IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House
Bloomsbury Place
London WC1A 2EB

17 January 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
BARRY COLGATE
RICHARD PROSSER OBE
Sitting as a Tribunal in England and Wales

BETWEEN:

UMBRO HOLDINGS LIMITED — Applicant
and
THE DIRECTOR GENERAL OF FAIR TRADING — Respondent

MANCHESTER UNITED PLC — Applicant
and
THE OFFICE OF FAIR TRADING — Respondent

ALLSPORTS LIMITED — Applicant
and
THE OFFICE OF FAIR TRADING — Respondent

JJB SPORTS PLC — Applicant
and
THE OFFICE OF FAIR TRADING — Respondent

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HEARING: PENALTY APPEAL
DAY ONE

APPEARANCES

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

Mr Peter Roth QC and Mr Paul Harris (instructed by James Chapman & Co) appeared for Manchester United PLC.

Mr George Peretz (instructed by Addleshaw Goddard) and Mr Adam Aldred (of Addleshaw Goddard) appeared for Allsports Limited.

Lord Grabiner QC and Mr Mark Hoskins (instructed by DLA Piper Rudnick Gray Cary UK LLP) 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.

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THE PRESIDENT: Good afternoon, Lord Grabiner.

LORD GRABINER: Good afternoon, I am very grateful to you for agreeing to hear me first so that I can deal with other matters. I am very grateful.

The approach that we plan to adopt is to follow the methodology in the Guidelines, which of course you are very familiar with, and we think the relevant Guideline is 423 of March 2000 because that was the Guideline in force at the governing time. The approach that I want to follow is the one that we followed in our skeleton argument, step one, step two, step three and then step four, aggravating factors and mitigating factors both in the context of step four.

First of all, the approach to adopted by the Tribunal: we dealt with this in the early paragraphs of our reply skeleton argument, and in its bare essentials the OFT have encouraged the Tribunal, we suggest, to ignore 423 and the approach adopted by the OFT in its Decision, and we say that that is the wrong approach for two principal reasons. First of all, under the Competition Act s.38(8), there is an obligation imposed upon the OFT to have regard to its own guidance when setting the amount of a penalty. When hearing an Appeal in relation to a penalty, the Tribunal should also, we suggest, have regard to the OFT's guidance, and a failure to do that would not be consistent with the approach adopted in the statute. Secondly, the Tribunal is exercising an appellate jurisdiction in relation to penalties and it should not be required to undertake its own *de novo* assessment.

What we suggest is the appropriate course is that the Tribunal should have regard to the Guideline – of course, the Guideline is not binding, we obviously accept that – and in particular to use the approach adopted in the Decision as the benchmark. Then the Tribunal, we suggest, should evaluate the appropriate level of the fine by assessing the approach adopted in the decision of the OFT in the light of the findings made by the Tribunal in its own Judgment.

Can I go to step one, which is the penalty calculation. The first point that arises here is the definition of the market, and the issue between the parties is a short issue. The OFT says that the relevant market is the full kit, that is the shirt, the shorts and the socks. We respectfully disagree and we say that the relevant market is shirts alone and, for the avoidance of doubt, shirts excludes goalkeeper's jerseys, because they are not in the team's colours. You do not buy the goalie's jersey, you buy the shirts to support your team apparently. Shirts do constitute a significant portion of the kit obviously, but there is a material difference between what we would call the shirt market and the full kit market. So in this particular case, and as

far as JJB is concerned, the full kit is about £14.7 million in terms of that market. A reference on that is para.664 of the Decision. That is in respect of the year ending 31st January 2001. If the relevant market is shirts alone, excluding the goalkeeper's jersey, then the equivalent figure is £9.4 million. So it is a significant difference.

In support of the proposition that we should be confined to what I will call loosely the "shirt market", we rely, first of all, upon the OFT guidance 423 and para.2.3. Could I just draw that to your attention. The relevant part of 2.3 is the bit that gives us a meaning for the expression "relevant turnover". It is tab 38 of volume 4 of the authorities bundle and p.773 if you are looking at the mauve book. The relevant part of the paragraph says – it is in the third or fourth line, depending on what you are looking at:

> "… the turnover of the undertaking in the relevant product market and the relevant geographic market affected by the infringement in the last financial year."

What we say about this is that it is obviously a market based exercise. That is in effect a market definition. We do say that the starting point of any market analysis is "demand side substitutability", in other words, what do the consumers consider as substitutes for the particular items that we are concerned with?

If you approach it in that way we would make the following points in relation to shirts. First of all, the OFT accepts that the individual elements of the kit are not substitutable by customers or consumers, I think is the word they use. Could we just look at that in the Decision at 553. Can we go, first of all, to the original skeleton argument of the OFT. That might be the best starting point. It is in the fourth consolidated bundle. It is rather clearer here, the original OFT skeleton argument on penalty appeals, and it is para.7(b) on the third substantive page which starts, "Replica kit consists of authentic reproductions", and so on, and if you go half way down that paragraph:

> "The evidence shows that key players in the industry regarded all the elements of the kit as a unit although the individual elements of the kit are not substitutable by consumers."

Then a similar point is made in the Decision at para.553. That should be the first point in your bundles. The same point is made, but in slightly different language, "Conclusion of the OFT", and six lines into the paragraph:

> "Therefore, whilst a replica kit is comprised of several products, adult and junior, shirt, shorts and socks and infant kits which are sold separately and whilst a fan who

wants to wear a pair of shorts cannot substitute this for a replica shirt, this does necessarily mean that each kind of product is a distinct relevant product market."

From my point of view, the point that I am concerned to get across is the non-substitutability point about the shirts.

The OFT accepts in para.553 of that Decision that adult replica shirts are sold separately from shorts and socks – so they are sold as separate items. This can readily be observed by, I am told, a trip to Oxford Street or, if you were there last week, in Princes Street, but you would have seen that point ----

THE PRESIDENT: We did not notice.

LORD GRABINER: I thought you had other more interesting things to deal with, as I understand, during the luncheon adjournment!

THE PRESIDENT: Nothing could be more interesting than your submissions at the moment, Lord Grabiner!

LORD GRABINER: And also it is the case that child kits are sold apparently as a whole package, but that is not the position in relation to adult shirts, shorts and socks, which are sold separately. The OFT does not dispute that replica shirts are bought and worn as leisurewear, but shorts and socks are not. The example suggested by my learned friend Mr. Hoskins is that if you walked into the bar ----

THE PRESIDENT: Yes, the man in the pub.

LORD GRABINER: And all that, whereas if you went in with the shorts and the socks on that might convey a rather different impression. There are some clubs presumably where, if you did turn up with the kit, you would actually get a game on the door! There are material differences anyway.

These factors point very strongly, in our submission, to the conclusion that the relevant market is shirts alone. In the circumstances, if the OFT wanted to adopt a different market definition in its Decision then it could have conducted a different analysis of why these fundamental pointers do not lead to the correct result.

I would add this, if I may: there is quite a useful cross-check on the validity of the point which is that in this very case in the agreements that were made, on the assumption of course that the Judgment is correct, the agreements were for shirts, they were not for the full kit, which tells you quite a lot about their perspective of the market. So, in my submission, it should be shirts and it does not extend to full kit.

Can I go on a separate point which is deterrents, and we come to deterrents later on in a slightly different context, but there is, so to speak, a double jeopardy point here. In para.16 of the Penalties skeleton argument, the OFT says that it has adopted a reasonable approach to step one of the penalty calculation. Can we just have a look at that. It is tab 5E in your bundle, para.16. It is at the foot of the page:

> "The OFT's position is that, of the many ways to slice the cake, it has adopted a reasonable approach that sets an appropriate starting point for calculating the penalty and for communicating an effective deterrent message …"

– and those are the words that I emphasise –

> "… signalling the gravity of this type of infringement."

This shows that, rather than adopting what we would suggest would have been a more appropriate objective approach to the penalty calculation, the OFT has adopted an approach designed to achieve as high a penalty calculation as possible, and in our respectful submission it is wrong for the OFT to take account of deterrents at two stages, which is the effect of what is happening here, both at step one, or stage one, and step three. In my submission, that is not appropriate. It is going to be dealt with, as we will see in a moment, in step three, and it should not have been dealt with in step one.

Can I say something next about the Sportsetail Agreement. In the Decision of the OFT at paras.664 to 669, the OFT justified its decision to apply a 9 per cent percentage to turnover on four specific grounds. You might like to have 664 to 669 handy. I do not need to go through them, but the relevant one I want to draw attention to is in 667:

> "JJB's stance in relation to supplies to Sportsetail initially prevented Sportsetail from beginning in its operations and then restricted its ability to compete."

It is that reference. The Tribunal's Judgment has turned that particular finding. In its Penalties skeleton argument, the OFT says, in effect, that this should make no difference to the starting point adopted. In our submission, that is not right. The allegation that JJB was a party to the Sportsetail Agreement was a material consideration which led to the adoption of the 9 per cent point. That allegation having not been satisfied or having been disproved, whatever, that should lead in principle to a reduction in the percentage applied. That is all I wanted to say about step one. Could I turn next to step two.

MR. COLGATE: Lord Grabiner, could I just clarify one thing before you move on in terms of figures you gave us at the beginning of your statement. You referred to 14.7 being the figure

that the OFT brought up, and then you said for shirts alone the figure was 9.4. Could you come back to us later with the figure which includes all adult shirts? That is my first question.

My second question is, does that figure of 9.4 include or exclude children's shirts?

LORD GRABINER: I will not say, let me find out. (After a pause) We think it excludes, but we will check and we will come back to you.

MR. COLGATE: Perhaps we could have both figures then.

LORD GRABINER: Yes, indeed.

On duration there are essentially two issues under this heading. When assessing duration is the relevant starting point the date of the making of the agreement, or the date when it was agreed to be or, as the case may be, was in fact implemented? So is it the date when the agreement was made or the date when it was agreed to be implemented or when it was, in fact, implemented? That is the first point under duration. The second point is, what is the appropriate multiplier for duration?

