I see, that may have some bearing on it, yes.

38 MR WEST-KNIGHTS: I would not need to challenge Mr Ronnie, Mr Ashley or anybody

1 else on everything to do with the England agreement, and there would be no need for
2 any cross-examination on questions of pressure and so forth.

3 THE PRESIDENT: Thank you. Mr Colgate just reminds me to make it clear, I think it is
4 very clear, we are not at this stage saying that we are going to give Judgment at the end
5 of the liability here, or that we are going to give Judgment at the end of the liability
6 hearing. We are simply saying that everybody must be prepared for the penalty appeals
7 to go ahead, and we will see where we are at the end of that hearing.

8 Yes, I think it is the Office of Fair Trading, yes, good morning, Mr Morris?

9 MR MORRIS: Good morning, Sir. May I start by echoing the remarks of my learned
10 friend, Lord Grabiner, in relation to the questions of warming up questions. We very
11 much support the view put forward that half an hour may be too long, and that the
12 warm up questioning should be limited.

13 The second point I would like to address is the question of witnesses and who is
14 to be called by the OFT. There is no doubt, as you have seen from paragraph 27, of our
15 submissions that is Messrs Ashley, Ronnie and Feloni, and then Mr Prothero, Mr
16 Atfield and Mr Smith.

17 THE PRESIDENT: Yes.

18 MR MORRIS: They are all witnesses whose evidence the OFT wishes to rely upon in this
19 appeal. On that basis, therefore, their witness statements will stand as their evidence in
20 this appeal, and it will then be a matter for the appellants to indicate whether they wish
21 to cross-examine.

22 However, in relation to the witness statements of other witnesses identified a
23 moment ago by Lord Grabiner, the position is not the same. In this appeal the OFT
24 does not rely upon the witness statement evidence of Mr McGuigan, or of Mr Hadfield,
25 nor does it rely upon the witness statement evidence of Mr Marsh. Because we do not
26 rely upon that witness statement evidence, we do not propose to tender it in this appeal
27 as being evidence relied upon.

28 THE PRESIDENT: I understood Lord Grabiner to say that he did not seek to cross-examine
29 this gentleman.

30 MR MORRIS: But he did go on to say that there may be parts of their witness statements
31 that they may wish to rely on.

32 THE PRESIDENT: The he may wish to rely on. You're making the point that you don't rely
33 upon it.

34 MR MORRIS: I don't rely upon it but that then raises a further question because we would
35 suggest that to the extent that those witness statements are being relied upon by the
36 appellant, then it may be that they have to be tendered as potential witnesses by those
37 who rely upon them.

38 The approach that we are taking to this matter is that it is not all the witness

1 statements that happen to be in bundle D that automatically go into evidence in this
2 appeal. What goes into evidence are those witness statements that each party states it
3 relies upon, and it is then a matter for others, if they wish to rely on other witness
4 statements, to indicate that they do rely on such witness statements, and in those
5 circumstances the OFT would wish to take a view as to whether it would want those
6 witnesses to be called for cross-examination if need be.

7 THE PRESIDENT: You will have to remind me, Mr Morris, the provenance of these three
8 gentlemen.

9 MR MORRIS: Mr McGuigan and Mr Hadfield, and Mr Marsh are all Umbro, actual or
10 former, I think. Indeed, I can say that the point is illustrated, Sir, by this, that the
11 witness statement evidence of Mr McGuigan, and Mr Hadfield are not relied upon in
12 the Decision either, in any material way. I have made a search throughout the Decision,
13 there may be one reference. There is certainly reference to them as individuals. There is
14 no reference to Mr Hatfield at all in the Decision.

15 MISS BACON: It's Hatfield.

16 MR MORRIS: No, it isn't. There is a Mr Hadfield, and there is also a Mr Atfield.

17 THE PRESIDENT: I see, just as a matter of procedure, what are you suggesting?

18 MR MORRIS: All I am suggesting is that we have indicated in paragraph 27 those
19 witnesses we wish to rely upon. I do not think there is anything to add as far as the
20 procedure is concerned, other than to put the appellants on notice of the line that we
21 take. If it is their intention to rely upon any witness statement evidence of Mr
22 McGuigan and Mr Marsh, there may have to be factored into the timetable time for
23 them to be called and cross-examined, if necessary, by the Office of Fair Trading.

24 Indeed, as Mr Turner points out to me, as far as we are aware there is no
25 reliance placed upon the witness statement evidence of Mr McGuigan or Mr Hadfield
26 in the JJB Schedule. I am merely flagging the point just to---

27 THE PRESIDENT: Well, I think all that we can do at the moment is just to note that it has
28 been flagged.

29 MR MORRIS: Yes, it may have an impact on the timetable if they are to be called, is all I
30 can say on that.

31 Then turning to the cross-examination by the Office of Fair Trading of
32 witnesses and, Sir, you have correctly identified the four principal witnesses that we
33 would wish to be cross-examined, and you have given us an indication of the Tribunal's
34 view on what we call "the paragraph 20 point", that is the point about failure to cross-
35 examine.

36 Sir, we would raise one issue in that connection and it is this. We understand
37 the view taken by the Tribunal, and we take account of the fact that this is a matter for
38 our judgment, but a question does arise in circumstances where more than one witness

1 gives evidence on effectively the same issue, and that is best illustrated by the evidence
2 of Mr Patrick, or one of the best illustrations is Mr Patrick's evidence in relation to the
3 price promise which I think is highlighted in our submissions.

4 Now, the Ruling we have been seeking is effectively a ruling that the mere fact
5 of non-cross-examination does not of itself necessarily lead to an adverse finding by
6 the Tribunal, and we would not propose calling witnesses where they give evidence
7 solely, or the only area where we would wish to cross-examine them is an area which is
8 also covered by two other witnesses, namely, Mr Hughes and Mr Guest. On that basis
9 we would suggest that the Tribunal is able, or may be able to give an indication where a
10 witness covers by way of direct testimony of a particular event, but a general topic like
11 the importance of Allsports' price promise, that there is no need in those circumstances
12 for each of those witnesses to be cross-examined on that subject. That is the area of
13 indication that we are most concerned with and I wasn't clear from the indication given
14 by you, Sir, at the outset, whether that was a matter which you had in mind.

15 THE PRESIDENT: Well we are not giving any ruling on any point, but as a matter of
16 general philosophy, subject to any submissions that be made if there is material
17 disagreement, I would have thought in principle if three witnesses all give evidence on
18 the same point, it is not necessarily the case that you have to cross-examine each
19 witness on the same ground. It very much depends what the answers are and how it
20 comes out. But it is very difficult to be more precise at this stage than that.

21 MR MORRIS: Very well, Sir.

22 THE PRESIDENT: If you have witness A and witness B, and witness B's witness statement
23 says he agrees with everything that witness A has said, and witness A comes apart in
24 cross-examination, I am not sure that you are compelled to cross-examine witness B
25 who is deemed to agree with witness A who has just come apart. I do not think we can
26 really address this issue except in the most general terms.

27 MR MORRIS: I understand that, Sir, but then in those circumstances, while we will take
28 every indication that you give obviously to heart and look at it carefully, we then would
29 say that we cannot necessarily exclude the possibility that would want to cross-examine
30 more people than we have indicated.

31 THE PRESIDENT: Is this beyond the people that you have in your list at the moment -
32 paragraph 27?

33 MR MORRIS: 26.

34 THE PRESIDENT: You have Mr Patrick and Mrs Charnock?

35 MR MORRIS: Yes, there are those people whom we may wish to cross-examine. There is
36 also, in the light of the indication that you have given, those people were given in
37 paragraph 26 as illustration, and in the light of the indication given earlier, it is
38 certainly the case at this stage, and it may be that we need to rise to consider it, but we

1 cannot exclude wanting to cross-examine Mr Bryan who is one of the JJB witnesses,
2 and possibly Mr Preston, who is another of the JJB witnesses.

3 THE PRESIDENT: I am not sure I have come across Mr Bryan.

4 MR MORRIS: Mr Bryan and Mr Preston are, I think, listed in JJB's---

5 THE PRESIDENT: Oh yes, JJB account manager, Umbro's sales manager.

6 MR MORRIS: Yes, and I think he is listed in JJB's list of relevant witnesses.

7 LORD GRABINER: Bryan was an Umbro employee.

8 MR MORRIS: Was an Umbro employee. If, Sir, you would like a firmer indication then
9 that may be a matter that we would wish to take a little time on this morning, even
10 briefly to rise and we can give you that firmer indication, but I do say that, in the light
11 of the indication that you gave earlier, there is a strong possibility that those people will
12 be called for cross-examination. Now it may be that that cross-examination need not be
13 very extensive, but again that is another factor---

14 THE PRESIDENT: Then I would have thought, Mr Morris, that the OFT could take a
15 reasonably robust view about the situation. You have three principal witnesses, Mr
16 Ashley, Mr Ronnie and Mr Feloni. If their evidence stands up you are in a relatively
17 strong position, arguably, and if their evidence does not stand up then you are not in a
18 strong position. Similarly, the key evidence from all the appellants is from the four
19 persons you wish to cross-examine, and if your cross-examination on those witnesses is
20 successful then your case is advanced, and if it is not it is not. I am not entirely sure
21 that you need to explore the outer peripheries of the case beyond those central
22 witnesses. It is a matter for you.

23 MR MORRIS: I am very grateful for that indication, and obviously given your view about
24 the difference between "central" and "peripheral", we will look at it with great care. It
25 is certainly the case that part of Mr Bryan's evidence might well be said to be very
26 central, and to that extent---

27 THE PRESIDENT: Well I think it is a matter for you, Mr Morris, we cannot take it further.

28 MR MORRIS: Sir, I am grateful for that indication. All I am indicating to you, Sir, and the
29 Tribunal is that they may have to be factored into the timetable equation.

30 That deals with witnesses. I think the only other matter was the question of the
31 penalty appeals. Really, we would be happy to go with the Tribunal's suggestion on
32 that. We are willing and ready to go on the penalty appeals immediately. We think that
33 in so far as questions of skeletons on the penalty appeals arise that actually they should
34 happen at the same time as the skeletons for the liability appeals, because if you are
35 going to have to be ready to go immediately, then there should be no distinction
36 between when the penalty skeletons are exchanged, and when the other skeletons are
37 exchanged.

38 One observation I would make is this, both counsel for Manchester United and

1 for Umbro suggest that the outcome of the liability appeals may have an impact on their
2 penalty appeals. We question that and we put a marker down to suggest that we think
3 that would be a rather difficult proposition for them to put forward.

4 It would be a matter for argument at the time as to what, if any, effect the
5 outcome of liability had on the penalty appeals.

6 MR MORRIS: On their penalty appeals?

7 THE PRESIDENT: On their penalty appeals, yes.

8 MR MORRIS: Precisely. The only other matter I would raise at this stage, Sir, is on the
9 timetable. If we do run into a third week, I may be in some difficulty but I am sure you
10 will all be relieved by then, anyway my learned Junior will pick up the pieces, yes!

11 THE PRESIDENT: Thank you, Mr Morris. Lord Grabiner?

12 LORD GRABINER: Sir, could I respond on just two points arising from my friend, Mr
13 Morris's observations?

14 THE PRESIDENT: Of course.

15 LORD GRABINER: One very shortly, and taking them in reverse order. He said on a couple
16 of occasion that he was very grateful for indications you were giving him. Can we be
17 very plain about this, that your Lordship was giving him no indications at all, apart
18 from the fact that it was a matter for him as to how he chose to conduct his cross-
19 examination. I do not want there to be any misunderstanding about this because if he
20 fails at some stage to put some critical point, and obviously I am not going to be
21 concerned about peripheral matters, but if he fails to put some critical point to
22 somebody that may well be a matter for comment when we come to closing
23 submissions, and I do not want him to come back and say that he got the impression
24 from something that passed between us on the CMC hearing, that he was justified in
25 taking that position.. He has to exercise a judgment about it and I am sure he will.

26 The only other point I want to mention is this, and it is rather more substantive.
27 What the Tribunal should understand in my submission is that the forensic game now
28 begins, and it is important that you are understand, as I am sure you do---

29 THE PRESIDENT: Well, we don't want to play games, Lord Grabiner.

30 LORD GRABINER: It is important just to make sure that it is on the table.

31 THE PRESIDENT: Yes.

32 LORD GRABINER: And it is in relation to these witnesses. My friend says that he does not
33 rely upon the evidence of Messrs McGuigan, Hadfield and Marsh - very clear and very
34 plain. We can forget McGuigan for the moment, and just concentrate on the other two.

35 THE PRESIDENT: Yes.

36 LORD GRABINER: Next he says that we make no reference either to Messrs Hadfield or
37 Marsh in our schedule - not true. We refer to both of them on a number of occasions
38 and I can provide the details if necessary.

1 The next point is this: the reason why they do not wish to rely upon, for
2 example, Mr Hadfield is because his evidence is that in respect of two of the charges no
3 pressure was ever applied by any retailer upon Umbro. So obviously they do not rely
4 on that because it is evidence which helps us not them. That is why we want to rely
5 upon Mr Hadfield's statement and, in principle, in our submission we should be able to
6 do so without having to call them as our witnesses, and the suggestion which, in my
7 submission is a rather naive suggestion, that we should be forced to do so in order to
8 conceal that possible area of debate should be on the table for you to make a
9 submission about that. In our submission, the right way to deal with it is that we should
10 be entitled to refer to the relevant passage or passages in Mr Hadfield's statement to
11 that effect.

12 The position of Mr Marsh is similar, but slightly and subtly different. Mr Marsh
13 was the author of a fax to Manchester United on 6th June, 2000 which is relied on in
14 paragraph 415H of the OFT Decision. His witness statement contradicts the document
15 and that is an obvious point we want to make to demonstrate that on this point the
16 Decision is wrong. Again, we do not see why it should be necessary to call Mr Marsh
17 as our witness, but we do say that it is important to our case that we should be entitled
18 to refer to what Mr Marsh had to say about this in his witness statement. So essentially
19 that is all that I want to say, but it is important that you understand why it is that they
20 are happy not to rely upon those statements and why, by a parity of reasoning we are
21 keen to do so.

