



NEUTRAL CITATION: [2004] CAT 17

**IN THE COMPETITION  
APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A 2EB

**Case: 1021/1/1/03  
1022/1/1/03**

1 October 2004

**Before:**

**Sir Christopher Bellamy (President)  
Mr. Barry Colgate  
Mr. Richard Prosser OBE**

**Sitting as a Tribunal in England and Wales**

**BETWEEN**

**JJB SPORTS PLC**

*Appellant*

**-and-**

**OFFICE OF FAIR TRADING**

*Respondent*

**ALLSPORTS LIMITED**

*Appellant*

**-and-**

**OFFICE OF FAIR TRADING**

*Respondent*

Lord Grabiner QC and Mr. Mark Hoskins (instructed by Messrs. DLA) appeared for JJB Sports Plc

Mr. Laurence West-Knights QC and Mr. George Peretz (instructed by Messrs. Addleshaw Goddard) appeared for Allsports Limited

Mr. Stephen Morris QC, Mr. Jon Turner and Miss Anneli Howard (instructed by Director of Legal Services, Office of Fair Trading) appeared for the OFT

Heard at Victoria House from 8 to 26 March 2004

**JUDGMENT ON LIABILITY**

**APPROVED BY THE TRIBUNAL FOR HANDING DOWN  
(SUBJECT TO EDITORIAL CORRECTIONS)**

**Note: Annex I to this judgment is a separate document which contains a chronology of events for general reference purposes. In this judgment, transcript references relate to the transcripts of the main hearing as posted on the Tribunal's website**

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## I INTRODUCTION

### *The decision*

1. In decision no. CA 98/06/2003 dated 1 August 2003 (“the decision”) the OFT found that a number of undertakings had engaged in price fixing of replica football kits in 2000 and 2001, contrary to the Chapter I prohibition imposed by section 2 of the Competition Act 1998 (“the Act”).
2. Section 2 of the Act provides:

“(1) ... agreements between undertakings, decisions by associations of undertakings or concerted practices which –  
(a) may affect trade within the United Kingdom, and  
(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited  
...  
(2) Subsection (1) applies, in particular, to agreements, decisions or practices which –  
(a) directly or indirectly fix purchase or selling prices or any other trading conditions ...”
3. By virtue of section 60 of the Act, section 2 is to be interpreted in a manner consistent with Community law.
4. According to paragraphs 322 and 511 of the decision, the OFT uses the word “agreement” in the decision to include a reference to a “concerted practice”. For convenience, we do likewise in this judgment, except where it is necessary to distinguish between those two concepts for the purposes of analysis.
5. In the decision, the OFT imposed penalties on the relevant undertakings, pursuant to section 36 of the Act, as follows:

Umbro Holdings Limited (“Umbro”)	£6.641 million
JJB Sports plc (“JJB”)	£8.373 million
Allsports Limited (“Allsports”)	£1.350 million

Sports Soccer Ltd (“Sports Soccer”) <sup>1</sup>	£0.123 million
Black’s Leisure Group plc (“Blacks”) <sup>2</sup>	£0.197 million
John David Sports plc (“JD”)	£0.073 million
Florence Clothiers (Scotland) Limited (“Sports Connection”)	£0.020 million
Manchester United plc (“MU”)	£1.652 million
The Football Association Ltd (“the FA”)	£0.158 million

6. A further undertaking, Sportsetail Ltd (“Sportsetail”), now in administration, was found to have committed an infringement, but no penalty was imposed.

*The appeals*

7. By appeals lodged on 1 October 2003 both JJB and Allsports appealed to the Tribunal under section 46 of the Act against the findings of infringement made against them in the decision and, in the alternative, against the amount of the penalty imposed. In their appeals against infringement, JJB and Allsports deny the existence of the agreements or concerted practices alleged against them.
8. By appeals lodged on 30 September 2003, Umbro and MU both appealed to the Tribunal under section 46 on the amount of the penalty imposed, but not as to the findings of infringement made against them.
9. The Tribunal has decided to give judgment on the issues as to infringement raised by JJB and Allsports, before considering any of the issues regarding penalty raised by JJB, Allsports, Umbro and MU. Accordingly this judgment deals only with the issues of infringement regarding JJB and Allsports. Those issues are primarily questions of fact as to the existence or not of the agreements or concerted practices alleged.
10. Although it is convenient to deal with those issues in a single judgment, the appeals of JJB and Allsports are separate appeals which require separate consideration.
11. Blacks, JD, Sports Soccer, Sports Connection (now in liquidation) and the FA have not appealed to the Tribunal, either on the issue of infringement or on the amount of penalty.

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<sup>1</sup> Sports Soccer has since been renamed Sports World International Limited but for convenience we continue to refer to that company as Sports Soccer

<sup>2</sup> At the material time Blacks traded as “First Sport”. References to “First Sport” or “Blacks/ First Sport” are references to Blacks.

*The infringements found against JJB*

12. JJB is found in the decision to have participated in four infringements of the Chapter I prohibition, namely:
  - An agreement or concerted practice between JJB, Allsports, Blacks and JD, as well as Sports Soccer and Umbro, around the time of the Euro 2000 tournament, to fix the retail selling price of England home and away replica shirts during the selling period of the run up to, and England's participation in, the Euro 2000 tournament in June 2000 ("the England Agreement"): see paragraphs 412 to 437 of the decision.
  - An agreement or concerted practice between at least JJB, Allsports, Blacks and MU, as well as Sports Soccer and Umbro, to fix the retail selling price of MU's new home replica shirt as regards the period following the launch of that shirt on 1 August 2000 ("the MU Agreement"): see paragraphs 438 to 477 of the decision.
  - An agreement or concerted practice between at least JJB, Sports Soccer and Umbro, with respect to the retail selling prices of England and MU replica shirts for the remainder of 2000 and in 2001 ("the Continuation Agreement"): see paragraphs 478 to 493 of the decision.
  - An agreement or concerted practice between JJB, the FA, Sportsetail and Umbro between 7 February 2000 and (as regards JJB and Umbro) August 2001, whereby the parties agreed to align the retail prices for England replica kit sold by Sportsetail from its England Direct website with JJB's retail selling prices for the same products ("the England Direct Agreement"): see paragraphs 511 to 530 of the decision.
13. In its notice of appeal JJB denies its participation in each and any of the four agreements or concerted practices alleged against it.

*The infringements found against Allsports*

14. Allsports is found by the OFT to have been a party to:
  - The England Agreement – paragraphs 412 to 437 of the decision;
  - The MU Agreement – paragraphs 438 to 477 of the decision.
15. In its notice of appeal Allsports likewise denies its participation in either of the agreements or concerted practices alleged against it.

*Replica kit*

16. According to the decision:

“Replica football kit consists of authentic reproductions of the short- and long-sleeved shirt, shorts and socks to which a football club or national football team’s logo or trademark and those of the manufacturer and any sponsors are applied and which are worn by the relevant team’s players when competing in football tournaments.” (paragraph 55).
17. As the decision points out at paragraphs 72 to 77, various studies by the FA indicate a high level of supporter loyalty towards a particular team, which is likely to last “almost from the cradle to the grave”. One consequence of this is that replica kit offered by a particular club (say Arsenal) is not substitutable for the kit offered by another club (say Manchester United).
18. The crucial selling period for most replica kit is the period between the launch of a new kit (usually between May and September) and the following Christmas (see also Day 6, p. 59). Sales of replica kit for national teams are more dependent on the success of the team in international tournaments. Most of the prominent football clubs have regular launches of new kits. England kits are usually launched on around St George’s Day, with alternate home and away kits being launched each year. The most important item of replica kit is the shirt, normally the short-sleeved version.
19. The right to manufacture authentic replica kit is licensed by the football club concerned to a manufacturer who is authorised to affix the club’s logo to the kit in question. The

manufacturer then sells the kit to retailers selling sports goods, who in turn sell to the general public. A number of clubs, including MU, have their own club shops and are important retailers of replica kits in their own right. Retailers tend to place orders for the shirts about six months in advance, and then “book-in” deliveries as required. There appears to be no effective contractual obstacle to a retailer re-scheduling deliveries, or even cancelling an order altogether.

20. In these proceedings the replica shirts mainly concerned are the England shirts manufactured by Umbro under licence from the FA, and MU shirts manufactured by Umbro under licence from MU. According to the OFT, the England and MU replica shirts were at the material time the largest selling items in the most popular replica kits supplied in the United Kingdom (decision, paragraph 495). The evidence before the Tribunal is that, from a sports retailer’s point of view, the England and MU shirts are “must have” items.

*The undertakings and principal persons involved*

- *Umbro*

21. Umbro, which is based in Cheadle, is licensed by a number of football clubs to manufacture and sell replica kit. Umbro has replica kit manufactured for it in the Far East and supplies that kit to retailers in the United Kingdom. Such products are often known as “licensed product”. In addition, Umbro sells other sports clothing and equipment under the Umbro brand or logo. Such other products are often referred to as “branded”, as distinct from “licensed”, products.
22. At the material time Umbro was licensed to supply replica kits by the FA, MU, Chelsea, Celtic, and Nottingham Forest. In the autumn of 2000 it became known that Nike would replace Umbro as MU’s exclusive licensee for the manufacture and supply of all MU’s merchandise, including replica kit, with effect from 2002. Umbro’s main competitors in the supply of replica kits and branded products were and are international companies such as Nike, Reebok and Adidas.
23. In 2000 and 2001, Umbro’s Chief Executive Officer was (and still is) Mr. Peter McGuigan. Mr. Chris Ronnie, who took garden leave from Umbro in February 2003 and now works for Sports Soccer, was Chief Operating Officer. Mr. Phil Fellone was United Kingdom Sales

Director, and is now United Kingdom Managing Director. Mr. Martin Prothero is and was a Board member, at the material time responsible for Marketing and International. Mr. Simon Marsh was Sports Marketing Director. The relevant account managers were Messrs. Lee Attfield for Sports Soccer, Phil Bryan for JJB and Anthony May for Allsports and JD.

24. Until 1999 Umbro was privately owned. In April 1999 Umbro was the subject of a management buyout under the aegis of Doughty Hanson Limited. At that time Mr. McGuigan and Mr. Ronnie, among others, became shareholders in Umbro.
25. Umbro's United Kingdom turnover was £83.8 million in the year ended 31 December 2000.

*- JJB*

26. JJB, which is based in Wigan, was at the material time the largest sports retailer in the United Kingdom, with some 430 retail outlets. JJB sells replica football kit, other football club merchandise, general sportswear and sports equipment. In the Spring of 2000, JJB accounted for a substantial proportion of Umbro's business, and was the largest buyer of replica kit. JJB was also the FA's Official Retailer for England merchandise.
27. Mr. David Whelan is the founder of JJB, having built that company up from virtually nothing over a period of many years. At the material time Mr. Whelan was Chairman of JJB. He was also Chief Operating Officer during 2000. Mr. Duncan Sharpe, Mr. Whelan's son-in-law, became Chief Executive Officer in February 2001. Mr. Sharpe died on 7 October 2002. Mr. Colin Russell is an associate director of JJB with overall responsibility for replica kit. Mr. Phil Bryan, who formerly worked for Umbro as JJB's account manager, now works for JJB.
28. JJB had a United Kingdom turnover of £659 million in the year ended 31 January 2001.

*- Allsports*

29. Allsports, which is based near Stockport, is also a sports retailer with some 240 retail outlets trading principally as "allsports" or "all:sports". Allsports' shops tend to be smaller in size than those of JJB and Sports Soccer. At the material time Allsports was an "official

retailer” for MU. Apparently about 20 Allsports stores had a “shop within a shop” dedicated to the sale of MU merchandise.

30. At the material time, Mr. David Hughes was the Chairman of Allsports. Mr. Hughes is the founder of Allsports, and also built that company up to its present position from small beginnings. Allsports is still, in effect, owned by Mr. Hughes. At the material time Mr. David Patrick was the Chief Executive Officer of Allsports and Mr. Michael Guest was the Buying and Marketing Director. Ms Michelle Charnock was a replica kit buyer.
31. In the year ending 29 January 2000, Allsports’ turnover in the United Kingdom was £139.5 million.

*- Sports Soccer*

32. Sports Soccer is involved in the retail supply of replica football kit and other sportswear and sports equipment. According to the decision, Sports Soccer had about 90 retail outlets in the Spring of 2001. Like those of JJB, these outlets tend to be relatively large in terms of square metres. Sports Soccer has built its business on discounting, believing that it can sell additional volumes of replica kit at discounted prices, thus generating satisfactory profits (paragraph 129 of the decision).
33. The founder, owner, and driving force behind Sports Soccer is Mr. Mike Ashley. Other members of the Sports Soccer board include Mr. David Forsey (managing director and company secretary) and Mr. Sean Nevitt (finance and buying director). Various commercial arrangements existed or were being negotiated between Sports Soccer and Umbro around the time of the alleged infringements which are not mentioned in the decision. These are discussed in more detail later in this judgment.
34. Sports Soccer, in the person of Mr. Ashley, complained to the OFT about price fixing in relation to replica football shirts on 3 August 2000, and met with OFT officials on 30 March 2001 and again on 13 August 2001. Sports Soccer may fairly be described as “the whistleblower” in this case (see paragraph 755 of the decision).
35. In the year ended 30 April 2001, Sports Soccer had a United Kingdom turnover of £320 million.



*- Blacks (trading as First Sport)*

36. During the period of infringement Blacks retailed sportswear and sportswear equipment, including replica kit, through its subsidiary First Sport. In the relevant period Mr. Tom Knight was the managing director of First Sport and also Chief Executive Officer of Blacks. In late 2002 Mr. Knight became the Chief Executive Officer of JJB, in succession to Mr. Duncan Sharpe. In 2002 the Blacks' business concerned with replica football kit was sold to JD. In the year ended 29 February 2000, Blacks' United Kingdom turnover was £208 million.

*- JD*

37. JD, also trading as JD Sports, is a sports retailer based in Lancashire. At the material time JD had about 130 shops, and a total United Kingdom turnover of some £171 million. Mr. Barry Bown was Chief Operating Officer of JD.

*- Sports Connection*

38. Sports Connection, now in receivership, was a sports retailer based mainly in Scotland. The only agreement to which Sports Connection was found to be a party, namely a price fixing agreement between Umbro and Sports Connection relating to the Celtic shirt in 2001 (paragraphs 496 to 500 of the decision), is not relevant for present purposes and we make no further reference to it.

*- MU*

39. MU is the parent company of the Manchester United Group. MU is one of the largest and most successful football clubs in England. As with other football clubs, MU has extensive merchandising activities. Until May 2002, MU licensed Umbro to manufacture, supply and distribute its replica football kit and other merchandise. With effect from May 2002, Umbro was replaced as licensee by Nike. Negotiations as to the renewal of Umbro's licence were in progress during the summer of 2000. In the autumn of that year it became known that Nike would be taking over from Umbro.
40. Mr. Peter Kenyon had been Chief Executive Officer of MU since August 2000. Mr. Peter Draper had been Marketing Director of MU since September 1999. At the material time

Mr. Steve Richards was responsible for MU merchandising. In the financial year to 31 July 2000, MU had a total turnover of some £114 million.

- *The FA*

41. The FA is the governing body for football in England. The FA licenses Umbro to manufacture, supply and distribute the England team replica kit and certain other merchandise. In the financial year ended 31 December 2000, the FA had a total United Kingdom turnover of £110 million.

- *Sportsetail*

42. Sportsetail is currently in administration. In February 2000 Sportsetail was granted by the FA the exclusive right to operate the FA's "England Direct" retail operations, which consisted mainly of the England Direct website through which replica kit and other items were sold by mail order by Sportsetail.

## **II THE ADMINISTRATIVE PROCEDURE**

43. On 6 August 1999, the FA and the FA Premier League gave the OFT a non-statutory assurance that they would take action to prevent resale price maintenance in the market for replica football kit. That assurance was given following an OFT investigation which found evidence that clubs encouraged manufacturers to withhold supplies from retailers who were selling at a discount.
44. On 11 August 1999, pursuant to that assurance to the OFT, MU wrote to Umbro asking it to inform its dealers that they were free to sell replica kit at whatever price they might choose.
45. In September 1999, Umbro wrote to all its dealers stating:

"Umbro have informed the OFT ... that we will not withhold supply of or take any action to prevent the display/advertising or the sale of licensed football kit at whatever price you, the retailer may choose."
46. The Act came into force on 1 March 2000.

47. On 3 August 2000 the OFT received a complaint from Sports Soccer about continued price fixing on replica shirts. Sports Soccer stated:
- “... the issue of price fixing is even more prevalent than at this time last year. Virtually all the brands and retailers within the Sports Industry are involved”.
48. OFT officials met Sports Soccer on 30 March 2001. The OFT commenced a formal investigation under the Act on 4 June 2001.
49. A second meeting between Sports Soccer and the OFT took place on 13 August 2001.
50. Pursuant to warrants issued by the High Court under section 28 of the Act, the OFT without prior warning entered the premises of Allsports, JJB, Nike (UK) Ltd, Sports Soccer and Umbro on 29 August and 5 September 2001, and took copies of documents.
51. Between September 2001 and March 2002 the OFT sent 40 notices under section 26 of the Act requiring information from various persons. Various parties to the investigation supplied information voluntarily to the OFT.
52. On 23 November 2001, Umbro informed the OFT that it intended to apply for leniency in accordance with the OFT’s *Guidance as to the appropriate Amount of a Penalty*, OFT 423. Umbro met with the OFT to discuss its application on 4 December 2001. After further correspondence, certain draft witness statements were sent to the OFT on 17 January 2002, including draft unsigned statements by Mr. Ronnie (“Ronnie I”), Mr. Fellone (“Fellone I”), and others. The OFT, however, considered that these statements did not materially advance the OFT’s case, and contained various inaccuracies and inconsistencies: see the OFT’s letter of 29 January 2002. By letter of 31 January 2002 Umbro said it would address these matters, and asked for an extension of time until 11 February. By a letter dated Friday 1 February 2002 the OFT insisted that any further witness statements should be submitted by Monday 4 February 2002. Umbro then submitted final versions of its witness statements to the OFT on 4 February 2002, again including statements by Mr. Ronnie (“Ronnie II”), Mr. Fellone (“Fellone II”) and others.
53. On 12 February 2002 the OFT wrote to Umbro stating that the witness statements that Umbro had provided under cover of its letter of 4 February 2002 still “contain material

inconsistencies as well as being vague on key matters such as discussions with retailers”, and that “substantial inconsistencies” existed between the witness statements and the documents obtained by the OFT on 29 August 2001, particularly as regards Mr. Ronnie’s statement.

54. A meeting took place at the OFT on 26 February 2002. The meeting was attended by a number of officials from the OFT, Mr. McGuigan, Mr. Ronnie and Mr. Marsh of Umbro, Ms Roseveare, Umbro’s in-house counsel, and a representative of Lovells, solicitors, for Umbro. A note of that meeting was taken by Lovells. In the course of these proceedings three notes taken by the OFT representatives at that meeting have also been produced. That meeting ended prematurely, the OFT taking the view that Umbro had not given satisfactory explanations of certain matters in issue.
55. On 28 February 2002 the OFT rejected Umbro’s request for leniency. The OFT took the view that Umbro had not met the pre-conditions for leniency, namely “the provision of all information available to the company and the maintenance of continuous and complete cooperation”.
56. In its appeal on penalty, which the Tribunal has not yet heard, Umbro contests the OFT’s view, set out at paragraph 596 of the decision, that no significant admissions or cooperation were given by Umbro at this stage. In a witness statement in support of Umbro’s appeal dated 30 January 2004 Ms Roseveare sets out Umbro’s version of the proceedings before the OFT.
57. According to the OFT’s submissions to the Tribunal, the Umbro witness statements submitted prior to 28 February 2002 were then put aside and did not figure in the administrative procedure. The existence of those witness statements came to light as a result of Umbro’s appeal on penalty and disclosure orders made by the Tribunal at case management conferences: see further below.
58. On 16 May 2002 the OFT sent the parties now identified in the decision, as well as Debenhams plc, a notice under Rule 14 of The Competition Act 1998 (Directors rules) Order 2000 (SI 2000 no. 293, “the Directors Rules”) indicating the OFT’s intention to

make a decision that the Chapter I prohibition had been infringed, and giving the parties the opportunity to make written and oral observations.

59. In July 2002 the principal parties, including JJB, Allsports, Sports Soccer, Umbro and MU responded in writing to the Rule 14 notice. In particular, on 15 July 2002 Umbro submitted further witness statements, including further signed statements dated 12 July 2002 by Mr. Ronnie (“Ronnie III”) and Mr. Fellone (“Fellone III”). JJB submitted certain witness statements to the OFT, including statements made by Mr. Whelan (“Whelan I”), Mr. Sharpe and Mr. Russell (“Russell I”) dated 15 August 2002. Allsports did not submit any witness statements to the OFT. The principal parties, with the exception of Allsports, also made oral representations to the OFT.
60. Further section 26 notices were sent by the OFT to Umbro, Sports Soccer and JD on 13 September 2002.
61. A Supplemental Rule 14 notice was served by the OFT on the principal parties, including JJB, Allsports, Sports Soccer, Umbro and MU, on 26 November 2002. The Supplemental Rule 14 notice was supported by, amongst other things, versions of the representations that the OFT had received in response to the first Rule 14 notice of 16 May 2002, including Ronnie III and Fellone III, and Umbro’s and Sports Soccer’s written representations to the OFT. At the same time the OFT stated that it was not proceeding against Debenhams.
62. The principal parties, including JJB, Allsports, Umbro, Sports Soccer and MU, responded to the Supplemental Rule 14 notice orally and in writing. JJB submitted certain further witness statements to the OFT, including statements by Mr. Whelan dated 20 January 2003 (“Whelan II”) and by Mr. Russell dated 17 January 2003 (“Russell II”). Allsports did not submit any witness statements.
63. A third Rule 14 notice was served by the OFT on MU, Sportsetail, the FA and Umbro, on 25 April 2003, on matters affecting those parties. The decision was adopted on 1 August 2003.

### III THE CONTESTED DECISION

64. The decision, which runs to 237 pages plus a number of tables and annexes, describes relevant background (section II), summarises the facts relied on (section III), sets out the OFT's legal assessment (section IV) and finally deals with penalties (section V).

#### A. SOME BACKGROUND MATTERS

##### *Selective distribution*

65. In relation to replica kit and other licensed products, the OFT points out that Umbro followed a policy of selective distribution, i.e. dealing only with retailers whom it regarded as "authentic sports retailers". During the period of the alleged infringements, Umbro resisted requests from supermarkets for supplies (paragraphs 87 to 96). In the OFT's view these matters:

"facilitated and reinforced the effectiveness of the price-fixing agreements and concerted practices described in this decision and protected major retailers from external competition" (paragraph 97).

##### *The attitude of MU*

66. The OFT considers, for the reasons given in paragraphs 98 to 112 of the decision, that in 1999 and 2000 MU was concerned about the possibility of replica kit being sold in supermarkets, about the wholesale prices it had to pay Umbro, and about the retail price of replica kit. Given also that these matters were being raised with Umbro at or about the time when Umbro was negotiating with MU for a renewal of its licensing agreement with respect to replica kit, the OFT takes the view:

"that Umbro, as a result, would have had a clear incentive to keep up retail prices where MU indicated that this was what it wanted" (paragraph 108).

67. The OFT also takes the view that:

"MU sought to forestall or limit any price competition which might come about if supplies were made to supermarkets or a cheaper version of the Replica Shirt was produced. In addition, MU used its bargaining power over Umbro as a licensor to achieve its aims" (paragraph 112).

*Recommended retail prices, retail mark up and margins*

68. At the material time it was the practice of Umbro (and other suppliers such as Nike, Reebok and Adidas) to publish a recommended resale price (“RRP”) for replica kit. In 2000, Umbro’s RRP was £42.99 for an adult replica shirt, and £32.99 for a junior replica shirt.
69. It appears that in 1998 around the time of the World Cup, JJB announced that it would not sell an adult replica shirt above £40.00, although contrary to that statement certain shirts were sold above that price up to March 1999 (see Mr. Russell’s fourth witness statement of 12 February 2004 (“Russell IV”). It is common ground that in 2000 and 2001 £39.99 was generally perceived to be the ‘ceiling price’ for adult replica shirts (£29.99 for the junior shirts), since it was virtually impossible for other retailers to sell above JJB’s prices. Those prices became generally known as, and are referred to in the decision as, “High Street prices”. In 2001, Umbro brought its RRPs into line with High Street prices for the shirts in question, i.e. to £39.99 (adult) and £29.99 (junior).
70. The evidence before the Tribunal is to the effect that other suppliers of replica kit such as Nike, Reebok and Adidas published recommended retail prices. Mr. Ashley’s evidence is that suppliers of replica kit were hostile to discounting below High Street prices on replica kit. In the context of evidence about discussions between Umbro and Sports Soccer about not discounting replica shirts for 60 days after the launch of a new shirt, such a practice was described in evidence as “the Nike 60-day rule” (see e.g. paragraph 29 of Ronnie III, Day 4, p. 188). We make no finding as to whether Nike had such a rule or not.
71. According to the OFT, at paragraphs 127 to 128 of the decision, one particular significance of RRPs in the present case is that Umbro’s wholesale prices to retailers for replica kits were arrived at by taking Umbro’s RRP and calculating back on the basis of a “standard” industry mark up of 60 per cent plus VAT. However, the largest retailers would obtain significant discounts off Umbro’s standard wholesale prices.
72. As we understand it, the practice of calculating the wholesale price by working back from the RRP meant that in ordinary circumstances discounting below the RRP or “High Street prices” would have the effect of reducing the retailer’s margin.

73. It is apparent from the decision, and from a large amount of evidence before the Tribunal, that in 2000 and 2001 a considerable tension existed in the market place between the philosophy of Sports Soccer, who believed in selling extra volumes at discounted prices, and those retailers who wished to maintain High Street prices and the profit margins which High Street prices generated.

74. The OFT considers that in this particular case RRP's and High Street prices operated "as focal points for concerted behaviour" (paragraph 125). The OFT states at paragraph 131:

"The fact that there was a standard mark-up in this industry indicates that the parties had to be vigilant to avoid collusion".

*Discounting in the period before and after the alleged infringements*

75. There is evidence before the Tribunal that sales of replica shirts are price-sensitive, and that a difference of (say) £3 between the prices of different retailers may have a significant effect on their respective sales or rate of sales (e.g. Russell I at paragraph 17).

76. The OFT finds, at paragraphs 129 to 142 of the decision, that between 1999 and 2001 the pricing structure in the industry gave considerable scope for discounting. Although some retailers, such as Allsports, did not, at the time, see discounting as part of their retail philosophy, other retailers including Sports Soccer, took a different view (paragraph 129 of the decision).

77. With regard to the period before the events of May and early June 2000 with which we are principally concerned, the picture which emerges from paragraphs 132 to 150 of the decision is as follows:

78. JJB's announcement in 1998 that it would not retail any adult replica shirt above £40, put pressure on the wholesale and retail prices then prevailing (paragraph 133 of the decision).

79. By 1999 Sports Soccer was emerging as a major sports goods retailer pursuing a policy of heavy discounting. Sports Soccer was, at that time, establishing itself as a key competitor of JJB (paragraph 135 of the decision).

80. In the autumn of 1999 and up to April 2000, JJB responded to competition, notably from Sports Soccer, by amongst other things giving a 20 per cent discount on all products



including replica kit at strategic outlets near to Sports Soccer (paragraph 133 of the decision). For example, an internal Nike document of 24 October 1999, cited at paragraph 135 of the decision, states:

“The discounting is now it appears ... in JJB as well as sports division (20% off everything and across all brands) and S[ports] ... S[occer] have gone a third off[f] in response”

81. An internal Nike document dated 25 October 1999, cited at paragraph 138 of the decision, is to the same effect. That reports Mr. Nevitt of Sports Soccer saying:

“This [replica shirts at £30] is a direct attack at JJB, we must be seen to be competing in the Football market”.

The same document indicates that JJB “have taken an extra 20% off”.

82. Various documents cited at paragraphs 134 to 142 of the decision indicate that Sports Soccer was continuing to discount replica kit at levels of up to 30% off in the period January to April 2000. A note of a meeting of 22 February 2000 between Umbro and Sports Soccer indicates Sports Soccer’s then intention to price the England kit at £32 for adults and £24 for juniors, with discounted prices also for shorts and socks.

83. As from the latter part of April 2000, the picture began to change. At this time, as the OFT states at paragraph 147 of the decision, several major events were in prospect: new shirts were due to be launched in May 2000 by Celtic and Chelsea; the Euro 2000 tournament, where sales of the existing England replica shirt, launched in April 1999, were expected to be high, was due to commence June 2000; and launch of a new MU home replica kit (featuring MU’s new sponsor Vodafone) was due on 1 August 2000.

84. Against that background, says the OFT, Umbro began to take action to ensure that the principal replica kit retailers did not discount Umbro replica kits in the key selling periods after launch or, in the case of the England shirt, during the Euro 2000 tournament.

85. This action by Umbro, says the OFT in the decision, coincided with pressure being exerted on Umbro:

- by JJB to see that retail prices were maintained by other retailers
- by MU to see that retailers maintained the retail price of MU shirts (paragraph 149 of the decision)

86. Before the Tribunal the OFT has also contended that Allsports brought pressure to bear on Umbro with a view to maintaining retail prices on replica shirts.
87. According to the OFT, various agreements or concerted practices fixing retail prices then came into existence in the period from the Spring of 2000 to August 2001, as found in the decision.
88. According to the OFT, discounting in the market place again took place after the OFT's unannounced visits in August 2001 (paragraph 130 of the decision). The evidence before the Tribunal is to the effect that since late 2001 discounting of replica shirts has been widespread. For example, in 2002 the new England away shirt was discounted at launch by Sports Soccer to £32. The new England home shirt launched in 2003 was priced at launch by JJB at £25, to which Sports Soccer responded with a price of £24. Allsports, while maintaining a price of £39.99, offered a "goods with purchase" promotion on that shirt, by giving away free sunglasses worth £20 (see OFT Survey, Day 9, pp. 111 to 113).

## B. THE ALLEGED AGREEMENTS AND CONCERTED PRACTICES

### *General*

89. The decision alleges five relevant agreements or concerted practices. The first four of these agreements concern the retail selling prices of replica shirts in retail outlets as identified in paragraphs 341 and 532 of the decision:
  1. The agreement, or series of agreements, described at paragraphs 342 to 411 of the decision between, at least, Sports Soccer and Umbro between April 2000 and August 2001 with respect to the prices of major Umbro licensed replica shirts, namely Celtic, Chelsea, England and MU and, at least during 2000, Nottingham Forest. This agreement or agreements, which the decision refers to in shorthand as the "Umbro/Sports Soccer agreement", is not contested by Umbro and Sports Soccer or, indeed, any other party.
  2. The England Agreement described at paragraphs 412 to 437 of the decision between JJB, Allsports, Blacks, and JD, as well as Sports Soccer and Umbro, with respect to England home and away replica shirts around the time of the Euro 2000 tournament.

Participation in this agreement is not contested by Umbro, Sports Soccer, Blacks or JD, but is contested by JJB and Allsports.

3. The MU Agreement described at paragraphs 438 to 477 of the decision between at least JJB, Allsports, Sports Soccer, Blacks, and MU, as well as Umbro, with respect to the new MU home replica shirt launched on 1 August 2000. Participation in this agreement is not contested by Umbro, Sports Soccer, Blacks or MU, but is contested by JJB and Allsports.
4. The Continuation Agreement described at paragraphs 478 to 493 of the decision between at least JJB, Sports Soccer and Umbro with respect to England and MU replica shirts for the remainder of 2000 and in 2001. Participation in this agreement is not contested by Umbro and Sports Soccer, but is contested by JJB.

90. The fifth agreement is the England Direct Agreement between the FA, Sportsetail, Umbro and JJB regarding the alignment of Sportsetail's retail prices on the England Direct website with those of JJB, as described in paragraphs 511 to 528 of the decision. Participation in this agreement is denied by JJB, but not by the other parties.

91. Although the Umbro/Sports Soccer agreement is not contested, there is a considerable overlap between the OFT's findings in relation to that agreement at paragraphs 342 to 411 of the decision and the OFT's findings in relation to the England Agreement and the MU Agreement at paragraphs 412 to 477 of the decision, which are contested by JJB and Allsports. Similarly there is an overlap between the OFT's findings in relation to the Umbro/Sports Soccer agreement and the OFT's findings in relation to the Continuation Agreement, which is contested by JJB.

*(1) The agreement between at least Umbro and Sports Soccer with respect to major licensed replica shirts between April 2000 and August 2001*

92. At paragraphs 342 to 411 of the decision, the OFT describes what it considers to be a continuing agreement or series of agreements between Umbro and Sports Soccer in relation to the retail pricing of Umbro replica shirts during key selling periods (normally for 60 days after launch, or in the case of the England shirt, during the Euro 2000 tournament), between April 2000 and August 2001.

93. According to the decision (paragraphs 342 to 348), the Umbro/Sports Soccer agreement began in April 2000, as evidenced by Umbro's April 2000 monthly management report (MMR), in which it was reported that Sports Soccer had:
- “agreed to sell all new Umbro licensed kits at £40 mens and £30 kids in line with the rest of the High Street.”
94. That agreement was then followed up, according to the decision at paragraphs 349 to 354, by a further agreement in May 2000, reached at a meeting on 24 May 2000, of which there is a manuscript note dated 25 May 2000. According to that note Sports Soccer agreed:
- “S[ports] Soccer agreed to increase the price of England (H) & (A) kits and for a set period of 60 days to maintain the prices of licensed kits (including G[oa]l keepers/infant kit)”
95. This agreement, says the OFT, was sought by Umbro in confirmation of the earlier agreement made in April 2000, since Sports Soccer had not in fact increased its prices for England shirts pursuant to the agreement made in April.
96. That was then followed, according to the OFT, by the England Agreement. That agreement to fix the retail price of England replica shirts is alleged by the OFT to have been made between Umbro and Sports Soccer and, in addition, other retailers, including JJB and Allsports: see paragraphs 355 to 361 of the decision. The England Agreement is fully dealt with later in this judgment.
97. As regards the forthcoming launch of the new MU home replica shirt, the OFT refers (at paragraphs 362 to 364 of the decision) to a fax from Mr. Marsh of Umbro to Mr. Draper of MU of 6 June 2000, which was sent in response to a fax from Mr. Draper dated 25 May 2000. The OFT takes the fax of 6 June 2000 as showing that Umbro had received assurances from Sports Soccer and JJB that those companies:
- “will revise their current pricing of jerseys to reflect a price point which falls in line with market conditions”
98. Thereafter, according to the OFT, Umbro and Sports Soccer were, together with MU and Blacks, parties to the MU Agreement made on 8 June 2000 at a meeting at Mr. Hughes' private home between Mr. Hughes (Allsports), Mr. Whelan and Mr. Sharpe (JJB) and Mr. Ashley (Sports Soccer): see paragraphs 365 to 372 of the decision. The MU Agreement is fully dealt with later in this judgment.

99. According to the OFT, further price fixing meetings between Sports Soccer and Umbro, concerning mainly what was known as the “60 day rule” (i.e. discounting could begin 60 days after the launch), in respect of the retail prices of various Chelsea, Celtic and Nottingham Forest shirts, and also the prices of MU shirts, took place on 18 July, and 24 July 2000 (paragraphs 373 to 382 of the decision).
100. According to the OFT in late 2000, and well into 2001, meetings and discussions continued to take place between Umbro and Sports Soccer about the pricing of replica shirts at High Street prices, according to meeting notes and e-mails dated 6 November 2000, 13 November 2000, 12 February 2001, and 17 April 2001, as well as Umbro’s MMR for May 2001 (paragraphs 383 to 389 of the decision). The OFT finds that in 2001 agreements to fix prices were made between Umbro and Sports Soccer as regards the Celtic home shirt launched in April 2001, the Chelsea home shirt launched in May 2001 and the MU Centenary shirt launched in July 2001. The launches of the England home shirt and the MU Centenary shirt in 2001 are also alleged to form part of the Continuation Agreement to which, according to the OFT, JJB was also a party.
101. According to the OFT, the effect of the foregoing was that between April 2000 and August 2001 there was an agreement between Umbro and Sports Soccer to the effect that Sports Soccer would respect “High Street Prices” during key selling periods for major Umbro licensed replica shirts during that period. According to the OFT, these agreements caused or contributed to Sports Soccer launching at least the following replica shirts at High Street prices “in fulfilment of its obligations to Umbro and not by way of any independent competitive commercial decisions” (paragraph 390):
- The Chelsea adult and junior away replica shirts launched on 11 May 2000 (discounted by Sports Soccer from 25 July 2000)
  - The Celtic adult and junior away shirts launched on 19 May 2000 (discounted by Sports Soccer from 10 August 2000)
  - The England adult home replica shirt (from 2 June 2000 to 21 June 2000)

- The MU adult and junior home replica shirts launched on 1 August 2000 (discounted by Sports Soccer from 1 October 2000)
- The Celtic adult and junior home replica shirts launched on 16 March 2001 (discounted by Sports Soccer from 9 April 2001)<sup>3</sup>
- The new England adult and junior home replica shirts launched on 23 April 2001 (discounted by Sports Soccer from 20 August 2001)<sup>4</sup>
- The Chelsea adult and junior home replica shirts launched on 3 May 2001 (discounted by Sports Soccer from 20 August 2001)
- The MU Centenary adult and junior replica shirts launched on 20 July 2001 (discounted by Sports Soccer from 20 August 2001)<sup>4</sup>

(2) *The England Agreement*

102. The OFT's case in the decision is that the England Agreement was not limited to Sports Soccer and Umbro, but also involved JJB, Allsports, Blacks and JD. The OFT's findings are summarised in the decision at paragraphs 414 et seq, with references back to earlier paragraphs in the decision:

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

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<sup>3</sup> The OFT regards this as Sports Soccer taking the opportunity to cheat on “the 60 day rule” as a result of a boycott by Celtic fans protesting at the design of the shirt: decision, paragraph 390(a).

<sup>4</sup> It appears that in relation to these launches, Sports Soccer observed High Street prices also in relation to the shorts, socks and infants kits: see decision, Table 3 and Table 5.

415 There is clear evidence that such agreement was reached, and that it included Allsports, Blacks, JJB and JD as well as Umbro and Sports Soccer:

- (a) During the meeting with OFT officials in August 2001, Mr. Ashley of Sports Soccer described an agreement concluded by telephone between Umbro and other retailers during May and June 2000, including Mr. Hughes of Allsports, Mr. Knight of Blacks, Mr. Sharpe of JJB, and possibly Mr. Makin of JD.
- (b) The witness statements of Mr. Ronnie and Mr. Fellone of Umbro support each other and confirm the version of events described by Sports Soccer; they each mention the specific retailers whom they respectively called, and from whom they received assurances (Mr. Ronnie: JJB and Allsports; Mr. Fellone: Blacks and JD amongst others).
- (c) Mr. Fellone of Umbro faxed Mr. Ryman of Debenhams on 2 June 2000 stating that other retailers had agreed a pricing strategy to take effect from the following day. The fax said that it 'is imperative that I speak to you this afternoon to ensure that [you]...will fall in line with the above'. Mr. Fellone again faxed Mr. Ryman on 8 June 2000 refusing to supply part of Debenhams' order for MU Replica Shirts due for launch on 1 August 2000. Debenhams has also expressly confirmed that on or around 22 May 2000 it was contacted by Mr. Fellone of Umbro and asked to 'increase the price of the England shirt on or before 3rd June 2000 as all the other retailers had agreed to do so.' This evidence indicates that telephone calls of the type described by Sports Soccer and the Umbro witnesses did take place, and that, as Debenhams had refused to co-operate, it was punished by Umbro with a refusal to supply part of its order for MU Replica Shirts.
- (d) Blacks has also confirmed that Umbro exerted pressure on it to maintain retail prices at various times. Mr. Ashley stated in his meeting with OFT officials that Mr. Knight of Blacks had contacted him directly to confirm that Sports Soccer had indeed agreed with Umbro to retail the England Replica Shirt at High Street Prices, and Mr. Ashley gave the requested confirmation.
- (e) Mr. Bown of JD said that he was telephoned by Mr. Ronnie of Umbro and that JD 'did become subject to pressure from Umbro to increase the retail price of replica England shirts'.
- (f) At a meeting on 2 June 2000 between Mr. Ronnie of Umbro and Mr. Hughes of Allsports, Mr. Hughes telephoned Mr. Knight of Blacks referring to the 'hat trick' promotion being run by JD on England Replica Kit. Mr. Hughes asked whether Mr. Knight was intending to do a similar promotion, and Mr. Knight confirmed that Blacks would not do so.

- (g) On 2 and 3 June 2000: (i) Blacks increased the prices of the adult and junior England home Replica Shirts to High Street Prices, and maintained the prices of the away Replica Shirts at High Street Prices or above; (ii) JD increased the prices of the adult and junior England home and away Replica Shirts to High Street Prices; (iii) Sports Soccer increased its prices on at least the adult home Replica Shirt to High Street Prices; (iv) JJB and Allsports maintained High Street Prices on England home and away Replica Shirts.
- (h) In his fax of 6 June 2000 to Mr. Draper of MU, Mr. Marsh of Umbro referred to Umbro having received ‘assurances from Sport[s]...Soccer and JJB that they will revise their current pricing of jerseys to reflect a price point which falls in line with market conditions.’ Mr. Marsh states that, at the time he wrote the fax, he had heard ‘that there had been discussions with the major retailers concerning current pricing of England jerseys, which many retailers had been discounting’. The OFT considers that his fax referred to discussions with the major retailers (at least Sports Soccer and JJB) about England and other Replica Shirts.
- (i) The section of the Umbro May 2000 monthly management report prepared by Mr. Ronnie referred expressly to an agreement having been reached on the England Replica Shirts involving JJB, Sports Soccer, Blacks, JD and Allsports. It said:

‘There has been a major step forward in the retail price of England [and] the launch of Manchester United. JJB, Sports Soccer, First Sports, JD Sports and all:sports have all agreed to retail their adults shirts at £39.99. This is following England being sold at various retail prices through April and May ranging from £24.99 to £29.99, £32.99 or £32.99 with a free £9.99 cap at JD Sports.

Following a month of dialogue with all the above accounts, Umbro cannot allow our statement product to be discounted.” (footnotes omitted)

103. At paragraphs 426 to 430 (Allsports), 431 (JJB), 432 (Blacks) and 433 to 436 (JD) of the decision the OFT rejects the parties’ contrary arguments advanced during the administrative procedure. The OFT concludes at paragraph 437:

“In conclusion, none of the Parties’ objections alter the OFT’s assessment of the weight of the evidence, or undermine its finding that Allsports, Blacks, JJB, and JD, as well as Sports Soccer and Umbro, all took part in an agreement to fix the prices of England home and away Replica Shirts during the key selling period of the run up to and England’s participation in the Euro 2000 tournament. Although most of the parties continued to price England Replica



Shirts at High Street Prices, the OFT finds in this decision only that this Replica Shirts Agreement ended when Sports Soccer began discounting these shirts on 21 June 2000.”

(3) *The MU Agreement*

104. In relation to the MU Agreement, the OFT’s findings are at paragraphs 450 et seq of the decision, again referring back to earlier paragraphs:

“450 In addition to Sports Soccer and Umbro, Allsports, Blacks and JJB also took part in an unlawful agreement relating to the price of the new MU home Replica Shirt. The OFT refers to the following matters:

- (a) As respects JJB, the fax of 6 June 2000 from Mr. Marsh of Umbro to Mr. Draper of MU in which an assurance was given about future retail pricing of the MU home Replica Shirt, referred to specific assurances having been received from JJB as well as from Sports Soccer. Although Mr. Marsh in his witness statement claims that he was referring only to discussions that had taken place with retailers about the England replica shirts, the OFT nevertheless considers the reference to JJB in this context to be significant in relation to MU replica shirts.
- (b) As respects Allsports, the OFT refers to the exchange between Mr. Hughes and Mr. Draper of MU on the subject of appropriate pricing of the MU replica shirts, during dinner on the Golf Day on 25 May 2000;... The OFT refers also to the reported comments by Mr. Hughes on 2 June 2000 (to Mr. Ronnie) and on 8 June 2000 (to the retailers meeting at his house) that ‘he had been in conversation with Manchester United regarding the price of the home shirt to be launched on 1 August 2000’.
- (c) Further with respect to Allsports, at the meeting between Mr. Ronnie of Umbro and Mr. Hughes on 2 June 2000, Mr. Hughes is reported to have said that “he would call Dave Whelan of JJB and Mike Ashley of Sports Soccer to discuss the imminent launch of the Manchester United Home shirt”, and that “if Umbro cannot ensure that the product will not be discounted it will affect Umbro re-signing the Manchester United deal”.
- (d) As respects Allsports, JJB and Sports Soccer, Mr. Hughes of Allsports organised the 8 June 2000 price-fixing meeting at which, the OFT is satisfied on the totality of the evidence (addressed in the following sub-paragraphs), an agreement was reached to retail at launch on 1 August 2000 the MU home replica shirts at High Street prices.

- (e) Mr. Ashley of Sports Soccer plainly understood that the other attendees at the meeting had agreed to retail the MU home replica shirt at High Street prices. In substance, there is little difference between the accounts of the meeting given by Mr. Hughes of Allsports, Mr. Whelan of JJB, Mr. Ashley of Sports Soccer and Mr. Ronnie of Umbro (who met privately with Mr. Ashley shortly after the retailers' meeting).
- (f) On 9 June, Mr. Hughes of Allsports produced two significant internal memoranda which are contemporaneous accounts of what had transpired the previous day. These memoranda show that an agreement had been reached to retail the forthcoming MU home replica shirt at High Street prices. They state:

'MUTD Replica Shirt Launch 1st August 2000

I have already told you that JJB are going at £39.99 on 1st August in adult sizes and Sport[s...] Soccer will also do that. After speaking to Tom Knight [of Blacks] this morning to appraise him of that information, he went on to say that he will be tactical in his pricing i.e. £39.99 where he is in proximity to a JJB or a Sport[s...] Soccer and £44.99 elsewhere.

Now that we can do different prices at different tills around the company, I think that we should do the same.'

'Discussions with JJB and Sport[s...] Soccer

'In my absence you should continue any necessary dialogue with JJB and Sports ... Soccer. JJB's Head Office number is 01942 221400 and Mike Ashley [of Sports Soccer] only operates from his mobile which is [ ... ]'(C)

The OFT is satisfied that this evidence sufficiently demonstrates that the parties agreed to retail both adult and junior replica shirts at High Street prices, given that £39.99 for an adult replica shirt and £29.99 for a junior replica shirt were known key price points.

- (g) The first internal Allsports memorandum cited above reveals also that Blacks was involved in the price-fixing arrangements with Allsports, JJB and Sports Soccer, Mr. Knight of Blacks having spoken with Mr. Hughes after the meeting on 8 June 2000.
- (h) The section of the Umbro May 2000 monthly management report, prepared by Mr. Ronnie on 8 June 2000 after his private meeting with Mr. Ashley, referred expressly to an agreement

having been reached on adult MU Replica Shirts involving JJB, Sports Soccer, Blacks, JD and Allsports. It said:

‘There has been a major step forward in the retail price of England [and] the launch of Manchester United. JJB, Sports Soccer, First Sport, JD Sports and Allsports have all agreed to retail their adult shirts at £39.99 ...

Following a month of dialogue with all the above accounts, Umbro cannot allow our statement product to be discounted.’

- (i) Mr. Ronnie said that Mr. Bryan “(Umbro account manager for JJB) later reported to me that Colin Russell of JJB later commented to him that it was obvious that those present at the [8 June 2000] meeting were no longer “hands on” in the business, as the agreement should have covered all products”.
- (j) All the relevant retailers, including Allsports, Blacks, JJB and Sports Soccer, retailed the MU home Replica Shirts (adult and junior sizes) at High Street Prices beginning on 1 August 2000, which is not consistent with competitive conditions.

451 In conclusion, the OFT is satisfied that at least Allsports, Blacks and JJB (together with Umbro and Sports Soccer) all agreed, in or around late May to early June 2000, to co-ordinate their pricing of the new MU home Replica Shirt that was launched on 1 August 2000. The arrangement between them was additional to the price-fixing agreement in respect of the England Replica Shirts that these parties adhered to beginning around the same time.

452 So far as Allsports and Blacks are concerned, the OFT notes that they both continued to sell the MU adult home Replica Shirts at High Street Prices uninterrupted until at least late 2001. Further, the OFT notes that on 24 October 2000 Allsports informed Umbro that their sales had dropped dramatically due to ‘discounting by Sports Soccer/JJB’. The OFT regards this as continuing commercial pressure on Umbro. Nevertheless, the OFT finds in this decision only that their participation in the arrangement concerning MU home Replica Shirts extended until October 2000. At this time, Sports Soccer discounted the product.”

105. At paragraphs 463 to 471 (MU) 472 to 473 (Allsports) 474 (Blacks) and 475 to 477 (JJB) of the decision the OFT rejects the parties’ contrary arguments.

*(4) The Continuation Agreement relating to England and MU replica shirts in 2000 and 2001*

106. The OFT's case is that JJB, in addition to Sports Soccer and Umbro, was a party to the Continuation Agreement during 2000 and 2001 in respect of the England and MU replica shirts. The OFT found at paragraph 480 of the decision:

“480 In the light of the totality of the evidence, and for the reasons given below, the OFT is further satisfied that Sports Soccer and Umbro were not the only Parties involved in unlawful agreements after the end of the key selling period following the launch of the MU home Replica Shirt in August 2000. The OFT finds that JJB at least, which was by a considerable margin the largest of the major retailers (and the most powerful vis-à-vis Umbro), took active steps which contributed towards the maintenance of High Street Prices on England and MU Replica Shirts during key selling periods through to the end of August 2001.”

107. The OFT sets out the facts relied on at paragraphs 481 to 485 of the decision and rejects JJB's contrary arguments at paragraphs 490 to 493 of the decision. We deal with the Continuation Agreement later in this judgment.

*(5) The England Direct Agreement*

108. The England Direct Agreement with which this appeal is concerned<sup>5</sup> relates to an alleged agreement between the FA, Sportsetail, Umbro and JJB to align Sportsetail's retail prices for England replica kit sold from its England Direct website with JJB's retail prices for the same products in order to avoid Sportsetail undercutting JJB: see paragraphs 511 to 528 of the decision. The OFT concludes that this agreement lasted from 7 February 2000 to August 2001, as far as Umbro and JJB are concerned. We deal with the England Direct Agreement later in this judgment.

#### **IV THE PROCEDURE BEFORE THE TRIBUNAL**

109. JJB, Allsports, Umbro and MU appealed to the Tribunal under section 46 of the Act by appeals lodged on 30 September or 1 October 2003. MU and Umbro contest the penalty only. The OFT served each of its defences in the four cases on 1 or 2 December 2003.

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<sup>5</sup> We do not deal in this judgment with the separate England Direct agreement between the FA and Sportsetail found in paragraphs 502 to 510 of the decision against which no appeal has been made

Amended defences were submitted by the OFT on 19 January 2004 pleading certain new material, following judgments by the Tribunal regarding the disclosure of Umbro's unsuccessful application for leniency: see below.

*The Tribunal's jurisdiction*

110. The Tribunal is established under section 12 of the Enterprise Act 2002. The jurisdiction of the Tribunal to determine the present appeals arises under section 46 and Schedule 8, paragraph 3 of the Act as amended. Paragraph 3 of Schedule 8 provides:

“3.(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.

(2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –

(a) remit the matter to the OFT,

(b) impose or revoke, or vary the amount of, a penalty,

...

(d) give such directions, or take such steps, as the OFT could itself have given or taken, or

(e) make any other decision which the OFT could itself have made.

(3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.

(4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.”

111. The Tribunal's procedure is governed by the Competition Appeal Tribunal Rules 2003 S.I. 2003 no 1372 (“the Tribunal's Rules”), made under section 15 and Schedule 4, Part 2, of the Enterprise Act 2002.

112. The record before the Tribunal is extensive, covering some 80 lever arch files, including 57 witness statements, 1100 documents containing pleadings, submissions and correspondence, and some 2600 pages of transcript of the main hearing.

*The interlocutory proceedings*

113. The interlocutory proceedings in this matter cover some 400 transcript pages. Case management conferences were held on 23 October 2003, 12 December 2003 and 22

January 2004. A pre-hearing review was held on 12 February 2004. The principal matters dealt with on those and other occasions have been as follows.

*- Sports Soccer's application to intervene*

114. At the case management conference on 23 October 2003 the Tribunal did not allow an application dated 16 October 2003 by Sports Soccer, renamed Sports World International Ltd, to intervene. The Tribunal's decision was taken mainly on the basis that Sports Soccer's intervention would risk introducing the possibility of a second prosecutor in support of the OFT: see [2003] CAT 25. Nevertheless, the Tribunal noted that Sports Soccer was fully entitled to collaborate with the OFT and treated Sports Soccer as an active observer during the proceedings. Sports Soccer was heard on a number of matters.
115. As a result of a press report arising out of the ruling by the Tribunal on Sports Soccer's intervention, which in our view did not fairly or accurately record what had transpired, the Tribunal ruled at the second case management conference on 12 December 2003 that in future all the non-confidential parts of transcripts of the Tribunal's case management conferences would be published on the Tribunal's website: [2003] CAT 30.

*- JJB's notice of appeal*

116. Also at the case management conference of 23 October 2003, the OFT submitted that JJB's notice of appeal failed to comply with the requirements of rule 8(4)(c) of the Tribunal's Rules and was materially incomplete. In response, JJB submitted that its case was adequately outlined, in accordance with the Tribunal's Rules, given that the dispute related to the OFT's finding of fact. In the event, the Tribunal invited JJB to serve a supplementary schedule to its notice of appeal within 21 days in relation to each of the grounds of appeal, cross-referencing to the relevant parts of the decision as necessary. That schedule, running to many pages, was served on 13 November 2003, but has proved to be without practical utility.
117. By letter of 18 November 2003 to the Tribunal the OFT applied for an order striking out JJB's appeal on the grounds that JJB had not complied with the Tribunal's order. That request was refused by the Tribunal on 20 November 2003. At the case management conference on 12 December 2003, the OFT applied for an 'unless' order requiring JJB to

particularise its case. On the basis that JJB could not, without the permission of the Tribunal, raise any matter outside the four corners of its existing notice of appeal, its witness statements, and the outline of its case as stated by counsel for JJB at the case management conference of 23 October 2003, the Tribunal made no order on the OFT's application.

*- Umbro's application as regards confidentiality in its appeal*

118. The Tribunal's duty to have regard to the need to exclude certain confidential matters from its decisions is set out in Schedule 4, paragraph 1(2) and (3) of the Enterprise Act 2002. An application by Umbro to preserve the confidentiality of its application for leniency relied on by Umbro in its appeal against penalty was held *in camera* by the Tribunal on 23 October 2003 and judgment given in open court on 27 October 2003: see [2003] CAT 26. As a result of that judgment, Umbro's notice of appeal, the correspondence between the OFT and Umbro regarding its leniency application, and the witness statements submitted by Umbro at that time, including Ronnie I and Ronnie II, were disclosed to the other parties.

*- Other issues involving matters raised in camera*

119. The OFT requested the Tribunal to hold an *in camera* hearing with Umbro following the second case management conference on 12 December 2003, the purpose of which was to raise with the Tribunal certain concerns of the OFT about the potential reluctance on the part of Umbro witnesses to give evidence fully and completely and the possibility of pressure being, or having been, applied. The OFT referred to Umbro's skeleton argument for, and the transcript of, the *in camera* hearing with Umbro on 23 October 2003, and two letters written to Umbro by the OFT on 4 and 10 December 2003. The OFT also invited the Tribunal to see the transcript of a private meeting Umbro had had with the OFT on 4 March 2003.

120. Counsel for Umbro stated:

“There is no evidence of any intimidation in the present case, witness intimidation. There has been no suggestion from Umbro that its witnesses are being intimidated by JJB or any party. Umbro has never made any complaint that JJB or Allsports are currently trying to intimidate its witnesses into giving evidence which would be

anything other than what is wholly truthful in the current proceedings.” (Transcript, 12 December 2003, p. 5).

121. The Tribunal declined to look at the document dated 4 March 2003
122. Having previously intimated its intention to Umbro by letter of 22 December 2003, on 13 January 2004 the Tribunal disclosed to all parties Umbro’s skeleton argument of 21 October 2003 for the *in camera* hearing of 23 October 2003, the transcript of that hearing, the transcript of the *in camera* hearing of 12 December 2003, and the OFT’s letters of 4 and 10 December 2003.
123. In proposed amended defences submitted to the Tribunal on 19 January 2004, the OFT proposed to rely on the transcript of the private meeting on 4 March 2003. However, in written submissions dated 20 January 2004 the OFT abandoned reliance on the transcript of the private meeting of 4 March 2003.
124. At the case management conference on 22 January 2004 the Tribunal intimated that it had paid no regard to the suggestions as to pressure on witnesses, which had been denied by Umbro and as to which there was no evidence before the Tribunal.
125. On 16 March 2004, day seven of the main hearing, the OFT again applied to admit into evidence before the Tribunal the 4 March transcript. As we understood it, the OFT’s principal reason for that application was to seek to contradict evidence given by Mr. Whelan of JJB to the effect that he had not spoken to Mr. McGuigan of Umbro about the witness statement Mr. Ronnie had provided to the OFT. In declining to admit, or even to look at, the transcript of 4 March 2003, the Tribunal took the view that, if it wished to prove the point, the OFT’s proper course was to apply for permission to call direct witness evidence as to what had or had not been said by Mr. Whelan: [2004] CAT 12.

*- Lifting of confidentiality as regards certain passages in the decision*

126. The decision as published by the OFT excluded certain commercially confidential information, pursuant to section 237 of the Enterprise Act 2002. The excluded matters included information enabling the parties to work out how the penalties imposed on other parties at paragraphs 536 to 790 of the decision had been calculated. By virtue of section



237(5) of that Act, the restrictions on disclosure of confidential information which apply to the OFT do not apply to the Tribunal. By letter of 31 October 2003 the Tribunal wrote to all the addressees of the decision requesting their observations on the possible lifting of confidentiality in respect of all confidential passages in the decision. JJB, Allsports, Sports Soccer, MU and JD raised no objection.

127. The FA raised objections to certain information which it regarded as confidential, as did Umbro. The Tribunal heard the FA *in camera* on 13 November 2003. No response was received from other addressees of the decision.
128. On 18 November 2003 the Tribunal made an order lifting confidentiality as regards the relevant passages in the decision, except in respect of the details of certain licensing arrangements relevant to the FA and Umbro referred to at paragraphs 700 to 702 and 766 to 768 of the decision: see [2003] CAT 29.

*- Allsports' application to strike out*

129. Allsports applied for an order striking out the OFT's defence and/or giving judgment for Allsports on one of the two principal allegations made against it, namely Allsports' participation in the England Agreement. That application was heard by the Tribunal on 22 January 2004. At the same time the Tribunal dealt with the OFT's application to adduce the additional evidence of Mr. May of Umbro.
130. Allsports argued, essentially, that in paragraph 21 of the defence the OFT (i) had abandoned its case on the England Agreement as set out in the decision; and (ii) had advanced two "new cases". First, the OFT had changed the nature of the case as regards Mr. Ronnie's telephone conversations. Secondly, the OFT had impermissibly introduced "pressure and complaints" by Allsports in support of its case on appeal. According to Allsports, it would be wrong in principle, contrary to the procedural scheme of the Act, and unfair, for the Tribunal to permit those two new cases to be advanced.
131. The Tribunal rejected Allsports' striking-out application, for the reasons set out in the Tribunal's judgment of January 2004: [2004] CAT 1. However, the OFT undertook to serve particulars under paragraph 21(b), paragraph 21(d) and paragraph 21 (e)(ii) of its defence of any specific complaints, pressure or other facts relied on to establish the

allegations made in those paragraphs. These particulars were duly served on 5 February 2004.

*- Disclosure of documents on the OFT's file for which confidentiality had been claimed*

132. Following the Tribunal's indication at the case management conference on 23 October 2003 that issues as to confidentiality should, so far as possible, be resolved by agreement, on 30 October 2003 Allsports sent the OFT a list identifying 77 documents where it sought disclosure in unredacted form of documents in the OFT's possession for which confidentiality had been claimed during the administrative procedure. This list mainly covered passages in Umbro's file notes, monthly management reports and correspondence, together with passages in the written and oral representations, responses to section 26 Notices and witness statements submitted by various parties during the administrative procedure. On 6 November 2003, the Allsports' list was circulated by the OFT to all parties concerned requesting them to respond by 17 December 2003. Following this action, many of the parties concerned waived confidentiality. The FA, Umbro and Sports Soccer did not give such a waiver and gave to the OFT their reasons for maintaining confidentiality. The FA documents are not relevant for present purposes.
133. On 13 November 2003, JJB similarly sought disclosure from the OFT in unredacted form of 86 partially redacted documents with which it had been supplied during the administrative procedure. To a large extent this overlapped with Allsports' list.
134. At the case management conference of 12 December 2003 it was agreed that the documents relating to Umbro and Sports Soccer remaining in dispute would be disclosed on a confidential basis to the external legal advisers. A joint schedule of outstanding document requests was submitted to the Tribunal by Allsports and JJB on 16 January 2004, supplemented by further written submissions made individually by JJB and Allsports on 19 January 2004. Sports Soccer submitted its observations on 15 and 20 January 2004. Umbro submitted observations on 20 January 2004.
135. On 12 February 2004 the Tribunal sent the parties a draft proposed order setting out its views as to the 82 documents remaining in dispute. Umbro indicated that it would accept the Tribunal's view in respect of all but 7 documents, about which it made further written submissions on 19 February 2004. Sports Soccer made written submissions concerning

some 10 documents, also on 19 February 2004. Umbro availed itself of the opportunity afforded by the Tribunal to make oral representations on 23 February, but Sports Soccer did not.

136. The Tribunal ruled in favour of disclosure of the outstanding documents on 23 February 2004, subject to the obliteration of certain figures, giving brief reasons. A request by Umbro for permission to appeal to the Court of Appeal was refused, and Umbro's time for requesting permission from the Court of Appeal was abridged to 3 days. Umbro did not in the event seek permission to appeal from the Court of Appeal.
137. The Tribunal's formal order dated 25 February 2004 [2004] CAT 3 resulted in the disclosure of a number of documents to JJB and Allsports, subject to restrictions as to the mention of the contents of certain documents in open court, including an unredacted version of the Umbro file note of its meeting with Sports Soccer on 24 May 2000. Many of those documents have been relied on heavily by JJB and Allsports in this appeal.
138. A further *in camera* hearing was held at the request of JJB and Allsports on 5 March 2004, as a result of which two further documents relating to drafts of commercial agreements between Sports Soccer and Umbro, together with certain other documents, were ordered by the Tribunal to be disclosed: [2004] CAT 10.

*- Disclosure sought during the hearing*

139. On 8 March 2004, the first day of the main hearing, a further application was made by JJB and Allsports for disclosure of an executed agreement between Sports Soccer and Umbro dated 24 August 2002, with its effective date stated to be 1 May 2000. After hearing the parties, the Tribunal ordered the agreement of 24 August 2002 to be disclosed in edited form with current business information redacted: [2004] CAT 11.
140. Also on 8 March 2004, the Tribunal requested both Umbro and Sports Soccer to clarify the trading terms negotiated and agreed between the two companies in 2000 and 2001. Submissions on that issue by Sports Soccer and Umbro were submitted to the Tribunal on 10 and 15 March 2004 respectively. JJB and Allsports made a further application for further and better particulars of these responses on 16 March 2004. On 19 March 2004 the

Tribunal made a formal written request to Umbro for further information, pursuant to Rule 19 of the Tribunal's Rules.

141. Umbro's response, dated 19 March 2004, was very brief. A further formal request for information on the same topic was sent to Umbro by the Tribunal by letter of 26 March 2004, the last day of the main hearing. In response, Umbro sent to the Tribunal a short witness statement dated 6 April 2004 by Mr. Paul Masters, Director of UK Operations at Umbro.

*- Other matters*

142. Further to requests pressed by Allsports, Mr. Ronnie's diaries for 2000 and 2001 were found and disclosed to the appellants. In response to a request by the OFT, JJB's counsel stated on instructions that Mr. Lane-Smith, senior partner of DLA, JJB's solicitors, and a non-executive director of JJB, had made no notes of the JJB Board meeting of 27 June 2000. Certain information requested of JJB by the OFT relating to a report by KPMG on JJB's prices was supplied following the Tribunal's indication that it would be prepared to make an 'unless' order. The Tribunal also dealt with various other issues including the service of a reply in the Umbro and MU appeals.

*The witness evidence*

143. As a result of the case management conferences and pre-trial review, a structure for the hearing and a timetable for the exchange of skeleton arguments were agreed. 57 witness statements were submitted to the Tribunal. The original witnesses to be called for cross examination were:

Name of Witness	Company	Position held at relevant time
Mike Ashley	Sports Soccer	Owner and CEO
Chris Ronnie	Umbro	COO and board member
Filippo Fellone	Umbro	UK Sales Director
Martin Prothero	Umbro	Board member
Anthony May	Umbro	Allsports' and JD's Account Manager
Phil Bryan	Umbro <sup>6</sup>	JJB's Account Manager
David Whelan	JJB	Chairman. Until 2000, Chief Operating Officer

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<sup>6</sup> Mr. Bryan was working for JJB at the time of the appeal.

Colin Russell	JJB	Associate director with overall responsibility for replica kit
Steve Preston	JJB	Associate director for buying
David Hughes	Allsports	Chairman and Board member
Michael Guest	Allsports	Buying and Marketing Director
Michelle Charnock	Allsports	Replica buyer

144. At the request of Allsports, the Tribunal issued witness summonses in respect of Mr. Guest and Ms Charnock, pursuant to rule 23 of the Tribunal’s Rules. Mr. Guest was served as a pure formality, since he is now working for another company. Attempts to serve Ms Charnock, including an attempt to do so via her mobile phone number, were not successful. During the hearing JJB waived reliance on the statements of Messrs. Bryan and Preston, and Allsports found it unnecessary to rely on Ms Charnock’s statement as regards liability.

145. On 1 March 2004 the Tribunal rejected an application by the OFT that the witnesses who had attended the meeting of 8 June 2000 should not give evidence in each other’s presence and should not know what the others had said until after each witness had given evidence.

146. In the event, Messrs. Ashley, Ronnie, Fellone, May, Prothero, Whelan, Guest, Russell and Hughes were called. Each witness confirmed on oath the truth of their witness statements on which they were then cross examined and, as the case may be, re-examined. The statements on which the witnesses were cross examined were:

Name of Witness	Date of witness statement(s) on which witness was cross-examined
Mike Ashley	1 <sup>st</sup> witness statement of 28 November 2003 (“Ashley I”); 2 <sup>nd</sup> witness statement of 28 November 2003 (“Ashley II”).
Chris Ronnie	1 <sup>st</sup> witness statement – undated (draft leniency statement - “Ronnie I”); 2 <sup>nd</sup> witness statement of 4 February 2002 (“Ronnie II”); 3 <sup>rd</sup> witness statement of 12 July 2002 (“Ronnie III”); 4 <sup>th</sup> witness statement of 28 November 2003 (“Ronnie IV”); 5 <sup>th</sup> witness statement of 10 December 2003 (“Ronnie V”).
Martin Prothero	1 <sup>st</sup> witness statement – undated (draft leniency statement); 2 <sup>nd</sup> witness statement of 4 February 2002;

Anthony May	3 <sup>rd</sup> witness statement of 12 July 2002.
Filippo Fellone	Witness statement of 13 January 2004. 1 <sup>st</sup> witness statement – undated (draft leniency statement “Fellone I”); 2 <sup>nd</sup> witness statement of 4 February 2002 (“Fellone II”); 3 <sup>rd</sup> witness statement of 12 July 2002 (“Fellone III”).
David Whelan	1 <sup>st</sup> witness statement – 15 August 2002 (“Whelan I”); 2 <sup>nd</sup> witness statement of 20 January 2003 (“Whelan II”); 3 <sup>rd</sup> witness statement of 30 September 2003 (“Whelan III”).
Colin Russell	1 <sup>st</sup> witness statement of 15 August 2002 (“Russell I”); 2 <sup>nd</sup> witness statement of 17 January 2003 (“Russell II”); 3 <sup>rd</sup> witness statement of 1 October 2003 (“Russell III”); 4 <sup>th</sup> witness statement of 12 February 2004 (“Russell IV”).
David Hughes	1 <sup>st</sup> witness statement of 30 September 2003 (“Hughes I”); 2 <sup>nd</sup> witness statement of 20 February 2004 (“Hughes II”);
Michael Guest	1 <sup>st</sup> witness statement of 30 September 2003 (“Guest I”); 2 <sup>nd</sup> witness statement of 20 February 2004 (“Guest II”).

147. The hearing took place in open court over 14 days from 8 March to 26 March 2004. The Tribunal went *in camera* on a number of occasions when commercially confidential material was in issue: Rule 50 of the Tribunal’s Rules.

