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.

20 January 2005

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

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 FOUR

APPEARANCES

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

Mr Peter Roth QC and 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 morning. Can I just start with a couple of things, Mr Morris? If you just glance at para.664 of the Decision, which is JJB's turnover in the market, could we just check that that is still the right base figure? I have the impression it probably is, but what that says is:

> "JJB's participation in the Replica Shirts Agreements and England Direct Agreements ended at the end of August 2001. JJB's relevant financial year is therefore the year ending 31 January 2001."

MR MORRIS: Yes.

THE PRESIDENT: What we have now got on the basis of the Tribunal's findings are replica shirts' agreements for MU and England during 2000, and then a gap, and then another agreement relating to the centenary shirt in July 2001. On that basis, is the relevant financial year still the year ending 31st January 2001? I think it probably is. Could you just reflect on that?

MR MORRIS: Can I reflect on it, and can I give you my immediate reaction which is that if it is regarded as one infringement, it would be the same. If it was not then it might not be.

THE PRESIDENT: Well that is what I want to know.

MR MORRIS: Can I come back to you on that one?

THE PRESIDENT: I think the second point is, and maybe JJB was going to do this anyway, we would be quite interested to have some feel for the turnover as regards the MU centenary shirt.

MR MORRIS: Very well, yes.

THE PRESIDENT: Thirdly, and more generally – I think it must be in our papers – we would be glad to be directed to, or have the references for the statutory accounts and financial statements, for each of JJB, Allsports, MU and Umbro referred to in the Decision. The reason for that is that although we appreciate it was not part of the scheme in the Guidance, or part of the statutory scheme we would wish just briefly to remind ourselves of the profit being made by these companies in that period, operating profit in particular, so that one can by way of background have at least a feel for the amount of the fine compared with operating profit. Our present impression is that it is quite high for Umbro but less high for the others.

MR MORRIS: We will look into those points, Sir, and come back to you as soon as we can.

THE PRESIDENT: Thank you.

MR MORRIS: I was on the cusp of finishing with JJB and starting MU, and could I pick up on four points that came out of yesterday?

THE PRESIDENT: Yes.

MR MORRIS: And I will try and rattle through these. The first point is a relatively short point, which is Mr Roth's half a key selling period point. Just to give you some references: Judgment

para.18, which in turn refers to Mr Ronnie's evidence at day 6, p.59. I would just remind you, Sir, of the words in para.18 in the Judgment.

> "The crucial selling period for most replica kit is the period between the launch of a new kit and the following Christmas (see Day6, p.59)"

If you go to Day 6, p.59 - I was not proposing to take you to these references unless you particularly would like me to. The thrust of that is 60 per cent. in the first four weeks from launch. You then remembered a reference in Mr Russell's evidence, and that reference is Day 9, p.87-88 where he agrees with a statement in his witness statement to the effect that it is 80-90 per cent. in the first four months is agreed by him in cross-examination.

The third reference for your note is in Mr Ashley's evidence in the witness statement bundle, bundle 1, under A, p.60-62, those were the notes of his meeting with the Office of Fair Trading in which he says that the critical period is the first few days or the first few weeks. There is a passage there which you may care to look at which we suggest supports the same proposition. The further point I would make is this, that of course it was well known that there was the concept of the 60 day launch period, and that again supports the proposition that the turnover would be well skewed in the early period from launch. That is the first point.

The second point is during the course of argument yesterday you asked me a question in connection with Mr Roth's point that the relevant turnover could not possibly cover the 1998/99 shirts sold in the year in question before the date of the launch of the shirts.

THE PRESIDENT: Yes.

MR MORRIS: With respect, we submit that some confusion has crept in here and I would just like to take a moment to explain and run through it.

THE PRESIDENT: Absolutely.

MR MORRIS: We say there is a clear answer. Could I ask you first of all to go to the Guidance at para.2.3 again? It is the middle sentence yet again. The point is: "The relevant turnover is the turnover of the undertaking in the relevant product market…" then missing out some words "… affected by the infringement…" and then the next few words "in the last financial year." We say that that sentence gives rise to two separate questions. The first question is what is the relevant product market affected by the infringements? We say that that is not a temporal question and at this point of the investigation we are not looking at any particular year, we are looking in general terms at what is the product market affected by the infringements?

I emphasise the word "market".

In the present case, the answer to that first question that we give is "all kit", for all the reasons you have heard.

THE PRESIDENT: Absolutely.

MR MORRIS: I understand Mr Roth's answer to that question to be "all shirts", and he will obviously correct me in reply. This is a general question going to the scope of the products affected generally. The second and separate question that arises from this sentence is, having decided what the relevant product market is, what is the turnover of the undertaking in that product market in the last financial year?

THE PRESIDENT: And that is quite independent of whether, in that financial year, anything was affected by the infringement.

MR MORRIS: That is precisely the point. That question has a temporal aspect. Now, what do we mean by the words "In the last financial year?" The words "In the last financial year" are determined in accordance with the provisions of the determination of penalties statutory instrument, Article 3(1) and that states – I can take you to it if you wish, but I was not proposing to – that it is the business year preceding the date when the infringement ended. That, you will have just seen from the paragraph you have taken us to about JJB's figures. It is p.459 of the purple book.

THE PRESIDENT: Yes. And in a case where there are a number of discrete infringements over a period is it the business year preceding the date of the ending of the last of the infringements?

MR MORRIS: It is on the basis that you have decided that it is a single overall infringement.

THE PRESIDENT: And supposing it is a series of infringements?

MR MORRIS: If it is a series, then you are presumably dealing with separate penalties, if you are going down the separate penalties route.

THE PRESIDENT: You might not.

MR MORRIS: If you do not, then I imagine that it would be the last date would be the date of the termination and you take the last financial year before the termination date. That is probably a point that I will come back to in answer to the first question, but if I can stay on this point. That date is the date taken to fix the statutory maximum, and the OFT follows that provision in determining what is the relevant period for ascertaining the turnover in the relevant product market, and they make that clear in 572 of the Decision. It therefore follows that it is quite possible, indeed it is likely, that the actual sales covered by the figure that you get for relevant turnover will, or may not include sales of the actual product which is the subject of the price fixing agreement. It is this point which the Tribunal's concerns about the 1998/99 turnover fails to take into account.

If you go to para.699 of the Decision, it states:

"MU's participation in the relevant Replica Shirts Agreement ended at the end of September 2000. MU's relevant financial year is therefore the year ending 31July 2000"

and the turnover figure is given there. That turnover figure is the 2000 turnover figure. Now, because of that provision the relevant turnover will include little, if any, of the sales of the actual red MU home shirt, which was the subject of the agreement. It so happens that in this case we know that it was launched on 1st August 2000, which was the day after the end of the relevant financial year. We would submit that were it not for the pre-ordered sales, the relevant turnover would in fact have included no adult home shirts at all. So, it would follow that if, for example, the same agreement had been made at the same time but in fact the launch date had been moved four months later to 1st December 2000 then the likelihood would have been that there would have been no Manchester United adult 2000 home shirts in that turnover figure.

THE PRESIDENT: You can imagine various other cases where that would be – what is the logic of doing it ----

MR MORRIS: The logic of taking the last financial year?

THE PRESIDENT: The logic of basing yourself on a turnover which is not the turnover of the products affected by the infringement, if you see what I mean?

MR MORRIS: It is the turnover in the product market affected by the infringement.

THE PRESIDENT: Yes, you just have to start somewhere, I suppose?

MR MORRIS: Yes, it is an approximation. The OFT does not know what figures it is going to have. It is in line with the statutory maximum. It may be, depending on the sequence of events and how quickly it is detected and terminated, it may be it is fortuitous whether or not it coincides with the date of the infringement. If you go to the previous year, the figure is more likely to be readily available.

THE PRESIDENT: So long as one is clear that relevant turnover does not mean turnover in the products affected by the infringement in the sense that that is the turnover of the products on which the infringement bit in that period. Relevant turnover means the turnover in the previous year.

MR MORRIS: Well it may be the previous year.

THE PRESIDENT: The last financial year.

MR MORRIS: Before the infringement ended.

THE PRESIDENT: Before the infringement ended, which may or may not include ----

MR MORRIS: Precisely, if the infringement has been going on a long time presumably it will include and if the infringement comes late in a financial year then it may very well not include

any of those. That is the mis-match, and that is why there have been problems in dealing with this 1998/99 turnover, and in our submission there is nothing in that point. If one took the point further then what does Mr Roth say would happen if – and I can take you to the figures in a moment – in the 2000 figures we know that of those 2000 figures 21 per cent. was accounted for by the adult home shirts. I think Manchester United will agree with that figure. **That** figure of 21 per cent. for 2000 was all pre-ordered shirts. That was sales before launch. What would Mr Roth's argument be if, in fact, it had been launched and there had been nothing there. Would he be suggesting that in those circumstances there should be some further reduction? We say that cannot be right, and the reason it cannot be right is that we are looking at two separate questions.

On the 21 per cent. point, can I just explain a little bit further the history of that? In Manchester United's Notice of Appeal they say that of the 2000 turnover Manchester United red home shirts accounted for 21 per cent. We do not dispute that figure, and that figure is all pre-ordered sales. (para.23 MU NOA) Now, then in response at paras.30-33 of our Defence we effectively made the point which I have just made, namely, that is not a very accurate reflection of the significance of the Manchester United home shirt, because you are looking at the relevant turnover year in circumstances where most of the sales of the MU shirt launched on 1st August would not be in that year. So we then, perhaps setting a hare off, say well let us look at the 2001 figures. If you are looking at that point about how significant Manchester United is, let us look at the 2001 figures by way of comparison, not because it forms part of the relevant turnover. When we then look at the 2001 figures, it shows that the figure is 38 per cent. adult, and 56 per cent. all red home shirts, and that is in para.32 of our Defence.

The further wrinkle to that is that that figure, when we looked at the 2001 figures and this is where there was confusion yesterday, **that** figure – the 2001 percentage rather than the 2000 – did not include the pre-ordered from July 2000. If you add the pre-ordered, pre-August 1st 2000 figures into the 2001 figures, you have added an extra 565,000 of turnover, and you get to a percentage figure of roughly 45 per cent. for the whole of 2001 – 46 in fact, on my calculation.

THE PRESIDENT: For the adult shirts?

MR MORRIS: For the adult shirt, and then if the whole of that shirt is taken into account, in other words, adult plus junior red shirt, it is 64 per cent. of all sales.

MR COLGATE: In the Decision we have £3.069 which is the turnover for 2000, have you got the corresponding figure for 2001?

MR MORRIS: I am not sure we have, actually. No, we have not because it is shirts. We have the shirts figure. Mr Roth may be able to give you the overall figure, I am not sure. There is a document, perhaps I can just, again for your note, in MU file 2 at tab 11, there is a document which is the PriceWaterhouse financial analysis, which MU put in in support of this 21 per cent. figure, and the calculations which I have just given you about these percentages, are taken from my mathematical extrapolation from those figures.

THE PRESIDENT: Why should we go into all this?

MR MORRIS: Well I am explaining, I do not want to take you any further than I need to but I am just trying to explain the wrinkle about the 1998/99, and the wrinkle about this 21 per cent./38 per cent. who said what. Since this is my last chance to put my side of the story I was putting it but I am very happy you have my point and you have my references.

On JJB duration, which was a question which arose yesterday and which one of your first questions this morning addressed, you have my submissions. For the avoidance of doubt we do not accept that there should be a reduction from 1.5. There is one additional factor we would invite you to bear in mind and it is this, I showed you the fact that we did not impose two separate penalties for the two distinct agreements under the Decision and it could be said, of course, well if you did not do that in the Decision, nor would it be appropriate to impose two separate penalties for, on the one hand, the 2000 agreements, and on the other hand the MU centenary kit. Could I point out one main distinction between the two cases? In the first case, the two infringements (England Direct and Allsports Agreements) were effectively overlapping infringements over the same period of time. There is the distinction here that you have got sequential infringements, and we would say that that factor is a factor which you should bear in mind. Obviously it is a difficult issue – to go down the two penalty route is complicated, but nevertheless we say if you balance it out and you take all the factors into account you come back to the same ----

THE PRESIDENT: I cannot think offhand of a case in which the European Commission or the Court of First Instance has imposed separate penalties for separate infringements.

MR MORRIS: Well if you cannot, I doubt if I can.

THE PRESIDENT: I am not the last word on these things, but I just do not have an example in my head, and the approach that you have followed in the Decision in relation to 675 and 676, just taking the shirts' agreements, and the England Direct agreement, which obviously were two separate agreements, and with no common factual matrix, as it were, treating them as a situation in which you imposed one penalty, but reflected in that penalty the fact that there was more than one infringement maybe a possible approach?

MR MORRIS: I am not urging separate penalties, I am just trying to work through how one fits ----

THE PRESIDENT: One might imagine that if we went down a separate penalty route that might greatly complicate life from your point of view in other cases.

MR MORRIS: It may have been one reason why I was not particularly urging it on you, but I was just trying to explain the logical position, to see where we go.

THE PRESIDENT: Yes.

MR MORRIS: The final picking-up point ----

THE PRESIDENT: I think there is quite a lot of case law that hints that you should not actually impose separate penalties, it says it is perfectly legitimate to impose one penalty for multiple infringements, but I think the implication is that that is a perfectly sensible way of doing it.

MR MORRIS: Indeed, there is some authority ----

THE PRESIDENT: Mr Roth will know better.

MR MORRIS: -- certain in the *ANIC* case, which is in the authorities' bundle, there you had a series of multiple pieces of conduct.

THE PRESIDENT: Quite apart from that it is very often difficult to work out whether it is a separate infringement, a continuous infringement, an over arching infringement, dozens of different infringements, or whatever.

MR MORRIS: But we say some recognition has to be given to the fact that, okay, there was a break in time, but here it is sequential – from A to B at the end.

THE PRESIDENT: Yes, we have your submission.

MR MORRIS: On the Celtic and Chelsea agreement we were looking at last night, it is our submission that on a fair reading of the Tribunal's findings that agreement as found extended to Chelsea and Celtic kits launched in May 2000, albeit a few days before 24th May, and that the Tribunal has found that JJB and Allsports were party to such an agreement.

In a moment, Sir, without going into detail, I am going to give you the references in the Judgment, which will enable you, the Tribunal, to consider whether that finding is such as to encompass fixing the prices of other shirts and, in particular, Chelsea and Celtic. We say they certainly must cover any shirt launched after 24th May, and therefore it does cover, at the very least, although the turnover is marginal, Notts Forrest shirts, home and away, launched on 25th July 2000 (Decision para.64). The question is whether it covers shirts launched before 24th May but still within their key selling period or within 60 days of launch. Obviously, it is ultimately a matter for the Tribunal, but we would suggest that the Tribunal should not step back from that conclusion on the basis of any perceived difficulties in revising the calculation. The relevant references for your note start at paras. 424, 425 and 429 in the Judgment – this is

about the dates of complaints. Then we go to paras.593, 598(1), 618 – timing of the telephone conversations effectively between JJB and Umbro in late April/May. Then to paragraphs 638-643, where you deal with the law on complaints. Then at paras. 645-646 where you make a finding that the indications were during May and probably April; paras. 688 and 706 which are Allsports' paragraphs on the same point. Then it is really against that background that the critical passages are paras.747 to 754.

When you get to para.754 if you look at the words "… the agreement or concerted practice" in line 2, one central question is what date was that agreement or concerted practice concluded? There are two possible answers. One is before 24th May, as a result of the complaints, and on that basis we would suggest if that were right then Chelsea and Celtic would in any event be included. The other answer, which I think was the answer that you gave to me yesterday, Sir, was that this is the England agreement we are effectively talking about, is that it was 24th May.

THE PRESIDENT: Yes.

MR MORRIS: Now if it was 24th May that still begs the question as to what was the nature of that agreement, and it is undoubtedly the case that in para.749 of the Judgment it seems to suggest that what the agreement was, as far as other shirts were concerned, was to maintain High Street prices on new launches for 60 days, which might suggest that we are talking wholly new launches looking to the future.

We say that the references in 748: "…*and* to maintain High Street prices on *all* replica kit for a period of 60 days from launch" comprises things which have already been launched. It does not say "on all the replica kit launched" or "new launches" for a period of 60 days from launch. We say that that similarly can be found in 751 in the quote of the Umbro fax to MU: "… revise their current pricing of jerseys…" Now if you ask that question about what jerseys would be being talked about there, we would suggest it must comprise the Celtic and Chelsea kit that had just been launched, and similarly we say 752 and 753 both comprise, not just looking into the future – new launches – but also things that had just been launched. That is the way we put it, Sir. We would ask, I suppose, the rhetorical question: "What if a few days after the meeting of 24th May Sports Soccer had discounted the Chelsea or Celtic shirt, set against the background of the Agreement that you have found. We would suggest, and of course it is entirely hypothetical, that there may have been a reaction from JJB or Allsports crying "Foul", this is not what the agreement covers. But I cannot take it further than that. What we have done is sought to interpret the Judgment as we read it.

THE PRESIDENT: A procedural difficulty is that this does not form part of the original Decision and was not a suggestion that was made by the OFT in the course of the hearing before the Tribunal, so it is not really a matter that JJB and Allsports have had a chance to deal with.

MR MORRIS: Yes, I see that point and I understand the Tribunal's concern there. I would like to come on to a few Manchester United points – not too many, but a few.

Manchester United's complaint on equality as between it and Umbro and it and Allsports.

THE PRESIDENT: Yes.

MR MORRIS: I am going to try and deal with this very briefly. First, the Manchester United home shirt launch in August 2000 was a one in 20 year event – more than just a key product. Secondly, Umbro were under great pressure from MU. Thirdly, Mr Roth in this connection relied on limited duration as compared with Allsports and Umbro, but then we suggest that is reflected in the duration factor and not at this stage.

THE PRESIDENT: He is saying in relation to Allsports he has the same duration factor as Allsports, even though Allsports is involved in two agreements, but he is only involved in one agreement.

MR MORRIS: And Allsports turns round and said we were only involved for two weeks anyway, but there we are.

THE PRESIDENT: Well it was a shorter duration on the findings of the Tribunal Allsports is involved for a longer period than MU. His point is that if you take the approach to duration that everything under a year is treated as one you cannot distinguish between different durations that are both under one year. That is the point, so far as it goes.

MR MORRIS: Yes. We say the MU infringement, the single infringement as opposed to the second infringement was of great significance and not a substantial factor which justifies a distinction being made. Presumably he says it comes in at what stage – at the deterrence multiplier? It is difficult to see where he says it comes in – some sort of adjustment, presumably.

THE PRESIDENT: He says there should be a downward adjustment relative to Allsports because his duration was shorter.

MR MORRIS: Yes, but if I one accepts the concept of key selling period within the year, then this is not an exceptional circumstance to justify a reduction in duration, we would say.

THE PRESIDENT: You might argue, I suppose, that the England agreement which lasted about three weeks was shorter – no, you still have a shorter duration however you argue it. But anyway you say we should look at all these things in the round?

MR MORRIS: It is difficult to see where the adjustment comes. Duration, save in exceptional circumstances is when you go beyond a year, we say. If you accept that there is no reason to go down from one then ----

THE PRESIDENT: You basically say five months, two months, whatever it is, there is a limit to the extent to which you can slice it all up.

MR MORRIS: Yes.

THE PRESIDENT: The other point on equality, of course, is the point I made yesterday. You have to step back and look at the overall picture, and certainly Umbro against Manchester United in terms of percentage on total turnover, the distance is very significant. There is little difference between Manchester United and Allsports. I think Allsports is slightly lower from the figures I gave. I think Manchester United were 1.45. As far as Umbro is concerned the two times deterrence was given specifically to bring them down and if you went back up to three times deterrence you would be grossly out of sync., we would suggest, between Umbro and Manchester United.

Can I then turn to the question of compliance programme as an aggravating factor? That is para. 715 of the Decision. As you will recall Manchester United were given a 10 per cent. uplift because the compliance policy was not being adhered to and that was set against the background of the non-statutory assurances having been given. I make four points on this, if I may.

First, the rationale for this increase was the fact that the infringement took place and was kept hidden in blatant disregard at the compliance programme. It is the disregard of the compliance programme that this goes to. Secondly, what happened at the board meeting of 26th May, that is the first board meeting, we submit was relevant, despite Mr Roth's submission that somehow that was a mistake and "we apologise, we gave the wrong date and it is of no significance." What happened on 26th May was relevant. Subsequently, after the June board meeting there was a further disregard of the compliance issue; and fourthly, this point is distinct from the point that the infringement itself involved senior executives.

Before turning to those points in a little bit more detail, on the question of the status of how compliance should be taken into account where compliance policy exists at the time of the infringement, we say that the existence of a compliance programme at the time that an infringement takes place may be, but is not necessarily, a mitigating factor in certain circumstances. But on the specific facts of any case, and in particular **this** case, the committing of an infringement in the face of a compliance programme is capable of constituting an aggravating factor where that programme is blatantly ignored, disregarded or treated in

a cavalier fashion because failure to heed the programme indicates perhaps a greater need for deterrence to get the message home, and that is the short point. Now, here it was because of the disregard by Mr Kenyon, Mr Draper and others, both of the policy once introduced, and of the knowledge gained before its introduction, but in connection with its introduction, that the Office submits that an increase is and was justified.

Can I just to look in a little bit more detail at the facts? Can I take you to my skeleton, which is in your bundle, our amended skeleton, vol.2, tab 5F? It is para.33A which is on p.14. It is worth reading that paragraph, if I may?

THE PRESIDENT: We have read it, Mr Morris.

MR MORRIS: It may be worth then looking at the MU yellow file, vol.2. The point I want to demonstrate is what was going on at 26th May board meeting and the fact that the issue of compliance was raised at that board meeting and following that meeting a clip of press cuttings was produced by Mr Beswitherick which was passed through to Mr Kenyon, and the point that we suggest at the end of 33A, we say that one would have expected him to have read the articles which went through him from Professor Smith to Mr Beswitherick – one would have expected him to have read those articles. The articles themselves have headlines about price fixing. The articles themselves for your note is MU file 2, tab 12, p.14.

THE PRESIDENT: Yes.

MR MORRIS: (After a pause) I will come back to the articles if need be. We do say that despite effectively the invitation by the Office to address this point there has been no comment either from Mr Roth on instructions as to Mr Kenyon's awareness of those matters that passed through his hands, those articles.

THE PRESIDENT: When you say Mr Kenyon was privy to the MU/Umbro correspondence, where do we get that? You mean Mr Draper's fax of 21st May and Mr Marsh's reply of 6th June.

MR MORRIS: Certainly 25th May, yes. I think he was copied in on it – well I more than think, I am pretty sure he was. I do not think that is disputed.

MR ROTH: No, that is right.

THE PRESIDENT: Was he copied on the fax of 6th June?

MR MORRIS: Yes, he was copied on 6th June fax as well.

MR ROTH: It is actually dealt with by Mr Kenyon in his witness statement.

THE PRESIDENT: And what does that say?

MR ROTH: That he was copied in.

MR MORRIS: Thank you. The references in the Decision are paras. 170, 184 and 466 of the Decision. That I the first point. The second point is well the subsequent events following the

introduction of the compliance programme, and that is dealt with in our defence at para.57, which I can take you to if you wish, that is in the yellow file again.

THE PRESIDENT: Yes.

MR MORRIS: It is tab 3B in the MU yellow file, p.22. It is dealt with at paras. E, F and G. So you get the board memorandum of 30th June, and then you have the letter in E, this is p.23 from Mr Prothero to Mr Richards "… stated as you know…" that is the agreement

> "… despite Mr Richard's receipt of the memorandum from the Chairman by way of implementation of the corporate compliance programme, he says nothing at this stage. Also on the same day Miss Quinn of Manchester United responded to the letter to Mr Richards providing an assurance. This is in clear and direct example of price fixing at the time when the compliance programme was being rolled out."

Then G, over the page:

> "On 21st and 22nd August 2000 both Stephen Richards and Peter Draper attended individual meetings with Mr Bestwitherick where they were informed of their specific responsibilities and were asked to identify any specific areas of risk of infringement …"

That is Mr Beswithericks's first statement. "Both Mr Richards and Mr Draper appear to have kept silent." Now how you characterise it in terms of words maybe a matter for debate, but there was at the very least a cavalier attitude to the compliance programme. We would say actually it was stronger than that and that in those circumstances there is no answer to the point that this was a distinct aggravating factor, and the Office was entirely justified in taking it into account.