22 MR WEST-KNIGHTS: I echo what my learned friend has just said and I have nothing
23 useful to add to it.

24 THE PRESIDENT: Thank you Mr West-Knights.

25 MR HARRIS: Sir, may I respectfully attempt to draw together one or two strands
26 concerning the penalties, because with great respect to all the other parties these are
27 now starting to turn into detailed issues about witnesses and hence the liability hearing
28 alone with which Umbro and my client are not concerned. I wonder if I could invite the
29 Tribunal to make a direction along the following lines which I think fits in with
30 everything that has so far been discussed, and it would be that there be no part of the
31 initially set down two weeks, beginning on Monday 8th that will deal with any penalty
32 appeal. From everything that I have heard it seems likely, with the greatest of respect,
33 that we are going to take a full two weeks on liability.

34 THE PRESIDENT: Well just pausing there. I think we can say at the moment with
35 reasonable confidence that we will not reach the penalty appeal any earlier than
36 Thursday, March 18th.

37 MR HARRIS: I hear what you say, I wonder whether realistically it is more likely to be the
38 following Monday, 15th I believe.

1 THE PRESIDENT: It is difficult, I think, to be precise at this stage, except to say not before
2 Thursday, March 18th.

3 MR HARRIS: But the current feeling is that it may spill over into the next week - may not
4 even be the Monday but one would hope if it is to---

5 THE PRESIDENT: We have to get a bit nearer the time before we can be more precise.

6 MR HARRIS: In any event, can I take it as established that certainly I shall not be required,
7 nor anybody from MU, at any stage before the Thursday of the second week, because
8 no matter what, we will not be dealing with the---

9 THE PRESIDENT: That seems to be the position at the moment.

10 MR HARRIS: I am very grateful. Perhaps another mechanical issue from that would be the
11 exchange of skeleton arguments. I would invite the Tribunal to give a direction as to a
12 date. As I say, I am fairly relaxed about it, but it would be helpful to actually be
13 provided with a date, and if that is two weeks even before the first day of the hearing,
14 so be it - I would prefer one week, say, I think that would be Monday, 1st March.

15 At the risk of repeating myself, there is a small list of issues that are common to
16 the parties that could sensibly be dealt with perhaps completely before the short
17 adjournment, with then these more detailed issues about in particular witnesses and
18 burdens of proof and warm up and the rest of it to be dealt with thereafter.

19 THE PRESIDENT: What I think we should do now, if we may, is to invite the parties
20 between now and the next CMC, which is fixed for 22nd January, perhaps under the
21 leadership of the OFT if they would be kind enough to take the lead, to write down a
22 structure for the hearing along the lines that I have indicated, or is it now agreed, to do
23 their best to sort out between now and then any further outstanding issues on witnesses
24 and we will seek to resolve any further issues about witnesses on 22nd January if they
25 are not resolved by agreement before that. But that, I think, just leaves on this stage of
26 the planning dates for skeleton arguments and so forth. I said at the outset that it would
27 help us to have the various skeletons by the week beginning Monday, 1st March, and I
28 think it is equally helpful, in fact, to have the penalty skeletons as well as the other
29 skeletons so that we can read everything in context. So could I have some views now
30 on timetable for skeletons specifically?

31 MR MORRIS: I will jump up and say that is fine for the OFT.

32 THE PRESIDENT: I think we are talking about contemporaneous exchange rather than
33 sequential exchange, are we? What is your view, Mr West-Knights?

34 MR WEST-KNIGHTS: If I may say so, the skeletons for this occasion have demonstrated
35 that sometimes exchange is not a good idea, that is to say what most of the parties have
36 spent the balance of this week doing, in fact, is catching up with what everybody else
37 has been saying.

38 At the risk of allowing the OFT yet further to widen its case, we take the view

1 that it would be helpful to the Tribunal to hear from the OFT first as to in effect its
2 opening, and for the appellants to respond by 1st March. In other words, you and your
3 colleagues would have the package at the start of the week during which you would be
4 making your final preparations for the hearing. I doubt that it would be sensible to say
5 that the OFT skeleton should be in more than a week before ours, and I am afraid I
6 don't know what that Monday is - 22nd?

7 THE PRESIDENT: 23rd.

8 MR WEST-KNIGHTS: But that would be our only departure from the suggestion of 1st
9 March.

10 LORD GRABINER: I would respectfully agree with that on the footing that although this is
11 an appeal by the appellants, it is in effect a hearing on the merits, so they have to go
12 first. They should say what is their case in a skeleton form, and we should respond to
13 that. Then I think from our point of view, and then perhaps more importantly from the
14 Tribunal's point of view, the then state of the issues ought to be very plain indeed.
15 Whereas, if there is a concurrent exchange it will be, or might be, ships passing in the
16 night, which is not very satisfactory and so in my submission there really ought to be a
17 successive exercise. They should go first and we are happy to produce ours following
18 that, but in time to satisfy your reading requirements for 1st March.

19 MISS BACON: We do not have any submissions as to the exchange of skeletons for JJB and
20 Allsports, but in our case we are entirely happy for contemporaneous exchange on 1st
21 March - the issues are well defined. We have put in our appeal, and they have put in
22 their defence.

23 THE PRESIDENT: What I would suggest, Mr Morris, I think it is perhaps more useful to
24 have your skeleton or the substance before we get the appellant's skeleton on the
25 substance. Would it be feasible to have a mutual and simultaneous exchange of
26 skeletons on the penalty issues on 1st March? To have your skeleton on the two
27 substantive appeals in the week beginning 23rd February.

28 MR MORRIS: In the week, Sir, yes. I would just make one observation, we have set out
29 our case pretty fully in the defence---

30 THE PRESIDENT: Well, you may not need to do a very elaborate skeleton.

31 MR MORRIS: I would not be particularly keen on doing it a week before they have to do
32 it. Perhaps to give us a bit more time three days before, or something in the middle of
33 that week, Sir.

34 THE PRESIDENT: They need to have done their stuff by Friday, 27th February, in a perfect
35 world.

36 MR MORRIS: Well Tuesday or Monday that week?

37 THE PRESIDENT: I would have thought if your skeleton is served on the appellants on
38 Monday, 23rd. As you rightly say your defence is already very full, we have read the

1 defence, we are not looking for anything elaborate - indeed, we are doing our best to
2 reduce the amount of paper rather than add to it. If you would be kind enough to
3 produce your skeleton on 23rd February, and the appellants are kind enough to produce
4 theirs by close of play on 27th February, that would be very helpful and the penalty
5 skeletons can all be exchanged on the Monday. Is that all right.

6 MR MORRIS: Very well, Sir.

7 THE PRESIDENT: If anyone can improve on that, of course, so much the better.

8 MR HARRIS: Well, Sir, if I may, I am most grateful, because that takes care of the most
9 important issues regarding the penalty appeal that concerns all four appellants, but in
10 particular United and Umbro as present here today.

11 Turning to what I referred to before as the miscellany of issues, if I could just
12 run through them. I hope this will be very brief and it may---

13 THE PRESIDENT: Let's see how we get on, Mr Harris, tell us what they are.

14 MR HARRIS: There is an issue of outstanding disclosure against Umbro. I am very
15 pleased to say there has been provision by various people, all be it during the course of
16 this week, of some material emanating from Umbro. I don't need to take up the
17 Tribunal's time with that, save only for one particular discrete issue, and that is the
18 transcript of the ex-parte hearing, which took place during part of the CMC on the last
19 occasion. You will have seen that there is, if you like, a formal application, at least by
20 Allsports, and I gather echoed by JJB, to see that transcript. My position is really this,
21 that we tag along behind their application, and I would invite the Tribunal to hear that
22 application before Manchester United is given permission to withdraw, but I do not
23 propose, if you like, to make it myself, but rather to tag along with them. No other
24 issues concerning disclosure as far as I am concerned.

25 THE PRESIDENT: So as far as you are concerned disclosure is sorted out subject to that
26 one point?

27 MR HARRIS: If I could leave it like this: we simply have not yet had the opportunity even
28 to peruse the materials that have been dribbling in during the course of this week, there
29 may be further disclosure issues once one has had an opportunity to consider that. I do
30 not currently envisage any. So as of today it is only this issue about the transcript,
31 obviously with expedition if there are further disclosure issues we shall inform all
32 relevant parties.

33 THE PRESIDENT: Yes, I see.

34 MR HARRIS: I should add, I suppose, at some stage, but it doesn't have to be today,
35 Manchester United would invite the Tribunal to make a formal order concerning the
36 confidentiality of the very minor redactions in its own Notice of Appeal and annexes,
37 but I am more than content that that just be left over - nobody seems to take any issue
38 with it.

1 THE PRESIDENT: Well that is a point, I am afraid we do need to grapple with today. That
2 does bear on points of principle that affect the appeals as a whole, the four appeals. I
3 think, Mr Harris, what I would like to do is I would just like to deal with one
4 administrative matter that concerns the organisation of the appeals, and then come to
5 the confidentiality.

6 MR HARRIS: I am very grateful. Whilst I am on my feet then, there are two very small
7 further points on the list. First, you will have seen from the letter of submissions, if you
8 like, at the beginning of the week from my instructing solicitor, that we have alerted the
9 Tribunal to the possible need of a further amendment to our Notice of Appeal arising
10 out of our belated knowledge of a difference between the 8 per cent. and the 9 per cent.

11 THE PRESIDENT: Yes.

12 MR HARRIS: I have discussed this with the learned Leader for the Office of Fair Trading
13 and he says if we are to make that amendment he wants to see it as soon as possible. I
14 am content to do that by the end of next week - seek permission for an amendment - it
15 is a very short point.

16 THE PRESIDENT: What I suggest is that you draft your amendment and supply it to the
17 Office of Fair Trading and the Tribunal, and other relevant parties if necessary, and we
18 will deal with it formally on next occasion, on 22nd January.

19 MR HARRIS: I am very grateful. Then in a similar vein there is provision, as you are well
20 aware, Sir, in the rules for permission to give a reply. We do intend to draft a reply and
21 seek such permission, but somewhat unsurprisingly in light of the ongoing receipt of
22 materials we have not yet had the opportunity to do that. What we propose to do is
23 formulate it, send it, and it can be dealt with by way of an application for permission on
24 the next occasion. It may be uncontroversial when it is seen.

25 THE PRESIDENT: Well if you wish to seek permission to file a reply then the best thing to
26 do is to prepare it in draft and seek that permission.

27 MR HARRIS: I am very grateful. I should just for the record state, though it is set out in
28 the letter, that may be accompanied by some very short evidence. There are some
29 issues of fact concerning our appeal that may simply need to be clarified. On that
30 occasion, therefore, I would be seeking permission for some short additional evidence,
31 but that could all be dealt with by sending it----

32 THE PRESIDENT: Well let us cross that bridge when we need to.

33 MR HARRIS: Yes, I am very grateful. So as I understand it, Sir, at least two issues then
34 arising from this list which we want to deal with. There is confidentiality with which
35 the Tribunal has a concern, which bears partly on our Notice of Appeal, and then there
36 is this issue about the transcript of the ex-parte hearing. It may be that those two having
37 been dealt with the scope of today's hearing could be narrowed, and the learned Junior
38 to my right could actually find a place at the table. Thank you.

1 MR WEST-KNIGHTS: Sir, just quickly - you did, as it were, invite any refinements on the
2 timetable for skeletons. On the assumption that the OFT is given a time limit of
3 Monday, 23rd February, I imagine it will not serve anything until 4 or 5 o'clock on that
4 day unless it is ordered to the contrary, unless the Tribunal knows that it will be
5 working over the weekend, I wonder if we could have until 10 o'clock on 1st March, 10
6 am, and then if there is any work to be done....

7 THE PRESIDENT: Yes.

8 MR WEST-KNIGHTS: Thank you.

9 MR MORRIS: Sir, could I just raise, in relation to Mr Harris's submissions about further
10 applications, could we have a date for him to serve his draft applications by the end of
11 the year so that we have time to consider them in advance of the draft reply, draft
12 amendment, which I think he is going to do sooner, and any evidence, that that be
13 served by 31st December.

14 MR HARRIS: Actually, Sir, that does create a problem, it is the holiday period problem. I
15 would be content to put in the proposed amendment application. I would be content to
16 use best endeavours to provide a draft witness statement, that may be possible, but it is
17 very difficult to say. But I would not be content with the end of the year for a draft
18 reply and all the evidence, simply because of the holiday period. I would ask for a week
19 before the CMC. I do not anticipate that these matters will be controversial, and indeed
20 a reply, one way of obtaining permission, is very short.

21 THE PRESIDENT: Let's say 9th January, Mr Harris.

22 MR HARRIS: Well, Sir, can I ask for either 10th or 11th just bearing in mind some holiday
23 periods that I am aware of and client difficulties as well.

24 THE PRESIDENT: Well 10th or 11th are Saturday or Sunday.

25 MR HARRIS: Well, perhaps the end of play on 12th. That is a good 10 days before the
26 CMC, for what I anticipate will be rather uncontroversial documents.

27 THE PRESIDENT: All right.

28 MR HARRIS: I am very grateful.

29 THE PRESIDENT: Miss Bacon, yes?

30 MISS BACON: Again, Umbro has a similar request. We are considering whether we ought
31 to put in a reply and/or witness statement. We would be very happy with 9th January to
32 put that in with the request for permission to be dealt with at the next CMC, if you were
33 happy with that.

34 THE PRESIDENT: Let's say 12th for you as well. Before we leave mechanics, as it were,
35 the next matter the Tribunal would like to mention and seek the help of the parties on is
36 the question of documents and document handling. We have already got 60 or 80 files,
37 another 40 files arrived last night - documents show some signs of getting out of
38 control, I think, in this case. What I think we need - we may in part have it already - but

1 what we essentially need is a convenient way of finding the Decision, the documents
2 referred to in the Decision, the Notices of Appeal, and the defence, and the witness
3 statements produced or relied on by each party. In particular, what we have not got at
4 the moment is a convenient way of finding all the witness statements, they are all over
5 the shop - unless we have missed something, including those things which may have
6 been served at the stage of the administrative procedure, but are still relied on at
7 present.

8 That leaves a rather miscellaneous collection of documents that are in the
9 common bundle of Allsports and JJB but are not documents referred to in the Decision.
10 Again, it is a bit difficult to find that. What I would suggest is that in the New Year,
11 there should be a working meeting on a date to be fixed between the Tribunal staff and
12 the parties, simply to sort out a convenient way of having the documents so that we can
13 all be working on files that are easily manageable. We will come back to you on a date
14 for a practical meeting of that kind.

