Neutral citation: [2004] CAT 3

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1019/1/1/03
1020/1/1/03
1021/1/1/03
1022/1/1/03

Before:
Sir Christopher Bellamy (President)
Mr Barry Colgate
Mr Richard Prosser OBE

UMBRO HOLDINGS LIMITED

Appellant

-and-

THE OFFICE OF FAIR TRADING

Respondent

MANCHESTER UNITED PLC

Appellant

-and-

THE OFFICE OF FAIR TRADING

Respondent

ALLSPORTS LIMITED

Appellant

-and-

THE OFFICE OF FAIR TRADING

Respondent

JJB SPORTS PLC

Appellant

-and-

THE OFFICE OF FAIR TRADING

Respondent

ORDER ON CONFIDENTIALITY

Background

1. On 1st August 2003 the Office of Fair Trading ("OFT") took a decision ("the decision") running to some 250 pages under section 2 of the Competition Act 1998 finding that a number of undertakings had engaged in price fixing of replica football kits in 2000 and 2001 contrary to the Chapter I prohibition and imposed penalties on those undertakings.

2. The undertakings principally concerned, with others, were JJB Sports PLC ("JJB") – a leading sports retailer – who were fined £8.373 million; Allsports Limited ("Allsports") – also a leading sports retailer – who were fined £1.35 million; Manchester United PLC ("MU"), who were fined £1.652 million; Umbro Holdings Limited ("Umbro") – a manufacturer of sports shirts and similar products – who were fined £6.641 million; and Sports Soccer Ltd (now Sports World International Limited) ("Sports Soccer") – a sports retailer known to follow a policy of discounting – who were fined £0.123 million. The penalties imposed on Umbro and Sports Soccer reflected the assistance given by those parties during the OFT's investigation. Sports Soccer is described in paragraph 755 of the decision as the "whistleblower" although it is clear that the OFT considered that both Umbro and Sports Soccer, like the other parties upon whom penalties were imposed, were guilty of serious infringements of the Chapter I prohibition.

3. JJB, Allsports, Umbro and MU have appealed to the Tribunal under section 46 of the Act by appeals lodged on or around 1 October 2003. JJB and Allsports in their appeals contest both the facts relied on by the OFT and the penalty imposed. MU and Umbro contest the penalty only. Each of the appeals is technically proceeding separately although common parts of the appeals will be heard together. Sports Soccer has not appealed. Although not formally an intervener, as a result of a ruling made by the Tribunal on 23 October 2003, Sports Soccer has been heard by the Tribunal on interlocutory matters affecting its interests and has attended a number of the case management conferences.

4. Case management conferences were held on 23 October 2003, 12 December 2003 and 22 January 2004. The main hearing is set down for 2½ weeks commencing on 8 March 2004 within a structured timetable. The timetable for skeleton arguments is now running. Cross

examination of witnesses is scheduled for the first week.

Disclosure issues

5. The question of disclosure of documents, in particular documents emanating from Umbro, but also some documents from Sports Soccer, to the other appellants in this case, has been an issue throughout these proceedings, raised at each of the case management conferences. The issue arises because, during the administrative procedure preceding the decision, the OFT kept the Umbro and Sports Soccer documents in question confidential from other participants in the proceedings, including JJB and Allsports (and in certain respects not material to this order, MU), pursuant to section 237 of the Enterprise Act 2002 (the 2002 Act). No consent arose under section 239 and no use was made of section 240. No criticism is made of the OFT. In order to protect confidentiality the OFT also redacted parts of the published decision. However, as explained below, section 237 does not apply to the Tribunal: see section 237 (4). Hence, in these appeal proceedings the appellants JJB and Allsports have sought further disclosure of documents withheld in the administrative proceedings.