*Post-hearing submissions*

148. After the hearing the parties, Allsports and JJB in particular, sent certain submissions to the Tribunal. The relevant correspondence was as follows:

- The OFT wrote to the Tribunal on 29 March 2004 recording the efforts that had been made by the OFT to obtain the mobile telephone records of Mr. Ronnie.
- Sports Soccer wrote to the Tribunal on 1 April 2004 giving its comments on the Tribunal’s request for information sent to Umbro on 26 March 2004.

- JJB wrote to the Tribunal on 1 April 2004 commenting on Umbro's response to the Tribunal's formal request for information of 19 March 2004.
- Allsports submitted on 5 April 2004 its "Post-Closing Observations".
- JJB submitted on 6 April 2004 its "Final Observations on the relationship between Sports World and Umbro".
- Allsports submitted to the Tribunal on 6 April 2004 a "Consolidated Version of the OFT's Annex to its Closing Submissions" which included Allsports' comments on the OFT's submissions.
- Umbro submitted on 6 April 2004 a witness statement in response to the Tribunal's request for information of 26 March 2004.
- The OFT wrote to the Tribunal on 7 April 2004 (i) enclosing correspondence between the OFT and Umbro concerning telephone records for Mr. Ronnie's mobile telephone; (ii) expressing reservations about the provision by Allsports of written submissions in its letters of 5 and 6 April 2004, and about JJB's observations dated 6 April 2004. The OFT's position on these matters is that "it is fully aware of, and indeed supports, the Tribunal's desire to avoid further argument by the parties conducted by correspondence after the closing of the hearing".
- The OFT wrote to the Tribunal on 19 April 2004 to address "a number of matters which have arisen since the close of the hearing" in relation to both Allsports and JJB.
- Allsports wrote to the Tribunal on 22 April 2004 responding to the OFT's letter of 19 April 2004.
- JJB wrote to the Tribunal on 29 April 2004 responding to the points made in the OFT's letter of 19 April 2004.
- The OFT wrote to the Tribunal on 28 April 2004 responding to Allsports' letter of 22 April 2004.
- The OFT wrote to the Tribunal on 19 May 2004 responding to JJB's letter of 29 April 2004, pointing out that the OFT has "steadfastly resisted the temptation to make further argument" and submitting that "the attempt by the parties to introduce further submissions after the hearing has closed should not be countenanced".

149. The further material relating to the relationship between Umbro and Sports Soccer has in our view clarified certain matters. However, the remaining largely uninvited material submitted to the Tribunal after the hearing has not in our view advanced matters significantly. Although we have read the further material submitted, we have focussed on the evidence heard and arguments made during the hearing. We agree with the OFT that uninvited post-hearing submissions are in general to be avoided.

## V THE LAW ON AGREEMENTS AND CONCERTED PRACTICES

150. The only issue at this stage of the present appeals is whether JJB and Allsports, or either of them, participated in agreements or concerted practices as alleged by the OFT contrary to the Chapter I prohibition imposed by section 2(1) of the Act. In accordance with section 60 of the Act, the meaning of “agreements or concerted practices” is to be determined in a manner consistent with decisions of the European Court of Justice, the Court of First Instance, or the Commission of the European Communities under Article 81(1) of the EC Treaty, the wording of which is followed in section 2(1) of the Act. The description of the relevant law as set out in paragraphs 306 to 319 of the decision has not been challenged by the appellants. We set out some of the leading cases.

### - *Dyestuffs*

151. The classic definition of a concerted practice was set out by the Court of Justice in Case 48/69 *ICI v Commission* [1972] ECR 619 (“*Dyestuffs*”) which concerned a series of parallel price increases in the dyestuffs market. The Court of Justice said at paragraphs 64 to 66:

“64. Article [81] draws a distinction between the concept of ‘concerted practices’ and that of ‘agreements between undertakings’ or of ‘decisions by associations of undertakings’; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.

65. By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.



66. Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.”

- *Suiker Unie*

152. In Case 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663 (“*Suiker Unie*”), which involved a number of collusive arrangements among sugar manufacturers, the Court of Justice said:

- “173. The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.
174. Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.
175. The documents quoted show that the applicants contacted each other and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors.”

153. Those general principles set out in *Dyestuffs* and *Suiker Unie* have been followed in numerous subsequent cases. The jurisprudence on a “concerted practice” is conveniently summarised in Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125 (“*Anic*”) at paragraphs 115 to 118. At paragraph 108 of *Anic* the Court of Justice said Article 81 is intended:

“ ... to apply to all collusion between undertakings, whatever the form it takes. ... The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion”.

154. The Court also said at paragraphs 130 and 131:

“130. ... it is clear from the settled case-law of the Court of Justice... that an agreement within the meaning of Article 81(1) of the Treaty arises from an expression, by the participating undertakings, of their joint intention to conduct themselves on the market in a specific way.”

131. A comparison between that definition of agreement and the definition of a concerted practice...shows that, from the subjective point of view, they are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves.”

- *Bayer*

155. In Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, on appeal Cases C-2/01P and C-3/01P *Bundesverband der Arzneimittel – Importeure and Commission*, 6 January 2004, not yet reported, (“*Bayer*”) the issue was whether measures taken by a manufacturer to restrict exports by wholesalers gave rise to an “agreement,” or whether the conduct in question was merely unilateral conduct by the manufacturer concerned.

156. The Court of First Instance said at paragraphs 66 to 69:

“66. The case-law shows that, where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 81(1) of the Treaty (Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 38; Joined Cases 25/84 and 26/84 *Ford and Ford Europe v Commission* [1985] ECR 2725, paragraph 21; Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 56).

67. It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article 81(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 *Van Landewyck and Others v Commission*

[1980] ECR 3125, paragraph 86; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 256).

68. As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, *ACF Chemiefarma*, paragraph 112, and *Van Landewyck*, paragraph 86), without its having to constitute a valid and binding contract under national law (*Sandoz*, paragraph 13).
69. It follows that the concept of an agreement within the meaning of Article 81(1) of the Treaty as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."

157. The judgment of the Court of First Instance in *Bayer* was upheld on appeal by the Court of Justice in its judgment in Cases C-2/01P and C-3/01P of 6 January 2004.

- *Cimenteries*

158. In Cases T-25/95 etc. *Cimenteries v Commission* [2000] ECR II-491, the Court of First Instance considered numerous allegations of infringement made against European cement producers. At paragraphs 1848 to 1852 the Court considered a submission by Buzzi to the effect that merely letting Lafarge, a competitor, know of its intentions, could not have amounted to a concerted practice. The Court said:

"1849. In that connection, the Court points out that the concept of concerted practice does in fact imply the existence of reciprocal contacts (Opinion of Advocate General Darmon in *Woodpulp II*, cited at paragraph 697 above, points 170 to 175). That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it...

...

1852. ... In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market (Opinion of Advocate General Darmon in *Woodpulp II*, cited at paragraph 697 above, point

172). It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct [on the market to be expected on his part]\* (Case T-4/89 *BASF v Commission* [1991] ECR II-1523, paragraph 242, and *Hercules Chemicals v Commission*, cited at paragraph 140 above, paragraph 260).”

- *Tate & Lyle*

159. Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc v Commission* [2001] ECR II-2035 (“*Tate & Lyle*”) (recently upheld by the Court of Justice in its judgment of 29 April 2004 in Case C-359/01P *British Sugar plc v Commission*, not yet reported) concerned a series of meetings between British Sugar, Tate & Lyle, and sugar merchants. The Court held at paragraphs 54 to 61:

“54. Moreover, the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice

...

57. In the present case, it is undisputed that there were direct contacts between the three applicants, whereby British Sugar informed its competitors, Tate & Lyle and Napier Brown, of the conduct which it intended to adopt on the sugar market in Great Britain.

58. In Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, in which the applicant had been accused of taking part in meetings at which information was exchanged amongst competitors concerning, *inter alia*, the prices which they intended to adopt on the market, the Court of First Instance held that an undertaking, by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market (*Rhône-Poulenc*, paragraphs 122 and 123). This Court considers that that conclusion also applies where, as in this case, the participation of one or more undertakings in meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors.

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\* We agree with the OFT that the above is the correct rendering of the French, Italian, Spanish and German versions of the judgment which is translated slightly differently in the English version

59. British Sugar and Napier Brown maintain that the price information envisaged by British Sugar was known by the latter's customers before it was notified to the participants at the disputed meetings and that, therefore, British Sugar did not reveal to its competitors during those meetings information which they could not already gather on the market.

60. That fact, even if established, has no relevance in the circumstances of this case. First, even if British Sugar did first notify its customers, individually and on a regular basis, of the prices which it intended to charge, that fact does not imply that, at that time, those prices constituted objective market data that were readily accessible. Moreover, it is undisputed that the meetings in question preceded the release onto the market of the information that was notified at those meetings. Second, the organisation of the disputed meetings allowed the participants to become aware of that information more simply, rapidly and directly than they would via the market. Third, as the Commission held in recital 72 in the preamble to the contested decision, the systematic participation of the applicant undertakings in the meetings in question allowed them to create a climate of mutual certainty as to their future pricing policies.”

- *Responding to complaints*

160. One of the allegations in *Suiker Unie*, cited above, was that certain producers of sugar had concerted their actions so as to restrict exports of sugar from Belgium to Germany. In its judgment the Court held at paragraphs 282 to 283:

“282 However the beforementioned letter shows clearly that the German producers to which it referred ... never at any time kept their dissatisfaction to themselves but told RT about it.

283 If an economic operator accepts the complaints made to him by another operator in connexion with the competition to which the products manufactured by the former operator expose the latter, the conduct of the operators concerned amounts to a concerted practice.”

161. In the *Hasselblad* case, the camera manufacturer Victor Hasselblad took steps to put a stop to parallel imports following complaints by its distributors in various European countries. In its decision (OJ 1982 L161/18) the Commission referred to *Suiker Unie*, stating at paragraph 42:

“[42] If an undertaking acts on the complaints made to it by another undertaking in connection with the competition from the former's products, this constitutes or is evidence of a concerted practice.”

(See also Case 86/92 *Hasselblad v Commission* [1984] ECR 883, at paragraphs 24 to 29)

162. In Case 100/80 *Musique Diffusion Française v Commission* [1983] ECR 1825 (“*Pioneer*”), Pioneer had passed on to its German and British distributors complaints by its French distributor, MDF, about parallel imports into France originating in Germany and the United Kingdom. The Court of Justice held that, as a result of its central position as the supplier, Pioneer was obliged to display “particular vigilance” to prevent concerted practices among the distributors (paragraph 75). By forwarding MDF’s complaints, Pioneer had implicitly invited its German distributor to try and discover the source of the parallel imports and put a stop to them: see paragraph 76 of the judgment. Pioneer was thus a party to the concerted practice.
163. We note also Case T-43/92 *Dunlop Slazenger International Ltd v Commission* [1994] ECR-II 441 (“*Dunlop Slazenger*”). At paragraphs 92 and 103 of that judgment the Court of First Instance treated as sufficient evidence of a concerted practice in the context of that case a telex indicating to Dunlop Slazenger that AWS had agreed to support its new strategy on pricing on the explicit condition that Dunlop Slazenger would have its distribution network under control.

## **VI. THE BURDEN AND STANDARD OF PROOF**

164. Although JJB and Allsports are the appellants in these proceedings, it is common ground that the burden of proof rests on the OFT to prove the infringements in question. In our view, once the addressee of a decision of infringement made under section 31 of the Act puts the finding of infringement in issue by appealing to the Tribunal under section 46, it is for the OFT to satisfy the Tribunal, on the evidence, that the infringement is duly proved.

### *The Napp judgment*

165. The issue of the standard of proof was dealt with by the Tribunal in *Napp v Director General of Fair Trading* [2002] CAT 1 [2002] CompAR 13 (“*Napp*”) at [98] to [109]:
- “98. As we have already stated in our interim judgment of 8 August 2001, we agree that the Director’s concession that these proceedings are “criminal”, for the purposes of Article 6 of the European Convention on Human Rights, is properly made: see Case C-235/92P *Montecatini v Commission* [1999] ECR I-4539, paragraphs

175 and 176. That is particularly so since penalties under the Act are intended to be severe and to have a deterrent effect: see the Director's statutory *Guidance as to the appropriate amount of the penalty*, (OFT 423, March 2000) issued under section 38(1) of the Act.

99. The fact that these proceedings may be classified as "criminal" for the purposes of the ECHR gives Napp the protection of Article 6, and in particular the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Article 6(1)), to the presumption of innocence (Article 6(2)), and to the minimum rights envisaged by Article 6(3) including the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" (Article 6(3)(d)).

100. In our view it follows from Article 6(2) that the burden of proof rests throughout on the Director to prove the infringements alleged.

101. However, as the Court of Appeal held in *Han*, cited above, to which we referred in our judgment of 8 August 2001, the fact that Article 6 applies does not of itself lead to the conclusion that these proceedings must be subject to the procedures and rules that apply to the investigation and trial of offences classified as criminal offences for the purposes of domestic law: see Potter LJ at paragraph 84, and Mance LJ at paragraph 88 of that judgment.

102. Neither the ECHR itself nor the European Court of Human Rights has laid down a particular standard of proof that must be applied in proceedings to which Articles 6(2) or (3) apply, and still less that the standard should be that of "proof beyond reasonable doubt", which is not a concept to be found in the domestic systems of many of the signatory States (see Sir Richard Buxton, cited above, at pp. 338 and 339).

103. In our view it follows that neither Article 6, nor the Human Rights Act 1998, in themselves oblige us to apply the criminal standard of proof as established in domestic law in cases where the Director seeks to impose a financial penalty in respect of alleged infringements of the Chapter I or Chapter II prohibitions under the Act.

104. In our view the standard of proof to be applied under the Act is to be decided in accordance with the normal rules of the United Kingdom domestic legal systems. Neither party has cited to us any decided domestic cases which suggest that, in circumstances such as these, the criminal standard should be applied, nor invited us to apply by analogy certain civil situations where traditionally the criminal standard of proof is required (e.g. committal proceedings).

105. Infringements of the Chapter I and Chapter II prohibitions imposed by sections 2 and 18 of the Act are not classified as criminal offences in domestic law, in contrast, for example, to the criminal offences created under sections 42 to 44. Under section 38(8), penalties are recoverable by the Director as a civil debt. Directions are enforceable by civil proceedings under section 34. In our view the structure of the Act points to the conclusion that under domestic law the standard of proof we must apply in deciding whether infringements of the Chapter I or Chapter II prohibitions are proved is the civil standard, commonly known as the preponderance or balance of probabilities, notwithstanding that the civil penalties imposed may be intended by the Director to have a deterrent effect.

106. We add that in many cases under the Act the factual issues before this Tribunal will often relate to such matters as determining the relevant market, whether dominance exists, and assessing whether conduct characterised as an “abuse” is economically justified. Issues of that kind involve a more or less complex assessment of mainly economic data and perhaps conflicting expert evidence. It seems to us more likely that Parliament would have intended us to apply the civil standard of proof to issues of this kind, rather than the time-honoured criminal standard of “proof beyond reasonable doubt”.

107. In our view it follows from the speech of Lord Nicholls (with whom Lord Goff and Lord Mustill agreed) in *Re H*, cited above, at pp.586 to 587, that under the law of England and Wales there are only two standards of proof, the criminal standard and the civil standard; there is no ‘intermediate’ standard. The position is the same in the law of Scotland and Northern Ireland. Within the civil standard, however, the more serious the allegation, the more cogent should be the evidence before the court concludes that the allegation is established on the preponderance of probability: see Lord Nicholls’ speech in *Re H*, citing notably *In re Dellow’s Will Trusts* [1964] 1 WLR 451, 455 and *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, 266.

108. Since cases under the Act involving penalties are serious matters, it follows from *Re H* that strong and convincing evidence will be required before infringements of the Chapter I and Chapter II prohibitions can be found to be proved, even to the civil standard. Indeed, whether we are, in technical terms, applying a civil standard on the basis of strong and convincing evidence, or a criminal standard of beyond reasonable doubt, we think in practice the result is likely to be the same. We find it difficult to imagine, for example, this Tribunal upholding a penalty if there were a reasonable doubt in our minds, or if we were anything less than sure that the Decision was soundly based.



109. In those circumstances the conclusion we reach is that, formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.”

*The parties' submissions*

166. During the hearing before the Tribunal, no party challenged the Tribunal’s approach in *Napp*, but the OFT and the appellants placed a different emphasis on the conclusions to be drawn from that judgment.
167. The OFT, relying on *Napp* at [105] and [109], submitted that the standard of proof to be applied is the civil standard of the balance of probabilities – i.e. more likely than not. Moreover the OFT submitted that the Tribunal should take account of the fact that cartels are inherently likely to be hidden or secret, there is likely to be little documentary evidence, and the evidence may be fragmentary and circumstantial : see the Tribunal’s remarks in *Claymore Dairies v OFT* [2003] CAT 18 at [3].
168. JJB and Allsports submitted that the Tribunal must be satisfied:
- “ on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, that undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.” *Napp* at [109].
169. Allsports and JJB also relied on the comment of Lord Bingham CJ in *B v Chief Constable of Avon and Somerset* [2001] 1 WLR 640 at [31] to the effect that in certain cases the difference between the civil and criminal standard of proof is “largely illusory”. According to JJB and Allsports, the standard of proof in this case, in particular the need for “strong and compelling evidence”, is driven by the seriousness of what is alleged, and should not be affected by the alleged difficulties of proving infringements in the case of secret cartels as the OFT appears to suggest.

170. In the light of certain developments in the domestic case law since the hearing, by letter of 30 June 2004 the Tribunal invited the parties to submit any further observations they wished on the standard of proof.
171. JJB submitted by letter of 5 July 2004 that the approach set out by the Tribunal at [107] to [109] of *Napp* was correct.
172. The OFT, in a letter of 5 July 2004, submitted that *Re H*, cited in *Napp*, remained the controlling authority. According to the OFT, in so far as the Tribunal's dicta in [108] and [109] of *Napp* suggested that the civil and criminal standard were the same, or that the difference was largely illusory, that was not correct. The Tribunal did not have to be satisfied "beyond a reasonable doubt".
173. JJB, in a further reply of 23 July 2004, reiterated that the Tribunal should not depart from [108] and [109] of *Napp*, which was in line with recent case law and which produces a flexible standard of proof akin to the criminal standard. The test of "strong and compelling" evidence goes to the degree of likelihood that the infringement occurred.
174. Allsports, in a letter of 6 July 2004, referring to *B v Chief Constable of Somerset and Avon*, cited above, and *R v. (on the application of McCann) v Crown Court of Manchester* [2003] AC 787 contended that either the criminal standard should be applied or a "heightened civil standard" which for practical purposes would be the same. Following the OFT's letter to the Tribunal of 5 July 2004 Allsports, in a further letter of 8 July 2004, reiterated that submission in more detail, emphasising that the present case did not involve complex economic assessment. Allsports submitted that the Tribunal's holding in *Napp* at [108] to [109] that the defendant is entitled to the benefit of any reasonable doubt is the minimum necessary to maintain the principle that "it is better that ten guilty persons escape than that one innocent suffer": Blackstone, 2 Bl. Com. c. 27, margin p. 328.

*Recent cases on standard of proof*

175. Since the Tribunal's judgment in *Napp* there have been a number of cases in the domestic courts which have a bearing on Lord Nicholls' remarks in *Re H*, upon which the Tribunal based itself in *Napp*. We set out the relevant case law, although none of it relates to the Act with which we are concerned.

176. *B v Chief Constable of Somerset and Avon*, cited above, concerned an application for a sex offender order under section 2 of the Crime and Disorder Act 1998 which provides:

“(1) If it appears to a chief officer of police that the following conditions are fulfilled with respect to any person in his police area, namely – (a) that the person is a sex offender; and (b) that the person has acted, since the relevant date, in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him, the chief officer may apply for an order under this section to be made in respect of the person.

(3) If, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrate’s court may make an order under this section...”

177. Lord Bingham of Cornhill CJ held at [28] that the proceedings under section 2 of that Act were to be regarded as civil proceedings, and that the jurisprudence of the European Court of Human Rights “does not even in criminal proceedings require Member States to apply what we call the criminal standard of proof if the standard of proof is sufficiently strong in the eyes of the domestic law to establish what needs to be established”. Lord Bingham continued at [30] and [31] as follows:

“30. It should, however, be clearly recognised, as the justices did expressly recognise, that the civil standard of proof does not invariably mean a bare balance of probability, and does not so mean in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters: *Bater v Bater* [1951] P 35, *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74.

31. In a serious case such as the present the difference between the two standards is, in truth, largely illusory. I have no doubt that, in deciding whether the condition in section 2(1)(a) is fulfilled, a magistrate’s court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard. In deciding whether the condition in section 2(1)(b) is fulfilled the magistrate’s court should apply the civil standard with the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them.”

178. In *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, the House of Lords heard argument on the standard of proof in a deportation case. Lord Hoffmann (with whom Lord Hutton and Lord Clyde agreed) said at [55]:

“55. I turn next to the Commission’s views on the standard of proof. By way of preliminary I feel bound to say that I think that a “high civil balance of probabilities” is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.”

179. In *R (on the application of McCann) v Crown Court of Manchester* [2003] AC 787, one of the issues before the House of Lords was the standard of proof to be applied when making an anti-social behaviour order under section 1 of the Crime and Disorder Act 1998. Lord Steyn held that the proceedings were to be classified as civil proceedings, both under domestic law and under the European Convention on Human Rights: [19] to [34]. On the standard of proof, Lord Steyn said at [37]:

“[37] Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: In *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under s 1 apply the criminal standard. If the House takes this view it will be sufficient for the magistrates, when applying s 1(1)(a) to be sure that the defendant has acted in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. The inquiry under s 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation. This approach should facilitate correct decision-making and should ensure consistency and predictability in

this corner of the law. In coming to this conclusion I bear in mind that the use of hearsay evidence will often be of crucial importance. For my part, hearsay evidence depending on its logical probativeness is quite capable of satisfying the requirements of s 1(1).”

180. Lord Hope of Craighead, agreeing with Lord Steyn said at [82]:

“... But it is not an invariable rule that the lower standard of proof must be applied in civil proceedings. I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made.”

Lord Hutton, Lord Scott and Lord Hobhouse agreed with the judgments of Lord Steyn and Lord Hope.

181. *Gough v. Chief Constable of Derbyshire Constabulary* [2002] QB 1213 [2002] EWCA Civ 351 concerned a banning order under section 14B of the Football Spectators Act 1989 which prevented the defendants from leaving the country during prescribed periods. Having found that the proceedings were civil in character Lord Philips of Worth Matravers MR said at paragraph 90:

“90 It does not follow from this that a mere balance of probabilities suffices to justify the making of an order. Banning orders under section 14 (B) fall into the same category as antisocial behaviour orders and sex offender orders. While made in civil proceedings they impose serious restraints on freedoms that the citizen normally enjoys. While technically the civil standard of proof applies, that standard is flexible and must reflect the consequences that will follow if the case for a banning order is made out. This should lead the justices to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard: see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 354 and *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 1084, 1102.”

182. In *Re T (children) (sexual abuse: standard of proof)* [2004] EWCA CIV 558 [2004] All ER (D) 277 the Court of Appeal (Dame Elizabeth Butler-Sloss P, Potter and Mummery LJ) considered the effect of *B v Chief Constable* and *McCann* on the judgment of Lord Nicholls in *Re H*, in cases under the Children Act 1989. Regarding the judgment of Lord Bingham in *B v Chief Constable* at [31], Lady Butler Sloss said at [24]:

“24. I understand from that passage that Lord Bingham was drawing a distinction between the standard of proof necessary to establish each of the two subsections [of section 2 of the Crime and Disorder

Act 1998] and that the standard of proof set out in the speech of Lord Nicholls in *re H* (above) was appropriate to proving the facts required for subsection 2(1)(b).”

183. As regards *McCann*, Lady Butler-Sloss P cited Lord Steyn’s speech at [37] and then stated at [26] of her judgment:

“26. Lord Steyn accepted the principles set out in Lord Nicholls’ speech above; referred to, presumably, the passage in Lord Bingham’s speech in the Chief Constable of Avon and Somerset, but gave pragmatic advice to magistrates as how to apply the standard of proof in applications for antisocial behaviour orders.”

184. After also referring to *Re E T (Serious Injuries: Standard of Proof)* [2003] 2 FLR 1203, Lady Butler-Sloss P held:

“28. I understand that in many applications for care orders counsel are now submitting that the correct approach to the standard of proof is to treat the distinction between criminal and civil standards as ‘largely illusory’. In my judgment this approach is mistaken. The standard of proof to be applied in Children Act cases is the balance of probabilities and the approach to these difficult cases was set out by Lord Nicholls in his speech in *re H*. That test has not been varied nor adjusted by the dicta of Lord Bingham nor Lord Steyn who were considering applications made under a different statute. There would appear to be no good reason to leap across a division between crime and preventative measures taken to restrain defendants for the benefit of the community and wholly different considerations of child protection and child welfare, nor to apply the reasoning in *McCann* to public, or indeed to private, law cases concerning children. The strict rules of evidence applicable in a criminal trial, which is adversarial in nature, is to be contrasted with the partly inquisitorial approach of the court dealing with children cases in which the rules of evidence are considerably relaxed. In my judgment therefore Bodey J applied the incorrect standard of proof in the case of *re ET*.”

185. Lady Butler-Sloss gave a judgment in the same terms in *Re U (a child)* [2004] EWCA Civ. 567 on 14 May 2004 sitting with Thorpe and Mantell LJJ.

#### *Other developments*

186. Since *Napp* there have been certain other developments which have a bearing on the domestic system of competition law including (i) the introduction by virtue of section 204 of the Enterprise Act 2002 of a power in certain circumstances to disqualify a director of a company which had been found to infringe the Chapter I or Chapter II prohibitions, or

Articles 81 or 82 of the EC Treaty, pursuant to sections 9A to 9E of the Company Directors Disqualification Act 1986 as amended; (ii) the enactment of a cartel offence under section 188 of the Enterprise Act 2002; and (iii) the coming into force with effect from 1 May 2004 of Regulation (EC) 1/2003 together with The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 SI 2004 no 261 (“the 2004 Amendment Regulations”).

### *Analysis*

187. The hallowed approach of the criminal law is that if, on the whole of the evidence, the jury is unsure, or left in any reasonable doubt, the accused is entitled to be acquitted, since it is the duty of the prosecution to prove the case beyond a reasonable doubt: *Woolmington v. DPP* [1935] AC 462, per Viscount Sankey LC at pp. 481 to 482.

188. In non-criminal proceedings facts are required to be proved on the balance of probability, that is to say that the court must be satisfied on the evidence, that the occurrence of the event is more likely than not. However, the principle is that the more serious the allegation, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities. Hence the civil standard provides for flexibility as to the cogency of the evidence required to satisfy the court of the facts.

Thus in *Re H* Lord Nicholls said:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.” [1996] AC 563, at p. 586.

189. This principle is expressed notably in *Hornal v. Neuberger Products* [1957] 1QB, cited by both Lord Nicholls in *Re H* and Lord Bingham CJ in *B v. Chief Constable of Somerset and Avon*. *Hornal v. Neuberger Products* refers in turn to *Bater v. Bater* [1951] p. 35, which Lord Bingham CJ also cites in *B v. Chief Constable*. In *Bater v. Bater* Denning J, as he then was, referred to criminal and civil cases and said:

“The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.”

190. In the context of proceedings before the Tribunal “a degree of probability which is commensurate with the occasion” means that the evidence needed to satisfy the Tribunal on the balance of probabilities must be commensurate with the seriousness of the infringement alleged.
191. In *Napp*, the Tribunal accepted, first, that proceedings under the Act involving penalties are to be classified as “criminal” for the purposes of Article 6 (1) of the European Convention on Human Rights, by reason of the autonomous concept of a “criminal charge” under that provision: *Napp* at [98]. In consequence, not only Article 6(1), but also the presumption of innocence under Article 6 (2) and the procedural rights envisaged by Article 6 (3), apply to proceedings before the Tribunal: *Napp* at [99].
192. However, in *Napp*, the Tribunal went on to hold that, as a matter of *domestic* law the proceedings before it are to be classified as civil and that, in consequence, the domestic civil standard of proof is applicable: *Napp* at [104] to [106]. Decisions by the OFT under the Act are taken following a purely administrative procedure. There is no indication that Parliament intended the proceedings to be classified as criminal: see Lord Bingham CJ in *Customs and Excise Commissioners v City of London Magistrates Court* [2000] 1 WLR 2020, 2025, cited by Lord Steyn in *McCann* at [20]. The procedures under the Tribunal’s Rules differ from those of the criminal courts, not least because of the partly inquisitorial role the Tribunal may have to play: see notably Rules 19 to 22. Although penalties may be



imposed on “undertakings” (but not on directors or employees) under section 36 of the Act, those are civil penalties, recoverable by civil proceedings for debt under section 37 of the Act. Similarly, directions under sections 32, 33 and 35 of the Act are enforceable by civil proceedings (section 34) as are decisions of the Tribunal: Schedule 4, Part I of the Enterprise Act 2002.

193. We also remind ourselves that many of the issues with which the Tribunal has to deal involve the appreciation or evaluation of economic questions, for example, whether an agreement “distorts” competition, the extent of the relevant market, whether dominance is established, whether certain conduct is “objectively justified”, whether an agreement satisfies Article 81(3) and so on. Under the 2004 Amendment Regulations, the question whether the Chapter I prohibition is infringed may now involve examining not only whether section 2 of the Act is satisfied, but also whether section 9 of the Act is not satisfied. Section 9 includes such concepts as “economic progress”, “allowing consumers fair share of the economic benefits”, and whether restrictions are “not indispensable”. In so far as the concept of “proof” is relevant at all, we see no sensible way of resolving such issues by the application of the criminal standard as conventionally understood.
194. We are not satisfied that it would be appropriate or even workable, as Allsports seems to suggest, to draw any distinction regarding the standard of proof between cases where the issue is *apparently* one of primary fact, such as whether there *was* a price fixing agreement, and other cases. Even in price fixing cases, the parties often rely on expert economic or econometric evidence as showing that there was no cartel. More fundamentally, it would seem to us unnecessarily complicated, and questionable under Community law, to have one standard of proof for whether there *was* an agreement, and a different standard of proof for all other issues such as whether the agreement “distorted competition”, or satisfied Article 81 (3) or its domestic equivalent, section 9 of the Act.
195. In our view, the same balance of probabilities standard should apply to all issues arising under the Chapter I prohibition, or for that matter the Chapter II prohibition, whether the issue is in some sense one of “primary” fact, or otherwise. Although the appellants are, understandably enough, approaching the issue from the perspective of this particular case, the Tribunal has to evolve a standard of proof that can be reasonably and pragmatically applied across the whole range of issues likely to arise under the Act. We have already

said, in *Aberdeen Journals (No. 2) v. OFT* [2003] CAT 11 [2003] Comp AR at [125] that in Chapter II cases the Tribunal should ask itself the question “is the Tribunal satisfied that the [OFT’s] analysis... is robust and soundly based?”

196. In our view, neither the post-*Napp* decisions referred to above, nor the other developments to which we have referred, lead us to modify the Tribunal’s basic approach in *Napp*. We are dealing with the particular context of the Act, and decisions under other Acts do not seem to us to be necessarily in point. The recent enactment of the cartel offence under section 188 of the Enterprise Act 2002 shows that there is a clear distinction between a criminal offence and an infringement of the Chapter I or Chapter II prohibition. In our judgment the applicable standard of proof in a case such as the present is the civil standard of proof – i.e. the infringement must be established on a preponderance of probabilities. The Tribunal must be satisfied that it is more probable than not.
197. However, in *Napp* the Tribunal held, at [107] to [109], that where penalties are imposed under the Act the balance of probabilities standard is to be applied taking into account the gravity of what is alleged. We take this opportunity to articulate further what we mean by this approach.
198. First, we accept that in the present case an allegation of an infringement of the Chapter I prohibition is a serious matter involving penalties.
199. Secondly, in our judgment it is important to distinguish between two different things: what the test is, on the one hand, and what is the nature of the evidence necessary to satisfy the test, on the other. As regards the test, the civil standard is the balance of probabilities. As regards the nature of the evidence, the authorities cited above show that where serious matters are in issue, for example conduct akin to dishonesty, the quality and weight of the evidence needs to be stronger than it would need to be if the allegations were less serious. As we understand *Re H*, the law in effect presumes that conduct akin to dishonesty, or capable of attracting penalties, is less likely than honest conduct. In addition, in a case such as the present, the presumption of innocence applies.
200. In these circumstances, in applying the balance of probabilities in a case involving penalties, the Tribunal must be satisfied that the quality and weight of the evidence is

sufficiently strong to overcome the presumption that the party in question has not engaged in unlawful conduct. For example, if in a borderline case the decision is finely balanced and the Tribunal finds itself to-ing and fro-ing, the correct analysis is that the evidence is not sufficiently strong to satisfy the Tribunal on the balance of probabilities that the infringement occurred.

201. In other words, the Tribunal will not apply what Lord Bingham described in *B v Chief Constable* at [31] as a “bare balance of probabilities” but will direct itself in accordance with the speech of Lord Nicholls in *Re H* at p. 586, that “...even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters”. We take the reference to “more sure” in the speech of Lord Nicholls to be a reference to the quality and weight of the evidence to which the test is to be applied: the more serious the allegation, the more cogent should be the evidence before the court concludes that the allegation is established on the preponderance of probabilities. Among many examples in the civil courts, we note in particular that this approach applies in cases involving the disqualification of directors, which is now one of the possible consequences of a finding of infringement under the Act, as mentioned above: see notably the judgment of Neuberger J as he then was in *Re Verby Print* [1998] 2 BCLC 23 [1998] BCC 652 under the heading “The burden and standard of proof.”
202. The Tribunal in *Napp* at [108] expressed the view that whether the Tribunal applied a civil standard based on strong and convincing evidence, or the criminal standard of beyond reasonable doubt “in practice the result is likely to be the same. We find it difficult to imagine, for example, this Tribunal upholding a penalty if there were a reasonable doubt in our minds, or if we were anything less than sure that the Decision was soundly based”.
203. This passage in *Napp* should not be interpreted as introducing the criminal standard through the back door. Adopting the approach of Lady Butler-Sloss in *Re T*, cited above, in our view it would not, in this Tribunal, be appropriate to “leap across” the distinction between a criminal prosecution and the wholly different and essentially administrative system established under the Act to prevent restrictions on competition. The authorities cited above in relation to football banning orders, anti-social behaviour orders and sex offender orders refer to matters which come before the criminal courts and affect the freedom of the individual. In our respectful view, those authorities concern different

legislation and do not warrant the introduction of the law and psychology of the criminal process into proceedings before the Tribunal. Nor do we think that that was the intention.

204. It also follows that the reference by the Tribunal to “strong and compelling” evidence at [109] of *Napp* should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.
205. What evidence is likely to be sufficiently convincing to prove the infringement will depend on the circumstances and the facts. In *Claymore Dairies v. OFT* [2003] CAT 18 the Tribunal was concerned that *Napp* might be interpreted by the OFT or other regulators in an unduly cautious way, inhibiting the enforcement of the Act. A similar issue arises in certain Chapter II cases currently pending before the Tribunal.
206. As regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in *Claymore Dairies* that cartels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see *Claymore Dairies* at [3] to [10]. See also, for example, the opinion of Judge Vesterdorf, acting as Advocate General, in *Rhône-Poulenc v Commission* [1991] ECR-II at p. 867; and *Cimenteries*, cited above, at paragraphs 1838 to 1839. As the Court of Justice said in Cases 204/00P etc. *Aalborg Portland v Commission*, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57:
- “55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.
56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.

57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence<sup>7</sup> of an infringement of the competition rules.”

207. We note also that since the coming into force of the Regulation 1/2003 on 1 May 2004 the Act as amended envisages the possibility of the OFT imposing penalties for breaches of Articles 81 or 82 of the EC Treaty, as part of the European system established by that Regulation. That reinforces our view that the standard of proof we apply should not be out of line with that applied by the Court of First Instance and Court of Justice when considering an appeal against a decision of the European Commission: see *Napp* at [112]. In our view *Aalborg Portland*, cited above, confirms the approach we have adopted.

208. Finally, the events of the present case pre-date the specific cartel offence created under section 188 of the Enterprise Act 2002, which came into force on 20 June 2003. That section (i) applies to individuals rather than undertakings and (ii) is worded differently from the Chapter I prohibition. The fact that an undertaking is found by the Tribunal to have participated in an agreement or concerted practice contrary to the Chapter I prohibition does not by any means imply that an individual would be found to have committed a criminal offence under section 188. The questions are quite different.

## **VII THE ENGLAND AND MU AGREEMENTS: THE ARGUMENTS ON THE FACTS**

209. In this part of the judgment, we summarise the arguments of the parties on the facts, as regards the England and MU Agreements, as set out in A, their respective pleadings; B, the opening skeleton arguments; and C, the closing submissions.

### **A. THE PLEADINGS**

#### *JJB's notice of appeal*

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<sup>7</sup> The French text in which this judgment was originally drafted uses the expression “la preuve”. We would have thought that, in this specific context, “proof” would have been an apt translation.

210. In its notice of appeal JJB's submissions in relation to the England and MU Agreements were confined to four short paragraphs, as follows:

“JJB strongly denies the allegations that have been made against it in the Decision. The Decision relies on very little direct evidence against JJB. Where there is evidence that relates to JJB, there are serious questions as to its reliability, and it is contradicted by JJB's own evidence. It is intended that Mr. Whelan and Mr. Russell of JJB will give evidence at the hearing in order to demonstrate the falsity of the allegations against JJB.

The Decision contains a very large number of allegations. This appeal notice does not seek to deal with each and every point with which JJB disagrees, but restricts itself, in accordance with the CAT Rules, to setting out a summary of the principal grounds for contesting the decision and a succinct presentation of the arguments supporting each of those grounds. The fact that the appeal does not expressly consider any particular point should not be understood as indicating that JJB necessarily agrees with that point.

In relation to the Euro 2000 England Agreement, the Decision alleges that Messrs. Ronnie and Fellone telephoned each of the major retailers to make sure that they would price the England Replica Shirts at High Street Prices in the run up to and during England's participation in Euro 2000 and that these telephone calls resulted in an agreement being reached between a number of parties, including JJB. JJB denies that any such conversations took place or that any such agreement was reached.

In relation to the Manchester United Agreement, the Decision alleges that, at a meeting on 8 June 2000 between Mr. Hughes of Allsports, Mr. Whelan and Mr. Sharpe of JJB, and Mr. Ashley of Sports Soccer, arranged by Mr. Hughes and held at his house, an agreement was reached to retail the new Manchester United home replica shirt at High Street Prices at launch on 1 August 2000. JJB denies that any such agreement was reached. When Mr. Whelan discovered at the meeting that David Hughes was suggesting that Sports Soccer and JJB should agree to adopt a price of £44.99 for the forthcoming Manchester United shirt, Mr. Whelan repeated JJB's well-known public policy not to price adult shirts above £40 and promptly left the meeting saying that he was not prepared to discuss retail prices with anyone.”

211. Certain short witness statements served with JJB's Notice of Appeal contain little reference to the England Agreement. As regards the MU Agreement, Mr. Bryan, formerly of Umbro and now at JJB, refers briefly to his understanding of the meeting of 8 June 2000 at paragraphs 11 to 14 of his witness statement of 1 October 2003. In the course of the

proceedings JJB waived reliance on Mr. Bryan's evidence. Witness statements by two non-executive directors of JJB, Mr. David Beever and Mr. Lane-Smith, dated 30 September and 1 October 2003 respectively, set out their accounts of the JJB Board meeting of 27 June 2000 at which Mr. Whelan gave an account of the meeting of 8 June 2000. Neither of those witnesses gave evidence.

212. Although not stated in the notice of appeal, it emerged before the Tribunal that JJB also relied on the witness statements it had already produced during the administrative procedure. In relation to the England and MU Agreements the statements of principal relevance appear to be:

- Mr. Whelan's first statement dated 15 August 2002 (Whelan I).

- Mr. Sharpe's statement dated 15 August 2002.

- Mr. Whelan's second statement (Whelan II) dated 20 January 2003.

- Mr. Russell's second statement dated 17 January 2003 (Russell II), and his fourth statement of 12 February 2004 (Russell IV) dealing with JJB's launch prices.

213. As already stated, an explanatory schedule, served by JJB pursuant to the Tribunal's order of 23 October 2003, proved to be of no practical utility and has not been referred to. The Tribunal did not find JJB's approach in its written pleadings to be helpful.

*The OFT's defence to JJB's notice of appeal*

214. In relation to the England Agreement the OFT relies in its defence on the facts and matters set out in paragraphs 414 to 416 of the decision, the earlier paragraphs there referred to and the OFT's response to JJB's arguments at paragraph 431 of the decision. In addition, the OFT relies on two witness statements of Mr. Ashley both dated 28 November 2003 (Ashley I, and Ashley II respectively), and a further witness statement by Mr. Ronnie also dated 28 November 2003 (Ronnie IV). The OFT sets out its case on "pressure" allegedly exerted by JJB against Umbro at paragraphs 47 to 50 of the defence.

215. At paragraph 53 of the defence to JJB's appeal, in relation to the England Agreement the OFT supplements its reliance on the facts and matters set out in the decision in these terms:

- “53. The OFT relies upon all the findings and analysis in the Decision ... subject to the following observations:
- (a) The phone call from Mr. Ronnie to JJB was made either to Mr. Whelan or Mr. Sharpe and in the working week commencing Tuesday 30 May. In any event the precise date or recipient of the call need not be determined.
  - (b) In the case of Allsports and JJB, Mr. Ronnie has now clarified that the telephone calls he made after the meeting on 24 May and before 2/3 June were made to inform those retailers of the fact that, in response to Allsports and JJB pressure and complaints, Umbro had managed to obtain Sports Soccer's agreement to increase its prices for England home and away Replica Shirt whilst England remained in the championship. Mr. Ronnie warned Allsports and JJB not themselves to discount as Sports Soccer would use any excuse not to abide by its agreement.
  - (c) Accordingly, to this limited extent, the OFT's findings, in so far as they refer to assurances given by JJB, at §§414, 415(b) and (in part) 427 and 431 are not adhered to. Nevertheless the OFT's findings, at §427 and 431, that the purpose of the phone calls to JJB and Allsports was to give them comfort about assurances being given by their competitors and to confirm that Umbro was speaking to other retailers, are correct.
  - (d) The receipt by JJB, in the course of the phone call from Mr. Ronnie, of confirmation as to Sports Soccer's agreement with Umbro to raise prices (following JJB's complaints) amounts to participation by JJB in an agreement or a concerted practice within the meaning of the Chapter I prohibition as to the pricing of the England Replica Shirt at the time of Euro 2000.”

216. As regards the MU Agreement, the OFT relies on the facts and matters set out in paragraphs 450 to 451 of the decision, which refer in turn to paragraphs 187 to 191 (as regards the events of 8 and 9 June 2000) and paragraphs 362 to 364 (as regards Mr. Marsh's fax of 6 June 2000) of the decision. The OFT relies, in addition, on its response to JJB's arguments set out at paragraphs 475 and 476 of the decision.

217. The following facts deriving from Mr. Hughes' witness statement of 30 September 2003 (Hughes I) are further relied on by the OFT at paragraph 58 of the defence:



- “(a) Mr. Hughes arranged a meeting on 8 June 2000 to put a stop to discounting. His diary entry for 30 May reads “*Phone David Whelan/ Mike Ashley – Man Utd Shirt Price*”
- (b) On 2 June 2000, Mr. Hughes met Mr. Ronnie to obtain Mr. Ashley’s phone number because he wanted to “*get Dave Whelan and Mike Ashley together and try and talk some sense into them as I had had enough of their price wars*”
- (c) Mr. Hughes’ diary for 5 June records: “Agree Man Utd + England prices with everyone incl Mike Ashley” and goes on “*Sports trade cartel arrange a meeting regularly*”
- (d) On or about 6 June, Mr. Hughes specifically told Mr. Sharpe that Mike Ashley had been invited to a meeting and the purpose was to stop Sports Soccer and JJB heavily discounting the prices of premium products on launch
- (e) Mr. Hughes states that, at the meeting, Mr. Whelan declared that JJB’s price for the MU Replica Shirt at launch would be £39.99, even though he reserved the possibility of responding to discounting by Sports Soccer.”

218. At paragraph 60 of the defence the OFT also relies on the evidence of Mr. Ashley in Ashley II about the meeting on 8 June.

*Allsports’ notice of appeal*

219. In its notice of appeal Allsports contests the OFT’s findings on the England and MU Agreements in considerable detail. Allsports summarises its position at paragraphs 4.8 and 4.9 of its notice of appeal in these terms:

“4.8 In relation to the England Agreement, Allsports denies the alleged telephone call. It also denies for the avoidance of doubt that it took part in an agreement or concerted practice relating to the England Replica Shirt in any other way but, again for the avoidance of doubt, the allegations and the findings are limited to one single telephone call which did not occur.

4.9 In relation to the MU Agreement, Allsports does accept that a meeting took place between its Chairman, Mr. Hughes, Messrs. Whelan and Sharpe of JJB, and Mr. Ashley of Sports Soccer on 8 June 2000 at Mr. Hughes’ house in Cheshire. It also accepts that those present spoke about the pricing of the new MU Replica Shirt. However, that did not result in an agreement “*to co-ordinate their pricing of the new MU home Replica Shirts*”.

220. According to Allsports' notice of appeal at 6.20:

“The OFT’s most detailed case on the England Agreement is that some time after 24 May 2000 Umbro contacted JJB, Blacks, JD and Allsports by telephone and that by virtue of those telephone calls those undertakings “took part in an agreement to fix the prices of” England Replica Shirts during the Euro 2000 selling period. The agreed price is said to have been £39.99. As far as the finding against Allsports is concerned, this one telephone call is the England Agreement.”

221. At paragraph 6.21 of its notice of appeal Allsports sets out its case with regard to the England Agreement in detail.

222. In relation to the MU Agreement, Allsports' case is:

“in essence, that Mr. Hughes did indeed try to organize an agreement between JJB, Sports Soccer (the 2 largest UK sportswear retailers) and Allsports to avoid discounting of branded sportswear and in particular MU Replica Shirts on launch. To that end, he arranged the meeting on 8<sup>th</sup> June 2000 attended by Messrs. Whelan and Sharpe of JJB and Mr. Ashley of Sports Soccer. At that meeting, however, no agreement was reached as to the pricing of MU Replica Shirts on launch”.

223. In the notice of appeal Allsports sets out a detailed refutation of the OFT's findings regarding the MU Agreement at paragraphs 6.26 to 6.52. Allsports relies in particular on Mr. Hughes' witness statement of 30 September 2003 (Hughes I).

224. Allsports' notice of appeal is also supported by witness statements dated 30 September 2003 from Mr. Guest (Guest I), Mr. Patrick, Mr. Knight, and Ms. Charnock.

225. Following the Tribunal's rejection of Allsports' strike out application, Allsports served further witness statements by Mr. Hughes dated 19 February 2004 (Hughes II), Mr. Guest dated 20 February 2004 (Guest II) and Ms Charnock dated 20 February 2004.

*The OFT's defence to Allsports' notice of appeal*

226. The OFT points out in its defence that at no stage during the administrative procedure did Allsports submit any witness statements, nor was Mr. Hughes' diary produced. The OFT relies on certain of the new evidence now produced by Mr. Hughes for the first time, and criticises his credibility, in particular as regards Mr. Hughes' explanations for the two

memoranda of 9 June, and the fact that Mr. Hughes' diary, which is inculpatory, was withheld from the OFT during the administrative procedure, even though it was relied on by Allsports as being exculpatory.

227. The OFT's defence is supported by Ashley I and II, and by Ronnie IV, and by Mr. May's witness statement of 13 January 2004.

228. In respect of the England Agreement, the OFT relies, as against Allsports, on the facts and matters set out at paragraphs 414 to 416 of the decision, and its rejection of Allsports' arguments at paragraphs 426 to 430 of the decision.

229. At paragraph 21 of the defence the OFT states, in respect of the England Agreement:

- “(a) The phone call from Mr. Ronnie to Allsports was made either to Mr. Guest or Mr. Hughes and in the working week commencing Tuesday 30 May. In any event the precise date or recipient of the call need not be determined.
- (b) In the case of Allsports and JJB, Mr. Ronnie has now clarified that the telephone calls he made after the meeting on 24 May and before 2/3 June were made to inform those retailers of the fact that, in response to Allsports and JJB pressure and complaints, Umbro had managed to obtain Sports Soccer's agreement to increase its prices for England home and away Replica Shirt whilst England remained in the championship. Mr. Ronnie warned Allsports and JJB not themselves to discount as Sports Soccer would use any excuse not to abide by its agreement.
- (c) Accordingly, to this limited extent, the OFT's findings, in so far as they refer to assurances given by Allsports, at §§ 414, 415(b) and 427 (in part) are not adhered to. Nevertheless, the OFT's findings at §427 (and §431 as regards JJB) that the purpose of the phone calls to Allsports and to JJB was to give them comfort about assurances being given by their competitors is correct.
- (d) The receipt by Allsports, in the course of a phone call from Mr. Ronnie, of confirmation as to Sports Soccer's agreement with Umbro to raise prices amounts to participation by Allsports in an agreement or a concerted practice, within the meaning of the Chapter I prohibition, as to the pricing of the England Replica Shirt at the time of Euro 2000.

- (e) Allsports' contention that the OFT's case is entirely dependent upon accepting Mr. Ronnie's evidence as to the telephone call to Allsports is incorrect:
  - (i) That such a phone call to Allsports was made is supported by other strong circumstantial evidence: see all the matters listed at paragraphs 9(a)(ii)-(vii) above.
  - (ii) Further, and in any event, even if the Tribunal were not satisfied that the telephone call between Mr. Ronnie and someone at Allsports did take place, nevertheless other evidence is sufficient to establish that Allsports was party to an agreement or concerted practice as to the pricing of the England Replica Shirt at the time of Euro 2000, by virtue of Allsports' complaints, pressure and its knowledge. In this regard, as well as the matters referred at paragraphs 9(a)(iii)-(vii) above, the OFT refers to the evidence that Allsports, and Mr. Hughes in particular, was most concerned about other retailers discounting Replica Shirts, including the England shirt; Mr. Hughes' words at the Golf Day dinner; his various diary entries about discounting and agreeing prices (including *specifically* the England shirt)."

230. Pursuant to an order of the Tribunal, the OFT served further particulars on 4 February 2004 of the matters relied on under paragraphs 21(b), (d) and (e) of the defence.

231. The OFT further contends, at paragraphs 49 to 59 of the defence, that Allsports as a major national retailer was one of the most active to complain about, and take proactive steps to prevent, discounting: see Mr. Hughes' diary entry "Sports trade cartel arrange a meeting regularly". See also (i) Allsports' letter of 20 April 1999; (ii) the regular conversations between Ms Charnock of Allsports and Mr. May of Umbro; (iii) Mr. Hughes' remarks at the Golf Day Dinner; (iv) Mr. Hughes' contacts with Mr. Knight of Blacks during his meeting with Mr. Ronnie on 2 June and again on 9 June 2000, (v) the fact that Mr. Hughes organised the meeting of 8 June 2000 with the purpose of stopping Sports Soccer and JJB "heavily discounting the prices of premium products"; (vi) the entries in Mr. Hughes' diary; and (vii) Mr. Patrick's concern to retaliate against JD.

232. As to the MU Agreement, the OFT relies on its conclusions as set out in paragraphs 450 to 452 of the decision, and the earlier paragraphs there referred to, as well as its conclusions set out in paragraphs 463 to 477 of the decision. At paragraph 22 of the defence the OFT places reliance on further evidence provided by Allsports, namely that:

- “(a) Mr. Hughes arranged the meeting on 8 June 2000 to put a stop to discounting. His diary entry for 30 May reads “*Phone David Whelan/Mike Ashley – Man Utd Shirt Price*”
- (b) Mr. Hughes’ diary for 5 June unashamedly records “*Agree Man Utd + England prices with everyone incl Mike Ashley*” and goes on “*Sports trade cartel arrange a meeting regularly*”.
- (c) Mr. Hughes’ new explanation for the terms of the two internal memoranda of 9 June, which on their face plainly record the fact that both JJB and Sports Soccer had agreed to price the MU shirt at £39.99, is incredible. On the other hand, his observation that he “*never thought it would become necessary to explain them to a wider audience*” explains why he was so incautious about recording in writing the fact and terms of an agreement to fix prices.”

## B. THE OPENING SKELETON ARGUMENTS

### *The OFT*

233. According to the OFT at paragraph 26 of its opening skeleton argument, the principal issues as regards the England Agreement are:

- “(1) Did each of JJB and Allsports make complaints to, or seek to put pressure on, Umbro about discounting of Replica Kit in general, about Sports Soccer’s discounting of Replica Kit in general and/or about the England Replica Shirts in particular?
- (2) Did Mr. Ronnie make a telephone call to each of JJB and Allsports, in each of which he informed the relevant person at JJB and Allsports that Sports Soccer had agreed to price the England Shirt at £39.99 for as long as England remained in Euro 2000?
- (3) Do the facts found in (1) and/or (2) give rise to an agreement or concerted practice, to which JJB and Allsports was party, as to the pricing of the England shirt?”

The OFT contends that each of those questions should be answered in the affirmative.

234. As regards the MU Agreement, the OFT submits that the principal issues are:

- “(1) What was the background leading up to the meeting at Mr. Hughes’ house on 8 June 2000?
- (2) What was said at the meeting on 8 June 2000?

- (3) Do the facts found in (1) and (2) give rise to an agreement or concerted practice, to which JJB and Allsports was party, as to the pricing of the MU home shirt?”

235. The OFT contends that the evidence regarding the MU Agreement establishes that:

- “(a) Mr. Hughes organised the meeting of 8 June for the specific purpose of reaching agreement between Allsports, JJB and Sports Soccer as to the price of the MU home shirt. His deliberate intention was to make a price-fixing agreement. Mr. Ashley travelled up to Cheshire specially for the meeting and was fully aware of the purpose of the meeting.
- (b) At the meeting itself, Mr. Ashley indicated that Sports Soccer would price the MU home shirt at £39.99 at launch. Allsports wanted to go higher than £39.99, but found out that it could not do so. JJB did discuss pricing; it indicated that it would price at launch at £39.99. Both Mr. Hughes and Mr. Ashley came away from the meeting with the clear understanding that JJB would price at £39.99 at launch.”

*JJB*

236. JJB argued in its opening skeleton that the OFT has advanced a “new case” in relation to the England Agreement. According to JJB, the OFT’s new case is “no (...) longer that someone from JJB entered into an agreement with Mr. Ronnie in relation to the retail price of England shirts,” but that “Mr. Ronnie telephoned someone from JJB, not to obtain an agreement on prices, but rather to inform JJB that Umbro had managed to obtain Sports Soccer’s agreement to increase its prices for England home and away shirts whilst England remained in the championship. The new case against JJB is set out at para 53(d) of the Amended Defence.”

237. JJB reserved the right to object to the new case put forward by the OFT, not least because one of JJB’s principal witnesses, Mr. Sharpe, died on 7 October 2002. JJB submits that it is now prejudiced by its inability to obtain instructions from Mr. Sharpe.

238. According to JJB, this change of case makes largely unsustainable the OFT’s contentions that JJB concluded an agreement with other retailers, or gave Umbro assurances as to its pricing, as set out notably at paragraphs 415 (a), (b), (c), (h) and (i) of the decision.

239. As regards the MU Agreement, JJB submitted that the factual issues should be resolved in its favour on the basis of the evidence of Mr. Whelan, Mr. Hughes and Mr. Ashley, and the witness statement of Mr. Sharpe. JJB also put in issue the inferences to be drawn from the various matters relied on by the OFT at paragraph 450, 459 to 462 and 475 to 477 of the decision.
240. In a supplementary skeleton argument filed on 4 March 2004, just before the main hearing, JJB contended that the various Umbro documents ordered to be disclosed by the Tribunal threw a completely different light on the relationship between Umbro and Sports Soccer, and negated any suggestion that the price fixing in question resulted from pressure from JJB, as distinct from the pursuit by Umbro and Sports Soccer of their own commercial interests.

*Allsports*

241. In its opening skeleton argument Allsports maintained, first, that it is not open to the OFT in this appeal to advance against Allsports new cases on the England Agreement that are entirely different from the findings on that agreement set out in the decision. All Allsports' submissions are made without prejudice to that contention.
242. According to Allsports, the OFT no longer maintains that Allsports agreed to do anything: the OFT's new case is that Allsports was a secondary party to a concerted practice who contributed to pressurising Umbro into making a price fixing agreement with Sports Soccer and willingly received news of that agreement.
243. Allsports emphasises notably (i) its relatively small size compared to JJB, Sports Soccer, Blacks and JD, (ii) the insignificance of the fact that it was an "official retailer for MU", (iii) its consistent policy of not discounting, (iv) its developing new strategy of moving up market towards "aspirational" brands, (v) the fact that replica kits form a small proportion of its turnover, (vi) the fact that its sales of replica kits were satisfactory even if priced above Sports Soccer: a slower rate of sales could be accommodated by rescheduling deliveries, (vii) that its sales of England shirts were satisfactory up to June 2000 and (viii) that Allsports had no significant ability to influence Umbro.

244. As to credibility, Allsports submits that no adverse inference arises from its failure to provide witness statements at the administrative stage: Mr. Hughes' diary would have been provided had the OFT asked for it. Umbro's evidence, says Allsports, is weakened (i) by its obvious incentive to blame the retailers in order to obtain leniency (ii) the contradictory versions, according to Allsports, of Mr. Ronnie's statements (iii) the absence of any evidence of threats to Umbro by its customers and (iv) inaccuracies in various Umbro documents including the May monthly management report which records that Allsports, JJB and others "agreed" the retail price of the England shirt, whereas the OFT's present case is that, rather than "agreeing", Allsports inveigled Umbro into making an agreement with Sport Soccer about which Allsports was then informed.
245. As to the case on "pressure and complaints" now made by the OFT against Allsports with respect to the England Agreement, Allsports relies on its witness statements to refute the matters relied on by the OFT. Allsports submits, essentially, that (i) it was in no position to put pressure on Umbro, (ii) Umbro had powerful commercial interests of its own to maintain retail prices, (iii) MU rather than Allsports was in a position to, and did, put strong pressure on Umbro.
246. Even assuming, contrary to Allsports' primary contention, that the OFT is entitled to advance its case on "pressure", Allsports submits (i) that the fact that that case was not run before weakens its credibility (ii) there is no reference to such pressure in any Umbro documentation, and (iii) the allegations of pressure made by Mr. Ronnie, Mr. Fellone and Mr. May are so vague as to be impossible to deal with sensibly. In addition, the timing of the alleged pressure relied on by the OFT does not accord with the chronology of events since, with the exception of Allsports' letter of 20 April 1999, all the matters particularised by the OFT took place after Umbro had reached agreement with Sports Soccer on 24 May 2000.
247. As regards the alleged telephone call from Mr. Ronnie to "someone at Allsports", Allsports submits that the details now given in Ronnie IV are equivocal and contradict Umbro's response to the OFT in September 2002 when it was stated that no details could be given of the date of the phone call or the person called.



248. More fundamentally, Allsports submits that the telephone call never took place. According to Allsports, Ronnie IV contradicts the Umbro May MMR, and also the statement of Mr. Ryman of Debenhams relied on by the OFT. Moreover, Mr. Ashley's statement of 13 August 2001 is now contradicted by Ronnie IV and replaced by Ashley II which is substantially different. In any event, Mr. Ashley can only say what Mr. Ronnie told him, which may not have been accurate.
249. As to the MU Agreement, Allsports refers to its pleaded case and emphasises that (i) no undue weight should be attached to the Golf Day, (ii) at the meeting of 8 June Mr. Whelan and Mr. Sharpe said nothing that was not common knowledge within the industry, and Mr. Ashley gave no commitment as to his pricing, (iii) the fact that Allsports, JJB and Sports Soccer all priced at £39.99 is explicable by the agreements Sports Soccer had made directly with Umbro, by the consistent policies followed by JJB and Allsports, and by the fact that every other retailer priced at that level, (iv) if Mr. Hughes' evidence is accepted, there is no agreement, and (v) if there was, at most, an exchange of information about prices, such a concerted practice was too insignificant to constitute an infringement, and had no effect on the pricing decisions of Allsports or any other party.
250. In its supplementary skeleton argument dated 4 March 2004 regarding the relationship between Umbro and Sports Soccer, Allsports adopted the observations made by JJB in its supplementary skeleton argument of the same date and further submitted, notably, that information at the heart of the appeal, as to the true relationship between Umbro and Sports Soccer, had been withheld from Allsports and JJB until the last moment, and was still incomplete, causing Allsports major difficulties in the preparation of its case.
251. Allsports also expressed astonishment at the apparent level of business between Umbro and Sports Soccer, compared to which Allsports' business with Umbro was small, and at the apparent complexity of the arrangements between the two companies. Allsports drew the conclusion that there was now no support for the OFT's contention that Umbro was a victim of pressure by Allsports, nor for the contention that Sports Soccer was a victim of pressure by Umbro.

#### C. THE APPELLANTS' CLOSING SUBMISSIONS ON THE FACTS

*JJB'S closing submissions*

*- The witnesses*

252. JJB's primary contention is that the evidence of Mr. Whelan and Mr. Russell should be preferred to that of Mr. Ashley and Mr. Ronnie whenever there is a material conflict between them. In any event, the evidence of Mr. Ashley and Mr. Ronnie is not sufficiently reliable to meet the "strong and compelling" standard of proof applicable in this case.
253. According to JJB, Mr. Ronnie was not an impressive witness. His ability to recall events in a reliable and accurate way was poor and he gave, for example, four different versions of the circumstances surrounding the making of the alleged England agreement. His responses when questioned were limp, and his memory unreliable.
254. As between Mr. Ronnie and Mr. Ashley, JJB submits that Mr. Ashley was the dominant personality. According to the evidence, Sports Soccer was bankrolling Umbro and had a powerful grip on the Umbro brand. Umbro was not in a position to put pressure on Sports Soccer. Umbro's conduct was driven exclusively by its determination to protect the Umbro brand. The evidence about the circumstances in which Mr. Ronnie left Umbro do not permit any adverse inference to be drawn against Mr. Whelan or JJB.
255. Mr. Ashley, according to JJB, is an intelligent and extremely successful businessman, forceful, articulate, and "superficially plausible". However, he is not a note taker or record keeper. His account of such matters as the meeting of 24 May 2000 had unexplained discrepancies and was obviously not his own evidence. Similarly, his account of the meeting of 8 June 2000 showed fundamental discrepancies and major fluctuations in important respects. His answers on Sports Soccer's fax to Umbro of 7 September 2000 regarding Nottingham Forest were tailored to meet his commercial and legal interests. He was not an open and frank witness.
256. Mr. Fellone, according to JJB was a "breath of fresh air", an obviously "open, frank and forthright witness", and "patently honest".
257. Mr. Whelan, submits JJB, was a forthright witness who has achieved obvious success in his life. JJB invites the Tribunal to find that Mr. Whelan is a man of principle and integrity

who was an honest witness on all matters of significance, and whose evidence has been consistent throughout. JJB invites the Tribunal to accept Mr. Whelan's evidence as to the meeting of 8 June 2000 as entirely accurate.

258. Mr. Russell, submits JJB, gave evidence in a straightforward and relaxed way, and his personal knowledge of the key issues was impressive and convincing.
259. As regards Mr. Hughes, JJB submits that he was wrong about his alleged conversation with Mr. Sharpe prior to the meeting of 8 June, but in all other respects Mr. Hughes' evidence confirms Mr. Whelan's account of that meeting.

*- Pressure and complaints*

260. As regards the OFT's case on "pressure" by JJB on Umbro, JJB submits: (i) that Umbro had a powerful independent reason for preventing Sports Soccer from discounting, namely the promotion of the brand. Keeping JJB and Allsports happy was thrown in by Mr. Ronnie as an afterthought; (ii) there is an important difference between "expressed concerns in the ordinary course of business" by a retailer, and "illegal demands and threats". The evidence in this case points to "the lawful end of the spectrum"; (iii) the only specific instance of pressure noted by Mr. Ronnie was the cancellation of the MU Centenary shirt in 2001; (iv) Mr. Ronnie's evidence is not compelling evidence of unlawful pressure by JJB on Umbro, and there is no evidence of such pressure in Umbro's monthly management reports; and (v) Mr. Fellone's evidence shows that the points made by JJB were fairly typical of the sorts of conversations that take place between a supplier and his retail customers, rather than "unlawful pressure". JJB concluded that this part of the OFT's case is "overblown and exaggerated".
261. As regards the alleged pressure by Umbro on Sports Soccer, JJB analyses in detail the evidence about the relationship between Sports Soccer and Umbro. That shows, according to JJB, "a very cosy relationship with a strong mutual dependence". In particular, Mr. Ashley knew that Umbro was financially insecure and urgently needed the large unsecured cash injection provided by Mr. Ashley by way of advance payment of royalties in 2000 and 2001. The licensing agreement also gave him a very powerful influence over Umbro, and shows that Umbro was prepared to yield control over its brand. In these circumstances Umbro was in no position to put commercial pressure on Mr. Ashley. The contrary

suggestion is “unreal and commercially naïve”. The note of the meeting of 24 May 2000, the draft of the agreement dated 14 September 2000, and the draft of February 2001 all show that Sports Soccer and Umbro were negotiating a licence agreement during 2000 and 2001 and doing business with each other in accordance with the terms proposed. In JJB’s submission, the price fixing agreement was part and parcel of the global commercial deal between Umbro and Sports Soccer whereby Sports Soccer got access to Umbro’s brand and Umbro got Sports Soccer’s price fixing undertaking. According to JJB, it is plain, notably from the draft of February 2001, that the deal extended to replica kit. The credit note of 7 September 2000 also shows the exceptionally favourable terms that Sports Soccer was enjoying from Umbro.

262. Taking all these matters into account, as well as the difficulties encountered by the Tribunal itself in obtaining information about the Sports Soccer/ Umbro relationship, JJB invites the Tribunal to find that Umbro was not in a position to, and never did, apply any unlawful pressure on Sports Soccer. Mr. Ashley’s characterisation of himself as a “victim” is driven by nothing more than a desire to damage his competitors.

*- The England Agreement*

263. According to JJB, the case against it is set out in paragraph 53(d) of the amended defence, and has fundamentally changed since the decision. JJB submits that the two principal factual issues are:

“(a) Did Mr. Ronnie, in the week beginning 29 May, telephone someone at JJB to inform them of the fact that “in response to Allsports and JJB pressure and complaints, Umbro had managed to obtain Sport Soccer’s agreement to increase its prices for England home and away replica shirts whilst England remained in the championship?”

(b) Did JJB exert “pressure” on Umbro in relation to Sports Soccer’s pricing? If so, what was the nature of that pressure?”

264. JJB then analyses the evidence in detail, and makes among others, the following points: (i) Mr. Ronnie’s first version of events is contained in Ronnie I and Ronnie II; however, neither Ronnie I nor Ronnie II implicate JJB in any way in any alleged telephone conversation about England shirts, even though Mr. Ronnie accepts that Ronnie II is likely

to be the best record of his true recollection; (ii) Mr. Ronnie's second version of events is contained in Ronnie III. According to this version, Mr. Ronnie telephoned *someone* at JJB sometime *after* 24 May 2000 and reached an *agreement* as to the prices of England shirts up to and during the Euro 2000 tournament; (iii) Mr. Ronnie's third version of events, now relied on by the OFT, is contained in Ronnie IV. According to this version, Mr. Ronnie telephoned Duncan Sharpe after 24 May to inform him that Sports Soccer had given a price guarantee, but that he did not "ask [JJB] to agree to maintain prices on the England home kit" (paragraph 27 of Ronnie IV); (iv) Mr. Ronnie's fourth version, given in evidence before the Tribunal for the first time, was that he already had an agreement with JJB to price the England shirt at £39.99 *before* 24 May, and that after 24 May he telephoned JJB to confirm that Sports Soccer would do likewise. JJB submits that this fourth version was put forward after Mr. Ronnie had heard Mr. Ashley's evidence, and was an attempt by Mr. Ronnie to tailor his evidence to accord with that of Mr. Ashley, even if done subconsciously.

265. JJB also points out that in Ronnie III of 12 July 2002, Mr. Ronnie did not identify Mr. Sharpe as the person he had called, nor did Umbro identify Mr. Sharpe in reply to the OFT's specific request of 13 September 2002. Mr. Sharpe died on 7 October 2002. Mr. Sharpe is not identified in a witness statement until Ronnie IV of 28 November 2003. Even now, Mr. Ronnie admitted in cross-examination that he could not specifically remember if it was Duncan Sharpe. The fact that Mr. Sharpe's name is mentioned in the notes of Umbro's meeting with the OFT on 26 February 2002 is of little evidential value; these notes are riddled with inconsistencies when compared with Mr. Ronnie's sworn testimony. In all the circumstances, submits JJB, Mr. Ronnie's evidence is deeply flawed and an insufficient basis on which to convict JJB.

266. JJB also points out that, following the meeting on 24 May, Sports Soccer did not in fact raise its prices until 2 June, although it had apparently agreed to do so from 25 May. In these circumstances, submits JJB, it is doubtful whether Mr. Ronnie could have telephoned JJB after 29 May to tell them that Umbro had obtained a price guarantee from Sports Soccer since, at that stage, Mr. Ashley had not taken action on his promise to raise the price of England shirts.