The point about the senior executives as I made at the outset, this is to do with the fact that the senior executives are blatantly disregarding the programme not that they are involved in the infringement. That factor was taken into account separately and they are, in our submission, distinct factors.

Can I move onto compliance as a mitigator? Mr Roth returned to that issue and he elided two points. One is should Manchester United have been given anything in the Decision for their compliance programme in place by the time of the decision? Our answer to that is first, if you are with me on the first point about aggravator, you cannot then be given something as a mitigator for putting in place a programme which has plainly not been effective. But even if you are against me and you do not think that it is right that there was an aggravating factor it would be a bit difficult and, we would say, impossible to give them credit for a compliance programme which has been treated in the way it has been treated even if that

treatment does not warrant aggravation. So that is compliance pre-Decision, and so far as compliance post-decision is concerned, we make the point I made yesterday that that is not really something that warrants a mitigating factor now over and above what has happened before the Decision. So that deals with compliance.

That then flows into the non-statutory assurance point, and Mr Roth complains about a double count. He says that because we took into account the non-compliance programme in para.715 that is a double it because it has been taken into account elsewhere. The first point on this is: if you read para.715 no distinct penalty or uplift was added in here for breach of the non-statutory assurance. The reference to the non-statutory assurance in 715 was given as a further reason for regarding the non-adherence to the compliance programme as warranting an increase in penalty. It is the context for the increase due to the non-compliance.

THE PRESIDENT: Is it the case that strictly speaking Manchester United was the only party who actually gave the non-statutory assurance, or on whose the non-statutory assurance was given?

MR MORRIS: I think of the parties before the Tribunal ----

THE PRESIDENT: Although Umbro apparently wrote letters, or said it did.

MR MORRIS: Yes, the FA as well obviously did in the terms of the overall Decision.

THE PRESIDENT: And why should there not be an uplift for that? Why should there not be an uplift for people who give assurances and then blatantly disregard them?

MR MORRIS: Well because Mr Roth would say that it is the distinction between the person who gives it and the awareness of their existence in the industry.

THE PRESIDENT: The awareness of the existence in the industry is the general point which applies to everybody ----

MR MORRIS: Precisely.

THE PRESIDENT: -- but is there not a distinct point that applies to the people who have actually given it, and if they had been under the Resale Prices Act regime they would have been in jail now for contempt.

MR MORRIS: That is one of the factors I raised in opening, that if you – the Tribunal – consider that matter as not having been given the weight it could have been given in the Decision that is a matter for the Tribunal. I cannot put it any higher than that.

THE PRESIDENT: Yes.

MR MORRIS: Finally on that, I should point out that Mr Colgate did ask Mr Roth a very specific question as to the steps that Manchester United had taken to comply with the non-statutory assurances. Mr Roth said he would come back to the point in his submissions, but he forgot to do so. I say no more ----

THE PRESIDENT: He has no done so yet, anyway.

MR MORRIS: He has not done so yet. I put it no higher than that – no doubt he will have something to say on the point.

That really comes to the end of the points that I wish to make about Manchester United except to pick up on one point that was in their reply skeleton. Just for your note it is the Human Rights' point. We say that it is a non-point, and a lot of debate ----

THE PRESIDENT: You need not bother as to that.

MR MORRIS: I am grateful.

THE PRESIDENT: What about the consideration that Manchester United is the only party who has had the grace to offer an apology to the Tribunal?

MR MORRIS: That is a matter for the Tribunal, and it is something which no doubt the Tribunal will take into account. We noted earlier on the statements that had been made in earlier Case Management Conferences and we cannot say other than we welcome that statement in the context of what was said earlier.

Finally, I am going to deal with Allsports' points, and again I will try to canter through these. The first point is the Allsports relative lack of importance on the markets and the fact that they were left responsible for the infringements. We say that Allsports did play an important role and its participation in the infringements had a significant effect. You have the points – the 8th June meeting was not only instigated by Mr Hughes, as the initially admitted, but it was instigated for the express purpose of price fixing. We have Mr Hughes conduct on the Golf Day, and we have Mr Hughes' conduct as very much the central key role in his meeting with Mr Ronnie on 2nd June.

We would suggest that the findings of the Tribunal in relation to pressure do go beyond the Decision and are also a significant finding in the context of considering how important Allsports' contribution to the infringement was. That goes beyond the basis of the Decision. We went uphill and down dale about pressure, there was a lot of debate about it and the Tribunal concluded that Allsports did put pressure on starting as early as April 1999.

THE PRESIDENT: Can I just raise a point that has an implication in relation to JJB as well? The situation is Allsports gets a 15 per cent. uplift for being an instigator, JJB gets a 10 per cent. uplift for being an instigator on the basis of its pressure. Allsports does not actually get anything for pressure, but they get 15 per cent. for organising the meeting. Is there some relation to the specific point of instigator pressure, and relative power to put pressure on Umbro? Is there some possible rebalancing that ought to take place as between para.614 and para. 673 of the Decision?

MR MORRIS: Well there is, but we are into again fine slicing. You could say on the one hand, now that we have the finding of pressure, for Allsports as well, that that in some ways would be one each on that issue. Then you have on the Allsports' side the instigation which the OFT in the Decision regarded as more significant than pressure. So on that basis it would look as though you were going to get Allsports to go up in some way, or as the balance is now that there is a greater aggravating factor for Allsports than for JJB. But, of course, you then have to take into account the relative weight of the pressure as between JJB and Allsports, and although I cannot go to the findings, and I do not think I can dispute that ----

THE PRESIDENT: Well at the moment for instigation/pressure Allsports has been treated more seriously than JJB which might be said to be the wrong way around.

MR MORRIS: The Allsports' figure takes account of, and you will have the para. before I will.

THE PRESIDENT: 614.

MR MORRIS: I am grateful. Also takes account of ringing Blacks and the JD Hat promotion – it is not just the organising of the meeting.

THE PRESIDENT: Yes.

MR MORRIS: There is no doubt that as far as the Decision is concerned, instigation in that very open way, both of the central meeting and of the JD Hat promotion, is regarded as a more serious factor than pressure, constant complaints. I would not resile for that proposition. I would not say that the balance should be rebalanced even now that you have pressure found for Allsports, I would not be saying that you should go higher for Allsports. You are asking should in fact JJB be levelled out?

THE PRESIDENT: The evidence so far is that JJB is by far and away the most powerful player in this market, and a question in our mind at the moment is how far the Decision reflects that when it comes to penalty?

MR MORRIS: It is a fair observation. A solution would be to drop Allsports down, but we would no suggest that, or a solution may be in the balancing exercise to raise JJB if you considered that it was the serious power in the market. I do not think I can answer it any other way.

THE PRESIDENT: Thank you.

MR MORRIS: But there were specific Allsports' factors which, although in terms of power in the market, we have seen the evidence, Mr Hughes was pretty central in activating what was going on, getting people together, and we say that should be reflected.

THE PRESIDENT: Yes.

MR MORRIS: The point that Allsports' infringements have no effect on prices. Insofar as it had no effect on Allsports' prices we say "yes" it plainly did and that you so found at least at paras.

873 and 877 of the liability Judgment. As far as effects on prices on others concerned, you have para.880 of the Judgment. There is also Mr Hughes' cross-examination (Day 11) where he accepted that the effect of the Agreement must have had some effect on Sports Soccer's pricing. We said it is almost a given, it must have been the effect that if you are party to an agreement it will have an effect on the prices of others.

The point about effective duration only being two weeks. First, it is not correct to suggest that Allsports had no involvement prior to the Golf Day, which was 25th May. Secondly, Allsports' pressure certainly took place before that date and indeed, of course, the starting point of our complaint went back as far as April 1999. Of course, it is not just Mr Hughes' conduct; you also have to take into account the evidence of Mr Guest and Miss Charnock. The evidence of Mr May about Miss Charnock's complaint, and the evidence from Mr Guest about his discussions.

Secondly, to characterise the involvement as ending on 8th/9th June is, in our submission, not a fair characterisation, particularly in the context of the diary entry of 8th August – the "Phone back Ashley" diary entry – that shows not only that an agreement has been reached but it plainly manifests as the very least an intention to follow up and pursue the agreement that had been made, and to do so at the date at the agreement, or close to the date that the agreement ----

THE PRESIDENT: It is 14th August I think, Mr Morris.

MR MORRIS: I am grateful, it is. The point about Mr Hughes's health being mitigation – the OFT of course is not without sympathy for Mr Hughes's physical condition at the time, but we do ask the Tribunal to consider whether it really is such as to justify a reduction in penalty, particularly absent any further explanation as to how the pain that he was suffering may have affected his ability to appreciate or perhaps understand the nature and consequences of his actions at the time. On that point, can I direct your attention to para.864 of the Judgment, where you make the point that I was going to, that the state of his health was not such as to stop him driving to and from the station. More generally we deal with that point at para.106 of our Defence in the Allsports' case – the Allsports' Defence.

The point that Allsports did not give assurances – the non-statutory assurances – it is certainly the case that they did not give them. They only got uplift because of their general existence in the industry. We suggest, although there was no direct evidence, that Allsports may well have received a copy of Umbro's letter and no doubt Mr Peretz can deal with that. We also point out that in para. 4.2 of Mr Peretz's reply skeleton that there is a suggestion that all retailers were aware of the non-statutory assurance at the time. There is no suggestion that

Allsports were excepted from that and we suggest that there is material which indicates that they would have been aware of non-statutory assurances at the time.

The next point is to deal with the question about the 5 per cent. discount for co-operation that was given by the Office of Fair Trading. Our point here, put simply, is that that 5 per cent. reduction for what was a very limited admission about organising the meeting should be withdrawn in view of what we now know about Allsports' conduct in the course of the investigation, most particularly as regard the diary. Now, I know in our skeleton we also refer to the failure to put the witness statements in. But what we are really majoring in on here is the conduct in relation to the diary. There are actually two separate points entwined in this issue. First, how significant was what they did that led to them being given the 5 per cent. reduction in the first place? In other words, how significant was that admission? Secondly, why the none production of the diary at the administrative stage was a matter of fault on Allsports' part.

Taking the point briefly, the admission about organising the meeting, in the context of what was also said at the time, which included a vehement denial of any agreement having been concluded at that meeting, is in our submission indicative that it was a very, very limited admission which indeed was intended to put the Office of Fair Trading off the scent at the time.

The non-production of the diary was a matter of fault because here this is not a case of somebody merely staying quiet and exercising their right effectively of silence and of not producing material. Here, as pointed out in para.313 in the Judgment was positive reliance at the written representations to the supplementary Rule 14 on the diary for exculpatory purposes to demonstrate that no follow up meeting was discussed and no follow up meeting took place. There are two points there.

One, that not to rely on the diary for exculpatory purposes without telling the whole story is in itself a matter of fault; and secondly, the answer about no follow up meeting was perhaps on the economical with the truth side of things. There was no follow up meeting and no follow up meeting was discussed, but that diary would have revealed that certainly a follow up phone call was in Mr Hughes' mind and had been entered in the diary. We suggest that that was plainly misleading to actually hold the diary up and say "Look what good boys we have been" when disclosure of the diary would have materially assisted the Office of Fair Trading in its investigation. I do not take the matter any further than that.

On the question of misleading the Tribunal in relation to the blanking out, you have my submissions on that, Sir, and I do not propose to take the matter any further. It is a matter for you how, if at all you wish to mark that.

The impact of the liability Judgment is the same point as JJB, and I believe that the final point is Mr Peretz's point on trail blazing costs. We suggest that that, if at all, is a matter to be considered in the question of costs. It is certainly not a matter which, in any way, is relevant to the fixing of penalties. Those are my submissions on the first three Appellants and, unless there is anything else, I propose handing over to Mr Turner on the question of Umbro.

THE PRESIDENT: Thank you.

MR TURNER: Sir, I am going to endeavour to be economical and brief, but looking at the clock I now fear that it is unlikely that we are going to finish everything by lunch time.

THE PRESIDENT: Yes.

MR TURNER: Sir, the thrust of Mr Green's argument to you is that 40 per cent. discount for exceptional co-operation was too low and that the Tribunal should enhance the discount for that one element of the penalty. I would stress that Umbro is not appealing today in relation to any other element of the penalty calculation such as, for example, the deterrence factor.

I will structure my submissions as follows: first, it is necessary to make some remarks about the 40 per cent. discount which was given to Umbro for its co-operation in order to set it in context.

Secondly, I will address Mr Green's points that the Office has failed to give Umbro credit for co-operation with the investigation and for the written representations under the Rule 14 Notice.

Thirdly, I will deal with the impact on 40 per cent. discount of subsequent events in the JJB Sports' liability appeals. There are two issues. The Office, as you will have seen, is relying on the Tribunal's finding in the Judgment that Umbro was not full and frank in the answers it gave to the Office in specific questions about its telephone calls with retailers (para.302).

Umbro, on the other hand, prays in aid its co-operative attitude during the Appeal process and says that should merit reduction in the fine.

THE PRESIDENT: Yes.

MR TURNER: So I turn to the first of the issues, which is to set this in context. We say that the 40 per cent. discount for co-operation that Umbro received was large. It needs to be viewed by the Tribunal against the following four considerations. First, Umbro has been given this discount of 40 per cent for exceptional co-operation even though the Tribunal must bear in mind it hotly denied the truth of central aspects of the Office of Fair Trading's Decision right up until the date of the decision itself. I have set out example in para.4 of the Office's Defence, and I will give only two now to the Tribunal by way of example.

The first is the point that the Office's Decision found that the Umbro/Sports Soccer agreement covered Chelsea, Celtic, Manchester United, Notts. Forrest and the England shirts. You will find that in the Decision paras 342-8. It is reflected in the Judgment at para.93. In particular you may recall that Umbro's April 2000 monthly management report had reported that Sports Soccer had – and now I quote – "…agreed to sell all new Umbro licensed kits at £40 men's and £30 kids' in line with the rest of the High Street". You have recorded that in the Judgment at 7480-9. Yet before the Office of Fair Trading and at all stages Umbro steadfastly stuck to a denial that the agreement with Sports Soccer had never touched on anything more than the Manchester United and the England shirts, and it is said that the April monthly management report was inaccurate. I will give you the reference to the written representations. Paras. 91-96, C2, tab.24 p.751-2. I will not turn those up now.

The second example is that before the Office Umbro consistently denied that it had been involved in any price fixing beyond, at the latest, February 2001. It told the Office (incorrectly) that the events effectively died out at the end of the year 2000. Those are the words of counsel at the oral representations (C4, tab.30, p.1308 lines 13-22) You will find the same maintained in the written representations at para.14, and the supplementary written representations at para.75-77 – the latter reference is C5, tab.62, p.1807). The Office's Decision, on the other hand, as the Tribunal is well aware, found that the unlawful agreements had continued until August 2001, and that there was more evidence which reinforced that, which came out in the liability appeal before the Tribunal as well. That is recorded in the Judgment and, in particular, what Mr Ashley had said in cross-examination, that the pressure from Umbro was still intense and gradually increasing in the first part of 2001. That is spelled out in the Judgment at para.911. So in short, Umbro's very large discount for exceptional co-operation with the investigation must be seen against the background that it denied important facts and fought on central parts of the case right up until the Decision itself.

The second matter is the issue of the comparative nature of this discount. Fairness does require, and it is an aspect of other Appeals before the Tribunal, that the 40 per cent. discount that Umbro received, should not be unduly favourable when compared with that given to the other parties in respect of their own co-operation. The clearest comparator is Sports Soccer. Sports Soccer also received a very large discount. Sports Soccer got 50 per cent. and it took into account in particular that it was the whistle blower, it came forward voluntarily and it admitted wrongdoing itself, and that it could be fined, and its assistance was central to the investigation. The reference for the Tribunal is para.755 of the Decision.

We have spelled this point out in the Defence and in our submissions. But Umbro has not explained why it deserves to be given a figure closer to the 50 per cent. for Sports Soccer and we say it must be clear that there was a gulf between the respective attitudes to progressing the Office's investigation and ending price fixing and this must be reflected in a significant difference between their respective discounts for co-operation as a matter of equity.

The third point is that the 40 per cent. discount must also be viewed – this is very important – in relation to what is available to companies under the leniency programme, who are in the position of Umbro. This was canvassed with Mr Green in the course of argument. A company which has compelled others to take part in a cartel can only get up to a maximum of 50 per cent. reduction under the published leniency programme. A reference which we may go to in a moment is para. 3.8 of the Guidance. The point is that to qualify for any figure up to 50 per cent. under the programme, a company has to provide all available information and maintain continuous and complete co-operation throughout the investigation. Those are the words of the Guidance in para 3.8.

The touchstone here is 100 per cent. openness and candour at the start. Mr Green was repeatedly aiming at an Aunt Sally when he complained that the Office was demanding instant and comprehensive information in every last detail. The point that we make is that Umbro did not do the best that it could, it was "holding back" – the expression used by Miss Kent in her witness statement on behalf of the Office – from giving details of important events that were within the direct knowledge of the very individuals concerned. I give four illustrations.

First, the leniency witness statements. They were inaccurate, they were unreliable and misleading in material respects. They did not refer to any agreement on the England shirt. They did not refer to telephone conversations with the retailers about England. They said that the main multi-management report referred only to the Manchester United shirt. Quite strikingly, when you look at it, and in the interests of time unless the Tribunal wishes I will not go there, the first Ronnie statement misquoted significantly the text of the May monthly management report in order to try to limit what was said to be of significance. You will see that if you look at para.14 of Ronnie 1, and compare the monthly management report on p.29. Words are missed out in order to give it a different meaning.

In the second Ronnie statement, Mr Ronnie said that his diary was not of any assistance on dates even though it was, and you found so in your Judgment. Full references for the Judgment are in the Office's skeleton at para.41, but the references that I will particularly give you now are paras. 300 to 301, 528, 549 and 551. Those were the Ronnie statements. It was urged upon you by Mr Green that the faults were limited to Mr Ronnie, but they were not. Nor

is it true to say that the Office, or the Tribunal, has found the evidence of all other Umbro witnesses accurate in every respect. I will give the example of Mr Marsh, his second witness statement at para.17. What he does there is to refer to the facts of 6th June 2000 to Mr Draper about having received assurances from Sports Soccer and JJB on their pricing. He said in his leniency witness statement:

> "I was merely reporting the intentions of Sports Soccer and JJB in respect of this product."

That laconic and misleading remark was changed and expanded in the revised Marsh statement that came with the responses to the Rule 14 Notice, and you will see that at para.19 of what we call Marsh 3. Some of the main defects in the leniency statements were picked up by the Office and that accounted for their attitude. We have seen those letters as Mr Green took you to them. There was the letter of 29th January 2002, which pointed out that in particular Ronnie 1 was materially inaccurate at paras. 14 and 77 and the Tribunal found that the Office was right to reject Ronnie 1 (Judgment para.551). The letter of 12th February 2002, which related to the second wave of witness statements said correctly that Ronnie 2 still contains substantial inconsistencies including a persistent misunderstanding or mis-statement of the name of the management report. The Tribunal found that in its Judgment at para.555. That was the leniency witness statements. The responses secondly given by the Umbro team to questions of the leniency meeting at the end of February 2002 were neither candid nor convincing. We have set out our case on that in the skeleton for this hearing and if I may ask the Tribunal briefly to look at para.46 of our skeleton. The text may be self-explanatory and all the references are there, but what is pointed out is the response to questions ----

THE PRESIDENT: Sorry, your paragraph?

MR TURNER: The paragraph is 46 on .19.

THE PRESIDENT: Thank you. Yes?

MR TURNER: One of these issues was canvassed by the Tribunal with Mr Green. This was the reference recorded in para.78 of Umbro's note of this meeting to "make believe". You see the references there – two documents were looked at. The first of those had a marking on it: "*Agreed return to £39.99.*" Mr Marsh and Mr Ronnie were asked about that. It was in Mr Ronnie's hand and they simply gave no answer in relation to that point. The second was the matter canvassed with Mr Green. The statement that discussions had already commenced regarding the issue of pricing, and Mr Marsh's comment that such discussions did not take place. It was put in Umbro's own note as the issue that it might have been "make believe".

That changes in Mr Marsh's subsequent witness statement, and I have set out the text at the end of 46.

"*On the issue of pricing more generally, I had heard from Chris Ronnie that* ***there had been discussions with the major retailers****…*"

in direct contradiction to what he had previously said. So that was the leniency meeting.

THE PRESIDENT: How far is it consistent for the Office to criticise what was said in the leniency meeting when before the Tribunal you relied on what was said at the leniency meeting in order to prove your case?

MR TURNER: Because you cannot regard every single answer as an indivisible whole. In some respects, such as the respects that I have just shown it is clear and demonstrated that inaccurate and misleading answers were given. The only other case, and I was going to come to this, where in the Tribunal's proceedings a matter was picked up was to rebut the suggestion of recent invention from Mr Ronnie in relation to the phone calls.

THE PRESIDENT: The misleading statements that you identify are those by Mr Marsh. Is that right?

MR TURNER: That I have identified here ----

THE PRESIDENT: Are there other misleading statements that you rely on in the course of that meeting, or is it just Mr Marsh?

MR TURNER: For the moment it is Mr Marsh, and also Mr Ronnie I have referred to because it was Mr Marsh and Mr Ronnie who both gave the laconic answer in relation to Mr Ronnie's handwriting "Agreed return to £39.99" that they had nothing to say about it. Beyond these points, Sir, I make two further observations. First, it is very difficult in this context for us now to pick over each and every point in that meeting and I am sure the Tribunal would not wish me to do so.

The second point, of course, is that there is a dimension to that meeting which is invisible necessarily to the Tribunal. The Tribunal cannot have seen, not just the answers that are given, which are noted in the records of the meeting, but the way in which they were delivered. In my submission, when an investigative authority is in a meeting with people – and I was not there obviously either – if laconic answers are given, people look to their legal advisers before deciding whether to answer, matters of that kind which may be described as "body language" occur, it may add to an impression and it is difficult for the Tribunal at this stage to say that the Office was wrong. Mr Green urges you to say that the result of the leniency meeting ought to have been an endorsement of the application for leniency.

THE PRESIDENT: What is the evidence about body language?

MR TURNER: There is no evidence about body language. I am giving that merely as an example to say that there is an aspect to what occurred in the meeting which is in his point.

The third area for context is the point that I am going to rely on in a different context in a moment, namely, that Umbro did give a false answer to the Office's question on 30th September 2002, when the Office asked:

"Do you have further details of the telephone conversations which took place with the retailers which you have now told us about in your post-Rule 14 witness statements?"

The reference to the document is the OFT Decision's documents files, tab 35 at point 2. At para. 302 of the Judgment, Sir, the Tribunal had found that the false answer was possibly explained by Umbro's fear of commercial repercussions. We respectfully see the sense in that. But however that may be this is not complete or continuous co-operation with the investigation. Mr Ronnie's evidence, when it came to the Appeal, which was crystallised in Ronnie 4 was to the effect that he plainly was able to remember details of what has been called the "ring around", and that led to a clarification. That clarification should and could have been given earlier.

Fourthly, as I have mentioned earlier, Umbro of course persisted in arguing that the scope of the agreements was narrower and the duration was shorter than they really were right up to the time that the Decision was made. If one stands back and takes all of that together, we say that Umbro is in no position today to say to the Tribunal that it should be treated as if it were a beneficiary of the leniency programme, who gave maximum continuous assistance to the Office during its investigation and could have received the top award which was up to 50 per cent. It cannot get 50 per cent. off its fine for co-operation. It cannot get anything like 50 per cent., and if you view it in that way, the discount at 40 per cent., which Umbro has received, is in our submission the very highest figure that can be allowed to an instigator in the position of Umbro without seriously damaging the leniency programme. That is the point of principle. From the Office's perspective it is felt that there is quite a lot at stake in your Decision on this narrow point for this reason. If one looks at Umbro's treatment by the Office in this case (it got 40 per cent.) there is a real risk that if any more discount is awarded for this element then in future cases companies may wonder what on earth is the advantage of trying to get into the leniency programme under which a condition is to maintain continuous co-operation.

Mr Green does not try to meet these objections of context, nor has he given you any coherent reason for supposing that 40 per cent. is too low when viewed in the wider context of the case. The argument that he has advanced before the Tribunal is purely a two dimensional

one – that the Office forgot to take into account certain factors and therefore the 40 per cent. should be increased. That is the logic of the argument.