6. The Tribunal has already ruled twice on certain aspects of confidentiality during the conduct of these appeals to date. In its judgment of 27 October 2003, the Tribunal rejected Umbro's request raised at the first case management conference that the contents of its entire Notice of Appeal be kept confidential. The Tribunal considered that it was in the interests of justice and the rights of the defence of the other parties that the contents of its Notice of Appeal and annexes should be disclosed to the appellants in the other appeals. This included copies of certain draft witness statements which had been submitted to the OFT in support of Umbro's ultimately unsuccessful application for leniency. The full text of that judgment can be found at [2003] CAT 26. Accordingly, in due course the parties exchanged amongst themselves redacted versions of their Notices of Appeal and accompanying documents. Secondly, following requests made by certain appellants at the first case management conference and after giving all affected undertakings the opportunity to make oral and written representations, the President made an Order on 18 November 2003 requiring the OFT to disclose certain redacted information in the Decision relating to the calculation of the penalty. That Order can be found at [2003] CAT 29.

7. The present Order relates to requests by Allsports and JJB for the disclosure principally of

unredacted versions of certain documents which were produced to them in redacted form at the administrative stage before the OFT.

8. At the first case management conference on 23 October 2003 there was considerable disagreement amongst the parties as to what could reasonably be withheld on the grounds of confidentiality. During the conference, and in the judgment of 27 October 2003 mentioned above, the Tribunal noted that it is in the interests of justice that its proceedings should be conducted on the basis that is as fully open as possible, subject only to the protection of vital business secrets or for some other overriding reason. On this basis, the Tribunal encouraged all parties to resolve amongst themselves any outstanding confidentiality requests as far as possible.

9. Accordingly, on 30 October 2003, Allsports sent the OFT a list identifying 77 documents where it sought disclosure of unredacted information. This list mainly covered paragraphs of Umbro's files notes, monthly management reports and correspondence together with paragraphs from the written and oral representations, responses to section 26 Notices and witness statements submitted by various parties during the administrative procedure. On 6 November 2003, the disclosure list was circulated to all parties concerned requesting them to respond by 17 December 2003. Following this action, many of the parties to whom the confidentiality related waived confidentiality. The Football Association ("The FA"), Umbro and Sports Soccer did not give such a waiver and they gave to the OFT their reasons for withholding confidentiality. The FA documents are not relevant for present purposes.

10. On 13 October 2003, JJB sought disclosure of the redacted information contained in 86 documents which it had obtained during the administrative procedure. To a large extent this overlapped with Allsports' list.

11. By the time of the second case management on 12 December 2003, significant progress had been made among the parties as to the disclosure of information but certain documents remained controversial. The remaining issues related principally to information about Sports Soccer's and Umbro's margins and about certain material discussed between Sports Soccer and Umbro at, inter alia, a meeting on 24 May 2000. On 12 December 2003, in a further effort to resolve the issue, the parties and Sports Soccer agreed to disclose the confidential versions of the remaining disputed documents to the external legal advisers of the parties. Having viewed the documents, the legal advisers of the parties then submitted submissions to

the Tribunal explaining which of those documents they considered still needed to be disclosed in unredacted form on a non legal adviser-only basis. This was on the basis that the legal advisers would need to take instructions on them from their clients and/or they might need to refer to them in open court. Those submissions were submitted on 16 January 2004 in the form of a schedule prepared jointly by JJB and Allsports and related to documents held by Umbro and Sports Soccer. The schedule was supplemented by further written submissions made individually by JJB and Allsports on 19 January 2004. Sports Soccer submitted its observations on 15 and 20 January 2004. Umbro set out its observations on the requests for disclosure set out in the joint schedule on 20 January 2004.

12. On the basis of those written submissions and following a further informal in camera discussion with the parties after the pre-hearing review on 12 February 2004, the Tribunal formed a provisional view on which documents ought to be disclosed and set out its reasons in a draft order and covering letter sent to the parties dated 12 February 2004. That draft order covered some 82 documents. The Tribunal invited the parties, if they wished, to make further representations about any specific documents.