267. Even if the Tribunal were to find that there was a relevant telephone call, JJB submits that an infringement could be established only if it was also shown that JJB had imposed unlawful pressure on Umbro in respect of Sports Soccer's pricing. According to JJB, that cannot be shown. Even on Mr. Ronnie's evidence, any alleged "threat" was not explicit, and arose, if at all, from Mr. Ronnie's perception of Umbro's commercial relationship with JJB, rather than from anything JJB did or said. As Mr. Fellone said, conversations in which retailers complain to manufacturers about the discounting activities of other retailers are frequent in the trade.

268. According to JJB, Umbro's monthly management reports are likely to be accurate: there is no reason why these reports should have recorded anything other than the unvarnished truth. Yet there is no mention of threats or pressure in these reports.

*- The MU Agreement*

269. JJB submits that Mr. Whelan has been consistent throughout and that Mr. Ashley's evidence is wholly unreliable. During the administrative procedure Mr. Ashley gave a number of different accounts of the meeting of 8 June, according to JJB.

270. According to JJB, Mr. Hughes must have had at least one conversation with Mr. Whelan before the meeting of 8 June. The effect of the evidence of Mr. Hughes, Mr. Whelan and Mr. Sharpe is that Mr. Hughes did not tell anyone that Mr. Ashley would be present at the meeting, or that the purpose of the meeting was to fix prices. In any event, the evidence demonstrates that Mr. Whelan did not know that Mr. Ashley would be present at the meeting and/or that the purpose of the meeting was to fix prices.

271. Moreover, it is common ground that at the meeting Mr. Whelan rejected Mr. Hughes' proposal to fix prices at £45, and made it plain that JJB was not prepared to enter into a price fixing agreement. According to JJB there was no agreement to sell at £39.99. In particular: (i) Mr. Ronnie's evidence is hearsay, and in conflict with that of Mr. Ashley, who made his own decision to go to the meeting. In any event Mr. Ashley was simply telling Mr. Ronnie something that he would be pleased to hear; (ii) Mr. Ronnie's account of his conversation with Mr. Sharpe on 9 June had never been mentioned in any previous statements; (iii) the two memoranda of 9 June 2000 are not evidence of an unlawful agreement as against JJB, and suggest that Mr. Hughes may have spoken to Mr. Patrick or

Mr. Guest about JJB before the meeting of 8 June; and (iv) Mr. Whelan reported the facts to the JJB Board meeting on 27 June. The evidence of Mr. Beever and Mr. Lane-Smith on this point has not been challenged by the OFT.

272. In addition, submits JJB, Mr. Whelan did not state that JJB would price the MU shirt at launch at £39.99. Both Mr. Hughes and Mr. Ashley's evidence was that they knew that that was JJB's pricing policy anyway. According to JJB, Mr. Ashley's evidence is consistent with him glossing what took place at a single meeting four years ago. Given the different versions of Mr. Ashley's story, his evidence is not compelling. It is sufficient for the Tribunal to think that Mr. Whelan's version *may* be the correct one, for the charge against JJB to be dismissed. Nor can it be excluded that there was a misunderstanding between the parties, with no consensus being reached. It is not possible to exclude the possibility that Mr. Ashley simply got hold of the wrong end of the stick.

273. Finally, even if the OFT were to argue that the mere mention by JJB of its pricing policy at the meeting of 8 June constituted a concerted practice, that argument would fail because of the lack of any knowing consensus between the relevant parties.

*Allsports' closing submissions*

*- General*

274. Allsports submits that the Tribunal cannot be satisfied, on the basis of strong and compelling evidence, the burden being on the OFT, that the decision is right in its findings against Allsports.

275. By way of introduction, Allsports submits that the OFT's case has been a "moving target" both in respect of the introduction of the "pressure" case against Allsports with regard to England Agreement, not found in the decision, and in the changed version of Mr. Ronnie's evidence. The "pressure case", now fatally undermined by the new information about the relationship between Umbro and Sports Soccer, and the "evaporation" of Mr. May's evidence, should not be allowed by the Tribunal. Similarly the OFT's "fall back" position as to a concerted "exchange of information", rather than an agreement, on the MU shirt, is not found in the decision either.

276. Moreover, submits Allsports, the OFT is in the uncomfortable position of relying on witnesses such as Mr. Ronnie whom it had in the past regarded as unreliable or vague, or whose evidence had been rejected on certain points. In addition, according to Allsports, the whole dynamics of the case has been fatally distorted by the concealment of the true relationship between Umbro and Sports Soccer.

*- Pressure and complaints*

277. As to “pressure”, Allsports submits: (i) expressing dismay is not “pressure”, nor is complaining: “pressure” involves having both the intention and the capacity to coerce; (ii) Mr. Ronnie’s idea of “pressure” really amounted to any kind of commercial behaviour, such as delaying orders due to current trading conditions, reducing stock cover, or responding to loss leading by a competitor: but that is normal commercial behaviour (e.g. the Celtic shirt in April 2000); (iii) Mr. Fellone’s evidence about “implied threats” turned out to be “nothing sinister” and just “a fact of life” in the market place; (iv) there is nothing to support the idea of unlawful threats “hanging in the air”; (v) there were never any cancellations regarding the England or MU shirts; (vi) Mr. Guest’s evidence is that any cancellations by Allsports, reductions in orders, or the like, were never linked to discounting; (vii) such examples of “pressure” as were given by Mr. Ronnie related to JJB, not to Allsports; (viii) Umbro had every incentive to exaggerate retailer “pressure” in order to obtain leniency; (ix) the pressure case against Allsports has shifted and changed, and can no longer be credibly based on Allsports’ position as an official Manchester United retailer, nor on Allsports’ supposed position as a potential customer for branded products; (x) Mr. Guest’s evidence was that it was “laughable” to suggest that Allsports could put pressure on Umbro; (xi) Umbro had its own obvious interest in maintaining retail prices, i.e. to promote the brand image and to prevent pressure on Umbro’s wholesale prices; (xii) pressure on prices came from MU, not Allsports; and (xiii) there is no documentary evidence of pressure.

278. As to the particular examples of pressure relied on by the OFT: (i) Mr. May says that his conversations with Ms Charnock did not involve pressure, that complaints only started after the JD cap promotion, and that when Ms Charnock asked what Allsports were going to do about it, “it was no big deal”; (ii) Allsports’ letter of 20 April 1999 was a means of seeking better terms; (iii) the evidence as to the Golf Day did not involve the England shirt, nor



Sports Soccer, it was an informal, after dinner occasion, any embarrassment was due to Mr. Hughes blurting out (incorrectly) the number of MU shirts he had ordered, and Mr. Fellone knew that Mr. Hughes had no power as regards the renewal of Umbro's contract with MU; (iv) Ms Charnock's alleged comments about the JD cap promotion, and Mr. Guest's possible conversation with Mr. Ronnie at lunch on 31 May, are without practical significance; (v) as regards the meeting between Mr. Ronnie and Mr. Hughes on 2 June, Umbro's primary concern was the fact that JD was using an "Admiral" cap, Mr. Hughes' question as to what Umbro was doing about it was, according to Mr. Ronnie, "a fair question"; (vi) Mr. Hughes' comment at that meeting that he did not think that Umbro would get the MU contract was not a threat; (vii) the example of First Sport discounting is undated and is not mentioned in Ronnie III; and (viii) it is not established that Mr. Prothero's complaint about the free autographed ball on the Manchester United Sky Open Channel came from Allsports.

*- The England Agreement*

279. As regards the telephone "ring round", that never involved Allsports: see Mr. Guest's evidence. In particular, Allsports submits as follows: (i) there is no trace of the ring round in Ronnie I and II: it emerges at the meeting of 26 February 2002 for the first time; (ii) particulars emerge only in Ronnie IV, despite previous Umbro assertions that particulars could not be given; (iii) why did Mr. Ronnie not say anything at the Golf Day (25 May), lunch with Mr. Guest (31 May), or during his meeting with Mr. Hughes (2 June)?; (iv) Ronnie III and Ronnie IV contradict each other; (v) Mr. Ronnie's evidence in the witness box that there was an antecedent agreement involving Allsports prior to 24 May 2000 had never been previously mentioned and was plainly "just made up" in order to be consistent with Mr. Ashley's evidence; (vi) the meeting of 24 May was just one of a number of occasions of price fixing; there was nothing special about that agreement so as to trigger a "ring round"; (vii) Mr. Ashley's alleged qualification that he would go up in price if everyone else did is not mentioned in the note of the meeting of 24 May, and emerges only in Ronnie III; (viii) There was no reason why Mr. Ashley would need assurances about Allsports, who did not discount anyway; (ix) Sports Soccer did not raise its prices immediately after 24 May, so the agreement was a failure throughout the period when the ring round allegedly took place between 24 May and 2 June; and (x) the evidence as to the alleged incident of the turning round of the Umbro lorry is contradictory as between Mr.

Ronnie and Mr. Ashley, and is probably, submits Allsports, “a not very well sorted but agreed lie”.

280. As to other evidence of the “ring round”: (i) Mr. Fellone’s evidence is now inconsistent with Ronnie IV; (ii) Mr. Fellone’s call to Mr. Ryman was around 22 May, i.e. the previous week; (iii) Umbro’s May MMR is contradicted by Ronnie IV; (iv) Mr. Fellone’s fax to Debenhams of 2 June is not evidence against Allsports; (v) Mr. Hughes’ diary entry regarding England on 5 June shows, if anything, that he could not have known that Sports Soccer had already increased its prices; (vi) the Tribunal should disregard Mr. Ashley’s entirely new evidence in re-examination that he rang Mr. Hughes on 2 June to confirm that he had put his prices up; (vii) numerous other retailers sold at £39.99 but are not alleged to be party to a cartel; (viii) Sports Soccer’s price increase was the result of the agreement with Umbro on 24 May, and not otherwise; (ix) £40 was anyway a perfectly competitive price for a peak product sold at a peak time.

*- The MU Agreement*

281. Allports submits that the prices for the MU shirt were agreed on several occasions between Umbro and Sports Soccer, but not at Mr. Hughes’ house on 8 June 2000. In particular, says Allsports: (i) Mr. Hughes wanted an agreement at £45, or £50, not at £39.99; (ii) Umbro’s May MMR is puzzling with its references to JD and First Sports; (iii) Mr. Ashley did not go to the meeting as a victim, but of his own accord, without Umbro needing to place any pressure on him: most probably, he went “for a laugh” in order to destabilise Messrs. Hughes and Whelan; (iv) the statements of Messrs. Hughes, Whelan, and Sharpe say there was no deal: why would Ashley do one? How did the “heated and forceful” statement of Mr. Whelan turn into an agreement? (v) Mr. Ashley’s statements to the OFT do not mention the MU Agreement, but refer only to the England shirt; (vi) Mr. Ronnie’s account of what Mr. Ashley told him is implausible and hearsay; (vii) because of the pain in his back and the prospect of an operation, Mr. Hughes was likely to have been “all over the place” when he wrote the memos of 9 June, fearing that “he would never work again”: his explanation of the memos should be accepted; (viii) Messrs. Patrick and Guest took no account of what they were told in the memos of 9 June; (ix) as to his diaries, Mr. Hughes is an honest man. He accepts the diary entry for 5 June, but his reason for the obliterated entries (embarrassment about selling the business) makes sense; (x) the OFT has not cross-

examined Mr. Knight on his statement that the MU Agreement was not mentioned to him by Mr. Hughes during the phone call between them on 9 June; (xi) the Umbro May MMR is likely to have been prepared before the meeting between Mr. Ronnie and Mr. Ashley on 8 June: Mr. Ronnie's attempts to explain that note were implausible; (xii) no mention is made of the MU Agreement in Umbro's documents until the admittedly exaggerated letter of Mr. Prothero to MU of 13 July 2000; (xiii) numerous other retailers priced at £40 without being accused of being in a cartel; (xiv) £40 was a sensible market price, given MU's success, a new sponsor (Vodafone) and the celebrity status of David Beckham; and (xv) Sports Soccer's pricing is most unlikely to have been influenced by any commitments that it had supposedly given to Allsports or JJB.

- *Pointers to the truth*

282. Allsports further relies on a "number of pointers to the truth". In particular, submits Allsports, Umbro's evidence is not to be relied on because they have been hiding the truth about the Umbro/Sports Soccer relationship, and have given misleading and incomplete answers on that and other issues. As to Mr. Ronnie: (a) he did not explain the true Umbro/Sports Soccer relationship in his evidence; (b) before the OFT, Umbro's own counsel accepted that Mr. Ronnie could not remember the precise content of a phone call made a long time ago; (c) Mr. Guest did not think it was likely that Mr. Ronnie was telling the truth all the time; (d) Mr. Ronnie was guilty of "dishonest elaboration" or suffered at best from "a extraordinary late revival of memory" on a number of issues, including scratching for a tennis tournament on 2 June, his alleged conversation with Mr. Sharpe on 9 June, and the circumstances in which he left Umbro; and (e) his evidence has been inconsistent on a large number of occasions analysed in detail in the schedule to Allsports' closing submissions. According to Allsports, Mr. Ronnie in his evidence to the Tribunal did not fully tell the truth and constantly said "I can't remember" when it suited him.

283. Finally, according to Allsports, Mr. Ashley told "obvious lies" in the witness box, particularly on questions of his alleged losses when going out at full price on replica kit, bearing in mind that Sport Soccer often did go out at full price; on the pricing formula applicable to Sports Soccer's purchases from Umbro; in alleging that there was no link between the price fixing agreement and the licensing arrangement between Sports Soccer and Umbro; and about the sources of his information on which his witness statement was

based. His explanation of the “quid pro quo” for price fixing was vague, but on issues such as the details of the meeting of 8 June he suffered from “inspired recollection” compared with what he had earlier told the OFT, and was disbelieved at least once by the OFT. Mr. Ashley, says Allsports, had every incentive to get his competitors into trouble and to play down his own role as a price fixer in order to avoid damage to his reputation as a discounter.

## **VIII THE EVIDENCE GENERALLY**

### **A. NEW EVIDENCE BEFORE THE TRIBUNAL**

284. The Tribunal has now heard a great deal of evidence, much of which is not referred to in the decision. Such a situation is a common occurrence in appeals to the Tribunal which are appeals “on the merits” and effectively take the form of a new hearing: see Schedule 8, paragraph 3(1) of the Act. Indeed, as the Tribunal observed in *Napp*, cited above, at [134], it is virtually inevitable that, at the appeal stage, matters will be gone into in considerably more detail than was the case at the administrative stage. New witness statements may be filed; new documents may come to light; a witness may say something in the witness box that has never been said before. Sometimes a new development will favour the OFT, sometimes it will favour the appellants. In our view, provided each party has a proper opportunity to answer the allegations made, and that the issues remain within the broad framework of the original decision, we should determine this appeal on the basis of all the material now before us: *Napp* at [135].

285. A matter, however, arises as regards the England Agreement. In its defences the OFT somewhat narrowed the case made against the appellants, as compared with the original decision, having regard to Ronnie IV: see section VII A above. However, as a result of the totality of the evidence before the Tribunal, including Mr. Ashley’s and Mr. Ronnie’s evidence in the witness box, in our judgment the case against the appellants is now wider than the OFT’s defences in the appeal suggest, and broadly corresponds, although in considerably more detail, to paragraphs 412 to 431 of the original decision. Much of the fuller evidence now before us resulted, in our view, from the cross-examination which the appellants chose to conduct. In those circumstances, the approach we have adopted is, first, to make our findings of fact on the basis of the totality of the evidence before the Tribunal.

Those findings are made in sections X to XV below. Having made those findings we consider, in section XVI below, what procedural issues, if any, thereby arise in relation to the England Agreement. We also revisit certain issues raised by Allsports at the time of its striking out application.

## B. THE EVIDENCE GENERALLY

286. The evidence in this case comes from (i) the economic and market context (ii) documents and (iii) witness evidence. We regard background evidence as to the economic and market context, both before and after the alleged agreements, as relevant to our assessment as to whether the alleged agreements or concerted practices are likely to have occurred.
287. As regards the contemporaneous documents, it seems to us that a document prepared at the time, which the author never anticipated would see the light of day, is likely to be more credible than explanations given later. We have therefore given weight to contemporary documents, unless there is a good reason not to do so. Mr. Hughes' diary, not previously disclosed to the OFT, seems to us to be of major importance. In relation to the England Agreement three documents seem to us particularly relevant: Umbro's monthly management report ("MMR") for May 2000; a fax sent by Mr. Fellone dated 2 June 2000; and a fax from Umbro to MU dated 6 June 2000. In respect of the MU Agreement, two memos written by Mr. Hughes on 9 June 2000 are of major importance. In relation to the England Direct Agreement, much of the evidence relied on by the OFT is documentary.
288. As far as witnesses are concerned, in this case we have no "independent" witness in the sense of an impartial third party who is free of the suggestion that he may have an axe to grind. On the contrary, all the witnesses in this case are open to the contention that their evidence is coloured, at least sub-consciously, by various factors. For example, it has been suggested that Mr. Ashley's evidence may have been embellished out of a desire to damage his competitors JJB and Allsports, and his motives distorted by the "secret" licensing arrangements in place between Umbro and Sports Soccer. As regards the Umbro witnesses, it is suggested that Umbro has, and had, a strong incentive to blame their actions on the "pressure" from retailers, and to downplay their own role, so as to obtain leniency and minimise the damage to Umbro. Similarly, Mr. Whelan of JJB and Mr. Hughes of Allsports are, for obvious reasons, vulnerable to the suggestion that they have every

incentive to understate, whether consciously or not, what occurred, for example at the meeting of 8 June 2000, so as to reduce the penalties on their companies and defend their own actions and credibility. Mr. Ronnie, now employed by Sports Soccer, is vulnerable to the suggestion that he has a motive to support the position taken by his new employer.

289. At all stages of these proceedings, the Umbro witnesses have found themselves in the invidious position of having to prepare witness statements tending to incriminate extremely valuable customers such as JJB and Allsports. Mr. Fellone, now Managing Director of Umbro, undoubtedly found himself in an acutely difficult position giving evidence to the Tribunal against JJB, Umbro's largest customer, whose future trading relationship remains vitally important to Umbro. By the same token, Mr. Russell of JJB, when giving evidence, was in a position of potential conflict, given his natural loyalty to his employer and his desire to defend his own actions. To add to those complications, some of the principal witnesses giving evidence on opposite sides had been close friends for many years. For example, Mr. Ronnie, Mr. Fellone and Mr. Guest have known each other well for a long time: Mr. Fellone was Mr. Guest's best man and is godfather to one of his children, and Mr. Ronnie and Mr. Guest had, in 2000, been regular weekly tennis partners. Mr. Hughes knew Mr. Ronnie well, and sponsored him as a county squash player when he was younger.

290. In addition, a number of those who figured in the evidence had worked for different companies at different times. Mr. Knight of Blacks/ First Sport now works for JJB, as does Mr. Bryan, formerly JJB's account manager with Umbro. Mr. Richards of MU formerly worked for Allsports, whereas Mr. Draper of MU had formerly worked for Umbro. Witnesses such as Mr. Ronnie and Mr. Guest have worked for a number of different 'brands' over the years, moving round the industry. We have the overall impression that, with the exception of Sports Soccer, who was something of an outsider, sports retailing was at the material time a relatively "small world".

291. The Tribunal did not have the benefit of oral evidence from Mr. Sharpe of JJB, who died in October 2002. We bear very much in mind that Mr. Sharpe has not been able to deal with the suggestions made in evidence concerning him.

292. Moreover, the hearing before the Tribunal took place four years after the events in question. However conscientious a witness may be, we remind ourselves that memory is

apt to play tricks, and recollections may be mistaken or incomplete. It is extremely difficult to remember details regarding dates, times, and the sequence of events even a short time after a particular happening, let alone four years ago. When businessmen are frequently engaged in meetings and conducting business on the telephone, it is difficult to identify precisely what was said at an individual meeting or during a particular phone call.

293. In addition, witnesses may find themselves in an unfamiliar situation when asked to prepare written statements. They understandably rely on lawyers to turn their raw material into drafts which they then approve. In the course of that process, nuances may be lost, or the draft may not capture, in the witness's words, what the witness is trying to say. Indeed the quality of a witness statement may to some extent depend on whether the lawyer who took the proof did his job properly or not. Similarly the witness may be shown a document, of which he has no particular recollection, and then give an explanation in good faith which turns out to be mistaken. Later events, such as the service of subsequent witness statements by others, may lead a witness genuinely to correct his earlier evidence, or prompt the recollection of matters previously forgotten. In this process inconsistency or late recollection does not necessarily mean that a witness is dishonest: but it does mean that the Tribunal must ask itself whether the witness's evidence is reliable.

294. In all these circumstances, our general approach to the witness evidence, whether given on behalf of the OFT, or on behalf of the appellants, is to be cautious, and to look for corroboration, whether from context, documents, or other witnesses, wherever possible.

### C. PARTICULAR WITNESSES

295. It is, however, necessary for us to form a view of the reliability of the various witnesses who gave evidence before us.

*Mr. Mike Ashley*

296. Mr. Ashley is a successful and astute businessman, who has built up Sports Soccer, now Sports World International, as a major force in the sports retail trade, on the basis of a philosophy founded on discounting. Mr. Ashley operates largely informally, conducting business on his mobile phone and in meetings, while leaving it to others to make notes and sort out the details. JJB suggested that Mr. Ashley's recollection of key events was not reliable, and Allsports went further and suggested that Mr. Ashley was not only unreliable, but had given the Tribunal dishonest evidence in certain respects.

297. In our judgment, Mr. Ashley's evidence was open, honest and in general reliable. We base that assessment partly on his demeanour in the witness box, which we found to be convincing, but largely on the overall consistency of his evidence on key points. Under sustained cross-examination by JJB and Allsports, Mr. Ashley's answers seem to us to have been largely convincing on the main issues to which his evidence is relevant, namely what he said at various meetings with the OFT, Sports Soccer's own participation in the alleged agreements, and what transpired at the meeting of 8 June 2000. We also attach importance to the fact that, having been complaining about retail price maintenance for many years, Mr. Ashley went spontaneously to the OFT and told them the facts as he saw them, apparently without having involved his lawyers. We regard evidence of that kind as particularly valuable. Mr. Ashley's evidence as to the Umbro/ Sports Soccer relationship was open and in our view largely accurate, despite the commercially sensitive nature of the matters under discussion. We see no sustainable basis for Allsports' submission that Mr. Ashley gave dishonest evidence, and we reject it.

*Mr. Chris Ronnie*

298. Mr. Ronnie was apparently a considerable athlete in his youth and has since worked mainly in various management positions in the sportswear industry, mainly on the marketing side.



He underwent sustained cross-examination over nearly four days. A number of inconsistencies in and between Mr. Ronnie's various statements, particularly between Ronnie I and II and later statements, were brought to light. Faced with such inconsistencies, Mr. Ronnie's response in evidence was often that each time he prepared a statement, it was to the best of his recollection at the time, even though he had remembered other things since; or to say that he could not now remember the details of the matters in question. Some of these reactions were understandable, for example when Mr. Ronnie was pressed on the details of particular discussions or the dates of telephone calls taking place four years ago. However, even the OFT, in closing, was constrained to accept that Mr. Ronnie's recollection was inconsistent on matters of detail, "and sometimes so inconsistent that it is difficult to rely upon those aspects of his testimony".

299. On the other hand, on a number of important issues Mr. Ronnie's evidence is corroborated by other witnesses or other evidence. For example, Mr. Ronnie's evidence in the witness box about his telephone conversations is corroborated in part by the evidence of Mr. Ashley and Mr. Fellone, by the wording of Umbro's May MMR and Umbro's faxes of 2 June and 6 June 2000 to Debenhams and MU respectively. His recollection of the Allsports Golf Day, and his meeting with Mr. Hughes on 2 June is largely accepted by Mr. Hughes. Mr. Ronnie's explanation of Umbro's relationship with Allsports does not differ significantly from Mr. Guest's evidence; and so on. Our overall conclusion is that when he was giving evidence to the Tribunal, Mr. Ronnie was not seeking to mislead us, however inaccurate parts of certain of his previous statements may have been.

300. A central issue to which Mr. Ronnie's evidence is relevant is the making of the alleged England Agreement and in particular the telephone conversations Mr. Ronnie is said to have had with JJB and Allsports. In that respect Mr. Ronnie's leniency statements Ronnie I and II prepared in January and February 2002 make no express reference to an agreement on the England shirt, nor to the telephone conversations between Umbro and retailers referred to in Ronnie III and IV. In addition Ronnie I and II are to the effect that Umbro's May MMR refers only to an agreement on the MU shirt.

301. In our judgment, in relation to the England Agreement and Umbro's May MMR, Ronnie I and Ronnie II were neither complete nor accurate. Despite Mr. Ronnie's evidence that Ronnie II was likely to represent his best recollection at the time (Day 4, p. 38), in our view

Ronnie I and II were not prepared as carefully and thoughtfully as they should have been as regards the England Agreement. There is evidence that those statements were prepared somewhat hurriedly. As Mr. Prothero told us, Umbro was very anxious to get its leniency statements in early: “everyone with hindsight would have preferred those to be more thorough” (Day 5, p. 158). As regards Ronnie II, we note in particular that by letter of Friday 1 February 2002 the OFT insisted that any further witness statements from Umbro be filed on Monday 4 February 2002. Ronnie II, which is dated 4 February, was presumably finalised in a compressed time scale. The Umbro executives, and Mr. Ronnie in particular, do not appear to have been familiar with the process in which they were involved and may have had difficulty in pinpointing particular conversations and placing particular documents in their proper context. In those circumstances, we are not prepared to find that Umbro was seeking deliberately to mislead the OFT.

302. Bilateral discussions between Umbro and the retailers referred to in Umbro’s May MMR are mentioned in paragraph 129 of Ronnie II. Certain details of the various telephone conversations now relied on by the OFT in relation to the England Agreement were given shortly afterwards by Mr. Ronnie at the private meeting with the OFT on 26 February 2002. Thereafter, Ronnie III, signed in July 2002, plainly refers to Umbro’s involvement in the England Agreement made by telephone (see e.g. paragraphs 32, 33, 66 and 67 of Ronnie III). Despite the fact that, in answer to the OFT’s questions of 13 September 2002, Umbro stated that it was unable to give further details of the telephone conversations in question, further particulars are given in Ronnie IV, dated 28 November 2003. The fact that details were not given earlier is possibly explained by Umbro’s fear of commercial repercussions. In oral evidence to the Tribunal, Mr. Ronnie has now given further evidence about the context of the England Agreement and more details of the telephone calls in question.

303. As further explained later in this judgment, our general conclusion is that the parts of Ronnie I and Ronnie II that deal with the England Agreement are unreliable. However, our view also is that in the course of these proceedings the facts dealing with the England Agreement have progressively emerged, and that his evidence to the Tribunal, which is admittedly fuller than anything in his previous statements, does represent the true position as Mr. Ronnie perceives it to be.

304. We accept that any tribunal of fact must be cautious in accepting the evidence of a witness who has made earlier statements which were in certain aspects inaccurate or misleading, whose memory for details is weak and certain of whose answers under cross examination were inconsistent. Nonetheless, in our judgment, much of Mr. Ronnie's evidence to the Tribunal is corroborated by evidence from context, by certain contemporary documents, and in some important respects by other witnesses. Despite Mr. Ronnie's inability to recall particular details, and the inconsistencies to be found in his various statements, we find that we are able to rely on his evidence to the Tribunal where it is sufficiently corroborated by other elements.

305. We therefore reject Allsports' submission that Mr. Ronnie gave dishonest evidence to us. We also reject JJB's and Allsports' submissions that Mr. Ronnie's evidence is too unreliable for the Tribunal to place any reliance on his evidence in these proceedings.

*The circumstances in which Mr. Ronnie left Umbro*

306. When cross-examined by counsel for JJB as to why he left Umbro, Mr. Ronnie said that it was due to a deterioration in his relationship with Mr. McGuigan, Umbro's Chief Executive, and was unconnected with any deals he had done with Sports Soccer (Day 3, p. 128). In answer to counsel for Allsports Mr. Ronnie said that he had been told that a "dishonesty situation" had arisen which had later been amicably resolved (Day 6, page 64). Asked in re-examination whether there was anything he wished to add about the circumstances of his leaving Umbro, Mr. Ronnie said that about a week before he left Umbro on 7 February 2003, Mr. McGuigan, Umbro's Chief Executive, had said to Mr. Ronnie that Mr. Whelan had complained to him about Mr. Ronnie's OFT statement, and did not wish to have dealings with Mr. Ronnie anymore. Mr. Ronnie had also been told by Mr. Knight (by then CEO of JJB) and Mr. Russell that Mr. Whelan was not happy with Mr. Ronnie's statement to the OFT (Day 6, pp. 214-217). In those circumstances Mr. Ronnie left Umbro on gardening leave. Mr. Whelan denied speaking to Mr. McGuigan in this sense, and said that Mr. McGuigan had told him that Mr. Ronnie had been engaged in transactions with Sports Soccer that had not been disclosed to the Umbro board (Day 7, pp. 74-79).

307. These events seem to have occurred not long after the OFT served its Supplemental Rule 14 notice of 26 November 2002, at which point Mr. Whelan would have seen Ronnie III for the first time. Mr. Whelan's statement in response is dated 22 January 2003. The allegation that Mr. Ronnie lost his job as a result of material having been placed before the OFT is a serious one. However, we indicated in our ruling of 16 March 2004 that the issue of what Mr. Whelan may or may not have said to Mr. McGuigan could not be resolved without direct evidence. Mr. McGuigan was not called as a witness. In the absence of direct evidence from Mr. McGuigan, we cannot resolve the conflict of evidence about whether Mr. Whelan did complain to Umbro about Mr. Ronnie's OFT statement, or the reasons for Mr. Ronnie leaving Umbro. In the result, we make no finding in this judgment as regards the circumstances in which Mr. Ronnie left Umbro.

*Other OFT witnesses*

308. We accept the evidence to the Tribunal of Mr. Fellone, Mr. Prothero and Mr. May.

*Mr. David Whelan*

309. Mr. Whelan has been a dominant figure in the sportswear retailing market for many years. He has created JJB, largely single handedly through his personal hard work and leadership. As a result, as he agreed in evidence, JJB largely "is" Mr. Whelan, and "if you hurt JJB you hurt me". Mr. Whelan agreed that he could be ruthless in business, and we have no doubt that he is the "boss" of JJB in every sense. For example, Mr. Russell told us that "a meeting" with Mr. Whelan would last about 30 seconds: Mr. Whelan would come in, say what was to happen, and then leave (Day 9, p. 159). Mr. Whelan accepted that he is a man of firm views (Day 8, p. 93). Mr. Hughes' view was that "David Whelan always marches to the beat of his own drum" (Hughes I, paragraph 21). Mr. Whelan was, we felt, likely to be intimidating to many.

310. In giving evidence, Mr. Whelan came across to us as a somewhat rigid witness. He did not need to refresh his memory of the meeting of 8 June 2000 because, he told us, he had "the actual facts in my brain" (Day 8, p. 70). He told us that his witness statement was the honest truth "and you never need to re-read or correct anything that is truthful" (Day 8, p. 71). On a number of occasions when his previous statements were put to him, he either maintained that his solicitors had made a mistake, or declared that "I must stick to my

statement,” even when it was apparent that the statement in question might well need to be qualified. In relation in particular to the meeting of 8 June 2000, in our judgment there are a number of inconsistencies and omissions in Mr. Whelan’s account of that meeting which lead us to conclude that Mr. Whelan’s recollection of what transpired at that meeting is not wholly reliable.

*Mr. Colin Russell*

311. Some of Mr. Russell’s evidence was straightforward, but we had the distinct impression that his loyalty to Mr. Whelan and to JJB led him to downplay the extent to which JJB had complained to Umbro about the discounting activities of Sports Soccer.

*Mr. David Hughes*

312. Mr. Hughes did not dispute the essence of Mr. Ronnie’s evidence about the Golf Day or his meeting with Mr. Ronnie on 2 June. Much of his account of the meeting of 8 June is supported by Mr. Ashley. However, in our judgment Mr. Hughes understated the result of the meeting of 8 June. The *ex post facto* explanation he gave us of the wording of the memos of 9 June 2000 – an explanation which was never advanced by Allsports to the OFT, despite the fact that Mr. Hughes had every opportunity to give instructions to his solicitors – is not in our view credible. Moreover, some comments are called for as regards Mr. Hughes’ diary.

313. It transpires that, although Allsports purported to rely on Mr. Hughes’ diary for 2000 for exculpatory purposes during the administrative proceedings (see Allsports’ written representations dated 8 January 2002 in response to the Supplemental Rule 14 Notice, point 46, and Day 10, pages 113 to 114) that diary was not produced to Allsports’ solicitors until after the decision. Once Allsports decided to appeal, the production of Mr. Hughes’ diary to the OFT and the Tribunal was in our view inevitable. We thus find it difficult to give Allsports credit for producing the diary at this late stage.

314. Mr. Hughes’ diary entries for 5, 6, 7 and 8 June 2000 are heavily scored out in three different colours of biro, although it is possible to decipher the underlying entries. In our view, those entries constitute material evidence that was not disclosed by Mr. Hughes to the

OFT during the administrative procedure. In particular Mr. Hughes' diary for 5 June 2000 states:

“Agree Man United and England prices with everyone including Mike Ashley ... Sports trade cartel – arrange a meeting regularly ... Visit David Whelan”

That entry is plainly evidence of Mr. Hughes' willingness to contemplate action to restrict competition, and in particular to enter into an agreement with his competitors, including at least JJB and Sports Soccer, on the prices of the MU and England shirts and his intention to do so. It is also evidence of Mr. Hughes' intention to form a “sports trade cartel”.

315. While the entries for 5, 6, 7 and 8 June 2000 were scored out in Mr. Hughes' diary in biro, further entries were scored out in black felt tip marker pen and cannot be read by the naked eye. As we understand it, this scoring out was done just before the diary was handed over. It is admitted that Mr. Hughes intended to conceal these entries, including from his own legal advisers. However, the OFT sent Mr. Hughes' diary for forensic examination, as a result of which the entry for 14 August 2000 was revealed. That reads:

“Phone Mike Ashley to review Man United launch and other issues”

316. Between 24 August and 23 September 2000 there are 11 further diary entries, all scored out with black marker pen, which state in one way or another “phone Mike Ashley”. These entries were equally revealed by the OFT as a result of forensic examination.

317. Mr. Hughes' explanation is that the entry for 14 August 2000 was a coded entry intended to disguise the fact that he was intending to call Mr. Ashley with a view to selling the Allsports business. The entries between 24 August and 23 September 2000 equally refer to Mr. Hughes' intention to ring Mr. Ashley for this purpose. However he, Mr. Hughes, could never bring himself to call Mr. Ashley. Mr. Hughes told us that he scored out those entries – together with certain others not material – because he regarded this as a private matter. It is common ground that Mr. Hughes never did ring Mr. Ashley.

318. We do not accept that the entry for 14 August 2000 in Mr. Hughes' private diary

“Phone Mike Ashley to review Man United launch and other issues”

is merely “code” for an intended phone call limited only to the possible sale of Allsports to Mr. Ashley. It seems to us that this entry is evidence that in Mr. Hughes’ mind the meeting of 8 June had ended amicably, such as to make a “review” of the MU launch a plausible reason for Mr. Hughes to ring Mr. Ashley, even if Mr. Hughes also intended to discuss “other issues”. This entry, in particular, supports the OFT’s case that a consensus was in fact reached at the meeting of 8 June. Similarly, the other entries relating to phoning Mr. Ashley are at least consistent with Mr. Hughes wishing to contact Mr. Ashley for the purpose of discussing market related matters.

319. Had the OFT not sent the diary for forensic examination, the effect of Mr. Hughes’ applying black marker to those diary entries would have been to conceal from the Tribunal potentially relevant evidence. We find it difficult to believe that Mr. Hughes, an obviously intelligent man, did not realise this.

*Mr. Michael Guest*

320. Much of Mr. Guest’s evidence seemed to us to be credible. On a number of issues he corroborated the evidence given by Mr. Ronnie and Mr. Fellone as regards Allsports’ attitude to Umbro, both in relation to support on branded products, and in relation to discounting. On some issues, however, such as the JD cap promotion, in our view Mr. Guest somewhat understated the position. On the main issue on which there is a direct conflict, namely as to conversations or phone calls between himself and Mr. Ronnie relating to Allsports’ and Sports Soccer’s pricing intentions, we accept the thrust of Mr. Ronnie’s evidence for the reasons we give below.

#### D. OVERLAP BETWEEN THE ENGLAND AND MU AGREEMENTS

321. Although for the purpose of analysis the OFT has rightly treated the alleged England and MU Agreements as discrete agreements, the short time frame with which we are concerned, May and June 2000, effectively encompasses both agreements. In particular, much of the focus of the evidence about the England Agreement is on the period between 24 May and 2/3 June 2000, when Sports Soccer, JD and Blacks/ First Sport simultaneously raised their prices on the England shirts to £39.99. Similarly, the focus of the MU Agreement is the period from about 25 May to 8 and 9 June 2000.

322. There is also evidence that the agreements between Umbro and Sports Soccer made in April and May, and the conversations between the parties taking place around that time, were not confined to the England shirts, but related to replica shirts in general. Events such as the Allsports Golf Day on 25 May, and Mr. Ronnie's meeting with Mr. Hughes on 2 June are relevant to both the alleged agreements, as are such documents as Umbro's May MMR. We bear in mind generally the closeness in time and overlapping events relating to the alleged agreements when assessing the evidence before us.

## **IX THE RELATIONSHIP BETWEEN UMBRO AND SPORTS SOCCER**

323. We deal next with an issue of which the appellants have made much, namely the trading relationship with Umbro and Sports Soccer. We deal with this issue now in order to dispose of it, since in our view it is not critical to the matters we have to decide.

### *General*

324. Evidence has emerged during this appeal tending to show that the commercial relationship between Umbro and Sports Soccer was much closer than the contested decision indicates. On the basis of that evidence, the appellants argue, essentially (i) the price fixing that took place between Umbro and Sports Soccer resulted from the pursuit by Umbro and Sports Soccer of their own commercial interests, and not as a result of any pressure from Umbro on Sports Soccer for which either JJB or Allsports could be held responsible; (ii) Sports Soccer was not "a victim," since Umbro was unable to put commercial pressure on Sports Soccer, which was the dominant force in "a cosy relationship with strong mutual dependence;" (iii) in particular, Umbro was dependent on Sports Soccer for cash flow and was prepared to give Sports Soccer exceptionally favourable terms and to yield control over its brand; and (iv) Sports Soccer's agreement to fix prices was simply a quid pro quo for the licensing deal between the two companies which extended to replica kit. In addition, JJB submits that Mr. Ashley's account of the arrangements had been "less than frank." Allsports goes further and submits that both Mr. Ashley's and Mr. Ronnie's evidence about the arrangements was dishonest in a number of respects. For the reasons given below we reject those arguments.

325. The details of the arrangements between Umbro and Sports Soccer have emerged piecemeal, initially as a result of disclosure orders made by the Tribunal, and then as a



result of further applications made by the appellants during the hearing, and further orders made by the Tribunal. As a result, some material emerged after Mr. Ronnie and Mr. Ashley had been cross-examined and, as to certain details, even after the end of the hearing itself. However, neither appellant sought an adjournment and we have received no application to hold a further hearing or recall any witness. JJB, Allsports and the OFT have made post-hearing written submissions on the material in question, JJB's final letter being dated 29 April 2004. Although even now there are one or two loose ends, in our judgment we have sufficient evidence to enable us to determine the essential features of the Umbro/ Sports Soccer trading relationship at the material time without unfairness to any party.

326. We took the view, not without hesitation, that we ought to allow the appellants, as companies facing penalties, latitude to explore the Umbro/ Sports Soccer relationship, notwithstanding that both Umbro and Sports Soccer were understandably extremely concerned that matters of a commercially confidential nature were being ventilated in open court. Sports Soccer as an observer of, but not technically party to, these proceedings, was particularly exercised by our approach, but nonetheless gave us helpful factual information, notably in its submissions of 10 March and 1 April 2004. Umbro too, although less rapidly, responded to the Tribunal's requests. Contrary to suggestions made by the appellants, we draw no adverse inference against either company, and still less against Mr. Ashley and Mr. Ronnie personally, from the manner in which the companies responded to the Tribunal's requests, nor from their wholly understandable desire to maintain commercial confidentiality, vis-à-vis JJB and Allsports, of the matters under discussion. In particular we reject the suggestion, made particularly by Allsports, that either Mr. Ashley or Mr. Ronnie were dishonest as regards the manner in which the Umbro/ Sports Soccer relationship was dealt with in evidence. On the contrary, we found the evidence of Mr. Ashley to be open and remarkably accurate considering the detailed questioning to which he was subjected. Mr. Ronnie, although at times less accurate on points of detail, did not in our view attempt to mislead us.

#### *The trading arrangements*

327. In following the course of events, it is useful to keep in mind three different aspects, namely (a) the sale by Umbro and the purchase by Sports Soccer of replica kit, also referred to as "licensed product" or "licensed apparel"; (b) the sale by Umbro and the

purchase by Sports Soccer of Umbro branded products, including branded apparel, footwear and equipment; and (c) the development of licensing arrangements in respect of Umbro branded products, whereby Sports Soccer was licensed itself to manufacture or have manufactured Umbro-designed products and to sell those products itself under the Umbro brand.

328. Products covered by (a) and (b) above are referred to in the material before the Tribunal as “in line” products or “buy/ sell.” We refer to products falling under (c) above as “sourced products”, since that is the expression used in the Sourcing and Distribution Agreement between Umbro and Sports Soccer which was finally executed on 24 August 2002. Although in the evidence “sourced products” are often referred to as falling under “the licensing arrangements” between Umbro and Sports Soccer, the expression “licensed product” conventionally refers to replica kit manufactured by Umbro under licence from the club concerned, and does not refer to “sourced products”.

- 1999

329. Prior to the Umbro management buy-out in 1999, Sports Soccer appears to have been a normal customer of Umbro, buying replica kit and Umbro branded products in the normal way. Sports Soccer purchased replica kit at Umbro’s wholesale price, less a negotiated discount.

330. At some point during 1999, discussions took place between Umbro and Sports Soccer as to a possible arrangement whereby products bearing the Umbro brand and designed by Umbro would be manufactured by Sports Soccer, using sources available to Sports Soccer. This arrangement gradually developed thereafter without any formal agreement being signed until August 2002.

331. An Umbro document of 26 July 1999 entitled “Sports Soccer Year 2000 Terms Proposal” envisaged that in 2000 Sports Soccer would do some £16 million of buy/ sell business with Umbro, and that the proposed licensing arrangement would guarantee a further £9.1 million of business.

332. Umbro told us in a submission dated 19 March 2004 that at the end of 1999, Sports Soccer purchased old stock of branded (in line) products from Umbro for £10 million. This, says

JJB and Allsports, must have been a considerable help to Umbro's cash flow. This purchase may have inflated Sports Soccer's turnover with Umbro in 1999 but in our view we have no sufficiently reliable figures for the extent of Sports Soccer's buy/ sell trading with Umbro in replica kit and branded products for 1999.

*- The negotiations in 2000 and 2001*

333. During the year 2000 regular meetings took place between Umbro and Sports Soccer. In the course of those commercial discussions, matters relating to replica kit, to branded products, and to sourced products to be supplied by Sports Soccer under the Umbro brand, were discussed in the same meeting, or are referred to in the same document. For example, the agendas and meeting notes for the meetings between Umbro and Sports Soccer on 20 March and 24 May 2000 refer both to the retail prices for replica kit, and to matters that are apparently connected to the proposed licensing arrangements, as well as other matters. The same appears to be true of other meetings taking place on 28/ 29 June, 3 July, 18 July, 24 July, 1 August, 6 and 13 November 2000, 13 March 2001, 6 February 2001 and 26/ 27 March 2001.
334. A draft heads of agreement dated 7 April 2000 apparently prepared by Umbro and signed by Mr. Ronnie (but not by Sports Soccer) seems to cover a range of issues, including the trading terms and purchases envisaged for "Licensed Apparel" (here apparently replica kit), footwear and equipment, as well as various items related to "Branded Apparel" (which appears to refer to the items to be sourced by Sports Soccer). A further draft document dated 14 September 2000 apparently contains the terms for the envisaged licensing agreement and mentions the payment of royalties. This document also refers, among other things, to the pricing formula to be used for "licensed textiles, equipment and luggage." A further draft apparently dated 2 February 2001 seems to include minimum purchase obligations in relation, among other things, to "Licensed Apparel" – here apparently replica kit – while containing obligations, including royalty payments, in respect of the products to be sourced by Sports Soccer under the licensing arrangements. It is not, however, clear to what extent Sports Soccer saw these Umbro documents of 7 April 2000, 14 September 2000 and 2 February 2001.

335. The final, legally binding and formal version of the “Sourcing and Distribution Agreement” between Umbro and Sports Soccer signed by both parties is dated 24 August 2002 and is stated to have an effective date of 1 May 2000. That agreement relates entirely to the products to be sourced by Sports Soccer and appears to have nothing to do with replica kit: see notably the definition of “sourced products” in that agreement.

- *The advance royalty payments*

336. At some point in 2000, quite possibly in April 2000, but in any event apparently prior to 1 May 2000, which later became the effective date of the agreement dated 24 August 2002, it was agreed that Umbro would receive a “guaranteed margin” on the products to be sourced by Sports Soccer under the licensing arrangements. Sports Soccer agreed to pay Umbro this “guaranteed margin” by way of advance royalty payments. Initially the guaranteed margin was 30 percent on products to be sold by Sports Soccer, although during the negotiations this was reduced to 20 per cent apparently in 2001. However, during 2000 Sports Soccer had not yet produced or sold any of the sourced products to which the royalties related.

337. On 2 May 2000, Umbro sent Sports Soccer an invoice for £3 million, followed by a further invoice for £3.6 million on 17 July 2000, in respect of advance royalties. Further invoices were sent on 29 September 2000, 30 October 2000, 22 November 2000, and 4 December 2000. The total royalties invoiced by Umbro to Sports Soccer during 2000 amounted to £13.425 million.

338. For the purpose of its internal management accounts, Umbro “grossed up” the royalty payments that it was expecting to receive from Sports Soccer. A copy of Umbro’s management accounts for 2001 found with Mr. Ronnie’s diary shows for the year 2000 a figure of £59.7 million for Sports Soccer under the heading “turnover”. That figure was apparently arrived at by taking the then expected royalty payments of £13.425 million, and then grossing up that figure on the assumption that it represented a gross margin of 30%, which gives an equivalent wholesale value of £44.75 million. To that figure is then added actual buy/ sell business (including sales of replica kit) which amounted to £14.95 million in 2000. The total of those two figures gives the figure shown in the management accounts of £59.7 million. Similarly the figure of £128 million shown in the management accounts

for total United Kingdom turnover in 2000 includes the notional grossed up figure of £44.75 million of equivalent wholesale value, whereas the statutory accounts, which show a United Kingdom turnover of some £87 million, do not include that figure.

339. Sports Soccer made an advance royalty payment to Umbro of £6.6 million on 20 September 2000, representing payment of the invoices of 2 May 2000 and 17 July 2000.
340. Although it was apparently envisaged at a meeting on 14 September 2000 that the remaining royalty invoices would be paid on 20 December 2000, it was apparently agreed that this would be deferred and Sports Soccer did not make a further payment until 1 June 2001. We are told that this was a payment of £6.825 million (which would make £13.425 million altogether). However, it appears that this payment was later “adjusted”, in a way which is not entirely clear to us, such that the total royalty payment received by Umbro was treated by the parties as being £12 million (see Sports Soccer’s answers of 10 March 2004).
341. This adjustment resulted, so it appears, from an agreement between the parties that Umbro’s “guaranteed margin” would be 20%, rather than 30%. It appears that this agreed reduction from 30% to 20% took place in the course of negotiations with effect from 2001 (see Day 2, page 76). In 2001 the formula for calculating the royalties on sourced products was Sports Soccer’s retail selling price divided by an agreed factor and multiplied by 20%.
342. Sports Soccer uses the term “the burn” to describe the sale of sourced products against the advance royalties already paid. During the year 2000, Sports Soccer, as we have said, did not manufacture or sell any products under these licensing arrangements. Thus in 2000 there was no “burn” under the licensing arrangements.
343. The situation we have in 2000, therefore, is that by September 2000 Sports Soccer had made an ‘upfront’ cash payment of at least £6 million to Umbro, apparently in return for the right to source and supply products under the Umbro brand, although the “burn” still lay in the future.

- *Buy/ sell terms on branded products*

344. It also appears that in 2000, Sports Soccer had also secured favourable pricing arrangements in relation to “in-line” branded products that were still being supplied to

Sports Soccer by Umbro on a buy/ sell basis. Under those arrangements, the wholesale price payable by Sports Soccer was calculated by taking Sports Soccer's selling price, dividing that by an agreed factor and multiplying the resulting figure by Umbro's margin as agreed between the parties. There does however, seem to have been some understanding as to the minimum price at which Sports Soccer would sell (Day 1, p. 127).

*- Replica kit*

345. It appears that from early 2000 at least, Umbro gave advice to Sports Soccer with a view to increasing their sales of replica kit, for example by giving more prominence to display, and Sports Soccer followed that advice. According to Mr. Ronnie, Umbro's strategy assisted Sports Soccer to emerge as a strong competitor to JJB, then Umbro's most powerful customer (Ronnie III, paragraphs 18 to 19). According to Mr. Hughes, it was not until 2000 that Sports Soccer was seen as a major force in the retailing of replica kit (Day 10, page 57).
346. Sports Soccer's buying price in relation to replica kit was initially Umbro's standard wholesale price less a negotiated discount. From 1 January 2001, this was changed to being Umbro's recommended retail price of £39.99 divided by an agreed factor (Day 7, p. 41, Sports Soccer memo 5 September 2001). Whereas the formula for the pricing of buy/sell branded products was apparently based on Sports Soccer's selling price, as was the formula for calculating the advance royalties, the formula for the pricing of replica kit adopted in 2001 was based on Umbro's recommended retail price.

*Pressure by Umbro on Sports Soccer*

347. Since the England and MU Agreements were both allegedly made in 2000, we must focus on the situation as it was then. The question whether Umbro during 2000 was able to, and did, put pressure on Sports Soccer to sell replica kit at Umbro's recommended retail prices involves a brief examination of (a) Umbro's position, including its financial position in 2000, and (b) the evidence as to Umbro's ability to secure compliance with its wishes, in particular by threatening to withhold or limit deliveries of replica kit.
348. In our view, although Umbro's statutory accounts for the year ended 31 December 2000 show an accounting loss, nothing in the those accounts indicates to us that Umbro was a

failing firm or anything of that kind. We have no reason to doubt Mr. Prothero's evidence (Day 5, p. 146) that, compared with the period prior to the management buyout, Umbro's business was in "rude health". The appellants produced no evidence to the contrary. However, we accept that, as in many management buy-outs where there are relatively high finance charges to meet, Umbro would have had an important need for cash flow in order to pay its interest charges. Primarily for that reason we accept that in 2000 Umbro had not yet reached a position of financial stability and was, to a certain degree, financially vulnerable.

349. Commercially speaking, although the Umbro brand as such may not have had the across-the-board stature of Nike, Adidas or Reebok, in the year 2000 Umbro was well established as the leading specialist supplier in the area of football, as Mr. Prothero reminded us. We have no reason to doubt Mr. Prothero's evidence that in football products "on our merits we were very capable of competing on a level playing field with Nike, frankly" (Day 5, p. 133). More importantly, at the time Umbro controlled the distribution of two products which were "must have" products from the point of view of a sportswear retailer, namely England replica kit and MU replica kit. No sportswear retailer could long maintain credibility if it was unable to offer those products, the two most important replica kits of all: see e.g. Mr. Ashley, Day 3, pp. 23, 27. Mr. Hughes regarded the forthcoming launch of the new MU shirt "as the biggest thing that had ever happened" (Day 10, p. 174).

350. In our view, by threatening to limit or reduce the supply of those products at periods of maximum demand to retailers which did not conform to its wishes, Umbro was in a position to exercise very considerable commercial pressure indeed.

351. Mr. Ronnie's evidence (e.g. Ronnie III, paragraph 21) is that he did indeed put pressure on Sports Soccer to raise prices by threatening that Sports Soccer might not receive a full order of those products if it continued to aggravate other retailers by its discounting. That evidence was not seriously challenged in cross-examination. Mr. Ashley, who was cross-examined at length on this issue, consistently maintained that he conformed to Mr. Ronnie's demands in order to ensure that he would receive sufficient supplies of replica kit and other products (e.g. Ashley II, paragraph 26, Day 1, pp. 84-85, Day 2, pp. 139-141, pp. 166-169, Day 3, pp. 29, 69). That is also the position that Mr. Ashley and Sports Soccer consistently maintained throughout their contacts with the OFT (see e.g. OFT note of

meeting with Sports Soccer on 13 August 2001; representations to the OFT dated 9 July 2002, 2.2.22 et seq; response of 9 January 2003 to the supplemental Rule 14 Notice, pages 4 and 8 to 13).

352. We accept Mr. Ronnie's evidence, which is corroborated in this respect by Mr. Ashley, that he did put pressure on Sports Soccer by threatening to limit supplies if Sports Soccer did not price the England and MU replica kits, or at least the shirts, at High Street prices. We also accept Mr. Ashley's evidence that he agreed to conform to Umbro's wishes in the light of his fear that, otherwise, he would not receive supplies of those products or other Umbro products in the quantities he needed. In addition, as he told us, Mr. Ashley feared that if he did not conform he would not receive supplies of replica shirts supplied by other brands (Day 3, pages 74, 76, 83, 84), or other sportswear products (note of meeting with OFT, 13 August 2001).

353. There has been a considerable amount of evidence about an occasion on which it is said that Umbro ordered a lorry delivering products to Sports Soccer to be turned round at Sports Soccer's Dunstable warehouse because Sports Soccer was not respecting Umbro's retail prices. Mr. Ashley, in Sports Soccer's representations to the OFT of 11 July 2002, 14 August 2002 and 19 January 2003, thought that this incident occurred in relation to MU shirts in or about August 2000 (Day 3, pp. 30-60). Mr. Ronnie, at paragraph 25 of Ronnie III, placed the incident in April 2000, apparently in relation to the England shirt. An Umbro answer to the OFT's questions of 13 September 2002 indicated that the incident concerned an MU delivery. In cross-examination, however, Mr. Ronnie said he could not remember when the incident took place, or to what shirts it related (Day 4, pp. 169 to 173, 193 to 194).

354. In these circumstances we cannot safely find that an incident concerning the turning round of a lorry in fact took place prior to the entry into force of the England and MU Agreements in May and June 2000. In our view, however, even without the lorry incident, Umbro's threat to Sports Soccer was real enough. We have in evidence two other instances where Umbro in fact made such a threat. First, Umbro stopped supplies to JD of MU shirts when the latter was reluctant to stop discounting or support the Umbro brand: (see Mr. Ronnie's file note of 25 July 2000 recording a telephone conversation with Mr. Bown of JD that "JD Sports unfortunately are no longer a priority account for Umbro", and see paragraph 208 of



the decision). Similarly, Umbro threatened to reduce Debenhams priorities on deliveries when the latter refused to stop discounting: see Mr. Fellone's letter to Debenhams of 8 June 2000. Mr. Ashley could not, in our view, afford to ignore the threats that Mr. Ronnie says, and we accept, he made.

355. The appellants argue however, that in 2000 Umbro was in no position to put pressure on Sports Soccer because of the financial arrangements between the two companies. We accept that in the year 2000 its trading relationship with Sports Soccer was important to Umbro, particularly in terms of the cash flow generated by the advance payment of royalties. Umbro may, as Mr. Ashley said, have intimated to him that the company had some financial difficulties, including about cash flow (Day 1, pp. 108-109). The purchase of stock at the end of 1999, about which we have few details, would presumably have assisted Umbro's cash flow. At the period with which we are concerned, May and June 2000, it appears that the arrangements as to advance royalties had been agreed in principle. The first invoice (for £3 million) is dated 3 May 2000, and the first payment of over £6 million, representing that invoice and the invoice of 17 July 2000, was made in September 2000.

356. However, we do not accept, on the evidence, that the relationship between Umbro and Sports Soccer in the first part of 2000 was one in which Sports Soccer was "calling the shots" or that Sports Soccer was "in the driving seat and driving all the horses". In our judgment, there was bargaining power on both sides. In relation to replica kit, in our view in 2000 Umbro had the greater bargaining power. Although the arrangements with Sports Soccer were important to Umbro, its relationship with Umbro was also very important to Sports Soccer. In 2000, that relationship with Umbro was still in its early days. No formal agreement was in place. As such documents as the notes of the meeting of 24 May 2000 indicate, it had not yet been agreed which products Sports Soccer could have manufactured under the envisaged Umbro licence, and in fact no such products were manufactured by Sports Soccer during the whole of 2000. Many details remained to be settled. In our view, there was no sense in which Sports Soccer had "control" over the Umbro brand: Umbro controlled which products were to be produced by Sports Soccer to Umbro designs, on an 'ad hoc' basis as Mr. Fellone pointed out (Day 7, p. 44). On the contrary, it was Umbro who had control over the items very much wanted by Sports Soccer, and wanted

immediately, namely replica kit and, in particular, the most important replica kits of all, England and MU, of which Umbro was the monopoly supplier.

357. Despite other strengths in its bargaining position, we are satisfied that Sports Soccer could not run the risk of finding itself with inadequate supplies of either the England or MU shirts, which were essential to its credibility, during peak selling periods: see e.g. Mr. Ashley, Day 2, pp. 123, 141, 166. We also accept Mr. Ashley's evidence that he feared that he would encounter difficulties in obtaining supplies of other products, whether from Umbro or from other brands, had he not acquiesced in Umbro's demands.

*Mr. Ashley's reluctance*

358. We also accept Mr. Ashley's evidence that he agreed to maintain the retail selling price of the England and MU shirts with extreme reluctance. It is common ground that Mr. Ashley's business has been built on discounting, on the basis of "pile 'em high and sell 'em cheap". It would be directly contrary to that philosophy for Mr. Ashley to agree to retail price maintenance, a consideration which further supports our conclusion that Mr. Ashley did not willingly agree to maintain High Street prices on replica kit. From Mr. Ashley's point of view, observing High Street prices would tend to reduce his sales volumes, and thus his profits, as well as damaging his reputation for competitive pricing (see e.g. Sports Soccer's oral representatives to the OFT, 11 July 2002, pp. 8-10). One small but striking illustration of Mr. Ashley's reluctance to raise prices is the numerous phone calls that he caused his area managers to make to Mr. Ronnie's mobile phone on 2 June 2000, when Mr. Ronnie finally insisted that he had to raise the prices of the England shirt. Although no doubt intended as "a hefty wind-up" (Day 6, p. 36), we see in that incident evidence of Mr. Ashley's resentment of the fact that he was being compelled to raise prices.

359. More importantly, Mr. Ashley's reluctance to go along with Umbro's demands is illustrated by the fact that he sought to discount whenever he could. Thus Sports Soccer failed to keep to its first agreement to observe High Street prices in April 2000. At the Chelsea and Celtic launches in May 2000, Sports Soccer discounted the socks. Sports Soccer discounted the England shirt as soon possible on 21 June 2000, provoking protests from Umbro on 28/ 29 June and 3 July 2000. In relation to the launch of the MU shirt of 1 August 2000, Sports Soccer discounted the adult shorts and socks, and the infant kit. Sports Soccer discounted

the MU third kit launched at the end of September 2000 and the MU away kit when it was launched on 18 October 2000. As Mr. Ashley told us: “We would not have done the higher price had we not been further pressured by Mr. Ronnie...Our skill is then not sticking to those RRPs” (Day 1, p. 85) or, as Mr. Ashley put it, once a price fixing agreement had been made “my job then was to get out of it and not to do it” (Day 2, p. 26).

360. In addition to those tactics, Mr. Ashley sought to escape from his dilemma by complaining to the OFT on 3 August 2000, which was then followed up by meetings with the OFT on 30 March and 13 August 2001. We accept Mr. Ashley’s evidence that he had been consistently complaining to Ministers and to the OFT about retail price maintenance for many years (see OFT’s note of the 30 March 2001 meeting with Sports Soccer, confirmed by Mr. Ashley, Day 2, page 114 and Annex I to Sports Soccer’s representations to the OFT following the oral hearing of 11 July 2002). In our judgment it is entirely contrary to that track record to suggest that Mr. Ashley voluntarily, and with no pressure from Umbro, agreed to maintain retail prices in a manner which was completely contrary to the discounting philosophy upon which Sports Soccer was founded.

*Assurances about other retailers*

361. As discussed later in this judgment, in our view a further key factor in inducing Sports Soccer to agree to maintain High Street prices for replica kit during key selling periods was the assurances or information given to Sports Soccer by Mr. Ronnie to the effect that other retailers would not discount if Sports Soccer did not do so. Given Mr. Ashley’s reluctance, and despite the pressure Umbro was able to exert, we see those assurances as crucial to Sports Soccer entering into the agreements it did: see further below.

*The quid pro quo argument*

362. We do not accept the suggestion that the price fixing between Umbro and Sports Soccer was no more than the “quid pro quo” for a wider commercial deal. The licensing arrangements between Umbro and Sports Soccer were first suggested in 1999 and evolved in a process of continual negotiation until the signature of the agreement of 24 August 2002. It is true that other aspects of their trading relationships were discussed at meetings where prices were fixed on replica kit by Umbro and Sports Soccer. It is also true that various drafts of the arrangements regarding sourced products apparently sought to include

terms about replica kit in the same document, but we do not think we can place much weight on those draft documents which were not necessarily seen by Sports Soccer. On the other hand, it is quite clear from the executed agreement of 24 August 2002 that the sourcing and licensing arrangements described therein as effective from 1 May 2000 have nothing to do with replica kit. We see no basis for finding that Mr. Ashley's willingness to agree to price fixing on 24 May 2000 and other occasions was merely in return for perceived benefits under the proposed licensing arrangements, nor do we see why, if that were so, Mr. Ashley should "blow the whistle" by going to the OFT. Mr. Ashley's evidence, which we accept, was that matters affecting replica kit were quite discrete from other matters discussed between Umbro and Sports Soccer (e.g. Day 2, pp. 14-15, 22-25, 58-59, and 159). In our judgment, the price fixing agreements made in May 2000 between Umbro and Sports Soccer came about as part of the immediate commercial forces that Umbro was facing in the market for replica kit in the Spring and Summer of that year, and the pressure to which Umbro subjected Sports Soccer as a result.

*Other pressures on Umbro*

363. In addition, in our view, whatever the importance to Umbro of its developing relationship with Sports Soccer in 2000, that relationship was not more important to Umbro than other vitally important considerations. The first of these was the imperative that Umbro should protect its relationship with JJB, its largest customer; the second consideration was Umbro's overriding need to retain the MU licence; and the third consideration was Umbro's need to develop its business on branded products. We revert to these factors in detail below.

*Sports Soccer's launch prices*

364. The evidence produced to us by JJB to the effect that, with few exceptions, Sports Soccer had over the years often priced replica kits at manufacturers' recommended retail prices, does not seem to us to take matters very far. That evidence, in our judgment, is equally compatible with the picture painted by Mr. Ashley, which we broadly accept, that he had for a long period been constrained to follow manufacturers' recommended retail prices in order to be sure of obtaining supplies of replica kit or other products at all. That conclusion is confirmed by the fact that Sports Soccer has often priced replica kit below manufacturers' recommended retail price since August 2001 when the OFT "dawn raid"

took place. From then onwards Sports Soccer was confident that manufacturers could no longer threaten sanctions against it.

### *Conclusions*

365. We therefore conclude on the evidence that in 2000 Umbro was in a position to, and did, put pressure on Sports Soccer to agree to maintain High Street prices for replica kit during key selling periods and that Sports Soccer entered into such agreements reluctantly because of its fear of obtaining insufficient supplies of replica kit and other products if it did not do so.

366. Finally and in any event, even if, contrary to the above, Sports Soccer was a willing partner in the price fixing arrangements with Umbro, that by no means excludes the possibility that other retailers were or became parties to the agreements or concerted practices between Sports Soccer and Umbro, as the OFT contends. For that reason, it seems to us, much of the appellants' arguments about the exact nature of the Umbro/ Sports Soccer relationship, let alone the details of such matters as Umbro's internal management accounts, are not germane to the central issues we have to decide, namely whether and to what extent JJB and Allsports became or were parties to the admitted price fixing between Umbro and Sports Soccer. It is perhaps unfortunate that the appellants chose to devote so much time to the Umbro/ Sports Soccer relationship, thus giving the impression, perhaps unwittingly, that they hoped to divert the Tribunal's attention from other issues in the case.

## **X. THE ENGLAND AGREEMENT: THE BACKGROUND CONTEXT**

367. In this section we first set out certain relevant market circumstances existing in the Spring and Summer of 2000. We then set out the main uncontested facts. Finally we indicate the framework for our analysis of the England Agreement.

### *The calculation of wholesale prices by reference to RRP's*

368. It seems to us that the mechanism whereby the standard wholesale price charged by Umbro to its retailer customers for replica kit was traditionally calculated by taking Umbro's RRP and calculating back on the basis of a standard industry mark up, gives both manufacturers and retailers a strong interest in discussing RRP's between themselves. In our view a

climate in which RRP's are regularly discussed between manufacturers and retailers gives rise to the risk that such discussions may in practice lead to an agreement as to the actual retail selling price.

*A previous culture of resale price maintenance*

369. In 1999 non-statutory assurances to prevent resale price maintenance on replica kit were given by the FA, and the FA Premier League. MU was a party to these assurances, as was Umbro.
370. The evidence before the Tribunal is that those non-statutory assurances had little or no effect. Umbro itself entirely disregarded the assurance it had given in September 1999 by procuring Sports Soccer, at least, to enter into agreements from April 2000 onwards not to discount replica kit at launch. MU, in its fax to Umbro dated 25 May 2000, described by counsel for Allsports as "not very subtle" (Day 6, p. 31), in our view plainly put pressure on Umbro to limit the discounting of replica kit. In addition, Mr. Ashley's evidence was that resale price maintenance was widespread in the industry, which was why he had persistently complained to the OFT. In our view Mr. Ashley genuinely felt that, as a discounter, he had encountered considerable commercial difficulties as a result of the prevalence of resale price maintenance on replica kit at the time: see Day 1, pp. 70, 75-76, Day 2 pp. 25, 114 – 120, 124, 135, 169; Day 3, pp. 76, 84 and 86. He also told us that in his view "Umbro were not the worst offenders": Day 3 p. 84.
371. While self evidently we make no findings against third parties not before the Tribunal, the evidence of Mr. Ashley is that such practices did not disappear until after the OFT's dawn raids in August 2001 (Day 3, p. 85). In our view in 2000 understandings, or exchanges of information, between manufacturers and retailers as to the retail price to be charged for replica kit may not have been seen as contrary to the historical culture of the industry.
372. That, in our view, is reinforced by the evidence, described below, of the extent to which retailers would complain to Umbro about discounting by other retailers, in the apparent expectation that Umbro was in a position to do something to limit or control such discounting. Allsports, in particular, seems to have regarded it as part of Umbro's legitimate sphere of activity to limit or control discounting by Allsports' competitors; see below.

*The price war between JJB and Sports Soccer*

373. The evidence of Mr. Ronnie, Mr. Fellone and Mr. Hughes is that from 1999 onwards a price war was in progress, principally between JJB and Sports Soccer. That is set out in the decision (e.g. paragraphs 187 and 234) already referred to above, and is amply corroborated by the evidence in the Umbro MMR's and other documents for the period from October 1999 to March 2000. See for example:

Umbro's MMR for February 2000

"JJB and Sports Soccer continue to go to war with each other"

Umbro's MMR for March 2000

"With the continuous battle that is taking place between these two accounts, the effect on the trade is a major concern"

Umbro's MMR for April 2000

"Sports Soccer continue with the 30% off to combat JJB 'price down'".

374. There seems to have been a pause in this battle on the part of JJB when the latter ceased its main discounting campaign on or about 23 April 2000. At that stage, however, Sports Soccer continued to discount during May 2000, not only on replica kit but on other products such as the "Predator" football boot, to which Mr. Hughes drew our attention. We also note Mr. Fellone's comment in his report dated April 2000

"JJB... have ended all blanket promotions in store for the first time in 6/9 months and are not currently discounting – for how long who knows?"

375. Mr. Ronnie's evidence to the Tribunal was that, if Sports Soccer had discounted the England shirt during Euro 2000, JJB would almost certainly have responded by cutting its prices. Thus, in answer to the suggestion that JJB would always stick to its regular practice of pricing at £39.99, Mr. Ronnie said:

"A. What would happen with JJB is that if Sports Soccer for example were going to go out at £35, JJB would go out at £34 to ensure that they were cheaper on the High Street than Sports Soccer, and then it would just be a snowball effect, as you can see from the main management report, where the price of that product was ranging between 24.99 to 32.99 with a free cap given away."

(Day 3, 142-143).

