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IN THE COMPETITION
APPEAL TRIBUNAL

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

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

23 October 2003

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

BETWEEN:

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

Miss Kelyn Bacon appeared for Umbro Holdings Limited.

Mr Paul Harris appeared for Manchester United PLC.

Mr Laurence West-Knights QC and Mr George Peretz appeared for Allsports Limited

Lord Anthony Grabiner QC and Mr Mark Hoskins appeared for JJB Sports PLC.

Mr Andrew McNab appeared for Sportsworld Int. Ltd (applicant Intervener).

Mr Jon Turner and Miss Anneli Howard appeared for the Respondent.

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good afternoon, ladies and gentlemen. Before we start going through
2 the agenda for this afternoon, perhaps I could make one or two general points about the
3 conduct of this appeal and where we are.

4 First, as a matter of information, which may be useful for you to know that at
5 the moment we are thinking in terms of a hearing beginning on 8th March. We are also
6 thinking in terms of, very probably, a second case management conference to take
7 place on 12th December, just before Christmas. There is a certain amount of room for
8 discussion about those dates but not much because of the Tribunal's diary and the
9 Members' diary, but we would just like to signal that at the outset as to what our
10 present thinking is.

11 As far as the appeals themselves are concerned, at the moment we have four
12 separate appeals. We are provisionally of the view that those appeals should, formally
13 speaking, remain separate appeals - at least for the time being - although it is fairly self-
14 evident that at various stages it may be useful for certain issues to be heard in common.
15 For example, one can think that at the stage of examination of witnesses it may well be
16 sensible for that to be done in common. It may well be sensible for any discussion of
17 penalty to be done in common, and in general it is almost certainly sensible for these
18 cases in a general sense to be heard together. However, for formal purposes, at least for
19 the time being, it is probably useful for them to stay separate and we can discuss that
20 in more detail later this afternoon.

21 Two of the appeals put in issue the underlying facts, and two of the appeals are
22 basically concerned with penalties. At the moment our provisional view is that it is
23 going to be difficult to deal with the cases involving penalties in advance of the cases
24 involving issues of fact. It seems logical to deal with factual issues first.

25 There is next specific and general issues about confidentiality. What I am going
26 to say very shortly about that is without prejudice to any specific submissions that we
27 are going to hear on confidentiality. In general the Tribunal at the moment thinks that
28 the aim should be to seek the maximum openness and transparency possible on all
29 issues that could possibly be affected by confidentiality. That affects, in particular, the
30 calculation of the fines, but it may also affect other commercially confidential matters.

31 We are not, in general, comfortable in a case involving penalties with certain
32 things being disclosed on a "counsel only" basis. That is a situation that can put both
33 the legal advisers and the Tribunal in a difficult position.

34 In relation to the calculation of the fines specifically, most of the turnovers that
35 form the basis of the calculation relate to financial years which ended in 2000, or in
36 2001. We are about to enter 2004, and it may therefore very well be doubtful whether
37 there really is any residual important commercial confidentiality to be protected in
38 relation to those turnover figures. If there isn't that would enable the turnover

1 calculations in general to be discussed more openly - certainly so far as parties who are
2 already before the Tribunal are concerned. Other parties who are not before the
3 Tribunal, of course, may need separate consideration. That is a matter that we would
4 like in due course to discuss with the parties - whether in general we can move to a
5 general lifting of confidentiality except for matters for which confidentiality really
6 needs to be protected.

7 If we were able to move in that direction that would also facilitate as between
8 the parties a general exchange of pleadings, so that everybody knows where everybody
9 else is coming from, albeit that the cases remain technically separate cases.

10 Those, I think are just some general matters that we would like to put on the
11 table, as it were, before we start.

12 The usual procedure in this Tribunal on a case management conference is to
13 take the agenda as circulated, and simply work through it. In this case everybody has
14 got the same agenda, except in the JJB case there is an additional item on the agenda
15 relating to JJB's Notice of Appeal. May I suggest, however, that we take the four
16 agendas - we have the four agendas in front of us - and we do these points one by one.

17 As far as the forum for the proceedings is concerned, we think we can get that
18 out of the way straight away. The Tribunal does not formally have to take a decision of
19 the forum for the proceedings, but it has a distant effect, possibly, on costs and on
20 procedure. I take it that nobody is contesting that the forum should be other than
21 England and Wales for the purposes of this case. If that is so we will simply decide for
22 the purposes of Rule 18 that the forum is England and Wales.

23 It may next be convenient, simply to get it out of the way at the risk of now
24 moving the debate towards a specific issue that arises in one case, the case of JJB, to
25 deal with the situation regarding JJB's Notice of Appeal. In that case, as we understand
26 it, Mr Turner, the Office lawyer is taking the position that the Notice of Appeal does
27 not comply with Rule 8 of the Tribunal's Rules, and they seek directions to the general
28 effect that something should be done to make it comply?

29 MR TURNER: Yes. Sir, I do not know whether you have had an opportunity to read the
30 Notice of Appeal itself.

31 THE PRESIDENT: Yes.

32 MR TURNER: The letters that were attached to our skeleton, which were the
33 correspondence between the parties on the point?

34 THE PRESIDENT: Yes.

35 MR TURNER: And I made reference also to certain provisions of the Tribunal's current
36 "Guide to Appeals".

37 What we say in essence is that the Notice, as it currently stands, represents a
38 wholesale failure to plead to the facts found by the OFT, which includes matters of

1 inferences from documentary materials, circumstantial evidence, as well as witness
2 evidence, and to say which facts are contested, and on what grounds, and we have
3 drawn attention to those provisions of the Guide, which repeatedly emphasise the need
4 for a written development of the grounds of appeal.

5 THE PRESIDENT: Yes.

6 MR TURNER: I do not know whether it is necessary for me to take you through those
7 provisions?

8 THE PRESIDENT: No, I think you have made your point fairly clear in your skeleton
9 argument. Lord Grabiner, I think we better try to tackle this issue, if we may.

10 LORD GRABINER: Yes, I am more than delighted to do so, and if I may say so also it is
11 quite convenient, so to speak, kick off with it because I do want to say something very
12 briefly about each of the charges, which is relevant to the argument that we make. So it
13 is probably quite convenient for everybody that we do so, because we are all impacted
14 by this, apart from those, of course, who are only concerned with an appeal, so to
15 speak, against sentence.

16 THE PRESIDENT: Yes.

17 LORD GRABINER: We do not accept that the Notice of Appeal is defective and, as my
18 friend has pointed out, the argument is based upon the content of the Guide To
19 Appeals. My understanding, incidentally, is that that Guide is applicable to the 1998
20 Rules, and not to the 2003 Rules. I suppose I should not be technical about it, but there
21 are not, as I understand it, any current guidelines in place.

22 THE PRESIDENT: I do not think the Rules have changed materially in this particular
23 respect.

24 LORD GRABINER: I see. I have not seen any new guidelines at all actually, and I do not
25 know if they have been published. In any event, Rule 8 is the starting point, because the
26 guidelines, whether they be applicable or not, are no substitute for the Rules.

27 Rule 8 tells us precisely what the Notice of Appeal should contain. In particular
28 it asks for: a "**concise**" - and I emphasise that word - statement of offence
29 rather than, for example, a rambling or prolix one. It asks for a "**summary**" - and I
30 emphasise that word - for the grounds for contesting the decision, so that it is possible
31 to detect from the document whether or not the complaint is that there has been an error
32 of fact, or that there has been an error of law, or that the OFT has made some error in
33 the exercise of its discretion. We are also told that there must be "a succinct
34 presentation of the arguments supporting each of the grounds of appeal".

35 THE PRESIDENT: Yes.

36 LORD GRABINER: So what the rule confirms, as one would expect, is the notion of
37 precision, and the notion of conciseness. They are, in my submission, quite inconsistent
38 with the notion of a detailed factual analysis taking the form of a 50 page skeleton

1 argument. I would respectfully suggest that that would be wholly inappropriate. The
2 important point is, and we certainly accept this, that everybody should understand the
3 nature and substance of the subject matter of the appeal, but the document is not
4 intended to contain the totality of submissions that would be made, for example, at the
5 closing of the whole of the evidence following cross-examination and so on.

6 This analysis, in our submission, is reinforced by the fact that under Rule
7 8(6)(b) the appellant is required to annex to the notice every document that is relied
8 upon, including every witness statement that is sought to be put in evidence, whether
9 factual or expert. The object of the exercise is to ensure that nobody is taken by
10 surprise at the hearing.

11 Now, under the Rules, the arguments to be made on the appeal must be founded
12 upon the materials annexed to the Notice of Appeal, so that no other matters can be
13 relied upon without leave from the Tribunal. Against that background, and I apologise
14 for, so to speak, teaching the Tribunal to suck eggs because I am in the learning process
15 myself, so I do apologise straight away, but against that background what we say is that
16 this set of appeals raises very straight forward disputes of fact in connection with four
17 distinct findings of infringement against which we appeal. The other point is concerned
18 with penalty. But the appeal does not raise any subtle legal analysis.

19 THE PRESIDENT: So you are not taking any legal points?

20 LORD GRABINER: There is no legal point that I am aware of thus far and certainly there is
21 no subtle point of principle either that I am aware of and everything is plain and
22 obvious.

23 Can I illustrate the point that I am making, and I will do it concisely, by
24 reference to each of these allegations---

25 THE PRESIDENT: Yes.

26 LORD GRABINER: ---and the different decisions. First, was there an agreement between
27 various parties, including JJB to fix the price of England shirts at the time of the Euro
28 2000 tournament? That is the first one.

29 The OFT decided that there was some such agreement between Umbro, Messrs
30 Ronnie and Atfield, and Sports Soccer by Mr Ashley. It is said that Sports Soccer
31 wanted an assurance from the other major retailers in effect to go along with that
32 agreement. JJB contests that finding of fact, namely, that that assurance was required
33 from others including us.

34 JJB also denies that part of the OFT decision to the effect that Mr Ronnie
35 subsequently secured JJB's agreement to participate in the price fixing.

36 Given the serious of the allegation and the finding, it is fairly breathtaking, we
37 would suggest, that Mr Ronnie never says who it was he spoke to---

38 THE PRESIDENT: I don't want argument at the moment on the merits, Lord Grabiner---

1 LORD GRABINER: Absolutely.

2 THE PRESIDENT: ---just on the principle of what is to go in the Notice.

3 LORD GRABINER: But in any event the conversation is specifically denied by JJB

4 witnesses, and that is the essence of the first issue. JJB cannot be expected, we suggest,
5 in making its closing submissions now, and the idea that the OFT does not have a
6 sufficiently clear indication from the Notice of Appeal and the witness statements, that
7 this is what this part of the case is about is, in our submission, not sustainable. So there
8 is a short question: did Mr Ronnie have a conversation with anybody at JJB and secure
9 their agreement to that price fixing arrangement? That is the issue of fact. It is a very
10 clean, simple point.

11 The second decision is: was there an agreement between, amongst others, JJB to
12 fix the retail price of Manchester United home shirts for the 2000 launch? Again, the
13 dispute is in a very narrow compass. It is said that the agreement was made on 8th
14 June, 2000 at the house of Mr Hughes of Allsports. JJB's witnesses say (Messrs Whelan
15 and Sharpe) that they understood the purpose of the meeting was to discuss the possible
16 acquisition by JJB of Allsports' business, because I think Mr Hughes was going to go
17 into hospital for some major surgery.

18 As soon as Mr Hughes began talking at that meeting about a price fixing
19 agreement the case for JJB is, and it is in the witness statements, that their
20 representatives left the meeting and in due course the fact of the meeting was reported
21 to the Board of JJB just a couple of weeks later. There is common ground between
22 Hughes, Whelan and Sharpe that no agreement was reached.

23 There are two factual issues: did Hughes advise Sharpe in advance of the
24 meeting that its purpose was to discuss retail prices? That is the first point. The second
25 point is: is Mr Ashley's evidence to the effect that there was such an agreement reliable
26 or credible given that, thus far, no witness statement has ever been provided by him ,
27 and such records as there are, of his version of what took place are confused and
28 inconsistent. I do not enter upon that debate, but what I have done in the last couple of
29 sentences is to encapsulate the totality of that debate. Once again, we would suggest,
30 that no one should be surprised by anything that I have just said, and it can be gleaned
31 from our Notice of Appeal, in conjunction with our witness statements.

32 The third point is this: was there an agreement between, amongst others, JJB in
33 relation to the retail prices of England and Manchester United shirts for the remainder
34 of 2000 and 2001? There are some disparate factual matters that are relied upon by the
35 OFT. The three key facts relied on by them are: First, that JJB imposed commercial
36 pressure on Umbro. Secondly, that JJB sold shirts at High Street prices; and thirdly,
37 that JJB cancelled an order for Manchester United centenary shirts and only reinstated
38 it after having asked for and received comfort about Sport Soccer's intended retail

1 prices.

2 Now, taking each of those points again quite briefly. The first finding, the
3 decision relied on assertions by Umbro's witnesses that Umbro's price fixing behaviour
4 was conditioned by commercial pressure from JJB. JJB's witnesses deny this and they
5 deny that pressure was exerted as suggested and that is what their witness statements
6 say.

7 As to the second finding, the decision relies on the fact that between mid-2000
8 and August, 2001 JJB consistently sold shirts at High Street prices - the price was
9 £39.99, a price regularly deployed by JJB, and JJB says that it followed a general
10 policy of pricing all replica shirts at that price since launch in 1996, and that it did not
11 conspire with Umbro on price and consistently priced below the recommended retail
12 price.

13 As to the third finding, the decision relies on Umbro's witnesses to the effect
14 that its price fixing behaviour was conditioned by commercial pressure. Well it is
15 denied that any such pressure was, in fact, imposed. That was the first finding. As to
16 the second finding, the decision relies on the fact that between those dates in mid-2000
17 and August, 2001, JJB consistently sold shirts at £39.99, but JJB's evidence is that it
18 had followed that policy.

19 It is correct on the third finding that JJB cancelled an order for the centenary
20 shirts, but the explanation for that is that JJB was driven to do so by legitimate
21 commercial considerations. Umbro had sold similar stock to Sport Soccer with a deep
22 discount which meant that JJB could not sell the stocks that it had already held at any
23 kind of profit. So it cancelled the order by way of protest to bring Umbro to the
24 negotiating table. It succeeded in doing so, but it certainly denies that there was any
25 attempt to produce the result of any kind of conspiracy to bring down the retail prices.

26 So once again, that is a slightly more complicated one because there are
27 disparate facts relied upon in the charge that is made, but the essence of what we say
28 can be distilled, or seen from the witness statements perfectly plainly and cleanly.

29 Fourthly, and finally before you come to the point about the penalty, was there
30 an agreement between, amongst others JJB, whereby the parties agreed to align Sports
31 retail prices for replica kit for England with JJB prices? Again, the lines of dispute are
32 self-evident. The decision is that on 7th February, 2000 the parties agreed to Sports'
33 retail prices for replica kit with JJB's prices. It is said to have been made in the context
34 of negotiations as to whether JJB would supply Umbro products to Sports Etail. JJB's
35 witnesses deny that they entered into any such agreement.

36 On or around 11th February, so that is just a few days later, JJB informed
37 Umbro that it did not wish to be involved in the Sports Etail Project. Now, this
38 decision must have been clear to all the other parties as JJB did not subsequently

1 supply any Umbro products to Sports Etail. Therefore, whatever the other parties may
2 or may not have agreed or done, JJB says that it was not a party to any offending
3 agreement. Now, again, the essence of the dispute is perfectly clear, and the Tribunal
4 will have to determine the dispute in the light of the oral testimony.

5 Then the final point is the question penalty and the main issue relates to the
6 OFT's failure thus far to identify the appropriate product market as we would
7 respectfully suggest, which serves as the starting point of the calculation of the penalty.
8 Again, as I said at the outset there's no mystery about any of the points that we are
9 taking, the areas of dispute are clearly identified in the Notice of Appeal. So what we
10 do respectfully suggest is that whatever may be the position in other cases. If it is
11 perfectly clear and plain that there are factual disputes surrounding, for example, the
12 making of an alleged oral agreement, then it is perfectly plain that that is what the
13 dispute is and we do suggest that that is precisely what the purpose of Rule 8 is, that we
14 have complied completely with Rule 8, and that all the points that we are going to be
15 relying upon are abundantly clear from the witness statements themselves, and that we
16 cannot reasonably be expected to do more than that; and I certainly respectfully suggest
17 that it is applicable not just to this case, but maybe for lots of future cases that there is
18 not, or may not be - certainly not in a case of this kind - a justification for a massive
19 document which simply reproduces, for example, whole slugs of material which are to
20 be found in the witness statements themselves. There cannot be any commonsense in
21 that. But in a fairly straight forward case, such as this one, where you are confined to a
22 debate in relation to all these matters, as to whether or not there was, at least in three of
23 them, a specific oral agreement on a particular day. There cannot be any
24 misunderstanding as to what the scope of the debate is as between the appellants and
25 the OFT.

26 Sir, that is all I wanted to say about that point.

27 THE PRESIDENT: Before I call on Mr Turner, I wonder if we could just discuss, as it were,
28 one or two of those comments you have just been submitting, Lord Grabiner.

29 I suppose the first point to make is that, self-evidently, these rules and the
30 general approach set out in the Guide is not there to cause difficulties to the parties. It
31 is essentially there to help the parties explain to the Tribunal what their case is.

32 LORD GRABINER: Absolutely.

33 THE PRESIDENT: It is very much in your interest that we are immediately seized with
34 what your case is. The situation that we have in this case is that we have a very lengthy
35 OFT Decision which certainly relies on the facts that you have put in issue, but also
36 relies on quite a lot of background, and quite a lot of documents, and one of the things
37 that we would like to know, as it were, is whether and how far those documents and
38 that background is accepted or not. For example, there is quite a lot of information in

1 an annex to the decision about what the prices were at a given time, and there is an
2 allegation about whether JJB stopped discounting in April, 2000 and didn't discount
3 thereafter, and there are various suggestions in various documents that JJB put pressure
4 on Umbro and so forth, and so on.

5 What we need to know is whether you have a position on all those other
6 matters, the ones we have not so far mentioned, or whether we just take it that they are
7 neither not in issue, or that the OFT is in some put to proof, or what?

8 LORD GRABINER: Can I make two points? First of all, we are not in the business of coming
9 along and surprising somebody with a non-admission or denial of something, so to
10 speak, at the hearing, because that would be wholly inappropriate.

11 THE PRESIDENT: Yes.

12 LORD GRABINER: And that is precisely the vice that the point you are making to me is
13 aimed at.

14 THE PRESIDENT: Yes.

15 LORD GRABINER: So we are not in that business. But could I inquire, respectfully, if it is
16 anticipated that in advance of the hearing there will be an exchange of what one might
17 call "skeleton arguments" or some outline argument?

18 THE PRESIDENT: There probably will. That takes us on, I think, to two further points. The
19 way this procedure is constructed, and it is basically based on a European model that
20 works in other cases.

21 LORD GRABINER: Yes.

22 THE PRESIDENT: It is true that the Guide has not been updated because we are waiting for
23 a particular issue under the Communications Act to be sorted out, I think the same
24 principles apply, though of course they are always fact specific. The basic idea is that
25 as much as possible is disclosed at a relatively early stage in the case so the OFT knows
26 what is really in issue so that they can produce a defence and that matters which, in
27 more traditional forms of procedure would wait until skeleton argument, an oral
28 hearing, can actually be thought about by the Tribunal beforehand so that we can do all
29 our homework and be ready for what can be quite a concentrated sort of hearing instead
30 of spending days and days in court and all of that. That is the idea.

31 LORD GRABINER: I understand.

32 THE PRESIDENT: Now, at a very basic level for that sort of thing to work what we need is
33 to know what, if any, position an appellant has got on the various paragraphs in the
34 decision and in so far as an appellant relies on witness statements, or other documents
35 or countervailing indications, we need a cross-referenced Notice of Appeal or
36 supporting document that simply tells us where to look for the points that are being
37 made. So that if you say "Well, I deny.." something, we need to know where to find the
38 denial, who is giving the evidence, what it is based on or whatever.