13. Umbro took advantage of that invitation to make written submissions dated 19 February 2004 about some 7 documents, deciding reluctantly that it did not wish to challenge the Tribunal's draft ruling in respect of the remaining documents in question. Sports Soccer similarly made representations about some 10 documents on 19 February 2004. The Tribunal gave Umbro and Sports Soccer the opportunity to make oral representations on 23 February. Umbro availed itself of that opportunity but Sports Soccer did not.

14. At the close of the hearing on 23 February, the Tribunal indicated its decision on the remaining documents in issue, giving brief reasons, intimating that those brief reasons would be followed up by a reasoned order. Umbro applied for permission to appeal to the Court of Appeal under section 49 of the 1998 Act, as inserted by the 2002 Act, which the Tribunal refused on the grounds that it was not satisfied (i) that a point of law was involved (see section 49 (1) (c)) or (ii) that any appeal would have any reasonable prospect of success. In view of the imminence of the main hearing of the appeals, the Tribunal abridged the time for appealing to 3 days from the date of this Order, with a stay on disclosure up to the permission hearing by the Court of Appeal, if any such appeal was made.

15. For the avoidance of doubt, we confirm the order and schedule made in our previous draft as circulated to the parties on 12 February 2004, subject to the comments set out hereafter.

16. We deal briefly with each of the documents remaining in issue at the hearing before the Tribunal on 23 February

Umbro documents
Document 12

17. This document, on which in our view the fate of the other documents in issue largely turns, is a note dated 25 May 2000 of a meeting between Umbro and Sports Soccer on 24 May 2000 during which it is undisputed that Umbro and Sports Soccer agreed to fix the prices of England home and away replica shirts, shortly before the start of the Euro 2000 tournament in which England were playing. The OFT's case, in the decision, is that this meeting led Messrs Ronnie and Fellone of Umbro to telephone Allsports, JJB and other retailers to ensure that they too would sell England shirts at High Street prices. Paragraph 414 of the decision reads:

> "On 24 May 2000, at a meeting between Messrs Ronnie and Attfield of Umbro and Mr Ashley of Sports Soccer, Sports Soccer agreed to raise its prices of England home and away Replica Shirts. Sports Soccer appears to have insisted on an assurance that the other major retailers would not undercut its prices, thereby placing it at a commercial disadvantage. This led to Messrs Ronnie and Fellone telephoning, between them, each of the major retailers in order to make sure that they would price the England Replica Shirts at High Street Prices in the run up to and during England's participation in Euro 2000."

18. This led, according to the OFT, to a price fixing agreement we call for convenience the England Euro 2000 Agreement. The evidence relied on in the decision is set out in paragraph 415.

19. The note of the meeting of 24 May 2000 or the meeting itself is also mentioned in paragraphs 165 and 167 of the decision. It is however right to say that in its defence in these proceedings the OFT has now partly qualified its case as to the precise content of the telephone calls allegedly made by Mr Ronnie of Umbro to Allsports and JJB following the

meeting of 24 May 2000, and seeks to support its allegation that Allsports was a party to this agreement with various further arguments and allegations: see paragraphs 8 to 9, 13 to 17 and 20 to 21 of the defence. These developments led to an application by Allsports to strike out paragraph 21 of the defence and/or enter summary judgment for Allsports in relation to the Euro 2000 Agreement. That application was rejected by the Tribunal in a judgment dated 29 January 2004.

20. Allsports and JJB deny that the alleged telephone calls were ever made, and/or that they had the content alleged by the OFT and/or that they were parties to the alleged England Euro 2000 Agreement. Allsports, in particular, contends that Umbro would have had no particular motive for calling Allsports as alleged, nor for seeking assurances from Sports Soccer about Allsports' pricing intentions, because Allsports was, so it says, pricing the shirts at High Street prices anyway. Allsports puts in issue the reliability of the evidence of Mr Ronnie and Mr Ashley who were present at the meeting of 24 May (paragraphs 6.15 to 6.21 of Allsports' Notice of Appeal). Allsports submits that it was not in a position to put pressure on Umbro as regards the retail prices charged by Sports Soccer (Notice of Appeal, paragraphs 6.3 to 6.5). It further submits that Sports Soccer may have had other motives for pricing England replica shirts at High Street prices during Euro 2000 (paragraphs 6.21.16 to 6.21.18).