376. On this point, Mr. Ronnie’s evidence is corroborated by Mr. Hughes, at paragraphs 48 and 50 of Hughes I, and Mr. Hughes’ evidence to the Tribunal. For example, Mr. Hughes told us that whenever Sports Soccer cut a price, JJB would respond. Mr. Whelan “would seem to get quite annoyed... He would always seem to open a new store with 20 or 30 per cent off everything” (Day 10, p. 58). Discounting at launch happened in particular on premium products (Hughes I, paragraph 50, Day 10, p. 75).

377. The fragility of the situation is also illustrated by Mr. Bryan’s report in Umbro’s MMR for April 2000 commenting on the imminent launching of kits for Chelsea, Celtic and Liverpool (the latter supplied by Adidas):

“it appears that a price war will develop with at least two retailers other than JJB going with significant discounts from launch. JJB will start at £29.99/ £39.99, but for how long?”

378. In all those circumstances we find that, if Sports Soccer had discounted the England shirt during Euro 2000, JJB would have followed suit and price competition on those replica shirts would have taken place. The same is true as regards the launch of the MU shirt.

379. It follows, in our view, that in normal competitive conditions in 2000 discounting on the England and MU replica shirts would have occurred. That is further illustrated, for example, by the discounting that has taken place since the OFT’s unannounced visits in August 2001. In the early summer of 2000 pre-emptive action of some kind was in our view necessary if that result was to be avoided.

#### *Uncontested facts*

380. Certain fundamental facts concerning the England Agreement have not been contested. These may be summarised as follows.

381. Discussions between Umbro and Sports Soccer about retail prices had commenced by late March 2000. In April 2000 Umbro reached an agreement with Sports Soccer in which the latter agreed “to sell all new Umbro licensed kits at £40 mens and £30 kids in line with the rest of the High Street” (Umbro’s MMR for April 2000). That agreement broadly coincided with a cessation of discounting by JJB. However, during May 2000, Sports Soccer continued discounting on the England shirts but observed High Street prices (except



for the socks) at the launch of the new Chelsea away kit on 11 May 2000, and at the launch of the new Celtic away kit on 19 May 2000.

382. During May 2000 there were further discussions about retail prices between Umbro and Sports Soccer which culminated in an agreement reached on 24 May 2000 at a meeting between Umbro and Sports Soccer in which Sports Soccer agreed (a) to increase the price it was then charging on the England shirt (around £32/ £34) to High Street prices i.e. £39.99; and (b) to maintain High Street prices on replica kits for 60 days after launch (Mr. Attfield's note of 25 May 2000).
383. It does not seem to be seriously disputed that during the course of those discussions Sports Soccer asked for and received from Mr. Ronnie information or assurances about the pricing intentions of other retailers. The evidence about that is considered later in this judgment.
384. There has been no real challenge to the evidence of Mr. Fellone (paragraph 27 of Fellone III) which is to the effect that Sports Soccer made it known that it would discount if other major retailers discounted, and that Mr. Fellone and Mr. Ronnie accordingly divided between them the task of telephoning the other major retailers to ascertain their pricing intentions. Mr. Fellone telephoned Blacks, JD, Debenhams and John Lewis.
385. There is undisputed evidence that Mr. Fellone had a telephone conversation with Debenhams on 22 May and asked Debenhams to increase its price of the England shirt on or before 3 June 2000 "as all other major retailers had agreed to do so" (decision, paragraph 169). On 2 June 2000 Mr. Fellone sent a fax to Debenhams stating that "other retailers including John Lewis have agreed to our requests which will take effect from opening of business Saturday 3 June. It is important I speak to you this afternoon to ensure that Champion Sports will fall in line with the above". In the event, Debenhams did not agree to raise its prices. According to the OFT, John Lewis' agreement was conditional on Debenhams' agreement.
386. It is not disputed that Blacks agreed with Umbro to raise its prices on the England shirt. Blacks raised its prices to £39.99 on 2 June 2000.

387. It is not disputed that JD agreed with Umbro to raise its prices on the England shirt. JD raised its prices to £39.99 on 3 June 2000.
388. It is not disputed that on the afternoon of 2 June Mr. Ashley received a series of phone calls from Mr. Ronnie. According to Mr. Ashley Mr. Ronnie said “that other retailers (I can’t remember if he gave names) had noticed that Sports Soccer’s prices had not yet gone up, although Chris had promised them that we would do so, and so he needed us to take action now” (Ashley II, paragraph 14). Mr. Ashley and Mr. Nevitt of Sports Soccer called Mr. Ronnie and Mr. Attfield of Umbro several times on the afternoon and evening of 2 June. Sports Soccer gave an instruction directly to all its area managers to raise prices that evening and to confirm directly to Mr. Ronnie that they had done so. This latter instruction was intended to “wind up” Mr. Ronnie. Sports Soccer’s area managers carried out the instruction to raise prices by the opening of business on 3 June. Mr. Ronnie received numerous calls on his mobile phone.
389. It is not disputed that during the afternoon of 2 June Mr. Knight of Blacks/ First Sport called Mr. Ashley directly seeking confirmation that Sports Soccer were going to increase the price of the England shirts. Mr. Ashley returned Mr. Knight’s call and gave that confirmation.

*Framework of the analysis*

390. It is admitted that Umbro, Sports Soccer, Blacks and JD were parties to an agreement or concerted practice, or a series of agreements or concerted practices, to maintain the price of £39.99 on England replica shirts during Euro 2000. During May 2000, JJB and Allsports were already pricing the England shirt at £39.99. The issue in the case is whether either or both of those companies were also party to an agreement or concerted practice with Umbro, and/ or the other major retailers, to maintain that price of £39.99 during Euro 2000. We use the term “the England Agreement” compendiously to cover any and all agreements or concerted practices to that effect.
391. In analysing the evidence regarding the alleged England Agreement we consider first the evidence regarding complaints by JJB (section XI) and Allsports (section XII) about discounting on replica kit, principally by Sports Soccer, in the Spring of 2000. In the OFT’s submission, those complaints were the root cause of the England Agreement.

392. We then turn to consider the evidence concerning the making of the England Agreement itself: section XIII. That evidence falls essentially into three parts, namely the evidence given by Mr. Ashley to the OFT in 2001; the evidence from a number of relevant documents; and the evidence concerning telephone conversations between Mr. Ronnie and Mr. Fellone and the major retailers, including JJB and Allsports, in the period prior to Euro 2000. In our view the evidence from these three sources, when properly analysed, is broadly consistent.

393. In the light of the foregoing we then set out our findings against JJB and Allsports in sections XIV and XV respectively. In that part of the judgment it is necessary to bring together all the evidence, including the earlier evidence as to complaints which preceded, and in the case of Allsports partly coincided with, the England Agreement. We conclude on the evidence that each of JJB and Allsports were respectively party to a relevant agreement or concerted practice to maintain the price of the England replica shirts at £39.99 in the period immediately before and during the Euro 2000 tournament. We consider finally certain procedural issues relating to the England Agreement (section XV).

## **XI. UMBRO AND JJB: PRESSURE AND COMPLAINTS**

### **A. THE POSITION OF JJB IN 2000**

394. It is common ground that at the material time JJB was the largest sportswear retailer in the United Kingdom. In terms of buy/ sell transactions, i.e. excluding Sports Soccer's licensing arrangements discussed above, JJB was Umbro's largest customer. The figures for 2000, supplied by Umbro, seem to be as follows:

#### **Umbro's sales to its largest customers (buy/ sell) 2000**

	Replica Kit £m	Other £m	Total £m
JJB	10.3	20.5	30.8
Sports Soccer	4.1	10.8	14.9
Allsports	4.4	1.5	5.9
MU club shop	4.0	0.0	4.0

395. In our judgment, JJB had for many years previously and continued to have in 2000 very considerable market power in relation to sportswear generally, including replica kit. As regards replica kit in 1998 and 1999 JJB had resisted manufacturers' attempts to raise RRP's, and had adopted a policy of not selling replica shirts above £40. Although there appear to have been some exceptions to that policy, JJB was able to dictate the "ceiling price" in the High Street. Similarly, Mr. Russell told us (Day 9, pp. 115-116) how, at the end of 2000, JJB had forced manufacturers to reduce wholesale selling prices for replica kit by the simple expedient of refusing to place further orders until agreement was reached.
396. We further accept the evidence that, in 2000, JJB had very considerable commercial bargaining power vis-à-vis Umbro. Mr. Ronnie's unchallenged evidence was that Umbro simply could not afford for JJB to cancel or reduce orders, as the business was not then sufficiently financially stable, following the management buyout in 1999 (paragraph 20 of Ronnie III). Mr. Whelan (Day 8, p. 42) and Mr. Russell (Day 9, p. 114) agreed that JJB had commercial bargaining power. We note that, whereas JJB accounted for over 30 per cent of Umbro's United Kingdom buy/ sell turnover, Umbro seems to have accounted for less than 10 per cent of JJB's business. JJB's total turnover was about six times that of Umbro's United Kingdom turnover.
397. As is apparent from the above figures, an important aspect of JJB's commercial bargaining power vis-à-vis Umbro was the scale of JJB's purchase of branded products. Although Umbro itself, in our judgment, had an important degree of market power in respect of replica kit, Mr. Ronnie's unchallenged evidence (Ronnie IV, paragraph 6) was that Umbro was over-dependant on replica kit. Its replica business was vulnerable to a football club switching to another supplier, as in fact happened with MU, and sales were dependent on the success of particular teams. In those circumstances, Umbro needed to safeguard, and expand, its sales of branded products. However, on branded products JJB had available to it a wide range of offerings from Nike, Adidas and Reebok and many other sporting and leisurewear brands. In our view, Umbro's fear, repeatedly referred to in the evidence, that JJB could, among other things, switch its purchases of branded products if Umbro did not conform to its wishes, was a real fear, especially given Umbro's cash flow problems at the time. In addition, JJB's position as by far the largest buyer of replica kit gave JJB strong commercial 'clout' vis-à-vis Umbro. JJB as a company was both much larger, and financially stronger, than Umbro.

398. Against that background, we find that Umbro would have felt under considerable pressure in the Spring of 2000 to do everything it could to assuage any commercial concerns that JJB or its forceful Chairman Mr. Whelan may have had.

399. Moreover, in our judgment JJB had a strong interest in seeing to it that discounting did not occur in relation to the England shirt during 2000. JJB's leading position in the High Street was being challenged for the first time for many years by Sports Soccer. JJB had ceased its own discounting campaigns at the end of April 2000. Despite Mr. Whelan's reluctance to accept the fact, the discounting that had gone on since the previous October must, in our view, have had an adverse effect on JJB's margins (see Day 8, pp. 31 -33). Discounting by Sports Soccer on a "must have" premium product such as the England shirt would not have been in JJB's interests. Indeed, it is clear from the evidence set out below that JJB did not wish to see discounting on leading replica shirts such as England during key selling periods, and expected Umbro to do something about it.

#### B. THE ALLEGATIONS OF COMPLAINTS AND PRESSURE BY JJB

400. Mr. Ronnie, Mr. Fellone, Mr. McGuigan and Mr. Attfield of Umbro all give oral or written evidence that complaints by JJB put Umbro under pressure in the Spring and Summer of 2000 as regards discounting by Sports Soccer in particular. Mr. Whelan and Mr. Russell deny any such pressure.

##### *The Umbro evidence*

##### *- Mr. Fellone*

401. In Fellone III, Mr. Fellone, then Umbro Sales Director, told us that he had a close relationship with JJB, among other retailers. At paragraphs 13 to 16, he said:

“13. Replica kit is seen as a premium product by retailers and the clubs and they want to make as big a margin as possible on the product. During 1999-2001, I constantly got pressure from retailers and from clubs (through the Umbro sports marketing department) about the wholesale and retail price of replica kit. This happened mostly around the time of a launch of a new product, major tournaments – such as Euro 2000 – and sometimes at Christmas.

14. Most of the time retailers gave me implied threats as to what might happen if we do not help them to control the retail price of

replica products. I interpret these conversations as meaning if Umbro does not comply it will have a significant effect on our business i.e. the amount of orders that they place. This can range from comments such as “sort it out” (referring to other retailers who are discounting the retail price of replica product) to asking us to speak to other retailers to pull promotions.

15. JJB is well known in the industry as being an aggressive retailer and was, consistently, the most vociferous in its complaints about discounting. Its threats were taken seriously by Umbro due to its buying power, as the retailer with the largest number of stores in the UK. JJB during 1999-2001 bought more replica kit than any other retailer.

16. JJB normally contacted Phil Bryan (JJB account manager) or me directly in order to point out those retailers who were discounting the retail price of replica product and to ask us to do something about it. The main comments were usually “why are they doing this – the products fly off the shelf so why should they discount”. It then put pressure on Umbro to stop this happening in the form, often by either cancelling orders, or threatening not to take repeat or future orders. The escalation of contact normally went from Colin Russell to Phil Bryan, Colin Russell or Duncan Sharpe to me, then Duncan Sharpe or Dave Whelan to Chris Ronnie. I normally responded by saying that there was nothing that I could do, but that I would ask.”

402. In cross-examination on behalf of JJB, Mr. Fellone was asked about paragraph 14 of Fellone III, cited above. He agreed that his reference in that paragraph to “implied threats” was very similar to the point that Mr. Ronnie was making in paragraphs 8 and 9 of Ronnie IV, and the point that Mr. McGuigan was making in his witness statement of 12 July 2002, both set out below. Mr. Fellone also agreed with paragraph 6 of Russell II, which is to the effect that on a number of occasions Mr. Russell successfully used discounting by other retailers to obtain better terms from his suppliers (Day 7, pp. 31-36). Mr. Fellone was not, however, cross-examined on paragraphs 13, 15 and 16 of Fellone III.

- *Mr. Ronnie*

403. Mr. Ronnie gave evidence in Ronnie III similar to that of Mr. Fellone:

“12. JJB has consistently put pressure on Umbro to “sort out” other retailers who do not sell replica product (especially Manchester United and England) at full RRP i.e. ensure that those retailers do not discount the retail price. Sports Soccer have been a particular problem for JJB as they have been trying to break into the sports retail market for some time, and have been trying to do so by discounting the price to attract customers. Over the last few years

Sports Soccer has grown significantly and has become a real commercial rival to JJB.

13. When Sports Soccer reduce the prices of replica shirts, especially Manchester United and England, Dave Whelan (Chairman of JJB) or Duncan Sharpe (CEO of JJB) from JJB normally call me to discuss this issue asking what Umbro is going to do about it. They will say things like “there is no need for him [Mike Ashley of Sports Soccer] to discount it as it flies out of the store”, or “this is getting out of hand – get it sorted.” The calls are more frequent around the time of a launch of a new shirt, and Euro 2000 was particularly bad when I would get a call from Dave Whelan at least once a week.

14. The same type of conversations take place between Colin Russell (Buying Director of JJB), Phil Bryan (former Umbro JJB account manager) and Phil Fellone (Umbro UK Sales Director). For example, JJB may say to them “you know what will happen when the boss [Dave Whelan] finds out”. There is normally an explicit or implicit threat that they will reduce orders or cease doing business with Umbro for branded and licensed products if we fail to respond to their request.

...

20. During 1999 and early 2000, the complaints by retailers – in particular MUFC, all:sports and JJB – regarding Sports Soccer’s pricing of replica kits intensified. Although Umbro had helped build up Sports Soccer as a rival to JJB, Umbro felt that it had to respond to these complaints, in order to protect its sales to the other large retail accounts. Umbro simply could not afford for JJB to cancel or reduce orders, as the business was then still financially vulnerable, following the MBO in 1999. We were also concerned about the renewal of the MUFC sponsorship contract, which is addressed in detail by Martin Prothero.

21. On a number of occasions, therefore, we had discussions with Sports Soccer in particular (but also sometimes other retailers) about retail pricing. On several occasions, I felt that I had to put pressure on Sports Soccer to raise prices, by threatening that it might not receive a full order of products if it continued to aggravate other retailers by its discounting. Mike Ashley would often “agree” to raise Sports Soccer’s prices. However, on many occasions, he did not then do so. Because of this, I knew that I could not rely on Mike Ashley’s assurances. However we could at least use these assurances to persuade other retailers that we were responding to their complaints.”

404. In Ronnie IV, sworn on 28 November 2003, Mr. Ronnie said, in the context of answering various contentions put forward by Allsports:

“8. When we received complaints from Allsports and JJB about discounts offered by other retailers, there was an underlying threat that they would withdraw support for Umbro as a brand in their stores if we did not do something about it. This would have serious repercussions for the Umbro business.

9. Also, perceived pressure (because nothing was explicitly stated) came in the form of order cancellations, a sudden reduction in the volume of a particular product that had been ordered and a perceived reluctance to place orders for Umbro products in future. These actions were not limited to replica kit but extended to apparel, footwear and other sports goods. Their timing would normally coincide with a recent retail promotion by one of Allsports’ or JJB’s competitors.”

405. Mr. Ronnie added at paragraph 16 of Ronnie IV:

“There is one part of my OFT statement that I need to clarify. In the last sentence of paragraph 13, I stated that “the calls [from JJB] are more frequent around the time of a launch of a new shirt and Euro 2000 was particularly bad when I would get a call from Dave Whelan at least once a week”. I would like to make clear that these calls did not last for the whole duration of the tournament. So far as I can now recall, calls from JJB were particularly prevalent in the weeks leading up to the start of the championship and immediately after its start.”

406. Mr. Ronnie was cross-examined by JJB as to paragraphs 8 and 9 of Ronnie IV, mainly on the basis that there was no mention of pressure from JJB in any of Umbro’s MMRs. He maintained that the management team at Umbro were fully aware of the pressure that Umbro was under, so there was no need to record it in Umbro’s MMRs. (Day 4, pp. 49-61). He also maintained that the replica buyer for JJB (Mr. Russell) would say to Umbro’s account manager (Mr. Bryan) or to the sales director (Mr. Fellone) words to the effect that “the boss is not happy” although there was never an explicit threat of an order cancellation (Day 4, pp 62-63). Mr. Ronnie was not, however, cross-examined on paragraphs 12 to 14 of Ronnie III, nor paragraph 16 of Ronnie IV.

- *Mr. McGuigan*

407. At paragraphs 7 and 8 of his witness statement of 12 July 2002 Mr. McGuigan, the CEO of Umbro – who was not called as a witness – said:



“7. I was aware of the pressure that JJB placed upon the Umbro business, in particular during spring 2000.

8. I have received telephone calls from Dave Whelan to discuss business in general. On several occasions he would discuss Mike Ashley and the effect of Sports Soccer’s entrance into the replica market. He would state that there was no need for Sports Soccer to discount the products as they “fly out of the store”. He did not like the fact that Sports Soccer’s market share was increasing and was having an impact on the traditionally high profit margin that JJB made on replica shirts.”

*- Mr. Attfield*

408. We regard Mr. Attfield’s brief evidence on this issue in his witness statement of 15 July 2002 as too vague to be helpful.

*- Mr. Bryan*

409. We note that the witness statement of Mr. Bryan, put in by JJB for whom he now works, does not contradict the gist of Fellone III, nor that of Ronnie III and IV, save to the extent that he denies that JJB ever cancelled orders. Mr. Bryan, who was Umbro’s account manager for JJB at the time, could presumably have contradicted the evidence of Mr. Ronnie and Mr. Fellone in some detail had he felt able to do so. JJB did not call Mr. Bryan, although the OFT had asked to cross-examine him.

*JJB’s evidence*

*- Mr. Whelan*

410. In Whelan II, Mr. Whelan denies that he applied pressure on Umbro in order to get Sports Soccer to increase its retail prices on football replica kit, or that any member of his staff would have done so. He categorically denies Mr. Ronnie’s contention that he telephoned Mr. Ronnie at least once a week “to stop Sport & Soccer from discounting”. Mr. Whelan continues:

“5. Chris Ronnie alleges at paragraph 13 that I said to him “there is no need for him (Mike Ashley of Sports Soccer) to discount it as it flies out of the store”. I am sure that I have never used such an expression, and I do not believe I have ever commented to Chris Ronnie (or anyone else at Umbro) on Sports Soccers’ pricing policy.

6. In addition, Peter McGuigan of Umbro alleges at paragraph 8 of his statement dated 12/7/02 that I called him on several occasions to discuss Mike Ashley and the effect of Sports Soccer's entrance into the market. I only remember ringing Peter McGuigan twice in the last two years. One of those calls was about a month ago. The other occasion was when I had to withdraw a product from the market because it fell apart. I do not recall discussing Sports Soccer with Peter McGuigan. Peter McGuigan also alleges at paragraph 8 that I said to him that there was no need for Sports Soccer to discount the products as they "fly out of the store". I repeat that this is not an expression which I have ever used.

7. I deny Umbro's claims that JJB threatened them with reduced orders if they did not stop Sports Soccer from discounting. We did not cancel or reduce any orders for this reason. When we wanted to respond to Sports Soccer's discounting, our response was to reduce our prices, as we often did.

8. On occasion we do cancel orders. The reason might be that the quality is not right, a delivery is late or because a certain product is not selling well, for example, because of the weather. However, we have never cancelled or threatened to cancel orders in an attempt to prevent discounting by other retailers (...) I have never asked Umbro to attempt to prevent discounting by other retailers, and I would never have expected Sports Soccer, for instance, to respond to any such pressure from Umbro.

9. During the times when Umbro allege that we threatened to cancel orders, such as before and during Euro 2000, it would have made no commercial sense to reduce orders. We would never have done so because the shirts were selling so well. This would have been damaging to our own interests as Umbro would have been well aware."

411. In cross-examination, Mr. Whelan accepted that Mr. McGuigan was an honest man, and he largely agreed with the thrust of paragraph 8 of Mr. McGuigan's statement. Mr. Whelan could not see himself making comments such as "fly out of the store" or "get it sorted", although he accepted that he may have said something similar (Day 8, pp. 39-40). He accepted that he would discuss Sports Soccer's pricing policy with Mr. McGuigan, and did not deny that the gist would be that Sports Soccer was rocking the boat in the sports retail market (Day 8, pp. 49-51). Mr. Whelan agreed that he would say to Mr. McGuigan or Mr. Ronnie "What the hell is going on" (Day 8, p. 177). We note that those answers, which we accept, directly contradict paragraph 6 of Whelan II, where Mr. Whelan states that he does not recall discussing Sports Soccer with Mr. McGuigan. On the issue of conversations with Mr. Ronnie, Mr. Whelan accepted that there were bound to have been calls in the course of

trading, but that he would be speaking more about the prices of Sports Soccer's footballs and T-shirts, putting pressure on Mr. Ronnie so that JJB could sell those products at the same prices (Day 8, p. 54). Mr. Whelan accepted that JJB would use discounting by others as a means of getting better terms (Day 8, p. 60). In answer to the suggestion that it would be an obvious strategy for JJB to complain about Sports Soccer's pricing policy, not just to get a better deal but in order to encourage Umbro to take steps to stop Sports Soccer discounting, Mr. Whelan's reply was "firstly they would never do it and secondly Sports Soccer would take no notice of Umbro" (Day 8, p. 61). That answer did not seem to us to be a direct answer to the question. Mr. Whelan however maintained his denial that neither he, nor Mr. Sharpe or Mr. Russell applied pressure to Umbro to stop Sports Soccer from discounting (Day 8, p. 65). Mr. Whelan accepted that Mr. Sharpe or Mr. Russell would not have wanted to inform him if they had done so, but he could not envisage that happening (Day 8, pp. 68-69).

- *Mr. Russell*

412. In Russell III, Mr. Russell categorically denies that JJB put pressure on Umbro to take action to prevent discounting by Sports Soccer. His conversations with Mr. Bryan about Sports Soccer's discounting were limited to attempts by Mr. Russell to get better deals for JJB, of which he gives examples in paragraph 6 of his statement. Mr. Russell denies that he had ever threatened to cancel an order. Mr. Russell did not consider that Mr. Sharpe would have made any threats or put Umbro under pressure to stop discounting by Sports Soccer.

413. In cross-examination, Mr. Russell agreed that he would get complaints from area managers about Sports Soccer's discounting, and that at times Sports Soccer's discounting would be a recurrent theme in his discussions with Mr. Bryan (Day 9, p. 126). He accepted "with the benefit of hindsight" that it would be tempting for Umbro to deal with JJB's complaints by putting pressure on other retailers not to discount, although he did not believe that Umbro was in a position to put pressure on Sports Soccer, or would do so (Day 9, p. 127). Mr. Russell denied talking to Umbro about Sports Soccer's discounting on the England shirt, except as a means of getting better terms for JJB, or saying to Mr. Bryan that the boss would not be happy about Sports Soccer's discounting (Day 9, pp. 133-135). He accepted that Mr. Sharpe would not necessarily tell Mr. Russell if he had put pressure on Umbro

about Sports Soccer's discounting, (Day 9, p. 136) but was reluctant to concede that Mr. Sharpe would have had the motive, opportunity or power to do so, or that he would have done so (Day 9, pp. 136-141). On the issue of whether he said to Mr. Fellone words to the effect "you know what will happen if the boss finds out", Mr. Russell did not explicitly deny it, but maintained that he and Mr. Fellone "do not need to talk like that" (Day 9, p. 156).

### *Analysis*

414. We accept JJB's submission that there appears to be no convincing evidence from Umbro's MMRs to support Umbro's assertion that JJB put pressure on Umbro to limit or restrain discounting by Sports Soccer in the period prior to Euro 2000. We also accept that there is no specific documentary evidence of order cancellations in the period prior to, or around the time of, the alleged England or MU Agreements. Nor do we have specific evidence of reductions in orders, failures to place orders, or switches of purchases to other suppliers, that can be directly linked to JJB's concerns about Sports Soccer's discounting in the first half of 2000.
415. Given the long standing relationship between Umbro and JJB we would not, however, expect there to be much written record of pressure from JJB. Nor would the management of JJB need to make explicit threats. It is not seriously contested that vis-à-vis Umbro, JJB had very considerable bargaining power leading up to and in the first half of 2000. We have already found that in the first half of 2000 Umbro could not afford to offend JJB, or to run the risk that JJB might reduce its orders, particularly on branded products. Umbro would, in our view, take any "message" conveyed by JJB very seriously. Our discussion in section XVIII below of JJB's cancellation of an order for the MU Centenary shirts shows that JJB was ready and willing to cancel a major order if JJB was displeased by Umbro's behaviour.
416. Against that background, we find first that, contrary to paragraph 6 of Whelan II, conversations did take place between Mr. Whelan and Mr. McGuigan in which discounting by Sports Soccer was raised by Mr. Whelan (e.g. Day 8, pp. 48-49), as Mr. McGuigan says in paragraph 8 of his witness statement. Mr. Whelan accepts that Mr. McGuigan is an honest man, and he did not in cross-examination deny the gist of Mr. McGuigan's

statement, although he queried the words used. He accepted that he would have pointed out to Mr. McGuigan the impact that Sports Soccer was having in the market, and that he said words to the effect that Sports Soccer was rocking the boat (Day 8, p. 49), and that he did not like the fact that Sports Soccer's market share was increasing (Day 8, p. 49). Mr. Whelan accepted that he would have said something very similar in meaning to the words "they fly out of the store" in order to convey his view that there was no need for discounting on replica kit, with the implication that such discounting should stop (Day 8, p. 40) and would ask "what the hell is going on" (Day 8, p. 177).

417. In our judgment, having seen him in the witness box, Mr. Whelan is a forceful personality who would be unlikely to mince his words, or make telephone calls for the purpose of passing the time of day. We find that those conversations with Mr. McGuigan would have conveyed to the latter that JJB was seriously displeased about discounting on replica kit by Sports Soccer. We find it difficult to see why Mr. Whelan, the Chairman of JJB, should speak directly to Mr. McGuigan, the Chief Executive of Umbro, about the activities of a competitor other than with a view to getting Umbro to do something about it. We find the statement in paragraph 6 of Whelan II to the effect that Mr. Whelan had only spoken twice to Mr. McGuigan in the relevant period, both times on unrelated matters, to be incorrect.

418. In the witness box Mr. Whelan came to accept that he would in the normal course of trading have had conversations with Mr. Ronnie. Although he initially told us that those conversations would centre on Sports Soccer's discounting on such items as T-shirts and footballs (Day 8, p. 54), we find it difficult to believe that the subject of Sports Soccer's discounting on replica kit would not come up, especially in periods preceding events such as Euro 2000. Again, we would expect Mr. Whelan to convey to Mr. Ronnie in no uncertain terms that JJB was not happy with the situation. Mr. Ronnie's evidence in paragraph 13 of his witness statement that either Mr. Whelan or Mr. Sharpe would have used words such as "this is getting out of hand, get it sorted" was not directly challenged in cross-examination. Nor was Mr. Ronnie's evidence in that paragraph that Mr. Whelan would discuss Sports Soccer's discounting with him and ask "what Umbro is going to do about it." Similarly, Mr. Ronnie's evidence, in Ronnie IV, paragraph 16, that calls from JJB in which Sports Soccer's discounting was raised were particularly prevalent in the weeks leading up to Euro 2000, was not challenged either. In all those circumstances, we

do not accept paragraph 5 of Whelan II, which is to the effect that Mr. Whelan “never commented to Mr. Ronnie (or anyone else at Umbro) on Sports Soccer’s pricing policy.”

419. Mr. Fellone states that he or Mr. Bryan would receive calls from either Colin Russell or Duncan Sharpe. In such calls JJB “would point out those retailers who were discounting replica product and ask us to do something about it”, as well as asking “why are they doing this, the products fly off the shelf”. Mr. Fellone also said that JJB was well known in the industry as an aggressive retailer, and was consistently the most vociferous in its complaints about discounting: see paragraphs 15 and 16 of Fellone III. That evidence by Mr. Fellone was not challenged in cross-examination. Mr. Fellone is accepted as an honest witness by all parties and we accept his evidence in those respects. JJB did not call Mr. Bryan to contradict him.
420. When it was suggested to Mr. Russell that he had said to Mr. Fellone words to the effect “you know what will happen when the boss finds out” we found his answer evasive (Day 9, pp. 156-158). We accept Mr. Ronnie’s evidence (Day 4, pp. 61 to 62), that words to that effect, or words such as “the boss won’t like it” were used by Mr. Russell, “the boss” in question being of course Mr. Whelan.
421. Mr. Russell accepted that discounting by Sports Soccer was a recurrent theme in his conversations with Mr. Bryan (Day 9, p. 126). We find it difficult to accept that Mr. Russell’s sole purpose in complaining to Mr. Bryan about discounting by Sports Soccer was “to get better terms for JJB”. In our view, an able and experienced replica buyer such as Mr. Russell would have realised that Umbro might very well respond to complaints by a powerful customer such as JJB by looking for ways to curtail Sports Soccer’s discounting. Mr. Guest of Allsports realised that (Day 11, p. 69) and it would be surprising if Mr. Russell did not. We therefore find it difficult to believe that Mr. Russell realised this only “with the benefit of hindsight”, or that Mr. Russell did not realise that one option open to Umbro was to limit, or threaten to limit, supplies of replica kit to Sports Soccer.
422. Similarly in our view Mr. Whelan, who is even more experienced, would have realised that conversations such as those he had with Mr. McGuigan or Mr. Ronnie would or might lead Umbro to consider ways of limiting discounting by Sports Soccer, so as to mollify JJB. In our view that was one of the principal purposes, or at least the reasonably foreseeable effect,

behind the conversations about Sports Soccer's discounting that took place in the relevant period between Mr. Whelan and Mr. McGuigan, Mr. Whelan and Mr. Ronnie, Mr. Russell and Mr. Fellone, and Mr. Russell and Mr. Bryan. "Getting better terms for JJB" does not seem to us to be an adequate explanation and there is no evidence of any discussion of "better terms" in the period prior to Euro 2000. In this case, in our view, JJB was making complaints and using its bargaining power with a view to affecting the discounting activities of a competitor. The fact that there is no written record of such conversations is immaterial given the evidence before the Tribunal that such conversations took place.

423. We accept the evidence of Mr. Fellone that any threat was only "implied" (paragraph 14 of Fellone III), and Mr. Ronnie's evidence in paragraphs 8 and 9 of Ronnie IV that any threat was "underlying", and that the pressure was "perceived", and that "nothing was explicitly stated". We understand that evidence to mean that in 2000 JJB did not make an overt threat to cancel or reduce an order expressly because of Sports Soccer's discounting. Nonetheless, in our judgment Umbro would, at the time, have seen what Mr. Fellone describes, unchallenged, as the "vociferous" complaints by JJB as putting Umbro under severe commercial pressure to react in a way that would meet those complaints. Mr. Whelan's evidence, in paragraph 9 of Whelan II, that JJB would not have reduced its orders of replica kit in key selling periods, is in our view beside the point. The point is that Umbro was extremely vulnerable to actions by JJB in other respects, in particular in relation to Umbro branded products. In any event, JJB's cancellation of part of its order for MU Centenary shirts in 2001, discussed later in this judgment, shows that on occasion JJB was prepared to reduce orders on replica shirts, even during key selling periods.

424. We therefore find that, to the extent set out above, JJB did make strong verbal complaints to Umbro in the Spring and early Summer of 2000 in relation to discounting by Sports Soccer and that such complaints exerted considerable pressure on Umbro to react in a way which would limit discounting by Sports Soccer and thus mollify JJB.

### C. THE EFFECT OF JJB'S PRESSURE ON UMBRO

425. Mr. Ronnie, at paragraphs 20, 25 and 28 of Ronnie III, and paragraph 17 of Ronnie IV gives evidence that Umbro felt that it had to respond to JJB's complaints, and did so by putting pressure on Sports Soccer to raise prices. Similarly Mr. Fellone states that JJB's

complaints were taken seriously by Umbro (paragraph 15 of Fellone III). We accept that evidence, which in our view is consistent with JJB's then market position and Umbro's relatively vulnerable financial situation in 2000 following the management buy-out in 1999. In our view it was JJB's intention, or at least the reasonably foreseeable effect, of JJB's complaints, that Umbro would be prevailed upon to do something about JJB's discounting.

426. We also accept, however, that complaints from JJB were not the only factors operating on Umbro at the material time. In addition, Umbro was also under pressure from MU, as the OFT found at paragraphs 438 to 449 and 463 to 468 of the decision, and as the evidence before the Tribunal confirms (see e.g. Mr. Prothero, Day 5, pp. 137-140). The risk of losing the MU contract would in our judgment have been highly material to Umbro's actions in May 2000, because of the perceived importance of demonstrating to MU that Umbro was in a position to control discounting during key selling periods, even though the discounting concerned related, at that time, to the England rather than the MU shirt.

427. In addition, we accept that Umbro itself saw the avoidance of discounting in relation to its "statement" products as a material factor in enhancing the image of the Umbro brand: see Umbro's MMR for May 2000, Mr. Ronnie at Day 4, pp. 41-42, and Mr. Fellone at Day 7, p. 39. It was also to Umbro's financial benefit to avoid pressure from retailers to reduce Umbro's wholesale margins.

428. We are also of the view that pressure from Allsports was a material factor as far as Umbro was concerned, for the reasons set out in the next section (Section XII).

429. We find, nonetheless, that complaints by JJB about Sports Soccer's discounting were, in the Spring and early Summer of 2000, a significant and material factor in inducing Umbro to persuade Sports Soccer to raise its prices for the England shirt and observe High Street prices during Euro 2000, given Umbro's perception that it could ill afford to ignore, or offend, JJB.

## **XII. UMBRO AND ALLSPORTS: PRESSURE AND COMPLAINTS**

### **A. THE POSITION OF ALLSPORTS IN 2000**



430. From 1998 onwards Allsports' traditional business model was no longer working because of discounting in the High Street (Guest I, paragraph 3). In the second half of 1999 Mr. Hughes decided to differentiate Allsports from JJB and Sports Soccer, and to reposition Allsports as "more aspirational and more upmarket" under the name "all:sports", and with new store fascias (Hughes I, paragraph 15).

431. There is evidence from Umbro's MMRs to suggest that in 2000 this exercise had not yet been a success. Thus

"Allsports falling behind considerably after their change in direction and rebranding their business all:sports"

(Umbro's MMR, for January 2000)

"Allsports are reporting like for like sales minus 15% - 18%"

(Umbro's MMR for April 2000)

432. According to Mr. May's report for Umbro's May MMR

"Sales of licensed have been vital to all:sports over the past month with England, Celtic, Liverpool and Leeds bringing turnover **not** being generated by branded category.

all:sports allegedly losing considerable turnover versus 1999 as new concept is not generating volume sales enjoyed by main high street competition.

Branded

all:sports not getting sell through in volume required on the category but talking up margin. The all:sports concept is limiting on their essential/core business..."

433. In cross-examination, Mr. Hughes agreed that in 1999 and 2000 Allsports' financial performance had suffered a downturn, and that Allsports had been overtaken by JD and Blacks in sportswear retailing (Day 10, pp. 32-33).

434. In addition, in May and early June 2000 Mr. Hughes was acutely worried about what he perceived as the general price war between JJB and Sports Soccer, and in particular the risk of discounting on premium products such as replica kit. Mr. Hughes told us that discounting was happening "on every premium product at every premium launch" (Hughes I, paragraph 50, Day 10, p. 75). He was particularly worried that this would occur at the

time of the launch of the MU shirt (Hughes I, paragraph 67, Day 10, pp. 192-193). In its representations to the OFT Allsports described the price war between Sports Soccer and JJB as “crippling,” and Mr. Hughes told us that “ready profits were sluicing down the drain”. By May 2000 Mr. Hughes had “had enough of their price wars” (Day 10, p. 120): there was “blood on the carpet” (Day 10, p. 207). At the Allsports Golf Day on 25 May 2000 Mr. Hughes used the expression “We are all going to hell in a hand cart” (Day 10, p. 97).

435. In all these circumstances, in our view in 2000 Allsports was losing ground and had a strong motive for seeing that discounting did not occur on premium products such as the England and MU shirts during the summer of that year.
436. As to whether Allsports had commercial bargaining power vis-à-vis Umbro, Allsports’ purchases of replica kit, although considerably smaller than those of JJB, were larger by a small margin than those of Sports Soccer. Allsports was Umbro’s second largest customer for replica kit in 2000 and had always been an important customer historically. In our view that circumstance gave Allsports a certain bargaining position vis-à-vis Umbro, notwithstanding Umbro’s position as a monopoly supplier of England and MU shirts. A reduction in orders from Allsports in 2000 could have had adverse implications for Umbro’s cash flow, a matter that would have been worrying from Umbro’s point of view at that time. Mr. Guest’s evidence was that Umbro appeared “desperate” for cash flow (Day 11, page 93).
437. In addition, we accept Umbro’s evidence, including that of Mr. Ronnie, that Umbro believed that Allsports had a line of communication with MU, through its trading relationship with MU and through Mr. Hughes’ contacts. Given the pending renegotiations in May 2000 regarding the MU contract, Umbro would in our view inevitably feel that it ought to do what it could to respond to Allsports’ concerns about discounting, which Umbro knew were shared by MU.
438. Moreover, in Ronnie IV, in answer to Allsports’ argument that it was not in a position to put pressure on Umbro, Mr. Ronnie told us at paragraphs 6 and 7 that Umbro wished to expand the branded side of its business in order to reduce its dependence on replica kit. In order to achieve this strategy, Umbro was reliant on retailers such as Allsports “supporting”

or stocking a wide range of Umbro products. According to Mr. Ronnie this gave Allsports a lever with which to exert pressure on Umbro in relation to replica kit.

439. In cross-examination Mr. Ronnie accepted that Allsports did not have the buying power of JJB, but did not accept that Allsports were “small fry” (Day 5, pp. 27-28), albeit that Allsports’ business with Umbro was smaller than that of JJB and Sports Soccer (Day 5, pp. 46-47). Mr. Ronnie maintained, however, that what was important was the potential for the development of Umbro’s business with Allsports (Day 5, pp. 57-58). Mr. Guest accepted that strategically Allsports was important to Umbro because it was the only retailer prepared to invest in making Umbro a more performance and technical brand (Day 11, p.93). Mr. Guest also said that Allsports and Umbro had “a real and working relationship” and that Allsports were spending a “lot more money than we needed to” on the Umbro brand, “which was really important to them” (Day 11, p.54). However, he thought it “laughable” that Umbro could be threatened by Allsports because “if they did not sell the jerseys to us they could sell them to somebody else” (Day 11, p.90). However, at the time, holding back on orders could cause a problem for Umbro for cash flow reasons (Day 11, pp.93-97).

440. In our judgment, as far as Umbro was concerned, its relationship with Allsports had some strategic significance in the development of its sales of branded products there being no other retailer with whom Umbro had such a close relationship. That factor in our view gave Allsports further commercial bargaining power vis-à-vis Umbro.

441. We do not accept Mr. Guest’s argument that the idea of Allsports being able to put pressure on Umbro was “laughable” because Umbro could sell all the jerseys (i.e. shirts). In the circumstances of 2000 an order reduction by Allsports, whether on replica kit or otherwise, would put pressure on Umbro’s cash flow. The timescale over which, and indeed the price at which, Umbro could sell the products in question elsewhere would be uncertain. Secondly, Mr. Guest’s argument overlooks Allsports’ importance to Umbro as the only major retailer prepared to work with Umbro to expand its branded business on an upmarket basis. Thirdly, the argument overlooks Umbro’s perception that Allsports had a working relationship with MU, whom Umbro was very anxious to conciliate. Fourthly, Allsports as historically the second largest seller of replica kit would still have been perceived as an extremely important customer from Umbro’s point of view.

442. For those reasons, we find that in the early Summer of 2000 Allsports had material commercial bargaining power to bring to bear, as necessary, vis-à-vis Umbro in pursuit of its commercial interest, which was to avoid or minimize discounting on replica shirts. We accept, however, that Allsports' bargaining power was less than that of JJB or MU.

#### B. THE ALLEGATIONS OF COMPLAINTS AND PRESSURE BY ALLSPORTS

443. The allegations of complaints by Allsports are conveniently analysed under three headings (1) the letter of 20 April 1999 (2) the general evidence of complaints and pressure and (3) three specific incidents, namely the Allsports Golf Day on 25 May 2000, Mr. Ronnie's lunch meeting with Mr. Guest on 31 May 2000, and Mr. Hughes' meeting with Mr. Ronnie on 2 June 2000.

444. Although the OFT sought to rely on an exchange of correspondence between Umbro and MU of 13 July 2000 relating to the Sky Open Channel, and to conversations Mr. Hughes allegedly had about discounting by Blacks in the South East, we find those allegations too vague as regards Allsports and we make no further reference to them.

##### (1) THE LETTER OF 20 APRIL 1999

445. Mr. Guest's letter to Umbro of 20 April 1999 reads as follows:

- “1. We are opposed to discounting as a matter of policy – what you are allowing to happen to your products is not in the long term interest of the brand or the category.
2. Allsports operate a “Price Promise” and we are obligated to match our competitors' offer.
3. If the new prices are to be dictated by a specific retailer it would be right to compensate Allsports to allow us to achieve our normal margin.
4. We have reduced the quantities of our order solely because you have failed to authorise the appropriate credit adjustment. As I explained at length we are happy to land the full quantity from the official order as long as the original intake margin is maintained at the new market prices”.

446. Mr. Guest said, essentially, that he wrote the letter of 20 April 1999 in order to secure better price terms from Umbro (Guest I, paragraph 3). In cross-examination Mr. Guest

accepted that that letter was prompted by discounting by others at the time of the launch of the England shirt in 1999 (Day 11, pp. 76-77). He had reduced Allsports' order, but left open the possibility of restoring the balance (p. 78). To the suggestion that this letter was implicitly suggesting to Umbro that they should not allow other retailers to discount, Mr. Guest said "we made it clear that we would have preferred things to stay where they were and for most retailers to conform to what were essentially recommended retail prices" (p. 79-80). He accepted that "It was definitely my intention to communicate the message that I was serious" (p. 87).

447. In our judgment, Mr. Guest's statement, in the letter of 20 April 1999 that "We are opposed to discounting as a matter of policy" was not just a statement of Allsports' own policy on discounting, but a statement to the effect that Allsports was against discounting generally. The following phrase "what you are allowing to happen to your products is not in the long term interest of the brand or the category" reveals Allsports' view that Umbro was wrongly "allowing" discounting to happen, thereby implying that Umbro both could and should take steps to prevent discounting, or restrict supplies to discount outlets, or otherwise enforce the observance by retailers of manufacturers' recommended retail prices. Any such action by Umbro would, at the time, have been contrary to section 9 of the Resale Prices Act 1976.
448. In our view the letter of 20 April 1999 inescapably demonstrates an attempt by Allsports to incite or pressurize Umbro to act in a way likely to prevent, restrict or distort competition, by limiting or controlling discounting, thereby protecting Allsports from the competitive market forces to which it would otherwise be subject.
449. Moreover, the context and tone of the letter ("we are opposed to discounting as a matter of policy - what you are allowing to happen to your products...") in our view also carries the additional implication that Allsports' business with Umbro could be reduced if Umbro did not take steps to limit or control discounting by other retailers.
450. In our view, when Mr. Guest very openly told us that, in writing the letter, he wanted to convey "the message" that "he was serious", his message was not merely about the negotiation of a credit note or better wholesale terms: the message was that, in Allsports' view, discounting in the High Street should be controlled by Umbro. Indeed, throughout

his evidence Mr. Guest made no secret of the fact that his personal preference was that “things should stay as they were”, and that there should be no discounting.

451. Although written a year before the Act came into force, the letter of 20 April 1999 is nonetheless relevant as demonstrating Allsports’ position that Umbro should control discounting, a position which we find is consistently borne out by the later evidence in 2000 discussed below. There is no evidence that Allsports ever changed its policy, whether in the light of the Act, or otherwise. That letter is also relevant in demonstrating that Allsports was capable of reducing orders in order to underline the “message” that Allsports was seeking to convey. That message, in our view, would not have been lost on Umbro, even a year later.

## (2) COMPLAINTS BY ALLSPORTS GENERALLY

### *Umbro’s evidence*

#### *-Mr. Fellone’s evidence*

452. At paragraph 19 of Fellone III, Mr. Fellone said:

“19. allsports were also one of the first customers to call us to tell us what other retailers are doing, putting pressure on us to resolve retail pricing issues. In the past they have cancelled orders on the forward order book, on the grounds that the rate of sale of these products had decreased due to Sports Soccer discounting prices, and that they therefore no longer want the product unless Sports Soccer increase the price. We would then be left with excess stock.”

453. In cross-examination Mr. Fellone said that in 2000 Umbro and Allsports were working closely together to develop “aspirational” brands such as Choice of Champions and the Pro Training Collection (Day 7, p. 48). It was inevitable that the subject of discounting would come up in conversation with Mr. Guest at that time (Day 7, pp. 50-51). The calls from Mr. Guest were not hostile or sinister calls, but if there was something of interest, Mr. Fellone and Mr. Guest would not hesitate to speak to each other (Day 7, p. 53). In answer to the suggestion that the relationship was not one where Mr. Guest put pressure on Mr. Fellone, Mr. Fellone replied “It is not, but it is” (Day 7, p. 55). He explained that with advance orders being placed some six months ahead, the market can have changed by the time the product is delivered. With discounting, Allsports’ sales would dip, and Mr.

Fellone saw Mr. Guest's calls as an implied threat that Allsports' sales were dropping, with the unstated implication that Allsports might not require repeat orders (Day 7, 55-56).

*-Mr. Ronnie's evidence*

454. In Ronnie III, Mr. Ronnie states that as sales of replica kit by Sports Soccer increased, he "received a lot of criticism and pressure from other large retailers such as JJB and all:sports" and that these complaints "intensified" in early 2000 (paragraphs 19 and 20). Mr. Ronnie states that the "underlying threat" from Allsports was that Allsports would withdraw support from the Umbro brand in their stores if Umbro did not do something about discounting. This manifested itself in order cancellations, reduced deliveries and a perceived reluctance to place orders, not only on replica kit but on other products. However, nothing was explicitly stated. Mr. Ronnie received complaints from Mr. Hughes and Mr. Guest (Ronnie IV, paragraphs 6-10). Complaints and pressure are not recorded in documents because most communication was on the phone or in face to face meetings (Ronnie IV, paragraph 13). As to particular examples of pressure, Mr. Ronnie states that "these hung unspoken in the background" but that nonetheless Allsports was "just as vocal" as JJB (Ronnie IV, paragraph 11).

455. In cross-examination on behalf of Allsports, Mr. Ronnie stated that Allsports had been late booking-in for the England shirt in 2000, but he could not give any significant examples of cancellations (Day 5, pp. 60-63). Mr. Ronnie saw cancellations for some other extraneous reason, such as the unpopularity of the Celtic shirt, as "pressure" (Day 5, pp. 64-66, 72). He agreed that there was no evidence of order reductions or cancellations, whether in connection with other retailers' promotions or otherwise, in Umbro's MMRs (Day 5, pp. 73-76; Day 6, pp. 67-68). He accepted that Allsports' sales of the England shirt in May 2000 were going well, despite the existence of discounting (Day 6, p. 16).

*-Mr. May's evidence*

456. Mr. May's witness statement of 13 January 2004 was originally prepared in answer to Ms. Charnock's statement although in the event Ms. Charnock did not give evidence. Mr. May states, among other things, that whenever Allsports' area managers mentioned that a competitor retailer was discounting replica kit, Allsports' representatives would ring to complain to Umbro. Mr. May was the first point of contact (paragraph 8). Ms. Charnock

would ask what Umbro were doing about it. Sometimes Mr. May would take the matter up with the discounter concerned, to try to persuade them not to discount, and on other occasions Mr. May would pass the complaint to Mr. Fellone (paragraph 9). He would tell Ms. Charnock what he had done and she would speak to Mr. Guest if the matter needed to go to a higher level (paragraph 11). Sports Soccer was the first major retailer to break away from established pricing practice; this caused consternation among other retailers, not just Allsports (paragraph 12). Ms. Charnock had particularly asked what Umbro were going to do about the JD cap promotion (paragraph 15).

457. Mr. May's evidence in cross-examination was to the effect that his conversations with Ms. Charnock of Allsports did not have any bearing on "pressure" (Day 5, p. 170). However, he particularly recalled complaints by Allsports among others about the JD cap promotion on the England shirt (Day 5, p. 172-177). We understand that that promotion commenced about 15 May 2000. Conversations would become more prevalent whenever Sports Soccer discounted a kit (Day 5, p. 173). Mr. May would however pass these matters up to Mr. Fellone to deal with (Day 5, p. 177). As regards the JD cap promotion, Mr. May told Ms. Charnock that Umbro were aware of it, that action was being taken, and that Umbro would let her know (Day 5, p. 179). On other occasions when Sports Soccer's discounting became known in the marketplace "there would be a stream of phone calls" from other retailers to all the account managers, who would feed that back to Mr. Fellone "who would have to start making phone calls to various people in terms of being seen to be trying to get hold of the situation and take some action" (Day 5, p. 208).

*Allsports' evidence*

*-Mr. Hughes' evidence*

458. In Hughes II, Mr. Hughes denies that there were any conversations with Mr. Ronnie that could be construed as a threat that Allsports would withdraw support for Umbro as a brand, although he accepted that Allsports' staff would refer to discounting by Sports Soccer to justify more favourable terms, or perhaps explain reduced or postponed deliveries. Mr. Hughes told us that he was unaware of discussions which Mr. Guest had had with Umbro, or the work Allsports was doing to promote Umbro as an aspirational brand (Day 10, pp. 76-82). He agreed that Allsports would be less inclined to support Umbro if discounting took place (Day 10, p. 83).



*-Mr. Guest's evidence*

459. In Guest II, Mr. Guest confirms that Allsports was working closely with Umbro to develop such ranges as “Choice of Champions” and “Pro-Training Collection”. He does not recall making complaints to Mr. Ronnie, whom he used to meet with Mr. Fellone “once or twice a year over a sandwich lunch”. He would have mentioned discounting by Sports Soccer at those meetings, as “observations”, Mr. Guest’s personal view being that Sports Soccer’s discounting was devaluing replica shirts. He did not ask Mr. Ronnie or Mr. Fellone to stop Sports Soccer discounting. If he said anything it would have been to ask Umbro not to supply Sports Soccer at all, but that would have been pointless, not least because anything Allsports said would make no difference to Umbro’s actions.

460. At paragraphs 13 and 14 of Guest II Mr. Guest said:

13. “When, at my instigation, Allsports began working with Umbro to develop aspirational non-licensed products in the first place, Umbro had assured me that they would protect their brand image and move it upmarket. Phil and Chris assured me that they could protect their licensed product, which was, frankly, an important source of funding to help with the development of the non-licensed product. I would not have bothered spending the time and money on Umbro had Umbro not told me that they would protect their brand image. (...)

14. Also, I will have mentioned that Sports Soccer’s discounting was affecting market conditions, our rate of sale and the amount of money we made, in order to support our case that better price terms should be offered to Allsports in order to protect our margins. (...)”

461. As to “underlying threats”, Mr. Guest did not believe that Allsports was in a position to force Umbro to stop Sports Soccer from discounting and Mr. Fellone and Mr. Ronnie did not appear threatened by Mr. Guest’s observations. They did not say anything about what they were going to do with Sports Soccer. Allsports rarely rescheduled an order and cancellations were very rare. According to Mr. Guest:

“(…) Since a major discounting campaign by Sports Soccer or JJB or anyone else for that matter may have an effect on Allsports’ rate of sales in some stores, that may in turn affect the dates of deliveries. Umbro would be able to see this for itself because of the weekly stock and sales reviews we sent it (...) This may explain Chris’ apparent belief that order reductions would “normally coincide with” a price promotion by a competitor.” (paragraph 18 of Guest II).

462. Had rescheduling of orders been due to slower sales as a result of Sports Soccer's discounting, Mr. Guest would have told Umbro so. However, Allsports would eventually take in all the stock and sell it because demand for replica kit has never fallen away. Allsports was not a threat to Umbro, because Umbro would always be able to sell all their shirts through other retailers. When Mr. Guest pointed out to Umbro that discounting would devalue the brand, such a remark was not "a threat," but common sense and commercial reality.
463. In cross-examination, Mr. Guest said he was the main point of contact with Umbro (Day 11, p. 34). He had a close personal relationship with both Mr. Fellone and Mr. Ronnie (Day 11, p. 37), which made it easier for both sides to do business (Day 11, p. 49). Cross-examined on paragraph 13 of Guest II, set out above, Mr. Guest's answers were somewhat equivocal, but he confirmed that it was no secret that Allsports would have preferred prices to stay at existing levels (Day 11, p. 51), and that Allsports would have no good reason for supporting the Umbro brand if prices had collapsed on replica (Day 11, p. 52). Allsports wanted to be in a true partnership (Day 11, p. 56) but it was inevitable that Allsports would not be able to support Umbro if Umbro chose "to go down the lower end of the market" (Day 11, p. 57). Allsports' position was made known to Umbro (Day 11, p. 57). Mr. Guest had 7 meetings with Mr. Ronnie in 2000 and 12 meetings in 2001 (Day 11, p. 58). Mr. Guest accepted that at the time there was no policy of not mentioning competitors' prices to Umbro, but that he personally was "not fully familiar with the law" (Day 11, p. 63). He had realised that one option for a brand in controlling the price was to control the distribution (Day 11, p. 69). He had suggested to Umbro the possibility of stopping supplies to Sports Soccer, although he maintained that he would have said this "tongue in cheek" without believing that Umbro would do so (Day 11, p. 71). Mr. Guest maintained that Allsports was not "obsessed by pricing" as they were selling everything they bought (Day 11, p. 102) but he accepted that he had made it known to Mr. Fellone that he did not like Sports Soccer's discounting (Day 11, p. 106).

### *Analysis*

464. We find as follows:
1. Discounting by Sports Soccer was discussed, apparently regularly, between Mr. Fellone, Mr. Ronnie and Mr. Guest in meetings and telephone conversations. Mr.

Guest made it plain to Mr. Fellone and Mr. Ronnie that Allsports was against discounting of replica kits, and did not approve of discounting by Sports Soccer. Mr. Guest took the view that Umbro should in one way or another seek to control the prices at which Umbro products were sold by retailers. On at least one occasion Mr. Guest suggested to Umbro that it should not supply Sports Soccer. Mr. Hughes too would complain to Mr. Ronnie about discounting by Sports Soccer.

2. We accept Mr. May's evidence that at buyer level Ms. Charnock would complain to Mr. May about discounting by other retailers. The JD cap promotion was a particular source of complaints from Ms. Charnock. Sometimes Mr. May would speak to the retailer concerned to try to dissuade him from discounting, otherwise he would pass the matter to Mr. Fellone, who on occasion would himself take it up with the retailer concerned.

3. The possibility of reductions or delays in orders from Allsports as a result of Sports Soccer's discounting in 2000 would have been seen by Umbro as "pressure" since such reductions or delays would have an adverse effect on cash flow, which was a matter of critical importance to Umbro at that time. We have no reason to doubt Mr. Fellone's evidence (paragraph 19 of Fellone III) that his conversations with Mr. Guest gave Mr. Fellone the impression that Allsports may have to reduce its orders in the light of Sports Soccer's discounting, unless Sports Soccer were to increase its prices. Although we accept that there is no clear evidence of order reductions in May/ June 2000, Allsports' late booking-in of the England shirt in May 2000 happens to coincide with a period when Allsports was concerned about discounting. In any event the letter of 20 April 1999 demonstrates that Allsports was prepared to reduce orders with a view to pressurizing Umbro to take action about discounting. There is no evidence of a subsequent change in Allsports' strategy.

4. We accept Mr. Guest's evidence (Guest II, paragraph 13) that there was an understanding between Allsports and Umbro that if Allsports worked with Umbro to develop aspirational brands such as Choice of Champions and the Pro Training Collection, Umbro would take steps to protect its brand image. In particular, Umbro gave Allsports an assurance that Umbro "would protect their licensed product" i.e. would do what it could to limit discounting. Mr. Guest made known to Umbro that

Allsports would not be prepared to support the Umbro brand if that brand was “devalued” by discounting.

### (3) SPECIFIC INCIDENTS OF PRESSURE BY ALLSPORTS

#### *The Allsports Golf Day*

465. At paragraphs 34 to 40 of Ronnie III, Mr. Ronnie describes events at the Allsports Golf Day dinner on 25 May 2000. Mr. Fellone similarly refers to this occasion at paragraphs 22 to 24 of Fellone III. This occasion is also described in the witness statement of Mr. Draper, Marketing Director of MU, of 10 January 2003 at paragraphs 14 to 32. Mr. Draper’s evidence was not challenged and Mr. Hughes states that he is not in a position to disagree with it. Nor did Mr. Hughes disagree with the thrust of Mr. Ronnie’s evidence (Day 10, pp. 96-109). Leaving aside various disputed details, which we regard as immaterial, we find as follows on the evidence.
466. On the morning of the Golf Day Mr. Hughes met Mr. Richards of MU to discuss merchandising issues relating to Allsports’ shops “within a shop” selling MU products. It is not denied by Mr. Hughes that Allsports’ intentions regarding the pricing of the forthcoming MU shirt may have been discussed. He accepted that discounting by other retailers could well have been on the agenda (Day 10, pp. 94-95).
467. The Allsports Golf Day dinner followed a golf tournament organised by Allsports. There were present at Mr. Hughes’ table Mr. Ronnie, Mr. Fellone, Mr. Draper and representatives of, at least, Adidas and Nike, as well as Mr. Hughes’ bank manager. At some stage towards the end of the meal Mr. Hughes gained the attention of the table and complained strongly about the treatment of Allsports by “the brands”. Mr. Draper says that Mr. Hughes “berated” the brands, that it was “nothing short of a tirade” and that Mr. Hughes was “clearly very annoyed”. Mr. Hughes’ principal complaint was about discounting of “statement products”, such as the Predator boot, but also the discounting of replica kit. According to Mr. Fellone, he wanted comfort that “the brands” would “sort this out”. According to Mr. Ronnie, Mr. Hughes wanted to know what the brands were going to do about the situation.

468. Mr. Hughes then apparently upbraided each of the brands' representatives present. Mr. Draper had the impression that Mr. Hughes' "outburst" was not spontaneous, and that he intended to humiliate major companies in front of their competitors. In the case of Umbro, Mr. Hughes mentioned specifically that he was concerned about the possibility of the forthcoming new MU home shirt being discounted at launch. Although Mr. Hughes denies that he mentioned Sports Soccer, it must have been clear to whom he was referring. Mr. Hughes then stated publicly that he had ordered 80,000 MU shirts from Umbro, the true figure being 50,000. Both Mr. Ronnie and Mr. Fellone were embarrassed by the figure of 80,000 shirts being mentioned by Mr. Hughes in front of their competitors.
469. Mr. Fellone's evidence, not challenged in cross examination, is that Mr. Hughes' comments put Umbro in a difficult situation, since it was known that negotiations were in progress for the renewal of Umbro's contract with MU, and that others including Nike, who were present at the table, were bidding for the contract. Mr. Fellone took Mr. Hughes' remarks as an implicit warning that the MU deal would be in jeopardy if Umbro "could not sort out the retail situation" (paragraph 24 of Fellone III).
470. Mr. Ronnie's evidence is that at some point in the discussion about the MU shirt, Mr. Draper said that "it will bastardise the product if it is discounted at launch". Mr. Draper, at paragraph 31 of his second witness statement, does not recall this response, but he does not deny it. He accepts that such a remark would accurately express his view that discounting a premium product such as the home shirt would have the effect of devaluing the brand. We find that words to that effect were said by Mr. Draper.
471. At the end of the dinner Mr. Hughes asked Mr. Ronnie to meet him to discuss possible discounting of the MU home shirt. A meeting was arranged for 10:30 a.m. on 2 June 2000. Mr. Hughes spoke to Mr. Ronnie on 30 May to arrange that meeting (Day 10, p. 118).
472. Even if others are present, in our view it shows a singular lack of awareness of the risks being run under the Chapter I prohibition if a group of competing suppliers are placed on the same table at a social function and the host, a retailer, then seeks to commence a discussion of retail prices with a view to limiting price competition by other retailers.

473. Making all due allowance for matters said at the end of a convivial dinner, we are satisfied that Mr. Hughes said, in front of Mr. Draper of MU, words to the effect that suppliers should exercise control over the retail price of “statement products” and, in particular replica kit. With the forthcoming launch of the MU shirt, it is difficult to believe that those remarks were not aimed at Umbro in particular, even if Mr. Hughes was addressing “the brands” generally. The specific reference to the MU shirt was in our view reinforced by Mr. Draper’s comment that discounting would “bastardise” that product.
474. Given the existence of the negotiations for the renewal of the MU contract, we find that this incident was a direct attempt by Mr. Hughes to bring pressure to bear on Umbro to control the prices of replica kit, particularly as regards the MU shirt. The fact that Mr. Hughes blurted out (incorrectly) the number of MU shirts he had ordered from Umbro was also, no doubt, an additional embarrassment as Mr. Ronnie accepted but, contrary to Allsports’ submissions, we do not see that as the main feature of the evening as far as Umbro was concerned. The main feature, in our view, was that Mr. Hughes of Allsports sought to put Umbro “on the spot,” in front of MU and its competitors, with a view to procuring action by Umbro to prevent or limit discounting of replica kit. That is confirmed by the fact that, later in the evening, Mr. Hughes said to Mr. Ronnie that he wanted to arrange a meeting with Mr. Ronnie in the near future to discuss discounting in relation to the MU shirt.
475. Moreover, we find that although Mr. Hughes no doubt had in mind primarily the MU shirt, his remarks related to replica kit generally. In the circumstances Umbro would have felt under pressure, not merely as regards the MU shirt, but also in relation to replica kit generally.

*Mr. Ronnie’s meeting with Mr. Guest on 31 May 2000*

476. Mr. Ronnie told us that in May 2000 Mr. Guest contacted him about the JD cap promotion to ask what Umbro “were going to do about getting the promotion stopped as JD were discounting the shirt” (paragraph 60 of Ronnie III). It appears to be common ground that this issue was raised by Mr. Guest during a lunch meeting on 31 May (Day 6, p. 125), despite the fact that in Guest I (paragraph 5) Mr. Guest denied contacting Mr. Ronnie about the JD promotion. It was not put to Mr. Ronnie that Mr. Guest had not said what Mr. Ronnie said he said (Day 6, p. 125). We find that words to the effect set out in paragraph

60 of Ronnie III were said. In cross-examination Mr. Guest said that he did not consider the JD promotion a big event in the overall scheme of things (Day 11, p. 110), although he accepted that it was unprecedented (Day 11, p. 111) and that he was surprised (p. 112). Mr. Guest said he was trying to find out if Umbro had been trying to bring JD back into replica kit; if they had, Mr. Guest would have put a stop to such projects as ProTraining and Choice of Champions (Day 11, p. 115).

477. In our view, Mr. Guest understated in evidence the importance to Allsports of the JD promotion. First, JD, like Allsports, were perceived as an “aspirational” retailer, not a committed discounter such as Sports Soccer. Such a promotion by a similarly upmarket retailer would be worrying to Allsports. Secondly, any further discounting in the market place at that time could easily have provoked further retaliation by JJB or Sports Soccer, with Allsports being caught in the crossfire: see Hughes I, paragraph 74. Thirdly, we have already seen from Mr. May’s evidence that there were many complaints from Allsports about the JD promotion.

478. In our judgment, the exchange with Mr. Guest on 31 May is a further example of Allsports raising a competitor’s pricing policy with Umbro, and plainly suggesting that Umbro should take action to stop promotional activity by a competitor. In addition, Mr. Guest’s remarks on this occasion would, at the least, have been taken by Umbro as a clear hint that, if Umbro did not react to the JD promotion on the England shirt, Allsports would be less likely to support Umbro’s branded business and/or might reduce its orders on replica kit. At this stage, on 31 May, the JD promotion on the England shirt had not yet ceased.

*The meeting of 2 June 2000 between Mr. Ronnie and Mr. Hughes*

479. In Ronnie III Mr. Ronnie describes the meeting of 2 June in these words, which are not materially challenged:

“41. During the meeting David Hughes mentioned that he had been in conversation with Manchester United regarding the price of the home shirt to be launched on 1 August 2000. I do not recollect if David Hughes told me who he had spoken to at Manchester United.

42. Towards the end of the meeting David Hughes called Tom Knight (Managing Director of First Sport) to ask him whether he had seen the promotion that JD Sports were running. This was an England shirt being sold at £39.99 with an Admiral cap worth about

£10. Tom Knight did not know that I was present as the call was not on speaker, and David did not mention it. I did not say anything. David told me about the content of the call afterwards. He said that Tom Knight had seen the promotion. David Hughes asked whether First Sport would be doing a similar promotion and Tom Knight confirmed that it would not.

43. I was under the impression that David Hughes was concerned that the price discounting that had been taking place by other retailers in respect of the England shirt would also be used in respect of the launch of the Manchester United home shirt a few months later.

44. After the telephone call with Tom Knight, David Hughes commented that he needed to “sort the situation out”. I understood this to mean that all:sports would lose margin if they could not ensure that the product would be sold at the recommended retail price. David Hughes then said he would call Dave Whelan of JJB and Mike Ashley of Sports Soccer to discuss the imminent launch of the Manchester United home shirt. I presumed that he meant the retail price of the shirts.

45. David Hughes asked me what Umbro were doing about the issue of the England promotion being run by JD Sports. He did not explicitly threaten that if I did not try to stop the promotion that all:sports would take action against Umbro. However, I did believe that if I did not do something then it would present a problem regarding Umbro’s relationship with all:sports and potentially Manchester United. I said that we would have to tell JD Sports that they were no longer a priority account, and that they might not be getting product. (...)

46. The discussion then moved onto MUFC. David Hughes said to me that “if Umbro cannot ensure that product will not be discounted it will affect Umbro re-signing the Manchester United deal”. David did not think that we would get the deal. As all:sports are the official retailer of MUFC, I know that they have a very close relationship with the club.

47. Immediately after the meeting I called Peter McGuigan and told him about the comment about the renegotiation of the MUFC deal. This meeting was around the time of the renegotiations of the MUFC deal, so I knew it was a sensitive issue.”

480. In cross-examination about Mr. Hughes’ remarks about the JD cap promotion, Mr. Ronnie described Mr. Hughes as “frustrated”, which would usually result in a “follow on” of some kind (Day 5, p. 91). Although Umbro itself was unhappy about the JD cap promotion both because it devalued the England shirt, and because it involved an “Admiral” cap, Mr.



Ronnie took Mr. Hughes' remarks about JD as "pressure" (Day 5, 91-94). It was pointed out that the statement in Ronnie II that Umbro were also concerned about JD's failure to support the Umbro brand had been omitted from Ronnie III (Day 5, pp. 96-97). Mr. Ronnie accepted that JD had been placed on "stop", not only because of the cap promotion but also because of JD's failure to increase their purchases of Umbro branded product (Day 6, p. 57). As regards Mr. Hughes' reference to Umbro not getting the MU contract, Mr. Ronnie maintained that he took Mr. Hughes' statement that the MU contract would not be renewed as "pressure", as if Mr. Hughes had some information on the point, and not just as a statement of opinion or fact (Day 5, pp. 14-19, 98-101).

481. Mr. Hughes in cross-examination did not challenge much of Mr. Ronnie's evidence but he denied that his remarks about the MU contract could be construed as pressure (Day 10, pp. 118 to 124). He accepted Mr. Knight's account of his telephone conversation (Day 10, pp. 130 to 133). He did not recall Mr. Ronnie saying that he would threaten JD, but Mr. Hughes accepted that he may have asked what Umbro was doing about the JD promotion (Day 10, pp. 135-136).