1 LORD GRABINER: Yes.

2 THE PRESIDENT: In this particular case, just to take a for instance in the exchange of
3 correspondence at some point it pops up that "JJB relies not only on the witness
4 statements that have been put in annexed to the Notice of Appeal, but also on the
5 witness statements that were put in before the OFT". What we need to have is a link
6 between all these points so that we can find everything. Now, it may well be that the
7 points you are making on the appeal are limited to the ones that you have just very
8 helpfully explained to us and that is very helpful.

9 LORD GRABINER: Well, certainly they are and, if I may say so, the points that you are
10 making to me I must say, speaking for myself, would respectfully suggest that these are
11 matters which so to speak fall between the Notice of Appeal and the date of hearing,
12 because the kind of detail that you have just been identifying is certainly not reflected
13 in the provision of Rule 8. I do not want to be over-technical about this but on the face
14 of it that is not what Rule 8 says. I can understand the value of having the kind of
15 regime that you have just been describing in place, but for ease of reference and for
16 everybody's convenience, but it is certainly not reflected in the provisions of Rule 8 if I
17 may respectfully suggest.

18 Could I suggest this: I am not aware that we challenge, for example, any
19 documentary material as being either, for example, forged or non-existent or anything
20 of that kind. As to the significance of some piece of background fact, I am not aware
21 for example that we debate the background facts and, in so far as we intend to do so,
22 what I would prefer to do and what I would suggest is a convenient way forward, is to
23 fix dates for delivery of skeleton arguments, not for a few days before the hearing but
24 may be for three or four weeks before the hearing when the kind of precision that you
25 are describing would be more appropriately laid out in the light of an examination of all
26 the material. I have not, for example, studied all the underlying material - I just have
27 not had the time to do so, but I will do so. But I am very reluctant at this stage,
28 especially bearing in mind that we might be looking at a hearing date next March, to
29 undertake that exercise on a final or conclusive basis today with a view then to
30 discovering when I come to look at the material, probably some time in February or the
31 beginning of March, that there is more material I want to deal with. But it could be, it
32 could be done and should be done significantly in advance of the hearing so as to make
33 sure that no one can fairly say "Well, I am taken by surprise by what you are doing", or
34 for the Tribunal to say "Well, we were not actually aware that this is how you were
35 putting your case", because most of those criticisms would be valid, and I respectfully
36 accept that.

37 THE PRESIDENT: Well, let us see what Mr Turner says in a moment. But I think from the
38 Tribunal's point of view the Guide to Appeals is regarded in much the same way as a

1 modern Practice Direction, is regarded as supplementing what is actually in the Rule,
2 and we have so far been working to the ideas that were set out in The Guide to Appeal.
3 The Rules and The Guide to Appeal were prepared together and published
4 simultaneously.

5 There are two underlying points in this. It is to enable the Tribunal to get on
6 with preparing the case. At the moment we can get on with preparing three of these
7 appeals, but not your appeal.

8 The underlying point is to enable the OFT to plead its case so we can
9 understand what its case is. They are in a position to do that at the moment with the
10 other appeals, but it is more difficult with your appeal. We have not yet got, if I may
11 say so, a sort of linking document that puts your case together. It says what the case is
12 going to be but it does not with any precision set out precisely which paragraph of
13 which decision refers to which paragraph in which witness statement so we can say:
14 "Ah, yes, they're relying on Mr Whelan's second statement, paragraph 24 which
15 contests what the OFT is saying in paragraph 401 of the decision." That sort of working
16 structure is not there at the moment, and since you have had two months to do it it is
17 putting us and the whole timetable for this case into something of a difficulty.

18 LORD GRABINER: Well, I am sorry that you should take that view, and if that is your view I
19 would not seek to persuade you otherwise, because you are the readers of the material,
20 you have to take a view about it. But I would respectfully suggest, and I do say so
21 respectfully----

22 THE PRESIDENT: Yes.

23 LORD GRABINER: ---that the provisions of 5.4 go way beyond the provisions of Rule 8 of
24 The Appeals Rules. On the face of it, as one comes to it to read it fresh for the first
25 time, the flesh, if you like, which is contained in the Guide goes well beyond the plain
26 language of Rule 8. But if that is the way that you would prefer to proceed----

27 THE PRESIDENT: It is what we find helpful, let's put it that way, Lord Grabiner, without
28 debating exactly what the minimum legal requirement is, it is very helpful for us to
29 have that sort of approach.

30 LORD GRABINER: I entirely understand and we will abide by whatever ruling you think it is
31 appropriate to make on that issue, and we will make the obligation, that is not a
32 problem. But I do respectfully say that there can be no doubt whatever as to where we
33 are coming from on this debate.

34 THE PRESIDENT: Yes, well can we take it that the points you have very helpfully made
35 today are the main points?

36 LORD GRABINER: Oh they are the points.

37 THE PRESIDENT: They are the points---

38 LORD GRABINER: Yes.

1 THE PRESIDENT: ---and, as far as we know, and without the Tribunal's permission, you
2 would not envisage advancing other points?

3 LORD GRABINER: I would not envisage advancing other points and if we discovered that
4 there were, if there was another point or there were other points that we wanted to raise
5 we would give notice of them immediately.

6 THE PRESIDENT: Yes, thank you.

7 LORD GRABINER: But I am not aware of any such points. There is no machiavellian plan
8 here to spring some wonderful point at the last minute giving nobody an opportunity of
9 dealing with it, which would be unacceptable.

10 THE PRESIDENT: Let us see what Mr Turner says in the light of that discussion?

11 MR TURNER: Sir, I will be very brief because Lord Grabiner has very graciously
12 indicated that he is minded to accept the Tribunal's guidance on this and has listened
13 carefully to what you have said. But there are a few short points that I would make, and
14 then I would wish just to show you some aspects of the decision because it is not clear
15 to me that the full force of what is needed to be done has been appreciated.

16 First, the position that Lord Grabiner has taken is that he has encapsulated the
17 totality of the debate in what he has just said which, of course, itself has gone some
18 way beyond the very small Notice of Appeal. But even in relation to that he has
19 expressed himself at a level of generality which has glossed over the specific matters
20 and facts found in the decision and which do need to be addressed if the OFT is to be
21 able to conduct its defence and for the case to proceed efficiently, and I will come to
22 that in a moment. But, just before doing so, the suggestion that this is an unreasonable
23 thing to ask I think is not sustainable, particularly in view of the fact that Allsports,
24 which is in a very similar situation, has itself produced a Notice of Appeal which does
25 precisely what we would have expected to have been done.

26 So far as the legal issues are concerned, I was slightly surprised to hear that
27 there will be no arguments on the law. For one thing in relation to the Notice of Appeal
28 itself in relation to penalty, at paragraph 17, there are references to disproportionality
29 and so on. The law may well become relevant in that context if not also in the context
30 of infringement where one needs to decide the test for when an agreement that infringes
31 the Chapter I prohibition has been arrived at.

32 Next, in relation to witness statements, and the suggestion that these can
33 supplement, or rather fill the gap provided by a slim Notice of Appeal, we respectfully
34 say "no", first, because one needs to understand how the witness statements relate to the
35 case that is being made. It is not sufficient to say "Look at the witness statements".
36 Secondly, because between the witness statements themselves there are occasional
37 differences, sometimes in nuance and sometimes more significant than that, which need
38 to be resolved by a clear statement of what the parties' case on those issues is.

1 Finally, if I may ask the Tribunal just to turn up the decision, I would try to
2 illustrate the point that even Lord Grabiner's exegesis of his case has not tackled the
3 specifics of the allegations adequately. I do not know whether each member of the
4 Tribunal has a copy of the decision to hand, but if you would turn, for example, to the
5 central part of the argument on what I will call the "Euro 2000" allegations relating to
6 the England shirt. In the decision, the primary elements, the central elements of the
7 analysis appear at paragraphs 412 to 416 starting on page 139.

8 You will see the heading for section 6.2 is that it is an agreement between the
9 various parties with respect to this tournament. In paragraph 415 in particular a number
10 of specific issues are listed, and those are all relied upon as really at the heart of that
11 particular limb of the case.

12 Then if you jog forward to paragraph 421, under the heading "Views of the
13 Parties", you see the summary of JJB's representations preceding the decision, and the
14 way that those were disposed of is at paragraph 431.

15 THE PRESIDENT: Yes.

16 MR TURNER: Now these specific matters have not been adequately addressed, and it is
17 not sufficient merely to say that everything is denied, and this is a matter of witness
18 evidence. If I may take just one or two examples.

19 If one takes the very first point at paragraph 415A, one of the first points that
20 arises is that Mr Ashley, then of Sports Soccer, refers to an agreement that was
21 concluded, and he names there Mr Sharpe of JJB as having been the protagonist.

22 THE PRESIDENT: Among the protagonists.

23 MR TURNER: Among the protagonists - I mean on the part of JJB. He was the JJB man.

24 THE PRESIDENT: Yes.

25 MR TURNER: If one then goes to 421 and sees at least the summary of what JJB said then,
26 just as one goes over the page: "Had Mr Sharpe taken such a call, Mr Sharpe would
27 have had to inform Mr Russell and Mr Whelan if the agreement was to have any
28 effect", and JJB said well, he didn't do that.

29 Finally, at 431 that point is addressed by the Office of Fair Trading, and it is at
30 the top of page 146 in the last sentence:

31 "If this course was taken by the late Mr Sharpe," and it was noted that he did
32 not directly address the specific point in his witness statement, "...he would not have
33 needed to inform either Mr Russell or Mr Whelan of this call as JJB was already
34 retailing at High Street Prices." So that is what the OFT concluded on that particular
35 little point. We do not know what they say about that. Maybe they say that is right,
36 maybe they say that is wrong, but we would expect in their Notice of Appeal them to
37 say if they contest that, that they do contest it and why - why that inference is wrong.

38 I can go on systematically through each of these points and to them---

1 THE PRESIDENT: Yes, I think you make a point, Mr Turner.

2 MR TURNER: Yes, that is the essential point. So we say that it is sufficient simply to wait
3 for further developments, but that the appropriate course now would be to ask JJB to
4 re-plead the Notice of Appeal; to do so within a prescribed time frame, and then the
5 case gets off on the proper footing, and we have suggested in our skeleton 7 days - the
6 precise period may well be open to argument but we would say that from our point of
7 view, because it is now for us to prepare the defence, it is very important to have a
8 properly pleaded case, and not simply to defer it and we therefore do ask the Tribunal
9 to assist us with firmness on this point.

10 LORD GRABINER: Sir, my learned friend can assume that all those matters are in dispute -
11 that the conversations took place and that the inference should be drawn -and at the end
12 of the day and, indeed, at the hearing of this appeal, the OFT is going to have to prove
13 this case in relation to each of these headings, and we are going to contest each one of
14 them because we deny that we participated in these agreements, and we assert that the
15 decisions below were wrong. So there cannot really, with respect, be any
16 misunderstanding about that, but I do not want to debate this all over again, because
17 we---

18 THE PRESIDENT: No, no. What I think would help us very much, Lord Grabiner, if your
19 clients are able to do it, is if within some time frame to be discussed you would be kind
20 enough to serve a supplementary schedule to your notice of appeal, which indicates
21 which paragraphs of the decision are put in issue, so we know which paragraphs we are
22 talking about, and under each heading, where it is put in issue, what particular elements
23 you are going to rely on and where there are specific elements, where we are to find
24 them. So "see witness statement so-and-so, document so-and-so", and so forth.

25 LORD GRABINER: Paragraph so-and-so, yes.

26 THE PRESIDENT: Paragraph so-and-so, so that we are all clear and there is no later
27 misunderstanding, however much people are trying in good faith to avoid them, there is
28 no later misunderstanding as to which case is which. Would that be---

29 LORD GRABINER: That suits me fine, largely because it is Mr Hoskins who will have to do
30 it! [Laughter] Would you bear with me for one moment - it is power without
31 responsibility. [Pause] Yes, Mr Hoskins' points, with which I respectfully agree, subject
32 of course to the views of the Tribunal are, that he would be happy to perform that
33 exercise, but in relation to each of the grounds of appeal, rather than to comb through
34 every paragraph of the decision saying which bits we agree with or disagree with. In
35 other words, it is going to be focused on the appeals themselves, or the subject matter
36 of each of the appeals.

37 THE PRESIDENT: Yes well if, in the context of this exercise, a paragraph is not put in
38 issue we shall simply assume it is not put in issue.

1 LORD GRABINER: I understand.
2 THE PRESIDENT: And proceed on that basis.
3 LORD GRABINER: I understand, and when revisiting the debate as to precisely what our
4 arguments are in relation to each of the appeals we will take account of the point you
5 have just made.
6 THE PRESIDENT: Each of the agreements do you mean?
7 LORD GRABINER: Each of the agreements, yes. When I say "each of the appeals" I mean
8 each of the five points.
9 THE PRESIDENT: The points that you have made?
10 LORD GRABINER: Precisely, yes, precisely. I am very content with that.
11 THE PRESIDENT: The trouble is we have to get on with these cases now.
12 LORD GRABINER: I understand.
13 THE PRESIDENT: And you are not the only party.
14 LORD GRABINER: No, I quite understand that. Bearing in mind the fact that we are looking
15 forward and perhaps it would be good to work backwards from the forward date, could
16 I suggest 21 days. I am saying that not because it affects me in the slightest, but it does
17 affect my learned friend for whom I do have a lot of sympathy, having once sat in that
18 position.
19 THE PRESIDENT: I had in mind the 14th.
20 LORD GRABINER: Bearing in mind March, it is, I would suggest, a reasonable request - if
21 one were contemplating a hearing in December, that would be another matter.
22 MR TURNER: Sir, on a point of clarification, we would hope very much that the document
23 will also perform the task as I indicated with reference to the witnesses, not just to the
24 paragraphs---
25 LORD GRABINER: No, I accept that. I think I said that when you talked about the witness
26 statements, and I said "paragraphs", and you agreed.
27 THE PRESIDENT: Yes, paragraph of the witness statement---
28 LORD GRABINER: That is what I meant.
29 THE PRESIDENT: ---relating to paragraphs in the decision.
30 LORD GRABINER: Definitely.
31 MR TURNER: But in relation to the time period we have suggested 7 days. We would be
32 content with 14. The point then arises as to the time frame for our defence. In relation
33 to that we have proposed four weeks from the time when they serve their amended
34 Notice of appeal and we adhere to that. We do not see that that ought to cause specific
35 difficulties, again on the basis that Lord Grabiner said, if the final trial is due to be in
36 March.
37 [The Tribunal confer]
38 THE PRESIDENT: We will say 21 days, Mr Turner. We will discuss your defence in a

1 moment.

2 MR TURNER: Yes.

3 THE PRESIDENT: 21 days - don't expect any further extensions on that point.

4 LORD GRABINER: I will pass that message on to Mr Hoskins.

5 THE PRESIDENT: And, if I may say so, because the Tribunal is getting on with the case,
6 the sooner your appeal, as it were, is able to catch up the better.

7 LORD GRABINER: And if we can do it quicker than that we will do so.

8 THE PRESIDENT: Yes, thank you very much.

9 LORD GRABINER: I do not know whether you want to talk about - I am sure you do - but I
10 do not know when will be an appropriate stage to talk about the date for the hearing as
11 well. You mentioned that as a general point in the introduction, perhaps we could talk
12 about that at some appropriate stage.

13 THE PRESIDENT: Well the date that I mentioned was 8th March.

14 LORD GRABINER: Is that fixed in stone?

15 THE PRESIDENT: It is not necessarily absolutely fixed in stone, but it is a date that looks
16 convenient at the moment. We have been trying, outside of this hearing, between
17 counsels' clerks to establish some dates that were convenient to as many people as
18 possible. I do not know whether that exercise involved your own clerk as well?

19 THE PRESIDENT: That did not, no, so we will come back to that later - I am sure it is
20 going to be difficult to fix a date. I think perhaps in the light of that discussion, Mr
21 Turner, what is logically next is to discuss the defence, and the timing for the defence.

22 MR TURNER: Yes.

23 THE PRESIDENT: It flows from our earlier observations on the desirability of keeping
24 these cases for the time being, as to which you may well have a view, that we were, I
25 suppose, envisaging a defence in the JJB case, a defence in Allsports, a defence in
26 Manchester United, and a defence in Umbro.

27 MR TURNER: Yes.

28 THE PRESIDENT: There may not be much more work involved from your point of view in
29 having separate defences in lieu of saying the same thing in one document but in three
30 sections, as it were.

31 MR TURNER: Yes.

32 THE PRESIDENT: Since the point is taken, and not necessarily identical, or expressed in
33 the same way, it seems to us not to confuse the issue too much at the moment that we
34 could proceed on the basis of separate defences, in which case you would automatically
35 have an extension of time of 21 days in the JJB case, to enable them to serve their
36 supplementary schedule.

37 As regards Allsports, Manchester United and Umbro, what do you say about the
38 timetable for the defence?

1 MR TURNER: In relation to Umbro we have said, and we continue to say, we can do that
2 separately and we can do that we think, subject to further discussion this afternoon,
3 expeditiously - we have no trouble with that.
4 So far as the other---

5 THE PRESIDENT: So you can serve that by the due date.

6 MR TURNER: We can serve that by the due date, yes. So far as the other appeals are
7 concerned, we feel that they are connected. It is not simply a matter of four separate
8 pieces of paper instead of one. The issues so heavily overlap, the facts interlink,
9 because they relate to precisely the same events, that to have to put in defences on
10 different tracks, relating to the same events is, in our submission, highly undesirable
11 and would not conduce to good order.

12 THE PRESIDENT: They would not be on different tracks, they would be the same tracks,
13 they could even be the same wording, they would just be in different documents---

14 MR TURNER: Yes.

15 THE PRESIDENT: ---with appropriate adjustment depending on what argument was being
16 put.

17 MR TURNER: Yes. Well we would prefer very much to be able to co-ordinate the efforts
18 of the different documents - if there are to be different documents - at least go in on the
19 same date rather than one a week earlier than the other with largely identical content,
20 because to all intents and purposes that will mean that the first document in time will
21 define all of the effort that will have had to go into the preparation of all of them.

22 THE PRESIDENT: Right.

23 MR TURNER: That relates first to the sequence of the documents. So far as the overall
24 timing of the defence is concerned, we would ask for four weeks from the date of
25 service of the JJB defence, not Notice of Appeal, not least because the Notice of
26 Appeal itself will be expanded, but also because of the other developments in the case,
27 and matters which are mentioned in the skeleton. The first point being that some of the
28 people, whose evidence has been placed in issue in the appeal itself, and whose
29 evidence is likely to be central are currently uncontactable. Others we have not been
30 able to speak to although they are in principle contactable.

31 Manchester United now wishes, of course, to amend its case in one respect. JJB
32 wishes to add another witness statement as of yesterday, and in view of all of these
33 developments, together with the fact, upon which we do not press too strong, that this is
34 a multi-party appeal with all the resource constraints associated with that we would ask
35 for four weeks from the delivery of the JJB Notice of Appeal.

36 THE PRESIDENT: Why do you need to contact all these people? You have taken the
37 decision on the basis of what you have already, why can't you just rely on what you
38 have already?

1 MR TURNER: Well to give two examples. There is a new witness statement on behalf of
2 Allsports, quite a detailed one from Mr Hughes. Mr Hughes referred to what has
3 happened at a very important meeting in his kitchen on 8th June, and for the first time,
4 because there was nothing in the administrative procedure, talks about what Mr Ashley
5 did and said, and in those circumstances---

6 THE PRESIDENT: I see.

7 MR TURNER: ---it would be useful and important to speak to him. He also makes
8 comments which are new about one of the other main characters from our point of
9 view, Mr Ronnie, and in the JJB Notice of Appeal some new points are made in
10 relation to a third gentleman, Mr Fellone, for example.