15 Now, confidentiality issues - if we have got that far. Again, I think today it is
16 not going to be possible to go into detail in relation to particular documents, but we
17 think that there are some points of principle floating around, and that one ought perhaps
18 to distinguish between various categories of documents for which confidentiality is
19 claimed.

20 The first category is claims of confidentiality for matters that are actually
21 mentioned in pleadings, that is the Notice of Appeal or the Defence.

22 The second category is claims for confidentiality in documents that are
23 mentioned in witness statements, or are annexed to witness statements, and by "witness
24 statements" I include there documents that were annexed to the original draft and other
25 leniency statements produced by Umbro at the stage of the administrative procedure.
26 The third category of documents are documents that were in the OFT's administrative
27 file for which confidentiality was maintained during the administrative procedure, but
28 have not so far surfaced as part of the pleadings or other witness statements.

29 In general, if we can take those matters in order, the Tribunal is not feeling very
30 comfortable about claims for confidentiality in the pleadings, or in the witness
31 statements. The Tribunal at some point has to write a Judgment on this case. If a matter
32 of fact is asserted in a pleading as being relevant to the Tribunal's Judgment it is going
33 to be quite difficult to treat that as a confidential matter.

34 If the matter of fact relates to the events of the year 2000 or the year 2001, in
35 relation to proceedings that will in fact be heard in March 2004, it is very doubtful
36 whether there is properly to be accorded such confidentiality or whether the interests of
37 maintaining that information as confidential actually prevail over the general principle
38 that these proceedings should be as transparent as possible.

1 The same, it seems to us, applies - and perhaps in a way even more strongly - to
2 the witness statements. If there is a fact which the witness considers relevant,
3 sufficiently relevant to be included in the witness statement, then it seems to us that
4 that fact could be, in principle, in the public domain.

5 So one of the matters on which we would invite submission, or at least
6 reflection about, if necessary to be sorted out at the next CMC if people want time to
7 think about it, is whether there are any grounds for maintaining any confidentiality in
8 relation to matters that are in Notice of Appeal, in the Defence, or are referred to or
9 annexed to witness statements.

10 We would invite the parties particularly to think about that. I appreciate that
11 there is, or maybe, some sensitivity about information about margins, for example. But
12 then again we are not considering, or the facts should not be directed to, the current
13 situation four years later but what the margins were at the material time, and that may
14 well be a material fact in the case. I think this point does affect everybody because
15 everybody has to some extent or other claimed some confidentiality for something - I
16 think with the exception of JJB who have not actually claimed confidentiality.

17 So we would like that problem on the table and invite your consideration of it.

18 MR WEST-KNIGHTS: Can I say on behalf of Allsports that I think that we claim
19 confidentiality only in respect of one matter and that is the current information as to the
20 spend on achieving our gross margins, that is to say shopfitting, employee training and
21 so forth, which appears in our Notice of Appeal. That is current information. It may be
22 that that information can simply be struck if the OFT accepts the proposition which is
23 being advanced. It was easier for those instructing me to acquire current information
24 than it was to acquire historic information. There are two redactions, I understand, in
25 the statement of Miss Charnock on current margins. It would appear that the Office is
26 not very excited about Miss Charnock's statement. They are current margin points but
27 again it may be possible for them to be struck if the proposition which underlies their
28 being there is acceptable. In other words, the problem can simply go away, that we will
29 not need to rely upon that current information.

30 Does that help?

31 THE PRESIDENT: Well, it is helpful to this extent. If for some reason current information
32 has crept into the Notices of Appeal it may well be possible to take the view that that
33 current information is not really relevant to the appeal, does not need to be in the
34 Notice of Appeal, and can therefore be left out and the problem can be
35 circumnavigated.

36 MR WEST-KNIGHTS: Certainly, so far as the Notice of Appeal is itself concerned it
37 would be helpful plainly if we could find the equivalent spend figures for the year in
38 question, unless the OFT does not take issue with the point being made. The point

1 being made being that we spend more on acquiring customers than, for instance,
2 Sportsworld. In other words, we have a higher overall pool of overheads because we
3 regard ourselves as a retailer of a different kind, that is all. It may be common ground.
4 The only other thing----

5 THE PRESIDENT: The other possibility here, Mr West-Knights, is that you indicate some
6 kind of order of magnitude---

7 MR WEST-KNIGHTS: Absolutely.

8 THE PRESIDENT: ---that conceals a precise figure, and gives one what one needs.

9 MR WEST-KNIGHTS: But in so far as we have, as I said, a claim for confidentiality it has
10 been very minimal and only in respect of those current figures.

11 Can I just put down two markers then on the general subject of your
12 observations on being comfortable or not?

13 THE PRESIDENT: Yes.

14 MR WEST-KNIGHTS: First, the Umbro leniency statements in draft are accompanied by
15 materials which are the subject of wholesale redaction. I have seen, and no doubt you
16 have, a brief disquisition from Umbro which certainly arrived on my fax machine this
17 morning, being supplementary submissions in respect of confidentiality saying they
18 had been facing a very difficult task and so forth. Any marker that I wanted to put
19 down is that we have asked for a number of documents relating to Umbro which went
20 on a list which had some new numbers on it. We produced a schedule, which is before
21 the Tribunal if we need to look at it, which said "Here are some examples where
22 Umbro simply say 'Business Secret', or 'Trade Margin' or whatever, and that is all that
23 they say". If I can just show you - perhaps not even need to show you---

24 THE PRESIDENT: This is 27th November, is it, or is it earlier than that?

25 MR WEST-KNIGHTS: It is attached to a letter of 28th November. It should be in tab 2 of
26 the submissions' bundle, and the new list is one of those grid-type jobs and starts with
27 the word "Schedule" - page 12.

28 THE PRESIDENT: Tab 4 in ours, at page 12.

29 MR WEST-KNIGHTS: I only wanted to take two - I don't want to get into the detail, but
30 this is our basic position, which is that we say that Umbro are simply not addressing
31 their minds to the indications which the Tribunal have already very clearly given on
32 the subject of confidentiality.

33 THE PRESIDENT: No, you have given an argued reason for why you want those
34 documents.

35 MR WEST-KNIGHTS: Can I just take you to U3, which is the bottom of the first page of
36 my version of this Schedule, if it has come out the same way.

37 THE PRESIDENT: Yes.

38 MR WEST-KNIGHTS: This is a memorandum of a meeting between Umbro and Sports

1 Soccer on the very day when it is alleged the England Agreement starts to be hatched.
2 This is the day on which it is said that Mr Ashley agreed with Umbro subject to the
3 subsequent concurrence of the other retailers that he would not discount the shirt. The
4 reason given is "Business Secret", that is the Umbro reason given. It is referred to in the
5 Decision, I should say, this document, so it is in the primary category. "Business
6 Secret" is defined by Umbro wherever used as "Strictly confidential information
7 regarding ongoing business which would be seriously detrimental to the Umbro
8 business if disclosed". Here is the note of that meeting. You can see vividly the whole
9 of page 1 is redacted, some of page 2 and the whole of page 3.

10 This is a document at the centre of this case. Now, all I say by way of
11 paradigm is that appears to be the Umbro reaction, "Business Secret", and I do remind
12 the Tribunal, if needs to be reminded, that that information is on its face highly
13 unlikely to be current, or capable of seriously damaging their business. But even if it
14 might **this** document is at the centre of one part of this case subject to the submissions I
15 shall be making later.

16 The other paradigm is U6, which is over the page. Another memorandum of a
17 meeting between Umbro and Sports Soccer, probably on 1st August. It looks as if
18 somebody has reused a form which has got the wrong date on it of 14th June.

19 Now, if I can remind you again, this is referred to expressly in the Decision, so
20 it is in your prime categories of documents. 1st August, if I may remind the Tribunal, is
21 the date on which the Manchester United Agreement, as it is alleged to be, came into
22 effect. So one would expect to see, perhaps, something about that in a document where
23 Sports Soccer and Umbro meet on that very day. This is that file note, page 2. It is
24 illegible and redacted. I am holding up an illegible copy - not because we've done
25 anything forensic, but this is as good a copy as we could get.

26 Again, the rubric used by Umbro is "Business Secret", that is to say ongoing
27 business the revealing of which would be seriously detrimental to their business. I
28 picked those two as paradigms to illustrate that the difficulty which we say the parties
29 have been faced with is a blanket, or at least a failure to take into account what, for
30 myself, seemed to be a clear indication on the last occasion, undoubtedly to be
31 bolstered today, as to the approach to be taken. But it is for that reason that All Sports
32 is seeking today whether it be an order or whether it be an indication in the clearest
33 possible terms, something better than just parking the problem of confidentiality over
34 to a number of occasions, which I think was being floated by other parties. What the
35 mechanism is seems to us to be broadly immaterial so long as it is effective.

36 THE PRESIDENT: Thank you. Yes, Miss Bacon. Umbro is caught in the crossfire?

37 MISS BACON: We are caught in the crossfire. Necessarily in this appeal the large majority
38 of the documents emanate from Umbro.

1 THE PRESIDENT: Yes.

2 MISS BACON: They concern Umbro's dealings with different retailers, and Umbro is in a
3 very difficult position. There is a difference between generic turnover figures and, for
4 example, prices, discounts margins which are specific to negotiations with individual
5 retailers.

6 THE PRESIDENT: Yes.

7 MISS BACON: Something which was negotiated in 2001 or even 2000, may well have a
8 bearing on ongoing commercial negotiations with parties today, because it is retailer
9 specific.

10 Umbro has not sought to give a blanket "no" in any respect. We have sought to
11 be as generous as possible but there are certain documents in which we simply cannot
12 explain the nature of the document, because that would involve disclosing the very
13 confidential fact which is sought to be protected. That is the problem in relation to
14 explaining this large schedule of documents produced by Allsports. It is the very nature
15 of those documents.

16 Umbro has already provided to the OFT the detailed reasons in relation to each
17 and every one of those documents why confidentiality is sought.

18 THE PRESIDENT: I see, just let me be clear. In relation to the Allsports schedule vis a vis
19 Allsports you have said "Business Secret" because it is difficult to describe the
20 document in more detail without revealing its contents.

21 MISS BACON: Exactly.

22 THE PRESIDENT: But you have, according to you, provided the OFT with further
23 information.

24 MISS BACON: We have. The problem is that the OFT, of course, cannot disclose that
25 information to Allsports without revealing the nature of the document. The way
26 forward that I would suggest, and Mr Morris agrees, is as follows: the Tribunal has a
27 copy of the relevant documents unredacted. We are not sure exactly where it is, but the
28 Tribunal does have the documents - C1 mainly, I am told.

29 MR WEST-KNIGHTS: The references are on our schedule.

30 MISS BACON: I would suggest that the way forward would be for Umbro to provide its
31 explanation as to the reason for confidentiality to the Tribunal, and the Tribunal can
32 then take a view on whether confidentiality ought to be maintained, if necessary, if
33 further explanation is needed than that which has already been supplied to the OFT
34 Umbro can provide it. But that in the first instance should be the way forward---

35 THE PRESIDENT: So you want us basically to rule on it?

36 MISS BACON: Exactly. And the Tribunal can then take a view---

37 THE PRESIDENT: How many documents are we talking about?

38 MISS BACON: Oh a large number. Allsports schedule runs to some four pages. It looks like

1 20 to 30 documents.

2 THE PRESIDENT: Yes.

3 MISS BACON: My instructing solicitor tells me that some of these have actually now been
4 disclosed. There may be less documents than appears on the face of it.

5 THE PRESIDENT: Are we talking essentially about the Allsports' Schedule, or are there
6 other documents that are still in issue?

7 MISS BACON: Essentially the Allsports' Schedule, yes. We understand that JJB has also
8 served some kind of schedule seeking further redactions to be lifted, but I believe it is
9 mostly Allsports.

10 LORD GRABINER: I am sorry, I do not want to throw any more rocks into this particular
11 pot, but I am told that we also have put forward such a schedule, but it has not been
12 progressed at all in the sense that we have had no response from the OFT on it. So what
13 is now being debated might, in due course, impact upon our position as well depending
14 upon the reaction we get from the OFT to our schedule.

15 THE PRESIDENT: I think there are possibly two ways of doing this, certainly in relation to
16 documents that appear to be contemporaneous with the facts that we are discussing, it
17 is very likely that the Tribunal will order their disclosure for the reasons that I have
18 already given. It may well be appropriate in relation to such documents to consider
19 certain safeguards, however, for example, that the documents, which I think is self-
20 evident anyway, are not used for any purpose other than the purpose of the
21 proceedings, that they remain in the custody of the instructing solicitors for the parties,
22 that they do not leave the offices of the instructing solicitors for the parties, nor are
23 copies taken; and that they are delivered up in some satisfactory way at the end of these
24 proceedings. That, I think, should avoid historical information that could conceivably
25 be commercially relevant, or at least minimise the risk of historical information that
26 could be commercially relevant, as it were, seeping back to the commercial policies of
27 the company's concerned. If someone simply comes in and sees a document in a
28 solicitor's office, well there it is. I am talking now about the documents in the Allsports
29 Schedule.

30 MR WEST-KNIGHTS: Sir, yes. I say, with the greatest of respect to the North of England
31 - from where I do indeed hail - that requiring me to visit Leeds to have a look at a note
32 of a meeting of 24th May would seem unduly harsh.

33 THE PRESIDENT: I do not exclude Counsel's chambers obviously, save for taking
34 counsel's advice.

35 MR WEST-KNIGHTS: I was simply going to make a small suggestion. Rather than get
36 into a possibly circular pickle about ex-parte hearings, I wonder if it might be prudent
37 now for us to rise, and for the Tribunal to have a look at the two paradigms that I have
38 looked at, just to form the flavour. I hear a nod of "no", or a shaking of the head of "no"

1 here. Only the Tribunal can cut this knot in the end. There can be no harm to Umbro in
2 the Tribunal seeing these two documents in their unredacted form, assuming that the
3 second one is legible in the iteration which you have, and just see whether that assists
4 you in whether that sort of regime is likely to be applicable to this kind of document. I
5 just float that as a possibility.

6 THE PRESIDENT: I do not think we do actually want to look at particular documents now,
7 Mr West-Knights. The other possibility, and I just float it, although I am not
8 particularly keen on a limited, as it were, Counsel only type exchange, is whether there
9 is some possibility for these documents to be considered by legal advisers to see if they
10 can crack the nut before you ask the Tribunal to crack the nut.