21. The note of the meeting of 24 May 2000 was made available to the parties during the administrative procedure in redacted form. However, it appears from the unredacted version of the note that other matters were discussed at the meeting of 24 May 2000. These matters apparently relate to commercial arrangements between Umbro and Sports Soccer relating to non-replica kit, not subject to the decision. JJB and Allsports seek disclosure of this note in unredacted form.

22. Allsports considers that the note of 24 May 2000 appears to disclose a separate agreement between Umbro and Sports Soccer. An understanding of the existence and terms of that agreement is necessary for, and relevant to, its appeal since it appears to have been negotiated at a key time, namely at the 24 May 2000 meeting. According to Allsports, the question of what happened at the 24 May 2000 meeting, and in particular whether, as paragraph 165 of the Decision claims, Sports Soccer requested and received assurances over the pricing intentions of other retailers, is fundamental to its case. So is the question of the circumstances in which the agreement was reached, given that the OFT asserts in its Defence

that "Umbro concluded the agreement with [Sports Soccer] on 24 May as a result of complaints and pressure from, amongst others, Allsports". Moreover, the question of the "balance of power" as between Umbro and retailers is important for the purposes of understanding the relationship between them and the extent of the former's ability to exert pressure.

23. Allsports points out that when it drafted its Notice of Appeal it was unaware of the existence of this further relationship between Umbro and Sports Soccer. This relationship may now indicate why Umbro was anxious to raise prices and give Umbro a motive for reaching an agreement with Sports Soccer that had nothing to do with pressure from Allsports. Allsports' counsel submitted that although it is apparently publicly known that there is some sort of close relationship between Umbro and Sports Soccer, he had not (because of limitations on the use to which the documents could be put) been able to obtain instructions from his clients as to whether they know precisely what the arrangement involved. Some of the contents of the note of 24 May 2000 could negate the statements of Mr Ronnie's statement of 28 November 2003 that Umbro was vulnerable to retailer pressure, according to Allsports. Document 17, as already disclosed at an earlier stage, includes the word "manufacture".

24. JJB makes similar points to Allsports.

25. Umbro's essential submission is that the fact of the existence of a licensing agreement between Umbro and Sports Soccer is highly confidential, and that the existence of such agreement let alone its terms was not known to JJB and Allsports. If the fact of the existence of the agreement were revealed it would be highly detrimental to Umbro commercially. The appellants had not, according to Umbro, been able to show that the document was sufficiently relevant to justify overriding Umbro's confidentiality, it being insufficient to show that it *might* be relevant.

26. Umbro submits that in drawing the necessary balance between protecting the defendants' rights of defence and protecting parties' confidential information, the Tribunal should adopt a similar approach to that adopted by the European Commission in relation to access to the file (see Notice OJ 1997 C 23/3). In short, the disputed documents should not be disclosed unless JJB and Allsports can demonstrate not only that they are clearly relevant and probative in relation to specific matters raised in their appeals, but also that they are indispensable in

that respect. Umbro submits that none of the documents fall into that category.

27. As regards the specific agreement, it is well-known that JJB and Sports Soccer are Umbro's two largest customers, and are direct competitors. The disclosure of the terms of Umbro's past negotiations with Sports Soccer to other retailers, and in particular to JJB, will therefore have a bearing on Umbro's current commercial negotiations. According to Umbro, this position is not affected by the fact that the information relates to 2000 or 2001 since, contrary to the position in some other industries, this will impact on Umbro's current commercial negotiations. Moreover, the parties' vague assertions do not refer to any *specific* issues raised in their appeals.