With that I turn to the second area of the address which is whether the Office forgot to take into account material elements of co-operation before the reply given by Umbro to the Rule 14 Notice.

THE PRESIDENT: Can I just ask something there, Mr Turner? I am not sure I know quite how to put it but I will have a go. In a way these points do bear on the relationship between the leniency programme and the question of how far you get a discount for co-operation during the Office's proceedings. We have not really got the leniency programme fairly and squarely in front of us as a sort of issue in the case, and we are therefore not really very fully informed about what the logic of the 50 per cent. is for people who may have been instigators as distinct from 40 or 60 per cent. or some other figure. If we look, for example, perhaps for argument's sake not to Umbro but in order to keep it more neutral to Sports Soccer, if you have a company who is the whistle blower or what would be called in a criminal context "the informer" – well let us not even talk about Sports Soccer let us talk about a notional company, who is the whistle blower, who produces the evidence or gives you enough to know where the evidence is to be found, and effectively enables you to prove your case and without whose evidence you might not have approved your case, one could argue that a company in that position should get a very substantial discount indeed.

MR TURNER: And they do under the programme.

THE PRESIDENT: Well do they? Is the 50 per cent. ceiling because you are an instigator? Or can you get somewhere between 50 per cent. and 100 per cent. for just being as helpful as you can possibly be even though you are not first in the door?

MR TURNER: No, the 50 per cent. is a maximum. There are three paragraphs in the leniency programme, which is part 3 of the Guidance we have already looked at.

THE PRESIDENT: Perhaps we just need to understand a bit the background. You are saying we must not undermine the leniency programme, and so we had better understand what it is we might be undermining.

MR TURNER: Part 3, behind Part 2 ----

THE PRESIDENT: Yes, we are there.

MR TURNER: -- is the leniency programme.

THE PRESIDENT: So you get total immunity if you are first in the door.

MR TURNER: The relevant paragraphs are 3.4, 3.6 and 3.8. 3.4 describes the situation where there is no discretion on the part of the Office, but where 100 per cent. immunity will be given. The

conditions are set out in that paragraph. By the way, this Guidance has been replaced as of December 2004, there is a new Guidance that has recently been put in place, but this describes the position at the time.

THE PRESIDENT: I think it would be useful for us to have that new Guidance on our files, just so we have the full picture.

MR TURNER: I am told it is in the authorities' bundle already.

THE PRESIDENT: We will look at it in a moment. To the extent this is now historical, that may be one thing, but let us go on with what it was at the time.

MR TURNER: It has not gone out of the window.

THE PRESIDENT: No, no, I am not saying that it has, I just want to understand what the situation is very fully.

MR TURNER: Absolutely. 3.4, you are the first, you come before the investigation has commenced, and then a number of conditions have to be satisfied, which are set out in (a) to (d) and which include (a) of course providing all the information available; and (b) maintaining continuous co-operation. (c) is important, but you cannot get in under that heading if you have been an instigator or you have compelled another undertaking, or played a leading role.

THE PRESIDENT: Yes, we have that issue in another case, I think.

MR TURNER: That is so. 3.6 is the case where total immunity may be given, "may be" given, and there is a discretion in that case. There you have to be the first, you are coming before the Rule 14 Notice and the same four conditions as set out in 3.4 have to be fulfilled. Again, one of those is (c) not having compelled others. That is discretionary.

The final case is the one which concerns Umbro, and that is in 3.8. Here the first condition is that you come before the Rule 14 Notice. You do not have to be the first. You do not have to meet all of the requirements under paras.3.4 to 3.6 above, and that includes therefore para.(c) in relation to being an instigator, and that is why Umbro was able to come in under this head. In those circumstances the policy Judgment was that it would be sufficient to allow up to 50 per cent. provided still that certain conditions were made, and certain of those common with the pre-existing conditions and there we have (a) providing all the information; and (b) the maintenance of continuous and complete co-operation in particular. So that Umbro, had it satisfied the conditions in particular in (a) and in (b) which formed the reasons for rejecting the leniency application could have benefited from up to a 50 per cent. reduction in the fine. It is wrong to say that that could be cumulative with additional discounts given for subsequent co-operation with the Office, for the reason that was noted in argument, namely,

that one of the conditions here is that you should, in any event, maintain continuous and complete co-operation, that is (b).

MR COLGATE: Mr Turner, could I clarify one point? Under 3.4 you can get total immunity on the terms that you have indicated there, but an undertaking trying to come in through that particular gateway does not actually know what percentage it might get. So, whereas under 3.8, in the case of Umbro, that they knew they could get up to 50 if they were granted leniency, an undertaking trying to get total immunity subsequent to the point knows that if it complies with (a), (b), (c) and (d) it could get 100 per cent.

MR TURNER: Under 3.4 it will get.

MR COLGATE: Yes, now however if it fails one of those subparagraphs it knows it will get something, but it does not actually know how much. What I am trying to get at is, is there any indication which says that it is still worth coming through the door because I am going to get 50, 60, 70 per cent? They run the risk that they might only get 20 per cent., for example?

MR TURNER: If you do not get in under 3.4 the 100 per cent. is out of the window. If you do not fit into either 3.6 or 3.8, if you do not fit into either of those you are back into the discount for exceptional co-operation under para.2.1.2, you are outside the programme.

MR COLGATE: I was thinking of the whistle blower, first through the door.

MR TURNER: Sports Soccer is an interesting example. Sports Soccer was the whistle blower.

MR COLGATE: I was trying not to be specific.

THE PRESIDENT: Well let us discuss it for argument's sake.

MR TURNER: It is possible to discuss it for argument's sake. Sports Soccer was the whistle blower. For the reasons given in the Judgment it did not qualify for leniency. One of the reasons being that it continued to participate in the cartel after having come forward. It could not do so on that account, another reason being that it went and told the others that it had been to see the Office of Fair Trading and had been asked not to do that. So it could not qualify for the leniency programme on such grounds. On the other hand, it was therefore thrown back into the general pot for co-operation and the discount of 50 per cent. was assessed outside the leniency programme at the end of the process. But it had no assurance, as far as I understand it, until the final assessment of the extent of the discount that it was going to receive for general co-operation. So it did not have anything, as it were, in the pocket.

Under the leniency programme, let us say that Umbro had satisfied the conditions and had been offered an initial assurance of 20 per cent. Mr Green is quite right to say as matters developed and as things have gone on that 20 per cent. could have been increased over time,

and it would have had something in the pocket, having got into the leniency programme, provided it did not subsequently breach the conditions.

THE PRESIDENT: Is it right – I am only trying to understand the structure on the way that this all worked at the time – that if you are first through the door and you fulfil all the conditions of 3.4 you get 100 per cent.?

MR TURNER: Yes.

THE PRESIDENT: But if you do not fulfil 3.4 for whatever reason, whatever you do, and whatever happens subsequently, and however much help you give you can never get over 50 per cent. Is that right, either under the leniency programme, or under general discretion?

MR TURNER: That is also provided that you do not come in under 3.6, which is a possibility. Assuming that you are not in 3.4 or 3.6, then the answer must be less.

THE PRESIDENT: So you cannot get 60 or 75, or something?

MR TURNER: In theory, there is nothing written which says under the General Scheme, under para.2.11 one could not get higher than the 50 per cent. figure.

THE PRESIDENT: I am sorry, I am only trying to understand it, no more than that.

MR TURNER: There is nothing written to that effect. However, trying to make sense of the mechanics of this, and to ensure that the leniency programme continues to have value, the judgment is that if you give 50 per cent. or anything approaching 50 per cent. under the general head you have to do so with great reserve, because otherwise the message is sent out to the business community that applying under the leniency programme does not have material advantages. It may be better to chance your arm and go under the general co-operation route.

THE PRESIDENT: The de facto position is that although strictly speaking there is nothing in the earlier part of the Guidance that says you cannot get more than 50 per cent. the policy view is that if anybody did get more than 50 per cent. that might undermine the leniency programme?

MR TURNER: That is so. It is the policy view. It is quite an important consideration so far as the Office is concerned.

THE PRESIDENT: It sounds as if it is a pretty decisive consideration.

MR COLGATE: And then just on my point, so far as Sports Soccer is concerned, were the same procedures followed with them as with Umbro? We have obviously seen the Umbro documentation, we have gone into it in some detail.

MR TURNER: Yes.

MR COLGATE: Are you able to say to us whether that procedure was followed in a similar way so they basically came in and then the percentage went up, or were they offered 50 per cent. at the start?

MR TURNER: Well interestingly in the case of Sports Soccer they applied late. They had the meeting with the Office and you have seen the notes of that in the course of the liability proceedings, but their formal application for leniency came at a very late stage. I will have to check the precise date but I am told it was after the Rule 14 stage.

MR COLGATE: Oh really?

MR TURNER: I will have to check, but I believe we have that on the file. At all events that provided another reason why they could not get into the conditions of the leniency programme. So they came forward, they offered the evidence, but for the reasons I have given, and for that reason as well they could not qualify for leniency.

THE PRESIDENT: It does not actually say that you have to ask for leniency, it just says that you must be the first to provide the Director with the evidence – or perhaps it does say you have to ask for it.

MR TURNER: Yes, just for Mr Colgate's reference, para.15 of the Decision, which was originally redacted as confidential, but which you can see, records the position in relation to Sports Soccer.

MR COLGATE: Can I just have a look at that?

MR TURNER: Yes.

MR COLGATE: (After a pause) So despite the fact that they were the whistle blower, the first through the door, and they did not comply with 3.4(c), their formal request was rejected. That is quite interesting.

MR TURNER: Well there were at least three elements to it. The first is that when you come into the leniency programme there does have to be some form of application because you will have to understand what the conditions are. You are signing up in the future to giving complete and continuous co-operation and so on. So an application of some kind is needed. But beyond that it is true that Mr Ashley came forward at a very early stage, and you have seen the magnitude of the discount that was given to his company for co-operation under the general scheme. However he did go off and tell the others that he had been to see the OFT. He did also fail in other respects to comply with these conditions, and for those reasons he was not judged to fall within the scope of the leniency programme, and certainly not to fall within para.3.4, despite having been the whistle blower. That was not a sufficient condition of qualification for the leniency programme.

MR COLGATE: I can understand (c) is a hurdle for him, but it does not actually say that you have to maintain confidentiality just as an observation on what you said.

MR TURNER: He was asked by the Office "Please do no do this", and he nevertheless did it", that is the problem. You have seen Mr Ashley, he took his own course.

THE PRESIDENT: We do not have to decide this point in this case, so far as I know, Mr Turner, because we have not got an Appeal from Sports Soccer, but the Guidance does not actually seem to turn on whether or not you have made an application. It seems to turn on whether or not you have given the information and co-operated and all the rest of it.

MR TURNER: Sir, even if that is so, there were the other features that I have just referred to.

THE PRESIDENT: Yes, but the reason given in para.15 is that the application had not been made before the Rule 14 Notice had been given to Sports Soccer.

MR TURNER: Sir, just for your note, if you return to the meeting note – I am not suggesting you do so – of 30th March 2001, which is when Mr Ashley came through the door, at para.14 it concludes as follows:

> "OFT would need to consider how best to progress Sports Soccer's complaint in the light of today's meeting. OFT agreed to inform Sports Soccer of how to apply for leniency and to consider the position regarding possible future infringements of the Act. Sports Soccer agreed to provide OFT with recordings of telephone conversations once Dave Pausey had returned from two weeks' holiday."

and so forth and so on. He was put on notice about the need to apply.

THE PRESIDENT: Well they were going to inform him of how to do it, did they do so?

MR TURNER: I am afraid I will need to follow this up, Sir. 755 of the Decision is perhaps where we can end this, unless you wish me to obtain further information.

THE PRESIDENT: Well we have not got Sports Soccer in front of us, so it is all a bit of a side issue, but it is just part of our general understanding of how this all works.

MR TURNER: 755 is quite helpful, because it gives a little bit more of the reasoning in relation to the mitigation discount that Sports Soccer received. You will see there other aspects of the reasoning that is taken into account. Some of these points are significant. In a cartel case, if someone is asked not to go ----

THE PRESIDENT: Well that point I can see – that point I can see. I suppose the only point one has in one's mind is the reason that is given at the end of para.15 seems to be somewhat formalistic when compared with the Guidance.

MR TURNER: Sir, I understand that.

THE PRESIDENT: But we are not really upon that point at the moment. Shall we go back to the case we have in front of us.

MR TURNER: Just to draw the strands together on that, there are two aspects. There is the Sports Soccer comparator, and there is also the more general principle about companies under the leniency programme, where there is the cap of up to 50 per cent., and we say that both of those are distinct and should be taken into account.

THE PRESIDENT: Should we just quickly glance at the existing Guidance so that we can understand what has changed?

MR TURNER: Yes. Tab 29.

THE PRESIDENT: Is this now definitive?

MR TURNER: It is effective and in force.

THE PRESIDENT: Effective and in force, right.

MR TURNER: I am afraid I have not looked at this in detail. I was discussing it with my instructing solicitor shortly before the hearing.

THE PRESIDENT: It seems to start on p.12.

MR TURNER: Yes. One change of which I am aware is 3.9(d) which is important. 3.9(d) reflects a change from the previous position relating to being an instigator as one of the factors that takes you out.

THE PRESIDENT: I see, you have gone to coercion.

MR TURNER: So let us say even if you started it, if you are an instigator that is not a bar, coercion is now the key.

THE PRESIDENT: Are you able to say whether, in broad terms, this leniency programme is the same as the European Commission's programme or is that different again?

MR TURNER: I am instructed that it takes into account elements of both the European precedent and also the American precedent. It is not modelled on the European precedent.

THE PRESIDENT: The European precedent seems to be limited to horizontal agreements.

MR TURNER: Footnote 25.

THE PRESIDENT: Yes. Leaving aside the exception for what I think is called "leniency plus" we still have the 100 per cent. 50 per cent. distinction.

MR TURNER: Yes.

THE PRESIDENT: There is not actually anything between 50 and 100 in practice?

MR TURNER: No, well under the 100, that is of course up to 100 per cent. (3.11)

THE PRESIDENT: Right, I see, yes. So 3.9 is the non-discretionary one. 3.11 is the discretionary one which could take you to 100?

MR TURNER: Yes.

THE PRESIDENT: But if you are not either of those categories 50 is your maximum?

MR TURNER: Yes.

THE PRESIDENT: Come what may?

MR TURNER: Yes. Sir, as it were, that model has been retained.

THE PRESIDENT: That is helpful, thank you. Yes, I am sorry, Mr Turner.

MR TURNER: If it is helpful I can take further instructions on the points of difference over the short adjournment.

I turn then to the central area where battle is joined which is whether the Office forgot to take into account elements of co-operation that existed prior to the reply to the Rule 14 Notice. The entire dispute centres, as it were, on the wording of 2.12 in the Guidance, which refers to the fact that when fixing the level of the penalty a mitigating factor may be – and here are the words that are important:

> "…co-operation which enables the enforcement process to be concluded more effectively and/or speedily than would otherwise be the case over and above that expected from any undertaking."

And it is for that reason that I am referring to this issue as exceptional co-operation. There are two separate strands to disentangle before the Tribunal today. The first is the clip of contemporaneous documents which Umbro submitted in late March 2002, and which were deployed in the Rule 14 Notice, and you have seen that. The second is the leniency statement and the information from the leniency meeting which were not deployed. So far as the documents are concerned, we have two points. The first is this: the reality in respect of the documents is that it was factored into the Decision. In other words, and you will have seen this from the Defence and from our skeleton – Defence para.65, amended Skeleton para.48. On instructions from the officials who are directly involved in the nitty-gritty the paragraph contained a drafting error, it was not an error of substance. We find it difficult to say more than this. It is not something capable of development. Sometimes drafting errors happen in life. In my submission the Office has to be able to say what the true position was.

THE PRESIDENT: Yes, so there is a mistake in that sentence, and then we have to work out what, if any, consequences follow.

MR TURNER: There is a mistake in that sentence, but the Office did have in mind the documents at the time when it set the 40 per cent. figure. We say that to say otherwise would be an unfortunate consequence if it was a universal rule that if there was a drafting error that it would mechanically lead to a reduction in the final Appeal.

THE PRESIDENT: Well we would not go down that sort of road, I do not think, Mr Turner.

MR TURNER: There is some material in the Decision which at least suggests that the Office was aware of the Umbro documents, and I cannot put it higher than that. Paragraph of the Decision states:

> "Other information was supplied voluntarily by various parties as part of the OFT's investigation."

That is expressed in general terms.

THE PRESIDENT: That may not be quite your best point!

MR TURNER: No. Secondly, there are specific references to it, the code is 7551, which you will see littered at various points in the Decision, so obviously it was utilised and known about, and I will give you one example, para.175 footnote 206, which is quoting an extract from Mr Ronnie's diary in the documentation and I take the opportunity to remind the Tribunal in that connection. Some photocopies of pages from the diary were within the documents.

THE PRESIDENT: We remember.

MR TURNER: But the whole diary was not produced by Umbro ----

THE PRESIDENT: We remember, yes.

MR TURNER: That is another issue. Third, even if it is necessary to treat the documents as forgotten about, which we say would be wrong, its significance in any event is not enough to cause the discount for co-operation to go over 40 per cent. I make three short points. First, Mr Green in his address at any rate, concentrated on the fact that the chronology in the clip indicated who had taken part in the meeting on 8th June, and that it concerned the Manchester United home shirt. That was the point he took orally.

In fact, by this time there was some evidence on that issue in the hands of the Office. Mr Hughes' memos of 9th June (E1, vol.2, tab 39). The Tribunal may recall they do not say "there was a meeting that took place on this date" but they were to the effect that Sports Soccer are going to go out at this price and JJB are going to go out at this price on the Manchester United adult home shirt.

Secondly, that the significance of this clip of documents is swallowed up, is dwarfed by the detailed witness statements which were subsequently submitted by Umbro with its representations on the Rule 14 Notice. That was the real impetus that caused the Office to issue the supplementary Rule 14 Notice, and more generally I rely on all of the contextual factors that I have outlined earlier to show that it would be wrong to increase the discount in this case above 40 per cent. I am reminded also in relation to the meeting on 8 June Mr Ashley, of course, in his meeting with the Office in March 2001 may have got the shirt wrong and so forth but he mentioned the fact of the meeting having taken place.

THE PRESIDENT: But he had not at that stage identified the date?

MR TURNER: No, he had not done that, nor had he identified the shirt because he got that wrong. He did, however mention the parties, although he named them wrongly, Mr Wren and Mr Hyde – or maybe that was mis-transcribed. Those are my submissions on the clip of documents and I can say no more about that.

The leniency materials formed the thrust of Mr Green's argument to you. We say that he cannot seriously be trying to argue that those should be treated by the Tribunal as having been submitted for use in the investigation and that this provides a basis for increase in discount for exceptional co-operation with the investigation.

THE PRESIDENT: The statements.

MR TURNER: The statements and what was said in the course of the meeting at the end of February 2002.

THE PRESIDENT: Statements not submitted for use in the investigation.

MR TURNER: No. I have five points. First, you have seen the documents, Mr Green took you to them. It is plain, we say in black and white, that there was an understanding between the Office on the one hand and Umbro on the other, that the Office would not use the leniency material in its ongoing investigation automatically and without Umbro's consent, but this arose out of Umbro's own very strongly expressed concerns that the other parties should not see any of that material.

THE PRESIDENT: We will come to this, but they are saying, I think, that they had effectively given their consent in one of Miss Roseveare's letters after the meeting.

MR TURNER: Yes they say in a letter which postdated this, 14th March, consent was given. I doubt whether Mr Green is saying that that could be treated retrospectively as it were. He did mention at the outset of his address that you should take November 2001 as the starting point. We say at the very earliest it would be March 2002. In relation to that letter – we will come on to it – the point is very simple. That letter was followed by a phone call in which the terms of disclosure of the leniency statement was discussed. It is covered in the two respective witness statements of Miss Kent and Miss Roseveare. The outcome was that those witness statements were resubmitted later. They were submitted after the Rule 14 Notice with the responses. We take that at face value. It is said by Miss Roseveare that she was discouraged positively by Miss Kent from, as it were, resubmitting notionally – if not physically – the leniency witness statements at that stage. That is a matter of dispute on the facts.

MR COLGATE: Do you mind if I just come back on that?

MR TURNER: No, not at all.

MR COLGATE: Because in the context of the papers that we saw it was quite clear that there was discussion on the evidence put in with the case officers – plural – so one assumes the substance of what had been discussed and disclosed would have at some point have been made known to the case officers, otherwise I am not quite sure how you can discuss it. So to pick up just one example, quite early on there was a disclosure of 8th June meeting and it was in the file notes. I am not quite clear in my own mind, you cannot forget something that you have been told.

MR TURNER: This is absolutely right. It also relates to a point that was canvassed by the President when Mr Green was on his feet. The position is this: the materials that are provided in the course of the leniency application procedure cannot be relied upon or used in the investigation as evidence to prove the infringement against, in this case, Umbro. If the application is withdrawn or it fails, that is not allowed.

On the other hand, it is also quite true that in some cases, and this is one of those cases, it is not possible to form a view on whether someone can get into the leniency programme, whether they are offering complete and continuous co-operation and so forth, unless someone who has a working knowledge of the case can participate. This was in fact, I believe, the very first case where this difficulty presented itself, because in a large number of cases people come forward for leniency even before an investigation has commenced, there are no documents and the sort of difficulty that presented itself here does not happen. This case was different because the investigation had already commenced, and there had been unannounced visits, dawn raids in August. The Office had got quite a lot of information. It was even drafting the Rule 14 Notice by the time Umbro knocked on the door. The case officers were some way into the case. You have seen the nature of the information they were supplying beginning at the end of November and through the leniency process. It was not possible to take a view on that it was eventually decided without the case taking parts that they could advise.

The necessary corollary of that is, as you say, they could not "unforget" things that they were told. That is the price of trying to come into the leniency programme in a case such as this. On the other hand, none of the material could be used and relied on against the other parties, and that was the advantage and that was the distinction that was drawn.

THE PRESIDENT: Mr Turner, the question of what is meant by the phrase "used in the investigation", and I think what I was asking Mr Green about, and perhaps you could just help us, and again this is all background so that we can understand, I am looking for the letter from Mr Walker-Smith to Umbro saying what use could be made of the documents. It is the one which mentions the case officers. Which one is that?

MR TURNER: That I will find, it is an early letter.

THE PRESIDENT: You know the one I mean?

MR TURNER: Yes. I am sorry, I will have to track that one down.

MR GREEN: It may be p.45 of annex 2, which is a letter of 12th February 2002, and there is a reference in the penultimate paragraph on the last page of the letter. That may be what you are looking for?

MR TURNER: No, actually the President is thinking of an earlier occasion when it was said that the case officers were not going to be ----

MR GREEN: There is a reference to the discussion on 4th December.

THE PRESIDENT: Yes, that is right, I am sorry. It is the meeting of 4th December, it is a note of the meeting - it may not necessarily be an accurate note. Paragraph 2 seems to give rise to a certain ambiguity. First of all it is said the information would not be disclosed to the case officer, but I think it looks as if, as you have just said, the case officers actually were to some extent at least involved. Then Mr Walker-Smith goes on to say:

> "… if the case officer asked him for advice on whether to pursue a particular line at a later stage in the investigation , he would have to indicate whether he thought that this would be a good idea."

which suggests you could at least make some use of the information in the investigation – with a view to following up a trail, for example.

MR TURNER: Yes.

THE PRESIDENT: I am not sure whether that was accurate or whether indeed the note is accurate, but there is a bit of a grey area about what is meant by "used in the investigation", maybe not as evidence you put in the Rule 14 Notice, but as a tip-off that you then follow up, I just do not know.

MR TURNER: Yes. I am going to take the record of the conversation at face value.

THE PRESIDENT: Yes.

MR TURNER: I have no basis for doing otherwise. The position is that "used in the investigation" for the purpose of 2.12 of the Guidance, and the subject of the discussion we are having today is intended to mean capable of being used as evidence against parties in the investigation of proving, establishing the infringements. The fact that a person who has been involved in the process may not be able to forget what they have already learned was found eventually to be an almost inevitable feature of dealing with leniency applications in some cases, and it is not intended to be what is meant by the term or phrase "used in the investigation".