11 MR WEST-KNIGHTS: That proposition has not so far been put forward by, as it were, the
12 OFT. I think we were aware latterly that a further explanation had been given to them
13 than had been given to us---

14 THE PRESIDENT: Yes.

15 MR WEST-KNIGHTS: ---but the procedure had there stopped pending today. Now, either
16 you can require the lawyers to cut the knot, which involves requiring Umbro to give a
17 degree of disclosure, or you have a look at them yourself. If you are not particularly
18 comfortable with the second option, then it would appear that an order in the first
19 instance, saying, "let the lawyers have a look at them", would go some way to sorting it
20 out, but sorted out it must be.

21 THE PRESIDENT: No, no, quite. Don't worry we will sort it out. We are just reflecting on
22 what is the best way of doing it? Yes, Mr Morris, what is the OFT's view on this?

23 MR MORRIS: Well our view generally is that we will do everything we can to help on
24 this.

25 THE PRESIDENT: Is it that you are stuck with your confidentiality duty, and you do not
26 dare do anything before the Tribunal's order?

27 MR MORRIS: Yes.

28 THE PRESIDENT: Or is it that you do not actually think that these documents are relevant
29 to the case?

30 MR MORRIS: Well, both. First, I do not think it is for us to form a view on relevance
31 when the source has been disclosed by appellants wanting to see them.

32 THE PRESIDENT: Well prosecuting counsel would normally have to form some view as to
33 whether something was relevant.

34 MR MORRIS: Secondly, we feel, having looked at them - certainly this is in relation to
35 Umbro, and the reason I rose to my feet is because I wanted to mention people other
36 than Umbro, because Sportsworld is precisely one of the issues.

37 We have looked at these documents on the question of confidentiality and we
38 feel that it is not for us, because of our duties not to disclose, to take a view. They

1 appear to be prima facie confidential, there then comes the balancing exercise that you
2 are talking about between disclosure and confidentiality and we do not feel that the
3 Office of Fair Trading is in a position to make a Judgment on that. I think either the
4 regimes that you have put forward is a good one, but perhaps the second suggestion on
5 a lawyers' only basis may be the best way because then people will be able to see
6 exactly what the documents are about, and it may be with a bit of luck that it can be
7 resolved that way.

8 On the question of parties other than Umbro and people other than parties to the
9 proceedings then we are their proxy in a way because we have to get their views, and
10 obviously even today we cannot put forward the views of it is not just Sportsworld, but
11 there are other people to whom we have sent a mass of documents asking for their
12 views - this is on the slightly wider area. Certainly in the case of Sportsworld there are
13 documents annexed to Mr Ashley's statement, and in the documents on file, and I am
14 reading now from a note passed to me by Mr Anderson in his observer status---

15 THE PRESIDENT: Where is Mr Anderson? Sorry, Mr Anderson.

16 MR ANDERSON: I wasn't quite sure how far back to sit in my observer status.

17 THE PRESIDENT: Near enough to be an active observer.

18 MR MORRIS: The note I have is that they are commercially sensitive and they would like
19 to be heard on those documents. How they are heard is again a matter for you. If the
20 Tribunal, however, felt that the OFT should be in a position in which to make a
21 judgment then we will obviously do our best, but we felt, given the strength of feeling,
22 certainly on the part of Umbro in relation to these matters that it would not have been
23 appropriate at that stage for us to release them without any further view from the
24 Tribunal.

25 THE PRESIDENT: Yes, thank you.

26 MISS BACON: Umbro is happy with a Counsel only exchange - external counsel only.

27 THE PRESIDENT: External legal advisers, i.e. counsel in external instructing solicitors.

28 MISS BACON: Exactly. Could we suggest the following logistical progression of this. There
29 are a number of document requests outstanding. There is the Allsports schedule. We
30 understand there are some JJB redactions sought. There is also the Notices of Appeal,
31 Defence and so on, perhaps it would be sensible for JJB and Allsports to prepare a
32 combined single list of the documents they now seek, because some of these they now
33 do not seek, some issues have been resolved in the meantime - some have been
34 resolved this week. So if we could have a single list of the particular documents for
35 which unredactions are sought, then counsel only inspection of the documents. If there
36 are any outstanding documents which JJB and Allsports' counsel believe to be relevant,
37 because we may be able to eliminate many of them at the counsel inspection stage, if
38 there are documents which they believe to be relevant and which they think should be

1 undredacted, then they should make submissions on their relevance and any other
2 matters to the Tribunal. The OFT and Umbro should then respond, and the Tribunal can
3 then take a view. At that stage the documents will not have been disclosed to the
4 individual undertakings, either Allsports or JJB.

5 THE PRESIDENT: Yes. Mr Anderson, do you want to say anything on behalf of
6 Sportsworld in relation to this issue?

7 MR ANDERSON: I do not wish to make any submissions on specific documents, but we
8 echo very much what Miss Bacon has said. There are documents in the file attached to
9 Mr Ashley's witness statement for which we do claim business secrets and would wish
10 to make representations to the Tribunal, in camera, obviously not in front of the other
11 parties, on the question of commercial sensitivity. We are not party to the proceedings
12 so we do not know the relevance of them. It would assist, we think, our ability to make
13 meaningful submissions to the Tribunal on other ways forward if we knew what the
14 documents were being used for, and what their relevance was to the proceedings. At the
15 moment I can say no more than we would wish to be heard before those documents for
16 which we are currently claiming confidentiality are...

17 THE PRESIDENT: Would you see advantage before the Tribunal ruled on an intermediate
18 step whereby the documents were in fact seen by external legal advisers in the hope of
19 largely resolving whether they are relevant or not?

20 MR ANDERSON: Certainly.

21 THE PRESIDENT: It sounds to us as if that might be a way forward.

22 MR WEST-KNIGHTS: Yes, if we could put a timetable on it that would plainly be helpful.
23 We are in a position, if they want a single list then certainly so far as every outstanding
24 request from us is concerned it can very quickly be put into a single piece of paper and
25 we can happily do that by 4pm on Monday.

26 THE PRESIDENT: Yes. If your instructing solicitor would be kind enough to liaise with
27 JJB's so that--

28 MR WEST-KNIGHTS: If we can deliver in one letter.

29 THE PRESIDENT: I think we have some sympathy for Umbro caught in the cross-fire here.
30 For logistical and other reasons it is quite difficult to deal piecemeal with this sort of
31 thing so we need to crystallise it now.

32 MR WEST-KNIGHTS: We have sought not to deal piecemeal---

33 THE PRESIDENT: I am sure you haven't, I am not suggesting you have.

34 MR WEST-KNIGHTS: We entirely understand, and unless my Lord Gabor has anything
35 to say different, we will liaise and give them a comprehensive list by 4 o'clock on
36 Monday.

37 MR MORRIS: I do apologise, there are practical issues here.

38 THE PRESIDENT: Of course.

1 MR MORRIS: We have been very much concentrating on Umbro's position. There is a raft
2 of other material in relation to the other people. The position more generally is that
3 initially there was a big All Sports list. The schedule you have been looking at is a
4 subset of that list because it is Umbro related, but the wider list, of course, has been
5 distributed more generally to other people, other people who were parties to the
6 investigation and beyond that. The OFT has been gathering in replies in respect of that.
7 Lord Grabiner mentioned quite correctly that there was also something called
8 the "JJB Disclosure List" and I can say to you, Sir, that that list I think was received on
9 the OFT by 13th November, and indeed, to put it frankly it was overlooked. You have
10 seen the volume of documents---

11 THE PRESIDENT: Never mind, Mr Morris.

12 MR MORRIS: Two weeks later we have taken that list up and we have in the last week
13 looked at that list, which is similar to the original Allsports' list, and we have produced
14 a composite list.

15 THE PRESIDENT: Have we got a composite list?

16 MR MORRIS: Which we have sent, I think that is right, and the people behind me and to
17 my side will correct me if I am wrong. We have sent it to all parties, which illustrates
18 also the overlap as between the Allsports' List and the JJB list.

19 THE PRESIDENT: Have we got that?

20 MR MORRIS: I think you have and somebody will tell me where it is to be found. It is
21 about 10th December, I think it was sent on the 10th. JJB Correspondence file. It is in
22 the JJB Correspondence file, and I will give you the reference, Sir, in a moment.

23 MR WEST-KNIGHTS: Whilst my learned friend does that, can I just flag up one matter
24 which will not be on that list, simply because it was only received by us this morning.
25 There is a bundle relating to Sportsworld's leniency application. I myself have not read
26 it but I have flipped through it, it was on my desk this morning. It contains large
27 quantities of redacted - I cannot even tell you the scope of the redaction or the apparent
28 nature of it, but that will need to be added to the list, but I can't think of anything else
29 which has happened since the 10th.

30 MR MORRIS: Can we deal with that in a moment? I am trying to assist in the general----

31 THE PRESIDENT: We are just dealing with general at present.

32 MR MORRIS: Sir, at page 363 of the JJB Correspondence file--

33 THE PRESIDENT: Are these the huge files that arrived at 6 o'clock last night---

34 MR MORRIS: I am afraid they are, Sir, yes.

35 THE PRESIDENT: ---which we have not had a chance to open.

36 MR MORRIS: I am not surprised, Sir, but they are there now, and hopefully they can form
37 the basis for the future. Page 363 of that bundle is a letter to all parties of 5th
38 December. It may not have been sent on 5th December, it was sent on the 10th.

1 Attached to that is a schedule of documents of which disclosure is sought. That is at
2 page 366 and runs for quite a few pages to page 383 of that bundle.

3 What that bundle is, and I don't know if you would like me to hand up---

4 THE PRESIDENT: No, I don't think we want to look at it now.

5 MR MORRIS: Anyway that is a composite schedule of the JJB list and where the overlap
6 with the Allsports' disclosure list is. The OFT would suggest that should be the
7 starting point. The prospect of preparing further lists is, I think, for those behind me
8 overburdensome.

9 THE PRESIDENT: If we can take matters in order and deal first with Umbro, we would
10 suggest that there should be an exchange of documents for which confidentiality is
11 claimed between external legal advisers who should then meet and sort out, so far as
12 they can, which documents remain in dispute by, say, Monday, 12th January. If there
13 are further documents upon which the Tribunal is invited to rule we need to know that
14 in good time before the next CMC on 22nd January. That would involve the Tribunal
15 having reasoned submissions on that point by Friday, 16th January. There may be some
16 flexibility in this timetable, but we need to know by 16th what the position is.

17 It seems to us that a similar procedure could be followed by Sportsworld who,
18 although their status at the moment is somewhat informal, I would have thought ought
19 to be associated with this process for the purpose of sorting out confidentiality and the
20 Tribunal will willingly hear Sportsworld on these issues if it becomes necessary.

21 So if we could, in the first instance, leave it to the parties to organise that along
22 with the general lines we have suggested, that leaves the other documents, the third
23 category of documents coming from third parties who were not present before the
24 Tribunal. It is not at the moment clear to the Tribunal whether those documents are
25 likely to have any relevance at all to these proceedings. I think from memory a number
26 of parties have given their consent. There are two, or possibly three, documents that the
27 Football Association has reservations about, and it may be that - is it JB has the
28 somewhat equivocal position?

29 MR WEST-KNIGHTS: I think that is right.

30 MR MORRIS: That is right, yes.

31 THE PRESIDENT: It is rather hard to imagine at this stage that there is any document from
32 JB that is relevant to an issue in the case that has not been made available already. It
33 may well be that the Football Association documents which would only concern JJB
34 anyway are not relevant. So as far as those documents are concerned I would have
35 thought at the moment we simply park them, and see whether anybody wishes seriously
36 to make an application for their disclosure. Does that represent a working way forward?

37 **(The Tribunal confer)**

38 THE PRESIDENT: What Mr Colgate is saying is that what we need by 16th January, is not

1 only an indication of what documents are in dispute, but what the arguments are on
2 both sides for withholding disclosure, or giving disclosure.

3 MR WEST-KNIGHTS: Reasoned submissions.

4 THE PRESIDENT: Reasoned submissions, so that we can deal with effectively all
5 outstanding issues on 22nd January.

6 MR HARRIS: I think there is the issue of when Umbro should provide this exchange of
7 documents to external lawyers. I would invite the Tribunal to say some point as early as
8 possible next week.

9 THE PRESIDENT: Well, let's see what is convenient. I am conscious of the strain and stress
10 of this for Umbro in physical terms. Yes, Mr Anderson?

11 MR ANDERSON: Could I just add one point, Sir?

12 THE PRESIDENT: Yes.

13 MR ANDERSON: And that is in relation to the Sports Soccer documents, they do not
14 conveniently fall into that sort of a process, because it is not for us to argue for or
15 against their inclusion in terms of their probative value in these proceedings. We
16 simply wish to make it clear to the Tribunal what our concerns are in their commercial
17 sensitivity, and somewhere into that process, in our submission, needs to be factored an
18 opportunity if there are documents which the other parties wish to rely on, or use, we
19 would wish to have an opportunity to come to this Tribunal in camera in order to make
20 good our submissions on those matters.

21 THE PRESIDENT: Yes. Well as I see it, if the matter cannot be resolved in a process with
22 which you are associated you will let us know by 16th January in writing what your
23 concerns are and if that is dealing with matters that can't be disclosed, that will have to
24 be dealt with by the Tribunal in a way that obviously protects the confidentiality until
25 the Tribunal has ruled.

26 MR ANDERSON: Because we need to make good our arguments on why they are
27 sensitive.

28 THE PRESIDENT: Of course, yes. Are we all reasonably clear now?

29 MR MORRIS: Can I make an observation? We are looking at the practicalities of this, Sir,
30 and really both the timetable and the demarcation between the OFT and Umbro. I can
31 say that in so far as the Umbro documents have been identified by Allsports, we have
32 got readily available the unredacted versions and we (the OFT) will be able to assist in
33 the process of supplying those. Otherwise, in so far as there may be other documents
34 which may come out of the JJB request, to the extent that that is not covered, that may
35 be a greater amount of work. We are very happy to assist as far as we can, but what we
36 would like to avoid is again being caught in the cross-fire as much as we have been so
37 far.