28. Sports Soccer considers that the existence and terms of the separate agreement (which is ongoing) with Umbro should not be disclosed, firstly because the products covered by the agreement are not replica products and are therefore irrelevant to the current proceedings, and secondly disclosure of its existence would effectively reveal details of the current trading terms between Sports Soccer and Umbro. Moreover, disclosure of references to the specific agreement is not, as JJB and Allsports suggest, necessary to understand the "commercial relationship" between Umbro and Sports Soccer since the only aspect of this relationship of relevance to these proceedings is whether Umbro pressured Sports Soccer and this is not in dispute. Umbro has admitted that it exerted pressure and Sports World has admitted that it yielded to it. Sports Soccer makes further detailed submissions applying the tests indicated by the Tribunal in its draft order, in its further written submissions of 19 February 2004.

Overview of relevant law

29. The position concerning confidentiality as it affects the Tribunal has been set out in previous judgments. In brief overview, the relevant confidentiality regime is set out under the Enterprise Act 2002 ("the 2002 Act"), and more specifically at paragraph 1, sub-paragraph 2 of Schedule 4 of the 2002 Act. That provision deals only with the decisions of the Tribunal, which are to be recorded in a document.

Schedule 4, paragraph 1(2) provides:

"(2) In preparing that document the Tribunal shall have regard to the need for excluding so far as practicable---"

that is to say excluding from the Tribunal's final decision or judgment---

"(a) information the disclosure of which would in its opinion be contrary to the public interest;

(b) commercial information the disclosure of which would or might in its opinion significantly harm the legitimate business interests of the undertaking to which it relates;

(c) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests."

But then:

"(3) But the Tribunal shall also have regard to the extent to which any disclosure mentioned in sub-paragraph (2) is necessary for the purpose of explaining the reasons for the decision."

30. In the Tribunal's judgment of 27 October 2003 rejecting Umbro's application for confidential treatment, mentioned above (judgment [2003] CAT 26), the Tribunal made a number of observations on its interpretation of the relevant provisions of the 2002 Act. More specifically, in relation to its duties under paragraph 1 of Schedule 4, set out above, the Tribunal noted at paragraphs 23 to 25:

"*Although that statutory provision deals only with what is to be included in the Tribunal's judgment, the Tribunal takes the view that, for that provision to be effective, the Tribunal should protect, during the appeal proceedings, information that it would be likely to regard as confidential for the purposes of its judgment subject, of course, to the overriding requirement of ensuring the fairness of the appeal proceedings.*

It is to be noted in particular, in subparagraph (2), that the need to exclude certain confidential material is expressed to be: "so far as practicable". As regards disclosure that might be contrary to the public interest, the disclosure must be such which would "in its opinion", that is to say in the opinion of the Tribunal, be contrary to the public interest.

As regards commercial information, it is information the disclosure of which would, or might, again in the "opinion of the Tribunal", significantly harm the legitimate business interests of the undertaking to which it relates, so there must be first of all significant harm, and secondly legitimate business interests. All those matters are, however, also to be borne in mind in the light of subparagraph (3), whereby the Tribunal has to have regard to the extent to which disclosure is necessary for the purpose of explaining the reasons for its decision."

31. More generally, the Tribunal noted at paragraphs 32 to 33:

> *"… the Tribunal takes the view that its proceedings should be conducted on the basis that is as fully open as possible, subject only to the protection of vital business secrets or for some other overriding reason. It must be remembered that the Tribunal's judgment is a public document that has to be published. The Tribunal's hearings are in public, the transcripts of its hearings are published and so on.*
>
> *Equally, in a case such as the present, which takes place in a setting in which parties have had penalties imposed upon them, it is, in the Tribunal's judgment, of overriding importance that the parties should be able to exercise their rights of defence without having possibly relevant material held back or inaccessible. In the event of a conflict between the rights of the defence and other claims to confidentiality there must, in our judgment, be a presumption that the rights of defence prevail."*

32. The above paragraphs from the 27 October 2003 judgment are also reproduced in the President's Order dated 18 November 2003, also mentioned above.