THE PRESIDENT: Again, we are just trying to understand it. If somebody comes along and says

"I was at a meeting on 8th June 2000, and I want leniency", and it is then said to them "Well we will not use that information if, for some reason you withdraw your application for leniency", and for some reason the application for leniency is withdrawn, or leniency is refused so it falls within the idea that the information will not be used in the investigation would you still, nonetheless feel entitled to send a s.26 request to the other party saying "Where were you on 8th June and did you meet somebody on that date?"

MR TURNER: Yes.

THE PRESIDENT: I just do not know what the answer is or whether it matters.

MR TURNER: No. I am unclear whether such a situation has in fact arisen – as a result of hearing what someone has to say "A section 26 Notice has gone out", that is not the position in this case. What I can say about this, on instructions from people concerned, was that in one respect what Mr Walker-Smith was saying was slightly too colourful. He says at the end of that para.2:

> "… as a result, if the case officer asked him for advice on whether to pursue a particular line…"

my instructions are that that was not going to happen, they would not come to him and say "Should we pursue advice and get smoke signals" or "directions to the churchyard" to use the metaphor that you used. That would not happen in this case. What the note does show is that Umbro was being told at the outset what the rules of engagement were. This is part of it, before they entered into discussions so they were on notice that this was to be the case. The subsequent documents, and I will take you briefly as ----

THE PRESIDENT: Just to follow – when he says:

> "…the OFT would treat any information provided in the course of the meeting as confidential and it would not be disclosed to the case officer if Umbro decided not to proceed with leniency."

have I correctly understood that in practice that possibly a bit of an overstatement because you need to disclose it to the case officers in order to understand whether it is any use or not.

MR TURNER: Yes. We addressed this in, I think, footnote 8 of our Defence, just for your note, where we pointed out that although Mr Walker-Smith had said this subsequently it became clear that on this case it was going to be necessary to bring in Miss Kent and the other case officer. This was an early case and that was his view at the time based on the experience with previous leniency applications. Since then it has become clear, and it is now more routine that case officers are involved.

MR COLGATE: Trying to get to the bottom of insofar as we possibly can. You said, I think in answer to my question, that at the time Umbro came through the door the officials were already drafting a Rule 14 Notice?

MR TURNER: I am instructed they were beginning to draft it, yes.

MR COLGATE: So were they aware, and you may need to come back on this, were they aware at that time of the major players involved and, to be slightly more specific, when Miss Roseveare wrote her letter of 5th December 2001 she specifically refers to the meeting on 8th June and some of the parties. Were the Office aware of the major parties at that point?

MR TURNER: They had of course had the information that they had received from Mr Ashley. They had engaged in unannounced visits to various parties' premises, including Allsports, including JJB, so those were certainly in the frame. One thing that I am aware of, though I would need to try to clarify further, is that although it was known also that Manchester United was involved it may be fair to say that the consequence of the leniency application process was that the spotlight came more strongly on to them and their role in exerting pressure than had previously been known. But so far as the identity of the major parties is concerned, the ones who are in front of the Tribunal, that was known.

Moreover, obviously if they had begun drafting the Rule 14 Notice they must also have in their own minds have thought that they had a basis for finding an infringement on the evidence available.

THE PRESIDENT: What seems to have happened, or might have happened is that although in the letter of 5th December, Miss Roseveare had told the OFT that there was a meeting on 8th June, and that Manchester United home shirts had been discussed and Messrs. Whelan, Sharp, Ashley and Hughes were there and they had all agreed £39.99 and so forth. That particular piece of information and the possible link between that information and the two Allsports memos of 9th June, was not in itself picked up and no particular connection was made between the memos of 9th June and the meeting of 8th June at the stage of the first Rule 14 Notice?

MR TURNER: That is so, and that leads on to an additional point, which is that the Rule 14 Notice as you have seen effectively did not include some of the information such as that point, which has been given in the course of the leniency application, and it appears that it was possible, and I am told without much difficulty, to draft a Rule 14 Notice which did not include these factors. Certainly, for the reasons with which you are well aware they could not have been relied on anyway, because any reference would have needed to be backed up by a source and under the parties' general rights when you received a Rule 14 Notice you have access to the file. If you cannot put any of that in it is simply impossible.

THE PRESIDENT: So none of this got to the file anyway.

MR TURNER: None of this got to the file, none of this was relied on in the Rule 14 Notice. None of it was used.

THE PRESIDENT: Yes.

MR TURNER: Sir, if the members of the Tribunal have annex 2 open I will just give you four references in the document that Mr Green took you through comprehensively. First, p.30 – the second page of the letter from Miss Roseveare, the penultimate paragraph where she says:

> "It is of great significance that the information contained in these witness statements remains confidential. We feel strongly that if this information was disclosed it would significantly harm…" etc. "Please confirm the witness statements will be excluded from disclosure."

THE PRESIDENT: We have read all that. So that is 17th January.

MR TURNER: 12th February, A2, p.45, the second page of that and there you see again in the penultimate paragraph, last few lines: "If, on the other hand, leniency were not available the Director General would not be able to rely …" and from there to the end of that paragraph is the part we rely on as setting out the rules of engagement.

THE PRESIDENT: Right, that is 12th February, yes.

MR TURNER: Third, Lovell's note of the meeting that took place on 26th February which we have seen (tab 3C, p.23), the last page of Lovell's typed note, para.81. You will see Mr Walker-Smith recording what the consequence was of the failure of the leniency application, what could be used and whether the OFT could rely – para.81.

Finally, the formal letter that followed that, 28th February, after the meeting (p.49-50) and it is most of the letter, beginning half way down on the first page: "As we discussed at the meeting, the Director will not use the witness statements", and so on and so forth. "..no reference will be made during the course of the cases."

Those are the main references in the course of the dealings between the Office.

THE PRESIDENT: And then we get the subsequent letter of March and the factual confusion as to who said what about that. Is that right?

MR TURNER: Yes. Before we go there, may I make two further points?

THE PRESIDENT: Sure.

MR TURNER: First, if you assume with Mr Green that the Office should have used all this leniency material, the leniency witness statements, in the ongoing investigation, despite Umbro's concerns about not revealing any of it, what follows from that? We say that the major

inaccuracies and self-serving and misleading in all of them would have led to what you referred to, Sir, as a "fine old muddle."

THE PRESIDENT: Yes.

MR TURNER: It is far from clear that it would have progressed the investigation substantially, had the Office taken all of that at face value.

A second angle of approach from Umbro is that the Office should have granted Umbro leniency as a result of all of this. That would have led to it receiving a superior reduction in the fine for co-operation, using that term very broadly. That is not right. If you assume that Umbro had been granted the initial 20 per cent. reduction, which might then have been bumped up, the fact is it would have been predicated on Umbro maintaining continuous and complete co-operation which it did not. Umbro is in no position to say to you today that if it had been granted leniency it would have got a larger discount from the eventual fine.

Now we come on to the issue relating to the 14th March letter and the subsequent conversation. The letter is at p.53 in annex 2. The relevant part is the third paragraph:

"Accordingly I should be grateful if you would treat the witness statements that were submitted during the leniency application as still having been submitted as part of the ongoing investigation. However, …" and then there is a small qualification.

The first point is that that very sentence written by Miss Roseveare, she is not assuming that the witness statements are automatically part of the investigation, she is giving formal approval asking that they should now be treated as such, and therefore recognising the distinction. The second point is that the subsequent events are explained in the respective witness statements of Miss Kent and Miss Roseveare. Miss Kent's description of what happened is at para.7, if you want briefly to look at that, in tab BB, just following. The nub of what she says is that she called to say that if you just treat these notionally as re-submitted there will be a difficulty because it may be obvious to the others what has gone on and you will need, I suggest, to re-submit the evidence. But what came from that was just the documents, and the witness statements followed later. It is then that you get the dispute because Miss Roseveare says in her second witness statement – we will go there if necessary but the gist of it is that she says "I was left with the impression that the Office considered it more appropriate for Umbro to wait and re-submit the witness evidence after the Rule 14 Notice.

THE PRESIDENT: I think we had just better look at that.

MR TURNER: That is tab C, p.83, the relevant paragraph is para.15 on p.87. Although this was not in the Notice of Appeal in a subsequent Skeleton Umbro says that is the Office positively discouraging the submission of witness statements until afterwards, and we rely on that. We

have not put in a witness statement in response. What we have done is to say Miss Kent's position is as follows, and we have said "If you need a witness statement we will provide one", and that is in our amended Skeleton. But we say Miss Kent's account is that it is not right that she positively discouraged, nor indeed is it the case that Miss Roseveare goes as far as to say that she did. Miss Roseveare says "I was left with the impression". That is different from saying that there was positive discouragement spoken by Miss Kent. We have not seen a copy of a supporting note of a telephone conversation from Miss Roseveare to support that account if a stronger statement is intended than what is in her witness statement. Miss Kent's firm recollection is that she said "It is entirely up to you what and when you re-submit". Then the documents came towards the end of March, the witness statements did not. What I would say further about the witness statements is this, when you think about it the witness statements that have been used in the leniency procedure had been found to have defects, and the Office had made no bones about what it thought about those. A certain amount of revision took place. The witness statements which came with the Rule 14 Notice were added to in significant respects and they were different. Therefore, it may not be surprising, standing back from the dispute of recollection, that the witness statements were only submitted subsequently and to get the formal written representations. That is a dispute of fact. I am unable to take that further, other than to say that the Office positively discouraged the re-submission of witness evidence.

THE PRESIDENT: The documents went in on 21st March, and the witness statements in revised form went in, I think, in response - when was the first Rule 14 Notice?

MR TURNER: First Rule 14 Notice was 16th May.

THE PRESIDENT: 16th May, and they came in at the beginning of ----

MR TURNER: 20th July – in late July. I think for accuracy I think it was 20th rather than 21st March. so that is the dispute. Finally, I address the point that you suggested yesterday in the course of Mr Green's submissions, and this is the point that the leniency witness statements were after all used in the Appeal proceedings, even if they were not used in the Office's investigation. They form part of the liability Appeal proceedings. So Umbro might try to claim an extra discount for that, and you asked Mr Green whether he took a point on that and he said "I do".

This suggestion is not in Umbro's written case and, with respect, we say it is not right when you think about it. The leniency statements were not produced by Umbro in the Appeal as an element of co-operation on their part at all. Quite to the contrary, the Tribunal will remember that ----

THE PRESIDENT: They opposed it as strongly as they could.

MR TURNER: Yes, so it would be rather odd to see that as co-operation.

THE PRESIDENT: Yes.

MR TURNER: Secondly, co-operation with the Office's investigation which is, of course, the inquiry we are presently embarked upon. Thirdly, in view of their many faults, the leniency statements you will clearly recall were essentially exculpatory material deployed heavily by leading counsel for JJD and Allsports. The main value to the OFT is the point we touched on at the outset, that the notes of the leniency meeting showed that Mr Ronnie's later evidence about his telephone calls was not a recent invention.

Sir, subject to the Tribunal's questions, that deals with the main part of Mr Green's case. I notice that there is a few minutes before lunch, I may try to conclude if the Tribunal will bear with me.

THE PRESIDENT: I think that is probably a good idea, Mr Turner if we sit on a minute or two after lunch.

MR HARRIS: Sir, may I be excused?

THE PRESIDENT: Of course, Mr Harris.

MR HARRIS: I am very grateful.

(Mr Harris withdrew)

MR TURNER: The last topic is co-operation in the Appeal proceedings. First, Mr Green says that Umbro should get a reduction in the fine for not having launched the wide-ranging Appeal containing a large number of grounds. Does the Tribunal wish me to address that?

THE PRESIDENT: No.

MR TURNER: The second point is the question of Umbro's co-operation in the Allsports and JJB's liability Appeals and whether Umbro deserves a reduction in that element of its fine on account of that co-operation. Umbro's essential argument is that it proffered witnesses and disgorged documents without the need for the Tribunal to exercise its compulsory powers. We say there is no basis at all for getting a reduction in the fine on that account. Quite apart from anything else, Umbro downplays somewhat its opposition to the disclosure of key documents in the Tribunal's process, and that included notably the leniency materials. It is true that a number of its employees gave evidence, but they did so in circumstances where this was required by the other parties to the Appeal and where the Tribunal would, in my submission, undoubtedly have made an order had those witnesses refused to come along.

We have set out our position on the principle for the Tribunal to grant a reduction in the penalty, or take into account I should say co-operation with its processes in the Appeal at paras. 83-88 of our skeleton. In a nutshell, we say that you might receive a discount in the penalty if you make admissions, or if you volunteer some information which is contrary to your interests

in the interests of making sure that the Tribunal has all the information that it needs to arrive at the right decision. The example that was given in the skeleton was the hypothesis that, say, Mr Hughes had only discovered his diary for the year 2000 at the early stages of the Appeal and then he had handed it over, and said "Well, I have to hand this over it is relevant to the issues in the case", he had not tampered with it or anything of that kind, even though it was inculpatory. That would be quite an important factor which the Office concedes might well be taken into account as an element in co-operation before the Tribunal. Umbro points to nothing of that sort here.

Duration arguments. Mr Green did not press his duration arguments orally. I will respond in kind – they are dealt with at para.72 to 79 of the Office's skeleton.

Finally, it is the Office's positive submission that Umbro has been found by the Tribunal to have given incomplete information in one material respect. That was in response to a question posed by the Office about what was a central and quite delicate aspect of the case, because it depended only on oral recollection, and it was crucial. The finding is in the Judgment at para.302. It relates to the memory of the telephone calls that were made by Mr Ronnie and Mr Fellone. In the Office's submission that does somewhat undercut the basis on which the discount at 40 per cent. was awarded by the Office, and our submission respectfully is that it should follow that the finding of the Tribunal in relation to co-operation should mark that finding in the Judgment by making a reduction in the discount for co-operation that was given to the Office. The co-operation given to the Office was not as full as had been thought. We have asked specifically for a 5 per cent. reduction, which increases the existing level of the penalty to £6.991 million.

Sir, unless I can assist the Tribunal further, those are the Office's submissions.

THE PRESIDENT: Two very quick questions, Mr Turner. This is a background question for general information, although it is not specifically said in the Guidance, is it implicit that the duty of continuous and full co-operation is expected to continue during an Appeal process before the Tribunal if there is one? Or does it simply relate to the investigation? I just do not know what the answer to that point is.

Secondly, on a quite different point which you may just want to mention briefly after lunch, although it is not one that Mr Green has developed in his oral submissions, in quashing JJB's participation in part in the continuation agreement and in the Sportsetail agreement, we are still left with Umbro's participation in those agreements, but to the extent that JJB is no longer a party in those agreements, those infringements might possibly be considered to be a bit less serious than they were before.

MR TURNER: Sir, those are the points which are addressed in para.72-79 of the skeleton. If I may pick up on the last comment? Umbro's participation in those agreements remains established. We have made the point that if anything if the pressure from JJB is not there then Umbro's own role in those later events, the finding for which has not been disturbed, may appear to be more rather than less serious because the evidence of pressure from JJB, which is the engine for the agreements in 2001, is not present.

The first point you raise, Sir, I will give you an immediate answer but consider the matter over the luncheon adjournment.

THE PRESIDENT: Yes. The discount for co-operation set out in the Guidance is intended to take you to the point where the Office makes a decision and factors that element into its eventual penalty. Subject to further instructions, we would say that after that, when the matter enters the realm of this Tribunal on Appeal, the Tribunal may take elements of co-operation into account but it is then a matter within the hands of the Tribunal. What has occurred here, however, is that it turns out that the basis on which the Office thought there was co-operation within its investigation has been falsified in one respect.

THE PRESIDENT: Yes, I was on a slightly different point, I think, Mr Turner, which is how the system works from your point of view. If there is an Appeal, there may be an application to cross-examine or you may be faced with the argument, as you were in both this case and the toys' case, that the existing evidence for one reason or another is insufficient, in which event you may well find that the Office needs to call some witnesses and may need the prior co-operation of those persons in order to give witness statements. The question, I suppose, at the back of my mind is how you prevail upon those potential witnesses to go through the possibly somewhat uncomfortable experience of being cross-examined before the Tribunal, if it is not in some way hitched on to the leniency programme or a discount for co-operation.

MR TURNER: I will take instructions over lunch. My immediate reaction is that it cannot be right that as a sweetener for a party, its officials coming forward before the Tribunal and giving evidence, that the carrot for reduction in the fine ----

THE PRESIDENT: Not necessarily a further reduction but the maintenance of the existing reduction is sort of implicitly dependent on seeing it through to the end, as it were. But maybe you would just like to think about it as a point generally, over the short adjournment.

MR TURNER: Sir, I will think about that.

THE PRESIDENT: We cannot permit inducements to produce witnesses.

MR GREEN: It may be that I ought to mention this point before Mr Turner finishes. I recollect that in *Hasbro* I made the submission that co-operation by witnesses was, or should be part of the

leniency operation and the OFT I think took the view that it was not. I would not want to raise that in reply if Mr Turner wants to address that matter with the solicitors, but that was my recollection.

THE PRESIDENT: That you said that the fact that Littlewoods had produced witness statements.

MR GREEN: The OFT could have brought forward the other witnesses who had been interviewed and did not and I recollect we had a debate as to whether or not that could have been done as part of the leniency, and I think the OFT said not. I would not want to raise that in Reply if Mr Turner did not have a chance to ----

THE PRESIDENT: Yes, but we are not seized with that case at the moment.

MR GREEN: Of course not, but it was an observation made in open court.

THE PRESIDENT: 10 past 2.

(The hearing adjourned at 1.10 p.m. and resumed at 2.10 p.m.)

MR TURNER: Just by way of conclusion then, may I just give you the missing reference that I ought to have given you before. This was Umbro's assertion throughout the Office's proceedings that the Defence died out by the end of, at the latest, February 2001. I gave you some references, I should have given you the reference in their written representations, para.14, bundle C2, tab 24, and p.735.

Then finally on the issue, Sir, you were canvassing just before the short adjournment I have had some instructions, as it were from the boiler room. It is a very serious issue that persons who co-operate with the Office of Fair Trading when there are no powers to cross-examine and so forth, may then turn out to be distinctly less forthcoming in an Appeal with the panoply of that process, and that if there is a significant mismatch it is inefficient, it does no help anybody, to put it mildly.

There is no express condition of the leniency programme which requires complete and continuous co-operation running forwards into the appeal, and that was not their case at the time under the old Programme. What has been drawn to my attention is para. 3.9 b) of the new Guidance. Paragraph 3.9 b) of the new Guidance, I am told is drafted in a rather open ended manner, in part, with an eye to the consideration that you had picked up on. (tab29, p.14)

This adds to what was there before with the words "..until the conclusion of any action by the OFT arising…" and it has been left rather open ended. I am told that the thinking is that the spirit ought to be whatever important powers may actually exist, that you should continue up to the end of the action, and that the conclusion as it were of the case. That is an expectation on behalf of the Office. Here, however, we are concerned not with the leniency programme in this case, but with the position under the general regime, and the discounts for

general co-operation. When you turn to that the process is backward looking. You come to the end of the process, you weigh up the factors and you look to see what co-operation has been given in the investigation. So then you need to distinguish two situations perhaps. The first is a situation where the witnesses concerned belong to a party which is appealing the penalty – as in the case of Umbro. In such a case it is our position that if, let us say, a party's witnesses start to tell a completely different story on Appeal, that that might be something that the Tribunal can take into account - I am now speaking hypothetically and generally ----

THE PRESIDENT: Yes.

MR TURNER: -- in its own processes marking the change in co-operation attitude, in its assessment of the penalty. In other cases, however, the witnesses may belong to a company which is not appealing the penalty and, in those circumstances, at the moment you are driven to the conclusion that the Tribunal's powers of compulsion to parties to appear would appear to be the main route for ensuring that the process works effectively.

Sir, those are my submissions.

THE PRESIDENT: Which would in most cases mean that you would need to take the precaution of getting a witness statement at an early stage.

MR TURNER: Yes.

THE PRESIDENT: Because our powers of compulsion only extend to getting the witness physically into the building. What he then says is another matter.

MR TURNER: Yes, well even with a witness statement that cannot be guaranteed, but yes.

THE PRESIDENT: If you have the witness statement you have at least some basis for proceeding. Yes, thank you.

MR MORRIS: Sir, in closing I was going to pick up on the three points you raised this morning. The first point concerns the turnover in the Manchester United centenary.

THE PRESIDENT: Yes.

MR MORRIS: I do not have an answer to that immediately. It is JJB's turnover I imagine you are considering and I imagine that that is something that perhaps JJB can provide. I have not at the moment tracked that down in the documents.

The second point is the report and accounts of each company, and I have been told that they are in the documents' files and I have some references here, but if you would prefer we could send them as separate documents.

THE PRESIDENT: No, if we have them we can use them.

MR MORRIS: References I have here are Allsports' 2000 accounts are in document bundle 1, tab.16. JJB 2001 accounts are in document bundle 1 at tab 22, and Manchester United 2001

account, which is a slight oddity because it was the 2000 accounts which were in the last final issue, shows both. They are in document bundle 1, tab 24. They are also in the MU bundle 2, tab 9(4). Umbro at the moment I do not have a reference for, and I am not sure they are in the document bundles.

THE PRESIDENT: I am sure they are because we have had to look at those reports in quite some detail.

MR MORRIS: I will have another look on that, Sir. The third point that you raised was about para.664, which concerns the relevant financial year. It is quite a complicated point, it leads back into the duration point that we were discussing. The first point to remember, of course, is what is the purpose of identifying a financial year? The purpose of identifying the end of the infringement is in order to identify the last financial year which is in turn to identify (a) an appropriate figure for turnover. If you assume that MU and England in 2000 and MU centenary kit for 2001 is one overall infringement then strictly you are looking at the year that has been used still, which is the accounts referred to in para.664.

THE PRESIDENT: January 2001.

MR MORRIS: 2001. If you are looking at the case of two agreements then we get back into the problem of having one year and a second year. Now, we have suggested as an option but we are not proposing that you should be looking for two turnover figures. We say that whatever you do in the case of JJB you are still looking for one single turnover figure. If you took the view that they were in some way two separate infringements, but you were only going to impose one fine calculated by reference to one turnover then we would say "You should still take the second year" in other words as decided in 664. The point which you might then make is, but in that year there was only infringement in relation to Manchester United kit and not England kit to which our answer is that should not alter your conclusion that you should still stick with the year 2 financials, because remember the purpose of finding the year 2 financials is to get a turnover figure, an appropriate figure, and the fact that that part of the agreement falling into that year did not involve England kit is irrelevant, so you still take the England and MU turnover in the second year.

If, however, you are not happy about that then the alternative in that situation is to take year 1 and take the financials in year one to reflect the turnover in both England and Manchester United in the year ending January 2000, you take those figures as the relevant turnover figures to which you apply whatever multipliers you apply. We would submit what you do not do is somehow, because it ended in year 2, then narrow down the relevant turnover to Manchester United only, or to Manchester United centenary kit only.

THE PRESIDENT: And have we got any figures for the year ending January 2000?

MR MORRIS: We have, I think, yes. We have them to hand here.

MR COLGATE: If we have the accounts for 2001, we have the comparisons for 2000.

MR MORRIS: That would be a total business figure whereas I think what we are looking for at the moment is the turnover in shirts.

THE PRESIDENT: We do have replica kit according to you?

MR MORRIS: Yes, indeed. I do not know whether this is at all in the document system, we have copies, DLA provided them on 25th March – I think rather than take up time here, I think we have them here but I need to be talked through them before ----

THE PRESIDENT: What document are you looking at?

MR MORRIS: This is a document that we have found for the purposes of finding out the Chelsea and Celtic figures and I am told, without having looked at it, that they will include Manchester United kit figures for 2000 – in fact, I have got them here. This is a letter which you have not seen – it may be in the document system, it may not be.

THE PRESIDENT: I think it would probably be helpful to write all this down on a piece of paper.

MR MORRIS: Very well. I would rather do that than spend time talking you through it.

THE PRESIDENT: Agree it if possible.

MR MORRIS: I am very grateful, Sir. Those are our submissions.

THE PRESIDENT: Yes, Mr Hoskins?

MR HOSKINS: Sir, I need to deal with a number of topics, but only one in any real detail, and that is market definition. The reason I need to take longer on that is because the first time the OFT actually made detailed submissions on its spill over argument was only yesterday, so in my client's interest I have to take that a bit more slowly than the others, and that is the one I would like to start with – market definition.