38 THE PRESIDENT: Well everyone can always apply to the Tribunal for more time if it

1 becomes difficult to meet deadlines. Could the exercise of exchange on a legal advisers
2 only basis be completed by Friday, 19th which is today week?

3 MR MORRIS: Sir, I am in some difficulty because I am trying to understand what further
4 process needs to be done that has not already been done. What is available and can go
5 now, and what the Tribunal already has are those documents that are on the schedule
6 that we have been looking at today, and they can go, today, tomorrow, whenever. What
7 I am less clear about at the moment, and I may need to take instructions over the
8 adjournment, is what remains to be done and what would be involved in so far as there
9 are other documents on the JJB list that are Umbro related. I apologise for the pause
10 and the hesitation, but I am trying to take instructions here from the OFT as to what
11 remains to be done.

12 THE PRESIDENT: Just to keep this moving forward, let's say best endeavours by 19th
13 December, and if there are difficulties we will obviously let you have further time.

14 MR MORRIS: Very well, Sir, I am grateful for that.

15 THE PRESIDENT: Subject to the point about the transcript, which you were about to tell us
16 about, Mr Harris, that sorts that out. I do not think the Tribunal particularly wants to get
17 into a detailed argument today about the transcript, but the situation, I think, regarding
18 that transcript does give rise to difficulty.

19 It is an occasion on which Umbro came to the Tribunal to explain its concerns,
20 particularly certain commercial concerns about the situation it was in. We have the
21 difficult task of both respecting the possibility of the party to come to the Tribunal and
22 explain why certain matters should be confidential in confidence and, at the same time,
23 making sure what should be in the public domain is in the public domain. We have
24 given a Judgment which I think to a very large extent lifted the confidentiality claimed
25 and we are not at this stage particularly persuaded that we should go further and reveal
26 the submissions that Umbro made to us in confidence.

27 It seems to us on that particular point that there may have been perhaps a
28 misunderstanding at one stage in, I think, one part of the Defence of the Office of Fair
29 Trading, in that it does not seem to us that the Office of Fair Trading can properly rely
30 in any way on anything that was either said in that Judgment, or was said to us at that
31 hearing, in relation to matters that are of contemporary interest. The only matter that is
32 relevant in this case is what happened at the time in 2000 and 2001, and what is said
33 today about what is currently is, or may not be, commercially sensitive is not relevant
34 to anything that anybody did or said in 2000 and 2001. So as at present advised we are
35 not persuaded that we should disclose the transcript. But I think if somebody really
36 wants to "argue the toss", if I may use the colloquial expression, we would rather that
37 was done on 22nd January, and not today.

38 Mr Harris, that is not entirely the answer you were hoping for, or expecting.

1 MR HARRIS: No, Sir, I am content that it be postponed until 22nd, it was rather because I
2 was going to ride on the coat tails of Allsports and JJB, and it may be that in the light
3 of what the Tribunal has just indicated, JJB and Allsports will take this opportunity to
4 consider it as well. It is not something urgent for this CMC.

5 MR WEST-KNIGHTS: I can hear a hint as much as the next man, but may I just ask the
6 Tribunal to bear in mind over the short adjournment the position, which is not merely
7 that there is a passing footnote in the defence to this, but that in fact what it is that the
8 Tribunal perceives itself to have given a fair summary of is precisely that which Umbro
9 objects to the underlying material in respect of coming out. I think there are a lot of
10 "ofs" in that sentence.

11 If you could please bear to turn to my skeleton just for one minute. It is at page
12 internal 16 which in a logical world would be before tab 1, or tab 1 itself, paragraph
13 3.8.

14 THE PRESIDENT: Yes.

15 MR WEST-KNIGHTS: It is paragraph 13 of the Judgment, and the material words have had
16 the emphasis added. It is the assertion by Umbro, made to you, it appears, that the
17 question of their having sought leniency, i.e. having as it were 'dropped everybody in
18 it', has already been commercially damaging as regards its relations with its customers,
19 notably JJB and Allsports. It has made efforts to restore these good relations. It would
20 not wish to see that undone. Other adverse commercial consequences are referred to.

21 We are not concerned plainly with "other adverse commercial consequences" if
22 they have no nexus with this case. But the submissions which I received this morning,
23 and no doubt the Tribunal did from Umbro, which run to four or five pages, specifically
24 object to the transcripts being disclosed because of what is in paragraph 13.

25 Let me see if I can find it. Yes, it is paragraph 12 "Ex parte hearing" is the
26 heading on their page 3. "Sought disclosure. The application is made ex parte precisely
27 because of its confidential nature, for the purpose of having that hearing in camera
28 negated the transcript be disclosed. No analogy with an ex parte hearing in a freezing
29 application. The Tribunal will appreciate the confidential nature of the material
30 summarised in paragraph 13 of the Tribunal's Judgment in relation to that application.

31 So Umbro takes the view, it would appear, and I am trying not to be forensic,
32 that whatever the summary that was contained in the Judgment at paragraph 13, is not
33 it, because it is what underlies the summary that Umbro have a continuing objection to
34 JJB and Allsports seeing. The premise on this is a brief one. We are not concerned to
35 roam through a transcript on matters which are not material to the appeal, but as it
36 appears Umbro made submissions to the effect that Allsports and JJB have somehow
37 effected reprisals by reason of the whistle blowing, and although the summary is in the
38 Judgment at paragraph 13, it is what that is a summary of that Umbro will not have us

1 see.

2 THE PRESIDENT: So that is your worry about it, is it?

3 MR WEST-KNIGHTS: It is not a worry, it is a submission based on you as the fact finding
4 Tribunal have had submissions made to you by Umbro about us. The summary, the
5 Tribunal regarded as a fair one, of the underlying material, but plainly Umbro takes a
6 contrary view because the underlying material it is they do not want us to see. Again,
7 that might be capable of being solved on a lawyers only footing, but there it is. Things
8 have been said about us which have about them the flavour of being adverse, and the
9 application is founded simply on that.

10 THE PRESIDENT: Yes.

11 MR WEST-KNIGHTS: It is the particulars of what is in paragraph 13 that we seek, and it
12 is the particulars of what is in paragraph 13 that Umbro object to.

13 MR MORRIS: I hesitate to interrupt again on this issue, but can I raise one other matter
14 that is connected. There is a matter that has arisen. I do not wish to say more than that
15 at the moment. It is connected with your consideration at this point. The OFT's view is
16 that initially that is a matter which needs to be heard in camera with the Tribunal.

17 THE PRESIDENT: The matter that you are about to---

18 MR MORRIS: The matter that is connected with the debate that is currently going on. We
19 would ask the Tribunal to sit in camera, if only briefly, perhaps with Umbro also being
20 present. We are not desirous of prolonging today's proceedings nor being unduly
21 secretive, but it is a matter which is connected, and we would suggest we would raise
22 that initially either now or immediately after the luncheon adjournment with a view to
23 you, the Tribunal, taking a view as to how to progress it.

24 THE PRESIDENT: You are saying in any event this is not a matter that we should rule on
25 until we have heard something from you that you want to tell us?

26 MR MORRIS: Correct.

27 MR WEST-KNIGHTS: If you promise not to be horrid about us.

28 MR MORRIS: I will be very nice about you.

29 THE PRESIDENT: We can see both sides of this particular conundrum.

30 MR WEST-KNIGHTS: It is a conundrum, Sir, and I don't propose it wilfully, but you can
31 see the point.

32 THE PRESIDENT: No, I see your point, Mr West-Knights, I entirely see your point.
33 This is not a matter that I think we particularly want to rule on today. But if
34 there is something that the OFT needs to tell us we had better know what it is.
35 On a number of occasions people have understandably referred to what might
36 transpire "after the short adjournment". I had the impression that we are making
37 reasonably good progress and I am not completely sure that we need to go over the
38 short adjournment, at least as far as today is concerned. I know we have an important

1 point Mr West-Knights wants to make, and I need, I am afraid, Lord Grabiner, to have
2 some dialogue with you about the situation on the Notice of Appeal.

3 LORD GRABINER: Yes.

4 THE PRESIDENT: But subject to those two issues it does seem to me that if we just allow
5 ourselves, if the Shorthand Writer will bear with us, if we go a bit past 1 o'clock we
6 may well get through most of what we can usefully do today anyway, so we will put off
7 the Umbro thing. We will hear the OFT a little later in the morning - or what is left of
8 the morning - when we have dealt with the two things that I think are outstanding
9 which is Allsports' application regarding what they say is a change of case, and the JJB
10 Notice of Appeal which I think is a matter we do need touch on.

11 MR WEST-KNIGHTS: I think there is possibly a third thing, unless it falls into the rubric
12 of everything else that is being sorted out. We have been served a statement for Mr
13 Ashley. You will recall that we suggested that and that suggestion has been taken up.

14 THE PRESIDENT: Yes.

15 MR WEST-KNIGHTS: We have had a schedule with that statement, and some clips of
16 underlying material from the process below.

17 THE PRESIDENT: Yes.

18 MR WEST-KNIGHTS: There are some quite serious ambiguities in which bits are being
19 relied upon. They underline certain passages, but some of those passages start with
20 "Moreover", or "Such pressure". In other words, there is an automatic reference to
21 antecedent paragraphs which are not themselves flagged up for reliance. I am very
22 happy to deal with that off-line, with the Office, so long as it gets dealt with.

23 THE PRESIDENT: Yes, I think if you are concerned about it you should write to the Office.

24 MR WEST-KNIGHTS: We have. It is on the table. We can probably resolve that between
25 ourselves, I see Mr Morris is smiling optimistically.

26 THE PRESIDENT: Yes.

27 MR WEST-KNIGHTS: If there is going to be an opportunity for a short break I would very
28 much personally appreciate one now.

29 THE PRESIDENT: Shall we take just five minutes?

30 MR HARRIS: Sir, may I, with the greatest of respect ask permission to withdraw. I will try
31 and do it as gracefully as possible?

32 THE PRESIDENT: Yes, of course, Mr Harris, thank you.

33 **(Short break)**

34 THE PRESIDENT: Shall we turn to your proposed application, Mr West-Knights?

35 MR WEST-KNIGHTS: I am very grateful.

36 THE PRESIDENT: As a matter of very first impression, and it is only a first impression,
37 because we have not heard your detailed argument, what we are wondering to ourselves
38 is whether this really is a matter that needs to be sorted out on an interlocutory basis, or

1 whether it is something that could not more conveniently be dealt with at the hearing
2 when we have heard the evidence?
3 MR WEST-KNIGHTS: I understand that, and I will meet that point directly.
4 THE PRESIDENT: We cannot, I think, go into it in detail today as you yourself say, but I
5 think we are a bit reluctant to pick at bits of a party's case until we have the whole
6 context, and it is going to be quite difficult to have the whole context until it got to a
7 hearing. So that is our first impression.
8 MR WEST-KNIGHTS: I understand that. It is extremely helpful to know where to focus
9 one's fire. I am not going to read to you my skeleton, but it might be helpful if I could
10 direct your attention to specific parts of it.
11 THE PRESIDENT: Yes, we have read it.
12 MR WEST-KNIGHTS: I am very grateful to you.
13 THE PRESIDENT: A further matter that is in our minds is whether what is being now said
14 by the OFT does require you to do very much, as it were, further work in order to deal
15 with it because, as we understand it the OFT is not actually referring to anything that is
16 not already in the Decision.
17 MR WEST-KNIGHTS: You are wrong about that.
18 THE PRESIDENT: Sorry?
19 MR WEST-KNIGHTS: You are wrong about that.
20 THE PRESIDENT: I am wrong about that, I see.
21 MR WEST-KNIGHTS: The one minute version is this: The particulars given of the
22 England Agreement in the Decision are that an agreement was reached on the
23 telephone on a date which they are wholly unable to specify.
24 THE PRESIDENT: We have read the Decision, yes.
25 MR WEST-KNIGHTS: That during the course of a telephone call Umbro asked Allsports,
26 and you can put square brackets "JJB" wherever I say this at this stage, whether or not
27 they would agree to fix the price of the England Shirt of 39.99.
28 THE PRESIDENT: Yes.
29 MR WEST-KNIGHTS: That agreement was concluded by Allsports agreeing to do so.
30 That is the "England Agreement" in the Decision - full stop.
31 THE PRESIDENT: Yes.
32 MR WEST-KNIGHTS: Below, observations were made that there was something
33 inherently unlikely about that scenario, not the least of which was the fact that Umbro
34 would, at all material times, have known what the pricing policy of Allsports was.
35 THE PRESIDENT: Yes.
36 MR WEST-KNIGHTS: That is enforced by an aspect of the Decision in which a letter from
37 Mr Guest to a Mr Gourlay of Umbro, of early 1999, April I think.
38 THE PRESIDENT: March, I seem to remember, but I may be wrong.

1 MR WEST-KNIGHTS: You may be right, I am told April.
2 THE PRESIDENT: Yes.
3 MR WEST-KNIGHTS: Was remarked upon in the Decision specifically, and only for the
4 purpose of saying that that indication of Allsports likely pricing policy may have
5 facilitated the making of agreements. Now, the challenge in the defence, which is
6 designed under the Tribunal's procedure, to identify what it is that the appellant says is
7 wrong with the Decision----

8 THE PRESIDENT: Yes.
9 MR WEST-KNIGHTS: ---met head on the allegation that the England Agreement was
10 formed in a telephone call between Ronnie on the one hand and somebody at Allsports
11 on the other.

12 The nature of the Tribunal's proceedings, as you have yourself remarked on a
13 number of occasions, is that the Decision is the benchmark, that the defence is required
14 to be sufficiently particular to identify those issues which are raised on the appeal.

15 THE PRESIDENT: Yes.
16 MR WEST-KNIGHTS: What is wrong with the Decision, and the purpose of the defence is
17 to meet, if it can, that attack.

18 We put in a defence which, I apprehend would be characterised by the Tribunal
19 and by the Office as a document of appropriate particularity - not more, but certainly
20 not less.

21 The result of our having been specific and particular to say why the Decision
22 was wrong in respect of the England Agreement is not met by rebuttal of that attack,
23 but by the production of a different case. That first is wrong as a matter of principle. If
24 that were all it was that is a submission which I could safely make to the Tribunal on
25 8th March, or so soon thereafter as I could sensibly be heard, and invite the Tribunal to
26 hear no evidence about the agreement whatever, but to allow the appeal.