11 We do not therefore seek to bolster with new evidence material that we could
12 have gone to before. What we are looking at is essentially in the nature of rebuttal
13 evidence.

14 THE PRESIDENT: Yes. Well let us just have a look at the calendar and then I will see
15 whether anyone else has observations on the timetable. It is 23rd October today. JJB
16 has to be in by 13th November. That would take us to 11th December. That is a bit
17 tight for the pre-Christmas---

18 MR TURNER: I appreciate that.

19 THE PRESIDENT: There is quite a lot you can be getting on with pending the JJB
20 supplementary schedule. I am not sure you can expect a great deal more elucidation
21 from them than what you have got already, but if we said - well 27th would be two
22 weeks after the JJB supplementary schedule is in. That enables you to work out the
23 general thrust of your case to deal with Allsports and Manchester United, you will
24 already have dealt with Umbro. Can we say, for the time being, November 27th, Mr
25 Turner? If that puts you in extraordinary difficulties I think you may have to come
26 back to us, but shall we say that for the time being.

27 MR TURNER: I understand, Sir - we may need to apply.

28 THE PRESIDENT: Yes, of course.

29 MR TURNER: The only other point I perhaps ought to have mentioned is that I understand
30 Mr Ronnie and Mr Ashley are at some sporting event currently taking place in
31 Australia.

32 THE PRESIDENT: Everybody seems to be at an event taking place in another hemisphere!

33 MR TURNER: I am content to leave it on that basis but we may come back to you
34 depending on whether difficulties arise.

35 THE PRESIDENT: Yes. Just before I lose the train of thought, what we have in mind is
36 effectively four separate defences which will no doubt contain some common parts, at
37 least in the case of Allsports, and JJB.

38 In the case of Allsports and JJB to be served by November 27th, but you may

1 want to serve all defences on the same date - Umbro included. That would be probably
2 be convenient, would it not?

3 MR TURNER: That would help us a little bit more.

4 THE PRESIDENT: Yes, I think we will say "everything on November 27th".

5 MR TURNER: I am obliged, Sir. Although if we find that we can serve the Umbro defence
6 beforehand we will.

7 THE PRESIDENT: Yes.

8 MR HARRIS: Sir, if I may, I appear on behalf of Manchester United. On this particular
9 point Manchester United has some concerns, and they are really these: as I understand
10 it from Mr Turner, the problems he faces are the lack of a schedule to JJB's appeal, a
11 difficulty of contacting witnesses and the voluminous nature of those appeals. But of
12 course none of those points apply to Manchester United's appeal. It does seem to me,
13 Sir, with respect, that there is no good reason why there should be a particularly
14 lengthy additional amount of time available to the Office to serve a defence to the
15 limited grounds of appeal as regards penalty in the Manchester United case and
16 particularly so since they are already willing to do the same in relation to Umbro.

17 In an effort to be of the greatest possible assistance to the Tribunal Manchester
18 United would not object to a limited extension, say, to 27th, but on the strict and clear
19 proviso that there is no slippage of that date as regards Manchester United. My learned
20 friend was talking about the possible need to come back and what have you as regards,
21 as I understood it, JJB and Allsports. We would be most unwilling for there to be
22 slippage on our defence on the limited penalty points.

23 THE PRESIDENT: Yes, thank you for that. I think the message is, certainly for Manchester
24 United and Umbro, it looks as if one should try and meet November 27th pretty firmly,
25 and use very much best endeavours for the other two.

26 MR TURNER: I understand, Sir.

27 MR WEST-KNIGHTS: Sir, merely this, we accept fully that there needs to be, and we
28 need to see, such further evidence in rebuttal as the OFT may be capable of producing
29 in respect of the further detail for what we call the "helicopter" day.

30 THE PRESIDENT: Yes.

31 MR WEST-KNIGHTS: The 8th June. What I don't accept, and I simply put down this as a
32 marker, is that we have made any - I think it was described as "new comments" about
33 Mr Ronnie, not least because my learned Junior and I set ourselves the task of not
34 doing so. In other words, our Notice of Appeal, which has apparently put me in the
35 unfortunate position of being, as it were, so far as the OFT is concerned, the "teacher's
36 pet", and so far as JJB is concerned grossly prolix, was careful to restrict itself to, as it
37 were, the regurgitation, for the assistance of the Tribunal, of those arguments which
38 had already been made.

1 THE PRESIDENT: Yes.

2 MR WEST-KNIGHTS: So we do not apprehend seeing anything new from Mr Ronnie, but
3 I will be saying something further about witness statements later on.

4 THE PRESIDENT: Yes, thank you, that point is noted, it is in the transcript. Very well,
5 where have we got to now? I think perhaps we ought to deal next with the question of
6 the intervention. Yes, Mr McNab?

7 MR McNAB: Sir, as you know, I appear on behalf of Sportsworld International, referred to
8 throughout the decision as "Sports Soccer", they have recently changed their name.
9 Sir, I hope you have received, read and digested (a) the application to intervene-
10 --

11 THE PRESIDENT: Yes.

12 MR McNAB: And also my skeleton argument that came through this morning.

13 THE PRESIDENT: Now the skeleton argument this morning - we have that skeleton but
14 speaking for myself, Mr McNab, I am not sure I have digested it with the attention that
15 it needs, so I think you may just have to remind us of the salient points.

16 MR McNAB: Yes, Sir, I apologise for its late arrival---

17 THE PRESIDENT: It is the Tribunal's fault for not making a deadline for the submission of
18 arguments, we have been somewhat deluged in the last 12 hours.

19 MR McNAB: Well, Sir, I also appear as a late replacement for Mr Rupert Anderson QC.

20 THE PRESIDENT: Yes. Just give us your main points.

21 MR McNAB: Please ignore any references to bundles in my skeleton argument, there is not
22 in fact a bundle. The first question is whether we have a sufficient interest---

23 THE PRESIDENT: Yes, you get that at paragraph 7.

24 MR McNAB: Yes, I ask you to have regard to the salient point I set out in paragraph 5, just
25 by way of background. The first point is that we have been informed by the Office of
26 Fair Trading that it is likely that Mr Ashley's evidence is going to be important to the
27 Tribunal's assessment of the contested version of events set out in the OFT's decision,
28 and I think that probably will be apparent from the submissions that Lord Grabiner has
29 already made, and also from the observations that JJB have submitted, and also from
30 Allsports' submissions, where they describe, I think, Mr Ashley's evidence as being
31 "important and controversial".
32 I have referred in the skeleton to a reference in the decision and I do not
33 propose to take you to it. I do not think that anyone would contest the proposition in
34 relation to liability that Mr Ashley's evidence is fairly central, as indeed was
35 information provided by Sports Soccer, Sportsworld.

36 THE PRESIDENT: Just a minute, you claim that your commercial interests can be affected
37 by the outcome of the appeals and secondly that your principal executive, Mr Ashley, is
38 going to come under fire during these proceedings, as far as we can anticipate and that

1 you want yourselves to be in a position to make submissions and cross-examine
2 witnesses.

3 MR McNAB: Sir, yes - not only commercial interests but "commercial and reputation
4 interest" it is described as in the application which in turn amounts to commercial
5 interest.

6 One point I would invite you to bear in mind is that Mr Ashley is (and was)
7 both the chief executive and also the owner of Sportsworld, so there is a close
8 identification between Mr Ashley and Sportsworld itself, so that attack on Mr Ashley
9 is, in effect, an attack on Sportsworld.

10 As you will also probably be aware, Sir, Sportsworld was the whistle-blower in
11 this matter and in the skeleton I have recorded a couple of paragraphs where the Office
12 has referred to that fact, and in the second of those extracts I have referred to the
13 passage where the OFT has recorded that Sports Soccer's assistance was central to the
14 OFT's investigation and that was recognised as a mitigating factor in relation to
15 penalties.

16 So the situation is that our evidence, with the information that we provide, and
17 the evidence of Mr Ashley was central to the investigation. Also that leads to the
18 conclusion that there is no particular reason to believe that any of the appellants is
19 particularly well disposed to our clients.

20 I have drawn attention to the fact that the Sports World business model is
21 essentially "Pile it high and sell it cheap". The reason that is significant being tied up in
22 paragraph 6 of the skeleton, namely, that Sports World wants to give us his hands-on
23 free supplies unencumbered by pressure from competitors, etc.

24 The further point I make in paragraph 5E is that Sportsworld is a relatively new
25 player in this market. It has significantly increased its presence since 1998/99 to the
26 situation where it is now recognised in the decision as a key competitor of JJB. So
27 again, we are the new kid on the block, and the decision recalls that we have become a
28 competitive threat to JJB. There is no particular reason to believe that JJB is well
29 disposed towards Sportsworld. Again, as recorded in the decision other retailers
30 complained to Umbro about Sportsworld, and the policy of discounting and pressure
31 was put on Umbro to "sort Sportsworld out" I think was the expression used.

32 So the summary position, as I said in paragraph 6, is that Sportsworld wanted to
33 discount resale prices, that being its business model, was prevented from doing so and
34 was forced into price fixing arrangements, as a result of the pressure applied to it by its
35 main competitor. Sportsworld blew the whistle. The information that was supplied by
36 Sportsworld was central to the investigation and to the decision. That decision is now
37 to be litigated in front of the Tribunal. Sportsworld's written evidence, and Mr Ashley's
38 oral evidence are likely to play an important part in the appeals, at least in those cases

1 where liability is in dispute and so I recognise there is a hierarch perhaps of relevance
2 of the points I make in relation to the various appeals, starting from JJB and ending up
3 at Umbro at the bottom. So the evidence is going to play an important part because of
4 the attacks being made on Mr Ashley.

5 THE PRESIDENT: Mr McNab, one can see up to a point an argument that says that
6 Sportsworld International should have some kind of observer status in these
7 proceedings. How far it is conceptually sound for Sportsworld to participate as a party
8 in examining witnesses, possibly of putting its own gloss on affairs, making
9 submissions about the credibility of evidence, in a case which is essentially between
10 the Office of Fair Trading and the appellants, is perhaps more open to doubt.

11 MR McNAB: Well Sir, the first question is do we have sufficient interest? In my
12 submission we quite clearly do for the reasons set out in the skeleton. The question, Sir,
13 I think that you may be addressing is what conditions should be placed on the
14 intervention---

15 THE PRESIDENT: Yes.

16 MR McNAB: --and what we do say is that despite---

17 THE PRESIDENT: What do you envisage doing? Do you envisage putting in a statement of
18 intervention and further evidence? Do you anticipate putting in any further evidence?

19 MR McNAB: Well, Sir, the evidence that is envisaged being put in I think in the first
20 instance go through the Office of Fair Trading, and Sportsworld is keen to assist the
21 OFT in the preparation of this matter. It is difficult to say at this stage whether it be
22 necessary to put in a statement of intervention or further evidence until one has seen the
23 OFT defence. What I propose - if we are permitted to intervene and if I thought
24 advisable - is that a statement of intervention would go in after the OFT's defence. As
25 one could imagine - I am sure the Tribunal would envisage, given the reason on which
26 Sportsworld is seeking to intervene, a statement of intervention would not be a long
27 document since, in essence, Sportsworld's role or intention, is to support the Office of
28 Fair Trading, to ensure that the situation that goes forward in the tribunal is not a
29 situation where one has JJB and Allsports, and my learned friends to my right here,
30 slugging it out with Mr Ashley and then making submissions as to what a complete cad
31 and a bounder he is, without Sportsworld themselves being able to say "Well, in fact,
32 you are bigger cads and bounders than we are". You may say "Well, of course, the
33 OFT can do that job for you", but the interest of the OFT as a responsible public body
34 may not necessarily be the same as those of Sportsworld, and the OFT as a responsible
35 public body may not quite be so astute to seek to protect the reputation of Sportsworld,
36 as Sportsworld's own legal advisers.

37 In essence, Sportsworld would envisage that as far the Tribunal goes,
38 Sportsworld believes it would be of assistance for it to be represented there. For

1 example, when one considers cross-examination of appellants' witnesses, Sportsworld
2 itself would be in a position to respond to answers given by those witnesses, perhaps
3 more quickly than the Office of Fair Trading could, and likewise in relation to re-
4 examination of Sportsworld and Mr Ashley and Mr Ronnie, who is a Sportsworld
5 employee, in a better position to any questions put to those witnesses in cross-
6 examination that require re-examination.

7 Of course, the Tribunal would also have direct access to the source of
8 information which formed a central part of the investigation.

9 THE PRESIDENT: Yes, I think we have your arguments, thank you, Mr McNab.

10 MR McNAB: Thank you, Sir.

11 THE PRESIDENT: I think I had better go round - Lord Grabiner, I think you are opposing
12 this---

13 LORD GRABINER: We are, Sir, yes.

14 THE PRESIDENT: ---for the reasons you give in your ---

15 LORD GRABINER: Yes, we are. If I can just summarise our points, Sir?

16 THE PRESIDENT: Yes, thank you.

17 LORD GRABINER: Again I will endeavour to do so quite succinctly. We say we accept that
18 Sportsworld is an interested party, but we do not accept that they have a sufficient
19 interest to justify an intervention. Alternatively we say this is a discretionary matter.
20 They should not be allowed to intervene, and I just want to make four points if I may.

21 First, if learned friend is right then most appeals against OFT decisions would
22 involve an intervention, or possible intervention, not just by one party but possibly by
23 several parties, depending upon the particular circumstances of the case. Although we
24 are all enjoying this jamboree from this side of the room, it cannot have been intended
25 that this procedure should result in a legal jamboree, and it ought to be in the interests
26 of everybody to ensure that that does not happen. I speak here as a turkey voting for
27 Christmas, so to speak, but I do make that point earnestly and in good faith.

28 Secondly, the approach adopted by my friend really does not take fully into
29 account the fact that the OFT is represented by counsel in the usual way, and are well
30 able, and indeed charged with, conducting the appeal, and to make all the points which
31 apparently Sportsworld believes only it can make. The arguments are designed to make
32 Mr Ashley a more attractive character in the eyes of the Tribunal. Well fair enough, but
33 to that extent any argument that Sportsworld wants to make will coincide precisely
34 with any arguments sought to be made by the OFT, because they will wish to
35 demonstrate to the Tribunal that he is a person of integrity and worth, and is a credible
36 witness, and to that extent the interests of Sportsworld, and the OFT will be entirely co-
37 extensive, so there is really no justification for having, so to speak, a second prosecutor
38 as a sort of back stop or long stop exercise.

1 Thirdly, this is a case where Sportsworld has itself been found guilty of
2 wrongdoing by the OFT and a penalty was imposed upon them. Now, if they were so
3 concerned to protect their own, and indeed Mr Ashley's character and integrity and all
4 the rest of it, they could and would have appealed and presented their arguments in the
5 usual way. Through this mechanism they could have made the points they wished now
6 to make through the intervention process. The fact that they have chosen not to appeal
7 shows conclusively that they acknowledge a tarnished reputation and in our submission
8 it is entirely inappropriate that the intervention procedure should be used for what is in
9 effect a completely collateral purpose. In our submission it would be an entirely
10 inappropriate use of the process.

11 Fourthly, the approach adopted by my learned friend seems to be to compare
12 this appeal process with something like the Hutton Inquiry. In that inquiry any witness
13 who stands to be criticised is warned in advanced, and has been given an opportunity of
14 making representations, for example, in person, or by counsel or solicitors, to present
15 arguments which are designed to dissuade Lord Hutton from his provisional
16 conclusions. But that is not this case. If they wanted to do that they could have
17 appealed. In this case, the persons who stand to be criticised are the appellants and that
18 is why they make their appeals.

19 So in our submission, in all these circumstances, since Sportsworld has decided
20 to take its medicine and not to appeal, that should be the end of the matter, and we
21 would strongly oppose their being permitted to intervene. If they wished to attend and
22 sit in on the hearing that is one thing, and we could not possibly object to that. But we
23 certainly would object to the notion that they would, in effect, be conducting a separate
24 campaign against us as a sort of second string to the OFT. In my submission that would
25 actually be an abuse of the process.

26 THE PRESIDENT: Yes. Yes, Mr West-Knights?

27 MR WEST-KNIGHTS: I apprehend that each of you has had the opportunity of looking at
28 my skeleton---

29 THE PRESIDENT: Yes, we have.

30 MR WEST-KNIGHTS: ---I shall not repeat it. Can I start with the headline which, in my
31 respectful submission, answers this question which is that if Sports Soccer wants to do
32 something which is coeval with what the OFT wants to do then it should not intervene
33 because 9.4 of the Guidelines says that is exactly the circumstance in which there
34 should be no intervention. It is helpfully set out at my learned friend, Mr McNab's
35 skeleton and doubtless you are familiar with it.

36 *"9.4 On the other hand, persons should not apply to intervene unless they have a*
37 *substantial interest in the outcome of the particular case before the tribunal.*

38 *Similarly, there is no need for an interested party to intervene if the interests of*

1 *that party are already adequately protected by the position taken by one or*
2 *other of the principal parties".*

3 And it goes on to give guidance further on about the inappropriateness and
4 undesirability of duplication of effort. So if they are going to do something which is
5 coeval with what the OFT are up to then it is duplicative and it should fall away.

6 THE PRESIDENT: Yes.

7 MR WEST-KNIGHTS: But what are they doing if they are not doing something which is
8 duplicative or coeval? They must, by definition, be doing something collateral and
9 inappropriate and, if I may say so with great respect, I am adopting Mr McNab's
10 attractive expression "cads and bounders". If he is in the business of attempting to
11 appear before the Tribunal to persuade the Tribunal that one person or another is more
12 or less a cad or a bounder, that is an inappropriate forum for such an exchange.
13 Furthermore, if they are doing something different from what the OFT are doing it
14 probably involves putting in something new. Now, that is completely and flatly
15 contrary to the established procedure of this Tribunal, which has been careful in the
16 past - and I have in mind particularly the case of *Napp* and indeed *Argos* where
17 observations were made that in principle the appeal takes place on the basis of the
18 material which was available below. To have rolling around - I say this bluntly - the
19 loose canon of a possible co-prosecutor, who plainly wants to put in something new,
20 otherwise they don't add anything, again in my submission is inappropriate and
21 improper, and I would go so far as to say an abuse of process.

22 Those are the substantial matters, although I do say that they do not have a
23 substantial interest in the outcome. The word "interest" is one usually used
24 ambiguously. For instance, the "Sun" frequently argues that it has an interest in
25 publishing X, Y and Z, and so it does - the public would be jolly interested in seeing it -
26 but that does not give the "Sun" public interest, and in my submission---

27 THE PRESIDENT: Being interested is not having an interest?

28 MR WEST-KNIGHTS: In a nutshell that is it. Those are my submissions.

29 THE PRESIDENT: Yes, Mr Harris?

30 MR HARRIS: Sir, if I may make four very short points on behalf of Manchester United.
31 The first is that I gratefully adopt the eloquent submissions of the two learned Silks to
32 my right to the extent that they apply to Manchester United.

33 The second is that, with respect, the game is given away, I say, by reference to
34 Mr McNab's skeleton argument. If you have it to hand it is paragraph 11.

35 THE PRESIDENT: Yes.

36 MR HARRIS: He says in the second sentence, under the part that refers to my lay client:
37 "If Man. U's appeal depends on disputed facts involving Sportsworld evidence, then he
38 should be permitted---

1 THE PRESIDENT: Yes.

2 MR HARRIS: Well of course the answer is that it does not, so that is the end of the matter.

3 I can make that submission and in any event the Tribunal knows that as regards my

4 appeal because the Tribunal has seen my Notice of Appeal.

5 To put the matter well and truly at the bottom of the borehole, that submission

6 is effectively echoed by my learned friend, Mr Turner, on behalf of the OFT, where he

7 says at paragraph 7(b)(i) of his skeleton: "(Sportsworld has no interest in the MU and

8 in addition Umbro appeal)." That is the third point.