Mr Morris suggested that market definition is not particularly significant, that it is only part of stage 1. With respect it is significant for JJB. I appreciate we have promised some updated figures but on the figures in our skeleton this issue makes the difference between a relevant turnover figure in the region of £50 million and a relevant turnover figure in the region of £10 million, so it is very significant.

THE PRESIDENT: We are still quite interested to know what accounts for the £5 million difference, and it is rather disappointing if you are not able to tell us.

MR HOSKINS: Sir, we were asked for the Allsports' style table and that has been produced, they will be produced today, it has simply taken some time to do that. Any information the Tribunal

wants we will produce and that is what we understood was requested, and that is what we will produce. If there is something else?

THE PRESIDENT: No, it is just to know what have you left out in order to make that difference?

MR HOSKINS: Sir, I think when the Allsports' style table comes I hope that will answer your question, but there is certainly no ----

THE PRESIDENT: It is going to come today, is it?

MR HOSKINS: It is going to come today, yes. There is certainly no intention on our part not to provide any information the Tribunal wants – if you ask me, we will provide it. If we start with para.2.3 of the guideline, and it is important to note what it actually says. It says:

> "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."

Therefore, what we are looking to identify is, of course, the relevant market affected by the infringement. The fact that one is looking for the relevant market affected by the infringement does not alter that position. The Guidance means what it says, you have to look for the relevant market and not for individual products that may have been affected in some way by the infringement. Of course, if one adopts the latter approach those products may or may not fall within the same market. So the word "affected" has been emphasised at various stages, but it does not change the fact that the point of reference is a market analysis and one is looking for the relevant product market.

Our submission is that a market analysis requires a principled and objective approach, regardless of whether one is doing it for the purpose of liability or penalties. The rough and ready subjective approach is never going to be sufficient or satisfactory. Before turning to the market analysis in this case there are actually two fundamental legal principles which we must not overlook. The first is that factual matters must be proved by evidence. I am sorry if that is obvious but I think it is important to state that; and the second equally important one, is that the OFT bears the burden of proof in relation to those issues.

When one comes to market analysis in this case the first question is an easy one: what products did the infringements relate to? We know that from the Judgment – England home and away shirts available during Euro 2000, the MU home shirt launched on 1st August 2000 and MU centenary shirt launched on 20th July 2001. The next question is the more interesting one: what product market do those shirts fall into? Sir, as you know we say it is the replica shirt market, and it is important not to overlook the principal reason why we say that is the correct analysis. It is common ground that there is no demand side substitutability between

shirts, shorts and socks. Mr Morris accepted that quite properly orally yesterday; it is in a previous skeleton of the OFT, and one also sees it in the Decision.

Demand side substitutability is the starting point for any market analysis and we say that given that common position that is a very strong indication that the relevant market is shirts alone. What that means is this, whatever degree of analysis the OFT has to carry out at the penalty stage, whether it is the same as a market analysis for liability or penalty, or whether it is something less, in the circumstances of this case they have to a sufficiently rigorous job to overturn that fundamental concept, i.e. no demand side substitutability and therefore the relevant market is shirts. In this case that is the primary question for this Tribunal – have the OFT disturbed that very important pointer? We say they have not got near to doing that.

Mr Morris focused on two principal reasons orally to justify the OFT's proposed market definition. First, he relied on the fat that a replica kit is designed and marketed at launch as a single product, but in relation to that, we say that is of little significance, given again that it is common ground that these products, though launched at the same time are sold as separate items. It certainly does not go any way to overturn the balance which demand side substitutability (or the lack of) gives you in this case.

What this point really boils down to we say is the spill over effect, and how do the OFT establish a spill over effect? Again, Mr Morris very fairly accepted that this point is not contained in the Decision. The central issue therefore is whether the OFT's case is supported by the evidence which is before the Tribunal. Mr Morris first of all relied on three items of documentary evidence, he picked them up from the Decision. The first one was para.139 of the Decision. I hope I do not have to take you through each of these in turn, but perhaps we can look at the first one – para.139. It is an Umbro file note prepared by Mr Attfield, of a meeting between himself and Mr Nevitt. It shows that there was a discussion in relation to the price of jersey, shorts and socks. The mere fact that at a single meeting the prices of shirts, shorts and socks are discussed does not indicate that there is any necessary relationship between the prices of shirts, shorts and socks. All it shows is that they were discussed at the same meeting.

The second piece of documentary evidence was paragraph 173, which is a reference to Ronnie 3 dealing with the Golf Day. It is the quote at the top of p.59. It is the same point. The first point is the point the President made, which is it is not clear exactly what Mr Hughes said, i.e. it was Mr Ronnie's understanding or not. But even if he did say shorts, socks and shirts were the things he was concerned about, again you can be separately concerned about all three items without them necessarily being in the same product market. The final point is exactly the same, it is paragraph 232, it is an internal email from Mr Attfield – I am not going to take you

to it – again it is just another example of where you have the words "shirts, shorts and socks" in the same email but nothing to tell you that the discussion on prices or whatever related to where the shirt was pitched at. So in our submission those documentary bits of evidence take the matter no further, they are simply neutral.

If I can then turn to look at the pricing information that is before the Tribunal, and I am going to focus on launch prices because that is where the debate has gone to. Our submission is that there is no correlation in launch prices. It is not just that the evidence does not go one way or the other. The evidence that exists actually suggests that there is no correlation not that it cannot be proven.

If I can take first RRPs which, by definition if you like, particularly pertain to launch. Whilst certain kits were priced at the ratio £42.99, £21.99, £8.99 - shirts, shorts and socks, other kits were priced in the ration £39.99 (i.e. £3 less) for shirts, £19.99 (£2 less) for shorts, £8.99 (the same) for socks. Rather than just waving my hands in the air perhaps I can show you the table just to show how that works? If we look at table 4 attached to the Decision. We take the MU home shirt, you will see in the third column the heading "RRP" and we have there the ratio £42.99, home shorts £21.99, and you then have to skip "change shorts" and the next figure is "home socks £8.99." So that is where I take the ratio 42:21:8. If one goes over the page one then has the centenary kit. One sees there the RRP figure in the third column, shirts, shorts and socks, £39.99, £19.99, £8.99. The point I am seeking to make is whereas the price of shirts has dropped £42.99 to £39.99 the price of socks has stayed exactly the same i.e. no direct correlation between the price of shirts and the price of socks.

Just to show that that is a consistent picture, table 6, which is Celtic, if one takes at the top "Celtic 2000 adult away shirts, shorts and socks, £42.99, £21.99, £8.99 and compare that to Celtic 2001 adult home shirts, shorts and socks one has the different ratio: £39.99 instead of £42.99 for the shirt, the socks remain at £8.99 – no direct correlation.

Page 7, in relation to Chelsea is exactly the same picture as Celtic, Chelsea 2000 adult – I am reading from the away shirts at the top. The Away shirt is £42.99, £21.99, £8.99 and then for the 2001 Chelsea shirt half way down the page the shirt is £39.99 not £42.99 but socks are still £8.99. So the punch line is the reduction of the RRP in shirts did not lead to any reduction in the RRP for socks. That is the first point.

MR COLGATE: Do you have any evidence of what the launch prices had been after the Decision?

MR HOSKINS: The only evidence is I think the evidence that came out in the liability hearing.

There is no fresh evidence in relation to that.

MR COLGATE: So you are not able to say whether launch prices post the Decision have been at £39.99 and similar prices for socks and shorts?

MR HOSKINS: Sir, what we are trying to do is to identify the relevant market in the year ending I think it is 2000 for JJB, and what I am going to do is to go through the evidence and show how the ratios just do not stack up. Even if one were to take the ratios now I am not sure that would help, because the picture I am going to show to you is that there is simply no correlation at all. If one brings in 2003, 2004 I am not sure that is going to help.

MR COLGATE: The purpose of my question was just to explore products affected and that there is still, if it is demonstrated that the launch price of shirts has come down to, say, £30, and the price of shorts and socks have likewise come down, so there is a bit of correlation albeit ----

MR HOSKINS: I am certainly going to deal with that point, but I would like to deal with it a but further down the line, because I think that is at best where the OFT's case gets to. I am going to deal with that, but I would like to establish what the pattern is because I think it is important to see that there simply is no correlation on the evidence we have, and then deal with that final point, but I am certainly not going to shy away from it.

That was the picture in relation to RRPs, but one can do the same exercise for retail launch prices. So again if we deal purely with launch prices. If I can start that analysis by taking table 3, this works by reading down, if you like. One has at the top "Launch date JJB," "Launch price for adult shirts £39.99", and then the companies go down in the column, Allsports, Sports Soccer, etc. In relation to the England 2001 shirt all the retailers mentioned there priced the shirt at £39.99 and so it was the common price. If one goes along in the product category, so it is the fifth column of products "Adult socks" one sees that JJB, Allsports and Black's all price socks at £8.99 against a shirt price of £39.99, whereas both Sports Soccer and JD price socks at £9.99 against the same shirt price of £39.99. So again no necessary correlation between shirts and socks.

THE PRESIDENT: Although everybody seems to adopt the same price for shorts.

MR HOSKINS: I appreciate so far I have given you "sock" points, I am now about to give you a "short" point. [Laughter] Moving swiftly on to table 4. It is somewhat confusing, this table works in a different way because one has to read horizontally for the retailers. Let us take the Manchester United 2000 adult shirt. The home shirt was priced by JJB, you will see "Launch Price £39.99", Allsports' launch price £39.99, and if one goes over the page one sees it is the same figure for all the retailers.

THE PRESIDENT: Yes.

MR HOSKINS: So everyone prices shirts at £39.99. When one looks at the shorts, JJB priced them at £21.99, Allsports priced them at £21.99 and Blacks priced them at £21.99. Sports Soccer priced them at £16, and JD priced them at £19.99. So there you are, it is the same point, no correlation, but this time it is between shirts and shorts, because there is a common price for shirts but there is not a common price for shorts.

If one can stay in table 4 but go to the second page and look at Sports Soccer we are still looking the first column "Manchester United 2000 adult shirts" and you will see there five entries in relation to the home kit for that particular year, but then there are three entries, for away shirts, away shorts, away socks and then another three for third shirts, third shorts, third socks. So there are three different types of kit included there. If one just takes the Sports Soccer position. Sports Soccer priced the home shirt at £39.99 and priced the home shorts at £16. Those are the first two entries under Sports Soccer. When one goes to the away shirt, the shirt was £30, not £39.99, but the shorts remained at £16, so there is a dramatic reduction in the price of the shirt, but the price of the shorts stays the same. It is precisely the same in relation to the third shirt and the third shorts, dramatically less charged for the shirt, but the shorts stay at £16. So again, the dynamics of the pricing that the OFT would have to show are not there, in fact, the opposite is shown, no correlation.

Sir, those were two short points.

MR COLGATE: As an observation it is actually quite interesting that the RRP of the away shorts is £8.99.

MR HOSKINS: I think that must be a mistake because if one looks, the shorts are put at £8.99 and the socks are put at £21.99. I think they have simply been inverted.

THE PRESIDENT: They have inverted the shorts and the socks.

MR HOSKINS: Precisely, and it is correct under the third shorts and third socks. That would be too good a point for me, unfortunately I think I have to accept it is a typographical error.

The final point on this particular part of the analysis comes out at table 5, in relation to the Manchester United centenary kit. It is the same form as table 4, we have to look horizontally for the retailers and vertically for the product. Again, JJB, Allsports, Sports Soccer and Black's all price the shirt at £39.99 – that is just reading across "shirt" horizontally. JJB and Black's price the socks at £8.99, Allsports and Sports Soccer price the socks at £9.99. So again, the same shirt price, different sock price.

We say on the basis of that evidence it is not just that the OFT has not shown a spill over effect, the evidence that the Tribunal has is actually quite strongly the other way – there is no necessary correlation.

Before we leave the tables I need to deal with the specific point that Mr Morris made which is in relation to table 4. The point he made was that in relation to JJB and Allsports, whilst shirts were priced below RRP and one sees that from the table RRP for the home shirt £42.99, launch prices were £39.99. He says that the shorts and socks were priced at RRP, so RRP £21.99 for shorts and £8.99 for socks. The problem with that point is it is actually a point against the OFT because what that shows is that Umbro considered that the appropriate pricing ratio was £42.99, £21.99, £8.99, whereas JJB and Allsports both considered that even with a shirt price of £39.99 the shorts should still be £21.99 and the socks should still be £8.99. So one has Umbro's view of the appropriate ratio with a £42.99 shirt price, and one has JJB and Allsports' view of the appropriate ration with a £39.99 shirt price. The shorts' and sock prices stay exactly the same. So we say that is actually a point that goes against the OFT because again it shows no correlation not correlation.

In light of that evidence we say that the highest that the OFT can put its case here is that when setting the launch price for shorts and socks a retailer may have some regard to the price of the shirts. It is a commonsense type argument, I think that is the way it is put. There are two problems with that. The first point is that the OFT has no produced any evidence to support that assertion and, indeed, the point was not put to JJB's witnesses in cross-examination so the point has not been tested, it simply lies as an assertion. But even if this assertion were admissible we say it would not mean that there was a sufficient correlation between the prices of shirts, shorts and socks to make good the spill over point. That is because the relative value of items which are sold by a particular retailer is simply one of the factors that a retailer may take into account when setting prices. Obviously when one has a range of stock in one's shop one may wish to take care to make sure that the pricing of some is not out of kilter with others. But that sort of approach, which is the highest it can be put, does not mean that all the items are in the same market. It simply means a retailer may be concerned about the range of the pricing of all sorts of different products. We say therefore the OFT's case, when we realise all it can be does not go anywhere near to establishing the spill over effect, because the financial figures are against it, and I come back to the fact that there is no demand side substitutability, it is strongly against it. So if it is simply "Oh well, maybe this is taken into account", and that is it simply as a commonsense assertion it does not go anywhere near to counterbalancing to know demand side substitutability.

I have focused on launch prices. We also have evidence in relation to the movement of prices of shirts, shorts and socks after launch. I do not need to go into the detail of that. It is summarised in the Lexicon Report that is produced by Allsports, and the reference is Allsports'

pleading bundle, file 2, tab F. I do not know if the Tribunal has had a chance to look at the summary on the first page. That is a very neat way into it. I do not think Mr Roth actually took you to that. The front page is headed "Memorandum", I think the quickest way is simply for the Tribunal to read that through to itself if you do not mind.

THE PRESIDENT: (Pause for reading) Yes.

MR HOSKINS: This saves us some time because what Lexicon have done is they have taken the tables attached to the Decision and they have analysed them for us. What they tell us this shows is that out of the 51 kits, where price changes took place, 37 of them showed prices moving independently, i.e. shirts, shorts and socks at different times. Even for the 14 of the 51 that saw simultaneous movement they were not always in the same ratio. My understanding is, and certainly orally Mr Morris has not challenged that analysis by Lexicon and if that is indeed the position I do not need to take it any further, that is the position as stands. Obviously, if one wants to one can work through the tables attached to the Decision and see the correlations but we do not need to because they have done it, and it is not challenged.

So we say that given there is no demand side substitutability, and given the other factors that we set out in para.12 of our amended Skeleton, particularly the different use that the customer sees in shirts as opposed to shorts and socks – our famous bar example – the OFT has not proved its spill over argument and therefore the relevant market is shirts alone.

THE PRESIDENT: Yes.

MR HOSKINS: In relation to the 9 per cent. point, I think the way it is proved by the OFT is that if the Tribunal finds that the relevant market is shirts alone then the Tribunal should increase the percentage applied to the starting point at stage 1 from 9 per cent. to 10 per cent. and it says that this follows because the Decision reduced the percentage from 10 per cent. to 9 per cent. to take account of the fact that the actual agreements did not apply to all items of kit, you have also had submissions on that.

Mr Roth is going to deal with this in some detail, but I will just make some quick specific points in relation to JJB, if I may. The relevant parts of the Decision in relation to JJB are para.666 and 669. Again I think very fairly Mr Morris accepted that this part of his case is not expressly spelt out in the Decision. He took the Tribunal to 666 and he referred to the third sentence:

> "Total replica sports kit sales amounted to about 9 per cent. of JJBs business in 2000 although the infringements affected only around 2 per cent. of JJB business."

So that tells us something about JJB's total kit sales vis à vis its total business. Then the next sentences:

"The infringements (other than England Direct Agreements) are limited to replica shirts within the relevant markets, but this is the largest selling element of Replica Kit…"

So what that is telling us is that shirts are the largest element of Replica Kit. What those two sentences together do not tell us is that OFT reduced the percentage of 10 per cent. to 9 per cent. to take account of the fact that the actual agreements did not apply to all items of kit. It tells us something about kit, but it tells us something about shirts.

THE PRESIDENT: I think they invite us to infer that from 666 to 669.

MR HOSKINS: Precisely, Sir. My point is that you cannot infer that from 666, it tells you something about kit, it tells you something about shirts, but it does not say what the OFT wants it to say. Indeed, it is pertinent to notice the context. 666 is one of the four headings under which the OFT considers what the appropriate percentage is. 666 is not the paragraph in which the decision is taken if I can put it like that, to which the conclusion is drawn to drop from 10 per cent. to 9 per cent. The paragraph that does that is 669. 669, it is interesting, it is actually in different wording than all the other parties, or certainly most of them, it says:

"However, although the market definition is relatively narrow, the Replica Shirts Agreements did not include all elements [as opposed to products] in the relevant markets."

Now that wording is equally consistent with Mr Roth's suggested approach which is – and I will put it in the JJB context – because the relevant turnover in relation to JJB, and this is seen from 664, was MU and England replica kits, it was appropriate to drop the percentage from 10 per cent. to 9 per cent. because the alleged infringements did not affect the Manchester United away kit or the Manchester United third kit. The point is the Tribunal cannot tell one way or another what was in the OFT's mind when it dropped from 10 per cent. to 9 per cent. and, of course, insofar as there is any doubt JJB is entitled to the benefit of the doubt. We say if one approaches this afresh, because one cannot look at the reasoning because it is not there, it is perfectly reasonable we say to apply 9 per cent. rather than 10 per cent. in this case, first of all to reflect the fact that the relevant turnover upon which stage 1 will be based is all shirts, and the infringements did not apply to all those shirts because they did not cover the MU away kit and the MU third kit.

Secondly, because as the President noted I think yesterday, it is important to leave the Tribunal somewhere to go in more serious cases. Yes, this is horizontal price fixing, but it is possible to imagine more serious cases and some leeway should be left. That completes the big point I have.

THE PRESIDENT: Yes, thank you.

MR HOSKINS: It is downhill from here – hopefully not for my submissions, but simply the amount of time! [Laughter] If I can deal with duration next, and I have a number of short points in relation to duration. Paragraph 2.7 of guideline 423 indicates that the multiplier applied for duration is a matter of discretion. The reason why I say that is the repetition throughout para. 2.7 of the word "may". It is quite clear that it does not lay down mechanistic rules, for example, a part of the year must always be treated as one for the purpose of the multiplier. So the question for the Tribunal we say, is what is the appropriate approach in the circumstances of the present case? Our submission is, as Lord Grabiner made clear in opening, that any penalty should reflect the effect that an infringement has on consumers. We say that submission gets support from the Guidance itself in para.2.6, because para.2.6 says:

> "Where an infringement involves several undertakings an assessment of the appropriate starting point will be carried out for each of the undertakings concerned in order to take account of the real impact of the infringing activity of each undertaking on competition."

Now, it is perfectly right that that particular paragraph appears under "Step 1 Starting Point" not "Step 2 Duration", but we say if one is looking for rationale behind the Guidance the rationale applies equally at Step 2 as it does under Step 1, and that is why we say when exercising discretion it is fair and appropriate to take into account the effect, the actual effect on competition on consumers that an infringement has had. That is why we say that in the circumstances of this case the relevant starting point for duration should be the date when the agreements took effect rather than the dates upon which they were made. That is the first point.

The other point is that the multiplier for duration should not automatically be set at one for part of a year, because one has to look at the effect, or at least take the effect into account. Mr Morris said that our approach could never work i.e. look how many months were affected, in total it is six months, therefore the multiplier should be 0.5, and he said that because you can have an infringement which is never implemented. He says that will give you a multiplier of zero and therefore no penalty. There are two answers in relation to that. First, where there is an agreement but it is never implemented in some cases it may be appropriate not to impose a fine – there may be other sanctions but you do not always have to impose a fine. The other point is that it is a matter of discretion so if, in a particular case, there is an agreement that was not implemented, but it is still appropriate to have a fine, that does not prevent the OFT or the Tribunal saying "We are going to impose a fine and we are going to take duration into

account, and apply a suitable multiplier in the circumstances. But it is not a mechanistic rule, so Mr Morris's point is not, if you like, a trump card, because we say it is all about discretion.

MR COLGATE: Just a small point on that. You are talking about 2.6, the effect on competition in relation to consumers. Can I just point out to you that I think that point is actually dealt with at the end of 2.5 when there is a specific reference to damaging consumers. I think 2.6 is a slightly different point.

MR HOSKINS: I think, Sir, I say that they are probably directed at different things, not surprisingly, which is why they are in different paragraphs. The reason we rely upon them is that they both show the underlying rationale of the Guidance. It is particularly directed at the effect on consumers and the effect on competition, not on formal breaches of the rules.

MR COLGATE: That is one interpretation of the words, and the words actually could be interpreted differently as well. Certainly in relation to 2.5 there is no time within which that has to be considered on a case by case basis.

MR HOSKINS: Precisely, my starting point is it is all a matter of discretion. We say the effect that agreement has actually had is a very important consideration when coming to a final conclusion, and one can look at certain parts of the Guidance 2.6 and 2.5 and we see they support a view that when looking at duration, and indeed other matters, effect is something you should take into consideration.

THE PRESIDENT: In a way, I do not know whether we should take this into account or not, but as far as consumers are concerned, although the OFT has assumed in your favour that the agreement comes to an end on the date when Sports Soccer first discovers the shirt, in practice the agreed prices in the case of JJB and Allsports, and indeed some of the others, of £39.99 in effect continue very often beyond that date, often for quite a long period. So it is another spillover effect if you like but in a different sense, that is to say there is a sort of run on effect on consumers, even after the agreement has formally terminated.

MR HOSKINS: Sir, I have not done the exercise of working it through, I am not sure, I cannot say hand on heart whether we have the information available to look at JJB discount, we may do. If that exercise were undertaken the point would be this, that if one comes to the opinion that the effect, against the total effect, of three agreements is substantially less than a year, six, seven, eight months whatever it is, the question then is whether it is appropriate to apply a multiplier of 1.5 against that background. Our submission says it is not appropriate, it is not fair to do that, certainly it is within the discretion of the OFT and the Tribunal to take that approach , but we say it is not the approach which should be taken in this case.

THE PRESIDENT: In relation to 1.5?

MR HOSKINS: Yes. One of the points taken against us was that it is appropriate, even if the duration of the effect is less than one year, it affected key selling periods, and a submission in relation to that is that that has already taken account of the fact that this took place in a key selling period at stage 1 of the analysis. That is clear from para.665 of the Decision, which relates to JJB. "Step 1 – Starting Point" para. 665 cross refers to para.605 for Allsports. Paragraph 605 for Allsports specifically takes account of the fact the infringements were aimed at key selling periods, that is part of the stage 1 analysis. So if it is taken account of at stage 1 we say you should not take account of it again further down the process.

I also want to deal with Mr Morris's one plus one point, which is should these be taken as two separate agreements? Our submission in relation to that is that the three agreements that made up the replica shirt agreement were each agreements that flowed from the same common factual matrix which existed at that time. The commercial situation was the same. The commercial situation was the one that led to the agreements being made. We say it is therefore appropriate to treat them as part of the same course of conduct rather than repeated infringements because this is important you get a lift for repeating infringements. We say no because they arise out of a common factual matrix.

Secondly, we say it is perfectly consistent with that to apply a multiplier for duration which takes account of the fact that whilst the agreements were spread over time the total combined effect was less than one year in total. So we say you can have a multiplier of, for example, 0.5 for duration without an uplift for repeated infringements. Mr Morris made some submissions that if it is one plus one then what years you should take. We say if you are going to split it one plus one you will have to take the relevant year for each one, which would mean for a year ending January 2000 it would be England and Manchester United, but for a year ending January 2001 it would have to be Manchester United only.

THE PRESIDENT: Do we have any figures upon which we could do that?