27 THE PRESIDENT: Yes.
28 MR WEST-KNIGHTS: The alternative formulation, however, has about it a number of
29 adverse consequences which do not admit of leaving it to the hearing. I leave aside the
30 fact, or indeed the mechanism whereby this has occurred, but it is itself deeply
31 unsatisfactory and itself demonstrative that something has happened which ought not to
32 have happened, namely, that we received, attached to the Office's defence, a witness
33 statement from Mr Ronnie, Ronnie (IV) - we call him "Ronnie (IV)" that being the
34 fourth statement of his, in which he says:

35 *"I did not ring Allsports and JJB to ask them to agree to maintain prices on the*
36 *England home kit".*

37 That was, although it does not say so in that witness statement, a quotation from
38 Ronnie (III) upon which the Decision is based, because his paragraph 32, as reflected in

1 the Decision, said "I rang Allsports and JJB to ask them to agree to maintain prices on
2 the England Home Kit..." and he goes on to say "Phil Feloni telephoned others". The
3 next paragraph: "JJB and Allsports agree.

4 He now says something entirely different - it is a wholly new case. That is
5 quintessentially what the Office may not do. There is a good analogy----

6 THE PRESIDENT: I think, Mr West-Knights, we are not really wanting to go into it--

7 MR WEST-KNIGHTS: OK.

8 THE PRESIDENT: ---in much detail now.

9 MR WEST-KNIGHTS: OK, that is the one minute version.

10 THE PRESIDENT: All we want to know is whether there is a serious point here to be
11 argued.

12 MR WEST-KNIGHTS: Yes, well there is plainly a serious point to be argued on the
13 change of case. The question is whether it need be taken earlier than the hearing.

14 THE PRESIDENT: That is, I think, crucial.

15 MR WEST-KNIGHTS: The alternative proposition is that Allsports were given
16 information about Sports Soccer's pricing intentions. That is now the allegation that is
17 made. That is new allegation number 1. For that to be an infringement requires more
18 than the mere making of a telephone call. For that to be an infringement, it requires
19 there to be a continuum of, the Office now puts it in its defence, complaints and
20 pressure.

21 Furthermore, there is a tertiary case, a second new case, mounted by the Office,
22 that it is not necessary for them to prove the existence of a telephone call at all, of any
23 character in order to implicate Allsports into the England Agreement. Again, they seek
24 to import matters of pressure brought by Allsports on Umbro.

25 There are two factors in that. First, everything which is expressly described as
26 pressure in the Defence is a matter which was expressly not used for that purpose in the
27 Decision.

28 I remarked at the first hearing that first, there was an express Decision made by
29 the Office to abandon its case against Allsports on retailer pressure on Umbro. Some of
30 those matters which now form part of the new case by the office were mentioned in the
31 Decision but wherever you find them you will find them used for a different purpose. If
32 I were to take, for example, the Guest/Gourlay letter, it is now proposed to rely upon
33 that as an example of a continuum of retailer pressure on the part of Allsports against
34 Umbro. In the Decision it is mentioned, but used only for the purpose of showing that
35 Allsports pricing policy was known to Umbro and that that fact facilitated the making
36 of agreements. There are passages in the third witness statement of Mr Ronnie, which it
37 is now expressly sought by the defence to use for the purposes of establishing pressure
38 by Allsports on Umbro. Where one looks in the Decision----

1 THE PRESIDENT: How much more work do you need to do in order to deal with all this?
2 MR WEST-KNIGHTS: I don't know, and I will tell you why. There are specific examples
3 of alleged pressure given in the defence which it is impermissible for the Office to raise
4 again. It is not a question of referring back for a fresh Rule 14 notice. This is territory
5 which has been roved over by the Office, and determined as not forming part of its
6 Decision. Now, those are certain events which took place around the time of the so-
7 called England Agreement. The only specific pressure which is identified in the
8 Defence - when I say "specific", the only particularity to which the Office condescends
9 is curiously matters occurring after 24th May. The current case that the Office seeks to
10 replace the Decision case with is that on 24th May, there was an agreement with
11 Ashley and that subsequently Allsports became a party to that agreement either by the
12 receipt of an assurance against the background of complaints and pressure, or that
13 Allsports is implicated in any event by reason of the pressure having been put on it. But
14 the specific examples of pressure, put into the defence as a new case post-date 24th
15 May - they include the Golf Day, which is 25th May. They include a meeting on 2nd
16 June. That to me makes little sense. What there is is a general statement that the Office
17 relies upon "the complaints" and "the pressure". We know that there was a good deal of
18 material in the Rule 14 Notice, in particular I think the supplementary Rule 14 Notice,
19 by which time the Office had started to hone its case, where strong allegations were
20 made - vague and unparticularised though they were, there were allegations being
21 made, usually as an afterthought to JJB, but Allsports was engaged in putting pressure
22 on Umbro throughout the period of 2000---

23 THE PRESIDENT: Mr West-Knights, subject---

24 MR WEST-KNIGHTS: We don't know how much of that we have to meet.

25 THE PRESIDENT: Subject to what Mr Morris is about to say, it does seem to me that this
26 probably does need to go off now to another day.

27 MR WEST-KNIGHTS: I have never suggested that it should be dealt with today, what I
28 am anxious to do is to displace any prima facie view that the Tribunal may so far have
29 taken that I am somehow "venturous" I think is Mr Morris's---

30 THE PRESIDENT: No, the only question in our minds is what is the appropriate moment to
31 deal with this -before the hearing or at the hearing?

32 MR WEST-KNIGHTS: My answer to your question is firmly, for the reasons which I have
33 expressed, and let me make it abundantly plain, we don't know what case we have to
34 meet on pressure, even if it is legitimate for them to run it, which it is not, and we have
35 no material in our witness statements which deals with it.

36 THE PRESIDENT: Right.

37 MR WEST-KNIGHTS: Accordingly, leaving it to the 8th March is returning to the fog.

38 THE PRESIDENT: We obviously need to ventilate it---

1 MR WEST-KNIGHTS: We do.
2 THE PRESIDENT: --I would hope on 22nd January.
3 MR WEST-KNIGHTS: I am grateful to you. That is all that I ask.
4 THE PRESIDENT: Having ventilated it we are then in a better position to see what should
5 be done about it.
6 MR WEST-KNIGHTS: Of course. But you very helpfully gave a prima facie view that this
7 might not need to be dealt with before 8th March, and I hope that my submissions at
8 least have taken me over to 22nd January, so that it cannot go in limine to the 8th
9 March. It is not just a point of principle which, in my submission, it would be helpful to
10 the Tribunal in any event to determine before 8th March, and I will tell you why. If the
11 Tribunal were to determine, simply as a matter of principle and, as it were, not need to
12 go to the further question as to whether the pressure case was insufficiently
13 particularised or onerous then the fields are clear. The only matter with which
14 Allsports will need to concern the Tribunal in its skeleton arguments, in respect of its
15 request for documents, in respect for its disclosure, in respect for matters such as
16 missing----

17 THE PRESIDENT: You have made that point, I think.
18 MR WEST-KNIGHTS: ---the missing Ronnie diary - I do put that in the pot. All of those
19 things will fall away if all that Allsports has to do is to address you on the Manchester
20 United Agreement, and that we all know that in advance.
21 THE PRESIDENT: Thank you. Yes, Mr Morris?
22 MR MORRIS: Sir, if I may try and cut this. We would say that the issue for you to decide
23 today, and we would suggest that actually that Decision should probably be made, is
24 whether this application is heard and determined before 8th March, or determined at or
25 some time during the hearing. We would, with respect, suggest, that merely leaving it
26 over to the 22nd January, to decide whether there would be a further hearing would not
27 resolve the issue.
28 THE PRESIDENT: What I am proposing is that we should hear it on 22nd January. We
29 have then to decide whether, at the end of that hearing, we then determine it, or
30 whether we leave it over to be determined at the hearing, or whether there is some
31 intermediate direction or other step that is appropriate to take. Or, indeed, whether this
32 part of the case proceeds at all. There are various combinations and possibilities that we
33 cannot pre-judge at this stage. The only point we are at at the moment is that it quite
34 difficult to deal with this now on a basis that does not involve further examination of
35 the point on 22nd January. It does not pre-judge anybody's position or anything.
36 MR MORRIS: Well may I respond in two ways to that. If the matter is left over to 22nd
37 January, it is possible that the matter itself, the application will be determined on that
38 day.

1 THE PRESIDENT: Well I cannot exclude that possibility.

2 MR MORRIS: But that in turn, in the light of Mr West-Knights' submissions would
3 involve skeleton arguments, detailed submissions before 22nd January. If I may take a
4 moment to just try to persuade the Tribunal not to deal with this matter until 8th March.
5 We suggest that a prior hearing will not save any time and expense, and indeed, it is
6 likely to involve substantial additional time and expense on the part of all concerned.

7 Let's assume that there is a prior hearing, and let's assume that it were
8 successful. We would submit there would be no significant saving of time and cost for
9 the main hearing in March. The appeals of all parties will go ahead on 8th March, that
10 is the first point.

11 Secondly, the England Agreement as an issue will still be an issue at the hearing
12 on 8th March, because of the JJB appeal.

13 THE PRESIDENT: Well our position is the same.

14 LORD GRABINER: Again, I do not want to put rocks in the pool, but we, as my learned
15 friend, Mr West-Knights has, I think, pointed out, he said you could put our name in
16 square brackets after all the points he was making, and our position is precisely the
17 same. The case has changed in at least two fundamental respects.

18 MR MORRIS: That is the first I have heard of that. My understanding was that JJB were
19 not---

20 LORD GRABINER: No, as far as I am concerned, this merely provides us with some
21 extremely valuable cross-examination material, so that at the end of the day we will be
22 saying that Mr Ronnie has dramatically changed his story. So I am quite content on that
23 basis----

24 THE PRESIDENT: You are not seeking a preliminary Ruling as such?

25 LORD GRABINER: I am not seeking one. If my friend gets it and it is thrown out I am happy
26 to hang on to it, but as far as I am concerned we will make these points good at cross-
27 examination in any event.

28 MR MORRIS: I am grateful for that indication.

29 MR WEST-KNIGHTS: I can assist Mr Morris to this extent. There is a very logical reason
30 why JJB takes a different stance from us. The pressure case against JJB is made
31 anyway.

32 THE PRESIDENT: I don't want to go into further detail at the moment, the clock is ticking
33 on.

34 MR MORRIS: Sir, if I may, I am trying to be as quick as I can on this point. Secondly, the
35 same witnesses are going to be called in any event - Mr Ronnie, Mr Ashley, Mr Feloni,
36 Mr Hughes and Mr Guest, will all be required to give evidence in relation to the
37 Manchester United Agreement. Those witnesses will be cross-examined by Allsports
38 and by the OFT. The only potential saving in time of the hearing on 8th May will be

1 that there may be some - may be some - limitation in the amount of cross-examination,
2 the duration of cross-examination of those witnesses. But that same saving, Sir, will be
3 made if the application is made at the outset of the hearing on 8th March, and succeeds
4 at that time. That is our first main point, namely, there is a lot to be done between now
5 and March and to have added in an additional hearing, with additional detailed
6 skeletons on an issue which is going to be clearly very contentious and involve detailed
7 consideration by the Tribunal of matters of great detail is not the sensible way forward,
8 and we would strongly urge the Tribunal not to say "We will deal with it on 22nd
9 January", because if, as soon as such an order is made that effectively means that the
10 point will have to be argued on 22nd January, and that will then involve going into all
11 the areas involved in the issue which are going to be raised in some detail for that
12 hearing. We submit that there is no saving in cost and time by having a prior hearing on
13 the point.

14 Indeed, we would suggest obviously because of the work that will have to be
15 done, there will be an increase in the cost and time involved of all parties. The
16 suggestion by my friend, Mr West-Knights, that they do not know how they are going
17 to respond to the case, we have set out in some detail in our defence what the
18 allegations are, the scope for further evidence on the point seems, in our view, to be
19 somewhat limited, it is a matter which they can respond to readily. The allegations of
20 pressure of which Mr West-Knights has sought to make so much a few moments ago,
21 all those allegations, all of them, were included, and formed part of the administrative
22 stage. They were all included in the supplementary Rule 14 Notice. They were all the
23 subject of response by ---

24 THE PRESIDENT: Are they in the Decision?

25 MR MORRIS: They are not relied upon in the Decision, and that is a separate point. They
26 are not relied upon in the Decision, but they were fully vented in the course of the
27 administrative process. The argument is whether or not the absence of finding, not an
28 express finding that there was no such pressure, but the absence of finding on that
29 aspect somehow precludes the matter from being raised again. But that is not a matter
30 for additional evidence, with respect.

31 MR WEST-KNIGHTS: At least three of the allegations are entirely new - I know that the
32 clock is passing, but this matters - secondly, there is a distinction between us and JJB
33 and it is material to this application. There is no case on pressure made in the Decision
34 at all. There is no evidence on pressure in my witness statement. The reimportation of
35 pressure is, therefore, wrong in principle; and secondly, is wide open - contrary to what
36 my learned friend says. The difference between me and JJB highlights this.

37 JJB faces a case on pressure anyway. There is a case on pressure against JJB in
38 the Decision. It is for that reason that JJB is in a different position from Allsports.

1 There is no case on pressure in the Decision against us. Expressly anything which
2 might have been used as pressure is used for another distinct purpose, but I say again
3 there are three distinct new allegations which are not in the Decision at all.

4 THE PRESIDENT: Thank you, Mr West-Knights.

5 MR WEST-KNIGHTS: And I would say that we will submit to a timetable for the service
6 of skeletons, and in our case the skeleton will give chapter and verse, as has been our
7 wont in the past, to identify precisely to the Office, and to the Tribunal why it is that we
8 make these submissions. We do so, if I may say so, not lightly and not merely as a
9 matter of principle.

10 **(The Tribunal confer)**

11 THE PRESIDENT: I think the Tribunal's present view is that the points that have been
12 raised by Allsports ought to be explored in more detail before we reach the beginning
13 of the hearing. I do not, at this stage, commit the Tribunal to deciding anything or to
14 pre-empting what may be properly argued at the hearing. I simply say we ought to go
15 into this in a bit more detail at some stage earlier than 8th March.

16 Our initial impression is that 22nd January may be rather crowded for various
17 reasons, and it seems to us that we ought to fix a separate day to explore a little further
18 what is being said. Did I say earlier that the pre-hearing review will be on 12th
19 February?