*Analysis of the meeting of 2 June*

482. There are four elements to Mr. Hughes' meeting with Mr. Ronnie on 2 June: (a) Mr. Hughes' general remarks about discounting and the future of the MU contract (b) The discussion of the JD cap promotion (c) Mr. Hughes' telephone call to Mr. Knight of Blacks/ First Sport and (d) the steps taken by Mr. Hughes to set up a meeting with Mr. Whelan and Mr. Ashley to fix the price of the MU shirt.

*- Mr. Hughes' remarks about discounting and the future of the MU contract*

483. At the meeting of 2 June Mr. Hughes reiterated to Mr. Ronnie his concern about discounting on replica shirts, and in particular the risk that such discounting would occur in relation to the MU shirt. In addition, Mr. Hughes commented to the effect that Umbro's failure to control pricing would affect the MU deal. Those matters would have maintained pressure on Umbro to see to it that discounting on replica shirts would not occur, given in particular Mr. Ronnie's impression, in our view reasonably held, that Mr. Hughes had a channel of communication to MU. At this stage, on the morning of 2 June, Sports Soccer had not yet implemented its agreement with Umbro to raise its prices on the England shirt

to £39.99. Indeed there is undisputed evidence that in the afternoon of 2 June Mr. Ronnie called Sports Soccer to insist that Sports Soccer raise its prices, and that a large number of telephone calls then passed between Sports Soccer and Mr. Ronnie and Mr. Attfield of Umbro on that subject: Ashley II, paragraphs 14-18.

484. In our judgment, Mr. Hughes' remarks about discounting to Mr. Ronnie at the meeting of 2 June reinforced the remarks he had already made at the Golf Day on 25 May and continued to maintain pressure on Umbro to take action to control or limit discounting on replica shirts, including the England shirt. Umbro did, in fact, maintain pressure on Sports Soccer to raise its prices on the England shirt later on 2 June and to adhere to these prices during Euro 2000.

485. Moreover, we find it difficult to believe that Mr. Hughes' remarks to Mr. Ronnie during the meeting on 2 June about the likely non-renewal of Umbro's contract with MU was merely the expression of an opinion or a statement of fact. While Mr. Hughes may genuinely have thought that Umbro might not get the MU contract, part of his reasons for conveying that opinion to Mr. Ronnie at that meeting was in our view to put pressure on Umbro to take steps to suppress discounting on replica kit, and in particular to ensure that MU's new shirt would not be discounted from £39.99 at launch. That that was Mr. Hughes' objective is in our view strongly corroborated by (i) the fact that Mr. Hughes raised with Mr. Ronnie his concerns about discounting of replica kit, in view in particular of the forthcoming launch of the MU shirt; (ii) the discussion of the JD cap promotion at the meeting; (iii) Mr. Hughes' telephone call during the meeting, in Mr. Ronnie's presence, to his competitor Mr. Knight of First Sport/ Blacks in order to ascertain the latter's views on the JD cap promotion, and in particular to find out whether First Sport/ Blacks was planning to do the same; and (iv) Mr. Hughes' intense concern around this time that discounting should be brought under control. Mr. Hughes' concern on the latter point is evidenced by (a) his remarks at the Golf Day dinner on May 25; (b) his activity in obtaining from Mr. Ronnie on 2 June Mr. Ashley's phone number and subsequently arranging the meeting for 8 June between Mr. Ashley, Mr. Whelan and Mr. Hughes with the express purpose of reaching an agreement to fix prices; and (c) his diary entries, particularly that of 5 June 2000 "Agree Man United and England prices with everyone including Mike Ashley (...) Sports trade cartel arrange a meeting regularly (...) Visit David Whelan."

486. Given, in particular, Mr. Hughes' contacts with MU, we think Mr. Ronnie would have taken Mr. Hughes' comments about the MU contract extremely seriously. Although we accept that Mr. Ronnie was plainly mistaken as to the number of Allsports shops that had an MU "shop within a shop" (Day 6, pp. 20 – 22), and that Allsports' title as the "official" MU retailer may be less grand than it sounds, we accept as genuine Mr. Ronnie's belief that Allsports had a close relationship with MU (Day 5, p. 22) and that Mr. Hughes might very well have some inside information as to the likely future of Umbro's contract.

*- Discussion of the JD cap promotion on 2 June*

487. We accept Mr. Ronnie's evidence – which is not materially challenged by Mr. Hughes – that during the meeting Mr. Hughes asked Mr. Ronnie what Umbro was going to do about the JD cap promotion on the England shirt. We also accept that Mr. Ronnie saw Mr. Hughes' remarks as pressure from Allsports to take steps vis-à-vis JD, in order to safeguard Umbro's relationship with Allsports, and potentially MU. We have no reason to doubt that, in response, Mr. Ronnie said to Mr. Hughes that he would have to tell JD that they were no longer a priority account and that they might not be getting product.

488. It is common ground that Umbro did in fact later limit supplies of the MU shirt at launch to JD. The evidence before the Tribunal is that that was partly because JD had discounted the England shirt, and partly because Umbro considered that JD did not sufficiently support the Umbro brand and needed to be "encouraged" to purchase more branded products (e.g. Day 6, pp. 57-58). However, in our view, Mr. Hughes' remarks about the JD cap promotion constituted further pressure on Umbro, to take action to control or limit discounting, specifically in relation to discounting on the England shirt.

489. It may be true that the fact that JD were giving away an "Admiral" cap with an "Umbro" product was a feature of the situation from Umbro's point of view (see Mr. Fellone, Day 7, p. 39) but it seems to us clear that Mr. Hughes' principal concern was the fact that the JD promotion on the England shirt was happening at all. We accept Mr. Ronnie's evidence (Ronnie III, paragraph 45, Day 5, p. 94) that he felt that that conversation constituted pressure by Mr. Hughes on Umbro to prevent discounting by JD on the England shirt.

490. It was suggested on behalf of Allsports in the course of cross-examination (Day 5, p. 93) that Mr. Hughes' question as to what Umbro was going to do about the JD promotion was

“a pretty fair question” given in particular that the promotion involved an “Admiral” rather than an Umbro cap. We reject that suggestion. Mr. Hughes’ comments about the JD cap promotion in our view represent a deliberate attempt by a retailer (A) to put pressure on his supplier (B) to take action to limit or restrain the competitive activity of another retailer (C). That in our view is plainly, at the very least, an attempt to prevent, restrict or distort competition within the meaning of the Chapter I prohibition and is capable of constituting evidence of a concerted practice between A and B to that effect.

*- Mr. Hughes’ conversation with Mr. Knight on 2 June*

491. Allsports, in its written submissions to the OFT of 8 January 2003, at pages 21 to 22, stated that Mr. Hughes (who had presumably been consulted on this point) “did not recall” his phone call to Mr. Knight about the JD cap promotion which took place in Mr. Ronnie’s presence during the meeting of 2 June 2003.

492. Mr. Hughes now accepts (Hughes I, paragraph 74) that he made this phone call to Mr. Knight. He tells us that his concern was “that this sort of behaviour [by JD] would encourage the general tendency of Sports Soccer to discount, to which JJB might react.” We accept Mr. Ronnie’s evidence that Mr. Hughes asked Mr. Knight whether First Sport would be doing a similar promotion, and Mr. Knight confirmed that they would not, but would be selling at £39.99. That evidence is confirmed by Mr. Hughes (Day 10, pp. 130-133) and by Mr. Knight’s witness statement of 29 September 2003, at paragraph 4.

493. In our judgment, the fact that Mr. Hughes made that call to Mr. Knight in Mr. Ronnie’s presence would again communicate to Mr. Ronnie the extent of Allsports’ disquiet about discounting, including on the England shirt. It also demonstrates that Mr. Hughes had no compunction in contacting directly one of his competitors, and seeking and obtaining information about that competitor’s pricing intentions.

*- Mr. Hughes’ intentions regarding the MU shirt*

494. It is further common ground that at the meeting on 2 June Mr. Hughes told Mr. Ronnie of his intention to arrange a meeting between himself, Mr. Whelan and Mr. Ashley with a view to discussing the pricing of the MU shirt. Mr. Hughes himself says that he arranged the meeting with Mr. Ronnie so as to obtain Mr. Ashley’s phone number (Hughes I,

paragraph 69). We find that he must have obtained that phone number either at the meeting or shortly afterwards, since it is common ground that Mr. Hughes called Mr. Ashley in the afternoon of 2 June. It was also at this meeting that Mr. Hughes asked Mr. Ronnie for a sample of the new MU shirt which he intended to use during his meeting with Messrs. Whelan and Ashley.

495. Although these events are also part of the prelude to the alleged MU Agreement discussed later in this judgment, they are further evidence of a consistent pattern in which the actions of Allsports around this time are directed to conveying to Umbro Allsports' concern about discounting, and the need for action to be taken to control it.

*- Mr. Hughes' concern about the England shirts*

496. Mr. Hughes maintained in Hughes I (paragraph 63) and in evidence (Day 10, p. 103) that in late May/ early June 2000 "The England shirts were simply not on my radar", since he was then more concerned about the Predator boot and the MU shirt. Mr. Hughes also points out that, at this time, the England shirt was selling well as far as Allsports was concerned (Hughes I, paragraph 60).

497. We do not accept that discounting of the England shirt was not on his "radar", as Mr. Hughes puts it. At the meeting of 2 June, Mr. Hughes specifically discussed the JD cap promotion on the England shirt, and went so far as to telephone his competitor Mr. Knight at Blacks/ First Sport about it. Furthermore Mr. Hughes' diary entry for 5 June refers to his intention to contact Mr. Whelan and Mr. Ashley about "MU + England". Even if Allsports' sales of the England shirt were satisfactory in May 2000, some time before the Euro tournament, there was no certainty that that would continue if discounting occurred *immediately before or during* the Euro tournament, once Allsports' major order had been booked in. Moreover, there is abundant evidence that Mr. Hughes' concern was about discounting in general and the risk that the more discounting there was, the more JJB and Sports Soccer would discount against each other: see e.g. paragraph 74 of Hughes I. Accordingly, we do not accept that Mr. Hughes was unconcerned about discounting on the England shirt during Euro 2000.

### C. SUMMARY OF CONCLUSIONS ABOUT COMPLAINTS AND PRESSURE FROM ALLSPORTS

498. We have already found that from at least 1999 Allsports was extremely concerned about discounting by Sports Soccer and JJB. That concern became intense by May 2000. Against that background the following matters may be highlighted from the findings set out above:

1. The letter of 20 April 1999 shows that Allsports took the view that Umbro should take steps to control the discounting of replica kit and actively expressed that view to Umbro. The letter also demonstrates Allsports' willingness to reduce orders on the basis that Umbro was not taking sufficient action to control or limit discounting. There is no evidence of a later change of strategy.
2. Allsports continued in 2000 actively to express to Umbro its view that Umbro should take steps to control the discounting of replica kit, as demonstrated by (i) Mr. Hughes' and Mr. Guest's comments to Mr. Fellone and Mr. Ronnie about discounting by Sports Soccer, including Mr. Guest's suggestion that Umbro should limit supplies to Sports Soccer; (ii) Mr. Hughes' remarks at the Golf Day dinner and in his meeting with Mr. Ronnie on 2 June 2000; and (iii) Mr. Guest's comments about JD on 31 May 2000.
3. There was underlying understanding between Allsports and Umbro that Allsports would work with Umbro to develop upmarket branded products, on the basis that Umbro would, so far as it could, limit or control discounting on premium products such as replica kit. It was made plain to Umbro by Mr. Guest that that relationship would be in jeopardy if Umbro were not seen to be taking steps to "protect their licensed product" – i.e. limit or control discounting of replica kit.
4. The foregoing matters would, in the Spring/ Summer of 2000, have maintained commercial pressure on Umbro to be seen to be taking steps to limit discounting on replica kit, notably so as (a) to avoid the cash flow problems that might arise from Allsports reducing its orders or delaying "booking in"; (b) to avoid any criticism by Allsports that might get back to MU; and (c) not to jeopardise its relationship with Allsports in the development of branded products. In our view that commercial pressure existed, notwithstanding the absence of any material documentary record.
5. Specific examples of Allsports seeking to incite, or put pressure on, Umbro to limit or control the discounting of replica kit are (i) Mr. Hughes' remarks at the Golf Day

dinner on 25 May; (ii) Mr. Guest's remarks about the JD cap promotion on 31 May; and (iii) Mr. Hughes' meeting with Mr. Ronnie of 2 June.

6. Although those incidents occurred after Umbro had reached agreement with Sports Soccer to raise the price of the England shirt, they equally occurred before that agreement had been implemented on 2 June 2000. In our judgment those specific incidents would have had the effect of maintaining pressure on Umbro to avoid discounting on replica kit during the Euro 2000 tournament.

7. Allsports specifically complained or commented to Umbro and/ or asked what Umbro was doing about JD's promotion on the England shirt. Those complaints were made at all relevant levels, namely (i) through Mr. Guest to Mr. Ronnie at the meeting of 31 May 2000; (ii) through Mr. Hughes to Mr. Ronnie at the meeting of 2 June; and (iii) through Ms. Charnock to Mr. May. In our judgment the effect of those complaints could have been to maintain pressure on Umbro to take action as regards the JD promotion. Those complaints all took place before the JD promotion ceased with effect from 3 June, and before Umbro put a 'P stop' on JD's account in substantial part to punish JD for discounting the England shirt.

8. It is not now disputed that during the meeting of 2 June Mr. Hughes telephoned Mr. Knight of Black's/ First Sport and ascertained from Mr. Knight what his pricing intentions were on the England shirt in the light of the JD promotion.

#### D. THE EFFECT OF ALLSPORTS' PRESSURE ON UMBRO

499. We have already found that in the Spring and early Summer of 2000 Umbro felt that it was under pressure from both JJB and MU to take some action to limit or control discounting in the High Street, particularly by Sports Soccer. We have also found that Umbro itself did not wish to see discounting on what it considered to be its "statement products". We also note that Ronnie III emphasises the pressure from JJB, but makes less reference to Allsports. Ronnie IV, although detailing Allsports' complaints and pressure, states that the pressure was "perceived" because nothing was explicitly stated, and that such pressure "hung unspoken in the background". Paragraph 17 of Ronnie IV does not specifically mention Allsports (Day 6, p. 70). There is evidence that Mr. Ashley did not specifically recall Mr. Ronnie mentioning to him that Umbro was under pressure from Allsports (Sports

Soccer's representations to the OFT 9 January 2003, p. 117), although Mr. Ashley was not specifically asked about that.

500. Nonetheless, making due allowance for those factors, we find on the evidence that general complaints and pressure from Allsports, as reflected notably in Mr. Guest's stated opposition to discounting, Umbro's knowledge that Allsports' willingness to work with Umbro on premium branded products was conditional upon Umbro "protecting" replica kit, and in the complaints made and observations made to Umbro by Mr. Hughes and Mr. Guest, were material to Umbro's decision to put pressure on Sports Soccer to maintain High Street prices on replica kit, albeit not as important as the pressure from JJB and MU already referred to.

501. In relation to the specific incidents referred to above, namely the Allsports Golf Day, Mr. Ronnie's meeting with Mr. Guest on 31 May and Mr. Hughes' meeting with Mr. Ronnie on 2 June, we find that each of those matters would have operated on Umbro's mind to reinforce the need to ensure that Sports Soccer raised its prices on the England shirt, and that discounting did not take place during Euro 2000.

502. Finally, in relation to the complaints or comments about the JD cap promotion by Mr. Hughes (2 June), Mr. Guest (31 May) and Ms. Charnock (last two weeks of May) we find that those complaints or comments would equally have operated on Umbro's mind to reinforce the need to maintain pressure on JD to raise prices, and to take action against JD in respect of its promotion on the England shirt.

### **XIII THE EVIDENCE ON THE ENGLAND AGREEMENT**

503. We now turn to consider the three strands of evidence regarding the England Agreement. In sub-section A we deal with Mr. Ashley's evidence to the OFT in 2001. We deal with the relevant documents in sub-section B and with the evidence as to telephone conversations in sub-section C.

#### **A. MR ASHLEY'S STATEMENTS TO THE OFT IN 2001**

*The meeting of 30 March 2001*



504. At a meeting with the OFT on 30 March 2001, before any investigations had commenced, Mr. Ashley said that he had attended a meeting with Mr. Whelan and Mr. Hughes<sup>8</sup> to agree the price at which they would all retail replica England shirts. In Ashley I, Mr. Ashley points out that the reference to the England shirt should have been a reference to the MU shirt, and that he described the arrangements relating to the England shirt at his next meeting with the OFT on 13 August 2001. A further clarification to that effect was made in Sports Soccer's written representations of 9 July 2002 (paragraphs 3.2.2-3.2.3).
505. It is not disputed that the only meeting which took place between Mr. Ashley, Mr. Whelan and Mr. Hughes was in relation to the MU shirt. We accept that Mr. Ashley's reference to the England shirt at the meeting with the OFT of 13 March 2001 was a simple slip, as he maintained in cross-examination (e.g. Day 1, p. 60, Day 2 p. 119), and does not affect Mr. Ashley's general credibility as a witness.
506. We note in passing that it was suggested on behalf of Allsports that Mr. Ashley had misled the OFT on 30 March 2001 by stating, according to paragraph 7 of the note of that meeting, that his business was "shrinking by 30 – 40%" whereas, at this time, Sports Soccer's business was expanding. Mr. Ashley maintained in evidence that parts of his business were shrinking because of difficulties in obtaining supplies of certain brands and cited his difficulty in obtaining supplies of Liverpool shirts from Reebok, among others (Day 2, pp. 120-129). In our judgment, in the light of his explanations, Mr. Ashley was not seeking to convey to the OFT that his entire business was shrinking since, at that time, it would have been evident to an outside observer that, overall, Sports Soccer was expanding. In our view Mr. Ashley was seeking to convey, perhaps with a degree of hyperbole, the difficulties which, as he genuinely saw it, parts of his business, including replica kit, were experiencing at the time. We reject the suggestion by Allsports (Day 2, p. 126), that Mr. Ashley was lying to the OFT.

*The meeting of 13 August 2001*

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<sup>8</sup> The meeting note refers to "David Wren" and "David Hyde" but it is not disputed that Mr. Whelan and Mr. Hughes are referred to, the note taker having transcribed the names incorrectly.

507. At Mr. Ashley's next meeting with the OFT on 13 August 2001 Christiane Kent of the OFT reverted to Sports Soccer's earlier allegations about the England shirt. The OFT's note says this at paragraphs 10 and 11:

"10. CK referred to SS' allegations in relation to the England shirt and the meeting that had taken place between the retailers. MA said it was very difficult to recollect the precise events. As he recalled matters there had not been a meeting as such. Chris Ronnie of Umbro had contacted MA sometime before the European Championships, probably May/June of last year, saying that he, Chris Ronnie, had contacted named people at other retailers who had agreed to price the then England home shirt at £39.99. MA could not recall the precise details of the conversations but thought that the names referred to by Chris Ronnie included Duncan Sharp of JJB Sports, Tom Knight of Blacks Leisure, David Hughes of Allsports and possibly Steve Makin from JD Sports on the latter he was particularly unsure. The agreement to retail at £39.99 was for so long as the England team was in the tournament. MA had confirmed to Chris Ronnie that SS would "conform" and retail the England shirt for £39.99. This meant that SS raised its price for the England shirt from £30/ £32/ £34 (MA could not remember precisely the price at which the England shirt was being retailed by SS at the time) to £39.99. Tom Knight of Blacks Leisure had contacted SS to confirm whether what he had heard from Umbro was right i.e. that SS would be conforming. SS was renowned in the industry for discounting hence, MA assumes, Tom Knight wishing to hear the confirmation from the "horse's mouth". MA gave that confirmation to Paul [sic, should read Tom] Knight.

11. CK enquired why SS had agreed to Umbro's request. MA said that he could not remember the precise nature of the pressure exerted, but it would be the usual threats along the lines that SS would not get supplies of particular Umbro products or would not receive full delivery. The way RPM operated was that it was across product lines i.e. if SS did not agree RPM for the England shirt, Umbro might not supply their latest line of sportswear."

508. In cross-examination on the note of the meeting of 13 August 2001 it was suggested to Mr. Ashley by counsel for JJB that, according to the note, when Mr. Ronnie asked Sports Soccer to sell the England shirt at £39.99, Mr. Ronnie told Mr. Ashley that he had already reached an agreement with other retailers, including JJB and Allsports, to price the England shirt at £39.99 for as long as the England team was in the tournament, and that Mr. Ashley then agreed to conform to that agreement. Mr. Ashley confirmed in evidence that that interpretation was correct, and that that was his recollection (Day 1, pp. 61 to 63, 83 to 84). Mr. Ashley did not accept that there was any "disconnect" between that proposition and the

fact that he had made an agreement with Umbro on 24 May 2000, and maintained that these matters were “absolutely linked” (Day 1, p. 85, Day 3, p. 119). He accepted that Sports Soccer’s agreement with Umbro on 24 May is not specifically mentioned in the OFT note of the meeting of 13 August 2001, and that when giving evidence to the Tribunal on 8 March 2004 he had no specific recollection of what Mr. Ronnie had said at the meeting of 24 May 2000 (Day 1, pp. 86-91). Mr. Ashley was also reluctant to accept that the passages in Ashley II referring to the meeting of 24 May 2000 had been prompted by someone drawing his attention to the note of that meeting (Day 1, pp. 67-68, 77, 79).

509. Counsel for Allsports did not directly challenge paragraph 10 of the note of 13 August 2001 (Day 2, pages 143-144). Indeed, Allsports appeared to accept that the deal done between Mr. Ronnie and Mr. Ashley was that he (Mr. Ashley) agreed to do what everyone else was doing. As to paragraph 11, it was, however, put to Mr. Ashley that it was easier for Umbro to pretend that they were getting “heat” from other retailers than to admit that the “heat” was coming from them. Mr. Ashley’s response was that that would have been a very dangerous strategy since if the other retailers then did discount, Umbro would look ridiculous (Day 2, pp. 143-145).

#### *Analysis*

510. In our judgment, what Mr. Ashley said to the OFT on 13 August 2001 is credible evidence, coming into being spontaneously, before the OFT had obtained any documents or witness statements, that in the course of prevailing upon Sports Soccer to fix prices Mr. Ronnie told Mr. Ashley that he (Mr. Ronnie) had procured an agreement with JJB, Blacks, Allsports and possibly JD to price the England home shirt at £39.99 during Euro 2000. We find, on the basis of the OFT’s note and Mr. Ashley’s evidence in the witness box, that Mr. Ronnie did indeed say words to that effect to Mr. Ashley. That is further confirmed by the largely undisputed evidence that, when it was asked by Umbro to fix prices, Sports Soccer sought from Umbro information and assurances as to other retailer’s intentions: see below. That, in our view, is the context in which Mr. Ronnie said what he did to Mr. Ashley.

511. We reject JJB’s criticisms of the credibility of this part of Mr. Ashley’s evidence. It is unlikely, in our view, that Mr. Ashley would, unprompted, have told the OFT in August 2001 what he remembered Mr. Ronnie as saying if Mr. Ronnie had not in fact said anything

of the kind. We attach no importance to the fact that the OFT's note of that meeting does not specifically mention Sports Soccer's agreement with Umbro on 24 May 2000: the note itself says that Mr. Ashley told the OFT that Sports Soccer would "conform", thereby accepting that Sports Soccer *had* made an agreement with Umbro. We accept that Mr. Ashley probably had been shown the note of the meeting of 24 May 2000 when preparing Ashley II, but we do not think he can be criticised on that account. It is true that when giving evidence he did not recollect having previously seen that note, but we find that unsurprising since Mr. Ashley himself operates on the basis of oral contacts, not documents. Nor do we accept that there is any material inconsistency between what Mr. Ashley told the OFT on 13 August 2001 and his evidence in Ashley II about the meeting of 24 May. The undisputed fact that Umbro made an agreement with Sports Soccer on 24 May is not inconsistent with Umbro having also made an agreement with other named retailers.

512. We note also that Mr. Ashley's evidence to the OFT on 13 August 2001 has since been confirmed by the fact that it is now established that Mr. Knight of Blacks/ First Sport did indeed telephone Mr. Ashley direct on the afternoon of 2 June 2000 to seek confirmation that Sports Soccer was raising its prices, as Mr. Ashley told the OFT he had at the meeting of 13 August 2001.
513. Although admittedly hearsay, Mr. Ashley's evidence to the OFT of what Mr. Ronnie told him is also in our judgment credible evidence that Mr. Ronnie had in fact contacted named people at other retailers who had agreed to price the England shirt at £39.99 as long as England was in the Euro 2000 tournament, the named people being Mr. Sharpe of JJB, Mr. Hughes of Allsports, Mr. Knight of Blacks and possibly Mr. Makin of JD.
514. It seems to us that we are entitled to accept that hearsay evidence as evidence of the underlying fact stated, unless there is some reason to believe either that Mr. Ashley misrepresented what Mr. Ronnie had said to him, or that what Mr. Ronnie reportedly said was itself inaccurate or for some reason was unlikely to be true.
515. We see no reason to find that Mr. Ashley misrepresented to the OFT what Mr. Ronnie said. As we have just indicated, we find that Mr. Ronnie said to Mr. Ashley what Mr. Ashley

says he said. Mr. Ronnie's evidence to the Tribunal, considered later in this judgment, is to the same effect.

516. As to whether what Mr. Ronnie said to Mr. Ashley was inaccurate or untrue, that is of course one of the central issues in the case. However as we find below, what Mr. Ashley said in August 2001 Mr. Ronnie had told him in May/ June 2000 is consistent with other evidence in this case, to which we now turn.

## B. THE RELEVANT DOCUMENTS

517. There are three documents relevant to the issues we have to decide.

*(1) Mr. Fellone's fax to Debenhams dated 2 June 2000*

518. A fax dated 2 June 2000 timed at 12.39 hours from Mr. Fellone of Umbro to Mr. Ryman of Debenhams (trading as Champion) states:

“Further to our conversation yesterday regarding our licensed kits, the other retailers including John Lewis have agreed to our requests which will take effect from opening of business Saturday 3<sup>rd</sup> June.

It is imperative that I speak with you this afternoon to ensure that Champion Sports will fall in line with the above.”

This fax confirms, first, that Mr. Fellone had spoken to Debenhams, apparently on 1 June 2000, see Fellone III, paragraphs 27 and 31. Indeed, that is not disputed. Debenhams itself says that in a phone call on or about 22 May Mr. Fellone said that “all the other retailers” had agreed to raise their prices for the England shirt before 3 June 2000 (paragraph 415 (c) of the decision).

519. The fact that Mr. Fellone stated to Debenhams that “the other retailers including John Lewis have agreed to our requests which will take effect from opening of business Saturday 3 June” is in our view at least indirect evidence that “the other retailers” had indeed so agreed to Umbro's “request.” It is not disputed that that request was to price at £39.99. It is now known that Sports Soccer, Blacks and JD had all agreed to raise their prices to £39.99 with effect from the opening of business on Saturday 3 June, as Mr. Fellone states in his fax sent the day before.

520. The phrase “the other retailers” used by Mr. Fellone is wide enough to include JJB and Allsports. Although those two retailers were *already* pricing at £39.99, Mr. Fellone’s fax is consistent with those retailers both having each reached an understanding with Umbro, or at the least given Umbro to understand, that they would not discount during Euro 2000.

521. As to the mention of John Lewis, the OFT’s explanation, to the effect that John Lewis’ agreement was conditional on Debenhams’ agreement, which was never forthcoming, has not been disputed by the appellants.

*(2) Mr. Marsh’s fax to MU dated 6 June 2000*

522. Mr. Draper’s fax to Umbro of 25 May 2000 referred to discounting of replica shirts by, among others, Debenhams and Sports Soccer. Mr. Draper asked for “written confirmation of the circumstances surrounding the recent pricing and promotions practices of some of your customers as it relates to replica shirts” and “...can you please advise what you understand Sports Soccer’s position is with regard to pricing new product on the replica category”. Mr. Draper also asked “What assurances can you now give [MU] that our stance is still the best one to adopt in the light of the activities highlighted?”

523. Mr. Marsh replied on 6 June:

“Following receipt of your fax, I am able to confirm that no discussions have taken place regarding the utilisation of the Club’s new home jersey in any such promotions.

As you know, our policy has always been, and will continue to be, that we do not utilise premium products such as replica jerseys for promotions of this nature. In essence, we have always managed to use alternative items from either within the product portfolio or by developing ‘exclusive’ merchandise.

As stated during our conversation, discussions had already commenced regarding the issue of pricing with both Debenhams and Sport[s]...Soccer. We have subsequently received assurances from Sport[s]...Soccer and JJB that they will revise their current pricing of jerseys to reflect a price point which falls in line with market conditions.

Our discussions with Debenhams are ongoing and as they form part of your retail partner strategy, I would appreciate any assistance you can lend to assist us in resolving this issue.

I trust this provides you with the assurances you are seeking.”

524. In our judgment the inference from the fax of 6 June 2000 is that Umbro had by then received assurances from both Sports Soccer and JJB to the effect they would “revise their

current pricing of jerseys” so as to reflect High Street prices, which is what the euphemism “a price point which falls in line with market conditions” is no doubt intended to mean. Although the reference to JJB’s “current pricing” was apparently incorrect, since JJB’s discounting had, so far as we know, ceased on 23 April, it is nonetheless in our judgment a reasonable inference from this document that JJB had in fact given Umbro an assurance to the effect that JJB would not discount from the £39.99 price point. The reference to “jerseys” is wide enough to include the England shirts. This document is thus consistent with the case made by the OFT against JJB. JJB did not comment on this document in its submissions to the Tribunal.

525. The document also illustrates one of the principal motives that Umbro would have had for seeking such an assurance from JJB, namely to demonstrate to MU that it had taken all possible steps to ensure that replica kit would not be discounted. Mr. Prothero in his evidence underlines the importance that Umbro attached to being seen to take active steps to meet MU’s concern in the Spring and Summer of 2000 (see e.g. paragraph 9 of Mr. Prothero’s witness statement of 12 July 2002).

526. We accept, however, that this document is not evidence against Allsports.

*(3) Umbro’s MMR for May 2000*

527. Umbro’s May MMR states:

“There has been a major step forward in the retail price of England the launch of Manchester United. JJB, Sports Soccer, First Sport, JD Sports and Allsports have all agreed to retail their adult shirts at £39.99 This is following England being sold at various retail prices through April and May ranging from £24.99 to £29.99, £32.99 or £32.99 with a free £9.99 cap at JD Sports.

Following a month of dialogue with all the above accounts, Umbro cannot allow our statement product to be discounted.

It has also been decided that meetings will now take place with JD Sports and First Sport to advise those accounts that unless Umbro are now supported across other product categories, it will effect their deliveries of Manchester United home, away and third shirts.

We, as a business, cannot allow these three accounts to buy licensed product and nothing else.”

528. There is an issue as to whether Umbro's MMR for May 2000 refers to an agreement on the England shirt at all, or whether it refers simply to the alleged MU agreement. That issue arises primarily because, at paragraph 77 of Ronnie I, Mr. Ronnie stated that Umbro's MMR for May 2000 referred to an agreement on the retail price of the MU shirt, and was based on information supplied by Mr. Ashley following the meeting between him, Mr. Whelan and Mr. Hughes around midday on 8 June 2000. Paragraph 14 of Ronnie I suggests that the "month of dialogue" referred to in this MMR referred to discussions with JD about the JD cap promotion. Following questions from the OFT on these points, in Ronnie II Mr. Ronnie said he could not recall exactly when he prepared this MMR and that "my diary does not assist me". Paragraphs 18 to 22 of Ronnie II then go on to say that this MMR refers to the MU shirt, and was based on what Mr. Ashley and Mr. Hughes reported to Mr. Ronnie following the meeting on 8 June. There is a reference at paragraph 128 of Ronnie II to the "month of dialogue" being related to "discussions which had taken place independently between Umbro and the various individual retailers about the prices at which they were selling the England shirts", but the words, "[Umbro] cannot allow our statement product to be discounted" is said to relate to JD's cap promotion.

529. However, in paragraph 67 of Ronnie III, Mr. Ronnie expressly states that the May MMR relates to *both* the England shirt and MU agreements and that the first sentence should read "There has been a major step forward in the retail price of England *and* the launch of Manchester United". Mr. Ronnie states in Ronnie III that in this MMR he was expressing his hope that the pressure and complaints that Umbro had been dealing with during May "would now stop or reduce following the agreement reached on the England home shirt, and the agreement between the retailers on the retail price of the Manchester United adult home shirt". Mr. Ronnie maintains that he prepared the May MMR on the evening of 8 June, after his meeting with Mr. Ashley (paragraph 66 of Ronnie III).

530. In answer to counsel for JJB, Mr. Ronnie said that Umbro's May MMR was prepared on the evening of 8 June, following his meeting with Mr. Ashley, and was based exclusively on what Mr. Ashley told him about the meeting that had occurred on that day (Day 4, pp. 76-77). JJB's closing submissions do not comment on Umbro's May MMR.

531. Mr. Ronnie was extensively cross-examined about Umbro's May MMR by counsel for Allsports (Day 6, pp. 128 to 161). It was suggested that the May MMR should read "a



major step forward in the price of England/ Manchester United”. It was also suggested that the May MMR related entirely to the England Agreement, and merely contained an *assumption* about Allsports’ pricing intentions. Mr. Ronnie was also asked how, if the agreement related to MU, there was a reference to JD and First Sport.

532. In answer to those questions, Mr. Ronnie said that in the May MMR he was referring to both the England and MU shirts, but that the key agreement related to the £39.99 price point (Day 6, pp. 130-131). He was not, however, able to explain how and when the information in the May MMR about JD Sports and First Sport came to his attention (Day 6, p. 132). Mr. Ronnie also stated that this MMR did not relate solely to the England and MU Agreement (p. 133). He could not remember when he wrote the MMR (e.g. Day 6, p. 132, 134, 136). Mr. Ronnie was also asked why, having referred to proposed meetings with JD and First Sport to advise them that their deliveries of the shirts would be affected unless they supplied Umbro across other product categories, he then referred to “these *three* accounts” (pp. 154-159). He answered that he would have meant Allsports (p. 156) but denied that there was any intention to put a P-stop on Allsports’ account (Day 6, pp. 157-158).

533. Mr. Ronnie’s answers to a number of these questions were in our view unconvincing (e.g. Day 6, pp. 130-132, 142-147, 149-150). Similarly we found unconvincing his assertions at paragraph 77 of Ronnie I that the May MMR related only to the MU agreement, and at paragraphs 22 and 68 of Ronnie II that the information in the May MMR was derived entirely from Mr. Ashley or Mr. Hughes.

534. It is unfortunate that Mr. Ronnie stated in Ronnie I and II that his diary “did not assist” in determining when he wrote the May MMR since, as Allsports pointed out, there is an entry in Mr. Ronnie’s diary for 7 June at 2:30 p.m. which says “monthly report” and a further entry for 8 June 9:00 a.m. which states “monthly report”, which suggests that Mr. Ronnie had reserved time in his diary to write the report on either Wednesday 7 June or before his meeting with Mr. Ashley on the afternoon of 8 June. The report itself bears the date 8 June, another matter that was not referred to in Ronnie I and II, nor was the page bearing that date exhibited to those statements. That evidence suggests that the report was written or at least completed on 8 June (see Day 6, pp. 133 to 137). Mr. Ronnie’s evidence was that his meeting on that day with Mr. Ashley started at 3 p.m., and lasted into the early part

of the evening. Mr. Ronnie's diary suggests that in the evening he had an engagement with Sports Soccer, either in Dunstable or in London (Day 6, p. 41-51). In those circumstances it seems to us open to question whether Mr. Ronnie wrote his report on the evening of 8 June, although it is not impossible that he finalised it in the light of what Mr. Ashley told him on the afternoon of that day.

535. We do not need, however, to determine precisely when Mr. Ronnie wrote the MMR for May 2000. In our judgment, it is plain on the face of the document that it refers to an agreement which includes the England shirt: "there has been a major step forward in the retail price of England". It is not suggested that the meeting on 8 June referred to the England shirt: that meeting related to the MU shirt. It has never been suggested, and the OFT has not found, that JD were a party to the MU agreement allegedly made on 8 June. The references to First Sport and JD in the May MMR in our judgment naturally refer to the agreements already reached with those companies, and implemented on 2 June, to which we have already referred. The third sentence of the MMR expressly refers to the prices on the England shirt that were prevailing in May 2000, with the implication that those prices had since been raised to £39.99, as was indeed the case. "The month of dialogue" referred to in the second paragraph of the MMR would naturally refer to a dialogue taking place during May 2000, which encompasses the period preceding the raising of the prices of the England shirt on 2/ 3 June. In our judgment, on a plain reading of this MMR, it relates to an agreement on the England shirt. It follows that the passages in Ronnie I and Ronnie II dealing with this document are inaccurate. So too in our judgment is Umbro's answer relating to the OFT's request for information of 13 September 2002 (see Day 6, p. 149).

536. Umbro's May MMR contains the statement:

"JJB, Sports Soccer, First Sport, JD Sports and Allsports have all agreed to retail their adult shirts at £39.99".

537. That in our judgment is strong *prima facie* evidence of the facts stated, namely that

"JJB, Sports Soccer, First Sport, JD Sports and Allsports *have all agreed* to retail their adult shirts at £39.99" (emphasis added)

538. The agreement as there expressed is an agreement to sell "adult shirts" at £39.99. In our judgment that necessarily includes the England shirts. The way the MMR is expressed,

however, is wider than the England shirts. That is reflected in the ungrammatical first sentence, which refers to “a major step forward in the retail price of England the launch of Manchester United”. In our view, the author of this report, Mr. Ronnie, thought that the agreement referred to was applicable to “adult shirts” and was thus applicable, or would be likely to be applied, in relation to the MU launch as well. That was also his evidence in the witness box (Day 6, pp. 130-131). We thus accept the submission on behalf of Allsports that Umbro’s May MMR does relate to the England shirts, but we do not accept Allsports’ further submission that this document relates *only* to the England shirts.

539. Umbro’s May MMR is correct in stating that discounting on the England shirt had ceased: Umbro’s “statement product” was no longer being discounted. Equally, it is not disputed that three out of the five companies mentioned (Sports Soccer, Blacks, JD) *had* agreed to retail the adult England shirt at £39.99.

540. It would not seem to us natural for Mr. Ronnie to state in this document that JJB and Allsports had agreed if one or both of those companies had not done so, nor for him to say that the named companies had “all” agreed if either or both of JJB or Allsports had not done so. In our view the natural inference from the document is that JJB and Allsports had “agreed” to £39.99.

541. The alternative possibilities are that Mr. Ronnie was exaggerating or mistaken, or that he was simply making it up. Whether any of those is a plausible explanation depends on how far the May MMR is consistent with other available evidence.

542. In that regard we find that Umbro’s May MMR is consistent with, indeed corresponds closely to, Mr. Ashley’s evidence discussed above, given to the OFT in August 2001, at a time when Umbro’s May MMR had not yet come to light. Mr. Ashley’s evidence equally identified JJB and Allsports, with First Sport and JD, as parties to an agreement on the England shirt, to which Sports Soccer agreed to conform.

543. Umbro’s May MMR is equally consistent with Mr. Fellone’s fax to Debenhams of 2 June 2000. As regards JJB, Umbro’s May MMR is also consistent with Mr. Marsh’s fax to MU of 6 June 2000, considered above.

544. In our view, Umbro's May MMR is also consistent with, and corroborates, the evidence as to telephone conversations which we consider below. In our view it is significant that the agreement referred to in the MMR is said to follow "a month of dialogue with all the above accounts". According to the MMR that dialogue concerned the discounting of Umbro's "statement product" i.e. replica shirts. There is before the Tribunal ample evidence that during May and early June 2000 Umbro did indeed conduct a dialogue with the retailers in question with a view to establishing a retail price of £39.99 for replica shirts. It is not disputed that such a dialogue was conducted with Sports Soccer, JD, and Blacks (and in the event unsuccessfully with Debenhams and John Lewis). The evidence discussed in the next section is to the effect that that dialogue extended to JJB and Allsports and that JJB, in particular, was closely involved. Indeed, given JJB's position as the leading retailer, and Umbro's largest customer, it is hard to imagine how any meaningful "dialogue" about replica shirts in the early summer of 2000 could take place at all without involving JJB. Similarly, given the fact that Allsports was the second largest seller of replica shirts, and that close personal relations existed between the senior executives of both companies, it would be surprising in our view if no dialogue had taken place between Umbro and Allsports.

545. At the very least, Umbro's May MMR is cogent evidence that each of the named companies had communicated their intended retail selling price to Umbro, namely £39.99, and had intimated to Umbro that that was the price they proposed to maintain.

546. In admittedly a slightly different context, JJB submitted to us that Umbro's MMRs, as internal documents for the eyes only of senior management, would be likely to contain the "unvarnished truth". The totality of the evidence considered in this judgment leads us to the conclusion that the words used in the May MMR, namely that named retailers, including JJB and Allsports, had "all agreed" to price at £39.99, were not mistaken, inaccurate, or mere assertion.

### C. THE TELEPHONE CONVERSATIONS

547. The central issue in this case is whether the England Agreement came into being as a result of telephone conversations taking place between Mr. Ronnie and, in particular, JJB and Allsports respectively. Our first task is to marshal the witness evidence.

*Mr. Ronnie's evidence as to his phone calls to JJB and Allsports and related issues regarding the England Agreement*

548. The evidence given at different times by Mr. Ronnie as to the phone calls he allegedly made to JJB and Allsports needs to be set out in the chronological sequence in which the evidence was given.

*- Ronnie I (17 January 2002)*

549. Ronnie I was prepared in connection with Umbro's application for leniency and sent unsigned to the OFT on 17 January 2002. Although many parts of Ronnie I reflect the evidence that Mr. Ronnie has given in later witness statements, what is material for present purposes is that Ronnie I makes no reference to an agreement to which JJB and Allsports were a party concerning the England shirt. There is no mention of particular telephone contacts between Umbro, JJB and Allsports or, indeed, any other retailer.

550. On the other hand, Ronnie I does state, in the context of the agreement with Sports Soccer of 24 May 2000, that Umbro "were getting pressure from the retailers especially JJB and all:sports" (paragraph 34), that Allsports and JJB had contacted Umbro with a view to getting the JD cap promotion stopped (paragraph 12), and that there was pressure from JJB to do something about discounting by Sports Soccer (paragraphs 5 to 7).

551. The OFT in their letter to Umbro of Tuesday 29 January 2002 considered that Ronnie I was vague and contained material inaccuracies in a number of respects, including at paragraphs 14 and 77, which relate to Umbro's May MMR. We have already found that Ronnie I was inaccurate in respect of Umbro's May MMR. In our view the OFT was right to reject Ronnie I.

*- Ronnie II (4 February 2002)*

552. Ronnie II was signed by Mr. Ronnie on Monday 4 February 2002 and submitted to the OFT on the same day. Umbro's covering letter of that date states that Umbro had sought, among other things, to clear up the confusion that had arisen as regards paragraph 14 and 77 of Ronnie I. Ronnie II, however, appears to have been hurriedly prepared, since by letter of Friday 1 February 2002 the OFT insisted that what became Ronnie II had to be submitted on Monday 4 February, as we have already pointed out above.

553. On many issues Ronnie II goes into considerably more detail than Ronnie I, and runs to 33 rather than 18 pages. However, paragraphs 18 to 31 of Ronnie II again explain Umbro's May MMR on a similar basis to Ronnie I, namely that it refers to an agreement as to the retail price of the MU shirt. We have already found that Ronnie II dealt inaccurately with Umbro's May MMR.

554. Although Ronnie II states that Umbro had been receiving an "incredible amount of pressure and complaints" about discounting on the England shirt (see e.g. paragraphs 18, 19, 26, and 106), there is no express mention in Ronnie II of an agreement on the England shirt. Although there is mention of pressure from JJB (e.g. paragraphs 19, 33 to 35), and Allsports (e.g. paragraph 19) there is no mention in Ronnie II of telephone contacts between Umbro, JJB and Allsports. However, paragraph 129 of Ronnie II states that "the dialogue" referred to in Umbro's May MMR referred to "discussions which had taken place independently between Umbro and the various individual retailers about the prices at which they were selling England shirts."

*- The meeting with the OFT on 26 February 2002*

555. By letter of 12 February 2002 the OFT stated, correctly in our view, that Ronnie II still contained substantial inconsistencies, including among other matters Mr. Ronnie's explanation of Umbro's May MMR. A meeting was then held with Umbro representatives, including Mr. Ronnie on 26 February 2002.

556. Umbro's solicitor's note of this meeting records Mr. Ronnie as referring to pressure from Allsports and JJB, in response to which he contacted Mr. Ashley and the latter agreed to raise his prices. "This was then reported to JJB" (paragraphs 9 to 11). Similarly Mr. Ronnie stated that he informed JJB, Allsports, JD Sports and First Sport of Sports Soccer's agreement of 24 May 2000 to raise its price (paragraph 15). The notes taken by Mr. Sheerin of the OFT record Mr. Ronnie as stating that there was pressure from Allsports and JJB, that JJB had said that Umbro had to get the price back up, that Duncan Sharpe had said there may be repercussions if Umbro did not take action, and that Mr. Ronnie had then gone back to Sports Soccer to raise its prices. When Sports Soccer agreed to do so for the duration of the Euro 2000 tournament, Mr. Ronnie "Went back to JJB and Allsports at buyer and board level to explain this" (pp. 5 to 7). In response to a question from the OFT

“And then you informed other retailers?” Mr. Ronnie replied “Yes a threat was there from the other retailers too.” Ms. Barr’s note on behalf of the OFT is to the same effect, namely that JJB, Allsports, JD and First Sport/ Blacks were informed of the agreement with Sports Soccer reached on 24 May. Page 2 of that note states “Told buying level JJB and Allsports, then senior level in both businesses”. Page 4 states “JJB spoke to chief exec.” The short note taken by Christiane Kent of the OFT also records Mr. Ronnie saying “Went back to JJB and Allsports to inform them of the agreement with SS. Confirmed their price intention.”

557. However, the OFT brought its meeting with Umbro on 26 February 2002 to a premature end, on the ground that the OFT was having difficulty in believing Umbro’s explanations of the documents. The OFT preferred to believe what they thought the contemporary documents showed. (Umbro’s note, paragraph 80; Mr. Sheerin’s note p. 29).

- *Ronnie III (12 July 2002)*

558. Ronnie III was signed on 12 July 2002, and submitted to the OFT in response to the first Rule 14 notice. Having recited JJB and Allsports’ complaints, Mr. Ronnie said, notably:

“21. On a number of occasions, therefore, we had discussions with Sports Soccer in particular (but also sometimes other retailers) about retail pricing. On several occasions, I felt that I had to put pressure on Sports Soccer to raise prices, by threatening that it might not receive a full order of products if it continued to aggravate other retailers by its discounting. Mike Ashley would often “agree” to raise Sports Soccer’s prices. However, on many occasions, he did not then do so. Because of this, I knew that I could not rely on Mike Ashley’s assurances. However, we could at least use these assurances to persuade other retailers that we were responding to their complaints.

...

32. Mike Ashley had stated, in the 24 May meeting, that if any other retailer discounted the England shirts he would follow suit. Phil Fellone and I therefore phoned the major retailers, to ask them to agree to maintain prices on the England home kit during the Euro 2000 tournament. I telephoned JJB and all:sports; Phil Fellone telephoned JD Sports, Debenhams, First Sport and John Lewis.

33. JJB and all:sports agreed, and I understand that the other retailers contacted by Phil Fellone agreed, with the exception of JD Sports’ promotion of the England shirt (see further below at §§ 60-

64), and Debenhams which refused to withdraw the England kit from its Blue Cross sales (see witness statement of Phil Fellone).”

- *Umbro’s reply to the OFT in September 2002*

559. In September 2002, the OFT asked Umbro for particulars of the telephone conversations between Mr. Ronnie and the retailers concerned. Umbro replied that it could not provide further details.

- *Ronnie IV (28 November 2003)*

560. Ronnie IV was sworn on 28 November 2003, after the OFT’s decision. In Ronnie IV Mr. Ronnie, now with Sports Soccer, replied to the further witness statements served on behalf of JJB and Allsports in support of their appeals. Mr. Ronnie said this at paragraphs 19, and 24 to 28:

“19. Monday 29 May 2000 was a bank holiday. So far as I can recall, I think I made the calls (referred to in paragraph 24 below) to Allsports and JJB sometime during that week.

...

24. I did call Allsports and JJB to tell them that Sports Soccer had agreed to launch the shirt at £39.99. Obtaining Sports Soccer’s agreement to such an increase was a considerable “result” for Umbro, which I relayed to the retailers in response to their persistent complaints about Sports Soccer’s discounting and the need to do something about it. I also informed them of our achievement in an effort to secure JJB and Allsports’ commitments to supporting Umbro on a wider range of products. I definitely called Allsports as they had been as vocal about the pricing of the product.

25. I cannot now remember exactly who I spoke to at Allsports. My instinct tells me that I would have spoken to Michael Guest as he was more involved in the day-to-day running of the replica kit business within Allsports. I cannot comment on whether he told David Hughes or not.

26. My recollection is that I rang Duncan Sharpe at JJB to inform him that Sports Soccer had given us a price guarantee.

27. So far as I was concerned, the task I had to carry out was somewhat different from Phil Fellone’s, as described at paragraph 28 below. I did not ring Allsports and JJB “to ask them to agree to maintain prices on the England home kit.” There was no need to extract any formal agreement from those particular retailers, as they both were pricing at £39.99 anyway. The purpose of the call to them was to inform them that Umbro had got a guarantee from Sports



Soccer. I warned them not to undercut the £39.99 price as Sports Soccer would use any excuse for retaliation. Once Sports Soccer had agreed that price, and these other retailers (Allsports and JJB) had been told this, they would not go below it.

28. Phil Fellone rang JD, Debenhams, First Sport and John Lewis. Some of these retailers were smaller accounts and more prone to discounting the kit so he may well also have wanted their agreement to stick to the £39.99 price point.”

*- Mr. Ronnie's evidence to the Tribunal*

561. When asked in cross-examination by counsel for JJB about the differences between his witness statements of 12 July 2002 and 28 November 2003, and in particular paragraph 27 of the latter statement, Mr. Ronnie said (Day 3, pp. 142-143):

“A. Because with JJB in particular and Duncan Sharpe I already knew that he would go out at 39.99, and with Allsports through conversations with Michael Guest, the buying director, I knew that they would go out at 39.99 as well, because those two particular accounts would not have discounted the product (...)

A. They had made it clear to myself and Phil Fellone, the sales director, that they would always stay at 39.99

But JJB in particular were always conscious of being more expensive on the High Street in replica than Sports Soccer and they did not want that situation to happen.”

562. The exchange continued:

“Q. What you are not addressing is the point I am asking you about, which is simply this, and I think you have agreed with me: that there was no specific agreement extracted from JJB that they would do their 39.99 agreement?

A. There was an agreement in place with JJB, because we discussed it through quite a period of time, that they would go out at 39.99, otherwise how would I know they retailed the product at 39.99?

Q. Because I think you just told us a moment ago that you knew and everybody else knew that this is how JJB conducted its business?

A. But I can be product specific there and say that we knew as a team within Umbro that JJB would retail at 39.99 because we had conversations around that product, and it had been agreed between JJB and between Umbro that they would retail that product for 39.99.

Q. So now you are retracting the second sentence of paragraph 27, are you:

“I did not ring Allsports and JJB to ask them to agree to maintain prices on the England home kit.”

Either you did or you did not?

- A. I absolutely did ring them.
- Q. You did? To do what, to maintain prices on the kit?
- A. I rang them to confirm that the price would be 39.99, as we had previously discussed.
- Q. Can you square that answer with your second sentence in paragraph 27: "I did not ring Allsports and JJB..."
- A. The purpose of the call was, as this says, to guarantee that Sports Soccer were going to retail at 39.99. Because Umbro got that guarantee.
- Q. But I think the point you are making is – and correct me if I am wrong – that because JJB Sports was known to do the business at 39.99, that was your expectation of what they would then do?
- A. Only if Sports Soccer went out at 39.99. If Sports Soccer, as I mentioned earlier, had retailed the product at £35, JJB would most certainly have gone out at £34.
- Q. I do not understand why, then, it was necessary for you to tell them at all. If you went out at £35 then a certain result would follow. So what was the purpose in calling them at all?
- A. Because we as Umbro could not afford for Sports Soccer to go out at anything less than 39.99 because of all the problems that it would create and had created in the past with JJB Sports, First Sport, Allsports, JD Sports.
- Q. Who could not afford to go out? Sports Soccer?
- A. Umbro could not afford for Sports Soccer to discount the product.
- Q. Why was it necessary for you to communicate that fact to JJB? If you had made a deal with Sports Soccer and Sports Soccer kept to the deal, why was it necessary to communicate that fact to JJB? According to you, the only reason for JJB to reduce its own prices would be if Sports Soccer discounted, and then it would retaliate?
- A. It was necessary for me, as Umbro, to go back to those two accounts as Phil Fellone and myself had been involved in a lot of dialogue with the accounts through a period of time to ensure that JJB were clear on the understanding, and Allsports, that we were trying to control Sports Soccer as far as price was concerned, because it was key to us that we were seen by the accounts to be trying to control Sports Soccer at price and work with Sports Soccer on the retail price.
- Q. As I understand your evidence, and correct me if I am wrong, if Sports Soccer retailed at 39.99 in accordance with the agreement that you had made with them, there would not be any problem, because your expectation is and would have been that JJB would equally have sold at 39.99 in accordance with its regular policy. The facts would speak for themselves. You could go into any Sports Soccer shop and you could tell on sight what the price was that they were selling this particular product at.
- A. I totally agree with you if you are a consumer. But if you were at Umbro at the time and you were trying to work with JJB and Allsports, the only way that we could guarantee that Sports Soccer would be at a price, and we were asked this very clearly on a number of occasions, both Phil Fellone and myself, by other retailers: what price will Sports Soccer retail this for?

So rather than walk into the store at point of launch, it was key to us, and the pressure that we were being put under by the major accounts and the continuous dialogue that we were having with them, that we informed them as early as possible to let them know that Sports Soccer would be going out at 39.99”

(Day 3, pp. 144 – 148 see also Day 4, pp. 17 – 18)

563. In further cross-examination on behalf of JJB, Mr. Ronnie was unable to deny that neither Ronnie I nor Ronnie II mentioned any agreement with JJB or Allsports regarding the England shirt, nor any telephone conversations. Similarly Mr. Ronnie did not deny that the version of events given in evidence to the Tribunal and set out above had not previously appeared in any witness statement (Day 4, pp. 11-19). He did, however deny the suggestion that his evidence to the Tribunal had been influenced by hearing the evidence of Mr. Ashley the previous day (Day 4, p. 20).

564. Mr. Ronnie was not able to explain why he had not mentioned Mr. Sharpe of JJB in his witness statement of 12 July 2002 (Day 4, p. 25), nor why Umbro had not identified Mr. Sharpe in response to the OFT’s request of 13 September 2002 (Day 4, p. 28). His evidence, however, was that he spoke to Mr. Sharpe, even though he could not now recollect the conversation, and he maintained he rang Allsports and JJB to confirm that Sports Soccer would retail at £39.99 (Day 4, p. 29). Mr. Ronnie denied that his recollection had improved, or that he was “developing this story in his mind” (Day 4, p. 30).

565. In cross-examination by counsel for Allsports, Mr. Ronnie agreed that Ronnie II “ought to be the best record of [his] true recollection of the events in question” (Day 4, pp. 137), but it was put to him that the OFT had queried the explanations given in Ronnie II (Day 4 pp. 124-146), and that that statement contained a large number of mistakes or inconsistencies such as juxtaposing an email of April 2001 to April 2000 (Day 4, pp. 162-168), referring incorrectly to the “launch” of the England shirt (Day 4, pp. 165, 168, 173), placing the alleged incident regarding the turning round of a lorry in the wrong time sequence if that incident ever happened at all (Day 4, pp. 169-179, 193-196, see also Day 6, pp. 74-76), making confusing references to MU and England (Day 4, pp. 174-177), and failing to refer to any telephone conversations between retailers (Day 4, pp. 178, 180). It was also suggested that during the meeting with the OFT on 26 February 2002 some of Mr. Ronnie’s

answers about the agreement with Sports Soccer on 24 May were misleading or incorrect (Day 4, pp. 184-190).

566. In further cross-examination by counsel for Allsports in relation to the price war between JJB and Sports Soccer, Mr. Ronnie's evidence was to the effect that during JJB's discount campaign of 20 percent off in certain strategic stores, the pressure was on Umbro during that period, because Umbro told Sports Soccer that JJB would not discount replica anymore, and that they (Sports Soccer) were to stay at £39.99. When asked when Umbro had assured Sports Soccer that JJB would be going out at £39.99, he replied "It had been ongoing". To the question "so you are constantly fixing the price with Sports Soccer?", Mr. Ronnie replied, "And other retailers, yes" (Day 6, pp. 14-15).

567. In cross-examination about the details of the telephone conversations referred to in Ronnie IV, Mr. Ronnie maintained that he would have made them following the May Bank Holiday on 29 May, but was unable to give the Tribunal a specific reason as to why he thought the calls were made during that period (Day 6, pp. 97-99).

568. As to speaking to Mr. Guest, Mr. Ronnie said that the likelihood was that he would have spoken to Mr. Guest about the result Umbro had achieved with Sports Soccer on 24 May before he and Mr. Guest had lunch on 31 May, but he could not recall the conversation with Mr. Guest on that day (Day 6, pp. 25-27, 101, 119). Mr. Ronnie repeatedly told the Tribunal that he could not remember when he spoke to Mr. Guest (e.g. Day 6, p. 27). In answer to the suggestions that he never did speak to Mr. Guest as alleged, Mr. Ronnie maintained that he did (Day 6, pp. 25-27, 101, 119).

569. Similarly, Mr. Ronnie maintained that he could not remember when he had told Mr. Hughes: although Mr. Ronnie accepted that his meeting with Mr. Hughes on 2 June would have been a good time to tell him, Mr. Ronnie could not remember when he did so (Day 6, pp. 27-28, 101). Similarly Mr. Ronnie said that he had not mentioned the matter to Mr. Hughes at the Golf Day on 25 May (Day 6, pp. 100-101).

570. However, Mr. Ronnie maintained

"I spoke with Michael Guest and David Hughes on a number of occasions regarding the price points of replica because they were concerned about them." (Day 6, p. 101)

571. Mr. Ronnie said that he had spoken to Allsports although he could not remember when (Day 6, pp. 117-119). He could give no detail of the context of the conversations other than that he told JJB and Allsports that he had got Sports Soccer to agree to £39.99 (Day 6, p. 109). It was however put to Mr. Ronnie later in cross-examination that he had had a number of conversations with Mr. Hughes “which included the words 39.99, because they were a focal point in the industry’s selling”, to which Mr. Ronnie replied “We would talk about 39.99 a lot” (Day 6, p. 145).
572. In response to Allsports’ suggestion that he would not have made the telephone calls before Mr. Ashley raised his prices on 2 June, because until Mr. Ashley raised his prices Umbro would not have got “a result”, Mr. Ronnie maintained that he had got Sports Soccer’s agreement by 24 May, and was confident that it would be actioned, despite Mr. Ashley’s previous failures to honour promises that he would increase his prices (Day 6, pp. 103-105).
573. Mr. Ronnie said that he had “guaranteed Mr. Ashley that JJB, Allsports and JD would stay at £39.99; that they would not undercut him” (Day 6, p. 72). Mr. Ronnie said that Mr. Ashley always asked for an assurance to that effect, and agreed to the suggestion, by Allsports’ counsel, that whenever Sports Soccer made a promise to raise prices there was “hovering in the background” the understanding that, if anyone “broke ranks” Sports Soccer would be the first to follow them down (Day 6, p. 74). Mr. Ronnie maintained that the key factor in Mr. Ashley’s decision to raise his prices was Mr. Ronnie’s guarantee that the other retailers would go out at £39.99 (Day 6, p. 76). Although Mr. Ashley did not want to put his prices up, because he is a discounter, his key concern was the possibility of other retailers breaking ranks (Day 6, p. 77). Mr. Ronnie accepted that Allsports was an “aspirational” retailer who had never discounted replica kit except as a clearance item, but nevertheless maintained that Mr. Ashley would need an assurance that Allsports would not discount (Day 6, pp. 72-73). Mr. Ronnie did not agree that there was no chance of Allsports discounting, because they were very frustrated about the state of the market and about the price point moving around (Day 6, p. 115). Mr. Ronnie was confident that Mr. Ashley would put his prices up, because he had told Mr. Ashley that “the other retailers would not break” (Day 6, p. 110, see also pp. 72, 103). According to Mr. Ronnie, Mr. Ashley’s agreement was conditional on Mr. Ronnie obtaining an assurance from other retailers that they would not undercut him (Day 6, p. 112).

574. Mr. Ronnie maintained that, as he said in Ronnie IV, he rang JJB and Allsports “to guarantee £39.99 and asked them not to undercut and break to a cheaper price” (Day 6, pp. 110-116, esp. p. 114). He also said that he would have put in calls to Allsports and JJB soon after Sports Soccer raised its prices with effect from Saturday 3 June (Day 6, p. 105).

*Mr. Fellone’s evidence*

575. In paragraphs 26 and 27 of Fellone III, Mr. Fellone said:

“I was aware that discussions had taken place between Chris Ronnie and Lee Attfield, and Sports Soccer, regarding their pricing of the England home shirt during the Euro 2000 tournament. I was told that Sports Soccer had agreed to put its prices up, and keep them at £39.99 for as long as England remained in the tournament. Sports Soccer had said, however, that it would discount if any other retailer discounted during that time.

Chris Ronnie and I therefore telephoned the major retailers to explain that the major retailers i.e. Sports Soccer were threatening to enter into a price war and discount if any other retailer discounted. We rang the other accounts to see if they were intending to discount the England home shirt below rrp during this time and explain the consequences of what would happen if they did. I recall that I telephoned JD Sports, Debenhams, First Sport and John Lewis. With the exception of Debenhams, the retailers agreed to sell the England home shirt at rrp. I discuss the situation with Debenhams further below. As I have explained above, JD Sports were still at this time selling at rrp, but were giving away a free Admiral cap.”

576. That evidence was not challenged by either JJB or Allsports in cross-examination.

*Mr. Ashley’s evidence*

577. We have already set out above Mr. Ashley’s evidence to the OFT on 13 August 2001, which he confirmed to the Tribunal, that at the time when Mr. Ronnie was insisting that Sports Soccer raise the price of the England shirt to £39.99, Mr. Ronnie told him that he had contacted JJB, Allsports, Blacks, and JD and that those companies had all agreed to the price of £39.99. As a result of that Sports Soccer raised its prices, the two things being, in Mr. Ashley’s words “absolutely linked”. As already stated, we accept that evidence.

578. In its further evidence to the OFT Sports Soccer confirmed that, when being asked by Umbro not to discount, it regularly sought from Umbro information about what other

retailers' pricing intentions were: see e.g. Sports Soccer's written representations of 9 July 2002 at paragraph 3.2.20; Sports Soccer's oral representations of 11 July 2002, at pp. 28-29, and Cameron McKenna's letter dated 20 August 2002, p. 8. That evidence was not challenged by either JJB or Allsports.

579. As to specific telephone conversations between Mr. Ashley, Mr. Ronnie and other retailers, Mr. Ashley's evidence was that Mr. Ronnie called him on the afternoon of 2 June, and told him that other retailers had complained that Sports Soccer had not yet raised his prices, although Mr. Ronnie had promised them that Sports Soccer would do so. Mr. Ashley, realised that "the game was up" and that he could no longer resist raising his prices. He then gave his area managers instructions to increase the prices and confirm that direct to Mr. Ronnie. That was done, Mr. Ashley's intention being to "wind up" Mr. Ronnie for having forced him to raise his prices (Ashley II, paragraphs 14 to 15).

580. It is not disputed that during the afternoon of 2 June Mr. Knight of Blacks called Mr. Ashley asking him to confirm that he was increasing his prices. Mr. Ashley gave that confirmation.

581. It is not disputed that Mr. Hughes also called Mr. Ashley on the afternoon of 2 June. Mr. Hughes' evidence is that this call was to invite Mr. Ashley to the meeting at his house on 8 June (Day 10, p. 217). Mr. Ashley cannot now remember whether Mr. Hughes' call was about that, or about the price of the England shirt (Ashley II, paragraph 20). In those circumstances we are not in a position to find that Mr. Hughes' conversation with Mr. Ashley on 2 June concerned the price of the England shirt.

#### *JJB's evidence*

582. In Ronnie IV Mr. Ronnie identifies Mr. Sharpe as the person he spoke to at JJB. Mr. Sharpe died on 7 October 2002. As we understand it, the OFT case on the England Agreement was first made in the supplemental Rule 14 Notice of 26 November 2002. We accept that this situation is unfortunate from JJB's point of view, but we do not think we have any alternative other than to take the case as it is on the evidence now before us.

#### *Mr. Hughes' evidence*

583. At paragraph 59 of Hughes I, Mr. Hughes denies that he received a call from Mr. Ronnie “some time after 24 May 2000” asking him to agree the price of England shirts, and he has no reason to think that anyone else at Allsports was contacted in that way. There was no need for such a call, because everyone knew that Allsports’ strategy was always to get the maximum price. Mr. Ronnie did not tell Mr. Hughes that Sports Soccer was discounting or had stopped discounting England shirts. In Hughes II, Mr. Hughes denies receiving a call as mentioned in paragraph 24 of Ronnie IV. Mr. Hughes was shortly cross-examined on this part of his evidence and maintained his denials (Day 10, p. 218).

*Mr. Guest’s evidence*

584. At paragraph 20 of Guest I, Mr. Guest states that he “never had any discussion about it with Umbro or any other retailer”, apparently referring to the allegation that Allsports and the retailers had all agreed to price the England shirt at £39.99. Mr. Guest denies that Mr. Ronnie telephoned him and that Allsports agreed not to discount. He would have remembered such a conversation, had it occurred. He states in Guest II that he did not receive the call mentioned in paragraph 24 of Ronnie IV.

585. In cross-examination Mr. Guest denied receiving a telephone call from Mr. Ronnie telling him about Umbro’s agreement with Sports Soccer. He said that, although he liked Mr. Ronnie a lot, “I do not think that he is the most likely fellow to be telling the truth all the time.” (Day 11, pp. 120-122) He maintained that Mr. Ronnie did not tell him that there was an agreement with Sports Soccer (Day 11, pp. 122-123). Mr. Guest would have thought such a result to be odd, because Mr. Ronnie did not have authority to speak for Mr. Ashley, and Mr. Ashley was a “loose cannon” liable to disregard any agreements made. Any agreement with Mr. Ashley would not have been worth the paper it was written on. (Day 11, p. 125). Mr. Ronnie did not need to have any conversation to persuade Allsports not to discount because they already “knew the answer” (Day 11, p. 126). In answer to the suggestion that it would not have been odd for Mr. Ronnie to tell him about Sports Soccer not discounting, Mr. Guest replied

“A. Yes, I am just saying that whenever he told me I could not have believed it anyway”. (Day 11, p. 127)

586. Mr. Guest was sure he would have been told about it if there had been an agreement with Sports Soccer but queried whether there ever had been such an agreement (Day 11, p. 123).



*General conclusions on Mr. Ronnie's evidence in the witness box*

587. We reach the following conclusions as regards Mr. Ronnie's evidence in the witness box.
588. Ronnie I and Ronnie II do not mention the England Agreement or the telephone conversations mentioned in Ronnie III and Ronnie IV and deal inaccurately with Umbro's May MMR. In our judgment there was insufficient attention to detail in the preparation of Ronnie I and Ronnie II as regards the England Agreement.
589. However, the fact that Ronnie I and Ronnie II are partly inaccurate, even misleading, and are silent about the England Agreement and the telephone conversations described in Ronnie III and IV, does not in our view mean that Ronnie III and IV are untrue, or that Mr. Ronnie's evidence in those statements and in the witness box is necessarily unreliable. The more probable explanation, in our view, is that as this case has continued more of the truth has progressively to come to light. Similarly, the fact that Ronnie I and Ronnie II contain various other errors (such as transposing the email of 17 April 2001 to 17 April 2000) does not in our view undermine Ronnie III and Ronnie IV.
590. It is also the case that no previous witness statement given by Mr. Ronnie explains in detail that, when he came to agree prices with Sports Soccer on 24 May, he had *already* had earlier discussions and reached what he considered to be an agreement with other retailers. That, however, does not necessarily mean that the oral evidence Mr. Ronnie gave to the Tribunal to that effect was untrue or unreliable, especially if Mr. Ronnie's evidence on this aspect is corroborated from other sources.
591. A further criticism of Mr. Ronnie's evidence is that he has been unable to be precise about the dates or times of the telephone conversations relied on by the OFT. It is not until the appeal stage that Mr. Ronnie has identified who he thinks he called, even though Umbro in Autumn 2002 professed to be unable to give further details.
592. Nonetheless, bearing all those matters in mind, we accept in essence the truth of Mr. Ronnie's evidence in the witness box about his telephone conversations, as set out below. We accept the truth of his evidence to us, first because we believe it and, secondly because in our view that evidence is largely corroborated by other elements. We give our detailed

reasons in the next sections in which we make our overall findings in relation to JJB, and Allsports, respectively.