Can I just deal with the first of those two points, the starting point. This arises in two situations in this case. First of all, in relation to the Manchester United Agreement, the Tribunal found that the agreement was made at Mr. Hughes' house on 8th June 2000, and it related to the Manchester United home shirt which was to be launched on 1st August 2000. Accordingly, the Agreement was not supposed to kick in, and indeed could not have kicked in in accordance with its terms, until 1st August. According to the Judgment the Agreement came to an end when Sport Soccer discounted the shirt on 1st October 2000. So the question here is whether duration includes or excludes most of the month of June and the whole of July 2000, being the difference between the date when the agreement was made and the date when it came in.

Secondly, in relation to the Manchester United Centenary Agreement the Tribunal found that the agreement was made at the meeting a year later, 8th June 2001. I do not know whether there was anything special about 8th June, but it may be that it was just pure coincidence. It related to the Manchester United Centenary shirt, which was due to be launched in the following month on 20th July 2001, about six weeks later. Now, according to the Judgment the agreement came to an end at the end of August 2001. So here the question is whether duration includes or excludes most of the months of June and July. Our submission is that, as a matter of common sense, we would suggest, and as a matter of ordinary fairness, "duration" in this context essentially means the period when the agreement was in operation.

The reason we say that is because that is the period of what one might loosely call wrongful competition in action, when the consumer was injured, if you like.

The submission perhaps can be tested by a couple of examples. First of all, an agreement – if we can just imagine a couple of examples – by which the parties agree to align prices in 12 months time and, when implemented, that agreement lasts for a month. It is true that in the 12 month period the parties to the agreement could have resiled, and no doubt should have resiled, from their bargain. It is also true that there was no damage to the consumer in that 12 month period leading up to the period of operation of their bargain. Our suggestion and submission is that the correct duration on that example is the one month period when the agreement was actually put into effect. What should not be taken into account is the whole 13 month period.

Perhaps I can just give you a second example which itself contains two possibilities. An agreement which comes into being and lasts for a month on the one hand, an agreement whose performance is agreed to be deferred for 12 months but, in the event, is never implemented: in our submission, it would be unreasonable to adopt a greater adjustment for duration in relation to an agreement that was never implemented than for one that was, even though on that example the duration, if you were to include the period waiting for the agreement to kick in, would be very much longer than the other one. That is perhaps quite a good example because if the agreement never kicked in there would not actually be any consumer damage suffered at all.

So our submission then is that it should cover the period of operation of the agreement.

THE PRESIDENT: Lord Grabiner, I seem to remember – and I will be no doubt be corrected – there is at least some evidence that these shirts are quite frequently pre-ordered, that is to say orders go in before the launch date so that the shirt can be actually picked up on the launch date, sometimes with an appropriate number on it, a number 7 or number 9 or whatever it happens to be, so that it might be that one needs to take into account the period on this example before 1st August when orders are already being accepted.

LORD GRABINER: My understanding is that certainly it might happen, but I do not think there is any detailed evidence about. Would you just forgive me for a moment.

THE PRESIDENT: I seem to remember Mr. Hughes gave some evidence about this.

LORD GRABINER: (After a pause) All that I would say, and I do not have any memory of it here now and I do not think Mr. Hoskins does either, is that it is not a point that has been, to say the

least, fully explored in the evidence that we have examined, but I accept that it is certainly a possibility that business was done in that way, but as to the extent of it I just do not know, and I do not think we do know.

So far as the multiplier is concerned, if the Tribunal accepts the approach for the starting point as I have been developing a few moments ago, in summary the relevant periods would be as follows: first of all, for the England Euro 2000 Agreement it would be May 2000 to June 2000, which is a period of two months; for the Manchester United Agreement it would be 1st August 2000 to 1st October 2000, which also is a period of two months; and for the Centenary Shirt Agreement it would be essentially two months, it is from 20th July 2001 to the end of August 2001, so it is a small part of July but on the assumption that one counts it for the whole of July it is another two months. So you have got three sets of two months which give a total of six months. In our submission, the appropriate multiplier on that footing should be 0.5, and certainly not 1.5 which is the approach for which the OFT contends. Even if you were to accept the approach adopted by the OFT, I think the result would be significantly less than 1.5 as a multiplier.

Can I just take you through those three possibilities by reference to the same three arrangements. It is two months for the England Euro 2000, it is four months for the MU Agreement because it is June 2000 to 1st October 2000 for that one, it is four months; and it is three months for the Centenary kit Agreement because it is June 2001 to August 2001. So all that I am doing in those examples is to extend it back to the time when the agreement was made, and that is the difference. On that approach you get a total of nine months and on that approach a multiplier of 0.75, but again nothing like 1.5.

THE PRESIDENT: Just before we leave that, just for argument's sake, I think I follow the argument that you might want to reduce for a duration shorter than one year, but the countervailing consideration – the OFT would say you should not reduce at all and that is their argument – we are dealing here with agreements that affect very important events that are intrinsically of a limited duration, a launch period or a Euro 2000 tournament, and it is not entirely clear to me whether a potentially serious infringement that affects an important event necessarily limited in duration should actually attract some kind of formulaic or mechanistic reduction for the fact that it happens to be something that, by its nature, is limited in duration. It is still quite serious, arguably.

LORD GRABINER: Yes, absolutely, but in a way the fact that it is tied to a specific competition or contest itself defines both the agreement and, by itself, also defines the extent of the

wrongdoing. It happens to produce the result that it is confined in duration as well, but I do suggest that that is purely fortuitously driven by the extent or length, if you like, or factors associated with the particular competition. If you do not adopt some such approach then you have got to find some other approach. That probably makes you more at sea perhaps than the formulaic one that we are contending for. What I am saying is that it is inherent in the peculiarities of the individual agreement and the particular transaction and in those circumstances it is not an unreasonable approach.

Mr. Hoskins also draws my attention to the Decision of the OFT, which suggests that the special factors, what are described in para.605 as the "key sewing periods", have already been taken into account at the step one stage. If you have a look at the Decision, para.665, under the heading "Type of Infringement, Nature of Product and Structure of Market":

> "Throughout the period of the infringement JJB was an official England retailer and began negotiations with Nike and MU from 1st July 2002. JJB became the official retailer (see paras.605, 6 and 7 in relation to Allsports)."

If you go back to para.605 it says, and this is all in relation to step one, in the second sentence:

> "The infringements were aimed at key selling periods immediately following the launch of a replica kit or in the run up to and including the major international tournament at the time."

– and so on. The point is that step one has already taken account of the peculiarities of the particular competition that the shirts are in respect of.

THE PRESIDENT: Having done that, it is possibly, arguably, somewhat illogical to say, "We go for 9 per cent because it was a key selling period and then we actually reduce it by half because the key selling period was rather short".

LORD GRABINER: It is not illogical, with respect. The reason for that is because duration has got to be looked at specifically, and you have got to come to a view as to what is meant by "duration" for these purposes.

THE PRESIDENT: "Duration" I think is in the statute as a consideration.

MR. COLGATE: Just commenting on that, in the OFT's own guidance at 2.7 it does say that part years may be treated as full years for the purposes of calculating the number of years of the infringement.

LORD GRABINER: It certainly may be, absolutely. I accept that it is possible that it could.

MR. COLGATE: Of course also bearing in mind the agreements took place at quite distinctly separate periods of time.

LORD GRABINER: Yes. All I am saying in relation to the part one or step one that if it had not been for that factor the percentage might have been somewhat less. It might have been 6 or 7 per cent, or something like that, instead of the 9 per cent.

THE PRESIDENT: I think I am wrong, Lord Grabiner, I do not think duration is actually in the statute.

LORD GRABINER: I think duration is in the guidance. I think one should not be, so to speak, construing the guidance like as a statute, because it is not binding upon you in any event.

Deterrents, step three: the Decision in para.672 applies a multiplier of three for deterrents which, in our submission, is disproportionate. If I can give you an example, if an uplift of 50 per cent were applied for deterrents the step three figure reached would be 2.9 million, as opposed to 5.9 million which is produced by the three multiplier. So in money terms that does make a very significant difference.

THE PRESIDENT: Where do you get that 2.9 million from? What is the calculation that gets you there?

LORD GRABINER: If you look at para.671 in the Decision you see the figure of 1.9, and they have multiplied the 1.9 figure by 3. You see in square brackets at the end of 671 the 1.994 times 3 produces the figure in 672 of 5.981, which is the figure I mentioned a moment ago.

THE PRESIDENT: How do you get to the 2.9 million figure that you also gave us?

LORD GRABINER: I think you have to scale down. I have not done the sum.

THE PRESIDENT: To what figure do you apply 50 per cent to get to 2.9?

LORD GRABINER: Add 50 per cent of 1.994.

THE PRESIDENT: On the assumption, which you contest, that 1.994 is the right starting point you add on 50 per cent?

LORD GRABINER: Yes, exactly. That assumes the accuracy of the 1.5 and all that. The reason for mentioning it is simply to show you the rather dramatic difference of multiplying by the one rather than by the uplift of 3.

THE PRESIDENT: Just to be clear, the 1.5, let us just track it back.

LORD GRABINER: That is the duration multiplier.

THE PRESIDENT: In 670 it is said that JJB's involvement in the replica shirts agreement lasts for one year and four months and the England Direct Agreements last in total for one year and six months. The England Direct Agreements have disappeared, so you submit presumably that we ignore that?

LORD GRABINER: Yes.

THE PRESIDENT: Then as far as JJB's involvement in the replica shirts agreements lasting for one year and four months ----

LORD GRABINER: Then reason for that is that they have treated it, so to speak, as one. They have taken the start point for the first one, May 2000, and they have run it all the way through to August 2001 as the end date of the third, the Centenary one.

THE PRESIDENT: Taking into account the continuation agreement as alleged in the Decision being, as the name suggests, a continuous agreement.

LORD GRABINER: Yes.