33. We should also mention that in *Aberdeen Journals Limited (Confidentiality)* [2003] CAT 14, the Tribunal expressed the view that information relating to market shares, revenues, costs and yields which was over three years old could no longer be regarded as confidential: see page 4 of the transcript. In paragraph 20 of the President's Order of 18 November 2003 it was indicated that figures in relation to turnover figures that were more than two years old should not be protected from disclosure. We stress, however, that those are presumptions, depending on the circumstances.

34. In determining any issue of disclosure of information for which commercial confidentiality is claimed, the Tribunal considers that there are essentially three questions which the Tribunal must ask itself, namely:

(i) is the information confidential in the sense that its disclosure would or might harm the legitimate business interests of the undertaking in question?

(ii) is the information relevant to the appeal?

(iii) is any harm that might be caused to the party disclosing the document outweighed by the interests of justice?

Applying the relevant questions to document 12

35. In relation to document 12, we have some doubts as to whether the information contained in this document is really commercially confidential, since it is four years old, but we will assume that it is. We also have doubt as to how far it is 'legitimate' to protect confidentiality as regards the contents of a meeting in the course of which it is admitted that an illegal price fixing agreement was made. However, we will for argument's sake assume an affirmative answer to the first question, namely that the redacted information in document 12 is confidential information the disclosure of which at least might significantly harm the legitimate business interests of Umbro and Sports Soccer.

36. As far as relevance is concerned, we note that the meeting of 24 May represents a crucial step in the OFT's reasoning leading to the conclusion that Allsports and JJB were parties to the England Euro 2000 Agreement. In our view it is important for an understanding of the case that the parties and the Tribunal should know the context in which that meeting took place, and exactly what transpired at it. Much may turn on exactly what was said at that meeting. From the point of view of Allsports and JJB, who wish to challenge the OFT's chain of reasoning linking them to the alleged England Euro 2000 Agreement, it is in our view undesirable that parts of the crucial meeting should remain hidden.

37. In particular, we see force in Allsports' submissions that an issue in the case is whether the assurance mentioned in paragraph 414 of the decision was sought at that meeting and/or whether, as now alleged in paragraph 21 (b) of the amended defence, Mr Ronnie's telephone calls to Allsports and JJB after the meeting of 24 May "were made to inform those retailers of the fact that, in response to Allsports and JJB pressure and complaints, Umbro had managed to obtain Sports Soccer's agreement to increase its prices" or whether, in fact, Umbro's price fixing agreement with Sports Soccer was made in the context of and/or to facilitate a close commercial relationship between Umbro and Sports Soccer rather than in response to pressure from JJB and Allsports. In our view, it would also be difficult for the Tribunal fully to evaluate the various arguments concerning the making of the alleged England Euro 2000 agreement without full knowledge of what transpired at the meeting and an understanding of the overall commercial relationship which existed between Umbro and Sports Soccer at that time.

38. We also note that document 12 read as a whole may suggest that it may be difficult to isolate the alleged agreement on England replica shirts which occurs on page 2 of a three page document from the commercial relationship between Umbro and Sports Soccer taken as a whole – see also the last paragraph of page 3 of the document where a link is apparently made between a reduction in the "licensed target" and an increase in what is apparently the target sales for "branded" – i.e. the products subject to the non-replica kits agreement.

39. It seems to us therefore that document 12 is potentially relevant (i) to the parties' and the Tribunal's understanding of the nature and content of the meeting of 24 May 2000, and of the then relationship between Umbro and Sports Soccer (ii) to the question whether, or to what extent, Umbro's agreement with Sports Soccer was made in response to complaints and pressure from other retailers, as Mr Ronnie contends in his witness statement of 28 November 2003 or for other reasons,; and (iii) as a background document relevant to determining disputed matters of fact such as whether Umbro had a compelling reason to telephone Allsports and JJB to confirm Sports Soccer's agreement with Umbro to raise prices.