#### **XIV THE ENGLAND AGREEMENT: FINDINGS AS REGARDS JJB**

##### **A. FINDINGS OF FACT**

###### *The position of JJB*

593. As regards JJB, we have already made four relevant findings of fact in section XI above.
594. First, in the early summer of 2000 JJB had a strong motive for acting in a way that would tend to limit discounting on replica shirts by its competitors. JJB's leading position in the market place was being challenged for the first time in many years by the emergence of its arch rival, Sports Soccer. A damaging price war between JJB and Sports Soccer had been taking place since October 1999, which had had an adverse effect on JJB's margins. By the end of April 2000, JJB wished so far as possible to cease discounting, and did so with effect from 23 April 2000. In any event, JJB did not wish to see discounting on traditionally premium products such as replica shirts.
595. Secondly, JJB had strong commercial bargaining power vis-a vis Umbro, because of its position as the market leader and Umbro's largest customer, and also because of Umbro's relative financial vulnerability in the summer of 2000.
596. Thirdly, in the spring and early summer of 2000 JJB made vigorous complaints to Umbro management up to the most senior level about discounting by Sports Soccer. Those complaints were intended, or had the reasonably foreseeable effect, of putting commercial pressure on Umbro to do something about discounting.
597. Fourthly, those complaints by JJB were a significant and material factor in causing Umbro to pressurize Sports Soccer to raise its prices on the England shirt and maintain High Street prices during Euro 2000, given Umbro's perception that it could ill afford to ignore or offend JJB.

###### *The telephone conversations*

598. Mr. Ronnie's evidence to the Tribunal is, essentially, to the effect that:

(1) He had conversations with Mr. Sharpe of JJB in the period prior to Euro 2000 in which he ascertained that JJB's intention was to price replica shirts at £39.99 and that JJB did not intend to discount replica shirts, including at least by implication, the England shirt, below £39.99. Mr. Ronnie had what he considered to be an agreement with JJB that they would price at £39.99 (Day 3, pp. 144-148, Day 4, pp. 17-18, Day 6, pp. 14-15).

(2) In those circumstances Mr. Ronnie was able to assure Mr. Ashley that if Sports Soccer agreed not to discount below £39.99, he (Mr. Ronnie) could guarantee that JJB (and the other retailers with whom Umbro had been in contact) would stay at £39.99 and not undercut Sports Soccer. Mr. Ronnie's ability to give a guarantee that other retailers "would not break" or words to that effect was a key factor in persuading Sports Soccer to raise its prices on the England shirt to £39.99 (Day 6, pp. 14-15, 73-77, 103, 110, 112).

(3) Having obtained Sports Soccer's agreement to price at £39.99, Mr. Ronnie then told Mr. Sharpe of JJB that Sports Soccer had agreed to price at £39.99. The purpose of telling JJB was to make sure that JJB understood that Umbro were taking steps to control Sports Soccer's discounting, and to warn JJB against undercutting (Day 3, pp. 144-148, Day 4, pp. 17-18, Day 6, pp. 110-116).

599. We accept that evidence. We reject the suggestion that this evidence was merely something said by Mr. Ronnie in order to conform to Mr. Ashley's evidence the previous day. In our view Mr. Ronnie's evidence is also corroborated by a number of elements as set out below.

*The surrounding circumstances*

600. First, in our view, Mr. Ronnie's evidence as summarised above seems entirely logical in the light of the circumstances then prevailing, seen from Umbro's point of view.

601. As set out earlier in this judgment, Umbro was facing a situation in late April/ May 2000 where the price war between JJB and Sports Soccer could easily reignite, or be extended to replica kit, most notably on the England shirts during Euro 2000 and on the new MU home shirt. From Umbro's point of view, in its then relatively vulnerable financial state, it was imperative to avoid that happening, for a number of reasons. Those reasons include the

need not to upset or provoke JJB, its largest customer; the need to respond to JJB's complaints; the need to satisfy MU on pricing issues in the context of the renewal of the MU contract; Umbro's own desire to move its brand "upmarket"; and Umbro's need to preserve and develop its relationship with Allsports.

602. However, in order to avert a JJB/ Sports Soccer price war on the England and MU shirts, in our view Umbro had *both* to put pressure on Sports Soccer to stop discounting, *and* to eliminate the risk that JJB would provoke Sports Soccer by discounting itself. In addition, Mr. Ronnie needed to be able to reassure Sports Soccer that if it did agree not to discount, it would not be undercut by other retailers.

603. The largely undisputed evidence (see e.g. Day 6, pp. 72-76) is that Mr. Ashley of Sports Soccer himself required assurances that, if he agreed not to discount, he would not then be exposed to undercutting from other retailers. We can fully see why, from his point of view, Mr. Ashley sought such assurances. For Sports Soccer, a committed discounter, to be at full price, while other retailers undercut them, would have been extremely damaging to Sports Soccer's reputation and to its business model. Mr. Ashley would obviously have been particularly concerned about JJB, his principal rival.

604. In those circumstances it was, in our judgment, inevitable that Umbro would need to involve other retailers in order to be sure of avoiding a price war on the England shirt during Euro 2000. In particular it was inevitable that Umbro would need to involve JJB as the largest player in the High Street, and the retailer most likely to respond to discounting by Sports Soccer, or to discount itself, as it had been doing over the previous six months.

605. Equally, we have found above that JJB was exerting pressure on Umbro by making complaints about discounting at all levels: in conversations between Mr. Whelan and Mr. McGuigan; Mr. Whelan or Mr. Sharpe and Mr. Ronnie; Mr. Russell and Mr. Fellone; and Mr. Russell and Mr. Bryan: see section XI above. In those circumstances Mr. Ronnie would have both needed and wished to involve JJB in its attempts to bring discounting to an end, and to let JJB know that action was being taken.

606. In our judgment it is inherently unlikely that Mr. Ronnie would have given Mr. Ashley a guarantee that JJB would not discount below £39.99 provided Sports Soccer did not do so,

had JJB not given Mr. Ronnie an assurance, or at least information, to that effect. Umbro would have lost all credibility with Sports Soccer if, Sports Soccer having actually raised its prices for the England shirt, Sports Soccer had then found that rivals such as JJB were discounting. Umbro therefore needed to give Sports Soccer credible information and assurances. In order to give that information or assurance, Umbro needed to ascertain JJB's (and other retailers') pricing intentions, and arrive at an understanding that they too would not discount. In our view this simple scenario, representing an obvious and logical strategy from Umbro's point of view, is entirely consistent with the totality of the evidence before the Tribunal.

*Umbro's MMR for May 2000*

607. As already set out above, the plain wording of Umbro's May MMR "JJB, Sports Soccer, First Sport, JD and Allsports *have all agreed* to retail their adult shirts at £39.99" (emphasis added) is further evidence of an agreement on the England shirt. That is also confirmed by the mention in Umbro's May MMR of "a month of dialogue *with all the above accounts*" (emphasis added), with a view to ensuring that Umbro's "statement product" was not discounted.
608. It is not disputed that such a dialogue did take place with Sports Soccer, JD and Blacks who all agreed to price at £39.99. In our view it is not credible that the dialogue referred to did not include JJB, Umbro's largest and most powerful customer, and to whose pressure and complaints Umbro wished to be seen to be responding. JJB's participation was in our view essential to the success of Mr. Ronnie's initiative. Indeed, neither JJB nor Allsports suggest that "a month of dialogue" with the above accounts did not happen (Day 6, p. 153). Nor did they challenge Mr. Ronnie's evidence that when he obtained assurances from Sports Soccer he would go back to other retailers in order to persuade them that Umbro was responding to their complaints (Ronnie III, paragraph 21). Indeed, paragraph 21 of Ronnie III was accepted during JJB's cross-examination as "a true statement of the facts" (Day 4, p. 78).
609. In all those circumstances, and for all the reasons already given, we see no reason to treat Umbro's May MMR as containing anything other than "the unvarnished truth", namely that JJB, among others, had agreed to maintain the £39.99 price point on replica shirts.

*Mr. Ashley's evidence to the OFT in 2001*

610. In August 2001, before any witness statements had been prepared or documents obtained, Mr. Ashley spontaneously told the OFT that he had been told by Mr. Ronnie that the latter had contacted other named retailers who had agreed to price the England shirt at £39.99 for as long as the England team was in the Euro 2000 tournament. As a result Mr. Ashley agreed to “conform” and raised his price to £39.99. The names Mr. Ashley gave were Mr. Sharpe of JJB, Mr. Knight of Blacks, Mr. Hughes of Allsports and possibly Mr. Makin of JD. We have already accepted Mr. Ashley’s evidence as to what he said on that occasion.
611. As we have found above, Mr. Ashley’s evidence to the OFT in 2001 is credible evidence that those named retailers, including JJB, agreed to price the England shirt at £39.99 during Euro 2000. Mr. Ashley’s account in 2001 accords in substance with the evidence that Mr. Ronnie has given the Tribunal in 2004. In addition, Mr. Ashley himself confirmed to the Tribunal that his understanding was that there had indeed been such an agreement on the England shirt.

*Mr. Fellone's evidence*

612. Mr. Fellone’s evidence is that “Chris Ronnie and I therefore telephoned the major retailers” when Sports Soccer made it clear that it would discount if other retailers did so (Fellone III, paragraphs 26 and 27). That corroborates Mr. Ronnie’s evidence that he and Mr. Fellone rang other retailers. It is not disputed that Mr. Fellone telephoned JD, First Sport, Debenhams and John Lewis. That leaves JJB and Allsports, whom Mr. Ronnie was to ring. If, as Mr. Fellone says unchallenged, he and Mr. Ronnie had divided between them the task of telephoning, it seems to us intrinsically unlikely that Mr. Ronnie would not have had telephone conversations with JJB.

*Mr. Ashley's contacts on 2 June*

613. Mr. Ashley’s unchallenged evidence is that Mr. Ronnie told him on the afternoon of 2 June that “other retailers” had complained that Sports Soccer had not yet increased its prices. That implies that “other retailers” had been told by Umbro that Sports Soccer’s prices were to be increased, and had reported to Mr. Ronnie that that had not happened. Mr. Knight’s call to Mr. Ashley to seek confirmation that Mr. Ashley was increasing his prices is further

corroboration of the fact that he had been told that Sports Soccer was going to increase its prices, but wanted confirmation “from the horse’s mouth”. If Blacks/ First Sport had been told that Sports Soccer was increasing its prices, it is likely that other retailers would also have been told.

*Mr. Fellone’s fax to Debenhams of 2 June*

614. Mr. Fellone’s fax to Debenhams of 2 June 2000 states “all the other retailers...have agreed”. This is a further item of evidence consistent with the above, and in our view illustrates the kind of conversation that Umbro was having with the retailers at the time.

*Umbro’s fax to MU of 6 June 2000*

615. Umbro’s fax to MU of 6 June states that Umbro has received assurances from Sports Soccer *and JJB* (our emphasis) to the effect that they will revise their current pricing of jerseys. That is further evidence that both companies had intimated to Umbro prior to Euro 2000 that it was not their intention to discount replica shirts. Again this evidence is consistent with everything set out above.

*The notes of the meeting on 26 February 2002*

616. The OFT relies in addition on Mr. Ronnie’s comments at the meeting with the OFT on 26 February 2002 where Mr. Ronnie intimated that, in response to pressure from Allsports and JJB, he contacted Mr. Ashley, persuaded him to increase his prices and then went back to JJB and Allsports to report that fact and confirm their pricing intentions. At this meeting Mr. Ronnie mentioned the “Chief exec.” of JJB – i.e. Mr. Sharpe – as the person to whom Mr. Ronnie spoke.
617. We see force in the appellants’ submission that a number of comments made by Umbro during the meeting of 26 February 2002 are open to question. The OFT itself brought the meeting to a premature close. Whether that was justified or not, we accept that what was said during that meeting should be treated with caution. However, at that meeting Mr. Ronnie did mention his telephone conversations with JJB and Mr. Sharpe. In our judgment the notes of the meeting of 26 February 2002 at the least rebut any suggestion that Mr. Ronnie’s evidence about his telephone calls was a recent invention.

*Dates and times*

618. We do not think that it is necessary for the OFT to satisfy us of the dates or the precise sequence of the telephone conversations in question. In our view it is probable that the relevant “dialogue” went on in late April/ May 2000, but we do not think it matters whether Mr. Ronnie first sought assurances from JJB and then went back to Sports Soccer or whether it was some other process of going back and forth. Whatever the precise sequence, it is in our view established that in the course of Mr. Ronnie’s telephone conversations Mr. Sharpe of JJB gave Umbro an assurance, or at least an indication, that JJB would maintain the £39.99 price point if other retailers did not discount. Mr. Ashley gave Mr. Ronnie a reciprocal assurance at the meeting on 24 May. It is most unlikely, in our view, that Mr. Ronnie did not inform Mr. Sharpe of that reciprocal assurance. We accept Mr. Ronnie’s evidence that he did.

*Paragraph 27 of Ronnie IV*

619. In paragraph 27 of Ronnie IV, Mr. Ronnie said

“So far as I was concerned, the task I had to carry out was somewhat different from Phil Fellone’s, as described at paragraph 28 below. I did not ring Allsports and JJB “to ask them to agree to maintain prices on the England home kit.” There was no need to extract any formal agreement from those particular retailers, as they were both pricing at £39.99 anyway. The purpose of the call to them was to inform them that Umbro had got a guarantee from Sports Soccer. I warned them not to undercut the £39.99 price as Sports Soccer would use any excuse for retaliation. Once Sports Soccer had agreed that price, and these other retailers (Allsports and JJB) had been told this, they would not go below it.”

620. The appellants argue that that paragraph shows that there never was any agreement with JJB and Allsports, who were at the most merely informed, after the fact, that Umbro and Sports Soccer had reached an agreement. It is also argued that that evidence shows that Umbro’s May MMR is incorrect in imputing an agreement to JJB or Allsports, and that no reliance can be placed on the faxes of 2 June and 6 June, nor on Ronnie III and Fellone III which are, it is submitted, inconsistent with paragraph 27 of Ronnie IV.

621. Dealing with those arguments at this stage from the evidential point of view, it is plain to us that a misunderstanding, apparently shared by the OFT when preparing its pleadings, has arisen as to what Mr. Ronnie was seeking to say in paragraph 27 of Ronnie IV. In the light



of his evidence in the witness box, in our judgment Mr. Ronnie was referring in that paragraph to the telephone calls he made to JJB and Allsports *after* Umbro had reached agreement with Sports Soccer. At that stage, Mr. Ronnie already knew that JJB and Allsports were pricing at £39.99 and would continue to do so. However, what paragraph 27 of Ronnie IV does not make clear is that the source of Mr. Ronnie's knowledge about the position of JJB and Allsports was the fact that he had *already* been engaged in a dialogue with both companies, and therefore already knew what their pricing intentions were. Thus, once he had obtained Sports Soccer's agreement, Mr. Ronnie did not need to make a *further* agreement with JJB or Allsports, but merely to inform them of Sports Soccer's intentions. That that was, in essence, the sequence of events, in our view emerges from the passages in Mr. Ronnie's evidence cited above, in particular Day 3, pp. 144-148, Day 4, pp. 17-18, Day 6, pp 14-15, 72-77, 101-105. In our judgment, paragraph 27 of Ronnie IV has to be read in the light of the totality of the evidence in the case.

622. We consider in section XVI below whether the confusion to some degree engendered by paragraph 27 of Ronnie IV has procedural consequences in the present case. As far as the evidence we have heard is concerned, our view is that paragraph 27 of Ronnie IV must be read in the context of the whole of Mr. Ronnie's oral evidence and the documentary evidence. That paragraph is to be understood as referring to Mr. Ronnie's confirmatory telephone calls to JJB and Allsports, after he had reached what he considered to be an agreement with those companies after a month of dialogue. Seen in that light, in our view there is in fact no material conflict between that paragraph, Mr. Ronnie's evidence, Mr. Fellone's evidence, Umbro's May MMR and the other elements to which we have referred.

623. Even if paragraph 27 of Ronnie IV as drafted does give rise to an apparent inconsistency, or at least ambiguity, we prefer to base our judgment on this point on the oral evidence of Mr. Ronnie given in the witness box, the contemporary documents and the surrounding circumstances. All three elements support the factual conclusions we have set out above.

*JJB's argument that Umbro simply inferred what its price would be from JJB's previous practice*

624. Apart from maintaining its denial, and challenging the reliability of the evidence against it, JJB's principal argument is that Umbro merely assumed or inferred that JJB would price at £39.99, since that had been JJB's consistent practice in the past.

625. JJB submits that, without any communication passing between them, Umbro could easily have inferred that JJB was intending to sell the England and MU shirts at £39.99 from the fact that it was JJB's invariable policy to sell replica shirts at £39.99 during launch periods. This argument, as we understand it, treats the Euro 2000 tournament as the equivalent of a launch period. A schedule provided to the OFT on 2 November 2001 purported to show that JJB had never discounted replica shirts at launch. Mr. Russell, who denied giving Umbro any advance information as to JJB's launch prices, maintained that Umbro could have made "an educated guess", (Day 9, page 119). He produced in Russell IV a schedule prepared by KPMG also purporting to show that, in fact, JJB had invariably sold at £39.99 during launch periods.
626. For the reasons already given, we have found on the facts that Umbro did not merely "infer" what JJB's price for the England shirt would be during Euro 2000, but that JJB gave Umbro an assurance, or at least an indication, that it proposed to sell the England shirt at £39.99 during Euro 2000, at least provided that other retailers did not discount.
627. In any event, we reject JJB's submissions on this part of the case for the following further reasons.
628. First, JJB's witnesses have themselves denied that there could be certainty in the market place as to what price JJB would launch at. Thus Mr. Sharpe in his witness statement dated 15 August 2002 said that manufacturers and retailers "could have no certainty that we would go out at [£39.99]" (paragraph 13). Mr. Whelan in his evidence to the Tribunal said JJB's launch prices were highly confidential and were only decided a few days in advance (Day 8, pp. 23 to 25). Mr. Russell said at paragraph 20 of Russell II that JJB's policy to launch at £39.99 was "subject to local discounting particularly in connection with the opening of new stores and response to price cutting by competitors".
629. Secondly, it emerged from Mr. Russell's cross-examination that the figures for launch prices provided to the OFT in November 2001 were only JJB's 'standard' prices and did not show *actual* prices as reflected in JJB's discounting campaigns or on a store-by-store basis (Day 9, p. 33). Moreover, in JJB's solicitors' letter of 2 November 2001 in answer to the OFT's section 26 request dated 18 October 2001, JJB denied that it was able to produce price information on a store by store basis, "for technical reasons" (paragraph 7 (f) of that

letter). It now transpires that that answer was incorrect, since JJB's computer system does hold such information, at least for certain shirts (Day 9, p. 74).

630. Thirdly, it appears that the information collated by KPMG on JJB's instructions and produced by Mr. Russell in Russell IV does not reflect JJB's discounting campaigns which took place in the latter half of 1999 right through to 23 April 2000. It emerged during Mr. Russell's cross examination that, during that period, a significant number of replica shirts were in fact launched at a discount (Day 9, pp. 90-93). Mr. Whelan agreed in cross-examination that that was the case (Day 8, pp. 26 to 28).
631. Fourthly, there is at least one specific example before the Tribunal which shows JJB discounting at the launch of the new England home shirt in April 2001 at its existing stores in either Bury or Carlisle<sup>9</sup>, as part of a discount of 20% off all products at the store in question (Day 9, pp. 95 – 100).
632. Fifthly, as Umbro's own documents show, it was uncertain in April 2000 for how long JJB would cease discounting: see e.g. Umbro's MMR for April 2000. As Mr. Ashley pointed out, it would in those circumstances have been extremely rash of Umbro to give Sports Soccer assurances about what JJB was going to do without having checked with JJB first.
633. We conclude from the above that it was, in May/ June 2000, perfectly open to JJB to decide to discount the England shirt during Euro 2000, or the MU shirt at launch on 1 August 2000 either on its own initiative, or in response to discounting by others, or to organise some kind of promotion on price. From the point of view of Umbro, there was no certainty that JJB would not do so. Moreover, for the reasons already given, it seems to us overwhelmingly likely that JJB would, in fact, have discounted either or both of those shirts in response to discounting by Sports Soccer if Sports Soccer had discounted.
634. For those reasons we reject JJB's arguments that it was JJB's "invariable" practice to launch at £39.99, or that Umbro could safely assume that JJB would launch at £39.99, or that there was no need for any form of communication between Umbro and JJB about the

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<sup>9</sup> There are two identical memos in the Tribunal's file, one of which refers to Bury, the other to Carlisle.

launch price, or that any such communication would merely convey what Umbro already knew from JJB's past practice.

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

*Pricing post August 2001*

636. The fact that discounting at launch has taken place since the OFT's unannounced visit in August 2001, including discounting by JJB, further supports the conclusion that in normal market conditions discounting on the England shirt would have occurred during Euro 2000. The fact that such discounting did not occur further corroborates the conclusion that an agreement or concerted practice not to discount existed between the principal retailers during that period.

**B. ANALYSIS**

637. An "agreement" for the purposes of section 2 of the act does not have to be a legally binding agreement: see the cases cited in Section V above. We accept for working purposes that an "agreement" may arise from the expression of the parties' "joint intention to conduct themselves on the market in a particular way" (*Bayer*, cited above, at paragraph 67) and that the concept "centres around the existence of a concurrence of wills" (*Bayer*, at paragraph 69). An agreement can equally exist where one party manifests its wish to achieve an anti-competitive goal, and the other party tacitly accepts that (*Bayer*, at paragraph 71, on appeal at paragraph 102). An agreement, in our view, can be constituted by an "understanding" even if there is nothing to prevent either party from going back on, or disregarding, the understanding in question.
638. A "concerted practice", on the other hand, is a form of collusion "falling short of an agreement" which "knowingly substitutes practical cooperation between the parties for the risks of competition" (*Dyestuffs*, cited above, at paragraph 64). Although that "does not involve the working out of an actual plan", nonetheless:

"each economic operator must determine independently the policy which he intends to adopt on the market including the choice of the

persons and undertakings to which he makes offers or sells.” (*Suiker Unie* at paragraph 173)

639. That in turn,

“strictly precludes any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.” (*Suiker Unie* at paragraph 174)

640. In particular, a concerted practice may arise if there are reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market (*Suiker Unie* at paragraph 175).

641. The Court of First Instance said in *Cimenteries* that “reciprocal contacts” are established

“where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it...” (paragraph 1849).

and that

“It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part” (paragraph 1852).

642. The fact that only one participant reveals his future intentions or other competitive information does not exclude the possibility of a concerted practice, since the recipient of the information in question cannot normally fail to take that information into account when formulating its policy on the market: e.g. *Tate & Lyle*, cited above, at paragraph 58.

643. Moreover, a concerted practice may arise if undertaking A complains to undertaking B about the activities of a third undertaking C, and undertaking B acts on those complaints in such a way as to lead to conditions of competition which do not correspond to normal conditions in the market, for example by prevailing upon C to limit its competitive activities. In those circumstances A, B, and C may all be guilty of a concerted practice: see notably *Suiker Unie* at paragraphs 282 to 283; and the Commission’s decision in *Hasselblad* at paragraph 42.

644. It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other: see Cases T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931 (“*PVC II*”), paragraphs 696 to 698; *Anic*, cited above, at paragraphs 131 to 133.
645. In our view the evidence set out above establishes first, that JJB at the very least indicated to Umbro that it would not discount the England shirt below £39.99 immediately before and during Euro 2000, on the understanding, express or implied, that Sports Soccer and other retailers would not discount either.
646. As regards JJB those indications were given in telephone conversations taking place between Mr. Ronnie and most probably Mr. Sharpe of JJB during May and probably April, 2000. We bear in mind that Mr. Ronnie was doing business over the telephone with JJB and other retailers all the time. It is unlikely in our view that there was a single telephone conversation. The likelihood is that the matter came up in a series of telephone conversations in which JJB intimated that it was not planning to discount during Euro 2000 but would or might discount if other retailers did so. We conclude that in those conversations JJB told Mr. Ronnie its future pricing intentions.
647. Mr. Ronnie in his evidence consistently used the words “agreement” or “agreed”. For example, Mr. Ronnie’s evidence, which we accept, was that:
- “there was an agreement in place with JJB, because we discussed it through quite a period of time, that they would go out at 39.99... we knew as a team within Umbro that JJB would retail at 39.99 because we had conversations around product, and it had been agreed between JJB and between Umbro that they would retail that product at 39.99”. (Day 3, p. 144)
648. “Agreed” is the word used in Umbro’s May MMR and Mr. Fellone’s fax of 2 June 2000. The fax of 6 June 2000 uses the word “assurances” given by JJB. That evidence establishes in our view that the pricing matters discussed between JJB and Umbro had crystallised to the extent that JJB had reached a consensus with Umbro to retail the England shirts at £39.99 during Euro 2000. Such a consensus constitutes an agreement for the purposes of section 2 of the Act and is so described in Umbro’s May MMR.

649. Umbro's May MMR confirms, at the very least, Umbro's knowledge that JJB's selling price during Euro 2000 would be £39.99, thus implying that no discounting or other promotional activity was planned as regards the England shirts. We have already found above that that knowledge could not have been simply 'assumed' by Umbro, as Mr. Ronnie confirmed in evidence (Day 3, p. 144).
650. Even if JJB was already charging £39.99, JJB's future pricing intentions were highly confidential matters, as Mr. Whelan himself explained in the witness box. By revealing or confirming its intended actual retail selling prices to Umbro, JJB at the very least reduced uncertainty as to its future pricing intentions. As we have already held, that uncertainty was particularly marked at the time, since discounting by JJB could resume at any moment.
651. At or about the same time as JJB reached a consensus with Umbro as to its pricing intentions as regards the England shirts, or at least intimated what those intentions were, Sports Soccer agreed with Umbro to raise its prices on the England shirts to £39.99 and not to discount during Euro 2000. That agreement by Sports Soccer was made following the communication by Mr. Ronnie of other retailers' pricing intentions. Mr. Ronnie, in effect, guaranteed to Sports Soccer that "other retailers would not break". Whether or not Mr. Ronnie specifically mentioned JJB to Sports Soccer (and we think it very likely that he did) it was implicit in the information that Mr. Ronnie gave Sports Soccer that JJB did not intend to discount during Euro 2000. Sports Soccer then agreed to raise its prices and not to discount during Euro 2000 on the understanding that other retailers would not undercut it. We are satisfied that Sports Soccer gave its agreement in part at least in the light of the assurances given by Mr. Ronnie as to the intentions of other retailers, including JJB. The giving of information as to its future pricing intentions by JJB to Umbro facilitated to a material extent Mr. Ronnie's ability to give Sports Soccer the assurance it needed.
652. We find furthermore that Mr. Ronnie then confirmed to JJB (most probably Mr. Sharpe) what Sports Soccer's future pricing intentions were. We accept what Mr. Ronnie said in evidence:

"It was necessary for me, as Umbro, to go back to those two accounts as Phil Fellone and myself had been involved in a lot of dialogue with the accounts through a period of time to ensure that JJB were clear on the understanding, and Allsports, that we were trying to control Sports Soccer as far as price was concerned, because it was key to us that we were seen by the accounts to be

trying to control Sports Soccer at price and work with Sports Soccer on the retail price...

So rather than walk into the store at point of launch, it was key to us, and the pressure that we were being put under by the major accounts and the continuous dialogue that we were having with them, that we informed them as early as possible to let them know that Sports Soccer would be going out at 39.99” (Day 3, pp. 146 to 148).

653. We point out that England’s participation in the Euro 2000 tournament lasted until 21 June. Thus in respect of that period JJB had been told by Mr. Ronnie what Sports Soccer’s pricing intentions were, and vice versa.

654. In those circumstances, we find that there was an agreement, or concerted practice, within the meaning of the Chapter I prohibition involving at least JJB, Umbro and Sports Soccer, in which each of JJB and Sports Soccer either agreed with Umbro, or confirmed to Umbro their respective intention, not to discount from £39.99 during Euro 2000, on the understanding that no other major retailer would do so. At the very least, each company knowingly gave Mr. Ronnie an intimation or assurance to that effect. Mr. Ronnie then confirmed to each company what the others’ intentions were. That in our judgment is properly characterised either as an agreement to fix the prices of the England shirts at £39.99 during Euro 2000, or as a concerted practice the object or effect of which was to influence the conduct on the market of a competitor, or to disclose to one competitor the future pricing intentions of another competitor, having both the object, and the effect, of maintaining the price of England shirts at £39.99 during Euro 2000.

655. We are satisfied on the evidence in this case that Mr. Ronnie of Umbro received assurances or intimations as to their future pricing intentions during Euro 2000 at least from each of Sports Soccer and JJB, and in each case passed those assurances or intimations on to the other company. In particular, we find that Mr. Ronnie confirmed to JJB Sports Soccer’s agreement not to discount and “guaranteed” to Sports Soccer that other retailers, including by necessary implication JJB, would not undercut. In those circumstances, JJB, Umbro and Sports Soccer are all in our view properly to be regarded as parties to the same agreement or concerted practice. In any event, it is in our view immaterial whether, technically speaking, the agreements or concerted practices are between Umbro and JJB, and Umbro and Sports Soccer, respectively. In either case the effect on competition is the same.



656. Similarly we do not need to find whether JD and Blacks are also deemed to be party to one agreement or concerted practice to which Umbro, JJB and Sports Soccer were also party, or whether there was a series of interlocking agreements or concerted practices between Umbro and each of the retailers concerned. Although JD and Blacks have hardly figured in the evidence concerning JJB, it is not disputed that a dialogue, including Mr. Fellone's telephone conversations, was going on with those retailers at the same time as Umbro was in dialogue with JJB and Sports Soccer. It seems to us highly likely that in the course of the relevant conversations Mr. Fellone would have conveyed to his respective contacts that other retailers, including by implication JJB, had agreed not to discount during Euro 2000: see e.g. Mr. Fellone's fax to Debenhams of 2 June 2000. In those circumstances JJB is in our view properly be regarded as a party, at least indirectly, to an agreement or concerted practice with Blacks and JD, as well as Umbro and Sports Soccer regarding the price of the England shirts during Euro 2000. However, we do not need to make a finding on this specific point. We deal with Allsports below.

657. It is true that cases such as *Suiker Unie*, cited above, concern situations where one competitor reveals *directly* to another his future pricing intentions. However, in our view it does not make any difference that in this case the reciprocal contact took place through the intermediary of Umbro without direct contact between JJB and Sports Soccer. *Suiker Unie* and subsequent cases state that what is strictly precluded is "any direct or *indirect* contact" between economic operators the object or effect of which is either to influence future market conduct or to disclose future intentions. In our view, the above facts establish at the least the *indirect* disclosure by one competitor (JJB) through a supplier (Umbro) of its future intentions to another competitor (Sports Soccer), the effect of which was to influence the conduct of the latter on the market. That is then followed by the disclosure to JJB of Sports Soccer's future pricing intentions, again indirectly through the intermediary of Umbro.

658. We have expressly found that Mr. Ronnie did go back to JJB to inform them of Sports Soccer's pricing intentions. However, we do not accept that the analysis would be substantially different even if Mr. Ronnie had not done so. *Cimenteries* (at paragraphs 1849 and 1852) and *Tate & Lyle* (at paragraphs 54 to 60), cited above, show that even the *unilateral* disclosure of future pricing intentions can constitute a concerted practice if the effect of disclosure is in fact to reduce uncertainty in the marketplace.

659. Thus, for example, if one retailer A privately discloses to a supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The prohibition on direct *or indirect* contact between competitors on prices has been infringed.
660. As regards A, the position might in our view be different only if it could be shown that retailer A revealed its future pricing intentions to its supplier B for some legitimate purpose not related in any way to competition, and could not reasonably have foreseen that such information would be used by B in a way capable of affecting market conditions. It seems to us that such disclosure by a retailer to a supplier will rarely be legitimate, otherwise resale price maintenance could be reintroduced by the back door.
661. In the present case there is no evidence that JJB disclosed its future pricing intentions to Umbro for some legitimate purpose. On the contrary, JJB in our view knowingly revealed its pricing intentions to Umbro in the course of a dialogue orchestrated by Umbro in which Umbro was seeking to “stabilise” the market and avoid discounting during Euro 2000. In any event, as we have found, this case does not involve purely unilateral disclosure on the part of the JJB but at least the indirect exchange of information as to pricing intentions between competitors through the intermediary of Umbro.
662. The situation we are dealing with here is quite different from, for example, a public announcement by JJB to the Stock Exchange that it would not price replica shirts above £40. That was a unilateral statement of general policy publicly made, relating to a maximum price. The present case concerns a hidden, private, reciprocal exchange of pricing information, organised by Umbro, the object or effect of which was to reach an agreement or understanding that, during Euro 2000, the price of £39.99 for England shirts would also be the minimum price.
663. The complaints made by JJB to Umbro set out in section XI above about discounting by Sports Soccer provide the context for the agreement or concerted practice which we have found. We find in particular that the actions taken by Umbro, including the fact that

Umbro went back to JJB (most probably Mr. Sharpe) to inform them that Sports Soccer would price at £39.99, were to a material and significant extent in response to JJB's complaints. Moreover, those complaints in themselves constitute an additional basis for concluding that JJB was party to a relevant agreement or concerted practice.

664. The cases about complaints cited above, notably *Suiker Unie* at paragraphs 282 to 283, and the Commission's decision in *Hassellbad* at paragraph 42, show that if a competitor (A) complains to a supplier (B) about the market activities of another competitor (C), and the supplier B acts on A's complaint in a way which limits the competitive activity of C, then A, B and C are all parties to a concerted practice to prevent, restrict or distort competition. We can see the sense of that case law. Were it otherwise, established customers would always be able to exert pressure on suppliers not to supply new and more competitive outlets, free of any risk of infringing the Chapter I prohibition. A competitor who complains to a supplier about the activities of another competitor should not in our view be absolved of responsibility under the Act if the supplier chooses to act on the complaint.
665. JJB submits that the pressure it exerted on Umbro was at the "lawful end" of the spectrum. We accept that mere grumbles at a junior level between supplier and customer about general discounting in the market place are not necessarily strong evidence of a concerted practice. We also accept that it may well be legitimate for a customer to argue for better terms in view of the prevalence of discounting in the market. Moreover, a supplier whose stock is not moving, whether because of discounting by others, or for whatever reason, may legitimately wish to reduce or cancel orders and take a unilateral decision to that effect. All those matters lie at one end of the spectrum.
666. On the other hand, the above cases show that the line is crossed if a retailer A explicitly complains to supplier B about the competitive activities of another named retailer C, and as a result the supplier B does, in fact, take action limiting the competitive activities of C. Such a situation is not in our judgment a case of "lawful pressure". In those circumstances A, who benefits from the limitation on competition imposed by B on C, is in our view properly to be regarded as a party to the overall concerted practice, provided only that there is a causal link between the complaints made by A and the action taken by B with respect to C.

667. Applying this approach to the present case, in the period prior to Euro 2000 JJB complained verbally and vigorously to Umbro about discounting by Sports Soccer. Those complaints were made at all levels from the Chairman of JJB to the CEO of Umbro; from the Chief Operating Officer of JJB to the Chief Operating Officer of Umbro; and from the replica buyer of JJB to Umbro's Sales Director and to JJB's account manager at Umbro. Although no specific overt threat to cancel orders or the like has been established, the effect of those complaints by JJB was in our judgment to exert strong commercial pressure on Umbro "to get it sorted", i.e. to take some action which would have the effect of limiting discounting by Sports Soccer and restoring "price stability" in the market at the level of traditional High Street prices.
668. In our judgment the principal purpose of making those complaints was to signal JJB's displeasure at Sports Soccer's discounting. Those complaints in our judgment also arose in an anti-competitive context in which JJB was making it known to Umbro that it did not wish to see discounting by others on the England shirt during Euro 2000. As we have already found those complaints were, in fact, a significant and material factor in inducing Umbro to pressurize Sports Soccer into raising its prices during Euro 2000 and not discounting during that tournament.
669. On the above basis we find, additionally, that as a result of its complaints JJB was a party to a concerted practice with Umbro and, indirectly, Sports Soccer, the object or effect of which was to eliminate discounting below High Street prices on replica kit in the period around the Euro 2000 tournament.

*Conclusion as regards JJB*

670. For the foregoing reasons, and on the basis of the totality of the evidence we find that JJB was a party to an agreement or concerted practice falling within the Chapter I prohibition having as its object or effect to maintain the retail price of England replica shirts at £39.99 in the period immediately before and during Euro 2000.

**XV THE ENGLAND AGREEMENT: FINDINGS AS REGARDS ALLSPORTS**

**A. FINDINGS OF FACT**

*The position of Allsports*

671. As regards Allsports, we have already made relevant findings of fact in section XII above. These are as follows.
672. In the early summer of 2000 Allsports, like JJB, had a strong motive for acting in a way that would tend to limit discounting on replica shirts by its competitors. Whereas JJB's interest was to limit the challenge from Sports Soccer and avoid discounting on replica shirts during key selling periods, Allsports' chief preoccupation was the risk of being caught in the crossfire of a price war between JJB and Sports Soccer on replica shirts. Allsports, then losing ground to other retailers, had every incentive to seek to avert that outcome.
673. Allsports had a material commercial bargaining position vis-à-vis Umbro, because of its position as a large purchaser of replica shirts, Allsports' strategic importance to Umbro in the development of branded products, and Umbro's perception that Allsports had a line of communication with MU.
674. Allsports had consistently made it known to Umbro, in its letter of 20 April 1999, and in contacts between the companies at senior executive level, (i) that Allsports disapproved of the discounting of replica kit by retailers (ii) that Umbro could and should take steps to limit discounting by retailers with a view to ensuring "that things should stay as they were" and (iii) that Allsports could reduce its orders if Umbro "allowed" its products to be subject to discounting.
675. Allsports complained regularly to Umbro about discounting, in particular by Sports Soccer and, in the case of the JD cap promotion, by JD. Complaints or comments about those matters were made at senior levels by Mr. Hughes and Mr. Guest to Mr. Ronnie and Mr. Fellone. Complaints or comments by Ms. Charnock to Mr. May were on occasions passed up to Mr. Fellone.
676. There was an understanding between Allsports and Umbro that Allsports would work with Umbro to develop premium brands such as Choice of Champions and the Pro Training Collection, provided that Umbro would take such steps as it could to limit discounting on replica kit and to protect the Umbro brand from being "devalued" by discounting.

677. Allsports sought to incite Umbro to limit discounting on replica kit and/ or complained about such discounting (i) at Allsports Golf Day dinner on 25 May 2000 (ii) during Mr. Guest's meeting with Mr. Ronnie on 31 May 2000 and (iii) during Mr. Hughes' meeting with Mr. Ronnie on 2 June 2000. At buyer level there were comments or complaints from Ms. Charnock to Mr. May.
678. Complaints from Allsports were material to Umbro's decision to put or maintain pressure on Sports Soccer to observe High Street prices on replica kit, albeit not as important as the pressure from JJB or MU.
679. Complaints from Allsports were material to Umbro's decision to put or maintain pressure on JD to observe High Street prices on replica kit, including Umbro's decision to refuse to supply JD.
680. On 2 June 2000 Mr. Hughes of Allsports telephoned Mr. Knight of Blacks, a direct competitor, and ascertained from him the price at which Blacks were intending to sell replica shirts during Euro 2000.

*The telephone conversations*

681. As regards Allsports, Mr. Ronnie's evidence to the Tribunal is essentially as follows:
- (1) Mr. Ronnie had a number of conversations with both Mr. Guest and Mr. Hughes of Allsports in the period prior to Euro 2000 about the £39.99 retail price point. It was clear to Mr. Ronnie from those conversations that Allsports' intention was to price replica shirts at £39.99, including by implication the England shirt. It was a necessary implication of those conversations that Allsports did not intend to discount below £39.99 or engage in other promotional activity during Euro 2000. Mr. Ronnie considered that at least implicitly Allsports had agreed with him to price at £39.99 (Day 3, pp. 142-143, Day 6, pp. 103, 145).
- (2) When discussing price fixing with Mr. Ashley, Mr. Ronnie assured Mr. Ashley that other retailers would not undercut him. Mr. Ronnie's ability to give a guarantee that other retailers "would not break," or words to that effect, was a key factor in persuading

Mr. Ashley to raise his prices on the England shirt to £39.99 (Day 6, pp. 73 to 77, 103, 110, 112).

(3) Having obtained Sports Soccer's agreement to price at £39.99, Mr. Ronnie then told Mr. Guest of Allsports that Sports Soccer had agreed to price at £39.99. The purpose of telling Allsports was at least to make sure that Allsports understood that Umbro was taking steps to control Sports Soccer's pricing (e.g. Day 3, pp. 145 to 148, Day 6, pp. 101, 119).

682. We have already accepted, as regards JJB, the credibility of Mr. Ronnie's evidence as regards his telephone conversations. We remind ourselves that Allsports' position is not identical to JJB. In particular Allsports, unlike JJB, had no history of discounting in response to discounting by Sports Soccer, and Allsports had less commercial bargaining power than JJB. Nonetheless we also accept Mr. Ronnie's evidence as regards Allsports. In particular, Mr. Ronnie's evidence is corroborated by a number of elements, as set out below.

*The surrounding circumstances*

683. We have already seen in relation to JJB that, in order to be sure of avoiding a price war between JJB and Sports Soccer on the England shirts during Euro 2000, Umbro needed to involve other retailers. First, Umbro needed to be sure what other retailers' pricing intentions were, so as to avoid anyone rocking the boat. Secondly, Umbro needed to be in a position to give credible assurances to Sports Soccer that no one would undercut them if they raised their prices. Thirdly, Umbro needed to respond to the complaints and pressure it was receiving from MU and from retailers such as Allsports, about discounting by Sports Soccer.

684. As regards Allsports, we accept that Allsports was, at the time, more predictable than JJB in that it had, up to the early Summer of 2000, followed a policy that did not involve discounting. However, in our judgment, Umbro could not be certain about Allsports' future pricing intentions without having conversations with Allsports on that issue. Although Mr. Hughes personally was opposed to discounting, Mr. Patrick, the CEO, and Mr. Guest, the Sales Director, had autonomy over pricing decisions. Allsports' policy was not irrevocable: as Mr. Guest put it in evidence, "Never say never" (Day 11, p. 74). For

example JD, like Allsports, was an “aspirational” retailer, but had decided to take advantage of Euro 2000 with an apparently well-structured promotion. Mr. Patrick makes clear that Allsports could have responded with a similar promotion (paragraph 21 of his witness statement of 30 September 2003), and we see no reason in principle why Allsports could not have organised such a promotion itself. Mr. Guest, in a thoughtful passage in his evidence, was aware that sooner or later Allsports would have to face up to what he called “the bigger picture” in relation to replica kit pricing.

685. Moreover, Mr. Guest’s evidence is that Allsports always reserved the right to react to discounting, although that was not Allsports’ preferred option (Day 11, p. 44). Ultimately discounting would have affected Allsports “because we are not an island” (Day 11, p. 45). Allsports would not have wanted to be named as the most expensive retailer on the High Street, and were aware of that (Day 11, p. 46). It was Mr. Guest’s prerogative to cut prices if necessary, or to use replica kit as a loss leader. He had considered being the cheapest (Day 11, p. 67). He had that option, even at the launch of a new shirt, and could have discounted within 24 hours (Day 11, p. 76). Those comments support and confirm Mr. Ronnie’s evidence that he needed to contact Allsports, because he could not be certain what they would do, particularly since “they were very frustrated about the state of the marketplace and the way that the price point was moving around” (Day 6, p.115).

686. We have further found above that Allsports had told Umbro that it was opposed to discounting on replica shirts, that Allsports had complained about discounting in the market place, and that Allsports had made it known to Umbro that something should be done about it. Given the scale of Allsports’ purchases of replica kit, the strategic importance of Allsports to the development of Umbro’s branded business, and Umbro’s perception that Allsports had a line of communication with MU, it seems to us logical that Umbro would have wished to involve Allsports in a dialogue about pricing.

687. Indeed, Allsports does not appear to dispute that conversations did indeed take place between Umbro and Allsports and about Allsports future pricing intentions, with reference to the £39.99 price point. Thus Mr. Ronnie:

“I spoke with Michael Guest and David Hughes on a number of occasions regarding the price points of replica because they were concerned about them.” (Day 6, p. 101)

...



“We [i.e. Mr. Hughes and Mr. Ronnie] would talk about 39.99 a lot.  
(Day 6, p. 145)”

688. Against that background, we accept Mr. Ronnie’s evidence that Allsports was included in the dialogue which Mr. Ronnie was conducting with all major retailers in the period prior to Euro 2000 about the pricing of replica kit. Since it is not contested that such a dialogue extended to Sports Soccer, JD, First Sport, Debenhams and John Lewis, and we have found that it extended to JJB, it would be surprising if Allsports, Umbro’s second largest customer for replica kit, was the only major retailer not involved in a dialogue with Umbro about the pricing of replica kit in April/May 2000, especially given Allsports’ vocal concerns on that issue. Indeed, it is not suggested that the month of dialogue did not happen (Day 4, p. 78).

689. We further accept Mr. Ronnie’s evidence that in the course of that dialogue Allsports agreed or at the very least gave Mr. Ronnie to understand that it would price its replica kit, including the England shirts, at High Street prices.

*Umbro’s May MMR*

690. The foregoing analysis is supported by the terms of Umbro’s May MMR. That states:

“JJB, Sports Soccer, First Sport, JD and Allsports *have all agreed* to retail their adult shirts at £39.99.

...

Following a month of dialogue *with all the above accounts*, Umbro cannot allow it statement product to be discounted”.

691. That in our view confirms that Allsports had been involved in a dialogue with Umbro about pricing, as Mr. Ronnie maintains. It is also evidence that in the course of that dialogue Allsports had, expressly or by implication, agreed with Umbro to retail its adult replica shirts at £39.99.

692. We reject the argument that this document merely reflects an *assumption* that Umbro made about Allsports’ intentions. The May MMR, is, in our view, based on the conversations which Mr. Ronnie had with Mr. Hughes and Mr. Guest of Allsports about the £39.99 price point.

693. Once again we see no reason to treat Umbro's May MMR as meaning anything other than what it says, namely that Allsports, among others, had agreed with Umbro, expressly or by necessary implication, to maintain the £39.99 price point on replica shirts.

*Other elements*

694. Further evidence as to the existence of an agreement by Allsports to maintain the £39.99 price point is also to be found in Mr. Ashley's evidence to the OFT on 13 August 2001 which specifically mentions Allsports. Such an agreement is also implicit in Mr. Fellone's fax to Debenhams of 2 June 2000 which states "all the other retailers...have agreed", which in our view illustrates the nature of the conversations Umbro was having with retailers. Mr. Fellone's evidence about telephone conversations, Mr. Ashley's contacts on 2 June, and what Mr. Ronnie said to the OFT on 26 February 2002, as set out above, are all consistent with the above.

695. For the reasons given above in relation to JJB, we do not consider that paragraph 27 of Ronnie IV, properly understood, is in conflict with the foregoing evidence. Even if there were such a conflict, we prefer to base our judgment on Mr. Ronnie's oral evidence, the contemporary documents, and the surrounding circumstances.

696. More generally, it seems to us that an implied agreement or understanding by Allsports vis-à-vis Umbro that it would respect the £39.99 price point is necessarily implicit in (i) Allsports' complaints to Umbro about discounting by others; (ii) Mr. Hughes' conversation with Mr. Ronnie, and his conversation with Mr. Knight, on 2 June; and (iii) the fact that the working relationship between Umbro and Allsports was built around the idea that Allsports expected Umbro "to protect the licensed product".

697. As we understand it, Allsports does not dispute that Mr. Ashley sought and received assurances from Mr. Ronnie about the pricing intentions of other retailers, although it is not accepted that Allsports was specifically mentioned to Mr. Ashley by Mr. Ronnie. Mr. Ronnie's evidence was that he told Sports Soccer of the intentions of JJB, Allsports and JD (Day 6, p. 72). Whether or not Mr. Ronnie specifically mentioned Allsports, in our judgment the assurance Mr. Ronnie gave Mr. Ashley that "other retailers would not break" by implication necessarily included Allsports, the second largest seller of replica kit. Nor does Allsports challenge Mr. Ronnie's evidence (Ronnie III, paragraph 21) that when he

obtained assurances from Sports Soccer, he would go back to other retailers in order to persuade them that Umbro was responding to their complaints.

*Did Mr. Ronnie inform Allsports of Sports Soccer's agreement to go out at £39.99?*

698. Mr. Ronnie could not pinpoint his conversation with Mr. Hughes (Day 6, p. 28). The only other evidence that Mr. Hughes was told of Sports Soccer's agreement or assurance to price at £39.99 is Mr. Ashley's evidence to the OFT in 2001. Although Mr. Hughes did speak to Mr. Ronnie on 30 May to arrange the meeting on 2 June, we are not able to make a finding as to whether Mr. Ronnie told Mr. Hughes.
699. There is a conflict of evidence as to whether Mr. Guest was told of Sports Soccer's intention to price at £39.99. Mr. Ronnie steadfastly maintained that he told Mr. Guest that Sports Soccer had agreed to price at £39.99 in a telephone conversation of indeterminate date. Mr. Guest does not accept that he was told. When pressed in cross-examination, however, Mr. Guest said he was sure he would have been told had there been an agreement with Sports Soccer, but queried whether there ever had been an agreement (Day 11, p.123). He agreed that it would not have been odd for him to have been told, replying, "Yes I am just saying that whenever [Mr. Ronnie] told me I could not have believed it anyway" (Day 11, p.127).
700. It is not disputed that there *was* an agreement between Umbro and Sports Soccer. Secondly, on the assumption that there was an agreement (which there was) Mr. Guest was sure that he would have been told. Thirdly, Mr. Guest's answers in cross-examination suggest to us that his main point was that he would not have believed what Mr. Ronnie told him, either because he would have been sceptical about what Mr. Ronnie said, or because he did not think that Mr. Ashley would stick to any agreement he had purportedly made, or both. However, whether Mr. Guest would have believed what he was told is of course a separate issue from whether he was told or not.

701. Mr. Ronnie's evidence in the witness box was:

"It was necessary for me, as Umbro, to go back to those two accounts as Phil Fellone and myself had been involved in a lot of dialogue with the accounts through a period of time to ensure that JJB were clear on the understanding, and Allsports, that we were trying to control Sports Soccer as far as price was concerned,

because it was key to us that we were seen by the accounts to be trying to control Sports Soccer at price and work with Sports Soccer on the retail price.”

...

So rather than walk into the store at point of launch, it was key to us, and the pressure that we were being put under by the major accounts and the continuous dialogue that we were having with them, that we informed them as early as possible to let them know that Sports Soccer would be going out at 39.99”

(Day 3, p. 146 to 148)

702. We accept that evidence. We have already seen above that in the Spring and Summer of 2000 Umbro was receiving complaints and comments from Allsports about discounting, notably by Sports Soccer. We have also found that its relationship with Allsports had some strategic value to Umbro, and was one which Umbro intended to develop. As Mr. Guest told us, at the heart of that relationship there was a general understanding that Umbro would seek “to protect the licensed product” while Allsports would work with Umbro to create a more upmarket image. In those circumstances, in our judgment Umbro would have had every incentive to tell Mr. Guest about the understanding reached with Sports Soccer, so as to show that Umbro were meeting Allsports’ concerns, and was seeking to honour the underlying understanding between the companies which Mr. Guest says existed. In addition, we bear in mind that there were at the time close personal ties of friendship between Mr. Guest, Mr. Fellone and Mr. Ronnie, and regular social contacts. We also accept Mr. Ronnie’s evidence that he would have informed Allsports even though Sports Soccer had not yet raised its prices (Day 6, pp. 72, 110).

703. Mr. Ronnie also told the OFT during the meeting on 26 February 2002 that he had gone back to Allsports. We cannot see any reason why Mr. Ronnie would not have done so, and powerful reasons for supposing that he did. The fact that Mr. Ronnie cannot now identify precisely when and how he told Mr. Guest is not in our view fatal to the OFT’s case. Nor do we think that in the circumstances Mr. Ronnie necessarily used the formal word “agreement”. In our judgment however, Mr. Ronnie did let Mr. Guest know that Sports Soccer “would be going out at £39.99”, or words to that effect, and we so find. We accept, however, that when told, Mr. Guest may well have been somewhat sceptical.

## B. ANALYSIS

704. We have already set out the relevant legal principles earlier in this judgment.
705. In our view the evidence set out above, establishes, first, that Allsports at the very least indicated to Umbro, expressly or by implication, that it would not discount the England shirt below £39.99 immediately before and during Euro 2000.
706. As regards Allsports, those indications were given, expressly or by implication, in various conversations taking place between Mr. Ronnie and Mr. Hughes and Mr. Hughes and Mr. Guest during May and probably April 2000. In those conversations Allsports told Mr. Ronnie its future pricing intentions.
707. As we have already found above, Umbro's May MMR refers to Allsports having "agreed" to price at £39.99. That document, read in its context and the other evidence we have already referred to, confirms that the pricing matters discussed between Allsports and Umbro had resulted in, or confirmed, a consensus between them that Allsports would price at £39.99 during Euro 2000. That is supported by the whole context of the Umbro/Allsports relationship in which Allsports, in particular, wished to see the price point of £39.99 maintained on replica shirts. Such a consensus is an "agreement" for the purposes of section 2 of the Act.
708. Umbro's May MMR confirms, at the very least, Umbro's knowledge that Allsports' selling price during Euro 2000 would be £39.99, thus implying that no discounting or other promotional activity was planned as regards the England shirts. We have already found above that that knowledge could not have been simply 'assumed' by Umbro.
709. Even if Allsports were already charging £39.99, Allsports' future pricing intentions were in principle confidential matters. By revealing or confirming its intended actual retail selling prices to Umbro, Allsports at the very least reduced uncertainty as to its future market conduct. The argument that Umbro "already knew" what Allsports' intentions were appears to us to be circular, since Umbro's knowledge in that respect would have derived from its earlier conversations with Allsports in which the latter had revealed to Umbro, expressly or by implication, that its policy was not to discount. In any event, as Mr. Guest pointed out, that past information was not necessarily valid for the future; hence, as we

have already found, Umbro needed to obtain express confirmation of Allsports' future pricing intentions.

710. At or about the same time as Allsports reached a consensus with Umbro as to its future pricing intentions, or at least intimated or confirmed to Umbro, expressly or by implication, its future intentions as regards the England shirts, Sports Soccer agreed with Umbro to raise its prices on the England shirts to £39.99 and not to discount during Euro 2000. That agreement by Sports Soccer was made following the communication by Mr. Ronnie of other retailers' pricing intentions. Mr. Ronnie in effect guaranteed to Sports Soccer that "other retailers would not break". Whether or not Mr. Ronnie specifically mentioned Allsports to Sports Soccer, it was implicit in the information that Mr. Ronnie gave Sports Soccer that Allsports, selling slightly more replica kit than Sports Soccer, did not intend to discount during Euro 2000. Sports Soccer then agreed to raise its prices and not to discount during Euro 2000 on the understanding that other retailers would not undercut it. We are satisfied that Sports Soccer gave its agreement in part at least in the light of the assurance given by Mr. Ronnie as to the intentions of other retailers. That assurance implicitly included Allsports.

711. We have further found above that Mr. Ronnie then confirmed to Allsports (Mr. Guest) what Sports Soccer's future pricing intentions were, that is to say that Sports Soccer would be going out at £39.99. England's participation in the Euro 2000 tournament lasted until 21 June. Thus in respect of that period Allsports had been told by Mr. Ronnie what Sports Soccer's pricing intentions were, and vice versa.

712. In those circumstances, we find that there was an agreement, or concerted practice, involving at least Allsports, Umbro and Sports Soccer in which each of Allsports and Sports Soccer either agreed with Umbro, or confirmed to Umbro their respective intention, not to discount from £39.99 during Euro 2000. Sports Soccer's agreement was given in the light of the assurance given by Mr. Ronnie that other retailers would not undercut Sports Soccer. Mr. Ronnie was able to give that assurance to Sports Soccer as a result of conversations he had had with the other major retailers, including Allsports, as to their future pricing intentions. The giving of information by Allsports to Umbro of its future pricing intentions facilitated, to a material extent, Mr. Ronnie's ability to give Sports Soccer the assurance it needed, which in turn contributed to Sports Soccer's agreement to

raise its prices on the England shirts. Mr. Ronnie then confirmed to Allsports that Sports Soccer would be going out at £39.99 during Euro 2000.

713. In the light of the case law already referred to, that in our judgment is properly characterised either as an agreement to fix the prices of the England shirts at £39.99 during Euro 2000, or as a concerted practice the object or effect of which was to influence the conduct in the market of a competitor, or to disclose to one competitor the future pricing intentions of another competitor, having both the object, and the effect, of maintaining the price of England shirts at £39.99 during Euro 2000.
714. In the case of Allsports we are satisfied on the evidence that Mr. Ronnie did receive from Allsports an assurance, whether express or implied, of its intentions not to discount during Euro 2000 and effectively passed that information on to Sports Soccer by giving the latter the assurance that other retailers would not break. Information that Sports Soccer would go out at £39.99, in turn, was conveyed to Allsports by Mr. Ronnie. In those circumstances in our view Umbro, Sports Soccer and Allsports are all properly to be regarded as parties to the same agreement or concerted practice. In any event, it is in our view immaterial whether, technically speaking, the agreements or concerted practices are between Umbro and Allsports, and Umbro and Sports Soccer respectively. In either case the effect on competition is the same. For the reasons already given in relation to JJB, the *indirect* disclosure between competitors about future pricing intentions is caught by the Chapter I prohibition.
715. We have expressly found above that Mr. Ronnie did go back to Mr. Guest to inform him that Sports Soccer would be going out at £39.99. However, we do not accept that the analysis would be substantially different even if Mr. Ronnie had not done so. For the reasons already given in relation to JJB, even the unilateral disclosure of future pricing intentions may constitute a concerted practice. In our view in this case Allsports did not disclose its future pricing intentions to Umbro in innocent circumstances, as suggested in Allsports' representations to the OFT (see paragraph 420 of the decision). In this case Allsports' discussions with Umbro about its own prices and the prices of its competitors took place against a background of Allsports' consistent opposition to discounting as set out in section XII above. In those circumstances Allsports in our judgment must have known, or at the least have reasonably foreseen, and certainly hoped, that information as to

Allsports future pricing intentions would or might be used by Umbro with a view to avoiding or minimising the risk of discounting on the England shirts. That indeed was the whole purpose of the dialogue referred to in the May MMR and orchestrated by Umbro. In any event, as we have found, this case does not involve purely unilateral disclosure on the part of Allsports but at least the indirect exchange of information as to pricing intentions between competitors, through the intermediary of Umbro.

716. As regards JD and Blacks, it is not disputed that a dialogue, including Mr. Fellone's telephone conversations, was going on with those retailers at the same time as Mr. Ronnie was in dialogue with Allsports, Sports Soccer and, indeed, JJB. For the reasons already given, it seems to us highly likely that in the course of the relevant conversations with JD and Blacks Mr. Fellone would have conveyed to his respective contacts that other retailers, including by implication Allsports, had agreed not to discount during Euro 2000: see e.g. Mr. Fellone's fax to Debenhams of 2 June 2000.
717. In those circumstances Allsports is in our view properly be regarded as a party, at least indirectly, to an agreement or concerted practice with JD and Blacks, as well as Umbro and Sports Soccer regarding the price of the England shirts during Euro 2000. However, in relation to both JD and Blacks there is direct evidence that Allsports was party to a concerted practice as regards those companies and the pricing of the England shirts at the time of Euro 2000.
718. Specifically as regards JD, we have already set out the evidence that Mr. Hughes was concerned about the JD promotion on the England shirt during the meeting on 2 June, and asked Mr. Ronnie what Umbro was doing about it. Mr. Ronnie told him that Umbro would have to take action against JD, which Umbro duly did. Mr. Guest also complained about the JD promotion during the meeting of 31 May and asked what Umbro was proposing to do about it. Ms. Charnock at a lower level also made comments about the JD promotion. In fact Umbro did not only procure JD to raise its price to £39.99 with effect from 3 June, but also later withheld supplies from JD, in part at least because of JD's promotion on the England shirt.
719. Those facts in our view are sufficient to establish a concerted practice between Allsports, Umbro and JD, in that (i) Allsports complained about the activities of JD, a competitor (ii)



Umbro took action to limit competition from JD (iii) Umbro's action can be attributed, partly at least, to the complaints made by Allsports about another 'aspirational' retailer.

720. With regard to Blacks, it is not denied that on 2 June 2000 Mr. Hughes telephoned Mr. Knight of Blacks in Mr. Ronnie's presence to ascertain Black's pricing intentions on replica shirts, and was told that Blacks was prepared to charge £39.99 and was not planning any promotions during Euro 2000. This action by Mr. Hughes shows Allsports' directly ascertaining the pricing intentions of a competitor. As already discussed, the unilateral communication by one competitor (here Blacks) of its future pricing intentions to another competitor (here Allsports) suffices to establish a concerted practice, as *Tate & Lyle* and *Cimenteries* show. The fact that this was done in Mr. Ronnie's presence in our view shows that Allsports was complicit with Umbro in ascertaining the pricing intentions of a competitor.

721. On the specific evidence indicated above, it is in our judgment established that Allsports was party to an agreement or concerted practice to maintain the price of England shirts at £39.99 together with Umbro, and also with Blacks and, indirectly with Sports Soccer and JD, for the reasons given above. We do not need to decide if Allsports was a party to the same agreement or concerted practice as JJB, or to a different agreement or concerted practice taking place at the same time. Either way, the restriction or distortion of competition is the same.

722. The complaints made by Allsports to Umbro set out in section XII above show that Allsports was prepared to exhort Umbro to take action to protect Allsports from discounting by its competitors. Apart from the specific example of the JD cap promotion already mentioned, it has been seen that (i) in its letter of 20 April 1999 Allsports conveyed to Umbro the serious message that Umbro should take steps to control discounting by others (ii) Allsports actively complained to Umbro about discounting by Sports Soccer including a suggestion by Mr. Guest that Umbro should limit supplies to Sports Soccer (iii) there was an understanding between Allsports and Umbro that Umbro "would protect the licensed product" – i.e. limit discounting on replica kit, in return for Allsports' assistance in developing certain branded products (iv) Mr. Hughes publicly put pressure on Umbro to limit discounting on replica kit at the Allsports' Golf Day (v) on 2 June 2000 Mr. Hughes continued to maintain pressure on Umbro by reiterating his concerns about the possible loss

to Umbro of the MU contract, quite apart from Mr. Hughes' remarks about JD and his telephone conversation with Mr. Knight on the same occasion.

723. In our judgment, the actions taken by Umbro, including the fact that Umbro went back to Allsports (Mr. Guest) to inform them that Sports Soccer would be going out at £39.99 were to a material extent in response to Allsports' complaints. Although certain specific incidents took place after Umbro's agreement with Sports Soccer on 24 May, the Allsports' Golf Day on 25 May, the conversations on 31 May, and the conversations on 2 June all took place before Sports Soccer had implemented that agreement and before the start of Euro 2000 in which England participated until 21 June. Those specific incidents in our view would have contributed to Umbro maintaining pressure on Sports Soccer to implement the agreement of 24 May and continue to observe it during Euro 2000. A similar analysis applies in relation to JD.

724. In our judgment Allsports' complaints in themselves constitute an additional basis for concluding that Allsports was party to a relevant agreement or concerted practice.

725. For the reasons already given in relation to JJB, if a competitor such as Allsports complains to Umbro about the competitive activities of another competitor such as Sports Soccer or JD, and Umbro takes action on those complaints, as Umbro did in this case, then Allsports, as well as Umbro, Sports Soccer and JD is to be regarded as a party to the concerted practice in question.

726. We accept Allsports' submissions that matters such as reducing orders on the Celtic shirt because the fans did not like it are not relevant to the analysis. We also accept that grumbles by Ms. Charnock at buyer level do not necessarily take the analysis very far. But in this case matters did not rest at that level, but were taken up to a very senior level by Mr. Hughes, the Chairman, and Mr. Guest, the Marketing Director, who raised discounting by Allsports' competitors with Mr. Ronnie and Mr. Fellone, Umbro's Chief Operating Officer and United Kingdom Sales Director respectively. The evidence taken as a whole discloses a consistent pattern of actions in which Allsports was, at the material time, inciting Umbro to take action to protect Allsports from discounting by others. Allsports having succeeded, in common with JJB and MU, in prevailing upon Umbro to take such action, Allsports

cannot in our judgment legitimately claim that the resulting restriction on competition before and during Euro 2000 was nothing to do with them.

*Conclusion as regards Allsports*

727. For the foregoing reasons, and on the basis of the totality of the evidence, we find that Allsports was a party to an agreement or concerted practice falling within the Chapter I prohibition having as its object or effect to maintain the retail price of England replica shirts at £39.99 in the period immediately before and during Euro 2000.

**XVI PROCEDURAL ISSUES**

728. The OFT's findings on the England Agreement are set out paragraphs 414 to 437 of the decision. In its defences in both appeals the OFT relies on all the facts and matter set out in the decision (paragraph 53 of the JJB defence and paragraph 70 of the Allsports defence) subject to certain qualifications. The OFT then states at paragraph 53 (b), (c) and (d) of the defence in JJB's appeal and paragraph 21 (b), (c) and (d) of the defence in the Allsports appeal:

- “(b) In the case of Allsports and JJB, Mr. Ronnie has now clarified that the telephone calls he made after the meeting on 24 May and before 2/3 June were made to inform those retailers of the fact that, in response to Allsports and JJB pressure and complaints, Umbro had managed to obtain Sports Soccer's agreement to increase its prices for England home and away Replica Shirt whilst England remained in the championship. Mr. Ronnie warned Allsports and JJB not themselves to discount as Sports Soccer would use any excuse not to abide by its agreement.
- (c) Accordingly, to this limited extent, the OFT's findings, in so far as they refer to assurances given by [JJB or Allsports], at §§ 414, 415(b) and 427 (in part) are not adhered to. Nevertheless, the OFT's findings at §427 (and §431 as regards JJB) that the purpose of the phone calls to Allsports and to JJB was to give them comfort about assurances being given by their competitors is correct.
- (d) The receipt by [JJB or Allsports], in the course of a phone call from Mr. Ronnie, of confirmation as to Sports Soccer's agreement with Umbro to raise prices amounts to participation by [JJB or Allsports] in an agreement or a concerted practice, within the meaning of the Chapter I

prohibition, as to the pricing of the England Replica Shirt at the time of Euro 2000.”

729. The paragraphs referred to by the OFT in its pleadings as partly “not adhered to” read as follows:

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

415 (b) The witness statements of Mr. Ronnie and Mr. Fellone of Umbro support each other and confirm the version of events described by Sports Soccer; they each mention the specific retailers whom they respectively called, and from whom they received assurances (Mr. Ronnie: JJB and Allsports; Mr. Fellone: Blacks and JD amongst others...

427 As to Allsports’ question why Umbro should be calling Allsports or JJB to confirm their retail pricing intentions if they were the source of pressure, the OFT is satisfied that it does make sense that Umbro would want to confirm with all retailers what their precise pricing intentions would be and to give comfort about assurances being given by their competitors.”

730. The OFT in its pleadings thereby sought to modify the case made in the decision in so far as those paragraphs found that after 24 May 2000 Mr. Ronnie made telephone calls to JJB and Allsports in which he *sought and obtained assurances from* JJB and Allsports to the effect that they would price at £39.99 during Euro 2000. In its defences in the appeals the OFT alleges that Mr. Ronnie’s telephone calls after 24 May had the more limited purpose of *informing* JJB and Allsports that, in response to their complaints and pressure, Umbro had managed to obtain Sports Soccer’s agreement to raise its prices and not discount during Euro 2000, and to warn JJB and Allsports not to discount. The OFT maintains that those calls did give an assurance *to* JJB and Allsports that Sports Soccer would not discount. According to the OFT in the defences, the receipt by each of JJB and Allsports of a phone call to that effect amounted to participation by those companies in an agreement or concerted practice.

731. The OFT also pleaded that Umbro was subject to pressures and complaints from JJB (paragraphs 47 to 50 of the JJB defence) and Allsports (paragraphs 55 to 57 of Allsports' defence).
732. The OFT's pleaded case, and indeed its opening submissions, therefore suggested that the OFT was proceeding on the basis of Mr. Ronnie communicating to JJB and Allsports the fact of his agreement with Sports Soccer, in response to complaints and pressure by JJB and Allsports. The OFT, however, also stated in the defences that it was relying on all the facts and matters set in the decision, subject to the matters identified as "not adhered to".
733. The evidence as it came out in cross-examination in our view now shows that the OFT had no need to "not adhere" to the paragraphs of the decision referred to above. While in our view the OFT's pleadings were correct to allege that Mr. Ronnie's phone calls after 24 May were essentially to inform JJB and Allsports of the fact of the agreement with Sports Soccer, the evidence now establishes that, prior to 24 May, Mr. Ronnie had *already* been in a dialogue with the major retailers, such that Mr. Ronnie was in a position to give Sports Soccer the assurances that he sought. It appears to us that the OFT's pleaded case in the defences was based on a literal reading of paragraph 27 of Ronnie IV, without taking full account of the wider evidential context.
734. The evidence now before the Tribunal supports a fuller and deeper analysis than the OFT's pleadings suggest. In particular, paragraphs 414, 415 (b) and 427 of the decision are correct, in so far as those paragraphs suggest that Umbro sought information or assurances from the major retailers as regards their pricing intentions in order to be able to assure Sports Soccer that it would not be undercut. Our findings set out above are to the effect that that was exactly what Umbro did do.
735. In our view this situation unforeseen by the OFT has largely arisen from (a) the OFT's entirely proper concern, in its pleading, not to put its case any higher than it then thought the evidence warranted; and (b) the appellant's decision to cross-examine the OFT's witnesses. As a result of that cross-examination, a great deal of additional detail emerged about the events with which we are concerned. We do not think the appellants can reasonably complain if the Tribunal takes into account evidence which the appellants themselves brought out in the course of cross-examination.