THE PRESIDENT: But the Tribunal has found that it was not a continuous agreement. You presumably submit that, on any view, the 1.5 cannot stand in the light of the Tribunal's findings on the facts.

LORD GRABINER: Absolutely. Then there is the other argument, namely that that is not a correct approach in any event, but I will not go back on that. You are absolutely right.

We do say that the OFT has approached the deterrents point in a rather discriminatory way against JJB. Can I explain why we say that. In relation to the FA, the FA was subject to a multiplier of 2 for deterrents rather than 3. The basis for that approach is explained in 779 of the OFT Decision, and perhaps we can just have a look at that. They say in the second sentence:

> "The OFT's policy objective of deterring other undertakings from infringing the Act is satisfied by the multiplier used with respect to other parties in this case."

So deterrents is a general policy and, in our submission, it is not fair to impose the burden of achieving that policy more heavily on some parties but not on other equally culpable parties.

THE PRESIDENT: How is the FA equally culpable in relation to the replica shirts agreements?

LORD GRABINER: I cannot say they are in relation to replica shirts. They accepted, but without debate, that they had infringed the Act.

Can I turn to the question of step four, which has the two elements to it, the aggravating factors and the mitigating factors. The aggravating factors, I think there are two or three points that I want to address on that. First of all, the OFT in para.51 of its skeleton argument accepts that in the light of the Tribunal's findings in relation to the England Direct Agreement it is not appropriate for a 10 per cent uplift to be applied for a repeated infringement on account of the England Direct Agreement.

The second point is in relation to findings of what I call wider infringement.

THE PRESIDENT: If you just pause on that point, what we are left with is the England Agreement and the MU Agreement which are very close together in time during 2000 and could possibly be regarded for a various reasons as a continuum. We have then got, as it were, quite separately a year later the MU Centenary Shirt Agreement which we have just agreed was not part of the continuous whole. If one took away the 10 per cent for the England Direct Agreement could one, in theory, if one was going down this road in the first place which I am not necessarily suggesting that one is, replace that 10 per cent with another 10 per cent for a repeated infringement reflecting the MU Centenary Shirt Agreement? Do you follow that somewhat garbled question?

LORD GRABINER: Yes, I understand exactly what you are saying. It would provide me with a logical argument which it would be more difficult for me to upset, if that is the point that we come to. I think that is the logical consequence of it. It restructures the arrangements and gets the same result.

THE PRESIDENT: Yes.

LORD GRABINER: On the findings of wider infringement in para.45 of the OFT's skeleton argument, they say that the level of penalty should be increased on the basis that the Tribunal made findings of infringement which go wider than that made in the Decision.

THE PRESIDENT: This is the original skeleton argument?

LORD GRABINER: It is the new skeleton argument, the amended skeleton argument, para.45. At the foot of p.20 on the internal numbering they say:

> "The Tribunal makes findings of infringement which go wider than those made in the Decision. In particular it finds an agreement or concerted practice in relation to replica shirts generally and not just confined to England or MU shirts and finds that JJB involvement dates back to as early as April 2000."

The OFT relies on the statement which, for your reference, is in para.754 of your Judgment, that JJB was involved in an agreement or concerted practice that extended to replica shirts generally.

We suggest that the Tribunal does not have jurisdiction to increase the level of penalty on this basis. The reason we say that is that the scope of any appeal to the Tribunal is circumscribed by a couple of things: first of all, the findings made by the OFT in its Decision; and secondly, by the scope of the Notice of Appeal. I will just give you the Schedule 8 reference, it is Part 1, para.3(1) to the Competition Act.

Then if you look across at para.540 of the Decision of the OFT, the OFT expressly says:

"The OFT considers that the first relevant product market in this case is each Club's or national team's replica kit. The OFT does not consider it appropriate to extend the relevant product market to encompass other teams' replica kits or Other Licenced Merchandise."

In our submission, it would subvert the rights of the Defence recognised by the Tribunal – and in that regard we would rely on *Aberdeen Journals*, paras.162 to 178 – if the Tribunal were to increase the penalty on the basis of findings adverse to JJB which had not been put to them in the Rule 14 procedure, and for that reason did not appear in the Decision.

What happened after that was that the defect was not remedied at the hearing before the Tribunal, and so we had no notice of, and were not aware of, the allegation that it was involved in an agreement or concerted practice in relation to replica shirts generally, and that that formed part of the Appeal process in front of the Tribunal. That is our point on that.

The third point concerns the allegation of the provision of inaccurate information to the OFT and to the Tribunal. These are serious allegations and we do need to look at a couple of aspects of them to make sure that there is no unfairness investigated in any decision you eventually come to.

THE PRESIDENT: Just before we leave the earlier point about replica shirts generally, my recollection is – I may be wrong – that in the relevant period there were only two other launches in relation to Chelsea and Celtic. The turnover of those shirts is presumably already picked up in the turnover figure that we are working on, replica shirts generally?

LORD GRABINER: We do not think it is.

THE PRESIDENT: It is not. What you have given us is just the turnover for the England and MU shirts?

LORD GRABINER: Yes. I am grateful to my friend, it is para.664 of the Decision. JJB's turnover in the markets for MU and England replica kits was 14.7. That is the figure I gave you.

THE PRESIDENT: Anyway, we have no idea what, if any, turnover was affected by these other things?

LORD GRABINER: No, I do not think that information is available. Since then, of course, Manchester United's ----

THE PRESIDENT: As you rightly say, I do not think any real time in the hearing was spent on Chelsea and Celtic.

LORD GRABINER: No. I do not know about Celtic, but Chelsea's lights have risen since then and Manchester United's have correspondingly fallen. I do not know if that is relevant. You must not imagine that Chelsea then was Chelsea now, and I speak as a Spurs supporter and we lost to them on Saturday!

THE PRESIDENT: Inaccurate information?

LORD GRABINER: Coming to that question of inaccurate information, there are a couple of points. First of all, the OFT says that JJB provided inaccurate information to the OFT during the course of its investigation regarding launch prices and its ability to break down prices on a store by store basis. We should just have a look at the material here. Can we look, first of all, at the OFT amended skeleton argument, para.46, p.21:

> "Secondly, JJB provided inaccurate information to the OFT during the course of the investigation, some of it in response to a s.26 Notice regarding its launch prices and its ability to break down prices on a store by store basis. Moreover, these points were the subject of extensive requests by the OFT in the course of these proceedings and the full picture only finally came to light during the cross-examination of Mr. Russell."

Then can we go to two paragraphs in the Judgment, paras.629 and 635. Paragraph 629 is at p.185:

> "Secondly, it emerged from Mr. Russell's cross-examination that figures for launch prices provided to the OFT in November 2001 were only JJB's standard prices and did not show actual prices as reflected in JJB's discounting campaigns or on a store by store basis. Moreover, in JJB's solicitor's letter of 2nd November 2001 in answer to the OFT's s.26 request of 18th October 2001 JJB denied that it was able to produce price information on a store by store for technical reasons. It now transpires that that answer was incorrect since JJB's computer system does hold such information, at least for certain shirts."

We are going to be quarrelling with that. At para.635:

> "We further find that the information given to the OFT in November 2001 and to the Tribunal in the KPMG schedule by JJB was incomplete or should have been qualified, a fact which the OFT rightly brought out in cross-examination."

In relation to information regarding launch prices this relates to our response, as indicated there, to the s.26 notice of 18th October 2001. Perhaps we can have a look at that. It is the cross-examination bundle for Mr. Russell, tab 7. If you go to tab 7 you will see the

18th October s.26 notice, and then the specific part of it is on the third page in a fairly general request at para.7, "A list in hard copy and electronic form of all replica football kit you have sold since 1st January 2000, in each case stating the information that is there specified, the date on which sales commenced in (c), in (e) the retail prices charged for the shirt, shorts and socks respectively, time when each was identified and first launched, and (f) whether any change was subsequently made to the retail kit charge, if so, what and where", and so on and so forth, a very general request. The answer you will see is several pages on in a letter of 2nd November, it is the next substantive document, and it is a letter from those instructing me. The first page of it has got 12 items – do you see that?

THE PRESIDENT: Yes.

LORD GRABINER: There are 12 items listed on the first page. Paragraph 7 is dealt with at the foot of the second page, and then on the third page the answers are given, including at (f), that the relevant prices and dates of changes in the retail price of replica kit are shown on the list. The first sale price shown is the current sale price. All previous prices are shown across the page with the corresponding date of change. The list is a record of standard prices that were applicable to all JJB stores nationwide and it does not include blanket discounts that may have been provided in relation to specific stores for commercial reasons, for example, the opening of a new store or periods during which overall discounts were given such as the 17.5 per cent discount given over all products at all stores during February/March 2000. For technical reasons it would not be possible to provide details of specific and individual price discounts on a store by store basis.

There was no specific request, as you have seen, for information in relation to discounts. In my submission, DLA's response was entirely candid. It stated that the information provided reflected JJB's standard prices and did not include information relating to discounts. It actually said that. In my submission, it clearly does deal with it in a frank and candid way and is an answer to the questions that have been raised. On this basis, in my submission, it cannot be said that JJB was doing anything other than being quite frank about the nature of the information that it was providing.

In relation to the ability to break down prices on a store by store basis, which is the other aspect of this, it is suggested that, contrary to the statement contained in the covering letter, JJB's computer does hold store by store information for certain shirts, and that was the conclusion reached in the Judgment. In our submission, that is not right. The letter was accurate. It is not possible to obtain store by store information from JJB's computer. It is true

that some store by store information was provided to the Tribunal during the Appeal, but that was obtained from hard copies of buyer sheets that came to light following a request by the OFT for that information, but that happened, and I emphasise this, after the adoption of its Decision.

THE PRESIDENT: Do you mind if I go back to the transcript that is referred to in this part of the Judgment because it is possible we misunderstood the answer.

LORD GRABINER: That may be the case.