40. As regards the balance between the confidentiality claimed by Umbro and the possible significant harm that disclosure may cause, on the one hand, and the interests of justice on the other, while we have sympathy with Umbro's arguments we feel we must come down in favour of the transparency and openness of the proceedings. Had document 12 not been a note of a meeting of central importance to the case, we might have taken a different view. But that meeting is central to the case against JJB and Allsports and it seems to us in principle undesirable that part of what transpired at that meeting should be "covered up" so that those representing JJB and Allsports are unable to obtain instructions from their clients as to the redacted parts of the document and are not able to see the meeting and the Umbro/Sports Soccer relationship in the full context or envisage possible lines of cross-examination. Similarly we think it would be difficult for the Tribunal in the hearing and in its judgment to do justice to this part of the case without an understanding on the basis of disclosed documents, of the course of that meeting and of the then relationship between Umbro and Sports Soccer.

41. We do not accept Umbro's argument that Allsports and JJB have not shown the document to be sufficiently relevant. Clearly it could not be mentioned in the Notices of Appeal because the appellants were then unaware of the underlying facts. Allsports does, however, put in issue Umbro's motives and actions in the passages of its Notice of Appeal we have mentioned above. Without, for obvious reasons, being able to obtain their clients' instructions, in our view Allsports and JJB have shown that the redacted parts of this central document are sufficiently potentially relevant to bring down the balance, in what is admittedly a difficult balancing exercise, in favour of disclosure in relation to this particular document, in the interests of the openness and transparency of the proceedings.

42. However, in view of the representations made by Umbro and Sports Soccer, we are on further reflection prepared to accept the redaction of the margin figure 6 lines up from the bottom of p. 2, and the figures for prices and volumes for which confidentiality is claimed on page 3 of document 12. We are thus to some extent protecting the terms, if not the existence, of arrangements between Umbro and Sports Soccer.

Document 16

43. This document is later in time, but dated 1 August 2000 as it is, is still within a potentially relevant time frame. We are unpersuaded that the redacted parts of this document would be significantly commercially damaging to Umbro at this distance of time. It indicates an ongoing commercial relationship between Umbro and Sports Soccer. We think that the interests of transparency should prevail over any confidentiality there may be. However, we are prepared to accept the redaction of the margin figure in the third point mentioned. The same document is also at no. 62.

Document 17

44. We understood that at the end of the hearing Umbro had conceded, reluctantly, disclosure of this document dated 3 July 2000 save for the margin figure mentioned at the bottom. This document refers to "All products including licensed" and then gives a pricing formula. Since we are dealing with products allegedly covered by the infringing agreements, we think the redacted figures are potentially relevant, particularly to an understanding of the margin in question. As to the figure at the bottom of the page, this relates to non-replica products and

appears to us to be an aspiration but on further reflection we are prepared to give Umbro the benefit of the doubt and redact the percentage figure there mentioned (see also Sports Soccer document 6).

Document 72-10

45. The issue here relates to the words "a license of branded apparel under a separate agreement". Disclosure it seems to us follows from our approach to document 12.

Document 74

46. Paragraphs 103 to 105 of a statement by Mr Ronnie of 4 February 2002 have been redacted. These paragraphs comment on the meeting note of 24 May 2000 and cover the first part of the meeting on that date. For the reasons already given in relation to document 12, we think it undesirable that part of Umbro's explanations of what transpired at, and the context of, the meeting of 24 May should be withheld from Allsports and JJB. At this stage of the proceedings it is also undesirable that there should be confidential passages in earlier witness statements which form part of the record which the Tribunal is required to examine.

Document 81

47. If document 12 is disclosed, it follows that this brief note of 20 March 2000 ought also to be disclosed.

Document 68

48. This document is in a slightly different category since it refers to margins earned on various licensed kits in the period 1998 to 2000. The figures relate to the period immediately before, and during, the infringements. All the kits mentioned were in one way or another affected by infringements in 2000, although not all those infringements are any longer contested. The figures relate to licensing agreements that are due for renewal some time in the future or, in one case, have expired. We doubt whether there is, at this distance of time, significant confidentiality attaching to these figures. The margins earned on products which were covered

by the infringements are in our view potentially relevant to the Tribunal's overall assessment of the arguments in this case.

