



[2004] CAT 12

1

Tuesday, 16th March 2004

3

RULING

4 THE PRESIDENT: The stage this matter has reached is that  
5 the tribunal is halfway through hearing evidence in  
6 JJB's and Allsports' appeals against the decision of  
7 the OFT in the replica football kits case.

8 The appellants have already cross-examined those  
9 witnesses on behalf of the OFT that they expressed  
10 a desire to cross-examine. Cross-examination of  
11 witnesses for JJB and Allsports, notably in this case  
12 Mr Whelan of JJB, is about to commence.

13 Counsel for the OFT now applies to the tribunal to  
14 admit into evidence, or at least as a first step to  
15 read, the transcript of a private hearing of Umbro that  
16 took place before the OFT on 4th March 2003, not  
17 previously relied on by the OFT. I will revert to that  
18 in a moment.

19 It is said that this document is relevant to two  
20 issues. The first suggestion is that it is relevant to  
21 the case made by Allsports that Umbro was motivated by  
22 a desire to blame other retailers in order to obtain  
23 leniency. Although it is conceded that Allsports had  
24 all along put in issue Umbro's motivation, it is only  
25 recently that reliance specifically on leniency has, as

1           it were, come more into focus.

2           The second round advanced is that this transcript is  
3           relevant to a statement made this morning by Mr Whelan  
4           in examination-in-chief to the effect that he,  
5           Mr Whelan, and Mr McGuigan, the chief executive of  
6           Umbro, had never discussed the OFT investigation. That  
7           last issue has arisen because Mr Ronnie, the former COO  
8           for Umbro, said in his evidence right at the end of  
9           re-examination that he had been told by Mr McGuigan that  
10          Mr Whelan had said to Mr McGuigan that Mr Ronnie was no  
11          longer acceptable to JJB because of a witness statement  
12          that Mr Ronnie had given to the OFT. Or words to that  
13          effect.

14          Mr Whelan in evidence today has effectively denied  
15          that suggestion, stating that he has never discussed  
16          the OFT investigation with Mr McGuigan.

17          The matter has a somewhat tangled history which we  
18          mention only in outline.

19          This case began with a large number of matters being  
20          covered by a cloak of confidentiality which initially  
21          extended to the fact that Umbro had applied to the OFT  
22          for leniency in the course of the administrative  
23          proceedings. As a result of a number of judgments of  
24          the tribunal at or following case management conferences  
25          in this matter, that confidentiality has progressively

1           been lifted.

2           It is not now necessary to go over matters in  
3           detail. Suffice it to say that on various occasions  
4           the OFT has referred to the existence of the transcript  
5           of the hearing of 4th March 2003, and in a proposed  
6           Draft Amended Defence presented to the tribunal at  
7           the end of December 2003 the OFT proposed to rely on  
8           that document.

9           In its submissions of 24th January 2004, however,  
10          the OFT said at paragraph 3:

11          "Secondly, in order to prevent these matters from  
12          causing unnecessary complication and confusion, the OFT  
13          will not seek to rely substantively upon the transcript  
14          of the private hearing of 4th March 2003 (the 4th March  
15          transcript) in these appeal proceedings.

16          Accordingly, the OFT does not seek permission to  
17          amend its defences to Allsports' and JJB's notices of  
18          appeal as regards the 4th March transcript. Subject to  
19          paragraph C below, the OFT does not invite the tribunal  
20          to consider the contents of the 4th March transcript."

21          Paragraph C below in that document referred to  
22          the possibility of there being a concern on the part of  
23          the tribunal or Allsports and indeed JJB that references  
24          that the OFT had made at the hearing on 12th December to  
25          the 4th March document may have sown doubt in the minds

1 of the tribunal as regards Allsports' or JJB's conduct  
2 at an antecedent stage in the case. The suggestion was  
3 that the tribunal might wish to resolve that concern by  
4 considering the contents of the 4th March transcript,  
5 and allowing Allsports and JJB to make submissions on  
6 it.

7 The approach the tribunal took at that stage was  
8 that it was for the OFT to decide either to rely on this  
9 document or not to rely on it. If the position was that  
10 it was not going to be relied on, that was the position;  
11 and as far as the tribunal was concerned there was no  
12 evidence whatever before the tribunal of any conduct or  
13 other behaviour which might in any way sow any doubt in  
14 the mind of the tribunal as regards any aspect of  
15 Allsports' or JJB's conduct.

16 That is where the matter remained at least as far as  
17 the tribunal was concerned until this afternoon when  
18 an express reference was made to the 4th March  
19 transcript and an application was made to introduce that  
20 document before the tribunal or at least that  
21 the tribunal should read it.

22 As far as the two grounds put forward are concerned,  
23 the argument put forward by Allsports that Umbro may  
24 have had a motivation to blame retailers, notably in  
25 order to secure more lenient treatment from the OFT, has

1 in our judgment been a foreseeable issue in the case  
2 since the early days; it is referred to in Allsports'  
3 pleadings and skeleton arguments, and although it may  
4 have come into focus more recently, we do not regard  
5 that particular ground as a good reason for now  
6 introducing the 4th March transcript at the late stage  
7 that this application is now being made.

8 As to the second reason, the suggestion is as we  
9 understand it that there may be something in  
10 the 4th March transcript that may or may not throw  
11 further light on conversations that may or may not have  
12 taken place between Mr Whelan and Mr McGuigan about  
13 the position of Mr Ronnie.

14 That may or may not turn out to be a relevant  
15 issue in the case. But it is very late now to introduce  
16 a new document, reliance on which has already been  
17 expressly disavowed at an earlier stage.

18 Our approach at the moment is that this issue, if it  
19 becomes relevant, should in the first instance be  
20 canvassed in cross-examination. If there is ultimately  
21 an issue about what Mr Whelan said to Mr McGuigan, and  
22 if that is an issue which is relevant to the case and if  
23 it is an issue which the tribunal needs to resolve, we  
24 think it somewhat unlikely that at this stage of  
25 the proceedings it can properly be resolved by referring

1 to a transcript of what may or may not have been said by  
2 counsel on a previous occasion at a hearing before  
3 the OFT, or by persons present at that hearing, without  
4 the benefit of hearing from the witnesses in person, if  
5 the matter remains in dispute.

6 The transcript itself would in any event be hearsay  
7 of what passed on that particular occasion and hearsay  
8 as regards the underlying matters referred to.

9 In our judgment, therefore, the proper approach at  
10 this stage is for the tribunal not to look at this  
11 transcript but to proceed with the cross-examination.  
12 If there is an issue that remains or arises, it seems to  
13 us that if it is a matter that we need to resolve it is  
14 likely to be a matter that may not be capable of being  
15 fairly resolved unless the tribunal were to hear direct  
16 witness evidence, in particular from Mr McGuigan, on  
17 what was or what was not said by way of rebuttal  
18 evidence as to the evidence that may be given on behalf  
19 in particular of JJB.

20 Whether we would or might contemplate rebuttal  
21 evidence it is far too early to say, and we are not  
22 ruling in any way at this stage as to whether we would  
23 permit such an application; whether the issue would or  
24 might be relevant to any issue we have to determine or  
25 what the further course of the proceedings should be.

1           All we are saying is that we are not at this stage  
2           closing the door to that possibility of witness evidence  
3           in rebuttal, whether by witness summons or otherwise, at  
4           a later stage of these proceedings.

5           We are not, however, minded for the reasons that  
6           we have given to look at the transcript at this stage.