THE PRESIDENT: I seem to remember this being based on an answer that Mr. Russell gave in cross-examination. It is Day 9. I think we were basing ourselves on – maybe the reference to the computer system is not entirely right – that exchange at Day 9, p.74:

> "Q. …
>
> "'For technical reasons it would not be possible …'
>
> "For technical reasons.
>
> "A. Yes, it does say that.
>
> "Q. And we now know that that was not right.
>
> "A. How was it not right.
>
> "Q. Because you were able to produce details of your discounts on a store by store basis?
>
> "A. Oh, I think I see where you are coming from. You are saying that, for example, the examples that we gave for Manchester United for October 2000 where we had specifically targeted a number of branches and reduced the price, that information can be produced by JJB. But in terms of where it is on the system I would not know …"

– et cetera, et cetera. That is where it came from.

LORD GRABINER: I understand, and all I am saying is that it did not come from the computer, and the reason it did is because it was not on the computer.

THE PRESIDENT: I see, somebody did it manually?

LORD GRABINER: Yes, exactly, and that was what was produced, these hard copies of the buyer sheets is what was produced when the appeal process was in play after the decision was adopted. Mr. Hoskins reminds me that the first time that the OFT asked for this material was only after the decision. It is a serious allegation and we are concerned – it is one thing to be responsible for things you have done, but it is another thing to be held to be responsible and punished for something that perhaps is the result of a misunderstanding.

Next, if I can turn to a slightly different point, and this is in relation to the KPMG information.

THE PRESIDENT: Just help me, conceptually speaking and looking at it in the abstract, there is no discount in favour of JJB in the Decision for co-operation. It would not be entirely clear to me why the exchange between the OFT and JJB in the course of the administrative procedure would be relevant to setting a penalty for the infringement. I can see that you might give a discount for co-operation, but what you are looking at is the infringement. That is what the penalty is for. It is not a penalty for failing to help, as it were.

LORD GRABINER: There are distinct penalties for failure to provide information.

THE PRESIDENT: As you rightly say, there is another set of enforcement rules for that sort of thing.

LORD GRABINER: One of the other, it may be, first of all, inappropriate for the reason you have just put to me, but in any event inappropriate if, in fact ----

THE PRESIDENT: You say you gave them everything that they asked for?

LORD GRABINER: That they asked for, yes.

Can we look at para.47 of the OFT's revised skeleton argument. This is in relation to the KPMG report where the OFT says:

"Thirdly, the information collated by KPMG and submitted in the course of the appeal did not reflect JJB's discounting campaigns for the period up to 23rd April 2000."

There is a reference then to paras.630 and 635 in the Judgment.

"Again, this was something which was the subject of extensive requests for clarification by the OFT leading up to the liability hearing."

This, we suggest, is an allegation without merit. Of the 54 shirts which are referred to in the KPMG report, the only shirts that were on sale before 23rd April 2000 – and I will show you a list from the face of the KPMG report in a moment – were the two shirts, the England adult and junior home and away shirts, which were launched respectively on 23rd April 1999 and 7th October 1999, and in relation to these England shirts JJB did not make any attempt to conceal the existence of its specific and general discounting campaigns from the OFT. They had already been referred to in JJB's response in the s.26 exchange that we looked at a moment ago.

Can I show you the KPMG report. I want to show you a couple of bits of that. It is file C3, combined core bundle, which came in with Appeal Notice. I do not know if that is easily accessed by you, sir. Page 890 gives you the list and you can see that (a) contains the

only ones that were pre-April 2000, Umbro England adult and junior home and away short sleeve shirts launched 23 April, 7 October, both 1999, as I just mentioned; and the other one of 23rd April 2001 that is referred to, that is post-April 2000. But all the others, if you just look down, they are all post-April 2000, every one of them, and also over the page.

If I can invite your attention to para.2.2.7, which is on p.893, it says that all shirts included in the product information, with the exception of the Nottingham Forest home adult and junior shirts launched July 2000 have been discounted at some stage during their life. The OFT did not seek any detailed information in relation to any of those discounting campaigns until after the adoption of its Decision, that is to say during the Appeal process. We suggest that any argument along the lines that JJB sought to conceal the existence of discounting is not properly founded.

THE PRESIDENT: I seem to remember – somebody will no doubt remind us of what happened – that there was quite a considerable interchange during the procedure in front of the Tribunal, leading, if I remember rightly, to an "Unless" order at some point requiring JJB to particularise on what basis the KPMG report had been prepared. I may have misremembered or have an incomplete memory of what happened.

LORD GRABINER: Would you forgive me a second. (After a pause) The "Unless" order was in relation to the instructions to be given to KPMG, but not, I think, in relation to the points which I have just been addressing.

Can I next go to the evidence of Mr. Whelan, still in this context as well, and can I go to the OFT skeleton argument at para.48. This is the inaccurate response point, where they say that, fourthly, JJB through its solicitors' letter of 13th March gave an inaccurate response to the OFT to the question of whether Mr. Whelan recalled Mr. Hughes producing a sample of the MU shirt at the 8th June meeting. Could we look at the Judgment at 833 and 834, which you will see was the subject of the footnote there. In the Judgment you say (pp.241-242):

> "One implication of Mr. Whelan's evidence on this issue is that he had never told his solicitor that he had no recollection of the MU shirt being produced even though DLA's letter of 13th March states that the OFT was asked whether or not it was the case that David Hughes had produced a sample of the MU home shirt at the meeting at his house on 8th June. I have referred this question back to our client and Dave Whelan confirms that the reason that he did not mention this in his statements is that he has no recollection of it. He would have seen a sample of the shirt some time before that when it would have been presented by the sales representative. To see the

shirt again at David Hughes's house would have held no particular significance and would not have been memorable."

Then you decide:

"We find it unlikely that JJB's solicitors would have stated in a letter to the OFT that they had checked with Mr. Whelan and had been told that he had no recollection of the incident if they had not been told anything of the kind."

That, if I may respectfully say so, is obviously right.

"This evidence seems to us to demonstrate the fallibility on some issues of Mr. Whelan's recollection."

And again I would really suggest not really controvertible.

The letter of 13th March was, therefore, not found by the Tribunal to be inaccurate or misleading in any way. As to Mr. Whelan's oral evidence there were apparent fallibilities in recollection on the part of a witness seeking to recollect events that had occurred some years earlier whilst being cross-examined but, in our submission, that is not a basis for increasing the level of penalty already imposed. If we were to have such arrangements generally in our law I would imagine that the financial consequences of almost every piece of civil litigation would be fabulous, but that may be the simple view of an advocate.

THE PRESIDENT: Lord Grabiner, I am still drawing a distinction in my mind between the penalty for the infringement on the one hand and what might have been done or said in the course of the proceedings on the other hand, which is a separate matter altogether.

LORD GRABINER: If I may say so, that is, I would suggest respectfully, the correct distinction to be drawn.

THE PRESIDENT: In other contexts it is true that there is a discount for co-operation and a plea of "guilty", if you want to look at it in those terms, but it is fairly standard that you do not increase the penalty because someone has gone into the witness box and told a story that the jury does not accept.

LORD GRABINER: Quite. I think, with respect, I agree and that the same principle ought to be applied here.

THE PRESIDENT: Yes.

LORD GRABINER: The only other point that I want to address, but I do not want to go into any detail on it, but I make the point, is that the other element of step four is in relation to the mitigating circumstance, and the only point that we would rely on here is what we have produced as annexe 1 to our reply skeleton argument: that we produced a compliance

programme, we produced it during March of last year, a copy has been provided, and we would ask the Tribunal to take account of it as mitigation.

There is also some further information, and I am sorry it has come in so late, but it is there, under cover of my solicitors' letter of 17th January 2005 – that is today. I do not know if you have that.

THE PRESIDENT: It may not have reached us, I am not sure that it has, Lord Grabiner.

LORD GRABINER: We have provided under cover of this letter answers to questions 3 to 9 of some questions that were put to us as long ago, I am afraid, as 1st March 2003 in relation to the parties' competition compliance policies. I think it is quite difficult to deal with this on the hoof, so to speak.

THE PRESIDENT: Especially as we have not got, I do not think, the document that you are referring to.

LORD GRABINER: I do not think it is realistic. I do not think it is going to give rise to any need for further complicated debate in court, but could I ask you, when that comes through to you which it should do by the end of today, to have a look at that and take into account on the mitigation point under step four.

Unless there is anything further I can assist you with, those are the submissions we wanted to make on penalty.

THE PRESIDENT: Thank you, Lord Grabiner, can you just give us a moment. (The Tribunal conferred) The Tribunal is just going to rise for five minutes. There is just Mr. Colgate's financial information that is outstanding, I think, Lord Grabiner.

(Short break)

THE PRESIDENT: Lord Grabiner, the promised information has now reached us, the letter of 17th January. It is actually our letter of 1st March 2004, not 2003, so it is still a certain amount of time but not as much time as we first thought. I think Mr. Colgate may have one or two questions, and I think we ought to put things to you while everything is fresh in our minds, if we may.

MR. COLGATE: I would like to go back over the comments you were making about the period that you are suggesting we should take into account. You are saying that the agreements started when they were implemented rather than when they were agreed. What is the logic for that when there is obviously certainty in the market place at the moment the agreements are made in relation to what is then going to be launched later? Surely the period should be from when

they are made because that is the point at which the parties know what is going to happen. That is my first point.

My second point is, what is the logic in arguing that the agreements made in 2000 should be seen as part of the agreements made in 2001? I am looking at it in particular in relation to the guidance notes where it talks about periods of less than a year may be taken as being one year. Therefore in relation to looking at the starting point should we not be looking at one plus one?

LORD GRABINER: Just taking them in the same order, the logic, I would suggest, in relation to your question one is that when you talked about certainty in the market, are you saying anything more than the parties had made an agreement, and they knew what was going to happen when commencement date arrived. I accept that. All that I would suggest is that the damage to the consumer was not sustained at the time the agreement was made. The damage to the consumer was sustained when the agreement was put into operation. Although it is true that the parties should not have made the agreement, and although it is true that they knew what was going to happen when the performance date arrived, the fact is that the damage to the consumers, which is what we should, I would suggest, really be concerned with, does not kick in until the agreement commences to operate.