9 The fourth point is, lest the Tribunal should need any further persuasion, one

10 will not find any reference in the Notice of intervention on behalf of Sportsworld, or

11 any adequate reason why they have even the interest in the "Sun" sense of the word, in

12 what Manchester United are going to do on appeal, let alone a sufficient interest within

13 the meaning of the Rules.

14 THE PRESIDENT: Yes.

15 MR HARRIS: Thank you.

16 THE PRESIDENT: Miss Bacon, yes?

17 MISS BACON: Umbro's position is very similar to that of MU. We cannot see that

18 Sportsworld has any interest at all in the outcome of Umbro's appeal. We are not

19 putting in issue the facts of the case, we are not seeking to challenge Mr Ashley's

20 account of events or evidence. Looking at Mr McNab's skeleton the only point I could

21 find in his skeleton on which Sportsworld has an interest from Umbro's appeal is what

22 I would term the "Schadenfreude" point, which was at paragraph 7(a) of his skeleton,

23 that the current decision has a deterrent effect on those who disagree with Sportsworld's

24 commercial policy and that could be weakened if the appeal were to succeed. So as far

25 as I understand Mr McNab's position is that he would like to see all penalties

26 maintained and that, I would submit, is not a sufficient interest for Sportsworld to

27 intervene in our case.

28 THE PRESIDENT: Mr Turner?

29 MR TURNER: I have a point of principle and a practical point. On the point of principle

30 we say if Sportsworld have a sufficient interest then it turns on the precise

31 circumstances of this case and relies upon the central role of the company and the

32 central role of the individual, Mr Ashley.

33 THE PRESIDENT: But do they have a sufficient interest in your submission?

34 MR TURNER: We would prefer to remain neutral on that point. The practical

35 consideration is this: we approach it with one question in mind, namely, "Will the

36 Tribunal or the process benefit and how?" There is one respect in which it may do so,

37 in our submission, and Mr McNab referred to the immediacy with which Sportsworld,

38 if it is directly engaged in the proceeding as an intervener, may assist by responding if

1 some issue crops up as issues often do, on a matter of fact or on a matter, for example,
2 relating to relationships between individuals in the case. Therefore, for that reason we
3 said in our skeleton that if Sportsworld is to be allowed to intervene, the terms on
4 which it should do should reflect that practical interest that the Tribunal might have,
5 and that it should be allowed to intervene to the extent of examination of witnesses in
6 relation to the two appeals where it does have an interest, and those are JJB's and
7 Allsports.

8 THE PRESIDENT: But why can you not do that? Why can you not examine the witnesses,
9 no doubt on the basis of what Sportsworld sitting next to you says, tells you.

10 MR TURNER: If Sportsworld is to sit next to us and to give us that degree of that co-
11 operation then that interest is removed, we accept that.

12 THE PRESIDENT: Yes, Mr McNab, do you want to come back on any of that?

13 MR McNAB: Sir, yes, just briefly. Starting with my learned friend, Lord Grabiner's points,
14 I am delighted to see that it is accepted that we do have sufficient interest within the
15 meaning of Rule 16 to---

16 THE PRESIDENT: Well, they say you are an interested party but not sufficiently interested
17 to justify an intervention.

18 MR McNAB: Well, yes, we get over one bit but we should not really be allowed in here.
19 The point is made that if our intervention were allowed then intervention would always
20 be allowed by anybody who had given information to the OFT. What I say in relation
21 to that, Sir, is that one has to look at every intervention on the facts of the particular
22 case and I do draw attention to the particular facts of this case, that Mr Ashley is very
23 closely identified with the company itself, and that the company itself and Mr Ashley
24 have a very central role in the investigation. This is the situation, a situation that could
25 arise is where Sportsworld's competitors are allowed to knock seven bells out of Mr
26 Ashley, and Sportsworld itself is given no opportunity to come back and say "Well, no,
27 in fact black is black as we had originally told the Office of Fair Trading, and the
28 Office of Fair Trading have found that it is not in fact white as has now been suggested
29 by these witnesses".

30 As regards the suggestion that Sportsworld would in effect be a second
31 prosecutor, that certainly is not the role that Sportsworld is seeking to engage in. I do
32 draw attention again to the point that I made in the course of my submissions, that the
33 position of the Office of Fair Trading as a public body may be different from
34 Sportsworld's position as a competitor of the appellants.

35 A point is made "well, you could have appealed but you didn't appeal". In my
36 submission it would have been ridiculous for Sportsworld to have appealed, given that
37 Sportsworld is prepared to take its medicine. There is absolutely no basis at all for its
38 appeal.

1 In response to my learned friend Mr West-Knights' submissions, he referred you
2 to paragraph 9.4 of the Tribunal Guidance, and the particular passage where it says:

3 *"Similarly, there is no need for an interested party to intervene if the interests of*
4 *that party are already adequately protected by the position taken by one or*
5 *other of the principal parties."*

6 I draw attention to the fact that that seems to be an acceptance, although my
7 learned friend may not perhaps go that far that we are a person at least with an interest
8 in intervening, so we get over the first hurdle. The question then is whether we should
9 be permitted to.

10 The purpose of our being here is not to start advancing some new case as
11 Allsports seems to believe, and spent sometimes in its submissions concentrating on.
12 The purpose of Sportsworld here is to have an effective rebuttal unit. We have a
13 situation, as I said earlier, where the Office of Fair Trading has said "We have looked
14 at all this evidence, and as far as we are concerned black is black." Then we have the
15 appellants coming along and saying "No, black is white", and the purpose of
16 Sportsworld is to provide evidence to rebut that and say "No, you are quite right, black
17 is indeed black as originally represented."

18 As I said in my submissions, Sportsworld would expect to be in a quicker
19 position to deal with responses in cross-examination from the appellants' witnesses and
20 also on the question of re-examination of Mr Ashley.

21 In relation to Mr Harris's point regarding Manchester United, I simply refer to
22 paragraph 8 of Mr Turner's skeleton submissions for the OFT, where reference is made
23 to the fact that the appeals involving JJB, Allsports, and Manchester United depend on
24 the same factual matrix. I do not think I can really take the point much further than that.

25 In relation to Miss Bacon's point all I can say is that Sportsworld has an interest
26 in seeing the fines maintained, and I really cannot take it much further than that.

27 THE PRESIDENT: Thank you.

28 [The Tribunal confer]

29 **RULING**

30 THE PRESIDENT: In this part of the case management conference Sportsworld
31 International applies to intervene in the appeals pending before the Tribunal on the
32 grounds that it has a sufficient interest within the meaning of Rule 16(1) of the
33 Tribunal's Rules.

34 Three arguments are put forward. First of all that Sportsworld has a commercial
35 interest in upholding the appeals, and it would be commercially and reputationally
36 damaged if any of the appeals were to succeed, and it therefore has an interest in
37 intervening in that context.

38 Secondly, that Mr Ashley, who is the chief executive and owner of Sportsworld,

1 is likely to come under attack during the appeal and be criticised in particular by other
2 appellants and Sportsworld would wish to have the opportunity principally on behalf of
3 Mr Ashley, as we understand it, to themselves make submissions and cross-examine
4 JJB's witnesses and make submissions on the cogency or credibility of those witnesses'
5 evidence.

6 Thirdly, it is said that Sportsworld (then Sports Soccer) was the original
7 whistle-blower in this affair and brought the matter to the attention of the Office of Fair
8 Trading originally and that is also a matter giving rise to a sufficient interest. It is also
9 submitted that Sportsworld general interest is not necessarily the same as that of the
10 Office of Fair Trading.

11 The application is opposed by all four of the appellants by JJB in particular,
12 who submit that:

- 13 * the intervention regime cannot have been intended to turn these proceedings
14 into a legal jamboree with many parties;
- 15 * the Office of Fair Trading is represented by counsel and that any points that can
16 be made should be made via the Office of Fair Trading;
- 17 * the Tribunal should not run the risk of introducing a second prosecutor,
18 Sportsworld itself has been found guilty and has chosen not to appeal and
19 therefore a collateral intervention in a case such as the present is both
20 inappropriate and an abuse of the process.

21 Those arguments are supported by Allsports who submit that if Sportsworld is
22 simply co-equal with the Office of Fair Trading and has nothing to add, which is the
23 situation foreseen in paragraph 9(4) of the Tribunal's Guidelines, then their interests are
24 already adequately protected by the Office of Fair Trading.

25 On the other hand, if it is a question of Sportsworld wishing to put before the
26 Tribunal new evidence, then that is inappropriate, because the foundation of this
27 Tribunal's procedure is that there should not be new material introduced at this stage in
28 principle since the matter depends on what was before the Office of Fair Trading
29 below.

30 Manchester United and Umbro both adopt those points and submit further that
31 Sportsworld has no particular interest in either of those appeals, because in particular
32 Manchester United and Umbro are only appealing the penalty and Sportsworld can
33 have no conceivable interest in those appeals.

34 In our judgment at this stage of the proceedings we are not persuaded that it
35 would be right to permit Sportsworld International to intervene. Being, formally
36 speaking, an intervener carries certain legal consequences. One is entitled in principle
37 to service of the various Notices of Appeal. One is entitled to put in a statement of
38 intervention. One is entitled to participate in a hearing and make submissions and

1 possibly to cross-examine witnesses, even if - which at this stage we are not deciding -
2 Sportsworld has a sufficient interest within the meaning of the Rules we take the view,
3 as a matter of our discretion, that it would over complicate these proceedings for
4 Sportsworld to be permitted to intervene at this stage. The proceedings are essentially
5 between the appellants and the Office of Fair Trading. It is for the Office of Fair
6 Trading to establish its case and to have the main carriage of the matter.

7 We do not wish, at this stage, to complicate matters by introducing the
8 possibility of another party who may be also making submissions and cross-examining
9 witnesses, not exactly as a second prosecutor, as it were, in support of the Office of
10 Fair Trading, who is the primary prosecutor.

11 We are, however, conscious of the fact that circumstances may arise in which it
12 is convenient for Sportsworld International to follow these proceedings closely. As far
13 as we can see there is no objection to Sportsworld, if so advised and if it so wishes,
14 collaborating with the Office of Fair Trading in supplying information to the Office of
15 Fair Trading and assisting with the presentation of the Office of Fair Trading's case. I
16 stress the Office of Fair Trading's case and not Sportsworld's case. If circumstances
17 were to arise in which fairness required that we heard directly from Sportsworld then
18 we, the Tribunal, would be open to a second application, either for a formal
19 intervention or for Sportsworld to be heard, as it were, informally. That is a bridge we
20 are prepared to cross if and when it arises, but we are not entirely, as it were, slamming
21 the door to Sportsworld at this stage.

22 For the reasons given by the appellants it does not seem to us that there are
23 sufficient grounds to permit the intervention at this stage. Those grounds are
24 necessarily of course, indeed determinative, in the cases of Manchester United and
25 Umbro, but equally strong in our judgment in the cases of Allsports and JJB.

26 So I think the result, Mr McNab, is that you are not permitted to intervene at
27 this stage, but you are fully entitled to collaborate with the Office of Fair Trading if that
28 is what you wish to do, and you are entitled to a kind of informal observer status and, if
29 at any stage, you or your clients feel that they are prejudiced by that procedural
30 situation then it is open to you to make a further application.

31 MR McNAB: I am obliged, Sir, yes.

32 THE PRESIDENT: Thank you.

33 MR WEST-KNIGHTS: Sir, again it is a marker which sometimes is unhelpful but on this
34 occasion I hope not. It is to be hoped that confidentiality difficulties can be minimised.
35 You have already made the very sensible point that a lot of these figures are old, and
36 therefore boring and of no commercial relevance. However, I just put down a marker
37 that there will be in some circumstances a confidentiality ring to which Sportsworld
38 will not be a party, and consequently the Office of Fair Trading needs to bear in mind

1 the limits upon its capacity to share information with Sportsworld.

2 THE PRESIDENT: Thank you. Now, I think we have got as far as point 3 of the Agenda -
3 how we are physically going to conduct the hearing. I think we have got at least a plan
4 for the pleading stage. What does the hearing look like.

5 Perhaps it is easier, unless you want to intervene urgently, Mr Harris, to hear
6 Mr Turner first and then we see where we are.

7 MR TURNER: Sir, we adopt the course that we recommended in our skeleton. We
8 envisage that there will be a hearing first on liability at which the representatives of
9 Allsports and JJB will attend for the parties.

10 THE PRESIDENT: Yes, there is no reason why others should not attend if they want to.

11 MR TURNER: They are free to attend but there is no necessity for them to do so and
12 formal interventions or pleadings by them directed to that stage of the case we think are
13 inappropriate.

14 THE PRESIDENT: Unlikely to be useful, yes.

15 MR TURNER: The hearing on penalties, we hear what, Sir, you said at the outset about
16 logical order comes next, attendance by JJB, Allsports, and Manchester United. For our
17 part we still adhere to the view, if the Tribunal is so minded, that Umbro's appeal,
18 which raises a discrete single issue on penalty, can and should be heard separately.

19 THE PRESIDENT: Yes.

20 MR TURNER: We do not envisage that that will cause any practical difficulties because
21 the Tribunal, unless it gives Judgment on the Umbro appeal very quickly will at least
22 for its part be able to take into account all relevant considerations for giving Judgments
23 in the round on each of the appeals, and for our part we see that as the appropriate way
24 to proceed.

25 As respects the order of presentation of the parties' cases, again that is dealt
26 with in our skeleton. Experience suggests witnesses come first, without prejudice as to
27 who actually is called. We have stated our position that the right of defence can be fully
28 and adequately met by a process of cross-examination. It unduly complicates matters
29 for witnesses to give evidence-in-chief except in very special circumstances.

30 THE PRESIDENT: Yes.

31 MR TURNER: And we recommend that the general practice of the High Court now should
32 be followed, and that any evidence-in-chief, if it is to be given, should be given
33 specifically with the leave of the Tribunal and not otherwise.

34 Following oral evidence there is then the question of the parties' presentation of
35 their cases. For our part, we see no reason to depart from the procedure that the
36 appellants, who are after all appealing against the OFT's decision, should present their
37 case first. The Office responds, and then each of the appellants in turn replies with its
38 closing submissions.

1 THE PRESIDENT: Yes.

2 MR TURNER: Sir, those are our submissions on this issue.

3 THE PRESIDENT: Let us go 'round the table and see what people think. There are one or
4 two points we need to clarify. Shall we go in reverse order? Yes, Miss Bacon?

5 MISS BACON: Sir, I hope you have received Umbro's submissions in writing, some matters I
6 cannot refer to in this room unfortunately. We note that the OFT essentially concurs
7 with our position which is that Umbro's appeal should be heard separately, and
8 expeditiously in fact. We would not wish to have to wait until the March date. Quite
9 apart from issues of availability of both Mr Green and myself from mid-March, we
10 deliberately put in an appeal on a very short point. We could have put in an appeal on a
11 large number of issues. We wanted to have our appeal determined swiftly so that we
12 can get it over and done with. We were rather hoping for a date early in the New Year
13 and we do not envisage that our appeal should take more than half a day to a day.

14 We take on board what you said in abstract terms about the desirability of
15 hearing penalties following the issues of liability. That would be the case, for example,
16 if we had raised points similar to those being raised by Manchester United, concerning
17 deterrents or the duration of infringements which necessarily put in issue the facts in
18 the case. That is not our case. We do not raise anything which relates to the facts of the
19 infringements. So as far as we see it, although in abstract terms one might logically
20 determine penalty after infringement and that does not apply in our case, which
21 concerns only the extent of our co-operation.

22 In addition to the submissions that I have made in writing, I would want to
23 comment on one issue which is MU's application to amend. We note that that occurred
24 as the result of an unfortunate disclosure on the Tribunal's website of a matter that was
25 previously redacted from the Decision. We do not see that MU's application to amend
26 affects in any way our submission that our appeal should be heard separately. We take
27 on board MU's wish to be treated in a manner equivalent to that of Umbro, but in
28 essence MU is raising separate points on factual issues which concern MU and which
29 do not concern Umbro.

30 THE PRESIDENT: Thank you.

31 MR HARRIS: Sir, if I may begin with that point, namely, that it falls to me formally to
32 make an application to amend, I ought to just state for the record in one sentence that it
33 was a commercial decision on the part of Manchester United not to dispute the liability
34 decisions, not that we have ever accepted that we were engaged in price fixing, but---

35 THE PRESIDENT: But you are stuck with it if you do not appeal it, Mr Harris?

36 MR HARRIS: I do not want to spend any more time on it. I think you ought to have a
37 formal application to amend before you. I do not know to what extent the Tribunal
38 wishes me to address the issue of the Rules? I am not sure that anybody else takes issue

1 with this application as a matter of principle. You have seen how it is put in the
2 application notice?

3 THE PRESIDENT: Yes, I do not think we have in principle any difficulty with the
4 application to amend.

5 MR HARRIS: I am very grateful, in that case it only falls to me to just refresh the Tribunal's
6 memory as to the terms of the proposed amendment, and for this reason that it does
7 have an impact upon how Man U participates or is otherwise involved in Umbro's
8 appeal. That ought to have appeared at schedule 1 to the application notice, paragraphs
9 36(a) thro' 36(f).

10 THE PRESIDENT: Yes.

11 MR HARRIS: You may recall that schedule 2, strictly speaking, to the application notice is
12 the summary of appeal as appearing from 8 October on the CAT website, to which my
13 learned friend Miss Bacon referred, and that is the one that in the fourth paragraph
14 down half way through says that on that basis the reduction in penalty for co-operation
15 stands at 40 per cent. So that is, on the face of it, what Umbro has received from the
16 OFT for co-operation, and that was the percentage figure that was redacted in the
17 version of the decision that came to Manchester United.

18 So prior to this proposed amendment, Manchester United did not propose to
19 take any separate point in reduction of the penalty as regards co-operation. But what
20 has emerged from that website entry is that in my submission Manchester United has
21 been treated substantially unfairly and inequitably when one compares the position
22 with Umbro. So it is quite important that even though in the text of paragraph 36(d) of
23 the proposed amendment these are free-standing factual points---

24 THE PRESIDENT: Yes.

25 MR HARRIS: So even though they are free-standing factual, and just for the sake of good
26 order I should say we do not propose to limit ourselves necessarily to those three
27 factual points, those are the key points but this is only a proposed amendment to the
28 Notice of Appeal, nevertheless the basis of the proposed amendment is at paragraph
29 36(c) and I quote from the final sentence:

30 "It is inequitable, disproportionate and discriminatory for Manchester United to
31 be treated so differently as regards mitigation for co-operation when compared with
32 Umbro".

33 So therein lies the rub. So what we say---

34 THE PRESIDENT: Yes, I think we have got the point, Mr Harris. We have given you leave,
35 so---

36 MR HARRIS: Yes, the only point that then arises is to what extent should MU and Umbro
37 be heard together on the issue, or to what extent should there be participation. I think
38 on reflection Manchester United would be prepared to accept that if there is to be a

1 separate hearing for Umbro at a different time, then provided Manchester United were
2 entitled to attend, if you like, on an observer basis that hearing - subject to any
3 confidentiality issues that may arise - then that would meet part of the problem, but I
4 am afraid it is not quite as simple as that. We say, with respect, in order to make our
5 case properly, as compared with Umbro, we ought to receive also a copy of the Umbro
6 Notice of Appeal. Again, if there are confidentiality issues, and if there is to be a ring,
7 as regards legal advisers, then that is something no doubt we can deal with sensibly.

8 So there are, so far, two points: the Notice of Appeal and attendance at the
9 hearing. Then if I may suggest that under a third heading there are some other issues. In
10 the first instance we suggest that we ought to seek to agree with the OFT the facts
11 concerning Manchester United's co-operation. One anticipates that that is something
12 that could be done sensibly and within a reasonable timescale. However, in the event
13 that there are difficulties with that procedure and/or in the event that something
14 emerges from the Notice of Appeal of Umbro that requires further disclosure, then that
15 would have to be revisited in due course - one simply cannot say at this stage. There
16 are outstanding issues regarding what has been going on between the OFT and Umbro.