MR HOSKINS: I think Mr Morris is going to check. If you have not obviously we are perfectly happy to provide any figures that are necessary, that is not a problem if that is route the Tribunal wishes to go down.

THE PRESIDENT: I am not saying we do, but we might well need background ----

MR HOSKINS: I think Mr Morris will provide the figures, if they cannot we have noted it and we will provide them.

THE PRESIDENT: Yes.

MR HOSKINS: Then three very short points to finish. Celtic and Chelsea, you have our point ----

THE PRESIDENT: I do not think you need to trouble us on that one.

MR HOSKINS: You have our point. A point that arose this morning was on aggravation, that Allsports had a 15 per cent. uplift (para.614 Decision). The uplift was for arranging the meeting and for contacting Black's about the JD Hat Trick promotion. We now know that we can add in pressure, if you like, on Allsports because that finding has been made. So in relation to Allsports when you look at that element of aggravation you have arranging the meeting, pressure, and the JD promotions. JJB on the other hand, gets 10 per cent. uplift and that is for pressure alone. The question is, is that fair as between Allsports and JJB, and we say it certainly should not be the case that we should be increased to any extent because on the one hand you have the fact that Allsports applied pressure and we applied pressure, and the point might be made that we were capable of applying more pressure because of our commercial muscle.

On the other hand, in relation to Allsports you have the fact that they decided to arrange the meeting and did arrange the meeting, and however one looks at it, deciding to arrange a meeting to create a cartel is worse than certainly the type of pressure that was found against JJB. So if one puts all the eggs in the basket and one attaches the correct weight to them we say there is absolutely nothing wrong with 15 per cent. being applied to the company that decided to create a cartel and 10 per cent. to a company that opposed pressure, but was not an instigator of any sort of meeting.

THE PRESIDENT: Our general concern, just to put it in the abstract, is that at the end of the day when one is arriving at penalties, the penalties do take account of the general power in the market place – or relative general power in the market place – of the various participants. It might be said in 673 that JJB has got off somewhat lightly if you take that point in isolation.

MR HOSKINS: Sir, I am not sure that is correct, because JJB's ability to impose effective pressure comes from its commercial muscle, and its commercial muscle is reflected in the relevant turnover.

THE PRESIDENT: So it is there already.

MR HOSKINS: It is there already, it is a circular argument, if I may say so with respect.

THE PRESIDENT: Yes.

MR HOSKINS: The final point is just to deal with some of the information gathering. As I have said, our version of the Allsports table will be ready today. In relation to centenary shirts I can give you figures. For the year ending 31st January 2001 we have not contacted the client on this but I think it must follow that the turnover is zero, because the shirts were launched on 20th July 2001, so by definition the preceding financial year ended on January 2001 the turnover must be zero.

THE PRESIDENT: How does the system work in such a case?
MR HOSKINS: The system works because, as Mr Morris said, what is taken is a proxy if you like, which is turnover in the financial year which ends in the year preceding the infringement.
THE PRESIDENT: So we take MU shirts in the preceding year?
MR HOSKINS: Precisely, and that maybe good or bad, I do not know how it works out. It may be good for us it may be bad for us, I do not know, but that is what you take.
THE PRESIDENT: I see.
MR HOSKINS: Sir, unless you have any questions, those are our reply submissions.
THE PRESIDENT: Thank you.
MR COLGATE: You were going to comment about price relationship, can you come back on that?
MR HOSKINS: Sorry, sir, the way I had hoped I had dealt with that was by taking the figures for 2000 and 2001 and showing you there was a necessary correlation, if that is not satisfactory obviously I will deal with any further point.
MR COLGATE: My question was whether there was any evidence of shirt prices lower and therefore whether socks and shorts likewise were on a lower basis as well?
MR HOSKINS: Sir, I do not have any evidence on that to hand. Sir, the way I tried to deal with it, I think it follows from a range point, if you like, that if you have a series of items – let us say one produces whisky and there is a luxury whisky, a medium whisky, and a not so good whisky, you have to price them taking account of the range. I have accepted if it is admissible as a matter of commonsense one would expect a retailer to have regard to that sort of range. That may or may not be the case in relation to our current pricing, but I do not have figures available. Again, obviously if it is something the Tribunal wants to follow up we will be happy to provide the figures, but that is the way I tried to deal with it, with the range.
THE PRESIDENT: Thank you
MR HOSKINS: Thank you very much.
THE PRESIDENT: Mr Roth.
MR ROTH: May it please the Tribunal, may I deal first with two preliminary matters outstanding from my opening submission? I referred to the Graphite Electrodes Judgment and took you to passages regarding the principles of equality and non-discrimination as applied in the Appeal against penalty. The President asked me what, if any, was the actual effect of the court's ruling in principle on the fines there, and I said I would come back on that. To save time I have put it on one sheet of paper, may I hand that up to the Tribunal and to my friends. [Document handed to the Tribunal and counsel] I do not ask you to turn up the Judgment, the reference is there. You see at the top left the fines imposed by the Commission, and you will see at the top right

the final result in the Judgment of the Court of First Instance, for all the parties save VAW that did not appeal. Then looking at those figures I would not want to be one of the lawyers who advised VAW not to appeal.

Then you see the Commission's starting amount and of course the Commission guidelines with their Step 1 work differently from the OFT guidelines. Then the CFI's variation explains at footnote 1 because of the infringement of the principle of equality and non-discrimination you see the first three were upheld, the next two were dramatically reduced, no appeal by VAW, the last two were also reduced. There was also a Commission multiplier. VAW did not appeal but they had a multiplier of 1.25. STK appealed and complained that the multiplier fixed by the Commission of 2.5 was discriminatory compared to the 1.25 for VAW and the court agreed and reduced it significantly to 1.5. Those are the main reasons where you have this dramatic result in the Judgment.

While I note that Mr Morris waxed eloquent at the outset of his submissions as to how the present case is a very serious case, price fixing, flagship products, mass market consumer product and so on, and without in any way belittling the seriousness of what my clients did, and you will recall I am sure that I began with a very full apology, here I refer to Graphite Electrodes this is a worldwide cartel, major global producers and it went on for between four and five years. So, to use the vernacular this Graphite Electrode was really was "big potatoes".

The second matter outstanding was the infant kit. We have made very considerable progress over the last three days with help from the people at the Nike subsidiary that now runs the Megastore and Direct sales. They have found some records, including happily some actual turnover records. As a result of that, again I have set them out – and this is not intended to be in any way contentious, we have reached what we believe is as complete a picture as can be constructed without the underlying database and I may say the finance director of MU has personally worked on this and we have been in contact with him after court each day.

Just to explain, we realised we left out and have now found, the pre-ordering of the whole 2000 infant kit, 950 of those. We do not have the actual price but we are virtually certain it would have been the Umbro RRP £29.99. The PWC report that is in the papers before you, found that the members discount of 10 per cent. had an effect altogether of between 2 and 4 per cent. and taking 3 that produces that turnover of £27,636. The home 1998 and away 1999 those are actual turnover figures. Just pausing there, you may note that if you did the division, the average price works out considerably less than RRP and that is because after Christmas there is substantial discounting that goes on.

The third 1999 kit, and the goal keeper 1999 infant kit we have actual figures for the megastore, we do not have actual figures for the additional sales by mail order and internet – not as big then as I am sure it has become. So we have grossed up the megastore actuals on the same ratio that the megastore actuals for the home 1998 and away 1999 add to the total. We applied a constant ratio and say it is designed to be a fair, objective, reasonable approach. We have applied the megastore prices, which again we have the actual average price and we have that total turnover. Then I have simply worked it through for you – the effect on the turnover in the market for replica kit, the effect on the total, the effect on the penalty.

THE PRESIDENT: Yes, thank you.

MR ROTH: Just to make clear, the discussion took place with other counsel, we are expressly not suggesting there is no jurisdiction to increase the penalty on MU, and to this extent, if you find that all our arguments fail that infant kit is part of the relevant market.

Next, may I pick up a point raised by Mr Colgate in his question regarding the overall size of Manchester United as a company when I was talking about unequal treatment. We have prepared, again on one sheet of paper, a table for all the defendants in this case, because the table Mr Morris handed up covered only the appellants, showing the relevant turnover of all the companies. [Document handed to the Tribunal] You will see there that Manchester United, which is in bold, in the year used was in fact smaller than all the retail chains … in a very different category and, in fact, closest to the FA, which is perhaps not surprising because MU, like the FA, their main income is sponsorship rights and media rights, it is not a retailer. The turnover figures that one has in that column are, of course, UK turnover, but if you are looking at the actual financial size of the company, it is worldwide turnover that is relevant. I do not suspect there is any difference for the UK retail chain, so far as I know they are not active abroad. MU is a little bit. Umbro is much more substantially because of course it is a manufacturer and it sells its kit overseas. So they come on their total turnover rather higher up in terms of the difference between them and MU, and then there is the point that Mr Morris explained this morning about the discrepancy in the years, because of the year end. Our year end was 31st July, Umbro's year end was 31st December 2000, so there is quite a mismatch for a comparison. So we have looked at the previous year which embraces some of our year that is used and you see the previous year their worldwide turnover and, indeed, their UK turnover was significantly in excess of Manchester United. All these are from the Decision and the references are there in the third column. I am sorry, I say they are all in the Decision, the 99 Manchester United turnover in brackets comes from the previous accounts which are not before you.

MR COLGATE: Perhaps I should not be directing my question to you, but since you are on your feet, is the legal definition statutory turnover, UK turnover or total goods' turnover? I ask that question because there is a slight difference between the table that was given to us yesterday, which appears to show the statutory turnover is defined there as the company's UK turnover, whereas you are implying that it is worldwide turnover?

MR ROTH: No, I think it is UK turnover, statutory turnover, and I thought that the second column, the UK turnover figures here are the same as in Mr Morris's table, and we have all the defendants and he only had the four appellants. The worldwide turnover is not the statutory figure, but we felt it went to your question of what is the financial strength as to the deterrent effect, and you look at what is the company doing as a whole.

MR COLGATE: Thank you.

MR ROTH: You have the reference from Mr Morris to our accounts in our pleadings' bundle. So Manchester United by far not the largest, because we are the richest football club and a household name, and our players get huge salaries, it is easy to assume that we must be in turnover one of the largest of these defendants, but that is not so and yes, we are financially successful compared to other football clubs, but sadly many football clubs are struggling to survive. One is pleased to see Exeter City has now done much better as a result of the encounter yesterday. We just cannot compare to a national retail chain.

The next point is the nature of this Appeal. Mr Morris particularly in the context of the power to increase the penalty, but as a more general point, said yesterday, and I timed it at 2.10 p.m. he said that the Appellants have been submitting that this is a retrial, a full trial on the facts and the Appellants can require the CAT to exercise fact finding *de novo*, they had been asked in the first place to find whether these infringements took place. That may be so in the case of some of the other Appellants, but it does not apply, of course, to Manchester United. We have appealed on penalty only. We have appealed the Decision on the basis of the facts set out in the Decision which may be supplemented so long as there is no unfairness to Manchester United and the facts set out in our Judgment on which you have made factual findings. Against that background I come to market definition.

I think there I some confusion regarding what I accepted, or did not accept, regarding product launches. Mr Morris stated that it is the shirts, shorts and socks that are the integrated product launch together, and that this was the unifying feature that distinguished those products as being in a single market distinguished from other licensed products. We said that was not the case in August 2000, wholly relied on its launch to which Mr Morris responded "Oh that was special because it was a change of sponsor", he is talking about the usual case. With

respect that is not correct. If he can, in effect, give evidence, may I correct him – and I am not being facetious about "nighties" and "pyjamas" , this is a serious point, when the new kit and new colours are launched on a two year cycle, so also are the training tops , the tracksuits, the rain jackets and the coats. all the clothing worn by the players in tournaments. For the same reason that a new kit is launched, namely, that they are all worn by players at tournaments and are part of the – I use the word adopted by the OFT – part of the uniform.

THE PRESIDENT: There are several passages in the Decision which distinguish other licensed merchandise from the kit itself, what do you say about that paragraph?

MR ROTH: We say as the basis of market definition that it is not right to say that this is always worn in tournaments. It is correct to say that it is worn by the players competing in tournaments (it is a point made in our Notice of Appeal) and so are these other items, and they are seen as such by fans at the games and watching on television.

THE PRESIDENT: I think he made the point that it replica kit that was worn by the players on the pitch, I think he said.

MR ROTH: There was some confusion about that. The Decision says "when competing in tournaments", and that is all that it says. It says it in a number of places. He said we were mistaken in complaining that the OFT only now claimed that. That is in the Decision. We say that is wrong for the reasons I have given.

THE PRESIDENT: What are the other items that the players wear when competing in tournaments according to you?

MR ROTH: Training tops, tracksuits, rain jackets, hats, you see them sitting on the bench by the side of the pitch, the substitutes, waiting to on, warming up and so on. The training tops, tracksuits, rain jackets are relaunched each two years.

The phrase "worn by the team players on the pitch" that is nowhere in the Decision. It is first raised by the OFT in its skeleton argument at para.11. We just note the reference, and we say that is also wrong – first of all, it is not the basis of the Decision, secondly, it is evidence given in the skeleton argument, and it is wrong as there again that category, worn on the pitch comprises other licensed products, and I gave them to you in opening submission. I was not going to repeat them now.

The "worn by team players on the pitch" was a re-definition of what is said to be the distinguishing feature of shirts, shorts and socks, not a definition in the Decision.

Mr Colgate asked if there is linkage between sales of shirts, shorts and socks in volume terms, it was a question to Mr Morris, and Mr Morris answered "There is no such evidence". That is correct, but with great respect it is a somewhat incomplete answer because there is clear

and specific evidence to the contrary. It is the table to para.15 of our amended Notice of Appeal – I think you have it in your master bundle, tab 2. It is the volume table, para.15, which shows very clear that there is no correlation whatsoever and may I say this, this is not new evidence put in in either the amended Notice of Appeal or indeed the original Notice of Appeal that came long before the liability trial. This is based, as the footnote makes clear, on the PWC analysis that was put into the OFT following the first oral hearing in August 2002. They have had this material since August 2002. They have had every opportunity either to challenge it or to come back in a second Rule 14 Notice subsequently, or in correspondence, and there is quite a lot of correspondence about the market in the administrative stage, with something else to put to it.

Mr Morris made two statements in his submissions. I think he said – if I got it down rightly – on the whole, when you buy shorts and socks you buy the shirt. He also said that you would not wear the new Manchester United home shirt and 1999 home shorts. I do not know where that evidence comes from, Mr Morris could not point to any evidence, and I respectfully echo what my friend Mr Hoskins said about deciding the case on the evidence, and it is simply not correct. The volume figures you have before you show in themselves that people usually evidently wear the shirt without the shorts, and there is some evidence that people buy shorts on a separate occasion from buying the shirt, so even when they buy shorts they do not buy a shirt – that is para.16 of **this** document, over the page.

THE PRESIDENT: It is not exactly evidence, Mr Roth?

MR ROTH: It is an assertion that is being made shortly after the Decision in September 2003, and it has never been challenged until the statement in argument yesterday.

MR PERETZ: There is also, if I may add, evidence to precisely that effect in Miss Charnock's witness statement which has also never been challenged.

MR MORRIS: I should not think it is a question of a challenge or not in Miss Charnock.

MR ROTH: I cannot comment on Miss Charnock, because I first heard about her yesterday. I do say that in a matter of this seriousness two Rule 14 Notices put to my clients, the point about market definition challenged right in the administrative stage – we have been consistent throughout in saying that it shows that – and two oral hearings involving the OFT, one cannot decide the important issues of penalties on the sort of anecdotal evidence Mr Morris was seeking to give to the Tribunal yesterday.

The question: is there a constant price ratio – at least at launch? You have looked at the tables in appendix 3 to the Decision, and I respectfully adopt what Mr Hoskins said in his submissions to you just now.

We have also tabulated the launch prices to see the price ratio – we have not included the RRP which he was referring to. This has been done and references there are to the Sharps', which are the Sharps annexed to the Lexicon Report, but the figures used by Lexicon, as they explain, all come from the OFT Decision. You will see how the ratio varies. Of course, shirts are always the most expensive, of course shorts are always significantly more expensive than socks, but it is not a clear constant launch ratio and that is even before you get into subsequent discount.

So I turn to the relevant market, and step one. How does step one of the guidelines work? I think there is some confusion for which I may be responsible, and I apologise, as to what our submissions actually are about this. There are two elements to step 1. First, the determination of turnover in every relevant market affected by the infringement. There may be one market affected by the infringement, there may be several markets affected by the infringement. Secondly, the application of a percentage to the aggregated sum of those relevant turnovers to reflect the gravity of the infringement. That much, I think, is common ground. Note please, that it is not the turnover in products affected by the infringement, but of the relevant market affected by the infringement, and for good reason. Suppose, if you would, that there was an RPM arrangement by Nestlé for Kit Kat, the first question would then be what is the relevant market? Clearly it is not just Kit Kat, it is not a market on its own, it would be chocolate confectionery or chocolate biscuit confectionery or something like that – considerably wider than Kit Kat. Then one determines the turnover of Nestlé in that market at the time, because they make other chocolate biscuit products. Why is it that market and not just Kit Kat, because as other products are in the same market, it is assumed logically, rationally that there is spill over – the words "spill over" not used here in Decision but in the OFT's Defence. Mr Colgate may remember from the *Napp* case the word spill over is a somewhat slippery word that has to be used with care. But they are all assumed to be affected.

The next question, are there any other markets affected by the infringement? In this case as regards Manchester United only the answer was "Yes", the market for sale of sponsorship rights? What is the turnover of that market, there was apportionment and estimation no longer challenged, it is calculated, the two were added up.

Next question: how great is the infringement? In my hypothetical example it is not as grave clearly as if Nestlé had engaged in RPM for all its chocolate confectionery in the relevant market, even though there is spill over, even though other products within the market are affected. It is clearly not as serious and that is one factor that one takes account of in

calculating the percentage for gravity – see how important a product is it in terms of turnover plus regard to the infringement.

THE PRESIDENT: When you say one takes account of it, that is something that is in the Guidance, or something that you suggest should happen?

MR ROTH: In the question of gravity going to seriousness, because what the Guidance makes clear is that there are a number of factors, speaking from memory 2.5 I think, that you look at a range of factors to decide gravity of an infringement.

THE PRESIDENT: But it does not say in the Guidance "We leave out other products that are in relevant turnover for the reason that you give, but were not actually affected by the infringement"?

MR ROTH: I am sorry, I was not suggesting you leave them out in a sort of mathematical sense.

THE PRESIDENT: No, but this point is not in the guidance either way, I do not think, is it?

MR ROTH: 2.4, the more serious the infringement the higher the percentage rate is likely to be. If Nestlé infringed for all its chocolate confectionery products that would be more serious than making an agreement only as regards Kit Kat. What is the scope of the agreement?

THE PRESIDENT: I am not saying that the submission is unfounded, but I think it involves reading into the Guidance something that is not there.

MR ROTH: I rely on the first sentence of 2.4 and on the fact that in looking at the seriousness of the infringement, what is set out I suggest is not an exhaustive list, and I do not think interpreted in this list as an exhaustive list, but an indicative list of the sort of things that go to gravity. Whether your infringement, your agreement covers only one product in a market where you may have, say ten products, or whether it covers six of those products, or 10, are different degrees of seriousness.

THE PRESIDENT: Yes.

MR ROTH: It is a very simple point. Here, the relevant market was determined as replica kit, and the OFT did that for everyone and then for Manchester United the separate market for sponsorship rights. When applying the percentage for gravity to the turnover, with respect – I say this with great respect – we totally agree with Mr Colgate that it needs to be looked at individually in each case. The guidelines indeed say that, and that is what the OFT did in the Decision. Sometimes they incorporated by a reference by dealing with one defendant a paragraph in their section dealing with another defendant, but they do that expressly at certain points. If I ask you now to look at the Decision you can see that at para.709, this is in the section dealing with Manchester United and the Step 1 starts at 699. In 709 they are there

saying "we incorporate 580 above in regard to Umbro". One goes to 580 with regard to Umbro "Damage caused to consumer", and reading that – that is under the other agreements – I do not think it can be the second sentence, because that is the fact that Umbro covered a whole lot of products, England, Celtic and so on, it is the last sentence:

> "In any event, it is noted that the infringements involved leading brands of Replica Kit and focussed on retail sales during the key selling periods."

That is the key selling periods point. Just as Mr Hoskins showed you that for JJB that was brought into the step 1 percentage. I cannot quarrel with that, that clearly goes to points on gravity. Then one has 710, the next paragraph, which is specifically directed at MU:

> "The OFT regards horizontal and vertical price-fixing as the most serious types of infringements. However, although the market definition is relatively narrow, the infringements did not include all products in the relevant markets. The percentage rate applied is 9 per cent. of relevant turnover."

The infringements did not include all products in the relevant market. What does that mean? we understand it to mean that not all products in the relevant markets are included in the concerted practice that constitutes the infringement. It cannot mean the infringement did not affect all products in the relevant market only because shorts and socks are left out, since the OFT's whole case for including shorts and socks in the relevant market, as explained by Mr Morris, is that the price of those products was affected by the infringement.

THE PRESIDENT: That is the logical difficulty we identified a bit quite early on.

MR ROTH: Yes and this argument is, with respect, circular. The words "the infringements did not include all products in the relevant market when given their ordinary natural meaning".

THE PRESIDENT: Does your argument not face a difficulty of equal strength that the turnover in the preceding business year will, by definition, very often include a lot of markets that are not affected by the infringement because it is the preceding year and were it not for the pre-ordering you may have no turnover affected by the infringement, in which case on your argument it would be rather difficult to make the system work at all?

MR ROTH: With respect, no, for this reason. This is not looking at that turnover figure that has been calculated. This is asking the question in general terms. I am not talking about a particular turnover period, I am talking about here in the relevant market, as defined. Never mind which year one is looking at.

THE PRESIDENT: Well the relevant market as defined is replica kit.

MR ROTH: Is Manchester United replica kit. The question is, as we understand it to be, and that is what I am putting, is to what extent are the products in the market for Manchester United

replica kit included in the infringement? Answer, it is only the home replica kit. We have not got the proportions or percentages yet, but that is the fact. It is the adult home replica kit, or adult home shirt we say. They say the adult shirt, they say that the shirt is the product, that subject to the infringement. Then one looks at the question of how important is that product or products within that market? Here you are not constrained by any particular year, you can look at the period of the infringement, you can look at the reality. That is why, when we put in figures, we put in the two years side by side, and you have them in our Notice of Appeal so you can compare the two years in the table that you have at para.23. The 2000 year, because of the pre-ordering, and this is shirts, of course, it is only 21 per cent. so I can see quite fairly that one looks at the 2001 year because that brings in August and September. The total share in the 2001 year is 38 per cent. So the point we are making is yes, because of the rule you have to take a figure for turnover in the 2000 year, but when you are asking the question how important product within the relevant market you can look at the yield that most corresponds to the duration of the infringement and there it is 38 per cent. That also includes a lot of home shirts that were not covered by the infringement, because the infringement ended at the end of September. So it is only two months of that period.

Let us take the whole year against myself. It is 38 per cent. so which ever year you look at it, we say, it is well under half, that is the point that we are making. We are not focusing on the 2000 year much, for the reason you have given us it would be putting it quite artificially.

THE PRESIDENT: Just to put it in a nutshell, it being common ground, just to take one example, if there was no agreement alleged in relation to the away shirt in 2000 that in your view is well within the phrase "The infringements did not include all products in the relevant markets" and that we cannot assume that the phrase "The infringements did not include all products in the relevant markets" relates only to shorts and socks, and even if that was the original intention then there are a lot of other products that are still not included in the relevant markets, so even if they tried to take account of the fact they had remembered the shorts and socks were not part of the infringements, they have still not remembered that there are other shirts that are not part of the infringement, so that therefore the 9 per cent. stays and you cannot put it up to 10. I have not put that very well, but ----

MR ROTH: Well it is putting it better than I did. A note on that point, looking at the 2001 the away shirt, of course it is nothing like as big as the home shirt, but it is not peanuts.

THE PRESIDENT: It is not to be sniffed at.

MR ROTH: And the centenary shirt ---

THE PRESIDENT: And there are other shirts too.

MR ROTH: And the third shirt, which was launched just after, 29th September, is again significant. There is a lot of other important shirts, and therefore it does not go up and that is the answer to Mr Morris.