That would be my answer to your question – in other words, the duration should not be driven by the fact that they made an agreement on day one which was to come into operation on day ten or whenever, and that you should be focusing upon the period of damage done to the consuming public. That, in my submission, is a rational basis for deciding about duration. Otherwise it us quite difficult to see how you would cope with examples of the kind that I gave a little earlier today. It may be that an agreement was made so that it would not take effect for 12 months. What would be the justification for saying that there should be a punishment, notwithstanding the fact, for example, that the agreement never kicked in at all; or that it did kick in but only kicked in for a very short period before it was brought to an end, but a long time in the future. If you just concentrate exclusively upon the period of operation of the agreement there is at least a rational basis for saying that the duration should be confined to that period of operation for the reason that that is the period when the public suffered.

Your second point proceeds, I think, on the assumption that, because the Guideline says that you may take a period of less than a year and treat it as a year as being, so to speak, a green light, that should be done in the first instance unless there is an argument for not doing it that way, but, in my submission, that would be making an assumption for which there was not

any justification. There might well be cases – I cannot conceive of any standing here now – where a part of the year you would be entirely justified in taking a whole year. It may have been nine months, ten months, 11½ months, and a guideline advice of that kind enables you to say, "I am going to look at this thing in the round and I am going to say I will take a year because it is a very large part of the year". Another example might be only a small proportion of the year. So, although on the face of the rule or on the face of the advice in the guidance, it says you could treat part of a year as a whole year in theory, in my submission, it would not be an appropriate way of proceeding, particularly if, for example, in the instant case it was one or two months in the course of a particular year.

If I can put it slightly colloquially, I would respectfully suggest that you should not be too hung up on the Guideline. I think you should treat the Guideline as something to guide you, but you should not treat it as a statutory instruction to tell you how you should go about doing the exercise. You have got to make your own common sense judgment about the appropriateness of the penalty in the circumstances of a particular case. I accept that the "may" is there, the discretion is there, but it ought to be exercised in a judicial way and in a fair way. The idea, for example, that you should treat two months of the year as constituting a whole year, in my submission, would not be an appropriate exercise of that discretion.

MR. COLGATE: Thank you, I wanted to hear your further comments. I would just make one small observation and that is that I hear what you say about how we should approach the guidance because other parties have asked us to look at it much more strictly. So we obviously have to weigh up both sides.

LORD GRABINER: What we do know on that subject is that they are not binding upon you, they are guidelines and you should not allow them to achieve a higher level of importance in your thinking than that, in my submission.

MR. COLGATE: Secondly, are you able to come back on the financial questions I raised earlier?

LORD GRABINER: I am certain that I cannot now, and if we can do so we will do so but it will have to be outside of this meeting, I am afraid.

MR. COLGATE: Thank you.

THE PRESIDENT: Lord Grabiner, can I just put a train of thought to you about your submission based on para.3.1 of Schedule 8 to the Act, which is the power of the Tribunal to increase the penalty, the argument being that that paragraph tells the Tribunal to determine the Appeal on the merits by reference to the grounds of Appeal set out in the Notice of Appeal. Since the

grounds of Appeal set out in the Notice of Appeal will never invite the Tribunal to increase the penalty, there is no jurisdiction to do so.

LORD GRABINER: I am very happy to adopt that situation! Indeed, on the face of it, it is unanswerable.

THE PRESIDENT: That is how I understood your submission.

LORD GRABINER: You put it much more concisely, but none the worse for that!

THE PRESIDENT: A possible answer – unanswerable though it may at first sight appear to be – a possible answer might emerge in asking oneself what para.3.1 is about, bearing in mind that under para.2 in various ways the Notice of Appeal is required to set things out in detail and indicate whether it is about fact or law or discretion or whatever. It may well be telling the Tribunal that the Tribunal should deal with the grounds of appeal. Clearly they should not not deal with the grounds of appeal, but it is not perhaps entirely clear that the grounds of appeal are the only things that the Tribunal can deal with in the course of its hearing. There may very well be all kinds of points that crop up in the course of the proceedings which appear to the Tribunal to be relevant. Provided the parties are properly on notice of those points and provided that the rights of the defence are fully observed it may will be that para.3.1 does not actually circumscribe the Tribunal beyond requiring it to actually deal with the points that are relied on by the Appellant. Otherwise it would seem to me that if you had a case, and I am not saying it is this case, if you had a case where, in the exercise of a full re-hearing, it had emerged that the infringement was much more serious than the OFT first thought, if you are right that the very wide powers in para.2 would not extend to increasing the penalty we would simply have to send it back to the OFT in order to do so, I suppose, which may not be entirely in the interests of procedural economy or the scheme that the draftsman of the Act envisaged.

LORD GRABINER: There are two points I would like to make. First of all, there is no reason why, even in the course of an appeal, an application could not be made for the grounds to be amended. If it transpired in the course of the hearing that further facts and matters had come to the surface, which ought to be the subject of the enquiry in the Appeal, then no doubt in a suitable case leave would be given.

THE PRESIDENT: Yes.

LORD GRABINER: The other point I would make is this, and this harps back to an argument I think we had right at the beginning of this exercise, namely as to the appropriate contents of a Notice of Appeal. You are turning an argument against me that I think I was putting the other way round, which I entirely understand and respect, but I actually would seek to get some

advantage from the debate in this way: in this jurisdiction the approach that has been adopted by the Tribunal is to oblige appealing parties to produce in great particularity the debate in paper form in the Notice of Appeal. Whereas the kind of example you were positing to me a moment ago might well arise in a typical appeal from a High Court Judge to the Court of Appeal over the road, that would not, I think, be true in this jurisdiction under the present arrangements, because the fine detail of what is required to be produced in the form of the Notice of Appeal is extraordinary by any standards. The idea that you could start the hearing without knowing exactly what was on the table is rather unlikely, whereas that would not be the case, I am afraid, in the Court of Appeal. You could find that the language of the Notice of Appeal was rather Delphic and might produce a result in which you found yourself arguing matters which, on the face of the notice, were not there. That is not this case and it is not this jurisdiction under these arrangements. So, in my submission, if you did take a narrow approach to 3.1 it would be entirely easy to justify it because of the way in which, the care in which and preparation for which is undertaken for the purposes of these Appeals.

THE PRESIDENT: I see. Thank you very much.

LORD GRABINER: I wonder if you will bear with me and allow me to depart.

THE PRESIDENT: Of course.

LORD GRABINER: What is going on is interesting but not directly to what I have to deal with, and I am very grateful to you. Thank you very much.

THE PRESIDENT: Thank you very much for your submissions, Lord Grabiner. Good afternoon, Mr. Roth.

MR. ROTH: In view of the detailed written submissions that you have received, I intend to put these oral submissions under four main heads: first, some observations about the Guidelines, OFT 423; secondly, market definition, to add some brief observations to what has been said by Lord Grabiner; thirdly, and I will do it in a composite way, to address the application to Manchester United of the percentage for gravity, the duration and the multiplier for deterrents; and fourthly, compliance programmes; and then to add some brief remarks, and they will be brief, on three matters, co-operation, the 1999 non-statutory assurance and what has been referred to as the iconic status of Manchester United, although I note that Lord Grabiner suggests that the icon is fading, and whether that is relevant.

Before doing that, sir, may I deal with two preliminary, but nonetheless important matters, and the first is something raised by the President at the Case Management Conference on, I think, 5th November of last year, a question raised specifically regarding Manchester

United and Umbro, as to the approach to be taken if an Appellant does not accept the findings of the decision although there is no appeal against the findings of infringement. That arose, I think, although I may be wrong, out of some *extempore* remarks made by counsel at a Case Management Conference, and we and our clients are very anxious to clarify our position.

I am authorised, indeed I am instructed by the Board of Manchester United Plc to say this: in the course of the OFT investigation Manchester United acknowledged that it was party to an information exchange agreement regarding the price of the new adult home shirt for a limited period prior to and following the launch of that product in August 2000. Having considered the findings in the OFT Decision and further the Judgment of the Tribunal on the Appeal by JJB and Allsports, Manchester United now acknowledges that these conversations and arrangements made it party to a concerted practice to prevent discounting of that product for that same period, that is to say four to five months ending late September 2000, which is the finding. The Board of Manchester United regards that lapse over these months in 2000 as a matter of profound regret. However, the Board wishes to stress that such conversations and arrangements were made without the approval or knowledge of the Manchester United Board and that the company takes the Competition Act very seriously and has maintained an ongoing programme of education of its executives and managers on competition law compliance since August 2000.

THE PRESIDENT: Thank you, Mr. Roth.

MR. ROTH: The second matter is one of considerable embarrassment on the part of our clients and it emerged very recently, and I mean this last Friday afternoon, in that it appears that they have understated the turnover figures given to the OFT in the course of the investigation, in that we ----

THE PRESIDENT: Have you put the OFT on notice?

MR. ROTH: No, because we have been clarifying this still this morning. If I can explain the situation, it is this: we supplied figures for adult and junior shirts, shorts and socks, but we omitted it seems the infant kit – that is small children up to the age of seven. Quite how this happened is unclear, but the infant kit is sold in a very different way from adult and junior products in that it is sold as a package. The infant kit, in distinction to adult kit and junior kit, is an integrated product. The figures given to the OFT were calculated by Manchester United's auditors, PricewaterhouseCoopers. We tracked down the individual who did the exercise late on Friday afternoon. He worked from a database of the Manchester United

merchandising division using product codes that were given by a member of that division, and it seems they did not include the product codes for infant kit.

As you know, sir, Manchester United ceased all retailing operations two years ago when those activities were taken over by Nike, including the megastore at Old Trafford which Nike now operate. The individual who supplied the product codes was then made redundant, so how that came to be left out, the infant kit, we just do not know. We can only imagine that there is some misunderstanding in the instructions that he received or understood.