17 Who is to say at this stage whether they involve co-operation or otherwise, so that may
18 have to be revisited.

19 In summary, my submission is having got permission, if there is to be a separate
20 hearing we would like to attend and observe. Prior to that we would like a Notice of
21 Appeal and between those two, we seek to agree facts with the OFT but if there is a
22 disclosure issue that arises at some stage thereafter it will have to be dealt with in the
23 usual way.

24 THE PRESIDENT: Yes.

25 MR HARRIS: I am very grateful. As regards the other aspects, we take no objection to, if
26 you like, the usual order of submissions on our appeal, that is to say we are the
27 appellant and on penalty we would go first and then my learned friend for the OFT, and
28 we reply, but we obviously make no submissions as regards how it should operate in
29 other cases.

30 Finally, on the issue of witnesses, I do not anticipate that that arises in
31 Manchester United's case.

32 THE PRESIDENT: No.

33 MR HARRIS: I am very grateful.

34 THE PRESIDENT: Thank you, Mr Harris. Yes, Mr West-Knights?

35 MR WEST-KNIGHTS: Sir, I think what I have to say depends upon how many bits of the
36 agenda we are currently covering, and if I have lost the plot then it is my fault.

37 THE PRESIDENT: Say what you want to say because they are inter-related.

38 MR WEST-KNIGHTS: Well I have a lot to say--

1 THE PRESIDENT: Yes.

2 MR WEST-KNIGHTS: ---about witnesses, and what they might be. Basically do you want
3 to hear the rest of it from me now in one go?

4 THE PRESIDENT: I think we might as well.

5 MR WEST-KNIGHTS: Right, let me steel myself.

6 THE PRESIDENT: If that is convenient to you?

7 MR WEST-KNIGHTS: I will take a deep breath - yes, plainly, I am prepared to assist the
8 Tribunal.

9 First, so far as the order of proceedings is concerned, although the OFT does not
10 say so, we anticipate that the OFT will call whatever witnesses it is going to call. We
11 will then cross-examine them in whatever order is convenient or appropriate.

12 THE PRESIDENT: Do you have a view as to what witnesses you would like them to call -
13 as to who you would like to cross-examine?

14 MR WEST-KNIGHTS: Yes.

15 THE PRESIDENT: The situation, I think, at the moment is that we have the decision, some
16 of it depends on circumstantial evidence, some of it depends on documents, some of it
17 depends primarily on what the OFT has been told in witness statements. If the latter are
18 contested, as they may well be, then it is probably incumbent on the OFT to proffer the
19 witness so that his evidence can be tested and I would have thought it probably
20 convenient to do that, as Mr Turner suggests, by putting the witness in the box, saying
21 to him: "Is this your evidence?" and then leaving it to whoever wants to cross-examine
22 to cross-examine. Is that how you see things or do you see it differently?

23 MR WEST-KNIGHTS: So far so good, Sir. I do not see it differently but there are bits
24 missing in there, and perhaps I can start with the paradigm bit missing, which is Mr
25 Ashley. Mr Ashley could go in the witness box: "Is what, your evidence, the whole
26 truth and nothing but the truth?" We don't have any such document in relation to Mr
27 Ashley.

28 THE PRESIDENT: We do not seem to have a statement, and at the moment we are not
29 sufficiently into the details of the case to know exactly what we have got, but we do not
30 actually have a statement. I gather we have various documents in which his views are
31 made known, which are relied on in the decision.

32 MR WEST-KNIGHTS: Yes, well if I may say so, with respect, it is not merely because you
33 perhaps have not had weeks and weeks and weeks to look at this decision that you do
34 not know where the stuff is because in the case of Mr Ashley I still have not
35 "bottomed" - to use the unattractive expression - where it is all to be found, but I can
36 tell you that it is a combination of a complaint made in writing on 3rd August, 00---

37 THE PRESIDENT: Yes.

38 MR WEST-KNIGHTS: ---right in the thick, I may say, of the supposed Manchester United

1 infringement from which Sports Soccer suffered so badly, and which was not
2 mentioned.

3 There is then a meeting between Office of Fair Trading and Mr Ashley and
4 others on 30th March, 01. There is then a further meeting on 13th August, 01, and,
5 doing the best I can, Sports Soccer then made written representations, which are called
6 "the first written representations" , then made oral representations by its
7 representatives - I cannot now recall whether Mr Ashley spoke on that occasion, he
8 certainly did on one of them - he did, I am told by Mr Peretz, I am very grateful.

9 There was then a second set of written representations. There was then a second
10 set of oral representations. There is an exchange of letters which I have been unable for
11 the moment to find, but I know they are there, because constructively, at least, I have
12 read all of this stuff - I say "constructively" I have a very unattractive stack of ring
13 binders here of which there are ten - that is just JJB's selection of the material on the
14 file, but there was an exchange of letters purporting to explain discrepancies in the
15 account given initially as to whether a meeting between Whelan, Sharpe, Ashley and
16 Hughes concerned Manchester United or England and, indeed, when it took place. That
17 is not the end of it, at least, because at the moment I have not found that letter - I think
18 it was written by Mr Fawsey, who is an employee of Sportsworld as I understand it
19 now is - although I know it is still here, and there may be more.

20 At some stage the Tribunal needs to know what Mr Ashley's evidence is---

21 THE PRESIDENT: Yes.

22 MR WEST-KNIGHTS: ---and at the very least Mr Ashley is going to have to have
23 something to speak to. "Yes, I adopt..." whatever it is. Now, it might just be a reading
24 list, but if there is going to be a reading list that Mr Ashley speaks to, the Tribunal is
25 going to need to have had it plenty of time in advance so that it can read through it. I
26 am bound to say I personally would regard it, if I were in your shoes, if I may
27 respectfully put it that way, as unattractive, to be invited to dip in and out of various
28 thick ring binders, and find a passage between pages 18 and 24, letter E on the one
29 hand, and G on the other, of a bit of blurring by Mr Ashley, and say "Ah, well, that's it,
30 but maybe subject to a wrinkle put on it by his counsel subsequently during the same
31 occasion".

32 THE PRESIDENT: So what is your suggestion for dealing with this?

33 MR WEST-KNIGHTS: My suggestion for dealing with this is no different - in fact, it is, in
34 respect of the other witnesses, I take Ashley as a paradigm, which is that the OFT
35 must, in its defence, specifically identify in respect of the decision, which is made
36 against my clients, Allsports, the two infringements you will recall - the ring around,
37 just like JJB were saying "That's just a phone call", and secondly, we say although
38 there were, as it were, dirty deeds planned on 8th June they came to nothing,

1 specifically for the OFT to identify the evidence upon which it would seek to rely on
2 the "prosecution" - I use that word advisedly, of this appeal.

3 I am a stranger to these proceedings as you personally will know, Sir, because
4 you are the Competition Appeal Tribunal, together with your colleagues, and you have
5 never seen me here before.

6 THE PRESIDENT: We are not that old as a Tribunal, Mr West-Knights.

7 MR WEST-KNIGHTS: Well, I am very grateful to you. We are all, in a way, feeling our
8 way---

9 THE PRESIDENT: Yes.

10 MR WEST-KNIGHTS: ---so I feel less embarrassed by my relative---

11 THE PRESIDENT: You should not be at all embarrassed.

12 MR WEST-KNIGHTS: I am very much obliged to you, Sir.

13 THE PRESIDENT: We are very much working it out in co-operation, I hope.

14 MR WEST-KNIGHTS: On that basis, and I am here to help because again, what one does
15 in a situation like this is frequently one puts oneself mentally into the shoes of the
16 Tribunal and says "Is this going to help?"

17 THE PRESIDENT: It is very much in your client's interest to help us as much as possible.

18 MR WEST-KNIGHTS: Indeed, Sir. The best way, therefore, it seems to me, that the OFT
19 can help all of us, because it is a Minister of Justice, it is prosecuting, it is required to
20 establish its case to the high burden in *Napp*, and it has an obligation to behave in a
21 balanced and ministerial way. Its obligation at the very minimum is to identify
22 specifically the evidence upon which it relies. Now, in respect of Mr Ashley I think I
23 can tell you this with some confidence that some of the statements that he has made
24 preclude, in effect, the provision by the OFT of anything more than we had got. We
25 have got a number of statements made by him, some of which are quoted in our Notice
26 of Appeal, to the effect that "On my son's life I could tell you that I can't remember
27 another bit more. You can have a pop at me for that if you want but there it is".

28 The minimum, therefore, is to say that the OFT relies up on the following
29 passages from the following documents as representing the evidence of Ashley, and to
30 pull those documents together and schedule them under a witness statement from Mr
31 Ashley saying that it is true.

32 In a sense it has some choosing to do because, as we have said in our Notice of
33 Appeal, I hope fairly, there are some grounds for supposing Mr Ashley's evidence is
34 not always consistent. But that is the OFT's problem, not ours. It must decide what it is
35 tendering Ashley to say, and when I say "Ashley" without the "Mr" it is a habit I hope
36 you have spotted from our submissions that when we first mention somebody they get a
37 "Mr" and after that nobody does.

38 So that is the position we say in respect of Ashley.

1 THE PRESIDENT: But what I would have thought we need is a collection of the documents
2 that are mentioned in the decision.

3 MR WEST-KNIGHTS: I am just talking about Ashley for the moment, or are we talking
4 more generally, Sir?

5 THE PRESIDENT: In relation to Mr Ashley because there are various footnotes - there is
6 "Mr Ashley said this, footnote so-and-so", we have all the documents, and they may
7 well include all the ones you have already listed for us, and an identification of
8 particular passages.

9 MR WEST-KNIGHTS: What I had in mind was a clip of paper, that you could put in your
10 pocket and know that that is Mr Ashley's evidence, one way or another.

11 THE PRESIDENT: Yes.

12 MR WEST-KNIGHTS: How physically it is pulled together is a matter for simply
13 mechanics. But those documents which I have identified are places where, as it were,
14 the Sports Soccer, Sportsworld story is to be found. It must be verified by Mr Ashley,
15 and they must choose which bits they are going to have.

16 Secondly, if I may say so Sir, with respect, you are completely right to say that
17 what the OFT must do is to go through its footnotes and decide which bits it wants in
18 respect of the appeal against me, because unlike the defences which you are about to
19 make an order in respect of if it has not already been done, will be a separate document
20 for each of JJB and Allsports---

21 THE PRESIDENT: Yes.

22 MR WEST-KNIGHTS: ---the decision, as you will remember is compendious, it has a
23 large swathe of background, some of the purpose of which is equivocal, some of which
24 is said to be facilitative but not itself an infringement under part one, and then there are
25 some direct parts, but again we do tend to get a sort of umbrella feeling. Now, what I
26 need, and what I suspect you need, in respect of the case against me, which is the only
27 case that I am here to talk about, Allsports, is a full schedule of the evidence which is
28 relied upon.

29 Now, in the case of Mr Ashley it will be, as I say, the materials culled from
30 those sources which I have identified, and everything that they say, that they had below
31 that made the decision justifiable from him. Now, he is a paradigm because there is no
32 statement from him at all, but if I were to turn to another witness who - it is a curious
33 world - also works now for Sportsworld it would appear, Mr Ronnie. Ronnie can say
34 nothing about the Manchester United helicopter day because he wasn't there, but he
35 purports to do so because he says that Mr Ashley visited him that day for collateral
36 reasons, nothing to do with that meeting, and then Mr Ashley reported to Mr Ronnie
37 what was said to have been said at that meeting. So there is some secondhand alleged
38 corroboration there.

1 In respect of Mr Ronnie, we have a mixture, because he is an Umbro man. We
2 have a statement from Mr Ronnie, but we have also got other representations made on
3 Umbro's behalf which I will refer to in the decision as forming parts of the basis of
4 parts of it. So again, if I can take Umbro as an umbrella picture rather than Ronnie
5 particularly, we have a number of witnesses - Ronnie, Fellone, he backs up Mr Ronnie
6 when Mr Ronnie says he rang everybody including us---

7 **THE PRESIDENT:** Yes.

8 **MR WEST-KNIGHTS:** ---for what it is worth, but he is there. There is a Mr Marsh, who is
9 relied up on in the decision because he wrote a letter which looks as if it confirms the
10 antecedent occurrence of an agreement such as the one with which we are currently
11 fixed.

12 That gives rise to a small problem because Mr Marsh, in his own witness
13 statement, says "Ah, when I mentioned 'agreement' actually I had nothing specific in
14 mind"---

15 **THE PRESIDENT:** He was a bit equivocal.

16 **MR WEST-KNIGHTS:** Well, I think, with respect, he is more than equivocal, he is simply
17 disavowing that was a reference to and therefore any evidence of specific agreements
18 having occurred.

19 **THE PRESIDENT:** Yes.

20 **MR WEST-KNIGHTS:** Now, again the OFT is to prosecute its case. It is not my job to
21 give it a blueprint, I am trying to help the Tribunal here. We say that in respect of the
22 Umbro witnesses, we want to see witness statements.

23 The existing witness statements will do, but there are two caveats to that. One,
24 they contain material which the OFT, if I can call it that, has disavowed. That is to say,
25 there are from time to time allegations made by those witnesses which had formed
26 support for matters contained in the original Rule 14 notices, which fell by the wayside,
27 which were abandoned by the Office and in respect of which no infringement was
28 found. Indeed, there are passages in the decision where Mr Ronnie, for instance, has his
29 witness statement quoted, but then they skip bits, because "the bits" are material only
30 to, for instance, an allegation that all sport was guilty of putting pressure on Umbro - an
31 allegation which is not now pursued. So they may need to be marked up, simply to say
32 they are not to be taken by the Tribunal as evidence upon which the OFT relies, but it is
33 there. It seems to me to be artificial to take it away, because the first thing that Lord
34 Grabiner or I are going to do is to put it them that they had said that and that it had
35 been---

36 **THE PRESIDENT:** The Tribunal - forgive me for interrupting - the Tribunal needs, I would
37 have thought, a full bundle of all the relevant documents produced by the relevant
38 witness at all stages of the case, whether in relation to a particular document it happens

1 to support some allegation in the decision or not, as well as no doubt identification by
2 the OFT of what specifically they actually rely on.

3 MR WEST-KNIGHTS: I am very grateful to you, Sir. The only query about this is simply
4 - we are criticised by the OFT I am disappointed to tell you, for deploying what I regret
5 to say was described as an excuse for not saying whether we wanted to cross-examine
6 anybody and, if so, whom? Our Notice of Appeal makes it abundantly plain that we
7 intend to cross-examine as necessary. What we do not yet know is who it is the OFT
8 propose to tender and which bits of what they have said they will say. I may not need to
9 cross-examine X if the OFT tenders X as part of its case, and I accept what it is that X
10 says. It is inevitable, unless there is a considerable change of heart on the part of the
11 persons concerned, that we will wish to cross-examine Mr Ashley, Mr Ronnie, Mr
12 Fellone - I stop there simply because I don't know what other witnesses the OFT will
13 seek to deploy.

14 THE PRESIDENT: Well, I am just wondering if we are on the right track here, Mr West-
15 Knights. I would have thought in so far as you contest particular facts in the decision
16 which are founded on the evidence of witnesses, or so far as you wish to abstract from
17 some witness at the OFT some favourable evidence that supports your case on the
18 background, or on the foreground, or on the specific elements, shouldn't you now be in
19 a position to identify who it is and what you would like to extract from them and what
20 point you disagree with them, and so on?

21 MR WEST-KNIGHTS: Bluntly, "no", and I will say why. The prosecution have not yet
22 laid out their stall, and when they do we will be back before you, all three of you, a few
23 days later, sufficient time sensibly to enable everybody to absorb what is there. By that
24 time we will be in a position to say with clarity who it is that requires to be called of
25 those witnesses tendered. But we do not know who is available to the OFT. We do not
26 know how the OFT will seek to prove its case live - it is a very different thing, live.

27 THE PRESIDENT: I think we are at the heart of working out how these appeals are
28 supposed to operate.

29 MR WEST-KNIGHTS: I think we are.

30 THE PRESIDENT: The OFT is, as it were, deemed to have set out its stall already in the
31 decision. That is the idea, they are supposed to have said in the decision we make this
32 finding on the basis of this evidence, this bit of this document, what this man has told
33 us, these background elements and so forth. That is the stall they have laid out, that is
34 they rely on.

35 MR WEST-KNIGHTS: I cannot tell from the decision, with respect. I hope I am not
36 interrupting you, I was not intending to. When they rely upon the written
37 representations of Umbro here, or the oral representations of Manchester United there,
38 how they will seek to establish the propositions contained in those matters I have no

1 idea. They may say "Ah, well in fact the source of that information was X, and X will
2 say 'yes, this is correct', and here is a witness statement from him".

3 Secondly, if I may say so with respect, I do not know, that may be the idea, but
4 I am not at all satisfied that it is the law, if I may say so with respect. We have said a
5 great deal in our Notice of Appeal, a surprising amount in a domestic context, if I may
6 say so, when we are in effect approaching the rehearing, all be it on a slightly
7 inquisitorial basis because of the role, the special role, that the Tribunal very properly
8 has. The rehearing of the prosecution of criminal offences - they weren't at the time,
9 but they are now - and my learned friend, Mr Turner writes, well "It is not as if Mr
10 Hughes is at risk of prison or a fine". No, but Allsports is, and it has the same rights as
11 Mr Hughes. We take very seriously, if I may say so with respect, the obligation on the
12 OFT to prosecute this appeal and for it to have the carriage and to behave properly
13 like a Minister of Justice, and that is for **it**, in its so-called defence - a phrase that still,
14 if I may say so with respect, jars in this context - that is effectively the moment, we
15 having identified so far as is necessary to assist the Tribunal why we are appealing. It is
16 then for the OFT to lay out its stall with its so-called "defence". It must be fundamental.
17 These proceedings are so close to being criminal that there is, in effect, no distinction. I
18 say that with no hesitation.

19 Now, if that is right and they have the burden of proof on the *Napp* standard,
20 which is probably indistinguishable from the criminal one except that instead of trying
21 to persuade 12 jurors there are three highly intelligent and knowledgeable individuals
22 at the end of the argument, it is for the OFT to put its case to which we will then
23 respond. We have done plenty already. We have reminded everybody of the arguments
24 which have been run below. We have made it crystal clear on what basis we attack the
25 two infringements of which we are guilty and that is as far as we are currently bound to
26 go. It is now for the OFT to put together its case in proper form for you and for us.

27 If I may say so, with respect, the Tribunal has already made the observation that
28 it would assist it if it knew exactly how it was that the OFT was going to prove its case.
29 Well the same goes for us, if I may say so, *a fortiori* - we have done enough. Of course,
30 I can say "Bring them all in, I want to cross-examine the lot", but that would be
31 irresponsible. I do not know whether, for instance, my learned friend is going to tender
32 Mr Marshall for cross-examination. If he should, as it were, offer him, I will make a
33 decision, together with my learned Junior, and those instructing me, when we have seen
34 the scope of how it is that the OFT puts its case, bearing in mind that although we have
35 a decision it is huge, and it overlaps and it has large bits of background, it has large bits
36 of, if I may say so, equivocal material, "facilitative of breach but not a breach", and that
37 sort of thing.

38 THE PRESIDENT: Let's work out how this is going to operate in practice, what practical

1 problems to solve. In a somewhat complicated context where this is, in a sense, both an
2 appeal and a rehearing, if you see what I mean. We are not a Court of First Instance, we
3 sit as an Appellate Tribunal. There has been a prosecution already at the administrative
4 stage, so we have not got a direct analogy with a criminal case, all be it it is a serious
5 case, we have to make the procedure that we have here work in as fair a way as
6 possible. I would have thought in principle, subject to anything Mr Turner says, that the
7 OFT is obliged to offer all the persons that are referred to in the decision upon whose
8 evidence they have relied.