736. In analysing what, if any procedural consequences flow from this situation, we observe, first, that the OFT has established before the Tribunal the more narrowly pleaded case relied on in paragraph 53 of the JJB defence and paragraph 21 of the Allsports defence. Thus, we have found expressly above that Mr. Ronnie did go back, after 24 May, most likely to Mr. Sharpe of JJB and Mr. Guest of Allsports to inform them that Sports Soccer was going out at £39.99, or words to that effect. We have found above that Umbro's actions were caused to a material and significant extent in the case of JJB, and to a material extent in the case of Allsports, by the complaints which those companies made to Umbro.

737. Moreover, in our judgment the OFT has established, in greater detail than has previously been possible, the essential elements of the England Agreement as alleged in paragraphs 414 to 437 of the decision. The essence of those paragraphs is that, as a result of telephone conversations between Umbro and all the major retailers, an agreement or concerted practice to price the England shirts at £39.99 during Euro 2000 came into existence. That agreement or concerted practice resulted from Umbro seeking or receiving information or assurances from the retailers in question about their future pricing intentions, and then using that information to reassure the retailers concerned, and in particular Sports Soccer, that they would not be undercut if they agreed not to discount. That is, in essence, the nature of the England Agreement which we have now found to exist.

738. In addition, the main elements upon which this judgment is based are to be found in the decision: for example, Mr. Ashley's meeting with the OFT in 2001, Umbro's May MMR, the faxes of 2 and 6 June, Mr. Ronnie and Mr. Fellone's telephone conversations, Mr. Hughes conversations on 2 June, and the evidence in Ronnie III about JD, are all referred to in paragraph 415 or elsewhere in the decision. To the extent that there is additional material now before the Tribunal that is, as we have said, largely due to the additional witness statements produced by Allsports, the OFT's witness statement in response, and what has come out in cross-examination. In our view the conclusion which we have reached in this judgment lies within the four corners of the original decision.

739. Nor do we think it can reasonably be argued that the OFT ever abandoned reliance on the materials referred to, in particular, at paragraph 415 of the decision: see paragraphs 12 and 28 of the JJB defence, and paragraphs 9, 20, 21 (e) and 27 of the Allsports defence. As we said in our introductory judgment on Allsports' application to strike out, the differences

between the decision and the OFT's pleaded case can be overstated: *Allsports v OFT* [2004] CAT 1, at [71] to [74].

740. It is true that there is a lack of particularity or some ambiguity in the decision as to the dates and times of the telephone calls relied on. For example, Mr. Ashley's evidence referred to in the decision (paragraph 415 (a)) refers to an agreement on the England shirts having already been made between the other retailers *before* Sports Soccer agreed to "conform". Umbro's May MMR refers to all the major retailers having "agreed", after "a month of dialogue with these accounts" (paragraph 415 (i)). Debenhams' evidence was to the effect that Mr. Fellone was already telephoning them on 22 May, i.e. before the agreement with Sports Soccer on 24 May (paragraph 415 (c)). Mr. Bown of JD states that he was telephoned by Mr. Ronnie, implying that there were more calls than those referred to by Mr. Fellone (paragraph 415 (e) of the decision). Paragraphs 26 and 27 of Fellone III do not state that his telephone conversations took place after 24 May, although admittedly paragraph 32 of Ronnie III does give that impression (paragraph 415 (b)). Umbro's fax to MU of 6 June 2000 speaks of JJB having "given assurances" to revise the price of jerseys, which suggests that JJB did more than passively receive information about Sports Soccer's agreement (paragraph 415 (h)). It is true that paragraph 414 of the decision implies that the telephone conversations of Mr. Ronnie and Mr. Fellone took place after 24 May. On the other hand, paragraph 431 of the decision finds that "during April or May 2000" Umbro did expressly contact JJB "to confirm that Umbro was speaking to other retailers about the pricing of the England replica shirts and to confirm that JJB's pricing intentions were still in line with expectations", although again what is referred to is "this call". However, considering that we are dealing with telephone conversations from four years ago, a degree of ambiguity in the decision was in our view understandable.

741. It was, no doubt, in a good faith attempt to clarify the telephone calls in question that the OFT pleaded its defence on the narrow basis set out above, although much of the material set out in the decision, upon which the OFT also relied, would have supported the wider basis now found by the Tribunal in this judgment.

742. In this somewhat unusual situation, we can see no procedural objection to this matter now proceeding to the next stage as regards the England Agreement, and for the findings that we have made as regards the England Agreement to be taken into account in determining the

penalty. Under paragraph 3 of Schedule 8 of the Act this is an appeal on the merits, where the Tribunal has power to make any decision which the OFT could itself have made.

743. Notwithstanding that in our view some confusion did arise in relation to the pleadings, the true position has in our view now emerged in the evidence. The appellants have been very fully heard on every aspect of the case. We have not identified any procedural unfairness which would prevent us from considering the issue of penalty in relation to the England Agreement. To decline to do so on a pleading point would not in our view be in the interests of justice.

744. As regards the specific matters that were raised by Allsports in its application to strike out paragraph 21 of the OFT's defence, upon which the Tribunal gave judgment on 29 January 2004 [2004] CAT 1, we have already dealt with the pleading point above. Allsports had the fullest opportunity to exploit in cross-examination the differences between Mr. Ronnie's various statements and has in our view been fully heard. The issue also raised by Allsports on that occasion as regards the OFT's alternative case, advanced on the basis that Mr. Ronnie never did go back to Allsports, does not now arise, since we have found that Mr. Ronnie did go back to Allsports. As to the fact that in our judgment of 29 January 2004 we permitted the OFT to plead the evidence of complaints and pressure by Allsports, we see no reason to modify the views we set out in paragraphs 77 to 94 of that judgment. Evidence of complaints by Allsports was in our judgment an important part of the context of this case and forms a subsidiary basis for the findings of infringement we have made. The findings we have made on the issue of complaints are, however, based on matters that are either mentioned in the decision, or figured in the administrative procedure, or are to be found in Allsports' evidence, or are matters which came out in cross-examination.

745. We therefore conclude that we should now proceed to the penalty stage as regards the England Agreement.

## **XVII THE MU AGREEMENT**

746. The events leading up to, and following, the meeting on 8 June 2000 have separate strands, which cross over from time to time but are essentially distinct. We deal with the relevant strands under three headings: A. Umbro's efforts prior to the beginning of June 2000 to



ensure that discounting did not take place on the MU shirt; B. The relationship between Allsports, MU and Umbro; and C. The initiative taken by Mr. Hughes of Allsports from early June onwards to bring Mr. Whelan and Mr. Ashley together for the purpose of fixing the price of the MU shirt. Our findings as regards strands A. and B. are subsidiary to our findings in C. below, which is the most important of the three strands concerned.

#### A. UMBRO'S EFFORTS PRIOR TO THE BEGINNING OF JUNE 2000 TO PREVENT DISCOUNTING ON THE MU SHIRT

##### *Umbro and JJB*

747. We have already found that, during the Spring and early Summer of 2000, JJB maintained commercial pressure on Umbro to take action to limit or control discounting by Sports Soccer on replica shirts.
748. According to the note of the meeting with Sports Soccer on 24 May 2000, Sports Soccer agreed “to increase the price of England (H) & (A) kits and for a set period of 60 days to maintain the prices of licensed kits (including Gkeepers/infant kit)”. That note indicates that the agreement between Sports Soccer and Umbro had two distinct elements, namely to increase the price of England shirts *and* to maintain High Street prices on *all* replica kit for a period of 60 days from launch. The earlier agreement reached with Sports Soccer in April 2000 was similarly to maintain High Street prices for replica shirts as regards “all new Umbro licensed kits” –i.e. extending to new launches of replica kit (Umbro’s MMR. for April 2000)
749. As already seen, the agreement of 24 May was implemented by Sports Soccer on 2 June, as regards raising the price of the England shirt. That nonetheless left extant the second element in Sports Soccers’ agreement, recorded in the note of the meeting of 24 May, namely to maintain High Street prices on new launches for 60 days. On the face of it, that agreement would have extended to cover the launch of the MU shirt on 1 August 2000, as the OFT finds in paragraphs 352 and 353 of the decision. The earlier April agreement, largely respected by Sports Soccer as regards the launch of the Chelsea and Celtic away shirts in May 2000, further supports that analysis.

750. Furthermore, we have already concluded above that in the period prior to Euro 2000, Mr. Ronnie had ascertained from Mr. Sharpe that it was JJB's intention to price replica shirts at £39.99, and that JJB did not intend to discount, at least provided that no other retailer did so. On the basis of that information, Mr. Ronnie gave Sports Soccer an assurance, or at least the information, that if Sports Soccer did not discount, other retailers, including expressly or by implication JJB, would not discount below £39.99. On that basis, Sports Soccer entered into the agreement of 24 May. Mr. Ronnie went back to JJB to inform them that Sports Soccer had agreed to price replica shirts at £39.99, as we have already found.

751. Umbro's fax to MU of 6 June 2000 in response to MU's fax of 25 May states:

“We have subsequently received assurances from Sports Soccer and JJB that they will revise their current pricing of jerseys to reflect a price point which falls in line with current market conditions.”

752. That fax, in our view, shows that by early June 2000 Umbro believed that it had received assurances from both Sports Soccer and JJB that they would not discount below £39.99, including in relation to the forthcoming launch of the MU shirt.

753. That analysis is further supported by the terms of Umbro's MMR for May 2000. That document commences “There has been a major step forward in the retail price of England launch of Manchester United”, and then states that JJB and other named retailers “have all agreed” to retail their *adult shirts* at £39.99. That, in our view, supports the conclusion that the agreement or concerted practice to which the May MMR refers extended to all adult replica shirts. The words “the launch of Manchester United” confirm that the agreement or concerted practice was understood as extending to at least the launch of the new MU home shirt on 1 August.

754. On the basis of the evidence, we conclude that, even prior to the meeting on 8 June, the agreement or concerted practice involving JJB which we have already found in section XIV above extended to replica shirts generally. That agreement or concerted practice by necessary implication extended, at least in principle, to the launch of the MU shirt on 1 August. Umbro's fax of 6 June 2000 to MU confirms that Umbro kept MU informed then of the assurances it had received, thereby involving MU as a party to the agreement or concerted practice in question.

*Umbro and Allsports*

755. We have already found that during May 2000, at least, conversations took place between Umbro and Allsports that gave Umbro to understand that Allsports intended to price the England shirt at £39.99 and not to run any form of promotion during Euro 2000. Similarly Allsports had given Umbro to understand, by complaints and observations going back to at least April 1999, that it saw replica shirts as premium products, that it was opposed to Umbro “allowing” discounting on replica shirts, and that its willingness to work with Umbro on developing premium products was dependent on Umbro “controlling the licensed product”. As we have already held, Mr. Ronnie assured Mr. Ashley that other retailers, including by necessary implication, Allsports, would not undercut him if he raised his prices on the England shirt. After the agreement of 24 May, Mr. Ronnie then went back to Allsports to inform them of Sports Soccer’s agreement.
756. In our view, by May 2000 Allsports had already communicated its pricing intentions to Umbro in respect of replica shirts generally, not limited to the England shirt. Those intentions were that Allsports would not ordinarily discount those products during key selling periods. Similarly, Allsports had brought pressure to bear on Umbro to take steps to prevent discounting by others. Moreover, as we have found above, Sports Soccer’s agreement of 24 May was not limited to the England shirt, but included an agreement to maintain prices for 60 days from launch in relation to replica shirts generally. The giving by Allsports to Mr. Ronnie of information as to its future pricing intentions materially facilitated Mr. Ronnie’s ability to procure Sports Soccer to enter into the agreement of 24 May, for the reasons already given above.
757. In addition, as discussed above, it can reasonably be inferred from Umbro’s MMR for May 2000 that in the course of a dialogue that had by then taken place, Allsports was among those retailers who had ‘agreed’ to price their *adult replica shirts* at £39.99. Similarly the reference to “the launch of Manchester United” shows that the agreement or concerted practice referred to extended at least to the launch of the new MU home shirt on 1 August.
758. On the basis of the evidence we conclude that, even prior to Mr. Hughes’ initiative regarding the meeting of 8 June, the agreement or concerted practice involving Allsports which we have already found in section XV above extended to replica shirts generally.

That agreement or concerted practice was in our view wide enough to extend to the MU shirt launched on 1 August 2000.

## B. ALLSPORTS, UMBRO AND MU

759. We have already seen in section XII above that in the course of the Golf Day dinner Mr. Hughes brought pressure to bear on Umbro to prevent or limit discounting on the new MU home shirt. Those remarks were made in the presence of Mr. Draper of MU, who agreed with Mr. Hughes that such discounting would bastardise the product. There is evidence that on the morning of the Golf Day Mr. Hughes had met Mr. Richards of MU and that Allsports' pricing intentions regarding the MU shirt had been discussed. In addition, at his meeting with Mr. Ronnie of 2 June, which Mr. Hughes organised following the Golf Day, Mr. Hughes told Mr. Ronnie that he had been in conversation with MU about the pricing of the MU home shirt. He also said words to the effect that he thought Umbro would lose the MU contract if it could not ensure that the product would not be discounted. In addition, Mr. Hughes said that he wanted to organise the meeting between himself, Mr. Whelan and Mr. Ashley which we discuss in detail in the next sub-section. Mr. Ronnie, as described below, facilitated that meeting by giving Mr. Hughes Mr. Ashley's telephone number, by phoning Mr. Ashley to tell him of the proposed meeting, and by supplying Mr. Hughes with an example of the MU home shirt. Indeed, we are of the view that Mr. Hughes' remarks about the MU contract would have provided a major motive for Mr. Ronnie to put pressure on Mr. Ashley to travel to Macclesfield to confirm, in person, to Mr. Hughes and Mr. Whelan, that he did not intend to discount the MU shirt.

760. In those circumstances it seems to us that by 2 June 2000 (a) Allsports had given MU to understand that it was not Allsports' intention to discount the MU shirt at launch (b) Allsports had given Umbro to understand that it was not Allsports' intention to discount the MU shirt at launch.

761. In addition, by 2 June Umbro had cooperated with Mr. Hughes in taking steps to avoid discounting on the MU home shirt at launch. In our view (i) the communication by Mr. Hughes to Mr. Ronnie of his intention to organise a meeting with Mr. Whelan and Mr. Ashley in order to fix the price of the MU shirt and (ii) the steps taken by Mr. Ronnie to facilitate that meeting (which include telephoning Mr. Ashley, giving Mr. Hughes Mr.

Ashley's telephone number, and supplying an example of the new MU shirt) show that Umbro and Allsports were acting in concert to procure an agreement to fix the price of the MU shirt. In the event, as we find below, Mr. Hughes was successful in the endeavours which Umbro in our judgment facilitated.

### C. THE INITIATIVE TAKEN BY MR. HUGHES

#### *Contacts between Mr. Hughes, Mr. Ronnie and Mr. Ashley*

762. It is common ground that during May 2000 Mr. Hughes became increasingly concerned that discounting would take place at the launch of the new MU home shirt on 1 August 2000. He feared, in particular, that Sports Soccer would discount that shirt and that JJB would retaliate (Hughes I, paragraph 67). Mr. Hughes' concern about discounting on the MU shirt was specifically indicated in the course of his remarks at the Golf Day dinner on 25 May 2000. At the end of that dinner, Mr. Hughes asked Mr. Ronnie to meet him to discuss the pricing of the MU shirt.
763. Mr. Hughes subsequently got in touch with Mr. Ronnie on 30 May to arrange that meeting. Mr. Hughes' diary for that day reads "Phone David Whelan/Mike Ashley – Man Utd Shirt Price (get number from Chris Ronnie)". The meeting with Mr. Ronnie was arranged for 2 June.
764. As already indicatd, in the course of the meeting of 2 June Mr. Hughes spoke of his fears about discounting on the MU shirt. He told Mr. Ronnie that he wanted to organise a meeting between himself, Mr. Whelan and Mr. Ashley. According to Mr. Hughes he wanted to "try and talk some sense into them as I had had enough of their price war". Mr. Hughes asked Mr. Ronnie for Mr. Ashley's phone number, which Mr. Ronnie gave him, and asked Mr. Ronnie to let him have an example of the MU shirt which he would use as a 'prop' for the meeting.
765. Mr. Hughes spoke to Mr. Ashley on the telephone on the afternoon of Friday 2 June. According to Mr. Hughes, he asked Mr. Ashley to come to a meeting with him and Mr. Whelan to discuss the price war between them, with a view to bringing the price war to an end. (Hughes I, paragraph 78, Day 10, pp 148-154). According to Mr. Ashley, Mr. Hughes

specifically told him that the purpose of the meeting was to fix the price of MU shirt, rather than ending the “price war” (Ashley II, paragraph 25).

766. According to Mr. Ashley he was already expecting a call from Mr. Hughes, since Mr. Ronnie had told him of his conversation with Mr. Hughes earlier in the day. Mr. Ronnie told him that he would have to go and convince the other retailers that Sports Soccer would not discount the MU shirt and would charge £39.99 (Ashley II, paragraph 23). This evidence suggests that Mr. Ronnie told Mr. Ashley that Mr. Hughes intended to discuss the pricing of the MU shirt, as Mr. Hughes had earlier intimated to Mr. Ronnie. In Ronnie III, Mr. Ronnie puts his telephone conversation with Mr. Ashley on Monday 5 June, rather than on Friday 2 June, (paragraph 48) but the evidence suggests that the relevant calls took place on Friday 2 June. Mr. Ronnie accepts that he told Mr. Ashley to expect a call from Mr. Hughes about the MU shirt (Day 4, p.71)

767. Even on Mr. Hughes’ evidence, it must have been clear to Mr. Ashley from his conversation with Mr. Hughes that the purpose of the meeting was to discuss pricing issues between JJB and Sports Soccer. It seems to us likely that the MU shirt was mentioned, given the imminence of the MU launch, and the fact that Mr. Hughes had already mentioned the MU shirt to Mr. Ronnie. Either way, it was plain to Mr. Ashley that he was being invited to a meeting to discuss prices with his two principal competitors.

768. Mr. Ashley tells us that he agreed to go to the meeting at Umbro’s insistence, and as a result of the pressure placed on Sports Soccer by Umbro (Ashley II, paragraph 26, Day 1, p.97-98). Mr. Ronnie maintains that he merely told Mr. Ashley to expect a call from Mr. Hughes (Day 4, p.71) and that he had no further involvement as regards the meeting. In our judgment, Mr. Ronnie is likely to have put some pressure on Mr. Ashley to attend the meeting, in order to further Umbro’s objective that the principal retailers, and more significantly MU, could be still further reassured that discounting would not take place at the launch of the MU home shirt. Mr. Ronnie’s involvement is also illustrated by the fact that he gave Mr. Hughes Mr. Ashley’s phone number, subsequently discussed the proposed meeting with Mr. Ashley on the telephone, provided Mr. Hughes with an example of the MU shirt, and arranged to have a meeting with Mr. Ashley in the afternoon of 8 June, after Mr. Ashley had met Mr. Whelan and Mr. Hughes.

769. It was suggested to Mr. Ashley by Allsports that it was untrue that he went to the meeting of 8 June because of pressure from Umbro: he went of his own accord, primarily because he was interested in meeting Mr. Whelan. Mr. Ashley maintained that he did indeed go to the meeting as a result of Umbro's pressure, and because of his fear of not getting full delivery of the products he needed (Day 3, pp. 70-74). We accept Mr. Ashley's evidence on this point, which is consistent with the evidence Mr. Ashley has given throughout this case as to the pressure he was put under by Umbro to sell replica kits at High Street prices.

770. We also accept Mr. Ashley's evidence that, having been so requested by Mr. Ronnie, and as a result of pressure from Umbro, he went to the meeting of 8 June with the intention of intimating to Mr. Hughes and Mr. Whelan that Sports Soccer would sell the MU adult shirt at launch at £39.99 (Ashley II, paragraph 23).

*Mr. Hughes' contacts with JJB*

771. Mr. Hughes slipped a disc for the second time during the weekend 2/4 June. His recollection is that this occurred on Friday 2 June (Day 10, p.146). He told us that as a result he was in severe, albeit intermittent pain. That did not however prevent him from making the following diary entry for Monday 5 June at some stage during the weekend:

“Agree Manchester United and England prices with everyone including Mike Ashley”  
“Sports trade cartel arrange a meeting regularly”  
“Visit David Whelan”

772. According to Mr. Hughes he attempted to speak to Mr. Whelan on the telephone on Monday 5 June, but Mr. Whelan was not there. Nor was Mr. Sharpe. Mr. Hughes left a message asking Mr. Sharpe to call. Mr. Sharpe was apparently somewhat slow in returning calls. Mr. Hughes rang two or three times. Eventually, Mr. Sharpe returned his call (Hughes I, paragraph 81).

773. Mr. Hughes places Mr. Sharpe's call to him on Tuesday 6 June 2000. His diary entry for 6 June reads: “Phone and visit D. Whelan with Manchester United Shirt.” That suggests to Mr. Hughes that by 6 June he had not yet heard back from either Mr. Whelan or Mr. Sharpe. However, either Mr. Sharpe then returned Mr. Hughes' call, or Mr. Hughes rang Mr. Sharpe again. Mr. Hughes maintains that he never spoke to Mr. Whelan before the meeting of 8 June.

774. According to Mr. Hughes, he told Mr. Sharpe that he had invited Mr. Ashley to a meeting, the purpose of which was to stop Sports Soccer and JJB from discounting premium products on launch. It was time for Sports Soccer and JJB to stop beating each other up: could not the parties get round a table and sort it out? (Hughes I, paragraph 82, Day 10, pp.155-156). Mr. Sharpe agreed that he and Mr. Whelan would be at the meeting. Mr. Hughes accepted in evidence that his remarks to Mr. Sharpe could only have meant that he wanted the discounting by JJB and Sports Soccer to stop (Day 10, p.156). Mr. Hughes also accepts that his purpose was to get Mr. Whelan and Mr. Ashley in a room so as to agree the price of the MU shirt (Day 10, p151), albeit that it was also about “blood spilling all over the carpet” (Day 10 p.151) and an end to the price war. On the basis of Mr. Hughes’ evidence, which we accept on this point, Mr. Sharpe at least must have known that he was being invited to a meeting to discuss prices with his principal competitors.
775. In cross-examination on behalf of JJB, Mr. Hughes maintained his recollection that he had spoken only to Mr. Sharpe, not to Mr. Whelan (Day 9, p.187-202). He confirmed that the landmarks near his house included the Jodrell Bank telescope and three ponds.
776. Mr. Whelan, at paragraph 25 of Whelan I, states that he received a phone call from Mr. Hughes on 8 June or shortly before. Mr. Hughes asked for a meeting without disclosing the reason. Mr. Whelan assumed that Mr. Hughes was looking to sell his business (paragraphs 26 to 27). Mr. Whelan was surprised when he found on arrival that Mr. Ashley was at Mr. Hughes’ house. Mr. Sharpe in his witness statement of 15 August 2002 states at paragraphs 28 to 30 that he believed that Mr. Whelan had been contacted by Mr. Hughes at short notice and that Mr. Hughes was looking to sell his business. He states that he too was surprised when he found Mr. Ashley was present at Mr. Hughes’ house.
777. Mr. Whelan’s evidence to the Tribunal is that Mr. Hughes rang him and asked for “a discussion about business” as soon as possible, saying that it was important. Mr. Whelan thought that call was made on 7 June. Mr. Whelan replied to the effect “OK we will go across quickly”. Mr. Whelan told us that he knew Mr. Hughes was due for an operation on his spine, and that the rumour in the trade was that Mr. Hughes wanted to retire (Day 8, p. 73). Mr. Whelan assumed that what Mr. Hughes intended to discuss was the sale of the business. He did not ask Mr. Hughes what the purpose of the meeting was (Whelan I, paragraphs 25 to 26). In answer to questions from the Tribunal, Mr. Whelan said that Mr.



Hughes had given him directions for the helicopter pilot, saying that the house was close to Jodrell Bank and that he had three ponds at the bottom of the lawn (Day 8, p.185). Mr. Whelan did not consider it unusual for him to rearrange his priorities at short notice to deal with important matters: if someone like David Hughes rang up and said he wanted a meeting at short notice and that it was important, Mr. Whelan would if necessary drop everything and go (Day 8, p. 137).

778. The above conflicting evidence goes to the question of how much the two senior executives of JJB, Mr. Whelan and Mr. Sharpe, knew of the purpose of the meeting before their arrival at Mr. Hughes' house. On that point, we accept Mr. Hughes' evidence that he spoke to Mr. Sharpe and told Mr. Sharpe that Mr. Ashley would be there and that, in effect, the purpose was to bring an end to the discounting between JJB and Sports Soccer. Since Mr. Hughes had had a similar discussion with Mr. Ashley, albeit one that, according to Mr. Ashley, focussed specifically on the MU shirt, it seems to us that Mr. Hughes would have conveyed to Mr. Sharpe at least that Mr. Ashley would be present, and that pricing would be discussed. It seems to us highly unlikely that Mr. Hughes would have given no reason for the meeting to Mr. Sharpe, especially when he had given a reason to Mr. Ashley. Mr. Hughes' evidence contradicts paragraph 29 of Mr. Sharpe's witness statement where he says that he thought that Mr. Hughes wanted to discuss a possible sale of Allsports.

779. As to what Mr. Whelan knew of the purpose of the meeting, the evidence suggests that Mr. Hughes did, in fact, speak to Mr. Whelan at some stage, in the course of which Mr. Hughes gave Mr. Whelan directions for the helicopter pilot. Mr. Hughes himself accepts that he must have made more than one call to each of Sports Soccer and JJB, the first call to set the meeting up, and at least a second call to make the detailed arrangements. Possibly, contrary to his recollection, Mr. Hughes spoke to Mr. Whelan in the latter context. However, whether or not Mr. Hughes also spoke to Mr. Whelan, we do not doubt Mr. Hughes' evidence that he told Mr. Sharpe about the expected presence of Mr. Ashley and that pricing was to be discussed.

780. Notwithstanding Mr. Whelan's evidence, we find it somewhat surprising that he should be prepared to drop everything to fly to see Mr. Hughes on the basis of a surmise to the effect that Mr. Hughes was planning to sell up. We equally find it surprising that Mr. Sharpe, who we find did know that Mr. Ashley would be there and that pricing would be discussed,

did not tell Mr. Whelan that that was the case. Mr. Hughes in cross-examination said he thought Mr. Whelan would have known that the price war was to be discussed, since Mr. Sharpe knew and would have told him. He accepted however, that Mr. Sharpe might not have told Mr. Whelan the purpose of the meeting (Day 9, pp. 204-205).

781. According to both Mr. Ashley and Mr. Hughes, they met the helicopter together on arrival. Neither Mr. Ashley nor Mr. Hughes suggest that Mr. Whelan (nor indeed Mr. Sharpe) was surprised to see Mr. Ashley, although Mr. Hughes says that Mr. Whelan's body language seemed to show that Mr. Whelan disliked Mr. Ashley. Mr. Whelan's recollection, which we have difficulty in accepting for reasons set out below, is that he did not even know Mr. Ashley was there until much later, when the meeting commenced in the study.
782. Even if Mr. Whelan did not know in advance that Mr. Ashley would be there, in our view he knew that Mr. Ashley was present soon after the helicopter landed. From then on, it would have been clear to him that the subject matter of the meeting was not the sale of Mr. Hughes' business but a discussion between competitors. Moreover, even if Mr. Whelan did not know, we find on the evidence of Mr. Hughes that Mr. Sharpe did know in advance that Mr. Ashley would be there and that pricing would be discussed.
783. It follows on the basis of Mr. Hughes' evidence that JJB, through Mr. Sharpe at least, knowingly went to a meeting with its competitors knowing that pricing issues would be discussed. The same is true of both Mr. Ashley and Mr. Hughes. Indeed Mr. Hughes has not denied the expressly anti-competitive purpose of the meeting which he set up. His diary entry for 5 June, which we bear in mind when considering his evidence as a whole, explicitly refers to his intention to form a sports trade cartel.

#### D. THE MEETING OF 8 JUNE: THE PRELIMINARIES

784. The meeting was arranged for 13.00 hours on Thursday 8 June. That time was chosen to give Mr. Ashley enough time to come up from Milton Keynes. Mr. Hughes had, in the meantime, arranged to see his neurosurgeon Mr. Leggatte at 15.45 hours. Mr. Hughes was expecting to have to go into hospital for an operation on his back.

785. On 8 June 2000 Mr. Hughes picked Mr. Ashley up at Macclesfield Station at 12.30pm and drove him to his house. There was apparently little conversation. Mr. Ashley was at Mr. Hughes' house for a short time before they heard the noise of Mr. Whelan's helicopter. According to Mr. Hughes, he and Mr. Ashley went out to meet the helicopter, the landing spot being about three minutes' walk from Mr. Hughes' study.
786. The helicopter landed at 13.06. Mr. Whelan and Mr. Sharpe alighted at 13.11, when the rotor blades had slowed down. According to Mr. Hughes, he introduced Mr. Ashley but Mr. Whelan and Mr. Sharpe did not shake hands. According to Mr. Hughes, Mr. Whelan's body language "made no secret of the fact that he despised Mr. Ashley". All four then walked back to the house, which took about four minutes. Arriving at the house at about 13.15, Mr. Hughes then took his visitors on a brief tour round the house. Both Mr. Ashley and Mr. Hughes agree that at one stage Mr. Whelan remarked that some things "must have cost a few bob" (Ashley II, paragraph 28, Hughes Day 10, pp. 157-159). It seems that at the end of the tour of the house, coffee was made in the kitchen. Mr. Hughes and his visitors then went back into the study, also referred to in evidence as the lounge. At all events Mr. Hughes puts the start of the meeting at about 13.23.
787. Mr. Ashley does not disagree with the broad lines of Mr. Hughes' statement. He maintains, however, that the atmosphere was jovial and relaxed and he does not recall not shaking hands (Ashley II, paragraph 28).
788. However, according to Mr. Whelan, he first saw Mr. Ashley in the study, after the tour round the house had taken place (Day 8, p 88 -91). Mr. Whelan told us that he was shocked to see Mr. Ashley in the study and that the atmosphere was not at all relaxed. During the tour, he did not say that some things in the house must have cost a few bob. However, Mr. Whelan did not leave immediately or say anything: "I had not called the meeting so obviously I am going to have a cup of tea and sit down and await events" (Day 8, pp.86-88). After initially saying that he did not know Mr. Ashley was present until he saw him in the study, Mr. Whelan later accepted that he had been told on arrival by Mr. Hughes that Mr. Ashley was there (Day 8, pp. 91 to 92).
789. Since both Mr. Hughes and Mr. Ashley recall going out to meet the helicopter, it seems to us that Mr. Whelan is likely to be mistaken as to when he first knew Mr. Ashley was

present, even assuming that Mr. Whelan did not know in advance that Mr. Ashley would be there. Similarly, both Mr. Ashley and Mr. Hughes gave evidence that all four visitors went on a tour of the house. Mr. Ashley, as well as Mr. Hughes, recalled Mr. Whelan making the remark that things in the home may have cost a few bob. We accept that evidence. It also seems to us intrinsically unlikely that Mr. Hughes would have gone out to meet the helicopter and then taken Mr. Whelan and Mr. Sharpe on a tour of the house while he left Mr. Ashley alone in the study. Mr. Hughes himself described this part of the preliminaries as an “ice-breaking exercise” (Day 10, p.158).

790. In our view, Mr. Whelan has for whatever reason not remembered that he had been introduced to Mr. Ashley soon after the helicopter landed, that all four men had gone on the tour of the house, and the remark about “costing a few bob”. That indicates in our view the “ice breaking” period prior to the start of the meeting was proceeding more satisfactorily than Whelan I would suggest.

791. More significantly, the evidence of both Mr. Hughes and Mr. Ashley is that Mr. Whelan knew of Mr. Ashley’s presence much earlier than Mr. Whelan remembered. Even if Mr. Sharpe had for some reason not told Mr. Whelan the purpose of the meeting, Mr. Whelan would have known, from an early stage of the encounter, that there was to be a discussion between three direct competitors, JJB, Allsports and Sports Soccer. Mr. Whelan in our view had ample opportunity to withdraw as soon as he knew Mr. Ashley was present, soon after the helicopter landed. Mr. Whelan, however, did not withdraw at that stage.

#### E. THE EVIDENCE AS TO THE DISCUSSION IN THE STUDY

792. Mr. Hughes estimates that the meeting lasted about 20 minutes. It is known that the helicopter took off at 13.58. Assuming Mr. Whelan and Mr. Sharpe boarded the helicopter about 10 minutes before take off, and it took four or five minutes to walk back to the helicopter, that puts the end of the meeting just before 13.43. We accept Mr. Hughes’ estimate that the meeting lasted about 20 minutes.

#### *Mr. Ashley’s evidence*

793. Mr. Ashley’s evidence has consistently been to the effect that an agreement was reached at the meeting of 8 June 2000 that the retail price of the MU shirt would be £39.99: see note

of meeting with OFT 13 March 2001, at paragraph 6, Sports Soccer's written representations of 9 July 2002 at 3.2.3, transcript of OFT hearing on 11 July 2002, p.69; Sport Soccer's further submissions, 14 August 2002, p.7; Sports Soccer's response to the supplemental Rule 14 notice, 19 July 2003, p.109.

794. In Ashley II, in response to the witness statement of Mr. Whelan and Mr. Hughes, Mr. Ashley described the meeting of 8 June 2000 in more detail than he had done previously. It was suggested on behalf of JJB that Mr. Ashley's recollection had manifestly "improved" but we do not think that is a fair criticism. In Ashley II, Mr. Ashley was responding to detailed witness statements served by others, particularly that of Mr. Hughes, and it is natural in our view that Mr. Ashley's response should be more detailed. At paragraphs 29 to 35 of Ashley II, Mr. Ashley said this:

"29. The meeting took place in David Hughes' study. I recall that David Whelan, Duncan Sharpe and I sat on settees on opposite sides of the room. We were on one side of the desk facing David Hughes who sat behind the desk.

30. I do not remember David Hughes mentioning the MU shirt being worth £50. He definitely said he thought he could get £45 for the shirt. I personally had not seen the new MU shirt before. David Hughes held the shirt up and made a fuss about its quality.

31. David Whelan said words to the effect that "The right price is £39.99 and I am going to be charging £39.99". There was no doubt that JJB would be pricing the MU shirt at £39.99. If I had had the slightest inkling that there was some uncertainty about his intentions then I would have gone back to Umbro to say that there was no agreement and would have used this as an excuse for discounts.

32. David Whelan said quite clearly that the JJB price for replica shirts was £39.99. He got quite heated and started talking "at me" quite forcefully. He said to me words to the effect that "the price for the MU shirt will be £39.99, son". I understood this to cover the prices of all the main retailers, including Sports Soccer's price, and not just JJB's.

...

33. If I was silent, it was because I was taken aback by the strong words of David Whelan. I can't remember saying that I was unloved or the pariah of the industry. I can't say that this was impossible because I might have put on a show to try to persuade that others that I was somebody who, if I was only treated properly, might be relied upon to keep the prices up. David Whelan said "There is a club in the North, son, and you're not part of it".

34. I do remember David Hughes getting very excited about the prospect of fixing the price at £45 and really getting some price maintenance. However, the comments which he attributes to me to the effect that Mr. Ashley would do as he wanted and might sell at

£32 are absolute rubbish. I went to that meeting for the specific purpose of fixing the price of the MU shirt to bring an end to the unbearable pressure and threats from Umbro. Why would I have travelled all the way from Dunstable to Macclesfield by train just to say what Mr. Hughes says I said: that I would “make my mind up on the day, and I might sell at £32 if it suits me”?

35. I told David Hughes, David Whelan and Duncan Sharpe that there was no problem, that I had got the message and that I agreed that I would price at £39.99 on the MU home shirt. I showed no resistance to their position and didn't even to try to suggest another price point. Everyone was absolutely certain on that agreement. The atmosphere at the end of the meeting was very cordial and business-like.”

795. The principal points put to Mr. Ashley in the course of a relatively brief cross examination on behalf of JJB were that Mr. Whelan never made any agreement at £39.99; that Mr. Hughes' purpose was to reach agreement at £44.99, that Mr. Whelan refused to make any such agreement and that the meeting then came to an end. Mr. Ashley agreed that Mr. Whelan was not prepared to make an agreement at £44.99, and that he might well have said words to the effect that JJB did not sell above £40 (Day 1, p.99). The exchange continued. (Day 1, p.100-101)

“Q. What I suggest is that he [Mr. Whelan] said he was not prepared to agree any prices?

“A. No, that he did not say.

“Q. So you have a clear recollection of that?

“A. Yes, yes.

“Q. Although it was four years ago?

“A. Yes, because I know what the outcome of the meeting was, so I am absolutely certain that there was an agreed price of £39.99.

“Q. And he then left the meeting?

“A. Give or take, yes.

“Q. What I am suggesting to you – so there is no misunderstanding between us – is that he never made any such agreement.

“A. £39.99?

“Q. That is what I am suggesting.

“A. Then you are wrong.

“Q. What I am saying is that when Mr. Hughes declared that the supposed purpose of the meeting was to agree a figure at £44.99, Mr. Whelan refused to make any such agreement, and the meeting came to an end. That is what I am suggesting to you.

“A. That is incorrect.

“Q. You have a very clear recollection sitting here now that what I have just said is incorrect?

“A. That is correct, yes.!”

Mr. Ashley denied that he was putting a gloss on the words used by Mr. Whelan (Day 1, pp. 105-106).

796. Allsports did not choose to challenge the detail of Mr. Ashley's evidence. Counsel for Allsports put Allsports' case to Mr. Ashley briefly and elicited the following responses (Day 3, p.68, 70, 73):

“Q. I have to put this to you because it is our case, although it has already been suggested. What you say in your witness statement Mr. Hughes did not say is exactly what you did say, that you went to that meeting and after seeing in the flesh Messrs. Whelan and Hughes you did not agree anything, you told them that you were going to do whatever you wanted, you might go out at 32 quid, you will decide on the day?”

“A. That is absolute crap. There was absolutely no doubt whatsoever that we agreed to charge £39.99 for the Man U home league shirt.

“Q. Why?”

“A. Because the reality is that that is what I charged for it. What is undisputed is that I make more money charging less, selling higher volumes. So why on earth would I want to charge £39.99 unless I was forced to?”

...

“Q. You do not make any promise to Whelan and Hughes, that is the point you agreed with Ronnie –

“A. Do not be ridiculous, of course I did. That is what I was there for.

“Q. But why? Who were you frightened of?”

“A. I was frightened of not getting my delivery of shirts.

“Q. So all you had to do was to persuade Mr. Ronnie that you had done the business?”

“A. No, because what would happen is: if I agreed with Mr. Hughes, Mr. Whelan and Mr. Sharpe that I was going to be £39.99 and I then did not, you would find it would not only be my Umbro relationship that would be affected, it would be others...”

...

Q. And there was no way that you were remotely intimidated by, or frightened of, either Messrs. Whelan or Hughes?

A. I would accept that Mr. Hughes is not an intimidating man, I would not quite say the same of Mr. Whelan.

Q. But you were not, in fact, either intimidated by, or frightened of him, were you?

A. I would be more frightened of Mr. Whelan because of the power that he has within the industry.

Q. You were not, in fact, intimidated by him or frightened by him?

A. I just said that I would have been a lot more than I am now, because he is not allowed to price fix now. He had the power to ensure that we would not get product from brands. That is what I

was at that meeting for. That is the kind of power he exerted in the industry.”

*Mr. Hughes' evidence*

797. According to Hughes I at paragraphs 96 to 100, Mr. Hughes tried to start a discussion about how to end the discounting. He mentioned when the meeting commenced the Predator boot, then moved to the launch of the MU shirt, holding up the example Mr. Ronnie had given him. He said it was worth more than £45, even £50. There was an uncomfortable silence. Mr. Whelan said words to the effect “As far as I am concerned £39.99 is the right price for replica shirts. That has been our policy for quite some time and that will continue to be it”. Mr. Whelan said he had told the City he would not sell over £40. At this point, or shortly afterwards, there was an outburst from Mr. Ashley, who said that he was the pariah of the industry, he was unloved, and could not get the stock he wanted. Mr. Hughes then tried again to get a discussion going about pricing the MU shirt at £45. Mr. Whelan said “I’ve told you what our position is”. According to Mr. Hughes, Mr. Ashley then said that the shirt was not worth £45, he would make up his mind on the day, and he might sell at £32 if it suited him. Mr. Whelan said he would beat Mr. Ashley’s price, whatever it was, adding words to the effect “There are a few of us in the North who have been around for some time and know how this business works”. As soon as Mr. Whelan started to get aggressive, Mr. Sharpe said it was time to go, saying “we have to get back”.

798. According to Mr. Hughes, there was no consensus reached: the meeting was a complete failure. There was no discussion of how to end the discounting; there was no chance of moving JJB above £39.99 and Mr. Hughes did not know what Sports Soccer would do. He thought Mr. Ashley utterly unpredictable. He had no confidence that he had avoided a price war on the MU shirt, and no information was forthcoming that would or could affect anyone’s position on pricing.

799. In cross-examination on behalf of JJB, Mr. Hughes agreed that Mr. Whelan had said that JJB had told the City on numerous occasions that it would not sell a shirt over £40 (Day 9, p. 206). Mr. Whelan also said that he was not prepared to agree retail prices with anyone. Mr. Hughes agreed with paragraph 31 of Mr. Sharpe’s statement (Day 9, p. 207), which is to the effect that Mr. Whelan said he was not going to be party to any price fixing agreement, and that he and Mr. Whelan left, but not before reiterating that JJB would not



sell a shirt above £40. Mr. Hughes' view that JJB would sell at £39.99 derived from his knowledge of JJB's past practice, rather than anything Mr. Whelan had said (Day 9, p. 208). However, he could not remember verbatim what was said (Day 9, p. 209).

800. In cross-examination on behalf of the OFT, Mr. Hughes maintained that Mr. Whelan did say "As far as I am concerned £39.99 is the right price for replica shirts." He also agreed that Mr. Whelan said words to the effect that "the right price is £39.99 and I am going to be charging £39.99". (Day 10, p. 160) Mr. Hughes added that that was said in the context of Mr. Whelan declaring that that was JJB's declared pricing policy, known to the City: "it was not a bold simple statement that said we were going to do 39.99" (Day 10, p. 161). He confirmed that Mr. Ashley had come out with a "tirade" about being a pariah, prompted in Mr. Hughes' view by the reference to the Predator boot (Day 10, p. 163). When Mr. Hughes said again that the shirt was worth £45, Mr. Whelan said "I do not bloody care." Mr. Ashley's tirade may have been in part due to Mr. Whelan's attitude, which could have had a patronising element.

801. Mr. Whelan's remark about the people in the North knowing the business had the flavour of Mr. Whelan telling Mr. Ashley that he was an upstart and that Mr. Whelan was an old hand. (Day 10, p. 166) Mr. Hughes came away from the meeting knowing that JJB could price at £39.99 unless Sports Soccer started a price war: Mr. Hughes knew from time immemorial that that was their price. (Day 10, p. 168) Mr. Hughes did not accept the suggestion that at the end of the meeting he knew that Sports Soccer would also price at £39.99 (Day 10, p. 169).

802. In Hughes II Mr. Hughes does not respond to the evidence given by Mr. Ashley in Ashley II.

*Mr. Whelan's evidence*

803. Mr. Whelan's account of the meeting in Whelan I is very short:

"After a quick look around the house and a cup of coffee, David Hughes initially suggested that it would be helpful for all of us to get together on a more regular basis to discuss business. He then suggested that he wanted to discuss the launch of the forthcoming Manchester United shirt and the fact that he felt that all retailers should set a retail price of £45. I told David Hughes that JJB had on numerous occasions stated publicly that the company would never

sell a replica shirt at a price in excess of £40 and, moreover, I was not willing to discuss retail price with anyone. Duncan and I then left the meeting. I estimate that I was only in David Hughes' house for 20 to 30 minutes, of which 10 to 15 minutes was taken up with viewing the house and other pleasantries. I believe that I left the house within four minutes of David Hughes raising the issue of retail prices”.

804. Mr. Sharpe's witness statement is to the same effect. In Whelan II Mr. Whelan states that Mr. Ashley did not make any comments about pricing while he was present. In cross examination Mr. Whelan told us:

“I was shocked [that Mr. Ashley was there] but you have to get on with the business and it was a meeting. I thought I would wait and see what the meeting was about; immediately the meeting started and they started talking about ‘This shirt is worth £45’ I said “Sorry we have a stated policy that we will never sell a shirt above £40 and I left. I said to Duncan “let's go”.” (Day 8, p. 93).

805. Mr. Whelan had a clear recollection of Mr. Hughes holding up the new MU shirt, and saying that this is worth £45, or words to that effect (Day 8, p.96). However, JJB's solicitors, in a letter to the OFT of 13 March 2003, said that they had gone back to Mr. Whelan about the MU shirt being produced at the meeting and that Mr. Whelan had confirmed that he had no recollection of this occurring. Mr. Whelan's response was that his solicitor was entirely wrong since, had he been asked, he would have given them the same answer that he gave the Tribunal (Day 8, pp 97-98).

806. As far as Mr. Whelan was concerned, Mr. Hughes' production of the MU shirt and his statement that it was worth £45 was both the start and end of the meeting (Day 8, p.95). According to Mr. Whelan, he stated that he would never sell a replica shirt above £40, and that he was not prepared to discuss retail prices with anyone. He and Mr. Sharpe then left the meeting (Day 8 p.99).

807. Mr. Whelan denied using any words similar to those referred to by Mr. Hughes and Mr. Ashley. He did not recall the course of the discussions as described in Mr. Hughes' and Mr. Ashley's witness statements, although he did accept that Mr. Ashley could have had a bleat about not being loved (Day 8, p.104-106). Mr. Whelan did not refer to “a few of us in the North” or anything like that. He denied Mr. Hughes' statement that he said “£39.99 is the right price for replica shirts. That has been our policy for some time and will continue

to be it” (Day 8, pp. 111-112). Similarly Mr. Whelan denied saying words to the effect “the right price is £39.99 and I am going to be charging £39.99”. He also denied saying to Mr. Ashley “The JJB price for replica shirts is £39.99” and being quite heated (Day 8, pp. 120-122). Mr. Whelan maintained “I did not say it will be 39. I said: we will never sell a shirt above £40”. (Day 8, pp. 108, 114, 121). He did not say “39.99 is the right price for replica shirts” (Day 8, p. 111-112, 120). Mr. Ashley could not have known from Mr. Whelan that JJB would price at £39.99 (Day 8, p.112).

808. Mr. Whelan did, however, say that when Mr. Hughes mentioned a price of £45 he could see that Mr. Ashley was against it. According to Mr. Whelan “And then I sort of said: sorry we will never sell anything over £40... public policy. And that defused the situation to a degree”. According to Mr. Whelan, Mr. Ashley did not say that he (Mr. Ashley) would be pricing at £39.99 (Day 8, pp. 122-123).

#### F. EVIDENCE FOLLOWING THE MEETING OF 8 JUNE

809. At the end of the meeting on 8 June, Mr. Whelan and Mr. Sharpe left in the helicopter at 13.58. Mr. Hughes took Mr. Ashley back to the railway station, where Mr. Ashley took a train to meet Mr. Ronnie. Mr. Ronnie’s diary shows a meeting with Mr. Ashley at 15.00.

##### *Mr. Ashley’s meeting with Mr. Ronnie on 8 June*

810. Mr. Ashley’s evidence is that he met Mr. Ronnie later that afternoon after his meeting on 8 June with Messrs. Whelan, Sharpe and Hughes. He told Mr. Ronnie that he had reached an agreement with Mr. Hughes and Mr. Whelan to launch the MU shirt at £39.99. Mr. Ronnie’s evidence is that he was told that those at the meeting agreed to price the shirt at £39.99 but did not agree a price on the shorts or socks. JJB did not challenge that evidence (Day 4, p. 72). According to Mr. Ronnie, Mr. Ashley reported that Mr. Whelan had said “there’s a club in the North and you’re not part of it” (Ronnie III, paragraphs 55-56). It was suggested to Mr. Ashley that he was merely telling Mr. Ronnie that he had reached an agreement when in fact he had not done so (e.g. Day 3, pp. 69-70). We regard that suggestion as extremely implausible.

##### *Mr. Hughes’ two memos of 9 June*

811. On 9 June 2000 Mr. Hughes wrote two memos. Allsports internal memorandum 700 dated 9 June 2000 entitled “MUTD Replica Shirt Launch 1 August 2000” from Mr. Hughes to Mr. Patrick, copied to Mr. Guest and Mr. Donnelly of Allsports states:

“I have already told you that JJB are going at £39.99 on 1<sup>st</sup> August in adult sizes and Sport Soccer will also do that. After speaking to Tom Knight this morning to appraise him of that information, he went on to say that he will be tactical in his pricing i.e. £39.99 where he is in proximity to a JJB or Sport Soccer and £44.99 elsewhere. Now that we can do different prices at different tills around the company, I think that we should do the same.”

812. A further internal memorandum numbered 701 also dated 9 June 2000 entitled “Discussions with JJB and Sports & Soccer” from Mr. Hughes to Mr. Patrick, copied only to Mr. Guest states:

“In my absence you should continue any necessary dialogue with JJB and Sport Soccer. JJB’s Head Office number is 01942 221400 and Mike Ashley only operates from his mobile which is [ ]”.

813. Mr. Hughes agreed in cross-examination with the suggestion that, on the literal wording of these memos, he knew on 9 June that Sport Soccer would be pricing at £39.99. However he maintained that what he said in the first memo of 9 June was false and deliberately intended to mislead his two most senior executives Mr. Patrick and Mr. Guest, his intention being to persuade those two executives to hold their price in any circumstances (Hughes I, paragraphs 113 to 116, Day 10, pp. 170-171). He disagreed with the OFT’s suggestion that that explanation made no sense at all (Day 10, pp. 171-179). He accepted, in answer to questions from the Tribunal, that the words “ I have already told you that JJB was going out at £39.99” could indicate that, at the time of writing the first memo, Mr. Hughes had already spoken to Mr. Patrick, albeit that the latter was then in California (Day 10, pp. 180-181). Mr. Hughes accepted that he had also told Mr. Knight of Blacks/First Sport that Sports Soccer would be going out at £39.99 (Day 10, p.181).

814. As regards the second memo of 9 June, Mr. Hughes denied the OFT’s suggestion that it would make no sense to continue “any necessary dialogue” with JJB or Sports Soccer if in fact there had been no agreement (Day 10, pp. 183-187). He said that the two memos were written effectively as a lie to his senior executives (Day 10, p.187). Mr. Hughes position was “I thought I was doing an Alistair Campbell of a PR job” by putting a spin on the price

he wanted his senior executives to sell at without directly usurping their authority (Day 10, pp. 183-184). He also stressed that he was in extreme pain (p.184).

815. Mr. Hughes accepted that Allsports' response to the Supplemental Rule 14 notice described the reference to Sports Soccer's price in the memo of 9 June as "guesswork", and did not contain the explanation now put forward (Day 10, p.189). He accepted that, on the hypothesis of no agreement, an observer in Mr. Hughes' position would not have "guessed" that Sports Soccer would go out at £39.99. Mr. Hughes agreed that, on that hypothesis, the best guess would be that Sports Soccer would discount (Day 10, p. 191).

816. Mr. Guest says that Mr. Hughes' memos had no influence on Allsports' pricing (Guest I, paragraphs 14-19). The evidence of Mr. Patrick, who was not called to be cross-examined, is to the same effect (paragraph 46 of his statement of 30 September 2003). In cross-examination Mr. Guest agreed that Sports Soccer would have been likely to discount the MU shirt on 1 August, assuming that no agreement had been made. In that event, it was "more than likely" that JJB would respond. Mr. Guest agreed that he would only assume that JJB could go out at £39.99 if Sports Soccer agreed not to discount. He accepted that JJB reserved the right to sell for less than £39.99 (Day 11, pp. 127-129).

*Mr. Hughes' conversation with Mr. Knight on 9 June*

817. In Hughes I, Mr. Hughes accepts that he had a conversation with Mr. Knight of Blacks on the morning of 9 June in order to find out how Blacks would be pricing the MU shirt. Mr. Knight told Mr. Hughes that he wanted to sell the MU shirt at £44.99 where he could and at £39.99 where they had to match a local market price. Mr. Hughes thought that this was a good idea, which he wanted to pass on to Mr. Patrick and Mr. Guest. Mr. Hughes accepted in cross examination that he told Mr. Knight that Sports Soccer would go out at £39.99 (Day 10, p.181).

*Mr. Hughes' diary entries*

818. As already set out above, it was revealed in the course of the appeal that Mr. Hughes' diary entry for 14 August 2000 reads "Phone Mike Ashley to review Man U Launch and other issues". A number of other entries refer to "phone Mike Ashley". Those entries were deliberately obliterated by Mr. Hughes to prevent them being read. In cross-examination

Mr. Hughes maintained that these diary entries were a code for disguising the fact that he intended to speak to Mr. Ashley with a view to discussing the sale of Allsports to him. Mr. Hughes resisted the OFT's suggestion that that was untrue (Day 10, pp. 195-202; see also pp. 229-230).

*Mr. Ronnie's conversation with Mr. Sharpe on 9 June*

819. Mr. Ronnie gave evidence that Mr. Ashley's account of the meeting of 8 June 2000 was confirmed to him by Mr. Sharpe when he saw Mr. Sharpe the following day (Day 6, p. 49). On that occasion Mr. Ronnie played football for JJB. Mr. Sharpe said, referring to Mr. Ashley "I saw your mate yesterday... he really likes you lads at Umbro". He then said "it has been agreed it is going to be £39.99". Mr. Sharpe had found Mr. Ashley an interesting character (Day 6, pp. 209-210). That evidence was given in re-examination, although in cross-examination Mr. Ronnie did say that the description Mr. Ashley had given him on the afternoon of 8 June of the meeting earlier that day had been confirmed when he saw Mr. Sharpe the following day. That matter was not pressed further in cross-examination (Day 4, p.49). Although the football match of 9 June is mentioned in Ronnie I and II, there is no mention there of Mr. Sharpe having told Mr. Ronnie what the agreement was, and the incident is not mentioned in Ronnie III. We prefer not to base our conclusion on this uncorroborated item of evidence, although it is consistent with other evidence in the case.

*Mr. Russell's conversation with Mr. Bryan*

820. It appears that, at the launch of the MU shirt on 1 August, Sports Soccer did not discount the adult shirt, but did discount the shorts and socks, as well as the infants' and goalkeepers' kits. According to Mr. Ronnie, Mr. Bryan (then Umbro's account manager for JJB) told him that Mr. Russell of JJB had said to Mr. Bryan words to the effect that those present at the meeting of 8 June 2000 were no longer "hands on" in the business, as the agreement should have covered all products (Ronnie III, paragraph 58).

821. In his witness statement of 1 October 2003, on behalf of JJB, Mr. Bryan says he did not know anything about the meeting until after it had happened. However, he does state "I understood the gist of the meeting had been to get some sort of standard in place in terms of pricing and that they had talked about jerseys." He spoke to Mr. Russell, who knew nothing about it and says "We agreed that in theory if people were trying to fix prices then surely it

would be in their interests to include infant kit, shorts, socks etc. Sports Soccer were discounting on these products at the time”.

822. Mr. Russell states that Mr. Bryan rang him to tell him of the alleged agreement. He was taken aback that any such agreement had been made, and may well have said that if they had agreed the price of the shirts, they might as well have agreed the price of the other items. Mr. Russell then went to Mr. Sharpe and asked him about it. Mr. Sharpe said there had been no agreement. They had gone to the meeting thinking that Mr. Hughes wanted to sell Allsports, they were surprised to find Mr. Ashley there, and had walked out when price fixing was raised (Russell III, paragraph 15).

823. In cross-examination, Mr. Russell maintained that he was shocked that Mr. Whelan had gone to such a meeting, and that his remark had been off the cuff. His reaction had been why just agree to the shirts, because many people buy the whole kit, particularly for children (Day 9, 142-145).

*Mr. Prothero's letter of 13 July 2000*

824. On 13 July 2000 Mr. Prothero wrote to Mr. Richards of MU:

“As you know Umbro have worked very hard in agreeing a consensus to the price of the new Manchester United jersey. At one stage we even managed to get Messrs. Hughes, Ashley and Whelan in the same room to agree this issue. It therefore causes me real concern that I am led to believe that the Manchester United jersey is being sold by the Club via “Open” at effectively a discounted price because of the inclusion of certain premium items such as free autographed balls etc. I guarantee that if any of the aforementioned gentlemen see this, which I am sure they will, we will have the makings of a price war on our hands”.

825. Mr. Prothero's letter of 13 July 2000 to MU is on its face evidence of a consensus being reached between, at least, JJB, Allsports and Sports Soccer on the pricing of the MU new home shirt at launch:

“Umbro have worked very hard in agreeing a consensus to the price of the new Manchester United jersey. At one stage we even managed to get Hughes, Ashley and Whelan in the same room to agree this issue”.

826. Although Mr. Prothero says in his witness statement of 12 July 2002 (paragraph 21) that he had “exaggerated” by claiming that it was Umbro who had managed to get Messrs. Hughes, Whelan and Ashley in the same room, whereas the retailers had reached agreement among themselves, what Mr. Prothero describes as an exaggeration does not affect the sense of Mr. Prothero’s letter, which is clearly to the effect that Mr. Prothero believed that an agreement or consensus as to the pricing of the MU shirt had been duly reached among the retailers concerned, albeit that Mr. Prothero himself had no personal knowledge of the facts. It was not put to Mr. Prothero in cross-examination that no such consensus had been reached, nor that he was exaggerating when he said there was such a consensus. The suggestion only was that in this letter he had exaggerated Umbro’s role in reaching the consensus (Day 5, pp. 149-150).

*The JJB Board meeting*

827. In Whelan I, Mr. Whelan states that he gave a full account of the meeting of 8 June to the JJB Board at its next meeting of 27 June 2000. It was agreed that Mr. Lane-Smith, senior partner in JJB’s solicitors DLA, and a non-executive director of JJB, would make an attendance note to be kept in his file in DLA’s offices.

828. Mr. David Beever, a non executive director of JJB, says in a witness statement dated 30 September 2003

“3. Dave Whelan told the Board Meeting that he had been to a meeting at David Hughes’ house. Dave Whelan said that he had assumed that David Hughes had organised the meeting in order to discuss a potential sale of Allsports to JJB. I recall this being perfectly reasonable assumption to make as JJB would be one of the first companies anyone would approach if they wanted to sell a sports retail business.

4. Dave Whelan reported to the Board Meeting that soon after his arrival at the meeting at David Hughes’ house the question of pricing replica shirts had arisen and after stating that they would not discuss pricing with competitors he and Duncan Sharpe immediately left.

5. I recall being insistent that this be minuted in the Board Minutes as I could see the legal consequences for those present. Dave Whelan did not want this to be minuted as he did not want to be responsible for getting the others into trouble as the Board Minutes would be a public record.



6. I was still insistent but as a compromise it was agreed that Roger Lane-Smith would do a private minute of Dave Whelan's comment so that this would be covered by legal privilege. I now understand that this was not done."

829. Mr. Lane-Smith, in a witness statement dated 1 October 2003, states that he has acted for JJB for many years and had been a non-executive director since 1998. He says:

"4. I recall attending a Board Meeting of JJB on 27 June 2000. I seem to recall that around that time there had been an article appearing in the tabloid press about the price of replica football shirts with the implication that the manufacturers and/or retailers were intentionally maintaining an artificially high retail price for these goods.

5. At the Board meeting David Whelan, the Chairman of JJB reported to the board that, within the last few weeks (I now understand on the 8 June 2000), he and the Chief Executive, Duncan Sharpe had been invited to a meeting at the house of David Hughes who is, I think, the Chairman of another sport retail company, Allsports. Mr. Whelan said that he had not been told the purpose of the meeting in advance but he thought it possible that David Hughes wished to talk to him about the possibility of JJB acquiring Allsports. When he and Mr. Sharpe arrived at David Hughes' house, the owner of yet another retail chain, Sports Soccer was also there.

6. Mr. Whelan reported that he then asked Mr. Hughes what the purpose of the meeting was. Mr. Hughes said that he wished to discuss with JJB and with Sports Soccer the possibility of agreeing minimum retail prices for replica shirts.

7. Mr. Whelan told the Board of JJB that he had immediately responded to Mr. Hughes by saying that JJB had never maintained any minimum prices and certainly did not intend to enter into any discussions of that nature at which point he announced that he and Duncan Sharpe were leaving.

8. Having reported the details of this meeting to the JJB Board, there was some discussion as to whether it should be minuted. After some discussion, it was decided that the detailed discussion would not be recorded in the formal JJB Board minutes, but I recall that I suggested that I would prepare a separate note of Mr. Whelan's report to the meeting which I would retain on my own file. In the event, however, I subsequently overlooked the preparation of such a separate minute.

9. The reason that it was decided not to include a minute in the JJB Board minutes was that we were all uneasy about including in JJB's minutes what could amount to an accusation against Mr. Hughes of Allsports.

10. I do, however, very clearly recall Mr. Whelan's report to the JJB Board meeting, the essence of which I have set out above to the very best of my recollection".

## G. ANALYSIS

### *Findings on the evidence*

830. Our first task is to determine what was said in the course of the discussion in the study, in particular by Mr. Whelan and Mr. Hughes respectively.
831. Mr. Whelan's statement in Whelan I as to what happened in the course of the discussion is extremely brief. The gist of his evidence is that as soon as retail prices were raised, he refused to discuss the matter and left within four minutes, making it clear that JJB would never sell a shirt above £40 (Whelan I, paragraph 31). The evidence of Mr. Ashley and Mr. Hughes is, however, that more than that occurred in an encounter that lasted about 50 minutes in total, of which some 20 minutes was spent in discussion. Although Mr. Whelan states in Whelan I that he said he was not prepared to discuss retail prices with anyone (Whelan I, paragraph 30) it does appear that Mr. Whelan remained for about twenty minutes in a discussion about retail prices with his two principal competitors. As to the course of the discussion, our conclusions on the facts are as follows.
832. The discussion commenced with Mr. Hughes holding up the new MU home shirt and saying that it was worth £45 at least. As already stated, JJB's solicitors said in a letter dated 13 March 2003 that Mr. Whelan had confirmed to them that he had no recollection of the MU shirt being produced at the meeting. In evidence to the Tribunal, Mr. Whelan said he did have a clear recollection of that, and that his solicitor was entirely wrong (Day 8, pp. 96-98).
833. One implication of Mr. Whelan's evidence on this issue is that he had never told his solicitor that he had no recollection of the MU shirt being produced, even though DLA's letter of 13 March states:

“[The OFT] also asked whether or not it was the case that David Hughes had produced a sample of the MU home shirt at the meeting at his house on 8<sup>th</sup> June 2000. I have referred this question back to our client, and Dave Whelan confirms that the reason that he did not

mention this in his statements is that he has no recollection of it. He would have seen a sample of the shirts some time before that when it would have been presented by the sales representative. To see the shirt again at David Hughes' house would have held no particular significance and would not have been memorable."

834. We find it unlikely that JJB's solicitors would state in a letter to the OFT that they had checked with Mr. Whelan and had been told that he had no recollection of the incident if they had not been told anything of the kind. This evidence seems to us to demonstrate the fallibility on some issues of Mr. Whelan's recollection.

835. After Mr. Hughes had held up the MU shirt, saying it was worth at least £45, Mr. Whelan said, according to Mr. Hughes, that as far as Mr. Whelan was concerned "£39.99 is the right price for replica shirts", that having been JJB's policy, which would continue. Mr. Ashley agrees that Mr. Whelan said that "£39.99 is the right price for replica football shirts", clearly indicating that that would be the price that JJB would be charging. Since both Mr. Hughes and Mr. Ashley agree that was what Mr. Whelan said, and since that is consistent with other evidence which we consider below, we find that words to the effect were said by Mr. Whelan.

836. Mr. Whelan contends that he said that JJB would not sell above £40, not that JJB would sell at £39.99. We accept that Mr. Whelan did say that JJB would not sell above £40, but in our judgment in the course of doing so or shortly afterwards Mr. Whelan also intimated that £39.99 was the "right price", or words to that effect indicating that that was the price which JJB was proposing to charge. That does not seem to us to be an unnatural thing for Mr. Whelan to say in the circumstances.

837. However, the discussion did not end there. According to Mr. Hughes, at or about this stage Mr. Ashley intervened to complain that the industry treated him as an outsider or pariah. Mr. Ashley does not deny that he said something along those lines, and in the witness box Mr. Whelan seemed to remember Mr. Ashley having a "bleat" along those lines, although that is not mentioned in Whelan I. Mr. Hughes then had another go at persuading those present that they could charge £45 for the shirt. Mr. Whelan responded by saying that he had already stated what his position was. That evidence by Mr. Hughes shows that Mr. Whelan had, in fact, continued to participate in the discussion.

838. It does appear that around this point Mr. Ashley may have said something to provoke Mr. Whelan. Mr. Hughes said that Mr. Ashley threatened to go out at £32, but Mr. Ashley denies that. Mr. Whelan at some point, according to both Mr. Hughes and Mr. Ashley, became somewhat heated. According to Mr. Hughes, Mr. Whelan said he could beat Mr. Ashley's price, whatever it was. According to Mr. Ashley, Mr. Whelan, looking straight at him, said words to the effect "the price for the MU shirt will be £39.99, son". Mr. Ashley took that to mean that £39.99 was the price which all retailers were to charge. We accept Mr. Ashley's evidence on this point. Both Mr. Ashley and Mr. Hughes agree that Mr. Whelan's attitude was somewhat one of an old hand dealing with an upstart (Day 10, p. 166).
839. Mr. Ashley recalls (and reported to Mr. Ronnie) Mr. Whelan saying words to the effect "There is a club in the North, son, and you are not part of it". Mr. Hughes recalls something very similar, namely Mr. Whelan saying "there are a few of us in the North that have been around for some time and know how this business works". However, Mr. Whelan had no recollection of saying anything of that kind. Once again, two witnesses recall something of which Mr. Whelan had no recollection.
840. Mr. Hughes in addition confirmed that he felt that Mr. Whelan had adopted a patronizing attitude to Mr. Ashley, and that the use of the word "son" would be consistent with that. Having seen Mr. Whelan in the witness box we think it very likely that Mr. Whelan would have used words to the effect that there were those in the North who knew the business of whom Mr. Ashley (who is based in the South) was not part. We note also that most of the principal participants in this case, other than Sports Soccer, namely JJB, Allsports, Umbro and JD are in fact based in the North West of England.
841. We therefore find, on the evidence (i) that there are gaps and inconsistencies in Mr. Whelan's evidence about the meeting on 8 June (ii) that Mr. Whelan knew, at the latest soon after the helicopter landed, that he was about to have a discussion with his principal competitors and that, in the circumstances, that discussion could only be about prices (iii) Mr. Whelan did not decline to sit down with Mr. Ashley but decided, as he put it, to "await events"; (iv) Mr. Whelan remained in the discussion for about twenty minutes; (v) in the course of that discussion Mr. Whelan did say words to the effect that JJB would not price above £40; (vi) Mr. Whelan went on to say words to the effect that "£39.99 is the right

price for replica shirts” or “the price for the MU shirt will be £39.99”; (vii) Mr. Whelan thereby conveyed to Mr. Ashley and Mr. Hughes that £39.99 was the price that JJB was likely to charge, and that was the price that other retailers ought to charge, for the new MU home shirt.

842. We now consider what Mr. Ashley said during the meeting. Mr. Ashley told us in paragraph 35 of Ashley II:

“35. I told David Hughes, David Whelan and Duncan Sharpe that there was no problem, that I had got the message and that I agreed that I would price at £39.99 on the MU home shirt. I showed no resistance to their position and didn’t even to try to suggest another price point. Everyone was absolutely certain on that agreement. The atmosphere at the end of the meeting was very cordial and business-like.”

843. Mr. Ashley was cross-examined about that, as set out above. We found his answers convincing. We accept his evidence that he had to travelled to see Mr. Hughes and Mr. Whelan at Mr. Ronnie’s insistence, in order to confirm to Mr. Hughes and Mr. Whelan in person that he would not discount the MU shirt at launch. From Mr. Ronnie’s point of view such an assurance would strengthen Umbro’s hand in avoiding discounting on the MU shirt, particularly vis-à-vis MU.

844. Whelan I does not refer to Mr. Ashley saying anything at all throughout the meeting. That does not seem to us credible.