The next question is what are the figures for infant kit. The difference, let me say straight away, is not vast, but it is not trivial. The live database of the Manchester United merchandising division from which the figures were all taken no longer exists, because the division no longer exists. There may be back-up tapes somewhere. We have, over the week-end, from other management records and with some estimating, ascertained the likely volume in the year used for the assessment of the penalty, which is the year ending 31st July 2000. The total number of units appears to be – as I say, with some estimating and some accurate figures – 5,879 units.

As regards prices, we know that the Umbro RRP for infant kit was £29.99. We also know we were generally selling below Umbro RRP at that time. You may remember from the hearing, which of course I was not at, that the Umbro RRP for the adult shirt was £42.99 at that time, and Manchester United sold it for £39.99. It was probably discounted further in the course of the year. We are trying to see if there are any available figures for prices. If we assume against ourselves that all these products ----

THE PRESIDENT: You have given £29.99 in the schedule to the Decision.

MR. ROTH: As the RRP, I think.

THE PRESIDENT: That is the price at which JJB and Allsports were selling. I do not think the prices at which Manchester United was actually selling emerge from these schedules.

MR. ROTH: We are not in that because we looked at that. That was our first port of call.

THE PRESIDENT: That is the price at which the others were selling.

MR. ROTH: You also may recall, I do not know, that the members of Manchester United – there is a membership of fans, quite a large membership – get a 10 per cent discount on all MU prices. Pricewaterhouse found that had an effect of between 2 and 4 per cent of MU turnover. So on that basis, and taking the £29.99 with a 3 per cent for ---

THE PRESIDENT: Let us do it for £29.99 and then you can give us the 3 per cent in a moment.

MR. ROTH: I have not got that, I would have to work back. What I was going to suggest, sir, was that we hand in some figures tomorrow.

THE PRESIDENT: Yes.

MR. ROTH: We have been getting this clarified through the morning and over the week-end. You have to do the VAT calculation because the figures used in the turnover are net of VAT. There is no VAT on infant kit, I am told. When you plug it in and follow it through to the penalty, if it is added in it will be, I think, under 60,000 – that is to say, times 9 per cent, times 3, with the uplift for aggravation, and so on, and I will give you the exact figures tomorrow.

That is why I say it makes a difference that is not trivial, but equally it is not vast.

THE PRESIDENT: Six thousand units at £30 a unit is £180,000 in turnover terms.

MR. ROTH: Yes.

THE PRESIDENT: As starting turnover, in very broad terms before you allow for discounts.

MR. ROTH: What I have done is applied all the steps that the OFT has then done to the turnover to get to the penalty, when I say it will be under £60,000. That goes into the turnover and then you say, "What is the effect on the penalty?"

THE PRESIDENT: If we look at 699 of the Decision, for example, which gives a turnover in the market for MU replica kit of 3.069 that would make the starting point, according to the OFT which you may not agree with slightly over 3.2.

MR. ROTH: That is right, exactly. I will do the exact calculation.

THE PRESIDENT: Thank you very much for that, Mr. Roth. Thank you for making the effort to get to the bottom of that.

MR. ROTH: As I say, we have been working on it over the week-end and, as I say, it is a matter of embarrassment and regret.

MR. COLGATE: Are you seeking to have the whole of this included. I am now slightly unclear about the Decision. Are we talking here about more than just adult home shirts?

MR. ROTH: I think perhaps, sir, that takes me to the next question.

MR. COLGATE: I am unclear now as to what we are trying to do.

MR. ROTH: The first thing I am trying to do is to correct the figure that should have been given to the OFT – that is my first task – and to say that if they had had that figure, on their reasoning what would have been the impact, and that is what I was addressing.

The next question, if I have understood it correctly, is what is the implication for that for our argument on market definition, and is there any implication? We say no because the

correct market is replica shirts as that expression is defined in the Decision at para.63. Perhaps I could ask you just to look at para.63 of the Decision:

> "The most important element of a Replica Kit in terms of retail sales, is the shirt. An internal report prepared by Umbro suggests the sales ratio in 2001 between shirts, shorts and socks was 5 : 1 : 1."

Just pausing there, you will see the footnote:

> "By turnover based on the adult size RRPs relevant to this decision, this would represent a ratio of appropriately 23 : 2 : 1."

The ratio of 5 : 1 : 1, I think must also leave out infant kit because you cannot do a split of infant kit as between shirts and shorts.

> "Although professional footballers will choose whether to play in long or short-sleeved shirts when competing for their team, with the exception of goalkeeper shirts, the vast majority of replica football shirts produced for sale in the UK are short-sleeved versions. In this Decision 'Replica Shirt' means the short sleeved shirt (home, away, third and special edition) in adult or junior sizes."

That is what we say is the relevant market.

THE PRESIDENT: That leaves out the long sleeved shirt and the goalkeeper shirt?

MR. ROTH: We do not take a point on the goalkeeper because it is frankly, in practical terms, insignificant, but we accept it is the adult and junior shirt which is the product that is sold separately. That clearly excludes the infant kit. Precisely because the infant kit is a composite product, unlike the adult shirt and the junior shirt, it is sold and priced in a different way. It is a package price. We say it is not the same market as the shirts and does not form part of the relevant product market.

So the net result of all this is that if the Tribunal accepts the OFT's argument on market definition we, of course, that this missed turnover will have to be brought into account. If we succeed in our arguments on market definition or indeed if Allsports or JJB succeed then it makes no difference to the penalty because it is not part of the turnover.

THE PRESIDENT: Mr. Roth, while we are on para.53, I am just trying to understand the 5 : 1 : 1 ratio that is set out against footnote 56. I am not sure it is something that I have been focusing on very clearly so far. Is that a ratio by volume, as you understand it, or by units?

MR. ROTH: It is by units.

THE PRESIDENT: If you take the ratio by turnover according to the footnote, in adult sizes it is 23 : 2 : 1.

MR. ROTH: Yes, I think that is put there to make the point that ----

THE PRESIDENT: To make the point that if you do it on turnover that is what you get.

MR. ROTH: Yes. I think the 5 : 1 : 1 must be volume, and indeed our own figures are not the same Umbro's.

THE PRESIDENT: But they show a similar ----

MR. ROTH: A similar relationship. We have put in figures.

THE PRESIDENT: Yes.

MR. ROTH: Finally, on that I would ask the Tribunal to accept that this was inadvertence. The figures are not large and we have no conceal anything. As soon as it is discovered we have been very open about it.

MR. COLGATE: Can I just be clear in my own mind on this. Are you going to take us later to 699 of the Decision – this is the turnover in the market of the replica kit – and whether those figures are still to be relied on?

MR. ROTH: The MU replica kit should include infant kit and that figure of 3.069 will have to be increased.

MR. COLGATE: So the 10 per cent figure that was taken is going to be increased?

MR. ROTH: All the consequential figures thereafter would need adjustment ----

MR. COLGATE: I am looking at 701 where it talks about ----

MR. ROTH: That is on the Umbro licence agreement.

MR. COLGATE: Yes, the USA.

MR. ROTH: No, it does not affect the argument about the USA. I will come back to the USA. We are not seeking to disturb the finding on the USA in that decision. It involves a lot of apportionments and we are not suggesting that certainly infant kit would make any appreciable difference.

So I come to the first of my main heads which is the Guidelines. What is the role of the Guidelines, of OFT 423? I think I would suggest that one asks that question in two stages: first, as regards the OFT and then as regards this Tribunal. As regards the OFT we make three points. First, the starting point is of course the statute, s.38, and these Guidelines need the approval of the Secretary of State, that is s.38(6), by contrast with the Competition Act advice booklets that the OFT also has to publish under s.52, which do not go to the Secretary of State and do not need approval, and can be amended without approval. So they have a particular status within the statutory scheme and they have more force that the guidance booklets. The purpose of publication I think must be transparency and consistency.

The second point, the OFT is required to have regard to the Guidelines, s.38(6): that is clearly not an absolute obligation to apply them, but we say that if the OFT is not going to apply them then it must explain why it is departing from the Guidelines. There may be something in the particular case or in the circumstances of the case where application of the Guidelines would conflict with some principle of law, or it may be because a particular aspect of the Guidelines had been disapproved in a previous Judgment of this Tribunal. One can see there might be various reasons, but they must give reasons. They cannot just say, "We had regard to it and we are going to do something else".

THE PRESIDENT: One could imagine cases in which the mechanistic application of the Guidelines may give rise to results that in a particular case did not seem quite to meet the justice of what was intended to be achieved.

MR. ROTH: Then that must be spelt out in the Decision to explain it. The wording, "have regard to", as you will recall, sir, is the same wording as the statute uses in s.60(3) as regards decisions of the European Commission, which are also not binding on the OFT or indeed this Tribunal, but you must have regard to them, and we say one could not just depart from them and say, "Well, yes, we have read it, we have had regard to it, we will now do something else". One would have to clear and good reasons for doing so, and they have to be spelt out.

THE PRESIDENT: I was just glancing at s.52, which is the one that deals with the publication of advice or information by the OFT.

MR. ROTH: I think same obligations to consult but not involvement of the Secretary of State and no need for his or indeed her approval.

THE PRESIDENT: Yes.

MR. ROTH: The third point is that if the OFT says in its Decision that it is applying the Guidelines then it must do so correctly. It cannot in those circumstances pray in aid of a failure properly to apply the Guidelines a submission that they are not binding or that there are actually other relevant factors which were not in the Decision and seek to argue an Appeal on some different basis. We rely in that regard on a decision of the court of first instance, a recent decision, the *Graphite Electrodes*, a cartel appeal. Could I ask you to look at that. It is in your authorities bundle 1 at tab 5. It is called *Tokai Carbon*, being one of the Japanese Appellants. It is a hugely long Judgment, but in the Judgment could you turn in the report, the numbering in the top right, to p.1535, para.231:

> "That argument cannot be accepted. As the Commission decided to apply in this particular case the differentiation method laid down in the Guidelines …"

Pausing there, those of course are the Commission Guidelines, they are different guidelines, but the principle is the same.