9 MR WEST-KNIGHTS: If I can just interrupt you the, this is deliberate, we sometimes do
10 not know who they are. Let me draw back one stage. You made the observation there
11 has been a prosecution - not as we know it.

12 THE PRESIDENT: Well, there has not been a criminal prosecution, but there has been an
13 administrative procedure against you.

14 MR WEST-KNIGHTS: But that is so far away from being a prosecution in the ordinary
15 sense of the word - and I say that again without apology - but it is not to be taken that
16 somehow there should not be a proper prosecution by way of an appeal.

17 THE PRESIDENT: In this jurisdiction this is still a civil jurisdiction.

18 MR WEST-KNIGHTS: I understand that entirely.

19 THE PRESIDENT: And we are appealing against an administrative decision. We are not in
20 the context of the full panoply of the criminal law, all be it that some of these offences
21 could now also be criminal, but it is perhaps somewhat dangerous to try to go too
22 closely down the criminal analogy and try to reproduce what would happen in a
23 criminal---

24 MR WEST-KNIGHTS: I am not being slavish, and I am not trying to throw Archbold at
25 anybody.

26 THE PRESIDENT: No, it is a very useful discussion to try to sort out where we are. The
27 overriding principle, as far as the Tribunal, is concerned, is that the procedure should
28 be fair, and that you should have every opportunity, you can barely require to contest
29 the case so far made, and the OFT should have the ability to respond to what you are
30 saying.

31 MR WEST-KNIGHTS: You have used the phrase "full panoply" and I am, of course,
32 conscious of such jurisprudence as there is, namely, simply because it has criminal
33 consequences it does not mean to say that the full panoply of the criminal law should
34 be imported into the proceedings.

35 THE PRESIDENT: It does not even have criminal consequences in this particular case.

36 MR WEST-KNIGHTS: Well, I don't know if a fine of £1.35 million isn't a criminal
37 consequence.

38 THE PRESIDENT: There is a question of an administrative sanction that is a heavy

1 sanction, and for that reason we have said in previous Judgments that we need to be
2 satisfied to a high degree and we need to make sure that the rights of the defence are
3 fully observed. But that does not imply that we necessarily go down the full route of a
4 criminal trial.

5 MR WEST-KNIGHTS: I understand, and this is genuinely a debate---

6 THE PRESIDENT: Yes.

7 MR WEST-KNIGHTS: ---but if I could just plug this into the debate---

8 THE PRESIDENT: Please.

9 MR WEST-KNIGHTS: ---if the mindset currently is that there has been a prosecution and
10 therefore this is an appellate procedure which does not require to follow the format of a
11 customary trial then we need to stop and pause there and say that there has not been a
12 prosecution in any sense that any of us would sensibly understand because if this were
13 an appeal from a prosecution in any form, let's say the Crown Court or, indeed, the
14 Magistrates' Court, what there would have been would have been the presentation of
15 live evidence to be tested on both sides, with the prosecution separate from the
16 deciding body. In other words, you would have had the procedure of testing the
17 evidence in front of a neutral tribunal which subsequently came to a result.

18 Plainly, an appeal from a procedure such as that is not an automatic rehearing.

19 THE PRESIDENT: You have not had a prosecution in that sense.

20 MR WEST-KNIGHTS: No.

21 THE PRESIDENT: You have not had a prosecution in the sense traditionally known to the
22 criminal law in this Country, but you have had an administrative procedure in which a
23 case has been put against you and you have had a chance to reply and the person
24 putting the case has taken the decision and imposed a penalty. You now appeal and the
25 question for us is what is a fair procedure to adopt on the decision appeal?

26 MR WEST-KNIGHTS: I entirely agree with you, Sir, if I may say so with respect. What I
27 am trying to put across, obviously not very well, is that if you start from the premise
28 that there has been a prosecution it is too easy to slither into saying in which case the
29 appellate procedure could be something, as it were, more appellate than rehearing. We,
30 of course, have had an administrative decision followed by a "heavy sanction", to
31 borrow those words, but what we have had is so far away from being a prosecution in
32 any ordinary sense of the word, that you should not say "We have had a prosecution,
33 therefore it is an appellate procedure", really what we are saying is there has been an
34 administrative procedure which is so far from being a trial, that the fair trial aspects are
35 more likely to be imported properly into the procedure on appeal. It is as simple as that.
36 It is "don't start with this is merely appellate from a prosecution---

37 THE PRESIDENT: No, we are not starting from that.

38 MR WEST-KNIGHTS: It is "we haven't had anything like a fair trial yet, when are we

1 going to have one".

2 (The Tribunal confers)

3 THE PRESIDENT: My colleague is just pointing out that we are somewhere in between a
4 full re-hearing and a sort of Judicial Review type appeal - we are somewhere in the
5 middle.

6 MR WEST-KNIGHTS: Are we? I pose the question in the sense in which the observation
7 was made, which is again, is that right?

8 THE PRESIDENT: Well, you cannot ignore, I would have thought, and when I express
9 myself in dialogue with the Bar it is for the purposes of the dialogue not necessarily a
10 concluded view, but we cannot pretend that there has been no decision, that the
11 decision just does not exist. What you are attacking is the decision. That is what the
12 appeal is against under the Rules, and in order to attack the decision you have to point
13 to those bits of the decision that you wish to attack.

14 MR WEST-KNIGHTS: There is quite a good analogy - perhaps there is not but I will try it
15 anyway and if it doesn't help we can forget it.

16 THE PRESIDENT: Yes.

17 MR WEST-KNIGHTS: In the old days, before the Civil Procedure Rules, if you wanted to
18 appeal from a Master you had to say why.

19 THE PRESIDENT: Yes.

20 MR WEST-KNIGHTS: When you got to the Judge in Chambers---

21 THE PRESIDENT: It was a rehearing.

22 MR WEST-KNIGHTS: ---it was a rehearing, but due regard would be given to the decision
23 of the Master. Now, of course is decision of the Master is a rather stronger animal than
24 an administrative decision because that was arrived at by a judicial process with for and
25 against with an independent party in the middle.

26 So if we are between a complete rehearing and a Judicial Review then in my
27 submission we are a jolly long way along the spectrum towards the trial element, rather
28 than the "What did they do wrong?" There is a requirement in the Rules that we
29 identify what kind of error has been fallen into, law or fact? If fact, vouchee the
30 arguments of Lord Grabiner to identify with sufficient particularity exactly why and
31 how. That is the hurdle. Once that hurdle is overcome, however, it seems to me, and we
32 respectfully submit that because this is only an administrative process, where nothing
33 has been challenged, we can say it is not right, but we have not had the opportunity of
34 hearing the *ipissima verba* of the persons concerned, or putting to them points that tend
35 to negate what they are saying. That tends again to push the procedure towards the
36 spectrum of a rehearing rather than Judicial Review. Indeed, when you say we are in
37 between, or "in the middle", with respect I think is what you said, which is where I then
38 stopped you and said---

1 THE PRESIDENT: I don't think that is where I put it on the spectrum.
2 MR WEST-KNIGHTS: No, I understood that, but it was at that moment when helpfully
3 you allowed me to interrupt again to say "Well, are we?" If we are then we are at **this**
4 end of the spectrum in my submission, and not **this** one. Not least because as I say, no
5 proper challenge yet, nothing remotely approaching a trial in domestic law - I notice
6 the word used by my learned friend, rather curiously he said these are not fully blown
7 "domestic" criminal proceedings. Well they are domestic proceedings, this is England
8 and Wales, not Kazakhstan. So we are faced with a procedure, in this case - it may not
9 apply to all cases - in this case the principal disputes are matters of fact, almost
10 overwhelmingly. There may be some legal argument in my case as to the effect of what
11 it is you find happened on 8th June. I do not think we will be able to argue that in
12 advance of your findings, but they are questions of fact that do require individuals to
13 attest ---
14 THE PRESIDENT: Let us see how far we can attack the practical level without getting too
15 far into the philosophy at this stage. What I think you are saying that you want from the
16 OFT in relation to Mr Ashley is a collection of the various documents relied on, an
17 identification of which should already be in the decision but let us have it clear in the
18 defence, what propositions are relied on, drawn from the various statements, and how
19 far they support the OFT's case, duly verified, schedule of evidence duly verified.
20 I think you are looking for, broadly speaking, the same thing from Mr Ronnie
21 and Mr Fellone, although it may be easier in their case, because we have witness
22 statements already, but there may be more than one witness statement, or there may be
23 other documents.
24 MR WEST-KNIGHTS: I think I can tell you in the case of Mr Ronnie there is gloss during
25 one of the written representations on something that he said and they need to pick that
26 up.
27 THE PRESIDENT: Yes, they need to pick that up.
28 MR WEST-KNIGHTS: Mr Marsh, of course, they have to make a decision as to whether
29 they go for what he says or what he wrote, but that is up to them.
30 THE PRESIDENT: If you want to put in issue the way that the OFT have relied on Mr
31 Marsh, which as far as I can see you do, isn't the right way for either the OFT to tender
32 him, or for the Tribunal to direct, that he be available on the same basis as with the
33 others so that you can then challenge his evidence, if you wish? Are we not *ad idem*?
34 MR WEST-KNIGHTS: I think we are. We are in "riotous agreement", or whatever the
35 expression is, "violent agreement". However, only this, it may be when my learned
36 friend, or Leading Counsel we apprehend is going to appear for the Office in due
37 course, they have a look at some of the footnoted matters in the decision and they first
38 have to decide whether it is truly relevant to me because of the compendious nature of

1 the document; and secondly, whether they can, in fact, prove it.

2 Umbro may have said something in written submissions that simply the OFT is
3 not in a position, as it were, to make good because what we are looking for is real
4 evidence. Of course, the Tribunal has noted to itself in the past it will take due account
5 of the probative value of documents, but in this case we are talking about who said
6 what to whom, and when.

7 I think so far we are in agreement on the way forward. What we were not in
8 agreement on is whether we had to take any further step now, antecedently to the OFT's
9 production of the blueprint of its case, and I hope we are now in agreement that the ball
10 is now in the OFT's court entirely.

11 THE PRESIDENT: In relation to the witnesses we have so far discussed.

12 MR WEST-KNIGHTS: In relation to those matters which it will identify that it will seek to
13 put forward to prove its case.

14 THE PRESIDENT: In respect of the matters that you have put in issue?

15 MR WEST-KNIGHTS: Oh, in respect of the matters which we have put in issue, certainly.
16 I think I can say with perhaps slightly more confidence than Lord Grabiner, we have
17 put in issue that which we seek to put in issue. But again, if we come unstuck we will
18 come straight back with humble pie and if it can be done compendiously I hope we can
19 get permission to improve our position.

20 Now, that brings me on to the next question, since you have asked me to go
21 through my agenda, and I will do so rapidly. The OFT is not very keen on agreeing
22 facts, it says it will be a waste of time---

23 THE PRESIDENT: Yes.

24 MR WEST-KNIGHTS: That, if I may say so, is not very helpful. We have put into our
25 notice of appeal, a number of facts which we think are probably uncontroversial, but
26 we do not know as to some of them. The OFT should, in its so-called defence, make as
27 many admissions as it can.

28 THE PRESIDENT: I am sure it will.

29 MR WEST-KNIGHTS: That was not the attitude that it was apparently striking in its
30 skeleton argument, but if you are confident then I have no doubt Mr Turner is listening.

31 THE PRESIDENT: Well, let's see, the Tribunal would in general expect that if propositions
32 in an appeal are not contested that would be signalled by the OFT.

33 MR WEST-KNIGHTS: I am very grateful. The next item on my agenda, or rather on your
34 agenda but with my skeleton, was disclosure of documents. Now, I do not want to
35 descend into the boring detail, I think the expression is "offline", I am certain that given
36 the indication which the Tribunal has given, namely, that people are not to get on their
37 high horses about confidentiality, but so far as possible confidentiality should be ----

38 THE PRESIDENT: I think we will come to confidentiality of documents in a moment, Mr

1 West-Knights.

2 MR WEST-KNIGHTS: I am obliged, because of course there is extant an ex-parte hearing,
3 we understand---

4 THE PRESIDENT: Yes.

5 MR WEST-KNIGHTS: ---which may, for all we know, have taken place. [Laughter]

6 THE PRESIDENT: No, it has not taken place.

7 MR WEST-KNIGHTS: I say that quite genuinely.

8 THE PRESIDENT: Yes, everybody is in a somewhat difficult position.

9 MR WEST-KNIGHTS: Yes, there are all sorts of bits and bobs, but I won't trouble you
10 with them now. Can I just make sure I've made the points of principle that I ought to
11 have made. Everybody is nodding furiously so I will sit down.

12 THE PRESIDENT: Lord Grabiner, I think this is a discussion primarily on witnesses at this
13 stage.

14 LORD GRABINER: Yes absolutely, but may I say respectfully, that the debate that has
15 passed between the Tribunal and my learned friend, Mr West-Knights, is extremely
16 fundamental.

17 THE PRESIDENT: Yes.

18 LORD GRABINER: Indeed, I cannot imagine anything more fundamental to the jurisdiction
19 of this Tribunal.

20 THE PRESIDENT: No.

21 LORD GRABINER: I do not characterise these proceedings as criminal, and I do not need to
22 for the purposes of the debate. If it had been intended that they should be, the
23 legislation would no doubt have said so.

24 That said, they are certainly not of the character of judicial review either, with
25 great respect. The role of the appeal, or the legal basis of the appeal is that this Tribunal
26 must determine the appeal on the merits.

27 THE PRESIDENT: Yes.

28 LORD GRABINER: Now what that means is that this Tribunal can make its own judgment
29 of the facts. That is not the role of a Judicial Review Court. A Judicial Review Court
30 merely comes to a conclusion as to whether or not the right facts have been taken into
31 account, or the wrong facts have wrongly been taken into account and all the rest of it -
32 we are very familiar with it. But, because it is an appeal on the merits, and because this
33 particular case is a case about facts, it does, in my respectful submission, involve the
34 absolute fundamental necessity for the OFT to come here and to prove its case, and that
35 is very, very fundamental in my submission. If this were a case, for example, where all
36 the facts were agreed, and the only issue before this Tribunal was whether or not those
37 facts amounted to an agreement or a concerted practice, I can well understand having
38 an appeal here in which the appellant went first. I could imagine the appellant standing

1 up and saying "These facts are common ground, we contend that as a matter of law
2 those facts do not give rise to an agreement or a concerted practice". Then the other
3 side would respond to it.

4 THE PRESIDENT: Yes.

5 LORD GRABINER: But if the subject matter of the appeal is, as in this case, a hotly
6 contested factual debate, on the format as we talked about earlier, then in my
7 submission you are driven to the conclusion that it is for the "prosecution" - and I use
8 that heavily in quotes because it is not a prosecution - to make and prove its case. For
9 my part I would invite the Tribunal to say that my learned friend at the substantive
10 hearing should open the case, and that he should call those witnesses that he intends to
11 rely upon to make his case, and if he cannot make his case he fails.

12 In so far as there are parts of his case to which we do not take objection then
13 there will not be any objection. In so far as he wants to lead evidence which will be
14 cross-examined because we disagree with the import of the evidence of the individual
15 witness it will be cross-examined, but we are entitled to know precisely what the case
16 is that is being made against us. Even if they are not criminal proceedings, my clients
17 have had a penalty imposed upon them in excess of £8 million, and in that context I
18 would certainly have suggested that we are entitled, as a matter of ordinary justice and
19 fairness to know exactly what is being said against us and to see the material which is
20 relied upon in support of that case.

21 THE PRESIDENT: Yes.

22 LORD GRABINER: We have not even got a witness statement from Mr Ashley, and I must
23 say it is astonishing I would respectfully suggest, that the OFT never got one from him.
24 Now, I can understand that at an early stage in the operation of the mechanics of this
25 process that that was not sufficiently carefully thought through. All that one can hope is
26 that in future cases that exercise will be carefully undertaken, because there is nothing
27 worse than having to dip in and out of bits of paper in order to create a total whole from
28 which you can infer or deduce a proper basis for a case. That said, I am not suggesting
29 that there should be a statement from Mr Ashley, what I simply do is to adopt the
30 points made by my friend, Mr West-Knights, namely, that there should be a statement
31 of belief in the truth of the materials which are to be relied upon which should then be
32 put into some form of schedule to a statement, to be put forward on his part.

33 THE PRESIDENT: Yes.

34 LORD GRABINER: And then for all of these witnesses to be cross-examined in the usual
35 way, but they must go first and they must make their case.

36 THE PRESIDENT: It partly depends what one means by calling the witness to make the
37 case. Does the following, as it were, meet the justice of the particular situation we find
38 ourselves in? Technically, I think it is probably correct to say that the OFT should

1 open, but in a sense the decision already is the opening, that is the case that has been
2 made on the basis of which the penalties have been imposed? So up to a point I would
3 have thought one could reasonably say that that plays the part of the opening. At that
4 stage, and before we get on to anything to do with the appellants, the OFT needs to
5 support the opening with its evidence. It shouldn't, I don't think, have a further chance
6 to explain to the Tribunal the meaning of particular documents, and all the rest of it,
7 those are already in the decision, but it should put forward at that stage the witnesses
8 upon which it relies.

9 I would not have thought, considering the propositions for which the witnesses
10 are relied on are already set out in the decision, I would not have thought that the OFT
11 is obliged to lead its witnesses in chief - at least not to any great extent, a minimal
12 extent probably.

13 But it is, I would have thought at first sight, without going into detail, probably
14 obliged at the stage of preparing what is called its defence, to identify in relation to at
15 least Mr Ashley, Mr Ronnie, Mr Fellone, and probably Mr Marsh, what exactly the
16 evidence is, where it is to be found, with a statement of verification that that is the
17 evidence, that being the evidence at that point if you wish to cross-examine, you can
18 cross examine.

19 LORD GRABINER: May I say, I think there is a good measure of agreement between us in
20 the light of what has just fallen from you. My learned friend, Mr Morris, I understand is
21 going to be conducting the case for the OFT, and he is a very sensible fellow, and I am
22 sure he will, in any event, be a reader of the transcript of today's proceedings.

23 But can I just give you two very brief hypotheses. One possibility is that he gets
24 up and says "Here is our massive tome, this is the case, that is my opening", and sits
25 down. That, of course, would be absurd and rather unhelpful to everybody. Equally, it
26 would be quite absurd for him to spend several days opening the case merely to read
27 out great chunks of the decision.

28 THE PRESIDENT: Yes.

29 LORD GRABINER: But what would be a very much more attractive thing to do, I would
30 have suggested, in the light of the exchanges of the papers between the parties,
31 including the skeleton arguments, because by then the skeletons will have been
32 exchanged, is that he might want to open and identify all the issues which fall to be
33 debated by the Tribunal, and to give a nutshell summary of the key issues which will
34 fall to be decided in the light of what has been exchanged between the parties. That
35 would not be an extensive exercise, but focus everybody's attention and I would
36 suggest that that was the correct way forward, and a sensible, commonsense way of
37 going forward. We would know the essence of what he is saying to us, and he, by then,
38 of course, will know the essence of what we will be saying by way of defence.

1 THE PRESIDENT: Yes.

2 LORD GRABINER: Then he should be tendering witnesses which it is plain, from the paper
3 work that we have presented, where their evidence is disputed and where we would
4 want to cross-examine their evidence. I would respectfully suggest that there be no
5 justification - there might, I suppose in respect of some last minute development but in
6 principle there should be no justification for any examination-in-chief at all, principally
7 because the material which is to be relied upon by the OFT ought to be confined to
8 material which was available to them at the first hearing, which led to their decision -
9 not a hearing, but which led to their decision in the first place, and the danger of
10 permitting examination-in-chief is that you then start getting introduced nuances, or
11 glosses on evidence, which actually would not be justified and actually might take
12 people by surprise.