20 MR WEST-KNIGHTS: You said provisionally.

21 THE PRESIDENT: I think I have been mis-reading the calendar. I think we actually meant
22 19th February. I did say 12th?

23 MR WEST-KNIGHTS: You did say 12th.

24 THE PRESIDENT: I did say 12th and I meant the 12th! One possibility would be to put
25 that back a week to the 19th and to deal with this on 12th.

26 MR WEST-KNIGHTS: I wish, I am very sorry, I have brought my dates with me, I have a
27 two day case in the Leeds Mercantile Court on 12th and 13th February - 13th I think
28 being Friday 13th.

29 THE PRESIDENT: It is, absolutely, so that is difficult, I see.

30 MR WEST-KNIGHTS: In other circumstances I might proffer Mr Peretz, but this is a
31 matter of significance which, in my submission...[Laughter] I haven't finished! Perhaps
32 the note could read "of such significance that it merits Leading Counsel".

33 THE PRESIDENT: One of the problems for us is that the date for our move has been put
34 back and we are actually moving in the week beginning 2nd February. What about
35 Thursday, 29th January?

36 MR WEST-KNIGHTS: Yes, I can do that date. I am clear that week, in fact.

37 MR MORRIS: I am not clear that week.

38 THE PRESIDENT: I do not think we can fix this now, I think we will have to find a date,

1 but we do not think we can dare risk doing it on 22nd, because I think that will be a day
2 for other things.

3 MR WEST-KNIGHTS: I am just thinking out loud. What we have put over to 22nd is a
4 large number of things which may evaporate. I wonder whether it might be worth, at
5 least pencilling in to start it on 22nd, assuming that any supplementary time the
6 Tribunal have would be after that, and if we make a start on it so be it, and if we don't
7 we don't. We are proposing in our skeleton to give, as I say, chapter and verse on any
8 paper that the Tribunal needs to look at, and indeed to summarise the paper and it could
9 form a view by the 22nd as to how long it thinks it is going to take. I am just trying to
10 help.

11 THE PRESIDENT: I think at this stage we just leave the date open, the Registry will
12 communicate with the parties as to what is appropriate.

13 MR MORRIS: Sir, may I raise one matter?

14 THE PRESIDENT: Of course.

15 MR MORRIS: One of the planks of Mr West-Knights' argument, is the need to provide
16 further evidence in response.

17 THE PRESIDENT: Yes, that is right.

18 MR MORRIS: We would ask that prior to such hearing date he either produces that
19 evidence or at least gives a clear indication of what that new evidence needs to cover,
20 or what issues it goes to and its likely scope, so that we know by the time of the hearing
21 what there is to that part of his case in relation to new evidence.

22 MR WEST-KNIGHTS: If I may say so, that is Alice in Wonderland speaking. My
23 complaint, subject to your hearing this on 22nd---

24 THE PRESIDENT: If I can just try and cut it short, probably mistakenly, Mr West-Knights,
25 you have various points of principle, you have various points of law, you have also got
26 the argument that if there is a new case to meet it will involve you doing a lot of new
27 work upon which you ---

28 MR WEST-KNIGHTS: Of unknown scope.

29 THE PRESIDENT: Of unknown scope.

30 MR WEST-KNIGHTS: Sir, that is why I am not going to particularise it.

31 THE PRESIDENT: When we get to the hearing of this matter, it would help us to get a
32 better impression of the reality of this, as yet, unknown scope.

33 MR WEST-KNIGHTS: Of course. I am sorry, my breath is almost literally taken away by
34 the suggestion that it falls to me to particularise what it is that I say they have failed to
35 particularise.

36 THE PRESIDENT: We just want to know what work really needs to be done on your side.

37 MR WEST-KNIGHTS: The answer will be I don't know until the Office decides how much
38 of the pressure case that it abandoned below it now seeks to resuscitate. But I am not

1 going to fall out with them over this now, here, or indeed at all, but that is the position
2 which we face and we will make that submission good.

3 I was going to offer that we should put in a detailed skeleton by Monday 12th
4 January, and anticipating a response from the Office by the 19th, assuming that the date
5 will be some time thereafter. Does that meet with the Tribunal's approval?

6 THE PRESIDENT: That sounds possible. Mr Morris?

7 MR MORRIS: My only observation on that, Sir, is that it depends on how many other
8 matters are going to be around in the days leading up to that next hearing. If the last
9 week has been anything to go by, to get their full case on this issue only on 12th
10 January, when they have flagged it now, a month before, may be a little late.

11 THE PRESIDENT: Let us leave a provisional timetable for their skeleton on 12th and yours
12 on 19th. It may well turn out that the 22nd is unrealistic, in which case we will have to
13 fix another date. I think you and those instructing you should keep in touch with the
14 Registry as to what your position is. I don't want the OFT to feel that they have so
15 much to do they have no time to deal with this as well. We will try and fit it in, doing
16 the best we can, at some date that people can manage.

17 MR WEST-KNIGHTS: We are very grateful, Sir, for your flexibility. It is very helpful.

18 THE PRESIDENT: Subject to the fact that we are moving house.

19 MR WEST-KNIGHTS: There was talk of an ex parte application.

20 THE PRESIDENT: There was. I also have to have a discussion with Lord Grabiner in a
21 moment. It would suit the Tribunal if we just pressed on at the moment, and I think,
22 Lord Grabiner, we do come next, if we may to JJB and the state of play in relation to
23 your Notice of Appeal about which the OFT is complaining. Can we deal with that?

24 LORD GRABINER: Certainly.

25 THE PRESIDENT: We have ourselves made some attempt to use the schedule that your
26 clients have provided, and I have to say we found it extremely difficult at the moment.
27 It really is a document that is very hard to make sense of, partly because - or perhaps
28 even primarily because - it does not actually set out the proposition for which the
29 relevant witness statement or other document is relied on in support. So it involves a
30 great deal of scrabbling around, if I may use the expression, in a lot of different files
31 and quite often one turns out to be not much wiser, because the reference does not
32 appear to bear very clearly on the matter that is in issue, so at least provisionally we
33 somewhat share the OFT's view that this document, no doubt produced in good faith
34 and all the rest of it, is not actually particularly useful for the purposes of this case in its
35 present state. The question is "Where do we go from here?"

36 LORD GRABINER: Can we step back from all this and try to think about this in a practical
37 way. My essential submission is that a document of that kind is very largely valueless
38 to anybody engaged in this appeal. That type of document, this particular one you say

1 you have difficulty working with. I, for myself, would never dream of working with a
2 document of this kind to deal with a case that we have to be concerned with here, and I
3 suppose that depends upon your working approach, but that would be certainly my
4 approach. Can I explain why?

5 THE PRESIDENT: Yes, well I think we are agreed on that point.

6 LORD GRABINER: Can I just explain the point? We agreed with this sentence in my friend's
7 skeleton for today, what they say is that it is necessary for the OFT effectively to
8 prepare its case for the appeal, and to define for the Tribunal the key points in dispute
9 at the earliest possible stage. That is how we see it. We respectfully agree with that.

10 My understanding was that the real purpose of this exercise was so the OFT
11 would have no difficulty at all in preparing its defence.

12 THE PRESIDENT: I think it has a second purpose, which is to help the Tribunal understand
13 what your case is.

14 LORD GRABINER: Absolutely, but the OFT was able to and did in fact produce its defence,
15 notwithstanding the apparent deficiencies of this document, so we know where they are
16 coming from, including the respective changes that they now make or put forward, an
17 example of which we discussed a little earlier, which I might need to come back to in a
18 moment.

19 Now, they have also studied our witness statements, and they have come to the
20 conclusion, very sensibly, that all that they need to cross-examine on is Mr Whelan and
21 Mr Russell. So if you read through Mr Whelan and Mr Russell--

22 THE PRESIDENT: I think there were some reservations, but that was the main thrust.

23 LORD GRABINER: Essentially that's it. They can see what our case is, they have made a
24 judgment about the other witnesses in respect of whom we provided witness
25 statements, and they have decided that they are the witnesses they want to cross-
26 examine. The idea that they do not understand what our case is with respect cannot
27 seriously be sustained, in my submission, in the face of that. Nor can it be seriously
28 sustained in face of the fact, and I will not repeat the detail, and I know that all three
29 members of the Tribunal are familiar with this detail, that the peculiarity of this
30 particular case is that it is essentially concerned with things supposed to have been said
31 at meetings, orally, essentially - there might be one or two knobs on it, but essentially
32 that is what it is about. It is a debate about who is telling the truth, or who has the best
33 memory, or who is a credible witness, about what did or did not take place on the four
34 events that we are concerned with in this case. So that the idea, as I say, that nobody
35 understands what this case is about, or that you need a more detailed schedule in order
36 to understand either what we are saying, or what this case is about is, with great
37 respect, not accepted by us. I am not suggesting that it follows that you should be able
38 to understand that schedule, but I am submitting with great respect that it is perfectly

1 obvious what our case is and it will be obvious to anybody who sits and reads those
2 two witness statements, and it is certainly obvious to the OFT because they know
3 exactly what questions they want to put and to which witnesses. That essentially is
4 what I am saying.

5 When we had this debate in the correspondence we explained our position - I
6 am sure you are familiar with the correspondence - we explained our reaction to their
7 complaint about the quality of the schedule, in our letter of 20th November, and the
8 Tribunal rejected the application which is the way that I would read the document -
9 your letter of 20th November - and where you said: "The President is not minded at
10 this stage to make the order you requested".

11 THE PRESIDENT: To strike out.

12 LORD GRABINER: Absolutely.

13 THE PRESIDENT: I think, Lord Grabiner, the way we are looking at it is this: It is in
14 principle up to the appellant to explain his case as he wishes to do. The purpose of the
15 largely written procedure that we follow is to make sure that relevant matters are
16 ventilated in writing before hearing---

17 LORD GRABINER: Certainly.

18 THE PRESIDENT: ---and that the relatively short hearing is conducted on the basis that
19 people are already very familiar with the case and that there are no surprises or last
20 minute points that arise at the hearing.

21 LORD GRABINER: Absolutely.

22 THE PRESIDENT: The situation that we would wish to avoid, and I hope there is no
23 dispute about this, because on the last occasion you stressed that there was no question
24 of any surprise, or ambush, or anything of that kind, being contemplated. What we wish
25 to avoid at the hearing is reliance on facts or matters that have not been clearly
26 explained in writing beforehand in the course of the written procedure.

27 LORD GRABINER: You can have my personal assurance on that and, if I may respectfully
28 say so, what comes out of all this, and indeed the procedure that has been adopted in
29 this particular case is what the OFT appears really to want is a sort of narrative analysis
30 of what our case is, to which I think they are not properly entitled. But whether they
31 were entitled to it or not, the difficulty in the case is that it turns upon the view that you
32 take as a Tribunal of the quality of these witnesses when they come to give evidence,
33 and that is the essential distinction between the European process and the Court of First
34 Instance, and a hearing of this kind.

35 You can go so far with the paper work, but at the end of the day what really
36 matters is what you think about these witnesses and who you are going to believe or
37 who you think is a more credible person whose word is to be taken over somebody
38 else's. Now, with the best will in the world there is only so far that one can go in the

1 discussion beforehand. You have to make a view about that on the day.
2 THE PRESIDENT: You are saying your case is in the witness statements.
3 LORD GRABINER: Absolutely right.
4 THE PRESIDENT: That is your case, and it is not outside the witness statements to any
5 material extent, and that is the basis upon which you invite us to hear the appeal.
6 LORD GRABINER: Absolutely, and can I just give you a practical example which is derived
7 from the debate we had a little earlier off the back of Mr West-Knights' application, and
8 I will keep it very, very short because I am hungry as well as you.
9 It is simply this, in the case originally made by Mr Ronnie in his witness
10 statement against us, he said that he sought and obtained assurances from, amongst
11 others, JJB.
12 THE PRESIDENT: Yes.
13 LORD GRABINER: That case is now apparently abandoned---
14 THE PRESIDENT: Modified anyway.
15 LORD GRABINER: ---a fundamental point, I will cross-examine about that. It is abandoned,
16 we believe, and in any event it involves a changed position. I will cross-examine him
17 about it in due course, unless Mr West-Knights satisfies you it should be thrown out.
18 What he now says is that he provided information as to Sports Soccer's own
19 pricing intention for the shirt. Now, that is a new point in his case.
20 Next, and for the first time in any statement relied upon in the Decision Mr
21 Ronnie identifies the person at JJB with whom he says he had this conversation.
22 Surprise, surprise he picks on the late Mr Sharp as the person with whom he had that
23 conversation, and for obvious reasons we are not going to be in a position to call Mr
24 Sharp, but we will be calling such other people in the company as can deal with the
25 point, and again that provides me with ability to cross-examine.
26 I make those points merely to indicate that such changes as there have been by
27 way of surprise in the story come not from us but from the OFT. Otherwise, our
28 position is as I explained at the last hearing, and we have no intention of departing from
29 that and our case is locked in both from the submissions I made, which are on the
30 record, and from the witness statements which you will have seen. I must say, with the
31 greatest respect, that to sit down now and to try to convert that very complicated
32 document into something more workable, or manipulative, now, I would suggest is
33 rather a waste of time and money, and I would very much hope that you would not take
34 that course. But I do say that in substance what you should be concerned about is to
35 be satisfied that the OFT know what the case is that they have to meet, and that you
36 should understand in advance of the hearing what the case is and I do respectfully
37 suggest that the position is very plain indeed without the need to go into further
38 development of that document.

1 THE PRESIDENT: I will hear Mr Morris in a moment. There is one point that is also of
2 concern. There is a suggestion, not in the Notice of Appeal, but within the subsequent
3 correspondence that some of the matters ventilated in the administrative procedures - I
4 have in mind particularly the two expert reports that your clients produced in that
5 procedure, one from Lexicon and one from KPMG I think, are still material in the
6 appeal. I am not at all clear on the basis of the submissions whether they are actually
7 relied on in the appeal, or at least to any material extent?

8 LORD GRABINER: As far as we are concerned, they do not play a big role for us.

9 THE PRESIDENT: Well they are not referred to in the Notice of Appeal, documents of that
10 kind tend not to be that persuasive when you are dealing with actual witness
11 statements.