> "… it was required to adhere to them, and where it departs from them it must set out expressly the reasons justifying such a departure."

A reference to the decision I can never pronounce the name of, *Fettcsa.*

> "Since the members of the cartel were in the words of the Decision placed in categories solely on the basis of their turnover and market shares the Commission cannot properly go back before the court on its own method of differentiation and claim that it was a question only of rather vague orders of size and that neither market share nor turnover necessarily reflected the impact of each undertaking on competition; nor does the Decision contain any specific element which explains why the latter argument would provide grounds for bracketing Tokai specifically with SDK and not with Nippon."

Perhaps I will read the next paragraph because I will come back to it at a later point in my submissions.

> "While it is true that the Commission may take a multitude of factors into consideration in determining the final amount of a fine and that it is not required to apply mathematic formulae when doing so, the fact remains that where it deemed it appropriate and equitable to have recourse at a certain stage of that exercise to mathematical calculations it must apply its own method in a manner which is correct, coherent and in particular non-discriminatory. Once it has voluntarily chosen to apply such an arithmetical method it is bound by the Rules inherent therein unless it provides express reasons for not doing so in regard to all members of the same cartel."

I think I can pause there. That was a case where the Court found that the Commission had failed correctly to apply its own Guidelines in an equitable manner. So that is my third regarding to the OFT, and now I turn to the Tribunal and the implications of the Guidelines for this Tribunal.

THE PRESIDENT: Can you tell us what the consequence was, Mr. Roth?

MR. ROTH: There was a regrouping of the various Appellants there.

THE PRESIDENT: Did that make any difference to the final figure?

MR. ROTH: Yes. I have not worked it out with regard to all of them, but yes, it did, in fact.

THE PRESIDENT: Maybe you could tell us what difference it finally made. This is *Tokai* that you are talking about here.

MR. ROTH: The difference it made depended on the method of bracketing turnover under the Commission Guidelines. It is the principle that I rely on rather than what actually that did to those fines under a different methodology.

THE PRESIDENT: It is just that sometimes you can not quite follow what you said you would follow, but if you did it slightly differently then it might not make a great deal of difference.

MR. ROTH: There it does. The OFT rely on that case for a quite different point of the court there increasing the penalties on some parties for other reasons, but that is another point.

THE PRESIDENT: Yes.

MR. ROTH: I turn to the Tribunal, if I may, and I will come back to *Graphite Electrodes*, as I said, on one other point later.

THE PRESIDENT: Yes.

MR. ROTH: Here we make four points with regard to the Guidelines. First, clearly they are not binding, the Tribunal has a wide jurisdiction. Secondly, nonetheless it cannot be the case that the Tribunal should disregard the Guidelines, otherwise that would place the OFT in an impossible position as the primary decision-maker. They have got to try and get their decision right, they have to have regard to the Guidelines and how can they operate if they know that on Appeal a quite different approach is taken. Thirdly, we therefore say what the Tribunal should do is to ask, first, has the OFT correctly applied its Guidelines, or correctly explained why not in a particular case consistently with the principles I have set out, or whether the application of any aspect of the Guidelines conflicts with some higher principles of law either generally or in their application in this case. So, somewhat like the analogy – although like all analogies it is never exact – somewhat like the approach of an administrative court to secondary legislation, given that these Guidelines have the Secretary of State's *imprimatur*, they say, "That is all very well, but we are the court and according to law this is not right", or, "It is not right in this case according to some fundamental principles which take priority". Fourth, subject to that qualification, an important qualification, we submit that one should treat with caution a suggestion that the approach of the guidelines – that is to say going through the five specified steps – is not the correct approach.

We referred in our skeleton argument to the *IBA* judgment in the Court of Appeal, para.27 of that. I do not ask you to turn it up now. That was with regard to guidelines on mergers under the Enterprise Act. It is para.27 of the judgment and the reference to your authorities bundle is bundle 3, tab 18.

Sir, I now turn to market definition. The essential issue is whether all the replica kit, as the OFT held in its Decision, is the relevant market or there is a narrower market confined to replica shirts, or something narrower still excluding goalkeeper shirts or junior shirts. We know of course that JJB and Allsports have submitted it should not include all the replica shirts, and I will comment on that in a moment. I wanted to first address the question of how should the issue of market definition be approached in the determination of penalties. We say the answer is that it should be approached as the Guidelines say it will be approached, on the basis set out in the guidance on this topic which Lord Grabiner has read to you. I do not think he mentioned that they expressly cross-refer to the OFT guidance on market definition in footnote 7. What the OFT says is correct, not only because the OFT says it but because, as Competition Law has matured in Europe over the past decade, it is quite clear that market definition is not some sort of "touchy-feely" idea, if I can put it colloquially, but is based on obviously verifiable criteria. The OFT approach in its guidance on market definition reflects the European Commission approach in its guidance on definition of the relevant market as the OFT should reflect the Commission in view of s.60.

THE PRESIDENT: The Commission's guidance of market definition is directed to the existence of an infringement. I do not think it is directed to the calculation of a penalty.

MR. ROTH: It is not directed to the calculation, but the starting point of the calculation of a penalty under step one is defining the relevant market.

THE PRESIDENT: You say they should do the same exercise under step one as they would do if they were defining the relevant market for the purposes of a Chapter One or Chapter Two case.

MR. ROTH: Subject to one proviso that I will mention in a moment. First of all, I would say the "relevant market" has the same meaning. It has an objective meaning whether you are talking about penalties, whether you are talking about a merger, whether you are talking about a block exemption which requires a market share to get through the relevant or whether you are talking about a dominant position, but it is a neutral concept and it is an objective concept. When the penalty guidelines referring to step one say that step one – I think Lord Grabiner took you to it, but perhaps it is worth looking at that again. It is I think in volume 4 of your authorities at tab 28, and at para.2.3 it says:

> "The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated by applying percentage rate to the 'relevant turnover'. The 'relevant turnover' is the turnover of the undertaking in the relevant

product market and relevant geographic market affected by the infringement in the last financial year."

Footnote 7 says:

"See the Competition Act Guideline *Market Definition* for further information ..."

THE PRESIDENT: It is the market affected by the infringement.

MR. ROTH: It is.

THE PRESIDENT: The word "affected" is quite a wide word, is it not?

MR. ROTH: It is, and that is why, for example, in our case the sponsorship rights under the Umbro sponsorship agreement comes into play. There is no cartel agreement, but it was found to be a market affected.

THE PRESIDENT: So you say by implication that the shorts and socks markets are unaffected by the infringement?

MR. ROTH: Yes. The point that I am making now is that market definition is cross-referred to the guidance on market definition, which is the guidance that applies to infringements as much as to penalties.

It is, therefore, a neutral approach. I appreciate that I stand here speaking for a party that has been found to have participated in a cartel, but when you look at this question of what is the relevant market it is not a question of who one is representing, it should be an objective question, and has nothing to do with the gravity of the infringement, and I respectfully Lord Grabiner's criticism of the OFT's justification for its approach to market definition as set out in their skeleton argument at para.16, which he read to you.

THE PRESIDENT: Which was, "We could set 10 per cent if we had not taken this into account".

MR. ROTH: No, it is before you get to the 10 per cent, that is the whole point. It is in the Tribunal bundle at tab 5.

THE PRESIDENT: Is this the skeleton argument or the amended skeleton argument?

MR. ROTH: It is the amended skeleton argument, the current skeleton argument. It is on p.7 of their skeleton argument, para.16:

"The OFT's position is that of many ways to slice the cake it has adopted a reasoned approach that sets an appropriate starting point for calculating the penalty and for communicating an effective deterrent message to the industry signalling the gravity of this type of infringement."

We say that when you are dealing with market definition the deterrent message is at that point irrelevant. That comes in at step three.

THE PRESIDENT: You simply work out what the product market affected by an infringement is?

MR. ROTH: Absolutely, and it is neutral in its approach – in its objective and neutral approach, value neutral. It is clear from that that is not the approach it seems the OFT has adopted, or at least it is not the way it is being defended.

THE PRESIDENT: Put in the amended skeleton argument.

MR. ROTH: Yes. The OFT says, and it is a point you have just made, sir, "We cannot be expected to do a full market analysis every time we impose a penalty". If this were a Chapter Two prohibition case where the OFT had done a full market analysis to determine dominance, clearly that same definition "relevant market" would apply to penalties. You would not do a different one.

First of all, we say it does, in fact, attempt a fully reasoned market definition in its decision. One sees that in this Decision at paras.540 to 556.

THE PRESIDENT: In the Chapter Two case you could, at least in theory, have a situation in which the market or markets affected by the infringement were different to or wider than the market in which the enterprise was said to be dominant, if there is a spill-over affecting an ancillary market or a downstream market, or something.

MR. ROTH: Yes. In this case clearly the market affected by the infringement is wider than the product, because the product was the adult home shirt. We are not suggesting that is the market definition.

THE PRESIDENT: Yes.

MR. ROTH: I am saying that if one looks at the Decision what the OFT has done is go through demand side substitutability, supply side substitutability. It is paras.540 to 556. They do not say, "We cannot be expected to do it", they say – indeed they recite on product market, "Refer to the Commission Notice on market definition", they do not say, "This does not apply". They then look at demand side substitutability in some detail, and I am not going to read it. They then look at supply side substitutability, they set out the parties' view and they come to conclusions.

THE PRESIDENT: It is all premised on the fact that we are talking about replica kit?

MR. ROTH: Oh, yes. They do do a relevant market analysis. For them to say, "We cannot be expected to do it", they do it here, and they have done it in the recent double-glazing decision, the *UOP* case, and they say, "We do not have to do it to find an infringement but we have to do it because of step one of the penalties". If the OFT wants to stop short of a full market analysis on an aspect that is unclear then the proper approach is to do just what they did in the

double-glazing and that is to give the benefit of the doubt to the defendants, the burden of proof being on the OFT, and adopt the narrower definition.