13 So in principle, I would object to the suggestion that there should be any
14 examination-in-chief at all.

15 THE PRESIDENT: Well, it is not being suggested at the moment that there should be.

16 MR WEST-KNIGHTS: It is me, can I help? I have suggested in my skeleton for two
17 reasons: first, warm up. I think there may be common ground that warm up is a good
18 idea. You do want to cross-examine somebody who is, in fact, focusing on the events
19 in question and not simply standing there in 2004.

20 Secondly, I did float the proposition that in some respects with some witnesses
21 it might be wiser, when they get to the key bit, "What happened on 8th June?" to take
22 just one example. "Put your statement one side, now take us through it". There is a risk
23 of *de novo* I accept that. I am not going to go to the stake on this one way or the other. I
24 bluntly think that it is premature perhaps to be discussing this today, because we are
25 going to have a further CMC when we have seen the shape of the OFT's case. It may be
26 that Lord Grabiner and I will not differ over this when the time comes. I see his point, I
27 think he may see mine, but anyway I responsible for that hare and I hope I can shut it
28 down, at least to that extent.

29 LORD GRABINER: I hear what my friend says. I do not want any public disagreement
30 between us, but there may be a private fisticuffs, we will see.

31 THE PRESIDENT: It is too early to get into detail.

32 LORD GRABINER: But the reason for having witness statements in the first place is to avoid
33 the need for examination-in-chief.

34 THE PRESIDENT: Absolutely.

35 LORD GRABINER: That is the purpose of them, at least in principle. We all know that they
36 have been drafted by the lawyers, and must be taken with a block of salt, but that is a
37 separate point we will come to when we come to cross-examine the witnesses and the
38 Tribunal can decide for themselves who they are going to believe and all the rest of it.

1 In essence what I am saying is that I agree with my friend, Mr West-Knight's
2 approach and we would like to know what the case is against us and we are going to
3 cross-examine these witnesses and we are going to be inviting this Tribunal to come to
4 its own judgment on these facts and we are saying that the decision arrived at in
5 relation to these four matters is wrong, and that is going to be our case.

6 There is one other point, and that is that we would respectfully suggest that in
7 view of the fact that we are on the penalty end of the story that we should have the last
8 word, so that they would open the case and that we should conclude the argument. That
9 would be our suggestion. These are not Commercial Court proceedings, they are not
10 criminal proceedings, but they are penalty proceedings.

11 THE PRESIDENT: I do not know whether we want to take a view on that last point.

12 MR WEST-KNIGHTS: I think it is common ground, Sir.

13 MR TURNER: Sir, do you want me to address some of the submissions that have been
14 made over the last half an hour or so?

15 THE PRESIDENT: We need to press on a bit.

16 MR TURNER: I understand that, but there were one or two indications that you gave with
17 which I cannot agree wholeheartedly.

18 THE PRESIDENT: Yes, well you tell us where your difficulties are, Mr Turner.

19 MR TURNER: I will deal only with those. The idea that it is incumbent upon the Office to
20 offer, proffer all relevant witnesses. I would like to stand back and just focus on what
21 that action means in practice.

22 THE PRESIDENT: Well we are talking about this particular case.

23 MR TURNER: In this case, yes. The extent to which, for example, Mr Marsh, or Mr
24 Prothero or any of the other individuals mentioned in the decision are relied upon for
25 any proposition is to be found in the *defence*. It is fully cross-referenced, it is fully
26 noted. It is apparent from the document itself.

27 THE PRESIDENT: In the decision, you mean?

28 MR TURNER: In the decision and it therefore must not be forgotten, no particular instance
29 has been drawn to your attention where that is not the case. It is a very conscientious
30 decision in that regard.

31 Secondly, these are not our witnesses. There is a major difference between the
32 situation of the Office in this sort of case, and the situation of the Crown in an ordinary
33 criminal case. They are not our witnesses, we can't even contact them. The last three
34 weeks we found it impossible to speak to any of these people. The Tribunal has to bear
35 in mind that we do not have power to bring them here, the Tribunal does.

36 THE PRESIDENT: And will if necessary.

37 MR TURNER: Absolutely, that therefore when it is spoken of in terms of the Office
38 proffering its witnesses, that is a major factor to be borne in mind. These are

1 individuals beyond our control.

2 LORD GRABINER: Sir, with great respect, that is simply not right. There were powers, there
3 are powers when during the inquiry the OFT could have insisted upon these people
4 giving evidence to them.

5 THE PRESIDENT: Well let us not go into the legal rights and wrongs of it at the moment,
6 we are just on a case management basis.

7 MR TURNER: On a case management basis, Sir, as you are aware at this stage we have no
8 ability to call these people of our own motion to give evidence before the Tribunal.

9 THE PRESIDENT: Well neither does the police force, in the last resort they are dependent
10 on a witness summons being issued.

11 MR TURNER: Ultimately, Sir, but you are well aware of the position in which the Office
12 conducts this sort of investigation.

13 THE PRESIDENT: Yes.

14 MR TURNER: The third point is, as a result of the fact that the parties can readily see what
15 reasoning there is in the decision, they can readily see to what extent individual's
16 evidence is relied upon. The decision, as you indicated, represents our case. It is for the
17 parties at this stage to identify in their Notices of Appeal where they dispute matters,
18 and then they can ask to cross-examine - they have that opportunity - witnesses whom
19 they disbelieve. If they do that those witnesses can be brought to the hearing. That is
20 the most efficient way to proceed, because otherwise, if the Office has to engage in
21 some other level of work now we are shooting in the dark beyond having produced our
22 decision, the preparation of our defence will be impaired, and it simply doesn't help. It
23 is for the appellants to identify now which witnesses, clearly identified in the decision,
24 they would like to cross-examine.

25 THE PRESIDENT: Well at the moment, Mr Turner, from a practical point of view, and we
26 can revert to this again when we are in the case management conference in December
27 when we have the defence and things have moved on. From a practical point of view it
28 has so far emerged that Messrs Ashley, Ronnie and Fellone, possibly Mr Marsh---

29 MR WEST-KNIGHTS: And possibly Mr Draper, I should add.

30 THE PRESIDENT: ---possibly Mr Draper, might need to be tendered as witnesses - might -
31 certainly the first three. What is being asked of the OFT is to state in its defence in
32 relation to the issues that have been put in issue by the appellants, what material it is
33 that the OFT is relying on and, in so far as it is material from at least Messrs Ashley,
34 Ronnie and Fellone, to collect up all the various documents emanating from those
35 people in some convenient way, that can later be used as a cross-examination if, at the
36 end of the day, they are sought to be cross-examined.

37 MR TURNER: Yes.

38 THE PRESIDENT: And the suggested form of that is that those various documents, as

1 collected up, should be verified by the witness. If you cannot physically contact the
2 witness to verify the documents you can still collect them up in some convenient way
3 and we will consider later on whether we use our own powers to call the man here.

4 MR TURNER: Yes, may I respond to that?

5 THE PRESIDENT: Yes.

6 MR TURNER: We will have no difficulty whatsoever, in collating for example in relation
7 to Mr Ashley for whom there is not a statement, the sources of the information which
8 are already fully referenced in the decision. In my submission that is not a difficult
9 exercise, but it is also an idle exercise because my friend can do it as well as myself.

10 THE PRESIDENT: Well never mind, it would be convenient I think if you would be kind
11 enough to do it.

12 MR TURNER: So far as the others are concerned, their witness statements are there. It can
13 be supplemented, Sir, as you suggest by adding the written representations of the
14 companies to which they belong.

15 In relation to a statement of verification, I would just mention that what should
16 not be forgotten is s.44 of the Act.

17 THE PRESIDENT: That they are obliged not to---

18 MR TURNER: That any information that is provided to the Office in the course of the
19 investigation which is false or misleading - and I do not have the precise words - is
20 subject to criminal sanction. That, in my submission, is a factor which, in this case,
21 could stand well in place of any form of verification because that was a matter of which
22 all parties were made aware by the Office at all stages.

23 THE PRESIDENT: Well at this stage if they are going to be called to give evidence, and
24 they are going to be cross-examined, they are going to have to give evidence on oath---

25 MR TURNER: Yes.

26 THE PRESIDENT: ---in the witness box. So it is a sensible precaution to ensure in advance
27 that they are prepared to verify that what they have said so far is truthful.

28 MR TURNER: Well, Sir, if we are unable to deal with them beforehand then perhaps we
29 should cross that bridge when we get to it. But we hear what you say. We will do what
30 we can to obtain such verification as we are able to do.

31 THE PRESIDENT: Right. I think the next stage is the OFT's defence. We have had I hope a
32 productive discussion that sketches out at least a possible working framework for the
33 order of events at the hearing. My suggestion would be to park that discussion there at
34 the moment, and return to it at the next case management conference. I think we, at
35 least in our heads, have an outline of what is likely to be a convenient framework. Yes,
36 Mr West-Knights? Do you want any further Ruling on any point at the moment.

37 MR WEST-KNIGHTS: I am afraid so, but it is quick!

38 THE PRESIDENT: Yes.

1 MR WEST-KNIGHTS: I can see how keen you are on this, and I can see what time of day
2 it is and the light failing, but, it has been suggested in our skeleton that all dealings
3 between the OFT and its prospective witnesses should be transparent. We are accused
4 of being extravagant, and applying the full panoply of "domestic" - as it is so
5 disagreeably described - criminal proceedings.

6 Now, I am going to be blunt about this, I think the Tribunal may find it helpful
7 to think ahead to 8th March, or whatever day it is, and Mr Ashley pops into the witness
8 box, and what happens when my third question of him is: "That's an interesting piece of
9 new recollection, Mr Ashley - have you been talking to anybody?" Now, I am bound
10 to say that if you are against me on this now, you are going to have to be against me on
11 it then, and you are going to say "I am sorry, Mr West-Knights, if you are going to ask
12 him about any conversations he had with the OFT I am not going to allow it because
13 they are privileged". That is not a great moment for that to occur, but I venture to
14 suggest you are not going to do that because it is inherently counter intuitive. Mr
15 Ashley will now be dealing with the OFT, we anticipate, and they may be dealing with
16 other witnesses. That process must be transparent.

17 This is not to, as it is said, build on the "domestic" - as it is so described -
18 criminal procedure, this is the simple question of fairness and justice. These are
19 witnesses who have so far come to a position. The OFT may be interviewing them
20 further. It is anticipated and indeed it told Mr Ashley when it wrote to Sportsworld's
21 solicitors on 13th October, the letter that gave rise to the application by my learned
22 friend, Mr McNab, to intervene - "We wish to interview Mr Ashley".

23 Now, it cannot be right that such interviews can take place without their being
24 transparent, so for that reason I ask for a ruling now---

25 THE PRESIDENT: So wait a minute, wait a minute, you would say that if there should be
26 any further interviews of witnesses those should be done on a transparent basis, should
27 perhaps be taped with the usual safeguards, as would happen in the interview of a
28 witness by policeman in a criminal case.

29 MR TURNER: If I may add, and as would happen "below" if I can so describe it, the
30 administrative procedure, where we are provided with the interviews of witnesses on
31 the OFT file. I have a note here from my very learned friend, Mr Peretz in the Ready
32 Mix Concrete cartel case in the Restrictive Practices Court, in which Mr Colgate sat, a
33 contempt case involving breach of orders not to form cartels the OFT was made to
34 disclose all drafts of witness statements and transcripts of interviews - it may be worth
35 referring to. Well, it may be, and there it is, look, I just did. But the test, if I may say so
36 really does answer itself, when you put yourselves collectively in the position of what
37 are you going to do when I say to Mr Ashley "Have you been talking to the OFT?" He
38 says "Yes", and somebody from the OFT stands up and says: "I object, it's privileged".

1 That is unthinkable, and it is only fair to raise it now so that the Office knows that
2 when it deals with prospective witnesses the regime that it must adopt from the word
3 "go" - it won't be taken by surprise, it is not something I am going to be saying at the
4 next CMC, but it might have, as it were, retrospective consequences for the Office,
5 which is why I make the point now.

6 THE PRESIDENT: So what exactly are you asking for?

7 MR WEST-KNIGHTS: All communications between the OFT and its witnesses of any
8 kind be transparent.

9 THE PRESIDENT: Right. Yes, Mr Turner?

10 MR TURNER: We strongly oppose that. This is a matter subject to ordinary litigation
11 privilege, it is well established. This is not a criminal case where that sort of process is
12 either required or appropriate. In the Ready Mix Concrete case, in which I also took
13 part, we had people subject to criminal sanctions, fines and imprisonment. It was a very
14 different case from this, and there is no case prior to this in which---

15 THE PRESIDENT: Why is a fine for contempt different from a fine for infringing Chapter I
16 Prohibition?

17 MR TURNER: In that case it was accepted that the procedures concerned were effectively
18 criminal in the context of national criminal procedures, whereas in this case it is a
19 different matter entirely. We have an administrative penalty which, as a matter of the
20 convention, counts for criminal purposes, and as, Sir, the *Napp* case has made clear,
21 that doesn't mean that all of the procedures appropriate to criminal procedure follow.

22 THE PRESIDENT: At this stage of the case, at least in the conception I have provisionally
23 in mind, except for possibly dealing with some points of rebuttal, it is not really a
24 matter for new evidence from the OFT, it is simply a matter of collecting up the
25 existing evidence, and putting it where it should be. It is not really now to be reglossing
26 what is in the decision.

27 MR TURNER: That is, of course, accepted, and we have no intention of doing that. What
28 we are talking about now is precisely the area of rebuttal evidence, but it has never
29 been suggested before that it is necessary for the OFT to have all its conversations with
30 such people, about such subjects taped.

31 THE PRESIDENT: I don't know that that is actually being suggested. If we tie it down, Mr
32 West-Knights, what is actually being suggested now? You get previous drafts of
33 witness statements, or drafts of witness statements?

34 MR WEST-KNIGHTS: I am going to confine myself to answering your question -
35 tempting though it is to do something else.

36 THE PRESIDENT: Thank you.

37 MR WEST-KNIGHTS: Transparent - whatever is said is conveyed to us. I don't care
38 whether it is tape recording or whether somebody is taking a shorthand note, or

1 somebody is taking a note of the gist. I am bound to say I am astonished at the
2 opposition by the Office. What is it proposing to do that it cannot allow those parties
3 affected by this to see the process.

4 THE PRESIDENT: Well, it seems we have a conceptual problem here, I think. The Office
5 sees it as more a civil sort of procedure in which you take a statement from a witness
6 and that is your witness statement.

7 MR WEST-KNIGHTS: Well, let me fall into the temptation since I am virtually invited to,
8 and say this: it is trite law that contempt proceedings are civil in character and quasi
9 criminal in outcome.

10 THE PRESIDENT: Yes.

11 MR WEST-KNIGHTS: It is, as I think you were already on your way there, if I may say so
12 with respect, a direct analogy here. Again, I say, not entirely rhetorically, what does the
13 Office think it is doing, or intends to do that cannot be transparent? It is as simple as
14 that. If my learned friend can identify any downside then perhaps we can debate that.
15 But there is, in my submission, no downside which is associated with propriety that can
16 be identified.

17 THE PRESIDENT: I think, Mr West-Knights, my own view - I will see whether my
18 colleagues agree.

19 (The Tribunal confer)

20 MR WEST-KNIGHTS: I am sorry, Sir, I was on my feet and you were addressing me, Sir.

21 THE PRESIDENT: I was inclined to say, Mr West-Knights, that is one possible solution to
22 this problem the following: we do not yet know whether the OFT is going to produce
23 further evidence and if so, what. If they do, for some reason, produce a further witness
24 statement that goes beyond merely collecting up what is there already it would surely
25 be open to you at that point to apply for the copies of any earlier drafts, notes of
26 interview, correspondence or whatever.

27 MR WEST-KNIGHTS: I wouldn't know, with respect, they do intend to, rebuttal evidence
28 no doubt in particular from Mr Ashley---

29 THE PRESIDENT: Yes.

30 MR WEST-KNIGHTS: ---what can be wrong with our, as it were, being there when they
31 speak to him?

32 THE PRESIDENT: Well I am slightly hesitant about deciding this in advance. It is a fairly
33 fundamental point to the way these appeals operate.

34 MR WEST-KNIGHTS: I raised it today for no other purposes as I made clear than to
35 ensure that the Office at least proceeded upon the footing that there may be shone a
36 spotlight, and entire transparency given to the whole process of this dealing with
37 witnesses. If it proceeds on that basis then you can later make the decision
38 retrospectively if it comes up.

1 THE PRESIDENT: For the Tribunal's part we are prepared to concede on the basis that
2 there may at some later stage be a spotlight shone on the way any further new evidence
3 was prepared.

4 MR WEST-KNIGHTS: The only caveat I have to that, Sir, and I am not suggesting for a
5 moment that anybody senior in the Office is deliberately going to do anything
6 improper, these things do not always happen at a senior level, and with the best will in
7 the world people are not always careful, and people do not always know what the rules
8 are, particularly the Office because they come at this from a different point of view
9 from those of us who describe ourselves as "common lawyers". But it is not merely
10 how did they get the information in the new statements, but was there any discussion in
11 the course of that information gathering exercise in respect of the extant material?
12 There is the possible rub.

13 THE PRESIDENT: Well, we will see. Mr Turner, I think our view at the moment is that if
14 there are further witness statements that you wish to prepare you should go ahead and
15 prepare them. But it may be that at some later stage one or other of the appellants may
16 wish to put those statements in doubt on the basis they wish to know more about
17 exactly how you went about preparing them.

18 MR TURNER: We have no difficulty with that in itself.

19 THE PRESIDENT: And you should therefore be prepared to meet that possible line of
20 appeal, and we may make any orders we feel that we need to make to get to the bottom
21 of it if we think there is a point there.

22 MR TURNER: Absolutely, we can cross that bridge when we come to it. May I just say for
23 completeness, first, we have not finally decided whether we shall require rebuttal
24 evidence, therefore for the record that has not been settled.

25 Secondly, also for the record, if transparency is going to be the issue in
26 proceedings of this kind let us not also forget the public interest context in which they
27 take place, and what is sauce for the goose should be sauce for the gander.

28 THE PRESIDENT: Meaning what?

29 MR TURNER: Meaning that we also may reserve the right to question witnesses on the
30 way in which they have had their evidence prepared.

31 MR WEST-KNIGHTS: These being civil proceedings my answer to that, and that of Lord
32 Grabiner, will be "absolutely legal privilege, full stop". And if my learned friend cannot
33 see the difference between the role of a prosecutor and the role of defendants in quasi
34 criminal proceedings then we may be heading for trouble.

35 THE PRESIDENT: Well, let's not cross all these various bridges - it is too early. Did you
36 wish to say something, Miss Bacon?

37 MISS BACON: Sir, there was the issue of consolidation and timetable for Umbro's appeal
38 which came rather at the start of that protracted discussion about witnesses in which

1 Umbro was not concerned. Would it be possible to have a ruling on that?

2 THE PRESIDENT: Well I think we had better park that until we have dealt with Umbro's
3 separate application later today, if we may.

4 MR WEST-KNIGHTS: Ex parte, I say---

5 MR HARRIS: Sir, if I may say there was the outstanding issue about whether or not we
6 would be able to see a version of the Notice of Appeal. Legal advisers would like to see
7 everything and, if needs be, confidentiality - I am happy that that be delayed only of
8 course I have absolutely no idea what the separate application may be.

9 THE PRESIDENT: I know.

10 MR HARRIS: Or when it may take place, so provided that is not lost sight of.

11 THE PRESIDENT: Your comment is borne in mind, Mr Harris.

12 MR HARRIS: I am very grateful.

13 THE PRESIDENT: It is not forgotten. Now, where have we got to on the agenda.

14 LORD GRABINER: Sir, I am sorry to be a pain, and I do not know if we are in the agenda,
15 but on this particular point there is a debate between us and my learned friend for the
16 OFT in relation to a further witness statement, a statement of a Mr Preston and,
17 technically, I need the permission of the Tribunal to put in this statement.