THE PRESIDENT: Although we then get into another argument about spill over. If the adult home shirt's price was a certain level what spill over effect would that have on subsequent pricing of the away shirts, and goalkeeper shirt, and centenary shirt and so forth?

MR ROTH: That is why they are in the relevant market, and that is why you take them in the turnover.

THE PRESIDENT: Yes, but if you assume that you take them in the turnover, you cannot take them in the turnover on the basis that it is likely to be a spill over effect. We assume that as a sort of rule of thumb, and then say, having taken them in the turnover, we can then excuse them again when arriving at the percentage because no infringement is alleged specifically in relation to those shirts, so the argument does come to a hitch at that point.

MR ROTH: We are not seeking to exclude them. We are just saying, having put them in the turnover for that reason ----

THE PRESIDENT: You can then take them out again ----

MR ROTH: You do not take them out, you just say "How serious is the infringement?" The maximum is 10 per cent., the most serious infringement is 10 per cent.

THE PRESIDENT: Yes, I see.

MR ROTH: It is the "Kit Kat" point. There is spill over to them but it is still not as grave an infringement as an agreement that covered the lot.

THE PRESIDENT: Yes. Yes, I think we have got as near to understanding the point as we ever going to get.

MR ROTH: One is not making a mathematical computation, it would come down quite a bit below 10 per cent. then if you were looking at just the first two lines.

THE PRESIDENT: Yes, I follow.

MR ROTH: I come then to duration and Step 2. The key selling period – two points. First, the point made by Mr Hoskins regarding JJB applies equally to MU. The fact that it covered a key selling period is one of the matters that was taken into account in fixing the high percentage, and that is paragraph 709 referring back to 580. The second point, the finding in the Decision is that the key selling period is launch to Christmas (para.81) and could I ask you to look at that?

THE PRESIDENT: I think we have already looked at it and got it in our minds, Mr Roth.

MR ROTH: You have it in your minds as a statement in the Decision but what perhaps has not been focused on is the substantiating evidence which is in footnote 78 and which is extensive. There is a lot of evidence – you may not want to look at it now, but make a note of that. We note a statement to the same effect in your Judgment para.18. We assumed, and perhaps it was wrong of us, that the reference that follows it to day 6 of the transcript was simply additional support for the statement set out in your Judgment, and I hope we are not to be criticised for that. The finding in the Judgment is the key selling period is launch to Christmas. I think the reference to pre-ordering and the recognition that there is pre-ordering has come from Manchester United, we are the people who proffered that information early on. In argument for the first time the OFT rely on that transcript reference to say that the key selling period is, in fact, the first month after launch, so that transcript reference is not their skeleton argument (para.27(b)) and of course it is not in their Defence, because their Defence is before the trial, but unlike the other parties they served no amended Defence to MU. So I invite you, when you consider this question, to look at the OFT defence, paras.36 and 39 and how they plead the point, and now that our attention has been drawn to it – and I do apologise, I had not realised it is all on the website – we have looked at what Mr Ronnie said in that answer, and can I hand that up so that one can see it. It was one question in his cross-examination:

> "Q. You have said in a witness statement and I am bound to say I cannot remember which one, that 60 per cent. of the sales of a shirt such as this take place in the first four weeks of launch? A. Correct."

There are five witness statements from Mr Ronnie that have been served on us as part of this Appeal. We checked through all of them last night and we cannot find this in any of them.

THE PRESIDENT: I think it is probably Mr Russell or somebody like that, I cannot remember exactly who said it. Anyway, Mr Ronnie agrees with the proposition.

MR ROTH: Yes, but it is put to him as something he said in his witness statement, "Do you agree with that?"

THE PRESIDENT: Oh I see, yes.

MR ROTH: If you are subject to cross-examination and counsel says to you "Well you said this in your witness statement, is that right?" Unless it is a very key point in the case in which usually it is said "Let the witness see what he put in his witness statement" the natural inclination is to say "yes, that is what I said." Further, it is not clear what he means. Is it 60 per cent. of sales over the two year cycle of the shirt? If so that is demonstrably wrong as I will show you later. Is it 60 per cent. of turnover in the first year following launch of the shirt? That is also wrong, at least as regards Manchester United sales. What actually is he saying? Could I ask you to

look at the analysis by PWC given to the OFT after the first oral hearing, which is in our pleadings' bundle, volume 2, tab A(11). If you go to para.6, if you go to para.6, and this is the source, when I said the "OFT has had this for a very long time" this is the source of the figures in our pleadings. Paragraph 6: "Total turnover generated from those MU shirts listed in the Notice was as follows" – this is adult and junior. You see the home 2000 shirt ----

THE PRESIDENT: Sorry, which page are we on?

MR ROTH: I think it is p.4 in the report, and it is para.6. "Total turnover generated from those MU shirts …"

THE PRESIDENT: Yes.

MR ROTH: One can see the "home 2000" launched on 1st August 2000. There are about 714,000 sales, that will all be in July, that is the pre-ordering, July 2000. Then 1.8 million in 2001, and then 650,000 – this goes up to April 2002, this was compiled, I think, in July 2002. So of the first 17 months that one has here in fact it is 22 per cent, the 714,000 that first month, that will be a month, is 22 per cent. If one takes it as a percentage of the first 13 months it is 28 per cent. If one takes it as a percentage of the next 12 months it is 39 per cent. As I say, I just do not know what Mr Ronnie was basing his 60 per cent. on.

So we do submit, with great respect, that where a witness at a liability hearing makes a statement which (a) is unclear, (b) is based on a false premise put in by counsel who say he said something in his statement when he did not, (c) is unsubstantiated, (d) we were not able to challenge at the time, (e) is not spelt out in the Judgment on liability as a finding of the Tribunal, and finally, of which we had no prior notice before this hearing despite extensive written submissions by OFT in accordance with the procedures of this Tribunal for the OFT to be allowed to rely on a very important point it should not be allowed to stand as evidence against us and that goes to the heart of the rights of the Appellants. This is a very important point as regards Manchester United – much more important than shorts and socks.

The only clear evidence is that the infringement lasted less than half a year – 3, 4, 5 months, and the key selling period was between the launch and Christmas, that is the finding in the Judgment which, of course, we accept, and then our infringement, even allowing for a month before launch, covered half the key selling period, and that is the evidence.

This morning Mr Morris turned to compliance, and can I say a word about that. The uplift of 10 per cent. for the disregard of our compliance programme, and he said that the OFT says the existence of a compliance programme at the time of infringement, may but is not necessarily a mitigating factor but in this case as regards MU there was flagrant disregard f its compliance programme, and therefore a greater need for deterrence.

We say on principle that to say that is an aggravating factor is wrong. *Ex hypothesi* if a company has a good compliance programme and then infringes the fact by price fixing there is a clear disregard of that compliance programme, it is inevitable, and Mr Morris did not suggest that our programme was a sham, or in any way calculated to deceive anyone, I said that it was an honestly introduced programme, and he did not challenge that. So of course, any infringement means there is going to be a clear disregard of the programme, there is no other way around it. But there is an important distinction to be made between the company and the individuals, maybe senior individuals, involved. The question the on compliance programme is to be addressed as regards the company – has it behaved responsibly as regards the Act or not? If the compliance programme is not a sham or a façade, then the answer is "yes", it may be criticised for not introducing it earlier, we fully see that. Quite separate is "had senior individuals been involved in the infringement, and therefore *ex hypothesi* disregarding the compliance programme – that is a very serious matter if senior individuals are involved, and that is a ground for aggravation, which is the 20 per cent. that we have received. But the compliance programme, the conduct of MU introducing the compliance programme, that is not in itself an aggravating factor. It is the disregard by senior individuals infringing the Act, and that is the 20 per cent. which we got – this is completely confusing the two.

We then turn to a quite separate question of compliance as a mitigating factor, and Mr Morris, with great respect, misrepresented the point we are making. The point we are making there is that the compliance programme has a continuing programme by MU. After the infringement ended but long before the OFT investigation, and you have already noted the point, Sir, that the new away shirt launched in October 2000 no infringement for that; and the new third shirt, launched at the end of September 2000, and from the dates in the chronology attached to your Judgment no infringement for that.

Sir, one asks the question, with respect, whether MU as a company, following the infringement, was behaving responsibly as regards Competition Act compliance, and you submitted a series of questions to all the parties on that. I invite you to look at the answers that we have given. We also took a while, I confess, to do it but nothing like as long as Lord Grabiner's clients. We have submitted a very full answer which you have attaching the slides used in the training, not attaching the manual, not because of Chapter 1 concerns, but because of Chapter II concerns, which I am sure you can appreciate, we have explained in our answer. We say our apology to the Tribunal is really in line with that – has the company behaved responsibly with regard to the Act following the infringement and compare then the Decision, the discount given to the other parties for introducing a compliance programme following the

start of the investigation. Nothing given to MU for what it has done after infringement. That is why we say the 10 per cent. should be removed and there should be recognition for that - we are not asking any more for what the obvious received is.

The next point, the non-statutory assurances from August 1999. Mr Morris said that I had not given chapter and verse on that in answer to Mr Colgate's question. I was going to do this in reply, it has not been forgotten – I am surprised Mr Morris should complain, the OFT knows the answer because they have had it from the first written representations in this case. It is in the bundle that you have before you now. If you go to our pleadings bundle, file 2, tab.9 sub-tab 3. I think schedule is the terms, at tab 9(3), the first page is headed "Schedule 10", I think that is schedule 10 to a document the Premier League put out as to what should be included in a new contract.

The next page is the letter from MU to Umbro:

> "As you are aware the Premier League has provided the DG OFT with assurances about pricing on 6th August. We need to bring to your attention the provisions annexed to this letter. We will notify the Director once we have done this. Please would you circulate to your dealers no later than Friday, 3 January a statement conveying the substance and in addition you could advise dealers there ….."

THE PRESIDENT: Yes.

MR ROTH: "… and they should inform the OFT of their concern" There is the Notice attached which I think follows appendix 10. We have also found the OFT's press release at the time, 6th August, 1999 – can I hand up copies of that – setting out the statement the Director General made [Document handed to the Tribunal]

THE PRESIDENT: Yes.

MR ROTH: You will see what had to be done. You will note the point in his statement on the second page, I am not taking any point on that.

THE PRESIDENT: Yes.

MR ROTH: And if there was, it was suggested we could have gone … the remark was made, I know it was very much extemporary, then I will not take a technical point on the basis of what is said there, it may not have been a breach of the Act, but I am not relying on that. Clearly the thrust of the assurances, what MU did hear was quite contrary to them, no question about it. All I say is this, yes, it is a relevant matter without a doubt, but all I can say is that there should be equal treatment as between the relevant parties in this respect. It applies also to the FA and it applies also, we say, to Umbro, because although they may not have technically given an assurance, they represented themselves as having done so as recorded in the Decision para.2. Neither

Umbro nor the FA got an uplift for these assurances. I am not saying they could not have done, but therefore Manchester United should not – I think that is all I can say about that.

In conclusion we say at the end of it all, if one does stand back, there are ten defendants to this Decision, not just the four before you but let us remember the others as well. Serious infringement – price fixing – but as regards Manchester United it was one product for a short period, an important period certainly, but not the whole of that important period following the launch. Manchester United ceased involvement within two months of launch, by the end of September. We ceased involvement long before ----

THE PRESIDENT: You say you "ceased involvement" but Sports Soccer started to discount, that is all that happened, everybody else carried on.

MR ROTH: But there is no suggestion, and the finding in the Decision is that the last ability for MU to do anything – everything we did was through Umbro – to say relations between Umbro and my client became strained when the news leaked out in the press, which is where they heard about it, is an understatement. There is no potential – and the OFT recognised it – for us to have any pressure on Umbro, rather the opposite at that time. We no longer had that channel open. So we say there is no evidence about our subsequent launches, and that is a very important consideration, not reflected either in the percentage for gravity or in duration or in the multiplier, and what we do say is it is wholly disproportionate by comparison with the way those matters are dealt with regarding the others, not to give due reflection to these matters somewhere in a carefully calculated penalty.

Those are our submissions.

THE PRESIDENT: Can I just ask you one question Mr Roth, on this key selling period point, which I understood you to say a moment ago is much more important than the socks and shorts argument? Where do I actually find that in the amended Notice of Appeal? I was on para.24, the last sentence of which says that

"MU acknowledges that the five months of the infringement covered the period following the launch of the new home shirt when the bulk of sales would be made."

But there ought to be some reflection of the fact that the infringement lasted at the most five months.

MR ROTH: I think it is in the Reply. It is paras.18-19.

THE PRESIDENT: Thank you.

MR ROTH: You will note that Reply was served before the liability trial.

THE PRESIDENT: Yes, thank you.

MR COLGATE: Looking at the accounts we have for Manchester United, the accounts we have are 2001, do we have your accounts for 2000?

MR ROTH: I think not in our pleadings, but with the Company Secretary, who is also the Compliance Officer, sitting behind me I am sure they can be produced. They can be couriered down tomorrow, or put in the post for Monday.

MR COLGATE: I was looking at them, and we have only got the comparisons for 2000, so perhaps we could have them.

MR ROTH: Certainly, we will get them to you.

THE PRESIDENT: I think we ought to make an effort to finish tonight if at all possible.

MR PERETZ: Yes, I am very conscious of the time.

THE PRESIDENT: But in order to do so we do need to rise to give everybody a chance to stretch their legs and have a short break, particularly the shorthand writer. I think we will rise for 10 minutes.

(The hearing adjourned at 4.10 p.m. and resumed at 4.25 p.m.)

MR PERETZ: I am conscious that I am into injury time, as it were – somebody had to say it – and also that Mr Green will be speaking after me, so I will try and keep my submissions as brief as possible. I have been greatly assisted in that by the fact that much of what I need to cover has been covered very eloquently by my learned friends Mr Hoskins and Mr Roth. Rather than go through the extensive list of matters upon which we agree with them, I think I can leave it to the Tribunal to work out which points we agree with and which points – very few points – we would not. I note quickly in passing that it is gratifying to see that much of the argument on market definition is based yet again on work that we have done, and indeed paid for, and yet another example of our assisting the other parties, and hopefully the Tribunal.

What I have is essentially a list of inevitably slightly bitty points, including Allsports' specific case on certain points raised by Mr Morris and left over from the points made by my learned friend. The first point I want to make follows on from Mr Hoskins and Mr Roth's discussion on duration, and specifically the point put by you, Sir, I think to Mr Hoskins, about the possibility of a run on effect. Essentially, as I understood it the point was that in the case of the MU agreement that lasted for two months from August and September, but you put it to Mr Hoskins that the effect of that may well spilled over into October and November, and so on. Our short answer to that point, and this may come with a certain degree of familiarity to the Tribunal but I make it anyway, Allsports' consistent policy throughout this period was to price at £39.99. That has never been questioned.

THE PRESIDENT: So you have always said there is no effect – run on, run off or otherwise?

MR PERETZ: Indeed, that is what we would have priced at anyway. Certainly, in the light of that policy there is certainly no evidence of any continuation in that £39.99 pricing point was in any way related to the agreement.

In relation to duration I should just perhaps make it clear as a footnote how that works in relation to Allsports in particular. We agree with Mr Hoskins that what matters is the period in which the agreement bites is operating, so as to cause in this case consumers damage. In relation to the England agreement that bit at the earliest on 24th May and indeed arguably up until 2nd or 3rd of June which was the point at which Sports Soccer and a couple of others finally got around to increasing their prices. It is common ground that it ended when England got to Romania on 20th June, so that is less than a month on any view. In relation to the MU agreement the dates are relatively easy to remember, that the agreement bit between 1st August and 1st October.

Mr Morris picked up on a point I made about Mr Hughes activities essentially being concentrated in the period of two weeks from the Golf Day to his going into hospital on 9th June. I should make it clear that I am not there taking a point about duration in the technical sense of the guidelines. I am simply there drawing attention to the fact that the core infringements found by the Tribunal to have been committed by Allsports in this case were attributable to Mr Hughes' activities over that period. There were some others, the Tribunal has found infringements in relation to various conduct by Mr Guest and so on, but that is the core of it. I simply wanted to make the point, really in the context of seriousness, and perhaps of deterrence, but our acts were concentrated in that very little period and Mr Hughes has never been accused of any similar activities before or since, and I also invite the Tribunal in that context to note during that period he was very ill.

The President asked about an apology for the conduct and Mr Roth started off his submissions with an apology for Manchester United. Of course, it does not lie in the mouth of a defendant, much like my clients, who are contesting liability to apologise. What I can, however, draw the Tribunal's attention to is first of all that we did introduce a compliance programme before the Decision was taken in an effort to stop this happening again. Indeed, the infringing behaviour ceased, on any view, at the very latest, I suppose on 1st October. That happened without any intervention by the authorities at all. In that respect I would suggest that actions speak at least as loud as - if not louder than – words.

On a minor point arising out of remarks by the Tribunal I think yesterday, in suggesting that the Tribunal may wish to look at the operating profit of the various companies involved. I have no instructions on operating profit at all, I would just invite the Tribunal to note, and

I am sure the Tribunal will take this point anyway, that it may be inappropriate to draw much in the way of inferences from operating profit without hearing submissions from the parties – particularly if those inferences are going to be adverse to the parties in any way. No profits or high profits may be caused by many things, the most obvious of which being efficiency or inefficiency, and also various accounting factors may come in. So all I can say is tread carefully, as it were.

THE PRESIDENT: Yes.

MR PERETZ: In relation to co-operation I think it is still the case that the OFT is not in a position to contest that the admission made by my clients very early on in the procedure before the OFT and that was at the earliest possible stage, but Mr Hughes instigated the 8th June meeting, was of great assistance to the OFT, and I talked the Tribunal through the points on that in my opening and showed how the OFT might had been in some trouble had that admission not been made. The point can be illustrated quite shortly by the fact that where the OFT relies on this point in a Decision (para.614) the cross reference is to that admission, the evidence that they rely on.

The admission was used by the OFT to prove anti-competitive intent, the words that it uses in para.614 talk about "ending a crippling price war", whatever that means, the OFT had no difficulty inferring anti-competitive intent on the basis of that. It also inferred that Allsports was the primary organiser of that meeting. I also draw the Tribunal's attention to the point that if the OFT had asked us to comment on our role, by a s.26 notice, we could have legitimately refused to answer on the basis of the self-incrimination principle. The Tribunal may not agree with that but the point is certainly, in my submission, at least arguable.

As to Allsports' submissions in its second set of representations that there was no discussion of a further meeting at 8th June meeting, and in fact it is said that no such further meeting or attempt to organise one – that is what it said in its representations, those representations have of course turned out to be correct, and undisputed.

As to Allsports' decision not to produce the diary voluntarily at the OFT stage, our submission is simply that that is a neutral factor. It would doubtless have been greater co-operation had we done it, we did not and that is simply neutral. The position would possibly be quite different if we had been asked by a s.26 Notice to produce the diaries but we were not. There was not even an informal request.

As to conduct during the Appeal, we respectfully agree with the reservations expressed by the Tribunal in argument about whether it is right in principle to take account of matters arising out of the Appellant's conduct during the Appeal when it comes to the assessment of

penalty. If, however, the Tribunal is minded to take a different approach I think all I can do at this stage is to invite the Tribunal to read again what we have to say on this in our skeleton argument and indeed in the post closing submissions which are referred to in the Tribunal's Judgment. I am reminded also to make the observation to the Tribunal that of course Mr Hughes and Allsports Ltd are not one and the same person. For what it is worth I am putting that marker down. As it happens Mr Hughes and his family's trusts are just about the majority shareholder, 52 per cent. shareholders on the basis of our last annual return, the rest being held by venture capitalists and others.

Trail blazing costs – Mr Morris said that that was most appropriately dealt with at the costs' stage. I would feel more comforted by that if I had realistically any real confidence that we were likely to recover the bulk of our costs at the costs' stage. I am very much in the Tribunal's hands on this point, but let me just put it this way, unless the Tribunal is confident that our trail blazing costs would be recoverable at the costs' stage it would be a matter, we would submit, which it is appropriate at least to take into account in fixing penalty. The extent to which this case has generated a large amount of jurisprudence can, with respect, be seen from the Tribunal's very important and helpful annual review, where it can be seen (ps.14-15) that this case has generated a very large number of case management conferences and interlocutory Judgments – that is a very swift illustration of the point.

THE PRESIDENT: Are you going to give us any order of magnitude of what you are talking about? Or are you simply going to ask us to ----

MR PERETZ: I think I would need to take instructions – they are fairly substantial, I can say that, but perhaps not as substantial as some others. If it would assist the Tribunal I am sure an estimate can be made.

THE PRESIDENT: I think it is genuinely difficult for us at this stage to mix up the question of penalty with the question of costs.

MR PERETZ: Yes, well I have made my point. As far as Allsports lack of importance – if I can put it this way – in the case. We simply rely on the terms of the liability Judgment and the way in which our involvement is routinely described as "material". "Material" is not insignificant, it means it matters. But it is quite different from being decisive or "but for cause" or anything like that, and our position is, with respect, quite different from certain other defendants here who have been shown to be quite able to get on with infringing behaviour on their own without involving us.

As to the question of rebalancing the 10 per cent. uplift given for JJB pressure, with the 15 per cent. uplift given for our instigation plus other matters. The first, and obvious point to make is that on any view the amount of pressure we exerted was less than that of JJB – Mr Ashley describing Mr Whelan as "the power within the industry". But that really leads into a wider point that I wanted to make. If I can take the Tribunal to para.2.6 of the Guidance. Paragraph 2.6 requires that the OFT look, in a multi-handed case, at the effect of each company's participation on the damage to competition. We say the inevitable result of that exercise must be given our material rather than decisive involvement – if I can put it that way – is that we should be treated more leniently than others, and if I can put that in terms of the table handed up by Mr Morris yesterday.

Our primary case about how one approaches this exercise is that essentially one follows the Guidance – that is what the Guidance is for. But in so far as it is relevant to have a look at the impact of fines, the percentage of total turnover at all, we would make these points. Comparing ourselves first of all to Manchester United and Umbro, probably not the obvious comparators, but they are there on the table, one has to remember that both Manchester United and Umbro were in their different ways in breach of assurances given to the OFT and they are both in their different ways holders of, putting it broadly, monopoly power within the industry. They are certainly not in the position we are at our level – a fifth player, effectively. Therefore, we think the relation between our fines and those of Manchester United and Umbro, the fines in relation to turnover are entirely indefensible on that basis. There is an obvious comparison, of course, between us and JJB, our direct competitor – what might be called perhaps the Stackelberg leader in our particular sector. Some people may not follow that reference, but you I think will know what it is.

THE PRESIDENT: Nobody will follow it, I think, Mr Peretz.

MR PERETZ: In relation to JJB the short point I want to make is that when one looks at the bottom two rows of the table our "hit" in terms of total turnover is slightly below JJB's in relation to the statutory maximum we have a hit which is greater than JJB's. We say that when one bears in mind first of all that JJB is guilty of a further infringement in which we were not involved, that it has power within the industry and that its participation is essential to the operation of these infringements, we say in relation to JJB we have been fined a bit too much. That point becomes starker if the Tribunal decides to reduce JJB's penalty on the basis that it has been found not guilty of one of the four infringements of which it stood accused.

Those, Sir, are my submissions.

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

MR GREEN: I am going to deal with Mr Turner's points as briefly as I possibly can, and I will go straight into the middle of them. First of all, documents. It is our submission that the documents submitted voluntarily prior to the Rule 14 Notice, constituted a very material part of the first Rule 14 Notice and Mr Turner was somewhat brief in his analysis of their actual impact, but I have done a short analysis and it will help to track the relevant documents through the Rule 14 and I need to explain that one document, which is attributed to us, is not in fact a voluntarily produced document. If you could just take the first Rule 14 I will do it as briefly as I can. Tab 5 of file 1.

What I am going to identify for you are references to documents produced voluntarily by Umbro, in other words not pursuant to a statutory request, prior to the Rule 14 notice being issued. The first reference is at paras.73, 74 and 75.

THE PRESIDENT: Do you want to give us these in writing, or do we need to look at them?

MR GREEN: I am very happy ----

THE PRESIDENT: Just the references I mean.

MR GREEN: Well there are not that many and I think it would help.

THE PRESIDENT: Fine – 73?