Could I ask you to look at the double-glazing case, which is in volume 4 of your authorities, tab 22. I have called it the double-glazing case, there are a lot of parties in it. It is technically about desiccant, actually I had never heard of desiccant until I read this decision. Would you look at paras.31 to 32. I should say that this is a cartel case, not of a wholly dissimilar nature to the case on which you are hearing this Appeal. Paragraph 31, "The Commission's notice on the definition", and so on. Then para.32:

> "However, the OFT is only obliged to define the market where it is impossible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and has as its object or effect the prevention, restriction or distortion of competition. No such obligation arises in this case ... [and so on] Nevertheless, market definition is the first step in the process of assessing penalties."

Reference to OFT 423 of the Guideline. No suggestion, it does not apply because they are only doing penalties. Then they discuss the market and what it is and what the parties' submissions are, and then at para.41:

> "For these reasons the OFT is not convinced that the relevant product market proposed by UOP, namely the supply of desiccant to distributors, is correct. However, the OFT accepts that the matter is arguable. Taking into account also the fact that the supply … by UOP did not form part of the agreement and/or concerted practice dealt with in this decision, the OFT has therefore decided to give UOP the benefit of the doubt and for the purposes of this decision to accept UOP's narrower market definition. Therefore, the relevant turnover used for the starting point in setting a penalty has not included UOP's turnover derived from the sale of desiccant to [X]. This is without prejudice … [to a future case]."

So it is perfectly acceptable that they do it that way and say, "We are not going to do elaborate studies, we will give an Appellant the benefit and take a narrower definition".

THE PRESIDENT: Yes.

MR. ROTH: So where does that take one here? We say as regards demand side substitutability there is no question and, as Lord Grabiner has pointed out, it is accepted that shorts and socks are not substitutable for what is the main selling item, the replica shirt.

The analysis of demand side substitution in the Decision does not even ask this question although this point was put by the parties in the administrative stage. It just looks at the question of one team against another team. We accept that. It does not even go through the exercise that its guidance requires of asking, "What about demand substitutability shorts and socks vis-à-vis shirts".

THE PRESIDENT: It would hardly need to, would it, Mr. Roth? I think it says somewhere that there is no physical substitutability because obviously a sock is not substitutable for a shirt.

MR. ROTH: You could do a price kind of substitution or you could do even a supply side substitutability.

THE PRESIDENT: There is a précis of the arguments on both those points in the Decision, is there not?

MR. ROTH: The reasoning of the OFT is this: they say, first, sales of shirts drive sales of shorts and socks. That is the point you have, sir. We say that is wrong, there is no clear relationship. We have put tables at para.15 of our amended Notice of Appeal showing that movements in volume numbers year to year for shirts, shorts and socks bear no relationship to each other.

THE PRESIDENT: It is a point of fact upon which we have got to come to a conclusion, I suppose, is it not?

MR. ROTH: That is the only evidence. There is no evidence for the assertion by the OFT, and we have put in evidence, not challenged, showing that there is no such relationship.

THE PRESIDENT: During the course of the Liability Appeal we had quite a lot of evidence about all kinds of things. There were certainly a number of points in the evidence where it seemed apparent that there was some kind of spill-over effect between the prices of shirts and the prices of shorts and socks, if only because the higher you set the price for the shirt the more margin you had to set a higher price for the shorts and socks. So we have got quite a lot of evidence about it, we will have to go back and dig it up but there is quite a lot in the files.

MR. ROTH: I have not read, I have to say, all the evidence of the liability hearing before you, in fact very little of it. The OFT, in its skeleton argument, although it says there is a spill-over effect, does not cite any evidence from the hearing. The suggestion that there is a spill-over effect in that sense on price – a specific spill-over effect – is first raised in the Defence of the OFT. It is not said in the Decision. In a very loose term a lot of items of clothing have some spill-over effect to another one. It is a very different thing to say that there is a specific and direct spill-over effect. One can see, you may say, as a matter of logic, that there is something

as between the adult home shirt and the adult away shirt and the goalkeeper shirt maybe – I can see that – but to start saying it does on socks or it does on hats ----

THE PRESIDENT: If you take into account the fact that we are dealing with prices of products at launch – we are dealing with launch products – and that at launch what is actually launched is typically a package of products consisting of the shirt, the shorts and the socks, if you have agreed an RRP on the shirt, it does not, I think, need a great deal of imagination to lead one to suppose that the fact that you are going to sell at an RRP on the shirt, on the shorts and the socks may have some bearing on the level of the price that you charge for the socks and the shorts so that it is in proportion to what you are charging for the shirt.

MR. ROTH: The situation here is that we are dealing with the August 2000 launch, certainly for my clients, where we did not just launch the shirts, the shorts and the socks, we launched a whole range of new apparel.

THE PRESIDENT: That is another point. If you look at the figures in the annexe to the Decision, table 4, with the exception of Sport Soccer, who is admittedly an exception in relation to the shorts and the socks, everybody else effectively followed RRPs on the shorts and the socks as well as on the shirts.

MR. ROTH: The difficulty is, of course, that I am saying that they may have done on a lot of other products launched at the same time.

THE PRESIDENT: They may have done, and maybe your logic takes you to include those other products, but we have not got any evidence about them. The only evidence we have got is in this pricing table.

MR. ROTH: We have the evidence that they were all launched at that time, and we also have the evidence from that table that subsequent discounting of shorts and socks follows a rather different pattern from discounting of shirts.

Secondly, we have the evidence, if you look at JD – if we are looking at the Manchester United 2000 table on the second page where you have Sport Soccer – they do not even stock shorts and socks. We have the evidence that the selling patterns for them are completely different.

THE PRESIDENT: I am sorry, Mr. Roth, can you just help me on one point: what is your position in relation to the junior shirts?

MR. ROTH: We hear what Lord Grabiner and the skeleton arguments of the others say about the children and the adult, and we can see force in the submissions that they make – we do not disagree with them. We have not made submissions on that basis and we have taken what we

say is a responsible and cautious approach to market definition and we say the widest that you can have is to say it would include the junior shirts. In our Notice of Appeal we say it includes the junior shirts, because they are also shirts, they are also the premium selling product.

Furthermore, again looking at it from a functional perspective, as Lord Grabiner pointed out, it is the shirt that is sold as the leisure item. It is the shirt that people work in Oxford Street or the pub or Princes Street; it is not shorts and socks in the same way, as we all know.

MR. COLGATE: Are you saying that there is no price relationship between the shirt on the one hand and a sock on the other, or a shirt and a short on the other?

MR. ROTH: There is no direct pricing relationship such that you can say that there is a spill-over.

MR. COLGATE: So if you reduce the price of shirts, hypothetically, you could still carry on selling socks and shorts without any price reduction?

MR. ROTH: Yes, and if you look at the table that the President has referred to, I think you can see, sir, that that is precisely what the retailers were doing. I am on the page with Sport Soccer, JD and Black's – do you have that page, sir? Let us leave out Sport Soccer because they were discounting, as we know. JD, they do not stock the away shorts at all, they stock the home shorts. They discount them on 20th December, even though it is just before Christmas. They do not discount the shirts.

THE PRESIDENT: Sorry, where are we, Mr. Roth?

MR. ROTH: On table 4, "Pricing of Manchester United 2000 Replica Kits", and on the second page of that table, do you have across the top Sport Soccer, JD and Black's?

THE PRESIDENT: Yes. It seems that they had a promotion on the shorts just before Christmas.

MR. ROTH: Yes, but nothing on the shirts. "DFD" means "date first discounted", as I understand it, and "FDP" means "first discounted price", so it is the date and then the price. So on 20th December they reduced the price of shorts from £19.99 to £14.99, which is quite a discount, but they do not reduce the shirts.

THE PRESIDENT: What would be interest is if you can point us to any examples where somebody discounts the shirt but does not discount the socks or the shorts.

MR. ROTH: Sport Soccer in the previous column discounts the shirt on 1st October but do not discount the shorts.

THE PRESIDENT: They have already discounted the shorts because they were never at RRP in the first place. I can see that you might have a decision to charge a lower price for the shorts or the socks – these are awfully difficult words to pronounce, as we discovered during the main

hearing – in order, for one reason or another, to promote those products. What would be strong evidence in support of your case is a discount on the shirt but no reduction on the shorts or the socks.

MR. ROTH: We will certainly look to see if there is anything.

THE PRESIDENT: See if you can find something, if there is anything we can ----

MR. ROTH: The reason we say there is not this direct relationship is because the market for the shirts is so much wider than the market for the shorts and the socks – the 5 : 1 : 1 volume – because the market for the shirt is a broad leisurewear market, people want to walk around wearing the shirt, and because the whole commercial incentive is on the shirt, being that the big selling and big value product are quite different.

THE PRESIDENT: Yes.

MR. ROTH: I do say that if there was to be a spill-over effect, it should not be right that this should come out as regards my clients in evidence at a Liability Appeal that we were in no position to challenge and were not part of. It should have been put to us so that we could make observations leading to the Decision. We certainly do not want, when we are not challenging liability, to have to turn up and take part in a hugely expensive Liability Appeal because something might be said which could then be used against us when we come to argue about penalty, although it was never put to us at the administrative stage.

I just notice that I have over-run.

THE PRESIDENT: Is that a convenient moment, Mr. Roth?

MR. ROTH: Yes, it is.

THE PRESIDENT: Very well, 10.30 tomorrow morning.

MR. PERETZ: If I may just say, following on from the discussion the Tribunal has just been having about the table that Mr. Roth was pointing to, and the way in which shirt discounting may or may not result in discounting of socks and shorts. The Tribunal may find helpful, immediately after tab F in Allsports file 2, there is a set of graphs prepared by Lexicon which simply set out those tables in a very easy to see graphical form. So it is very easy from there to find examples of what I think the Tribunal is looking for.

THE PRESIDENT: Thank you, Mr. Peretz, we will look at that in due course. Very well, 10.30 tomorrow.

(Adjourned until 10.30 a.m. on Tuesday, 18th January 2005)