18 THE PRESIDENT: Yes, you can have it, Lord Grabiner.

19 LORD GRABINER: I am very grateful, thank you very much.

20 MR TURNER: Sir, I am not sure you are aware of the Office's position on that?

21 THE PRESIDENT: I am sorry, Mr Turner, I may have jumped the gun. Is there some
22 overriding ---

23 LORD GRABINER: Sir, I can deal with it quite quickly - I know I am being a pain, and I
24 apologise, but I do need the permission. In essence it is this: we have produced a four
25 page further witness statement of a man called Mr Stephen Preston. There is a debate
26 between the OFT and those instructing me at an extraordinarily absurd level, so that
27 where he says in the witness statement things like: "I understand the position to be
28 that", or "I believe that", they are saying that he ought to provide the source of
29 information, otherwise the object to the introduction of the document. Now, if he has
30 said that, and it is in relation to some controversial issue, they would be open to cross-
31 examine him, because we intend to produce him as a witness, and so that for the most
32 part those expressions are going to be very largely irrelevant, and if they are relevant
33 then they could be the subject of cross-examination.

34 Just a couple of other matters which arise. May I say also that in the witness
35 statement of Mr Ronnie, on behalf of the other side, if I can just quote you the
36 following couple of sentences: "It is my understanding that JJB and Manchester United
37 were concerned what Umbro would do with the replica product... I understand that they
38 thought that...I understand that it was for this reason that JJB bought up our remaining

1 stock."

2 I am not remotely interested in discovering what the basis of his understanding
3 was. What I would say is that that formula, or similar formulae are used in the witness
4 statements against us. So I really would say that this was a rather fanciful objection and
5 not a well placed one.

6 So far as the copies of any underlying documents, which are relied upon by Mr
7 Preston, we absolutely agree, and we are prepared to provide disclosure of them, and
8 we will do so. The other objection, which is seriously taken by the OFT, is that they
9 expect us to provide, and I quote: " a cogent and adequate explanation for the apparent
10 lateness of our production of the witness statement."

11 The explanation is that Mr Preston no longer works with JJB and we have only
12 recently been able to get to him, he is based in the Netherlands, and is not going to be
13 available to us. Whether or not that amounts to a cogent and adequate explanation I do
14 not know, but in our submission it is, and we ought for that reason to be allowed to put
15 it in.

16 THE PRESIDENT: Sorry, Mr Turner, what is the point?

17 MR TURNER: The point is, Sir, it is not quite what Lord Grabiner was referring to. It is a
18 slightly wider point. When the new statement arrived, and we were able to inspect it
19 and how it fitted in with the existing statements, we noticed that there was a more
20 general issue relating to each of the new witness statements that JJB have put in. I don't
21 ask you to turn this up, but I will give you an example, the statement of Mr Russell.
22 Each of them, by the way, says at the beginning of their statement says that they have
23 now had the opportunity to speak to individuals from Umbro, Mr McGuigan, Mr
24 Fellone, Mr Brian, and they say new things as a result of that. It has to be viewed in
25 that context. Two points arise: first, and it seems following from those conversations
26 they say "I understand that Mr Sharpe at a certain meeting did this, and I understand
27 that someone else did something else".

28 From our point of view, it is actually important to know from whom they
29 understood this, because we may now want to go back to Mr McGuigan, or Mr Fellone,
30 and we may have to in the preparation of our defence, because if they were the source
31 of the information we would like to say "Well, did you say this?" and that will in turn
32 lead practically to the question of whether they have to come here to be cross-
33 examined, so there is a real point.

34 Secondly, in relation to documents, again, it is not just Mr Preston's statement. I
35 take Mr Russell, and he now says on 31st May, 2001 "Mr Sharpe held an internal
36 meeting". This is new. This sort of fact may be created as a result of documentary
37 material, a diary or something that we have not seen. The request that we have made is
38 that if there is underlying documentary material we should see those in fairness and

1 obviously we should see all relevant materials and not just bits that are favourable to
2 that party.

3 LORD GRABINER: We will provide that, there is no debate about it.

4 THE PRESIDENT: I think this matter, so far as it can be pursued in correspondence
5 between the parties, and everybody provide what is reasonable, that is probably the
6 way to go and we will consider making an order if there is an application in due
7 course.

8 LORD GRABINER: Could we have permission in relation to Mr Preston?

9 THE PRESIDENT: Yes.

10 LORD GRABINER: I am grateful.

11 THE PRESIDENT: Time is moving on and I think the last point that we can probably debate
12 usefully today generally is to come back to this question of confidentiality. We,
13 provisionally - as I said at the outset - see advantages in a general raising of
14 confidentiality as between all the existing parties, so that everybody can understand
15 how the fines have been calculated, and there should be very little that is kept back on
16 the grounds of confidentiality, and we are not particularly favourable to the creation of
17 a confidentiality ring. At this stage of the evening having made that observation my
18 suggestion would be that we simply park that possibility there for the time being - the
19 Registrar may be in touch with the parties in the meantime by correspondence, to see
20 how those general thoughts can be made a bit more concrete. Other than that, I am
21 personally conscious that some of the discussion we have had is left a little bit in the air
22 but we need to tie it down a bit at the next case management conference and perhaps
23 we are beginning to form collectively a sort of view as to how the shape of these
24 proceedings, subject to various arguments yet to be addressed no doubt.

25 MR WEST-KNIGHTS: I am sorry, it is me again! There is one matter that we cannot park,
26 and that is in respect of the fines' confidentiality because not all parties are, in fact,
27 here. You need to make an order, and I do not think it is opposed, so that the OFT is off
28 the Enterprise Act hook - it can't disclose that material without an order from you.

29 THE PRESIDENT: It is very difficult to make an order in relation to parties that are not
30 here without telling those parties that we propose to make the order and letting them---

31 MR WEST-KNIGHTS: I would be astonished if the OFT had not taken the step of telling
32 the FA---

33 THE PRESIDENT: Well what has gone on at the moment is that as I understand it there has
34 been a certain amount of exchange of information on a counsel only basis. We are not
35 in favour of a counsel only basis.

36 MR WEST-KNIGHTS: Nor am I. Counsel only is very dangerous.

37 THE PRESIDENT: And we would prefer maximum disclosure on a general basis.

38 MR WEST-KNIGHTS: I think Umbro are in the position of having vouchsafed nothing.

1 THE PRESIDENT: That is the situation and I do not think we can usefully take this matter
2 further forward tonight. We are going to need to consider, procedurally, how we
3 address it.

4 MR WEST-KNIGHTS: Forgive me one moment. [Counsel takes instructions] I simply do
5 not know where the OFT has got to with the Football Association, but it is urgent that
6 we see everybody's fine calculations because, apart from anything else, we do not want
7 to be criticised, or put you in difficulty. We have reserved the right to say that if it
8 looks as if there has been a disproportionate treatment in one respect, in respect of
9 somebody else, we want to say so as soon as possible.

10 THE PRESIDENT: I say this deliberately for the transcript, it is a matter in relation to
11 which the Tribunal attaches the highest importance.

12 MR WEST-KNIGHTS: I am very grateful to you. I have only one more thing which I do
13 want to say, equally for the transcript, that I trust and hope that when Leading Counsel
14 for the OFT reviews these papers, conscientious thought will be given as to whether it
15 is proper to oppose Allsports appeal in respect of the "England ring around". I know
16 what that means, the person who reads will know what that means, but it is the alleged
17 telephone call between Ronnie, and somebody at Allsports, as to which there will never
18 be any further particulars because that has been gone through in the administrative
19 procedure below. I say that with some sincerity. It may, and I only say "may" assist in
20 the shortening of these proceedings otherwise than merely in relation to England. I do
21 ask that the conscientious exercise be gone through as to the propriety of opposing the
22 appeal on that footing.

23 LORD GRABINER: Can I apologise---

24 THE PRESIDENT: No, not at all.

25 LORD GRABINER: The point that we have not debated is the date or the time for the
26 hearing. Can I just say this, and I am not sure it is appropriate to deal with it now, it
27 may be better dealt with outside of this meeting through the usual channels, and I have
28 not had a specific discussion about this with my learned friends - maybe one or two of
29 them, but no more than that. Our expectation is that the hearing is likely to take about 8
30 to 10 days. As I say, there may be agreement about that, there may not be. I am not sure
31 what sort of window you had in mind when you identified 8th March as a start date.

32 THE PRESIDENT: As a window we had, I suppose, mentally booked at least five days, and
33 left a further five days in reserve just in case.

34 LORD GRABINER: So to speak the following week, continuing?

35 THE PRESIDENT: Yes.

36 LORD GRABINER: I do not want to debate it now, although I am happy to do so - I have my
37 diary in front of me, others may or may not have theirs with them - but I just do not
38 know how flexible you might be in relation to the timing.

1 THE PRESIDENT: Well, there might be a degree of flexibility, but as usual with as many
2 parties as we have got, and the Tribunal's own diaries, there is not a great deal of room
3 for manoeuvre. It is somewhat complicated by the fact that the Tribunal is "moving
4 house" to new premises, which I hope will be ready for the new appeal on, I think, 11th
5 January. We then need about 10 days to get all the systems up and working, so it is
6 difficult to contemplate anything really before the end of January, that leaves February.
7 February is already fairly taken with a lot of other things, so we were going to kick off
8 in early March, which was more or less, from our point of view, the first open date for
9 a hearing like this.

10 LORD GRABINER: Can I put in a personal plea, which is that a three week period beginning
11 15th March, which is the following week, would be absolutely fine as far as I am
12 concerned, but as I say I do not know the position as far as my friends are concerned.
13 But I do think we could consider the position outside of this meeting and see if that is a
14 possibility so far as the Tribunal are concerned.

15 THE PRESIDENT: I think the parties need to contact the Registrar, with a view to reaching
16 agreement on a hearing window as soon as possible.

17 LORD GRABINER: Well can you leave that with us?

18 THE PRESIDENT: Yes.

19 LORD GRABINER: I am very grateful.

20 THE PRESIDENT: Are there any other points in general meeting that anybody wishes to
21 make. Yes, Mr Turner, you were asking for some further directions, further
22 information, is that right?

23 MR TURNER: Sir, I had only three points to make. First, arising out of the fines'
24 calculation, it is quite right that we have contacted everybody who was fined---

25 THE PRESIDENT: What, including the ones who have not appealed?

26 MR TURNER: Yes, we have, and the three outstanding companies from whom we have
27 not had consent are Sports Soccer and Umbro, both represented here today, and the
28 Football Association who simply refused. So to that extent we are in the Tribunal's
29 hands.

30 THE PRESIDENT: But you have contacted them on the basis of a counsel only disclosure,
31 haven't you?

32 MR TURNER: Yes.

33 THE PRESIDENT: I think they have to be recontacted on the basis of open disclosure.

34 MR TURNER: Well they have refused it on the more limited basis.

35 THE PRESIDENT: Well, we have to give them a chance to be heard and we need to do that
36 fairly quickly.

37 MR TURNER: The second point which actually I ought to have mentioned earlier arose
38 from paragraph 20 of our skeleton argument, and we attribute some importance to this

1 as a general point of procedure, and this is the extent to which the Office, which is now
2 confronted with a clutch of witness statements sought to be relied upon by the
3 appellants, both new statements, and statements where it says we are going to continue
4 to rely upon those put forward in the investigation, has to cross-examine on each and
5 every point where it disagrees with some proposition, or be taken to accept that
6 proposition.

7 Now, this is an area which, so far as we can tell in the High Court is still under
8 some evolution since the new rules and in particular the new provision for the court to
9 be able to limit cross-examination. Our submission would be that if, in this procedure,
10 even more acutely than in the High Court, we ought to be able to dispense with the
11 need to cross-examine all individuals on all points where they say things with which we
12 disagree.

13 THE PRESIDENT: Well I think at this stage, Mr Turner, we hear what you say. I think we
14 will put this item on the agenda for the next case management conference. We may
15 well need to look at it in the light of particular witnesses and particular witness
16 statements, and then we will see where we are, but I think it is a bit late to debate it
17 tonight.

18 MR TURNER: Yes. The only other matter with which we do wish to proceed is a request
19 that we have made of Allsports and JJB relating to pricing information, and the
20 Tribunal may have seen the basis upon which we have asked for it and what it is.

21 THE PRESIDENT: Yes.

22 MR TURNER: Essentially we have asked both of those parties for details of any
23 discounting which they have engaged in this calendar year - we have taken the year
24 2003 really for convenience. The reason for this is in relation to both of those parties
25 because we apprehend that that sort of information is essential background information
26 that the Tribunal may wish to have in any event.

27 Specifically in relation to Allsports it arises from the way that they put their
28 appeal, because in their appeal they lay emphasis upon the fact that they are not a
29 discounter. They do not suggest that market conditions have changed in any way, and
30 Mr Hughes makes this point himself repeatedly in his witness statement as a plank of
31 their appeal.

32 THE PRESIDENT: Yes.

33 MR TURNER: For that reason we say that, all other things being equal, it would be
34 particularly useful to see this sort of information.

35 MR WEST-KNIGHTS: I have no idea, myself, what Allsports current policy is. When it
36 says in our Notice of Appeal that Allsports is not a discounter, it is casting its mind
37 back to the material period. The OFT know precisely what the pricing policies were
38 and, indeed, the actual prices because we have already referred to the table annexed to

1 the decision, the price points on each shirt at every period during the material time
2 which, in our case, is at its maximum at the end of May, 2000 to October, 2000. What
3 on earth the OFT can be thinking that our policy now in 2003 might shed light on
4 smacks, in my view, of simply curiosity. It proves nothing. It is rather like the claimant
5 who says "Well, I know I have a weak case about tripping over the pavement, because
6 they say the pavement wasn't that bad, but they've fixed it now". Of course, the market
7 conditions are different now - apart from anything else the Tribunal's decision will have
8 had an effect on the market.

9 THE PRESIDENT: I think, Mr West-Knights, this is not a point we want to decide tonight.

10 MR WEST-KNIGHTS: Good, I am very happy for it to be parked.

11 THE PRESIDENT: If the Office writes to you with a reasonable request, if you feel able to
12 meet it so much the better because it is a reasonable request. If you feel, for whatever
13 reason, you either should not or cannot, or it would be wrong to do so you will no
14 doubt write back appropriately.

15 MR WEST-KNIGHTS: These things have happened, the Office has written with a request
16 saying that it regarded it as relevant. We have written back to say that we do not regard
17 it as relevant, the answer is "no".

18 THE PRESIDENT: Right, well we have not got the correspondence all in front of us, and
19 we are not sufficiently seized of the point to rule on it tonight.

20 MR WEST-KNIGHTS: I am very happy you should park it.

21 THE PRESIDENT: If it is not resolved then clearly the OFT may wish to return to it on the
22 next occasion when we meet.

23 MISS BACON: I am very sorry, just a housekeeping point. We did not specifically ask for
24 costs of the appeal in our Notice of Appeal. We do not take the view that we need to
25 ask for it because that lies within the discretion of the this Tribunal anyway, but if this
26 Tribunal thinks we should ask for it then could we formally have permission to amend
27 our Notice of Appeal on that point?

28 THE PRESIDENT: I think we will park that point too, Miss Bacon. We are a long way from
29 dealing with issues of costs.

30 MR WEST-KNIGHTS: Can I ask, as it were, across the Tribunal, whether the ex parte
31 application, about which we still know nothing, is to be parked, or what?

32 THE PRESIDENT: No, the ex parte application will proceed in the very near future.

33 MR WEST-KNIGHTS: Well the anticipation is, certainly between myself and my learned
34 friend, Lord Grabiner and his Junior, that we would be present.

35 THE PRESIDENT: Well we have not really addressed that point yet.

36 MR WEST-KNIGHTS: I was only asking the preliminary question, is that being parked
37 until 12th December?

38 THE PRESIDENT: No, it is not. I was proposing to go straight on and deal with it tonight,

1 if we can.

2 MR WEST-KNIGHTS: I am very grateful to you, thank you.

3 THE PRESIDENT: So are there any other points that anybody would like to raise at this
4 stage?

5 MR HARRIS: Sir, only this, that Manchester United has quite profound concerns as
6 regards what was going on between the Umbro and the OFT, but simply have no idea
7 what the ex parte application is. So we would echo the concerns of JJB and Allsports.

8 THE PRESIDENT: Thank you very much.

9 MR WEST-KNIGHTS: I've got one, and it's a quick one. It says here: "Suggest to Tribunal
10 that Sportsworld permit their financial information for Sportsworld be revealed", well
11 he shouldn't be but he is still here, look. I am told that that will actually cut through an
12 awful lot of the Gordian knot because the principal parties are those in respect of whom
13 we want to make comparisons.

14 THE PRESIDENT: I do not know if Mr McNab is in a position to take instructions.

15 MR McNAB: Well, the reason why I had actually remained here, Sir, was because this
16 point had been floated. The position of Sportsworld is that we do not consent to
17 disclosure of the final calculation material. We do not consent to the Office of Fair
18 Trading being permitted to disclose it, we are not proposing to disclose it ourselves of
19 course, but since we are not a party I am not quite sure what the method would be for
20 us---

21 THE PRESIDENT: Yes, you are not opposing the disclosure by the OFT of this
22 information?

23 MR McNAB: Oh we are. Certainly, the OFT has to be released from its obligation of
24 confidentiality by us, in effect . We do not consent to the disclosure of the information.
25 Our position is, and has been, that disclosure would reveal commercially confidential
26 information. We have not seen any detailed, reasoned basis, from either JJB or
27 Allsports as to how or why disclosure should be ordered, and as regards the questions
28 of penalties, if it is being suggested there is some question of discrimination between
29 parties, appellants, call them what you may, we really cannot see any basis on which
30 our position as whistle blower could be described as being "the same" or "similar" to
31 the position of JJB or Allsports.

32 THE PRESIDENT: There will be a letter from the Registrar to all parties---

33 MR McNAB: I am glad.

34 THE PRESIDENT: Thank you very much.

35 LORD GRABINER: Sir, without intending any discourtesy I wonder if you would allow me
36 to depart. I have had a conference waiting for me since 5 o'clock.

37 THE PRESIDENT: I am very sorry---

38 LORD GRABINER: No, no, not at all, it is not your fault - it is all **this** lot! [Laughter] I am

1 most grateful.

2 THE PRESIDENT: Very well, we will rise for a few minutes.

3 **[Short break]**

4 THE PRESIDENT: We gather that Umbro wants to make an application to the Tribunal to
5 discuss the particular matter that Umbro says is confidential to Umbro. Persons other
6 than Umbro are present as can plainly be seen. What is the position? Is that agreed or is
7 that not agreed?

8 MISS BACON: No, Sir, it is not agreed. We precisely do not want representatives of other
9 parties because the matter to which we refer has not been disclosed to anybody else
10 other than obviously the OFT.

11 THE PRESIDENT: Yes. I think in those circumstances it is very difficult. We are placed in
12 a very difficult position as regards others who are represented here, but I think we will
13 just have to ask you to withdraw for the purposes of this.

14 MR WEST-KNIGHTS: I think we all entirely understand. No doubt the first thing you will
15 canvas is whether - we will not be very far away if you come to the conclusion on
16 hearing my learned friend that our absence is inappropriate.

17 THE PRESIDENT: Thank you, Mr West-Knights, that is the best we can do at the moment,
18 I am afraid.

19 MR HARRIS: Sir, I am happy to withdraw and be ready to be called. I just anticipate that to
20 the extent this may involve, for example, leniency, and I really do not know, then that
21 bears closely on what we have now got permission to say in our appeal, and it may be
22 the case that it would be appropriate for me to return and not necessarily Mr West-
23 Knights, Mr Hoskins?

24 THE PRESIDENT: Every possible combination is not ruled out.

25 MR WEST-KNIGHTS: We could park it!

26 THE PRESIDENT: Thank you very much.

27 **[For hearing in camera see separate transcript]**

28