MR GREEN: 73, 74, 75 and you will see that these concerned relations with Manchester United and they demonstrate the level of Manchester United's participation and the extent of the participation. Mr Turner said, somewhat obliquely this morning, that the Office of Fair Trading did not know about the full extent of MU's participation. Well documents provided to us and incorporated into the first Rule 14 demonstrate that a considerable amount of its knowledge was dependent upon Umbro's voluntary disclosure.

THE PRESIDENT: This particular document rather dropped out of the picture after the stage of the second Rule 14 Notice.

MR GREEN: Yes, and as you know a great deal of the second Rule 14 Notice was then based on Umbro's subsequent submissions in subsequent co-operation and there are a number of other documents. I am not going to read them to you, we simply do not have time. 74 deals with additional documents, and in particular a document of 7th April 1999. 75 up to the end of the first sentence is referring to a fax of 5th August 1999, now that is footnoted to document 7551, and that would by definition attribute it to an Umbro voluntary disclosure. In fact, it was not and I need to just correct that. That was not in fact a voluntarily produced document, and we have checked that by cross-referencing through the Decision – that is not one I can take credit for. So the MU involvement, both as to level and extent was referred to in those documents.

Then if you go to 89 and 90, referring to the June meeting, here one sees a number of documents from Umbro being referred to. First, the Debenhams' fax of 2nd June 2000, described at para.137 below – I will take you to that in one moment. Then there is the Umbro confirmation that a meeting took place – that was not in a document, that was in the chronology attached to a letter from Miss Roseveare to the OFT. In other words – and I do not think this is unimportant – the source of this was simply an oral or written statement from the company. It could have been in a witness statement, it was not a core document, it came from the company itself.

Paragraph 90, you will see there is a reference to footnote 66 – this is the Martin Prothero letter relied upon by the OFT. Then you will see in para.91 that Mr Ashley gave evidence as to a meeting and it was materially inaccurate in almost every respect. He first of all described it as relating to England – he could not give dates nor attendees. He then altered the description of it and then he was wrong in the evidence he gave as to who organised it. It was vague and inaccurate. Only Umbro got it actually even remotely right and Umbro's evidence came, as you know, from evidence given by Mr Ashley to Mr Ronnie and recorded, not least in the chronology by way of summation. So the 8th June meeting was first introduced, and Mr Ashley would be the only other person who would have given evidence about this meeting. Mr Turner did not say to you that he had knowledge of it before Umbro brought it to the OFT's attention.

The next set of paragraphs, paras. 121, 122, and 123 and document 90 – a document which is footnoted attached to it, 99 – which is in the middle of that paragraph and was an Umbro voluntarily produced document. You can see that by reference to the footnote, document 7/551. Equally references at 122 and 123. I know you will have a chance to look at these in much more detail later, but the next set of documents is at para.137 thro'139, which are documents of 2nd June, 6th June and 8th June, involving Mr Marsh and Mr Fellone.

Those were documents provided voluntarily, but they played a not insignificant part in the first Rule 14 Notice. They identified events which enabled the OFT to include them in the Rule 14 Notice which meant they were then put to all the other parties forcing responses and admissions. They were plainly material and not least the genesis of the 8th June meeting was able to be included in the first Rule 14 Notice exclusively because of evidence provided by Umbro, even without recourse and reference to the witness statements. That produced a snowballing effect which ultimately generated a great deal of further evidence, itself provided in very substantial part by Umbro.

So those are the documents, what about the witness statements? I am not going to repeat what I said, I am just going to try and deal in reply to the points made by Mr Turner. First, you know that there is no distinction which was drawn between the case team and the leniency team in this matter. The case officers had all the information which was contained in the witness statements, and they plainly could not wipe that information out of their minds. Mr Walker-Smith's statement in December was to the effect that information could be used. You will know, and I will just give you the reference, para.3.12 OFT Guidance – which Umbro had obviously had recourse to and refers to in its correspondence – makes it clear that confidentiality is not a given in the course of an application for leniency. So the starting point was not an absolute guarantee of confidentiality. The OFT did use the evidence from Umbro's chronology, which was not a document source, and the OFT's concern when it came to witness statements was only about confidentiality.

If I can go straight to the issue of 14th March letter, where Umbro waived the concerns it had about non-use of witness statements which had been put to it in the previous meeting a few days earlier, the most explicit waiver that one can imagine was included in correspondence. Then Miss Kent phoned and said "Well what about confidentiality?" The issue on the correspondence, both from the OFT and from Umbro to the OFT was only about confidentiality, and it is plain from the 14th March letter that not only did Miss Roseveare waive non-use of the statements, but at the same time she said Let's deal with confidentiality" because in her mind it was a separate point. Confidentiality concerned information in the documents but not the documents themselves, and Miss Kent's reply also said "If you wish to preserve confidentiality resubmit them." But there was then an exchange, as you have seen, as to confidentiality. If you ask yourself what was the policy issue on the OFT's side it was not non-use of the documents it was preserving confidentiality, but that was then dealt with on a pragmatic basis as you have seen unravelled in the correspondence.

You may find that it is unnecessary to try and resolve a dispute of fact between Miss Kent and Miss Roseveare, but Miss Roseveare's witness statement is entirely credible. She distinguished confidentiality bit by bit from the information in the witness statement. Why, one should ask oneself, offer use of the documents if it was coy about the witness statements? It plainly was not, it was willing and indeed anxious that the statements should be used. Why would Umbro send a chronology including information about the Golf Day and the June meeting if it was coy about those events? It was not . If there was a misunderstanding between Miss Roseveare and Miss Kent it remains the case that Umbro was not coy about use of the witness statements, and it wanted them to be used. I am not going to repeat additional

submissions that I have already made about the content of those statements. We have firmly in mind your observations on Mr Ronnie's inadequacies and inaccuracies, they contained good and they contained bad. The OFT could have used that information to further its investigation even if it did not want to use the witness statements themselves, for example, s.26 of the Act would have enabled the OFT to ask Messrs Hughes, Whelan etc. about the June meeting. They could simply have asked about it. You will recollect from Mr Walker-Smith's communication with Miss Roseveare that he referred to the "Spanish Banks" case. In the time today I have not had the chance to refresh my memory of that, but that was a case where the European Court as I recollect, and I think there was a subsequent case on the same issue, said "You cannot use information which you gained in a national inquiry as part of an EC inquiry, but you can use it to start the investigation again. So there was nothing to start the OFT using that information and taking it away and using it as a basis for a s.26 – nothing at all.

The only other point I want to make about witness statements is to correct a point made by Mr Turner, and there is a distinction to be drawn between error and candour, which Mr Turner did not respect. It is common ground that Chris Ronnie's first and second statements, and Mr Marsh's in one respect, were inaccurate and unsatisfactory. But Mr Turner's suggestion that there was a lack of candour is incorrect. He spent a bit of time referring you – in fact he repeatedly referred you – to para.302 of your Judgment, but when you read paras. 301, 302 and 303, you will recollect first that you rejected a submission that Umbro was seeking to mislead the OFT, that is 301 – you rejected that submission. You said in the final sentence of 301, after you have analysed Mr Ronnie's inadequacies.

> "In those circumstances we are not prepared to find that Umbro was seeking deliberately to mislead the OFT.

You said that some of the Umbro executives were unfamiliar with the process, and you pointed out that Mr Prothero gave evidence to you that Umbro was very anxious to get its leniency statements in early and you cited his evidence to the effect that everyone with hindsight would have been preferred those to have been more thorough. You also note that Ronnie 2 was finalised in a compressed timescale because of the OFT's strictures, but you found as a fact that you were not prepared to conclude that Umbro was seeking deliberately to mislead the OFT. It is not therefore fair to say there was a lack of candour. There were errors, and they were material and significant, but it is not fair to say there was a lack of candour.

302 and 303 then deal more specifically with Mr Ronnie, and you found in 303, and indeed in 304 and 305 that Mr Ronnie gave additional evidence in a number of respects, but you found that you could rely upon this evidence where corroborated and you rejected JJB's

and Allsports' submissions that Mr Ronnie's evidence was too unreliable for the Tribunal to place reliance upon it, and you found as a fact that he was not misleading you. Again, it is not fair to say there was a lack of candour, it is fair to say there were inaccuracies and errors and Umbro is sorry for those but that is what happened.

In particular, you made the point and you have the reference, I will not take you to it, para.740 in relation to the withdrawal by the OFT of a part of their Decision that it was in part due to ambiguities caused by the passage of time. Mr Marsh's error was described by Mr Turner as being rectified by Umbro in its reply to the Rule 14 Notice. Well, there was an error and Umbro is sorry for it, but Umbro itself sought to perfect that information.

Let me turn next to leniency. Leniency is not directly in point in this case but it is obviously, because of the facts, a part of the context. In this case leniency was rejected, Umbro was not in para.3.8 of the leniency notice, it was a 2.12 case. I was not entirely certain if Mr Turner was suggesting that 3.8 was somehow separate from leniency because as we know, to get into leniency you have to sign an agreement, that is the right of passage, you sign the agreement and you accept the conditions. 3.8 is to be distinguished from 2.12 which is general co-operation. 3.8 can only be understood as what happens in the course of a leniency agreement. 3.8 (b) and (c) are in a sense explicit in that regard. 3.8(b) requires you to maintain continuous and complete co-operation throughout the investigation, in other words, once you are in the programme. We never got into the programme, and it is an important point as a matter of law that 2.12 does not say that there is a cap on the maximum credit that can be given for co-operation and that is an important point in law.

THE PRESIDENT: What they say is that if there is not *de facto* some sort of a cap you could hardly make the leniency programme work.

MR GREEN: Exactly, that is what they do say and that is therefore the point to address. First of all, under the Act, s.38(1) to (3) of the Competition Act, the OFT must provide Guidance. It could alter its Guidance at any time, but if it alters its Guidance it must be published. 31(8) when setting the amount of the penalty they must have regard to Guidance.

What that actually means, when you consider the policy underlying it, is that if you wish to alter a policy or introduce some new aspect to your penalty setting policy it needs to be transparently set out. You have your Guidance, if you change your policy then you must set it out transparently and prospectively, not retrospectively. There is nothing in the Guidance which says if you do not get into the leniency programme you are limited to 50 per cent. It is not in the old Guidance and it is not in the new Guidance. Mr Turner said it was by implication because it would undermine leniency, but the policy which guides leniency also guides co-

operation and if you think of it this way, one can imagine many circumstances where, to have an excessively rigid rule about mitigation generally would be utterly counter productive. Many people here will know of situations of clients applying for leniency where there is a veritable scrabble to get in front of the OFT. You can be first, second, third or fourth by virtue of 24 hours or 48 hours. If you in good faith turn out to be fourth, and it is clear that you are going to get only a relatively limited amount of leniency – 15, 20 per cent. – then you may say "Why bother? Why don't I just go into co-operation?" Are you limited to that amount, maximum 50 per cent. if you, as number 4, turn out to be the person that gives the pivotal evidence in the case – evidence which the OFT ultimately relies upon. Are you limited to 50 per cent? Is it good policy that you should be limited to 50 per cent. because you were fourth through the door? If the OFT wished to make that policy they are perfectly entitled to but it should be set out in advance, that if you are not in the leniency programme there is a cap of 40 per cent.

THE PRESIDENT: The cap is 50 per cent.

MR GREEN: I think they have said that 40 per cent. is the maximum that we should have outside of leniency.

THE PRESIDENT: Sports Soccer got 50 per cent.

MR GREEN: If they got 50 per cent. then 50 per cent.

THE PRESIDENT: But anything more than 50 per cent.----

MR GREEN: Is out of bounds.

THE PRESIDENT: Is out of bounds.

MR GREEN: Yes. That may be a policy which they could adopt ----

THE PRESIDENT: But it is not published.

MR GREEN: It is not published, and if they did adopt the policy we would be saying to you that it is good as a rule of thumb, but it cannot be applied in an absolute sense. That is all I wished to say about leniency. The next point ----

THE PRESIDENT: So are you saying that under s.38(1) what you say is an unpublished policy ought to have been published in the Guidance?

MR GREEN: We are entitled to draw a legitimate expectation from a document which does not have a limit on credit. We are entitled to say that we will get such credit that is commensurate with the value of the evidence that we provide and the extent of the co-operation and it is at large because that is what 2.12 says. If you wish to apply for leniency you know what the score is. Those are the Rules you comply with, you get what you have bargained for. If you are not in leniency, then it is in a different exercise, but the policy which provides a greater discount is just as great outside of leniency as it is. There is no greater advantage of being in

leniency than out. You can co-operate, further the public interest in the suppression of cartels outside of a leniency agreement, just as much as you can ----

THE PRESIDENT: Having got 40 per cent. for the co-operation you gave as from the Rule 14 Notice, having resubmitted those witness statements which were much improved on the previous versions, what further element over and above that is there?

MR GREEN: Because it is quite plain, and we were told at the outset that the extent of one's co-operation is in substantial measure a function of time.

THE PRESIDENT: If it starts earlier.

MR GREEN: If it starts earlier. Let us take the most benign version of events according to me. The OFT take our witness statements and our documents at the end of December, and they then work with those and my client with a view to producing a Rule 14.

THE PRESIDENT: We take the point on the documents, but in relation to the witness statements incomplete and inaccurate as they were, could it really be said in terms of 2.12 that that co-operation in relation to those witness statements could have enabled the enforcement process to be concluded more effectively and more speedily than otherwise could have been?

MR GREEN: In some respects absolutely yes, for example the 8th June meeting, evidence about the Golf Day – Mr Fellone giving the first evidence of the ring around.

THE PRESIDENT: I think we have got that point.

MR GREEN: That is the substantive point. It is very much a curate's egg but there are areas where the answer is "yes". Miss Bacon makes the point that if you are in a leniency programme, a process of perfection and improvement starts as part of the programme. If you start at an earlier stage you get to a better position more quickly and you iron out errors.

The next point I wish to make concerns the OFT's submission that it is all just an unfortunate error. This is, we would submit, a most unfair proposition. One can see from para.596 of the Decision that it was very deliberately drafted. It has a series of statements within it which can only be interpreted as a deliberate expression of the view that we get no benefit for post reply co-operation. Can I pick up a number of points within the drafting which really makes it explicitly clear that the OFT's position was quite deliberate. It was not a mistake, it was not a typo, it was not a drafting error, it is not a slip rule case. They say:

> "Umbro has co-operated with the OFT's investigation principally in its responses to s.26 Notices and in its written and oral representations on the Rule 14 Notice and supplemental Rule 14 Notice."

So that makes it clear as to the precise points in time at which we co-operated. They buttressed that by producing the negative statement which makes it clear;

"No significant omissions or co-operation was given until Umbro submitted its written representations on the Rule 14 Notice. The admissions at this stage [in other words, on the Rule 14 Notice] did assist the OFT by enabling the enforcement process to be concluded more effectively in respect of the Replica Shirts' Agreements. It gave the OFT a more complete picture of events and this led partly to the issue of the supplemental Rule 14 Notice as a result. The OFT relies on the admissions…"

And this is also important for a reason I will give you in a moment:

"The OFT relies on the admissions made as set out in detail in part 3 above, particularly in relation to the Replica Shirts Agreements."

When you go back to Part 3, and I think I can just do this by reference, footnote 167 explicitly says that a great deal of what they are doing is taken from our reply to the Rule 14 Notice. So they cross refer to that particular document – not to anything before that. They rely heavily by cross reference on the reply to the Rule 14. There is a very deliberate statement of fact and policy that we get our co-operation discount from the date of the Rule 14 and explicitly not before that.

Now it is, with the greatest of respect, not open to a decision maker to say after the event that there were other things in its mind. Legal certainty, which is an important principle, and an extremely important one in respect of penalties, means that a decision maker who imposes a fine should be explicit about the reasons. It is nowhere stated in the Decision that 40 per cent. is due only to a policy Judgment based on the Guidance. The OFT accepts that this policy is not in any written statement. The policy has every appearance of being on the hoof, and I have made my submissions about the circumstances in which they can change it.

The OFT has a duty to be clear and transparent. If one changes the scenario to test the logic, a Crown Court Judge who makes clear sentencing remarks cannot, when the matter comes before the Court of Criminal Appeal write a note to prosecution counsel saying "Oops, please tell the Court of Appeal there were other things in my mind. The Court of Appeal takes the transcript, looks at the remarks and draws accordingly. Justice cannot be adjudicated upon any other fragile basis that the OFT submits to you. That is all I wish to say about that.

So far as Mr Turner's suggestion that fines should be increased, this is based on the fact that Mr Ronnie gave extra evidence under intense cross-examination and he said that this should have resulted in co-operation earlier. He relied upon the word "probably" in para.302, but I have taken you to 301, and 303 where you found that Umbro did not mislead the OFT and Mr Ronnie did not mislead you. It is common ground that he was in error. Mr Ronnie, at the time he gave that evidence, was an employee of Sports Soccer not of Umbro. It is odd, we

would submit, that an individual which assists the Tribunal and gives expanded evidence should trigger the consequence that that witness's employer then gets a fine. This is counter intuitive. It creates an incentive on witnesses not to expand their evidence and it creates an incentive on employers not to tender their witnesses or co-operate with the OFT in an Appeal. With respect, we submit it is a bad point.

One or two concluding matters, if I may. Consequences and conclusion. As you know, the OFT has refused to give Umbro credit for pre-July co-operation. Instead it fined Umbro a sum which measured against turnover statutory maximum or operating profit, and you will get the figures from us once we have managed to verify them, is disproportionate – six times higher than JJB statutory maximum, eight times higher than Allsports' statutory maximum. On average four times higher than any Appellant in respect of the statutory maximum, and this was a sum which, as we will be able to clarify to you in due course, was a very high percentage of its operating profits. But yet this was the company that endeavoured to co-operate, provided documents, was the first to make substantial and accurate omissions certainly when comparison is made with Mr Ashley, who could not even get the details of the 8th June meeting right, and we submit in those circumstances that the failure to give mitigation pre-July was most unfair.

The final point in relation to the mitigation in relation to Appeal. Insofar as it is relevant to my client's Appeal, it does not appear to be part of the leniency programme that, if an undertaking helps the OFT in the course of Appeal, the OFT can give any further credit. Indeed, once a decision has been adopted, as a matter of principle it is difficult to see that the OFT can then take what happens after the Decision into account relation to the penalty in the Decision. It is something which the court can take account of, but it is hard therefore to see that it is something the OFT can deal with. So that if it was part of a leniency programme, and an undertaking breached it, continuous co-operation included for the investigation and the Appeal and the OFT said "You have not co-operated in the Appeal, it is difficult to see how the OFT can then go back and increase the penalty. So I am not certain that there can be a clear and easy nexus between co-operation and an Appeal, though one can see that it may well be in the public interest that such a link should exist.

Umbro did not get leniency, it did not get co-operation and discount for pre-July, but Umbro witnesses not only gave evidence voluntarily but did so accurately and you set out in para.308 that you accepted unequivocally the evidence of the three Umbro employees who gave evidence. Mr McGuigan did not give evidence to you, he was available – Mr Marsh equally. What Mr Turner did not explain to you about the process prior to the Appeal was that

the OFT used Umbro extensively. Indeed, the entire legal team visited Umbro's head offices to interview witnesses in situ and counsel came up on other occasions as well. They had full access to Umbro's employees in preparing this case with Umbro's co-operation. It is in the OFT's interests that witnesses should be available on Appeal. It is also in the Tribunal's interests. Umbro could have refused access. We could have said to counsel and the legal team "You cannot come up to our offices and walk around, talk to our people, we will not make them available." They could have refused to answer queries.

THE PRESIDENT: This is at what stage, Mr Green?

MR GREEN: This is in the preparation of the Appeal. We could have just refused point blank, and no one would have been any the wiser and there would have been no come back.

MR COLGATE: Presumably so far as Mr Ronnie is concerned we are talking here about Sports Soccer?

MR GREEN: In relation to Mr Ronnie of course it is Sports Soccer, yes. Four witnesses were available to speak to the OFT – McGuigan, Marsh, Prothero and Fellone – Mr Ronnie of course had departed at that stage.

THE PRESIDENT: I am just reminding myself what further Umbro evidence, apart from Mr Ronnie was put in at that stage?

MR GREEN: I do not think any of the witnesses produced further witness statements for the purpose of the Appeal. In a sense that increases the value of the assistance. The OFT needed to learn, they wanted people to talk to, they were collecting evidence which was coming in from other parties. You have a ready sounding board. Umbro could simply have shut its doors.

THE PRESIDENT: There was a further witness statement from Mr May.

MR MORRIS: Mr May had left Umbro by that stage.

MR GREEN: I think that is correct – I am just getting that from behind.

THE PRESIDENT: Apart from Mr Ronnie, we heard from Mr Prothero and Mr Fellone who both dealt with their statements made in July 2002 – in fact Mr Prothero's statement I do not think it appears it was updated. I do not think there was much difference in relation to Mr Prothero and Mr Fellone between their July statements and their earlier statements – maybe Mr Fellone's statement was a bit fuller.

MR GREEN: And Mr May's statement was the one he prepared whilst he was at Umbro – no, I am being corrected. I stand corrected. That is a fact and the only distinction I draw is between a company who simply slams its door shut and says "All right, we have been fined we will go and lick our wounds" and one who does not.

A very final matter. You will have seen from the documents, indeed you will have seen from Mr McGuigan's statement that Umbro was clearly contrite about what happened. You will see from Mr McGuigan in his witness statement of 12th July it is explicitly stated that Umbro understood, accepted responsibility for its part in the breaches (para.5). He personally accepted responsibility for ensuring compliance (para.18) and you have seen from the voluminous correspondence that Miss Roseveare, when she was first employed was not so much a breath of fresh air but a howling gale through Umbro, imposing leniency programmes, going to the OFT, trying to engage in a very detailed internal investigation. Umbro accepted its liability as Mr McGuigan set out in his witness statement, and accepted and understood responsibility, and I hope you will accept that actions speak louder than words.

Thank you very much.

MR MORRIS: Sir, can I raise three housekeeping matters, it will save time later on. The first is the figures for JJB turnover for 2000, they are in **this** document – I will hand it up – which is within the document bundle in any event. [Document handed to the Tribunal] You will see those figures attached there, which give on the first page – I do not need to take you to them, but it does have the England and Manchester United turnover for 2000 as well as 2001, and you will find the reference I have marked on, it is document bundle 4, and the tab number is on it as well, so it is already in the Tribunal's bundles.

The second point concerns two other references. Umbro accounts 2000, Mr Green can check this, are in Decision bundle 4, tab 55. Manchester United accounts 2000 – there is an extract from the 2000 accounts in Decision bundle 1, tab 24.

The third matter is that I would invite JJB, through the Tribunal, to provide to the Tribunal if possible the price of shorts for England, April 2003 and for England March 2004, transcript reference for the price of shirts at 13.79. It is a matter for JJB, but it was raised in the course of argument.

THE PRESIDENT: I think it is a bit late now, Mr Morris, we are on the last day of the penalty hearing.

MR MORRIS: Very well, we did ask before and there has been no response. There is one final matter which I am asked to address arising out of Mr Green's submission and I raise it only because it is a matter of OFT policy. It is important not to mis-state the OFT's submission on discount for co-operation outside leniency. Mr Turner did not say that there was an absolute cap at 50 per cent. to preserve the leniency programme. It is only that any discounts of this level or more need to be give sparingly and with reserve, bearing in mind the leniency programme. There was no absolute bar – it is a matter of discussion.

Those are my points.

THE PRESIDENT: Thank you. I have the impression we are just waiting for some outstanding turnover figures from JJB?

MR HOSKINS: Sir, yes, 2001 we are just getting in a form to get to you. I think what arose from our exchange was that you also wanted the 2000 ones from us, so we will need to go back to the clients to get them. I do not know whether you prefer to have 2001 first, or have them it altogether.

THE PRESIDENT: Whatever it was you were relying on when the submissions were made.

MR HOSKINS: We will provide both of those and we will provide them separately.

THE PRESIDENT: I am sure the Umbro accounts are in our documents anyway, Mr Green.

MR GREEN: Mr Morris has just given you the reference. We will check that and if there is any discrepancy we will let you know, but it sounded absolutely correct.

THE PRESIDENT: Tab 55, Decision bundle 4.

MR GREEN: Decision bundle 4, tab 55 was the reference given.

THE PRESIDENT: Good. Thank you all very much indeed. Judgment reserved.

(The hearing adjourned at 5.20 p.m.)