12 LORD GRABINER: Well it is secondary material.

13 THE PRESIDENT: It is very secondary material.

14 LORD GRABINER: Absolutely.

15 THE PRESIDENT: I think we would need a bit of persuading to allow any real debate on
16 the content of that material.

17 LORD GRABINER: I absolutely agree with you. If nothing else we have a very practical
18 understanding of what this case is about.

19 THE PRESIDENT: I will hear Mr Morris, but the point that we wish to stress, which is not
20 in dispute, is that at this stage parties are now stuck with the case that they have made,
21 and you explain what case it is.

22 LORD GRABINER: We are very happy with that, but the same is true of the OFT.

23 THE PRESIDENT: Yes. Now, Mr Morris, what do you want to say?

24 MR MORRIS: We would respectfully adopt the view that you initially expressed to my
25 learned friend, Lord Grabiner.

26 THE PRESIDENT: The schedule is not much use.

27 MR MORRIS: The schedule is useless. It is useless. We have tried, believe me, we have
28 tried, and if nothing further is done that schedule will not see the light of day again.
29 The second point is that it is not the case that we know what JJB's case is on any
30 particular aspect. The suggestion that that case can be derived from reference to the
31 witness statements is absolutely fanciful.

32 An example, in the schedule JJB rely upon, in relation to 8th June meeting, not
33 only the witness statements of Mr Whelan, but they expressly rely on the witness
34 statements, paragraphs 91 to 109, to the witness statement of Mr Hughes served on
35 behalf of Allsports. Mr Hughes's account of that meeting, and Mr Whelan's account of
36 that meeting are not the same, they differ in material respects.

37 THE PRESIDENT: That is the case they are making.

38 MR MORRIS: What, they are relying on both?

1 THE PRESIDENT: That is a matter of comment, it is a matter of cross-examination, it is a
2 matter of argument. The case is the case.

3 MR MORRIS: Well, when you say "the case is the case" - what is the case? What is the
4 case that they are making as to what happened on 8th June?

5 THE PRESIDENT: The case they are making is that they are not guilty, and they rely on
6 witnesses to---

7 MR MORRIS: If that is the response, Sir, then the position is this: it means, if I may, Sir,
8 respectfully submit, if that is all an appellant needs to do in a case before this Tribunal,
9 it changes fundamentally the approach that is set out in the Rules and the Guide. This is
10 a written procedure, basically written procedure. There are principles, which I do not
11 need to remind you of, Sir, you know them far better than I do, about the nature of this
12 procedure. If the case is now really this on the appeal: the OFT's findings X, Y and Z
13 are denied because they are wrong and at the oral hearing we will rely on the following
14 witness statements indiscriminately, not saying necessarily why a particular witness
15 statement is relevant to a particular allegation, then that fundamentally alters the nature
16 of the proceedings in this Tribunal, and we would suggest respectfully that that is not
17 what has been intended by the rules, and it is not an appropriate way to proceed. Can I
18 give you another illustration, Sir?

19 Lord Grabiner suggests today that JJB wish to rely upon Mr McGuigan and Mr
20 Marsh's evidence.

21 LORD GRABINER: Mr Hadfield, if you were listening.

22 MR MORRIS: Mr Hadfield, I think initially there was a statement---

23 LORD GRABINER: I said there were three witnesses that were not sought, and two of them
24 were very relevant to points I wanted to make, and I made special reference to Mr
25 Hadfield and Mr Marsh. McGuigan is not somebody that I discussed with the Tribunal.

26 MR MORRIS: We do not know what point it is - the only way we can find out what point
27 it is is by going through that schedule and trying to work out what that particular
28 evidence may go to. We do submit that this approach by JJB to this appeal is not what
29 was intended by the Rules, it is an approach which has not been followed by Allsports.
30 Allsports' approach is the approach that we would suggest as being the correct
31 approach. We have been able to respond properly and effectively and helpfully to the
32 Allsports Notice of Appeal in the defence. We have done our best with JJB's Notice of
33 Appeal and its Schedule, but we are not any the wiser as to why it is any particular
34 finding that the OFT has made is challenged.

35 Can I remind the Tribunal of this, Sir? The basis of this appeal is that it is the
36 Decision that is effectively being reviewed on the merits, but it is the Decision. It is not
37 a trial de novo. We are not permitted to go beyond the scope of the Decision, and no
38 doubt we will have extensive argument about that. We do respectfully submit that in

1 these proceedings, and in proceedings generally where the nature of the proceedings is
2 the review of the Decision, we are entitled to know what it is in the OFT's reasoning,
3 careful reasoning, that is disputed and contested and why? That is what the guidance
4 says, but more practically that is the process by which the Tribunal will be able to
5 narrow the issues, we will be able to know in advance of the hearing the case being
6 made. At the moment, the case that is being made is a pure denial, and we submit that
7 that is not the approach that this Tribunal should adopt to proceedings of this nature.

8 THE PRESIDENT: I think, Mr Morris, the way we are looking at it at the moment, is
9 broadly along these lines: if an appellant comes to the Tribunal and says "I deny it",
10 and puts the OFT to proof of the allegation, it may or may not be a particularly wise
11 course to take, but if that is his case, that is his case.

12 However, if the appellant wishes to support his bare denial by further material,
13 or argument, then that further material or argument should be set out in the written
14 procedure, in other words, his stall should be set out.

15 In this particular case, as I understand it for better or worse JJB says that their
16 stall is set out, notably in the witness statements, that means the witness statements that
17 you have already got and which you have indicated your intention to cross-examine on
18 in due course. That is their case. It may be according to you a contradictory case, or an
19 incomplete case, or a weak case, or whatever but it is the case. At this stage it is fairly
20 clear, at least in our mind, that JJB have not in fact introduced any further material,
21 other than that that is in the witness statements, at least not without the permission of
22 the Tribunal, subject to unforeseen developments that may occur en route. So perhaps
23 slightly unusually but because this case has some unusual aspects, that is the case that
24 they are making, and you are perfectly entitled to comment if you wish at some point
25 that that does not meet this, that or the other point in the Decision, and we no doubt
26 take that into account. But they are saying that this case turns very largely on the
27 credibility of the witnesses and that is what they rely on. There it is.

28 MR MORRIS: Well can I ask then whether JJB is saying that they will not be making any
29 argument on the reasoning contained in our Decision?

30 THE PRESIDENT: You can assume that you have got their case and there is no further case
31 that they are entitled to make without the permission of the Tribunal. You have already
32 pleaded to the case, and you are going to cross-examine their witnesses and that is
33 where we are, and the Tribunal will not allow, because I think it is common ground,
34 surprises or ambushes to take place later down the road.

35 MR MORRIS: Well, obviously my submissions are not being received, but we do say that
36 there is a material difference between evidence that is being relied upon and argument,
37 and contention. Evidence is the bare bones of the material from which you make a case.
38 We do not know, other than the bare denial, what JJB's case is on any particular aspect

1 of this case, the reasoning in the Decision.

2 THE PRESIDENT: What you have is, the admittedly somewhat scanty Notice of Appeal.
3 You have the explanation given by JJB's counsel on the occasion of the last Case
4 Management Conference. You have the witness statements, and that is their case. It is
5 within the four corners of that material. The conclusion they invite the Tribunal to draw
6 from that material is that the allegations made in the Decision about the agreements
7 with which they are concerned are not proved.

8 MR MORRIS: But when it comes to closing speech in this case JJB's counsel will not be
9 saying to the Tribunal "You've heard all the evidence, now not proven", they will be
10 putting together an argument. We will not see that argument until their closing speech.
11 Their case is based on the witness statements. What do the witness statements establish
12 is what we are asking.

13 Sir, you did say right at the outset that the schedule is impossible to work with -
14 I am not quoting you verbatim - but we would submit that it is impossible to work with.

15 THE PRESIDENT: Well I don't think even Lord Grabiner was supporting the schedule
16 particularly.

17 MR MORRIS: Yes, and the schedule was served in an attempt to meet the concerns raised
18 last time in a direction that was made last time. That schedule has turned out not to be
19 of use to anybody, and we would submit that---

20 THE PRESIDENT: The Tribunal's position is that any argument hereafter advanced by JJB,
21 which goes outside the four corners of the existing Notice of Appeal, the statements
22 that are already in evidence, and the events of the actual hearing itself, are not
23 arguments that the Tribunal is prepared to entertain.

24 LORD GRABINER: Nor will they be put forward.

25 THE PRESIDENT: And JJB has expressly - on several occasions now - assured the
26 Tribunal that that is the framework of their case, and press, as you undoubtedly wish to,
27 and very understandably too, wish to sort of pin them down to further precision I think
28 it is quite difficult at this stage to actually do so.

29 MR MORRIS: Of course, I hear the views of the Tribunal and I do not press the point
30 further, but you have our points.

31 THE PRESIDENT: Indeed we do, Mr Morris.

32 MR MORRIS: And you see the basis upon which they are made.

33 THE PRESIDENT: Of course I do.

34 MR MORRIS: You are aware of where we are coming from on it.

35 THE PRESIDENT: Absolutely, and it will be a matter of argument, comment, submission,
36 etc. etc. later on on your part no doubt, as to the situation, but I do not think we can get
37 any further than we have in clarifying it.

38 MR MORRIS: Very well. Can I just raise one matter that was discretely raised?

1 THE PRESIDENT: Yes.

2 MR MORRIS: And I am going to hand over to Mr Turner on this, I think, which was the
3 question of the KPMG and the Lexicon reports.

4 THE PRESIDENT: Well I think there is an issue about that, but I have a feeling that those
5 representing JJB, Lord Grabiner's team, are on the point of reconsidering whether that
6 really is something that is in the case or not.

7 MR MORRIS: But I think there may be a discrete point about that that does not depend
8 upon whether they rely on it, and perhaps Mr Turner could address you briefly on that.

9 THE PRESIDENT: Yes.

10 MR TURNER: Sir, only very briefly - the expert from KPMG said at the oral
11 representations meeting, that they had been given, for the purpose of preparing their
12 report, full access to prices from JJB for the relevant period, and they used that to
13 prepare their report.

14 Sir, you are aware of the rule that if one is to be able to appraise that sort of
15 thing, that every bit of information fed to an expert should be made available to the
16 other side.

17 THE PRESIDENT: But is that in their case now?

18 MR TURNER: If it remains in their case now, because we haven't got anywhere with this,
19 what I would ask for is simply that the experts concerned, at KPMG, should provide us
20 with the information that we have requested by letter, namely, to specify to us what
21 information was made available to them in detail and we can have a look at that.

22 THE PRESIDENT: Yes.

23 MR TURNER: We would propose that if their case continues with that report in the appeal
24 that that should be done.

25 Similarly for Lexicon we have asked for the substance of the instructions that
26 were given. Again, that is uncontroversial in principle. All we want is something, if it
27 remains an issue from the expert, within a week to say "these are the instructions that I
28 was given". Beyond that if it does not remain in the appeal - I think this is what Mr
29 Morris was referring to - the issue of the pricing information about JJB's pricing of
30 replica football kit in that period, and the extent to which it was discounted and when,
31 is actually relevant material anyway. Therefore, there is an additional point that,
32 regardless of whether that material is relied on still for the report in the appeal we
33 would say it is still relevant to the issues in this appeal. It may very well be important
34 on cross-examination.

35 THE PRESIDENT: I think we cannot do any more at the moment except generally park the
36 KPMG point until the next occasion.

37 MR TURNER: Can I ask in relation to the issue of receiving letters from the experts, if
38 that remains in the appeal that we should have some material from them within a week,

1 because otherwise there will be a tendency to drift until the new year, and with
2 everything else it will get lost.

3 MR HOSKINS: Sir, if the OFT is so keen to see this information, we are currently working
4 on the requests, there is a paper trail I will not bore you with, we will keep working on
5 it and hopefully resolve it with the OFT as quickly as possible.

6 THE PRESIDENT: Can you do that by the 19th, Mr Hoskins?

7 MR HOSKINS: One of the problems is, if we want to get into the nitty-gritty, that the
8 KPMG material that is requested, there is not a hard copy where we simply copy it,
9 because certain material was taken from computer screens at JJB's offices.

10 THE PRESIDENT: If you are already working on it, if we say "best endeavours" to meet
11 19th December---

12 MR TURNER: With a letter from the expert as well, I think.

13 THE PRESIDENT: ---to meet the OFT's request.

14 MR HOSKINS: Best endeavours, we will try and satisfy them by the 19th.

15 MR TURNER: We can see where we are next year. Sir, the only other point to raise in
16 relation to the schedule, anticipating Mr Morris, quite a lot of cost has gone into that,
17 and that may therefore need to be reserved.

18 THE PRESIDENT: We will deal with all that at a later stage. Yes, Mr Anderson?

19 MR ANDERSON: If I could just raise one point out of a matter of caution?

20 THE PRESIDENT: Yes.

21 MR ANDERSON: When I agreed, and do still agree, to the process whereby documents are
22 provided to our external advisers only, there is one particular factual area where, as a
23 matter of caution, I ought to reserve my position until I have had an opportunity to
24 speak to Sports World International Executive themselves, so I would ask that one
25 matter, and it is only one factual matter, be excluded from the scope of that exercise at
26 this stage, and if necessary the opportunity is there to address the Tribunal further. It is
27 only one factual matter and it may come to nothing, but I ought, without the Executives
28 being present today, reserve my position in relation to that one factual matter.

29 THE PRESIDENT: Yes. Well, if you would kindly write to the Registry about it if you
30 need to do so. That is probably the best way forward at this stage.

31 MR ANDERSON: Thank you, Sir.

32 THE PRESIDENT: Now, have we got as far as we can for the time being? I think we have.
33 Thank you all very much indeed, we just need to deal with the ex parte matter.

34 MR WEST-KNIGHTS: The Umbro transcript, we are in the air on that. Is that the subject
35 of whatever is now going to follow?

36 THE PRESIDENT: We are in the air because it was related to something they want to tell
37 us.

38 MR WEST-KNIGHTS: So we will go outside and wait now.

1 THE PRESIDENT: Well I am not going to rule on it today anyway, and we will see where
2 we are. It may be that is parked for the time being.

3 MR WEST-KNIGHTS: So be it thank you.

4 THE PRESIDENT: Thank you very much. Thank you all very much indeed. We will just
5 stay here.

6 **(For in camera hearing see separate transcript)**