Sports Soccer (Sports World) documents

49. Sports Soccer documents 3-2.2.30, 3.-2.2.31, 3-6.11 and 4 refer to "the licensing agreement" between Umbro and Sports Soccer and comment on where the balance of power lay between Umbro and Sports Soccer. The fact that there is such a licensing agreement for non-replica products seem to us to emerge from Umbro document 12. The fact that Sports Soccer considers the agreement to be commercially favourable is in our view relevant. The observations we have already set out above in relation to document 12 seem to us to apply.

50. Document 5 is a response of Sports Soccer under section 26 of the Act. It appears to relate entirely to replica football kits – i.e. the products covered by the alleged infringements, as regards the terms applicable in the period 2000 to 2001 and Sports Soccer's selling prices. Most of this information relates to the allegedly infringing products and is unlikely to be properly considered confidential, at this distance in time. The one reference to "the licensing and sourcing agreement between Umbro and Sports Soccer" is in our view covered by the considerations already mentioned in relation to document 12. See also Umbro document 17, referred to in Sports Soccer document 5, which we have already discussed above.

51. Sports Soccer document no. 6 dated 7 April 2000 sets out the terms of the arrangement between Umbro and Sports Soccer. This document, unlike document 12, does not figure in the decision. Sports Soccer, in its submissions of 19 February 2004 displayed a particular sensitivity about this document. In our view it should be disclosed, since it goes to the existence of the commercial arrangement between Umbro and Sports Soccer the apparent implementation of which Umbro document 12 refers. However, it should be disclosed only on the basis that all figures relating to turnover, margin and volume should be deleted.

52. Sports Soccer documents 3.3.2.27 3-Annex 1, 3-Annex 2, and 9 contain certain redacted figures as to the margins it was earning on replica products mainly during the period of the infringement, the quantities sold and the formulae used for calculating mark-ups. The formula appears to be similar to that referred to in Umbro document 17 discussed above. These documents appear to us to be of relevance to understanding the general context of the case. On

the basis that this information is to be treated as historical, we can see no compelling reason for maintaining confidentiality.

53. For the above reasons, we are of the view that the remaining documents in dispute should now be disclosed, subject to redactions of the figures mentioned above in relation to Umbro documents 12, 16, 17 and Sports Soccer document 6. The Registrar will arrange to send the parties new versions of these documents showing exactly what the Tribunal has in mind.

54. All disclosure will be subject to a requirement that the documents are not passed into the possession of clients but remain under the control of legal advisors, and that clients are not to keep copies. At this stage the documents are to be used only for the purposes of obtaining instructions for the purposes of the present appeal, and only so far as strictly necessary for that purpose. The documents are to be kept in a separate file. Mention of the documents in open court requires the prior permission of the Tribunal. The contents of this order must not be published or referred to publicly without the Tribunal's permission.

55. On those grounds, the Tribunal makes the following Order:

(1) The time for applying to the Court of Appeal for permission to appeal this Order under section 49 of the Competition Act 1998 is abridged to three days from the date of service of this Order.

(2) If no application is made to the Court of Appeal for permission to appeal within the time limit referred to in subparagraph (1) above, then within three days thereafter, the OFT will disclose to the appellants unredacted versions of the documents referred to in this Order, subject to deletion of the figures in the documents mentioned above. If such an application for permission is made, disclosure is stayed until the Court of Appeal has dealt with that application or until further order.

(3) The contents of this Order are confidential to the OFT, Umbro, Sports World (formerly Sports Soccer) and the legal advisors of JJB and Allsports until the expiry of the time periods referred to in paragraph (2) above or until further order.

(4) Disclosure of the documents is subject to the restrictions set out in paragraph 54 above.

(5) Liberty to apply.

Sir Christopher Bellamy

President of the Competition Appeal Tribunal

Made 25 February 2004

Drawn 25 February 2004