845. Whelan II states that Mr. Ashley did not make any comments about pricing while Mr. Whelan was present. Again, we do not find it credible that Mr. Ashley, who had travelled from Dunstable to Macclesfield, at Mr. Hughes’ instigation and Mr. Ronnie’s insistence, in order to discuss pricing, should say nothing at all about the subject matter of the meeting during the twenty minutes in which the discussion continued.

846. Hughes I suggests that Mr. Ashley confined himself to saying that he would make up his mind on the day, he might go out at £32. Both Mr. Hughes and Mr. Whelan denied in cross-examination that Mr. Ashley had said anything about £39.99, or that anything could be described as an agreement or consensus was reached.

847. Mr. Ashley, on the other hand, states that there was an agreement at £39.99, and has done so consistently since his first meeting with the OFT in March 2001, some 9 months after the meeting of 8 June (see Ashley II, paragraphs 29 to 35, Day 1, pp. 100-101, Day 3, pp. 68, 70, 73 all cited above) . He disagrees with the suggestions that the meeting was a failure (Mr. Hughes) or that Mr. Whelan left in peremptory fashion deciding that he would make no agreement. According to Mr. Ashley

“Everyone was absolutely certain on that agreement. The atmosphere at the end of the meeting was very cordial and business-like.”

848. On this part of the case the evidence is so divergent that either Mr. Ashley is misleading the Tribunal, or Mr. Hughes and Mr. Whelan are misleading the Tribunal, or Mr. Hughes and Mr. Whelan have subconsciously “blanked out” in their minds what happened, or somehow convinced themselves that what Mr. Ashley says happened did not happen. The suggestion that Mr. Ashley somehow got hold of the wrong end of the stick is not in our view plausible.

849. We have already accepted that Mr. Ashley is a credible witness, and we accept this part of Mr. Ashley’s evidence. We accept in particular Mr. Ashley’s evidence at Day 1, pp. 100 to 101, and Day 3 pp. 68, 70, and 73. We note that on 1 August 2000 Mr. Ashley did in fact go out at £39.99, that he had been consistently under pressure from Umbro to do so, and that he had already agreed vis-à-vis Umbro to price replica shirts at £39.99 during Euro 2000 and for 60 days from launch.

850. In all those circumstances it would seem to us natural for Mr. Ashley, in the situation that he was in, to say to Mr. Whelan and Mr. Hughes, albeit possibly after a show of bravado, that he too would fall into line and price at £39.99. In our judgment that was precisely what Mr. Ashley went to the meeting for, having been persuaded to do so by Mr. Ronnie, who was in turn seriously worried about the prospect of discounting on the MU shirt and the future of the MU contract.

851. Moreover there is strong documentary support for Mr. Ashley’s evidence.

852. As already set out, Allsports internal memorandum 700 dated 9 June 2000 and written by Mr. Hughes to Mr. Patrick, copied to Mr. Guest and Mr. Donnelly, states:

“I have already told you that JJB are going at £39.99 on 1<sup>st</sup> August in adult sizes and Sport Soccer will also do that. After speaking to Tom Knight this morning to appraise him of that information, he went on to say that he will be tactical in his pricing i.e. £39.99 where he is in proximity to a JJB or Sport Soccer and £44.99 elsewhere. Now that we can do different prices at different tills around the company, I think that we should do the same.”

853. As Mr. Hughes agreed, that memorandum shows Mr. Hughes telling his Chief Executive and Sales Director that

“I have already told you that JJB are going out at £39.99 on 1 August in adult sizes and *Sports Soccer will also do that* (emphasis added).

854. The plain inference is Mr. Hughes already knew that Sports Soccer would be going out at £39.99. In addition, Mr. Hughes’ memo states that he had also spoken to Mr. Knight of Blacks “to apprise him of that information” – i.e. that both JJB and Sports Soccer would go out at £39.99. Mr. Hughes accepts that he told Mr. Knight that Sports Soccer would go out at £39.99.

855. In our judgment, the information in the memo of 9 June from Mr. Hughes that Sports Soccer would be going out at £39.99 came from what Mr. Ashley said during the meeting on 8 June. That memo also confirms that Mr. Hughes knew that JJB would go out at £39.99.

856. Mr. Hughes’ evidence in Hughes I and in the witness box was that this memo was written in order to deceive his senior executives into thinking that there would be no heavy discounting on the MU shirt and that it would therefore be safe for Allsports to sell at a high price, which is what Mr. Hughes wanted them to do. We do not accept that evidence.

857. The memo itself states that what Mr. Hughes wanted was to “dual price” i.e. for Allsports to sell at £45 where it could, and £39.99 elsewhere. To that extent we accept that the memo was intended to persuade Mr. Patrick and Mr. Guest at least to go to £45 where they could.

858. However, the suggestion that Mr. Hughes was simply “pretending” that Sports Soccer would go out at £39.99 makes no sense to us, commercially or otherwise. If, as Mr. Hughes says, there had been no agreement, the working hypothesis would have to be that

Sports Soccer would discount, and that JJB would retaliate, as Mr. Guest accepted. On that hypothesis, discounting at launch would take place, and Mr. Hughes memo of 9 June would simply look ridiculous. Moreover, on the hypothesis that Sports Soccer and JJB would discount, the last thing Allsports would want to be would be *above* High Street prices. We also find it impossible to believe that the chairman of a company such as Allsports would wish to mislead or deceive his own senior executives by giving them false information. Indeed, on the hypothesis of no agreement, the falsity of the information would inevitably be revealed sooner rather than later.

859. We note that the explanation Mr. Hughes gave to us was not given to the OFT. As regards the OFT, Allsports' case was that the reference to Sports Soccer going out at £39.99 was "guesswork" on the part of Mr. Hughes. We entirely reject that suggestion as well. On the hypothesis of no agreement, Sports Soccer would have been expected to discount. No one, unaware of any agreement, would have "guessed" that Sports Soccer would go out at £39.99, as Mr. Hughes agreed in cross-examination.
860. A much more rational, and in our view true explanation, is that Mr. Hughes was seeking to build on the information that he in fact had – namely that JJB and Sports Soccer would not be discounting – in order to persuade Mr. Patrick and Mr. Guest to charge £45 where possible. As Mr. Hughes says in Hughes I, Mr. Patrick knew about the meeting of 8 June in advance, and would assume that Mr. Hughes was accurately telling him the result. In our view, that is exactly what Mr. Hughes was doing.
861. Nor can we see why Mr. Hughes should seek to deceive Mr. Knight of Blacks/ First Sport, by telling him that Sports Soccer would go out at £39.99 if Mr. Hughes had no information to that effect. Again, on the hypothesis of no agreement, discounting by Sports Soccer would occur, and Mr. Hughes would look misinformed and ridiculous for having told Mr. Knight that Sports Soccer would price at £39.99.
862. In our view Mr. Hughes' evidence that in the first memo of 9 June 2000 he was only "pretending" that Sports Soccer would go out at £39.99 is itself a pretence. That memo, in our view, accurately recorded what Mr. Ashley and Mr. Whelan both said.



863. As to the second memo, Mr. Hughes states in Hughes I that he wrote it because he had a “faint hope” of further dialogue, “to make the first memo look more convincing”, and to show Mr. Patrick and Mr. Guest that Mr. Hughes “had not just fabricated the information”. (paragraph 115). In our view, the wording of the second memo telling Mr. Patrick and Mr. Guest “to continue any necessary dialogue with Sports Soccer” is plainly indicative of a positive outcome to the meeting of 8 June, on which Mr. Hughes wished to build. We find it impossible to believe Mr. Hughes’ suggestion that this memo was in fact fabricated by him to make his senior executives believe that there had been an agreement when there had not been an agreement.
864. We accept that on 9 June Mr. Hughes knew that he was facing an operation on his back and did not know how long he would be away. We accept that he had been in at times extreme pain. However, we note that on 8 June Mr. Hughes was still able to drive to the station to meet Mr. Ashley, drive Mr. Ashley home, walk out to greet the helicopter, show his guests round the house, conduct the meeting and drive Mr. Ashley back to the station. In those circumstances we do not accept that the fact that Mr. Hughes may have been in pain and concerned about his back operation affects our findings, either as to what transpired at the meeting of 8 June, or as to the meaning of the memos of 9 June.
865. As to Mr. Whelan’s evidence, Mr. Hughes first memo of 9 June equally rebuts Mr. Whelan’s denial that Mr. Ashley said that Sports Soccer would go out at £39.99. We reject as unsupported by any evidence Mr. Whelan’s suggestion that Mr. Ashley could have said something to Mr. Hughes after Mr. Whelan had left. That would be entirely contrary to Mr. Ashley’s evidence, which we accept, and was not a matter that was suggested either to Mr. Ashley or to Mr. Hughes.
866. Although there may have been a stage in the meeting where Mr. Whelan became somewhat heated, we accept Mr. Ashley’s evidence that the meeting ended amicably enough. That is supported by Mr. Hughes’ second memo of 9 June, and by Mr. Hughes’ subsequent diary entries including his intention to ring Mr. Ashley “to review” the MU launch.
867. We therefore further find, on the evidence, (i) that Mr. Ashley went to the meeting knowing that pricing, and in particular the pricing of the MU home shirt was to be discussed; (ii) that Mr. Ashley, under pressure from Umbro, went to the meeting intending to intimate that

Sports Soccer would price the new MU home shirt at £39.99 at launch; (iii) that a discussion on retail prices lasted about twenty minutes; (iv) that in the course of that discussion Mr. Whelan intimated JJB's intention to go out at £39.99, as already found above; and (v) that Mr. Ashley said words to the effect that he had "got the message" and that Sports Soccer would price at £39.99 at the launch of the new MU home shirt.

*Agreement or concerted practice*

868. We have found above that during the meeting of 8 June 2000:

(1) Mr. Whelan said words to the effect that £39.99 was the right price for replica shirts, thereby conveying JJB's intention to go out at £39.99 at launch on the new MU home shirt.

(2) Mr. Ashley said words to the effect that Sports Soccer would fall in line and equally go out at £39.99 on that shirt.

(3) That exchange is accurately recorded in Mr. Hughes' first memo of 9 June which states "I have already told you that JJB are going out at £39.99 on 1 August in adult sizes and Sports Soccer will also do that."

869. Mr. Ashley's consistent evidence has been that an agreement was reached. Mr. Ashley's evidence is corroborated by the two memos of 9 June, and our findings above as to what was said by Mr. Ashley and Mr. Whelan. Mr. Hughes' contrary evidence is undermined by the unacceptable explanation he gave to the Tribunal about the memos of 9 June. Mr. Hughes' subsequent diary entries are equally consistent with a consensus having been reached. We have already rejected Mr. Hughes' explanation for those entries in our comments on his credibility as a witness. We prefer Mr. Ashley's evidence to Mr. Whelan's because Mr. Ashley's evidence has in our view generally been credible and is supported by the memos of 9 June. Mr. Whelan's evidence, on the other hand, has tended to understate what transpired at the meeting and his recollection has been shown to be unreliable in a number of respects.

870. It would also seem to us surprising that not only Mr. Ashley, but also Mr. Ronnie, Mr. Bryan and Mr. Prothero of Umbro should have been under the impression that there was an agreement made on 8 June if in fact no such agreement was reached.

871. We therefore find on the evidence that there was an agreement reached at the meeting of 8 June 2000 between JJB, Sports Soccer and Allsports, at least, that the new MU home shirt would be priced at £39.99 at launch on 1 August 2000. During the meeting of 8 June JJB and Sports Soccer, and by necessary implication Allsports, expressed their respective intentions to conduct themselves in the market in a particular way, namely by pricing at £39.99.
872. In the alternative, the above findings in our view at the very least disclose a concerted practice, within the meaning of the Chapter I prohibition, having as its object or effect to avoid discounting on the new MU home shirt at launch on 1 August. Applying the principles of *Suiker Unie* and *Cimenteries*, cited above, the facts as we find them to disclose direct contact between competitors, taking place in a private home, at which retail prices were discussed. In the course of that contact both JJB and Sports Soccer respectively disclosed the course of conduct which they had decided to adopt or contemplated adopting in the market, namely to price at £39.99. By stating their respective pricing intentions, both JJB and Sports Soccer in our view substantially reduced uncertainty as to their future conduct in the market.
873. It further follows from *Tate & Lyle*, cited above, that even if the evidence had established only that JJB had unilaterally revealed its future pricing intentions to Allsports and Sports Soccer a concerted practice falling within the Chapter I prohibition would thereby have been established. The fact of having attended a private meeting at which prices were discussed and pricing intentions disclosed, even unilaterally, is in itself a breach of the Chapter I prohibition, which strictly precludes any direct or indirect contact between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions. Even where participation in a meeting is limited to the mere receipt of information about the future conduct of a competitor, the law presumes that the recipient of the information cannot fail to take that information into account when determining its own future policy on the market: *Tate and Lyle*, cited above, at paragraphs 56 to 58, referring in particular to *Rhône-Poulenc* at paragraphs 122 and 123.
874. The same analysis would apply even if the evidence had established only that Sports Soccer had revealed its future pricing intentions to JJB and Allsports. The hypothesis of no concerted practice thus arises only if the evidence fails to establish either that Mr. Whelan,

or that Mr. Ashley, revealed their future pricing intentions. In our view the evidence establishes that both men did so.

875. We find in addition, as regards Allsports, that Allsports' actions were material in involving Blacks in the same concerted practice regarding the pricing of the new MU home shirt, in that Mr. Hughes informed Mr. Knight of the information that Sports Soccer would be pricing at £39.99.

876. As to Mr. Hughes' suggestion that what Mr. Whelan said (that JJB would launch at £39.99) did not tell him anything that he did not know already, in our view there could have been no certainty as to what JJB was going to do at the MU launch, for the reasons we have given earlier in this judgment. The information conveyed by Mr. Whelan therefore reduced uncertainty, as far as both Mr. Hughes and Mr. Ashley were concerned. Similarly the information conveyed by Mr. Ashley reduced uncertainty as far as Mr. Hughes and Mr. Whelan were concerned. Furthermore, by passing the information on, Mr. Hughes reduced uncertainty as far as Blacks is concerned.

877. As to the suggestion that the information conveyed at the meeting made no difference to Allsports, the evidence of Mr. Patrick and Mr. Guest is that they considered the information in Mr. Hughes' memos of 9 June and decided not to alter Allsports' policy. That shows, in our view, that the information was taken into account in formulating Allsports' policy. In any event, as stated above, it is presumed that an undertaking cannot fail to take into account information about a competitor's future pricing intentions: *Tate & Lyle* and *Rhône-Poulenc*, cited above. See also *Aalborg Portland*, cited above, at paragraph 85.

878. The same considerations apply to JJB's argument that the meeting of 8 June 2000 made no difference to what it was going to do anyway. Indeed, in JJB's case in our view the information that Sports Soccer did not propose to discount would have been highly material to JJB in formulating its own policy. JJB at the time had a strong interest in ascertaining Sports Soccer's intentions and in avoiding discounting on the MU shirt, for the reasons given earlier in this judgment.

879. As to Mr. Hughes' suggestion that the meeting was a failure, it is true that he had not achieved the £45 he was seeking. On the other hand, in our judgment he had succeeded in

obtaining assurances from both JJB and Sports Soccer that they would not discount the MU shirt. Whether Mr. Hughes believed that those assurances would be respected is another matter. The point is that Mr. Hughes had achieved at least verbal acknowledgment that the price war between JJB and Sports Soccer would not extend to the MU launch. That understanding was in fact respected when the MU home shirt was launched on 1 August.

880. Finally we reject the submissions that the agreement or concerted practice of 8 June 2000 had no causative effect because Umbro had already reached an agreement with Sports Soccer as to the pricing of the MU shirt. In our judgment the agreement reached on 8 June reconfirmed and consolidated the efforts of Umbro, and indeed JJB and Allsports, to avoid discounting on the MU shirt and was material in preventing such discounting from occurring when the MU shirt was launched on 1 August.

*JJB's Board meeting*

881. According to Mr. Lane-Smith, prior to the Board meeting on 27 June 2000 reports about artificial pricing arrangements for replica shirts had already appeared in the press. The suggestion that Mr. Whelan, Mr. Ashley and Mr. Hughes had met was apparently known, at even junior levels, as Mr. Bryan's conversation with Mr. Russell indicates. In those circumstances it is possible that Mr. Whelan thought it necessary to say something to the Board, rather than simply reporting the matter spontaneously. As to what Mr. Whelan told the Board, we have to decide this case on the basis of the witness evidence and documents before us.

882. Mr. Whelan stated in Whelan I (paragraph 31) that he gave a "full account" of the meeting to the Board. Mr. Beever's statement suggests that Mr. Whelan's report to the Board was very short. It is somewhat difficult to reconcile these two positions.

883. On the basis of what Mr. Lane-Smith and Mr. Beever say Mr. Whelan told the Board, we cannot see any good reason for the matter not to have been minuted. To do so would have been an obvious precaution to protect the company. The fact that the matter was not minuted in our view reinforces the conclusion that we have reached on the evidence set out above. The fact that Mr. Whelan opposed minuting the matter, on the ground of protecting Mr. Hughes, does not in our view assist JJB's case. In any event, we are surprised that no record of any kind apparently exists of what was said at the Board meeting.

884. As to Mr. Beever’s correct insistence that the matter should be minuted, we are also surprised that he should have been persuaded to acquiesce partly on the basis that any note by Mr. Lane-Smith would be “covered by legal privilege” (paragraph 6 of Mr. Beever’s statement). The protection from disclosure of certain communications passing between a client and his legal advisor would not in our view extend to a factual record of what was reported to a Board meeting by the Chairman of a public company regarding a meeting between competitors that had taken place shortly before.

#### *Conclusion on the MU Agreement*

885. For the above reasons, we find, on the totality of the evidence, that both Allsports and JJB were a party to an agreement or concerted practice within the meaning of the Chapter I prohibition with at least Sports Soccer, and in the case of Allsports, Blacks, having as its object or effect to fix the retail price of the new MU home shirt to be launched on 1 August 2000 at £39.99. Neither Umbro, Sports Soccer, MU, nor Blacks have denied their participation in an agreement or concerted practice to that effect.

## **XVIII THE CONTINUATION AGREEMENT**

### **A. INTRODUCTION**

#### *The decision*

886. The OFT’s case is that JJB, in addition to Sports Soccer and Umbro, was a party to the Continuation Agreement during 2000 and 2001 in respect of the England and MU replica shirts. The OFT found at paragraphs 480 to 485 of the decision (footnotes omitted):

“480 In the light of the totality of the evidence, and for the reasons given below, the OFT is further satisfied that Sports Soccer and Umbro were not the only Parties involved in unlawful agreements after the end of the key selling period following the launch of the MU home Replica Shirt in August 2000. The OFT finds that JJB at least, which was by a considerable margin the largest of the major retailers (and the most powerful vis-à-vis Umbro), took active steps which contributed towards the maintenance of High Street Prices on England and MU Replica Shirts during key selling periods through to the end of August 2001.

481 First, each of the Umbro witnesses has confirmed that Umbro's price-fixing behaviour was conditioned by commercial pressure from, in particular, JJB.

482 Secondly, Sports Soccer has stated that it only retailed at High Street Prices because of pressure from Umbro, and that Sports Soccer sought and received from Umbro assurances as to the pricing intentions of other retailers in order to ensure that its agreements with Umbro would not put it at a commercial disadvantage. Sports Soccer has said that *'the pressure became more intense during 2001 than it had been in 2000'*.

483 Thirdly, JJB was actively involved in both the major price-fixing arrangements in mid-2000, namely the agreement surrounding the sale of England Replica Shirts at the time of Euro 2000, and the agreement surrounding the launch of the new MU home Replica Shirt on 1 August 2000. The OFT considers that, taking these two events together with the striking fact that JJB continued consistently to sell at High Street Prices, this strongly supports the view that JJB is likely to have continued participation in price-fixing activities on England and MU Replica Shirts until the end of August 2001.

484 Fourthly there is additional contemporaneous evidence to support the OFT's finding of JJB's continued participation in maintaining the prices of Replica Shirts in 2001:

- (a) The MU Centenary Kit was launched on 20 July 2001. Umbro's monthly management report for May 2001 specifically stated that JJB had 'voiced their concerns' about Sports Soccer's discounting of the MU home Replica Shirt, and were *'threatening cancellations on the centenary kit as a result'*. In fact, on 1 June 2001, JJB did cancel such an order. According to JJB the order was reinstated once Umbro had offered a substantially better wholesale price. However, Mr. Fellone of Umbro explained in his witness statement that the reason for JJB reinstating the order was that, during a meeting on 15 June 2001, Umbro had said that it was *'confident that Sports Soccer were not going to discount the product for at least the first few weeks after launch'*. Mr. Fellone's version of events is supported by the terms of the May 2001 management report, which went on to give as an action point arising from JJB's complaints: *'Objectives/AOB: resolve current Sports Soccer issue.'*
- (b) In his fax of 26 June 2001 to Nike (copied to MU), Mr. Whelan of JJB stated that he had purchased the remaining stock of MU home Replica Shirts which had been launched the previous August to *'ensure that the MU shirt is not bastardised on price around the country'*.

This supports the view that JJB were seeking to avoid a situation in which market conditions for the Replica Shirts were unsettled by heavy discounting activity, and thereby to ensure that minimum prices could be maintained.

- (c) The new England home Replica Kit was launched on 23 April 2001. On 17 April 2001, an internal email from Mr. Attfield to Mr. Ronnie's PA referred to Sports Soccer's intention to sell England shorts, socks and infant kits at launch a few days later at reduced 'MEGA' prices. Mr. Attfield wanted to inform Mr. Ronnie of this intended discounting '*in view of the recent reaction to the pricing of the Celtic (H[home]) shorts, socks and Infantkit*'. In the light of the fact that JJB had been the major source of pressure on Umbro in 2000 in relation to discounting by Sports Soccer, and having regard to the incident about MU Replica Shirts documented in the Umbro May 2001 management report and Mr. Fellone's witness statement (sub paragraph (a) above), the OFT considers it probable that this reference denoted a reaction by JJB in relation to discounting of the Celtic Replica Kit. Umbro's concern, therefore related to expected pressure from JJB in response to any future discounting by other retailers on the new England Replica Kit.
- (d) At launch on 23 April 2001, Sports Soccer did discount the England infant kit, but within 3 days increased its prices back up to RRP levels. The OFT considers, in the light of the evidence, that this action was prompted by pressure from JJB, exerted through Umbro
- (e) JJB retailed the England home Replica Shirt at High Street Prices, although there was a local exception to this in JJB's Carlisle store. Mr. Bryan and Mr. Fellone of Umbro contacted Mr. Russell of JJB several times, raising Umbro's concerns in relation to JJB's Carlisle branch which was offering a 25 per cent discount off the new England Replica Kit on the day of its launch. An Umbro file note referring to the matter stated:

'Concerns were raised that this could give other retailers the perfect opportunity to reduce their stock and start a price war. Colin [Russell of JJB] said that he could see our point of view but the discount applied to all product as a result of a commercial decision made by Duncan Sharpe [of JJB]. He did say, however, that he would speak to Duncan when he came back to the office that



afternoon.

...

Phil Bryan [of Umbro] spoke to Colin at 4.45p.m who advised that Duncan was aware of our concerns but stood by the original decision to apply the discount.'

The OFT considers that, viewed in context, this file note indicates that Umbro and JJB had a continued overall understanding in relation to the prices of England Replica Shirts at this time, and that JJB's action in Carlisle was contrary to that understanding and therefore made the subject of a specific complaint by Umbro.

485 Fifthly, the OFT refers to JJB's participation, during 2001, in the England Direct Agreements: see paragraphs 514 to 520 below. These demonstrate the involvement of JJB at the material time in a separate arrangement which restricted the pricing of England Replica Shirts sold on the internet."

887. The OFT rejects JJB's contrary arguments at paragraphs 490 to 493 of the decision.

*JJB's main arguments*

888. In its notice of appeal, JJB states in relation to the Continuation Agreement simply that

"the Decision relies on a number of matters in support of the allegation that JJB is "likely" to have continued its participation in price-fixing activities on England and Manchester United replica shirts until the end of August 2001. The ragbag of matters relied on falls far short of "strong and compelling evidence" of participation by JJB in an unlawful price fixing agreement until the end of August 2001, or at all and JJB denies any such participation".

889. This uninformative contention was somewhat elaborated in JJB's witness statements prepared during the administrative procedure or served with or shortly after the notice of appeal. Those witness statements deal mainly with the cancellation of part of JJB's order for the MU Centenary shirt on 1 June 2001 and the reinstatement of that order on 18 June 2001, together with the associated purchase by JJB of all remaining stocks of the MU home shirt launched on 1 August 2000.

890. In essence, JJB in its witness statements maintains that the partial cancellation of its order for the MU Centenary shirt due to be launched on 20 July 2001 was in retaliation for Umbro having sold large quantities of the remaining stocks of the MU home shirt launched in August 2000 to Sports Soccer at very low prices, without giving JJB the chance to match

the offer for those shirts which Umbro had accepted from Sports Soccer. JJB's order on the MU Centenary shirt was then reinstated after a meeting on 15 June 2001 when Umbro offered to sell JJB all the remaining stocks of MU home shirts at a clearance price satisfactory to JJB (see Whelan I, paragraphs 14 to 23; Whelan II paragraphs 17 to 24, Whelan III, paragraphs 1 to 3; Sharpe, paragraphs 36 to 39; Russell I, paragraphs 23 to 31; Russell II, paragraphs 17 and 18; Russell III, paragraphs 2 to 14 and Mr. Preston's statement of 7 November 2003).

891. In Russell II at paragraph 18 Mr. Russell denies that the reinstatement of the MU Centenary shirts order had anything to do with the price at which Sports Soccer would sell those shirts at launch. A similar denial is made in Mr. Preston's statement at paragraph 11.

892. No JJB witness statement addresses the issues raised by the decision in relation to the new England home shirt launched on 23 April 2001.

893. In its closing submissions, JJB emphasised in particular:

(a) The cancellation of part of JJB's order on the MU Centenary shirt was a means of securing better terms for the purchase of the remaining stocks of the MU home shirt, and resulted in a commercial deal to that effect which was satisfactory to JJB. This was unrelated to any attempt to prevent discounting by Sports Soccer, whether relating to the MU Centenary shirt or otherwise.

(b) The purchase by JJB of the remaining stocks of the MU home shirt on terms satisfactory to JJB was again a commercial deal which involves no relevant infringement. The reinstatement of JJB's order on the Centenary shirt was simply the result of the conclusion of that deal which, again, was unrelated to discounting by Sports Soccer.

(c) Umbro's file note of 23 April 2001, which is the only evidence bearing on the launch of the new England home shirt, shows clearly that there was no agreement involving JJB.

*The shirts concerned*

894. According to the decision, the Continuation Agreement applied in respect of “key selling periods” in respect of England and MU shirts from August 2000 to August 2001: see paragraph 480. It is useful to clarify the shirts involved.
895. As regards England shirts, the only significant launch during that period was that of the new home shirt launched on 23 April 2001. Sports Soccer launched that shirt at £39.99, but discounted the infant kit. Three days later, Sports Soccer raised the infant kit prices to High Street prices. Sports Soccer subsequently maintained High Street prices until the OFT’s unannounced visits at the end of August 2001. JJB maintained High Street prices throughout the period in question. We analyse under B. below the evidence in relation to the new England home shirt.
896. The previous England home shirt launched in 1999 was in any event coming to the end of its life and was due to be replaced in April 2001. That shirt, which was the subject of the England Agreement in relation to Euro 2000, was discounted by Sports Soccer from 21 June 2000, and by JJB from 21 August 2000. The England away shirts were also discounted by Sports Soccer from 21 June and by JJB from 17 September 2000. No issue arises in respect of any of those shirts.
897. As regards MU shirts, there were three launches during the relevant period, namely the new MU third shirt launched on 29 September 2000, the new MU away shirt launched on 18 October 2000, and the new MU Centenary kit launched on 20 July 2001.
898. It is not disputed that Sports Soccer discounted the new MU third shirt and the new MU away shirt at their launches on 29 September and 18 October 2000 respectively. Although JJB and other retailers did not discount those shirts at launch, there appears to be no specific evidence of an agreement or concerted practice as far as JJB is concerned. We therefore say no more about those shirts.
899. As regards the MU Centenary shirt, Sports Soccer launched that shirt at £39.99 on 20 July 2001 and maintained that price until the OFT’s unannounced visits at the end of August 2001. JJB maintained High Street prices on that shirt from launch. We analyse the evidence about the MU Centenary shirt in C. below.

900. Much of the evidence also concerns the low prices that were obtaining by June 2001 in relation to the MU home shirt, launched on 1 August 2000, that was the subject of the MU Agreement already discussed. Sports Soccer had discounted the latter shirt with effect from 1 October 2000. By mid-2001, Nike was replacing Umbro as the MU licensee, but Umbro apparently still had large stocks of the MU home shirt still available. As we see it, the summer of 2001 was no longer a “key selling period” within the meaning of the decision in respect of the MU home shirt, the launch period for which had been in August and September 2000. In our view, the main relevance of the MU home shirt to the Continuation Agreement is the part allegedly played by that shirt in the events leading up to the cancellation of JJB’s order on the MU Centenary shirt.
901. Before us the OFT has, however, argued that JJB’s actions in buying up the remaining stocks of the MU home shirt in the summer of 2001 was itself an infringement of the Chapter I prohibition. We deal with that point also in C. below.
902. There were two other launches during this period. The new Celtic home kit was launched, apparently less than successfully, on 16 March 2001. The main retailers, including JJB and Sports Soccer, launched the shirt at RRP, but Sports Soccer discounted the shorts and the socks. Sports Soccer discounted the shirt, which was not selling well, from 1 April 2001. A memo written by Mr. Attfield to Mr. Ronnie on 17 April 2001 refers to “the recent reaction” to discounting on the Celtic home shorts, socks and infant kit, which is relied on, in relation to the launch of the new England home shirt on 23 April 2001, at paragraph 484 (c) of decision. Otherwise, the Celtic launch is not relevant to the allegations against JJB in the Continuation Agreement.
903. The only other launch which took place during the period relied on is the Chelsea home kit launched on 3 May 2001, where Sports Soccer apparently observed Umbro’s RRP. This launch is not expressly relied on in the decision as against JJB and we have heard no evidence about it.
904. It follows from the foregoing that the alleged Continuation Agreement in fact involves only two launches, namely the new England home shirt launched on 23 April 2001, and the MU Centenary shirt launched on 20 July 2001. We deal with those two launches in turn under B. and C. below.

905. There is in our view little evidence of any continuing agreement involving JJB in the period from 1 October 2000 (when Sports Soccer discounted the MU home shirt launched on 1 August 2000) up to at least April 2001 when the launch of the new England home shirt was in contemplation.

#### B. THE LAUNCH OF THE NEW ENGLAND HOME SHIRT IN APRIL 2001

##### *Analysis of matters relied on in the decision*

906. The matters relied on by the OFT in respect of an agreement involving JJB to fix the price of the new England home shirt in April 2001 appear to be as follows:

(i) There was a price fixing agreement between Umbro and Sports Soccer in respect of the England home shirt launch in April 2001 (see paragraphs 232, 233 and 390 (b) of the decision). According to the OFT, Umbro's price fixing behaviour was conditioned by pressure from JJB (paragraph 481 of the decision).

(ii) Sports Soccer entered into that price fixing agreement under pressure from Umbro. That pressure was more intense in 2001 than it had been in 2000. Sports Soccer sought assurances about the pricing intentions of other retailers before it entered into price fixing agreements (paragraph 482 of the decision).

(iii) JJB was involved in the England Agreement during Euro 2000 and the MU Agreement and continued to sell at High Street prices. JJB is therefore likely to have continued to participate in price fixing on England and MU shirts until August 2001 (paragraph 483 of the decision).

(iv) The email from Mr. Attfield to Mr. Ronnie of 17 April 2001 warns Mr. Ronnie that Sports Soccer was intending to discount the new England home shorts, socks and infant kit to be launched on 23 April 2001. Mr. Attfield states that he was informing Mr. Ronnie of Sports Soccer's intentions "in view of the recent reaction to the pricing of the Celtic (Home) shorts, socks and infant kits". The OFT considers it probable that this denotes a reaction by JJB in relation to discounting at the launch of the Celtic replica kit (paragraph 484 (c) of the decision).

(v) The fact that at launch in April 2001, Sports Soccer discounted the England infant kit but within 3 days increased its prices to RRP levels. The OFT considers that this was prompted by pressure from JJB, executed through Umbro (paragraph 484 (d) of the decision).

(vi) An Umbro file note dated 23 April 2001 relating to discounting by JJB in its Carlisle store (paragraph 234 of the decision). This note is considered by the OFT to be evidence of an overall understanding between JJB and Umbro, to which the Carlisle branch was the exception (paragraph 484 (e) of the decision)

(vii) JJB's participation in the England Direct Agreement considered in the next section (paragraph 485 of the decision).

We take these matters in turn.

*(i) Whether a price fixing agreement between Umbro and Sports Soccer in relation to the launch of the new England home shirt in April 2001 was conditioned by pressure from JJB*

907. The OFT's finding in the decision that the launch of the new England home shirt in April 2001 was the subject of a price fixing agreement between Umbro and Sports Soccer has not been disputed. The first factual issue is whether that agreement was conditioned by pressure from JJB.

908. With the exception of a passing reference at paragraph 81, Ronnie III does not contain any specific reference to pressure from JJB as regards 2001, as distinct from 2000. Although Mr. Ronnie deals with discounting by JJB at its Carlisle store in April 2001 at paragraphs 80 and 81 of Ronnie III, there is no express mention of pressure from JJB at this time. Paragraphs 78 and 79 of Ronnie III suggest that Sports Soccer's launch prices for 2001 had been discussed with Umbro at the end of 2000 and the beginning of 2001, because of Umbro's fear that "we would come under renewed pressure from JJB". However, there is little direct evidence that Umbro did explicitly come under such pressure in the period prior to April 2001. The witness statements of Mr. Attfield and Mr. McGuigan say nothing about pressure from JJB during 2001.

909. In Fellone III Mr. Fellone mentions pressure from JJB in general terms in the period 1999 to 2001, but he does not focus specifically on the period prior to April 2001. He deals at paragraphs 17 and 18 with the cancellation of the MU Centenary shirt order, but that is a different matter which we discuss under C. below.

910. We are prepared to accept that in April 2001 Umbro still feared pressure from JJB if Sports Soccer were to discount, and also feared that such discounting would provoke JJB to retaliate, thereby provoking or reigniting the price war which Umbro had striven hard to avoid. But direct evidence of such pressure by JJB around the period April/ May 2001 appears to be lacking.

*(ii) Whether Sports Soccer entered into a price fixing agreement in relation to the England home shirt to be launched in 2001 under pressure from Umbro, and asked for assurances about other retailers' pricing intentions*

911. It is true that in its representations to the OFT, Sports Soccer contended that it had come under more intense pressure from Umbro in 2001 than in 2000 (see e.g. Sports Soccer's response of 19 January 2003, p. 10). Mr. Ashley said in cross-examination (although admittedly in answer to Allsports rather than JJB) that the pressure from Umbro was still intense and gradually increasing in the first part of 2001, although it came in peaks and troughs (Day 3, pp. 77-79).

912. As to whether Sports Soccer sought any assurance about JJB's pricing intentions in relation to the launch of the new England home shirt in April 2001, we have no explicit evidence to

that effect in relation to that shirt. The references in the evidence to Sports Soccer seeking such assurances are in the context of the England Agreement concerning Euro 2000, a year earlier. While it would in our judgment be logical for Sports Soccer to seek such assurances, the evidence that they actually did so in 2001 is lacking.

*(iii) JJB's previous involvement in the England and MU Agreements*

913. Similar fact evidence of involvement in previous agreements concerning the same or equivalent products in the recent past is capable, in our judgment, of being relevant evidence for the purpose of proving an infringement of the Chapter I prohibition. In the present context there is, in addition, evidence that the England Agreement reached in April or May 2000 involving at least Sports Soccer and JJB (among others) related to replica shirts in general. One inference that could be drawn from the evidence is that that earlier agreement continued to be applicable to subsequent launches, at least so far as England and MU shirts are concerned.

914. On the other hand, the fact that an undertaking has been involved in earlier infringing agreements does not of itself necessarily establish its involvement in subsequent infringing agreements. Much care should be exercised, in our judgment, before drawing inferences from past conduct, having regard in particular to the presumption of innocence. We revert to this issue below.

*(iv) Mr. Attfield's email of 17 April 2001*

This document reads:

“Subject: Sports/Soccer England Launch

Please find below the pricing structure for the forthcoming England Home kit.

	Junior	MEGA	Adult	MEGA
Jersey	£29.99		£39.99	
Shorts	£16.99	(£12)	£19.99	(£15)
Socks	£7.99	(£6)	£9.99	(£7)
Inf[ant]/Kit	£29.99	(£22)		

In view of the recent reaction to the pricing of the Celtic (h[ome]) shorts, socks and Infantkit I thought it best you are aware of this information.”



915. The OFT considers that Mr. Attfield's reference to "the recent reaction" to discounting of the Celtic shorts, socks and infant kit, is a reference to a reaction from JJB. There is, however, no evidence from Mr. Attfield about what he meant by this memo, and Mr. Attfield does not mention it in his witness statement of 12 July 2002. Again, concrete evidence is lacking, as far as concerns JJB.

*(v) The fact that Sports Soccer discounted the infant kit, and then quickly raised its prices.*

916. It appears to be undisputed that Sports Soccer launched the new England home replica kit at Umbro's RRP's, with the exception of the infants' kit which was discounted. Shortly afterwards, Sports Soccer raised the price of the infants' kit to RRP's. We accept that that was the result of pressure from Umbro on Sports Soccer, as Sports Soccer stated to the OFT (response of 19 January 2003, p. 21). Again, however, there is no explicit evidence that Umbro's pressure on Sports Soccer was, in turn, as a result of an express complaint or explicit pressure from JJB. No OFT witness statement explicitly deals with this point.

*(vi) Umbro's file note of 23 April 2001*

917. Umbro's file note of 23 April 2001 about JJB's discounting in the Carlisle store reads as follows:

"DATE : 23 APRIL 2001  
SUBJECT : JJB DISCOUNTING ENGLAND HOME KIT

- Colin Russell advised a.m of Carlisle branch offering 25% discount off England kit on launch day by P.Bryan.
- Concerns were raised that this could give other retailers the perfect opportunity to reduce their stock and start a price war.
- Colin said he could see our point of view but the discount applied to all product as a result of a commercial decision made by Duncan Sharpe. He did say, however that he would speak to Duncan when he came back to the office that afternoon.
- Phil Fellone had a similar conversation with Colin later that morning.
- Phil Bryan spoke to Colin at 4.45p.m who advised that Duncan was aware of our concerns but stood by the original decision to apply the discount."

There is a similar note with regard to JJB's Bury store.

918. In cross-examination Mr. Russell denied that he had said that "he could see Umbro's point of view". According to Mr. Russell, Mr. Bryan of Umbro had asked him to take the shirts

in question off display, but Mr. Russell had said that JJB would not do it, as it was their policy to have this kind of discounting in new stores. Mr. Sharpe had confirmed that policy to Mr. Russell. Mr. Russell thought that the incident related to the Bury store, rather than the Carlisle store (Day 9, pp. 95-100).

919. The OFT submits that this Umbro file note is indicative of a continuing understanding between JJB and Umbro that JJB would price at £39.99, to which JJB was making an exception: hence the references to Mr. Russell being able to see Umbro's point of view, and Mr. Sharpe saying that he could understand Umbro's concerns. JJB, on the other hand, submits that this file note is in fact evidence that there was no agreement between Umbro and JJB.
920. Despite Mr. Russell's evidence, we take this note at face value. The note records that JJB could see Umbro's point of view, and understood their concerns, but nonetheless stood by their decision to allow local discounting in the stores in question. Contrary to Mr. Russell's recollection, there is evidence that neither the Bury nor the Carlisle stores were new stores at the time: see Day 9, pp. 107-108. Mr. Ronnie's evidence, at paragraph 80 of Ronnie III, was that JJB was discounting in response to Sports Soccer opening a new store next door. That was not challenged in cross-examination.
921. In our view this file note of 23 April 2001 does confirm that Umbro had concerns about discounting, the concern this time being that JJB's discounting would provoke other retailers, and notably Sports Soccer, to engage in a price war. Mr. Ronnie's evidence, at paragraph 81 of Ronnie III, supports that. In our view, such discounting by JJB would have potentially undermined any assurances, express or implied, that Umbro had previously given other retailers such as Sports Soccer to the effect that they would not be undercut if they sold at High Street prices.
922. On the other hand, the note of 23 April 2001 also shows that JJB was prepared to disregard or ignore Umbro's concerns, which tends to suggest that any earlier understanding there may have been was no longer fully effective. We discuss this point further below.

*(vii) JJB's participation in the England Direct Agreement*

923. We do not think any inference can be drawn against JJB in the context of the Continuation Agreement in 2001 from the evidence as to the England Direct Agreement. The latter agreement concerns a different aspect of the business. There is, moreover, evidence that JJB withdrew from any direct participation in the England Direct Agreement in February 2000. Although, as we find below, JJB had passive knowledge in 2001 that the FA/Sportsetail arrangement involved Sportsetail respecting JJB's retail prices, we do not find an infringement against JJB. In the present context, we do not think that JJB's passive knowledge about the operation of the Sportsetail website is a sound basis for drawing any inference about JJB's participation in the alleged Continuation Agreement.

*Conclusions on JJB's participation in an agreement relating to the launch of the new England home shirt in April 2001*

924. In our judgment, the evidence establishes that

(a) The launch of the new England home shirt, and indeed the whole kit, was subject to a price fixing agreement between Umbro and Sports Soccer.

(b) Sports Soccer entered into that agreement as a result of pressure from Umbro, which resulted in Sports Soccer going out at High Street prices on the shirt, shorts and socks, and raising the price of the infant kit to High Street prices shortly after launch.

(c) Umbro was extremely concerned that discounting by Sports Soccer would provoke retaliatory discounting by JJB.

(d) Umbro was equally concerned that discounting by JJB in Carlisle or Bury would provoke retaliatory discounting by Sports Soccer.

(e) Such retaliatory discounting by either JJB or Sports Soccer would have undermined whatever indications Umbro had in the past given to either company that they would not be undercut if they refrained from discounting.

(f) The understanding underlying the England Agreement reached in April/ May 2000 was that neither Sports Soccer nor JJB would discount adult replica shirts at launch, provided the other did not do so. The MU Agreement, in our view, reinforced that understanding.

There is no explicit evidence that that understanding reached during 2000 had been terminated by April 2001.

(g) JJB throughout maintained High Street prices on the new England home shirt, except at Carlisle and Bury.

925. On the other hand, we have no evidence that JJB itself did any overt act or took any positive step after October 2000 to affirm any understanding with Umbro that JJB would continue to price at High Street prices on replica shirts during key selling periods. There is no evidence of specific incidents of pressure from JJB which can be linked to the period October 2000 to April 2001, nor is there evidence of meetings between JJB and Umbro, or of telephone conversations, during this period at which these matters were discussed. The reaction of JJB to Sports Soccer's discounting of the new MU third shirt and the new MU away kit in October 2000 is not recorded. The evidence does not specifically link Mr. Attfield's file note of 17 April 2001 to JJB.

926. In our view the file note of 23 April 2001 shows, at the least, that at this time discussions and exchanges of view between Umbro and JJB about actual retail prices do not appear to have been regarded as anything unusual. As paragraph 493 of the decision points out, Mr. Sharpe and Mr. Russell did not distance themselves from Umbro's concerns, for example by informing Umbro unequivocally that JJB's retail prices were none of their business.

927. On the other hand, the file note of 23 April 2001 is in our view ambiguous. On one view it supports JJB's case that there was at this stage no understanding, as shown by the fact that JJB was discounting.

928. More generally, this part of the case seems to us to raise the sometimes difficult issue of whether the continuation of an earlier agreement or concerted practice has been sufficiently proved. The general rule is that the burden of proof rests with the OFT, not only as to the existence of the agreement or concerted practice, but also as to its duration: see *Cimenteries*, cited above, at paragraphs 2800 to 2806, citing *Dunlop Slazenger*, cited above, at paragraph 79 of that judgment. On the other hand, in certain particular circumstances a concerted practice may be found to have continued even in the absence of

active steps to implement it beyond a certain date. In *Pioneer*, cited above, Advocate General Sir Gordon Slynn, as he then was, said at p. 1941:

“...A concerted practice is capable of continuing in existence, even in the absence of active steps to implement it. Indeed, if the practice is sufficiently effective and widely known, it may require no action to secure its implementation. Cases may arise in which the absence of any evidence of measures taken to implement a concerted practice may suggest that the practice has come to an end. That, however, is matter of evidence, which must depend upon the circumstances of the case ... It is perhaps of interest to observe the decision of the United States Court of Appeals in *US v Stromberg and Others*, 268 F 2d.256, in which it held that a conspiracy, once established, is presumed to continue until the contrary is shown.”

929. In *Pioneer*, it was held, in effect, that once instructions not to export had been given, there was no need to establish that those instructions had subsequently been reconfirmed.

However, as Lord Slynn pointed out in *Pioneer*, everything depends on the evidence in the particular case.

930. In the present case in our view the evidential support for an agreement or concerted practice involving JJB at the launch of the new England home shirt in April 2001 is weaker than the evidence in relation to the England and MU Agreements considered above, and indeed in relation to the MU Centenary Shirt considered below.

931. We bear in mind that, as indicated in section VI above, the burden is on the OFT to prove its case. The Tribunal does not decide an issue such as this on what Lord Bingham has described as “the bare balance of probabilities”. JJB is entitled to the presumption of innocence.

932. Having regard to the totality of the matters before us, we find that the evidence taken as a whole is not sufficiently convincing to establish that JJB was party to a relevant agreement or concerted practice with Umbro and/ or Sports Soccer to fix the price of the new England home shirt launched on 23 April 2001.

### C. THE MU CENTENARY SHIRT

933. Most of the evidence and the parties’ submissions regarding the Continuation Agreement have in fact centred on the launch of the MU Centenary Shirt on 20 July 2001.

*The decision*

934. In the decision, the OFT relies on the following matters to establish that JJB was party to an agreement or concerted practice with regard to the MU Centenary shirt within what the OFT considers to be the broader umbrella of the Continuation Agreement:

(i) Sports Soccer launched the MU Centenary shirt at High Street prices on 20 July 2001 as a result of a price fixing agreement between Sports Soccer and Umbro (decision, paragraph 478).

(ii) Sports Soccer entered into that agreement as a result of pressure from Umbro. It was Sports Soccer's practice to seek assurances from Umbro as to other retailers' pricing intentions before entering into such agreements (decision, paragraph 482).

(iii) Umbro's behaviour was conditioned by pressure from JJB (decision, paragraph 481).

(iv) JJB's participation in the England and MU Agreements in 2000, together with the fact that JJB continued to sell at High Street prices, strongly supports the view that JJB is likely to have continued to participate in price fixing activities in relation to MU (and England) shirts until August 2001 (decision, paragraph 483).

(v) According to Umbro's MMR for May 2001, JJB had "voiced their concerns about Sports Soccer's discounting on the MU home replica shirt and were "threatening cancellations on the centenary kit as a result". That report states "Objectives/ AOB: resolve current Sports Soccer issue".

(vi) The fact that on 1 June 2001 JJB cancelled part of its order for the MU Centenary kit.

(vii) According to paragraph 18 of Fellone III:

"We requested a meeting with JJB to understand why such a big order had been cancelled. Duncan Sharpe, Colin Russell and Steve Preston were present. I attended the meeting with Chris Ronnie. The JJB representatives asked us if we could guarantee the price at which Sports Soccer would sell the Centenary shirts at launch. We said that we could not guarantee the price but we were confident that Sports Soccer were not going to discount the product at least for the first few weeks after launch, as Mike Ashley had told us that was his

intention. JJB then reinstated the order.” (decision, paragraph 484 (a)).

(viii) By a fax to Nike of 26 June 2001 (copied to MU) Mr. Whelan stated

“Regarding the current MU home shirt, it would appear that Umbro feel they have received the sticky end of the stick, and consequently have been jobbing the home shirt off at all kinds of prices.

I had a meeting with Chris Ronnie [of Umbro] last week and JJB have agreed to buy the total production of the MU home shirt, which is around 85,000 units, but no further shirts can be made. This should enable a smooth transition from Umbro to Nike, and ensure that the MU shirt is not bastardised on price around the country.” (decision, paragraph 484 (b)).

935. The OFT also relies, at paragraph 485 of the decision, on JJB’s alleged participation in the England Direct Agreement. For the reasons already given, we do not think that this is a relevant consideration.

936. At paragraph 490 of the decision the OFT concludes that the MU Centenary shirt order had been cancelled because of JJB’s objections to Sports Soccer’s discounting activities. The subsequent purchase of the remaining MU home shirts by JJB was to prevent a disturbance of settled retail price levels for MU replica shirts in 2001 (paragraph 492).

937. The OFT also supports the decision with the subsequent witness statement of Mr. Ronnie in Ronnie V, dated 10 December 2003.

#### *The parties’ submissions*

938. As already stated, JJB submits essentially (i) the cancellation of the MU Centenary shirt order on 1 June 2001 was not so as to put pressure on Umbro to prevent discounting of replica kits by Sports Soccer, but was part of a commercial dispute which resulted from the fact that Umbro had sold residual stocks of the MU home shirt at clearance prices without giving JJB the opportunity to make an offer comparable to the offer which Umbro had accepted from Sports Soccer. (ii) The subsequent purchase by JJB of the remaining stock of MU home shirts from Umbro at clearance prices was done in order to lower JJB’s overall average purchase price for that shirt, and thus enable JJB to compete effectively with Sports Soccer at the retail prices then prevailing. (iii) Both JJB and Sports Soccer sold the MU home shirt at discounted prices. (iv) The reinstatement of the MU Centenary

shirt order following the meeting of 15 June 2001 was due to the satisfactory resolution of the commercial dispute, and was unrelated to discounting by Sports Soccer. (v) It was no part of that settlement that Umbro would be giving any guarantee as to Sports Soccer's future pricing policy. (vi) JJB's concern at the time may well have been to ensure that Umbro would not supply Sports Soccer with the Centenary shirt at clearance prices.

939. The OFT's essential submissions are (i) JJB cancelled its order because of discounting by Sports Soccer, and in particular JJB's fear that Sports Soccer would discount the Centenary kit at launch. (ii) JJB purchased all the remaining stocks of the MU home shirt on an exclusive basis, to prevent market prices falling any further on that shirt and, indirectly, to protect the launch price of the MU Centenary shirt. (iii) Irrespective of the course of events surrounding the cancellation by JJB of the Centenary shirts order, there is no doubt that JJB sought and received an assurance from Umbro to the effect that Sports Soccer would not be discounting that shirt at launch. Once that assurance had been given, the order was reinstated.

*The main events surrounding the cancellation of the MU Centenary shirt order and the subsequent purchase by JJB of the remaining stock of the MU home shirt*

940. We have heard a great deal of evidence about the cancellation by JJB of part of its order for the MU Centenary shirt, the subsequent agreement by Umbro to sell JJB its remaining stocks of the MU home shirt, and the reinstatement of the Centenary shirt order. We start by summarising the main facts on the basis of the relevant witness statements.

941. In September 2000, it became known that Nike was replacing Umbro as MU's licensee. At that time Umbro still had considerable stocks of the MU home shirt which had been launched on 1 August 2000.

942. In October 2000, JJB bought quantities of the MU home shirt from Umbro, apparently at prices slightly below JJB's usual wholesale prices, apparently for sale during the Christmas period. By Spring 2001, JJB still had extensive stocks of the MU home shirt, apparently of the order of 60,000 shirts.

943. In or about April 2001 Mr. Ronnie offered JJB further stocks of the MU home shirt at clearance prices. There is some dispute as to what price Mr. Ronnie indicated would be



acceptable, and what price Mr. Russell of JJB said he would be prepared to pay. There is evidence that Mr. Ronnie was seeking £10/£11, and that Mr. Russell was prepared to pay some £6.50/ £5.50, but we do not have to resolve that issue. No deal was concluded between Umbro and JJB at that stage.

944. Shortly afterwards JJB became aware that Sports Soccer was retailing the MU home shirt for around a discounted price of £20. JJB deduced that Umbro had in fact sold quantities of the MU home shirt to Sports Soccer at very favourable clearance prices. In fact it appears that Umbro had sold Sports Soccer some 40,000 shirts at £8/£9. JJB complained strongly to Umbro, considering it was extremely unfair that they had not been given a further chance to match the price at which Sports Soccer had purchased the clearance stocks. As a result, JJB's stocks had been bought at a higher average price, making it difficult for JJB to match Sports Soccer's discounted retail price. The evidence is that Mr. Ronnie had sold the stocks to Sports Soccer, and to another retailer, Streetwise, at prices which were better than Mr. Russell of JJB had previously offered.

945. On 1 June 2000, on Mr. Whelan's instructions, JJB cancelled a tranche of 40,000 MU Centenary shirts, representing half of JJB's then existing order. This was done, according to Mr. Russell "to register our annoyance and to encourage Umbro to make a reasonable offer for the sale of further shirts to JJB" (Russell I, paragraph 26), "to shock Umbro into addressing our complaint over the clearance sale of [MU] home shirts" (Russell II, paragraph 18) and "to show Umbro that JJB were disgusted at the treatment they had received" (Russell III, paragraph 9). According to Mr. Whelan, the cancellation was done "in order to encourage Umbro to come to the table and offer a satisfactory price to JJB for any further [MU] home shirts in the pipeline" (Whelan I, paragraph 19)

946. Umbro's May 2001 MMR prepared by Mr. Bryan, apparently written before the cancellation was received on 1 June states:

"The licensed market place continues to have fantastic England home kit sales however the focus is back on Sports Soccer discounting policy in this sector with their reductions on MUFC home jerseys. JJB have voiced their concerns and are threatening cancellations on the centenary kit as a result.

...

Objectives/AOB

- Resolve current Sports Soccer issue."

That MMR confirms that JJB were concerned about Sports Soccer's selling prices on the MU home shirts, and were threatening cancellations on the MU home shirt as a result.

947. After 1 June, at least two meetings then took place between Umbro and JJB to resolve the matter. The main meetings appear to have been on 8 June and 15 June 2001.

948. Mr. Fellone says at paragraphs 17 and 18 of Fellone III:

“17. One example of the kind of pressure that they put on us was in May 2001, relating to a repeat order for the Manchester United Centenary shirt. An initial order had been placed for 40,000 shirts and they had subsequently placed a repeat order. At the time Sports Soccer were discounting the England shirt. I received the cancellation, which was reported in the May 2001 trading report.

18. We requested a meeting with JJB to understand why such a big order had been cancelled. Duncan Sharpe, Colin Russell and Steve Preston were present. I attended the meeting with Chris Ronnie. The JJB representatives asked us if we could guarantee the price at which Sports Soccer would sell the Centenary shirts at launch. We said that we could not guarantee the price but we were confident that Sports Soccer were not going to discount the product at least for the first few weeks after launch, as Mike Ashley had told us that was his intention. JJB then reinstated the order. In fact Sports Soccer did discount the kit one month after launch, however by that time JJB was selling its shirts so well that it did not react.”

949. Mr. Fellone agreed in cross-examination that his reference in paragraph 17 to the “England” shirt is mistaken, since it was the MU home shirt which was the concern. As far as we know, there was no discounting at this stage on the new England home shirt launched in April 2001. We revert below to Mr. Fellone's evidence to us about paragraph 18 of Fellone III.

950. Mr. Ronnie states, in Ronnie V, as follows:

“6. On 1 June 2001 JJB cancelled 40,000 MU centenary shirts (the second tranche). I do not think that there was any explanation given at the time by JJB.

7. So far as subsequent meetings with JJB are concerned, I do remember a meeting with Dave Whelan in his office, with Duncan Sharpe. I remember that, at that meeting, we discussed the deal whereby JJB would buy up the full amount of our production of the MU home shirt in the Far East on an exclusive basis, and I confirmed that no more production of MU home shirts would be

made. The reason for this was that JJB were concerned that otherwise we would dump additional shirts into the marketplace, and other retailers would then sell them at heavily discounted prices.

8. I also remember that I wanted to get something out of this for Umbro. I managed to negotiate a deal whereby JJB would, for its part, purchase a certain amount of associated product. I think that, originally, I went for £2m worth of product, but that in the end this may have been reduced to £1m. I see from my letter to Dave Whelan of 18 June 2001 that JJB also formally must have agreed to reinstate its cancelled order for the Centenary kit at that time.

9. I do not now clearly remember an earlier meeting at which the issue of Sports Soccer discounting the *MU home kit* was specifically discussed, although I see that it is very likely that a meeting took place on 8 June 2001. This would accord with Phil Fellone's file note which has that date. It is also possible that, at that earlier meeting, the idea of JJB buying up a further large quantity of MU home shirt production was discussed. I see from Phil Fellone's file note that the issue of the reinstatement of JJB's order for the MU Centenary kit appears to have been raised at such a meeting, although no firm decision was taken about the matter at that stage.

10. Separately, and around that time, I do remember attending a meeting with Phil Fellone at which, at least, Duncan Sharpe attended for JJB. I do not now definitely remember whether anyone else in particular was there on behalf of JJB, although this was likely. I do not remember that Peter McGuigan was also there. This would have been very unusual because I oversaw the JJB account with Phil Fellone as part of my UK responsibilities.

11. I cannot now date this meeting precisely. What I do distinctly recall is that, at that meeting, JJB's representatives were worried that Sports Soccer would discount the new gold Centenary kit on launch, and that they wanted reassurance from us that Sports Soccer would not do this.

12. I also recall distinctly that, before this meeting, I had spoken to Mike Ashley of Sports Soccer about the issue of pricing for the Centenary kit at launch. I remember telling him that it was very important that he didn't discount. I remember clearly that he told me that Sports Soccer would charge full price for the first 3 to 4 weeks after launch. That was the most I could get.

13. When it then came to the meeting with JJB, I or Phil Fellone told the JJB representatives that Sports Soccer would not discount for the first few weeks after launch."

951. Paragraphs 9 to 13 of Ronnie V were not challenged in cross-examination.

952. Mr. Russell, at paragraph 18 of Russell II, recalls attending a meeting with Mr. Ronnie and Mr. Fellone at which Mr. Sharpe and Mr. Preston were also present. Mr. Russell was present only for a short time. Mr. Russell dates this meeting to May 2001, but in paragraph 10 of Russell III, Mr. Russell identifies the meeting as being on 8 June 2001. This meeting, Mr. Russell says, was attended by Mr. McGuigan and Mr. Fellone, Mr. Sharpe and Mr. Preston. Mr. Sharpe intimated that JJB would like to buy MU home shirts at the same price that they had been sold to Sports Soccer. Mr. McGuigan said that Umbro had enough extra fabric for 80,000 shirts which could be sold to JJB at the same prices as they were sold to Sports Soccer. Mr. Sharpe said that he would have to consult Mr. Whelan (Russell III, paragraph 10). Mr. Russell denies that anything had been said about Sports Soccer discounting in his presence (Day 9, p. 174).
953. A file note written by Mr. Fellone dated 8 June 2001 indicates that he was present at a meeting on 8 June 2001 when reinstatement of the JJB order was discussed.
954. According to paragraph 2 of Whelan III, correcting paragraph 18 of Whelan II, a meeting between Mr. Sharpe, Mr. Preston and Mr. Russell, for JJB, and Mr. Fellone and Mr. Ronnie most likely took place on 8 June 2001, Mr. McGuigan also being present.
955. Mr. Preston, who was not called as a witness, refers in his statement of 7 November 2003 to a meeting at JJB's offices on 8 June 2001, although he also refers to a meeting "possibly before" with Chris Ronnie (paragraph 6). According to Mr. Preston, he made no reference to Sports Soccer's discounting during the meeting on 8 June 2000 and he does not recall it being mentioned by anyone else (paragraph 11).
956. It appears to be common ground that a meeting then took place between Mr. Ronnie and Mr. Whelan on 15 June 2001. At that meeting it was agreed that JJB would buy, on an exclusive basis, some 80,000 MU home shirts, representing all the remaining stocks and fabric available to Umbro, at prices of £9 and £8 for the adult and junior sizes respectively, which was apparently the same price that had been paid by Sports Soccer. At the same time JJB agreed to buy up to £2 million of Umbro branded products, and to reinstate the cancelled Centenary shirt order.

957. That was confirmed by a fax sent by Mr. Ronnie to Mr. Whelan dated 18 June 2001 which states:

“a) Umbro... will sell the total balance of stock in the UK and the full amount of production that is currently taking place in the Far East of the Manchester United Home jersey in adults and junior sizes and confirm no more production of Manchester Utd home shirts will be made... . The net price of the adults jerseys is £9.00 net net and the junior jersey is £8.00 net net. The Manchester United product is to be sold to JJB... on an exclusive basis and the current order for Manchester United Away product is to be reinstated.

b) Due to the impact this sales promotion will have on UMBRO's Profit and Loss account for 2001, JJB Sports plc will agree to purchase a total of £2.0m of Manchester United and England apparel product based on JJB Sport plc's current terms.

958. Mr. Whelan then sent a fax to Nike, as set out above, on 26 June 2001. That fax states that JJB had bought the total production of MU home shirts which “should enable a smooth transition from Umbro to Nike, and ensure that the MU shirt is not bastardised on price around the country”.

959. When the MU Centenary shirt was launched on 20 July 2001 both JJB and Sports Soccer observed High Street prices, at least up to the OFT's unannounced visits at the end of August.

*The issues that arise*

960. In the light of the foregoing, in our judgment there are three issues: (i) Do the circumstances of the cancellation of part of JJB's order on the MU Centenary shirt support JJB's participation in the alleged Continuation Agreement? (ii) Does the fact that JJB reinstated its order, on the basis that Umbro could sell to JJB on an exclusive basis all its remaining stocks of the MU home shirt, support JJB's participation in the alleged Continuation Agreement? (iii) Did JJB ask for and/ or receive an assurance from Umbro that Sports Soccer would not discount the MU Centenary shirt at launch, such as to make JJB a party to a relevant agreement or concerted practice?

*Does the cancellation of part of JJB's order on the MU Centenary shirt show that JJB participated in the alleged Continuation Agreement?*

961. JJB's evidence is that the cancellation of part of its order on the MU Centenary shirt was in order to show JJB's displeasure at the fact that Umbro had apparently sold large stocks of the MU home shirt to Sports Soccer at clearance prices, without giving JJB the opportunity to match the price Sports Soccer was prepared to pay. That put JJB at a competitive disadvantage, because its existing stocks of the MU home shirt had been purchased at a higher average price, which made it difficult for JJB to compete against Sports Soccer's discounted retail selling price of £20. JJB thus cancelled the order so as to "bring Umbro to the table", with a view to Umbro agreeing to sell JJB further stocks of the MU shirt at the same price that had been paid by Sports Soccer or, according to Mr. Whelan, reaching some other kind of settlement such as a credit note. See e.g. Mr. Whelan's evidence (Day 7, pp. 77 to 83, Day 8 pp. 130-137).
962. Mr. Fellone agreed, essentially, with JJB's account. Mr. Fellone accepted in cross-examination that the cancellation of the order on the MU Centenary shirt was because JJB were frustrated by the clearance order that Umbro had supplied to Sports Soccer. According to Mr. Fellone, JJB's witness statements make sense (Day 7, p. 23). In effect, the cancellation was prompted by a genuine commercial concern by JJB which was then resolved by the deal which Mr. Ronnie did in selling JJB further MU home shirts at clearance prices (Day 7, p. 27).
963. Mr. Ronnie also agreed that JJB were extremely annoyed by the situation which had arisen, although he also said, without elaborating "that that was not the reason they cancelled the shirts" (Day 4, p. 88). Mr. Ronnie also accepted that the reinstatement of JJB's order was in return for the deal he offered JJB on further MU home shirts (Day 4, p. 91), although he also said that the deal also resolved JJB's "concerns regarding Sports Soccer's discounting on the England product as well; they were linked". From Umbro's point of view, the deal enabled Umbro to dispose of stocks that would potentially be surplus to requirements as a result of the transfer of the MU contract to Nike (Day 4, p. 91).
964. In our view, the evidence has not enabled the OFT to contradict JJB's account, which is to the effect that the order was cancelled as a result of JJB not having been offered the chance to match the clearance prices that Sports Soccer were prepared to pay on the MU home shirts. The fact that the subsequent negotiations revolved around a deal that enabled JJB to obtain further supplies of the MU home shirt at prices equivalent to those paid to Sports

Soccer confirms in our view that the central event which led to the original cancellation was Umbro's sale of substantial stocks of the MU home shirt to Sports Soccer at clearance prices.

965. We accept that there is a sense in which the OFT is correct to allege that JJB's cancellation was prompted by Sports Soccer's discounting of the MU shirt (not England as Mr. Fellone originally supposed) because it was Sports Soccer's discounted prices for the MU home shirt, and JJB's difficulty in matching those prices, which led JJB to realise that Sports Soccer must have got a special deal. From that point of view, Umbro's May 2001 MMR, to the effect that JJB had "voiced their concerns" about Sports Soccer's discounting and were "threatening cancellations on the Centenary kit as a result", is not inconsistent with JJB's evidence.
966. However, the allegation against JJB in respect of the Continuation Agreement at paragraphs 480 et seq of the decision is that JJB took active steps to maintain High Street prices – i.e. Umbro's RRP's – during key selling periods as part of an agreement or concerted practice with Umbro and Sports Soccer. The discounting of the MU home shirt to which Umbro's May 2001 MMR refers is not taking place during a key selling period since that shirt had been launched the previous August. JJB's actions were not, according to the evidence, directed towards re-establishing High Street prices on the MU home shirt, but rather competing with Sports Soccer with a price of around £20 on that shirt.
967. In all those circumstances it does not seem to us to be established that JJB's original cancellation of part of its order of MU Centenary shirts, in itself and standing alone, shows JJB to have been a party to the Continuation Agreement alleged in the decision.
968. The position would be different if the evidence had shown that at least part of JJB's original motivation for the cancellation had been to put pressure on Umbro to ensure that Sports Soccer did not discount the MU Centenary shirt below High Street prices at launch. The evidence considered below shows that JJB was, indeed, concerned about that possibility. However, in our view the evidence before the Tribunal falls short of establishing that the cancellation of JJB's order was originally motivated by a desire to put pressure on Umbro to maintain High Street prices on the Centenary shirt, as distinct from a

commercial bargaining tactic aimed at securing redress for what had occurred in respect of the MU home shirt.

*Does JJB's purchase of the remaining stocks of the MU home shirt show that JJB participated in the Continuation Agreement?*

969. It is not disputed that JJB's deal with Umbro following the meeting on 15 June 2001 enabled JJB to acquire exclusive rights in respect of the entire remaining stocks of the MU home shirt, which at that stage would have had a remaining life of over a year.
970. According to Mr. Whelan, he could still make a reasonable profit (Day 8, pp. 142-148). Taking account of existing stocks, JJB had by then purchased about 142,000 MU home shirts (Day 8, p. 147). Mr. Whelan's principal concern, he told us, was that large quantities of the MU home shirt would end up with market traders and on the grey market, selling for as little as £10, leading to the "bastardisation" of the shirt, which Mr. Whelan took to mean the loss of "credibility" for MU shirts generally (Day 8, pp. 148-152). Mr. Whelan resisted the suggestion that by the word "bastardisation" he meant no more than protecting the MU shirts from very low prices (Day 8, pp. 150-160).
971. In our view, the effect of the settlement agreement between Umbro and JJB reached at the meeting of 15 June 2001 was to prevent Sports Soccer or any other retailer from acquiring any further stocks of the MU home shirt. By controlling supplies, JJB was able to put a floor in the market, and thus prevent the price falling further than it otherwise would. As Mr. Whelan put it in his fax to Nike of 26 June 2001, this prevented the MU home shirt from becoming "bastardised on price".
972. We can see that the agreement made by Umbro and JJB on or after 15 June 2001 enabled JJB to acquire all the remaining stocks for the MU home shirts. However, we are not in our view concerned in this case with whether that agreement in itself fell within section 2 of the Act and was not justifiable under section 9. That is not an issue raised by the decision. In this case we are concerned with whether the fact of the agreement of 15 June 2001 supports the allegation that JJB was a party to an agreement or concerted practice with Umbro and Sports Soccer to maintain High Street prices during key selling periods, as alleged in the part of the decision dealing with the Continuation Agreement.



973. The agreement reached at the meeting of 15 June 2001 did not relate to a “key selling period” within the meaning of the decision, but rather to the final selling period of the MU home shirt before that shirt came to the end of its useful life. It did not directly concern the maintenance of High Street prices, since by then the MU home shirt was selling well below High Street prices. The agreement of 15 June 2001 did not, in itself, as far as we can see, imply any collusion as regards Sports Soccer’s or JJB’s selling prices for the MU home shirts in question.

974. In all those circumstances we have difficulty in seeing that the agreement of at the meeting 15 June 2001 supports the allegation that JJB was party to the Continuation Agreement as alleged in the decision.

*Did JJB ask for and/ or receive an assurance from Umbro that Sports Soccer would not discount the MU Centenary shirt at launch?*

*- Mr. Ronnie’s evidence*

975. Mr. Ronnie states in Ronnie V that, at a meeting that he cannot identify but which seems to have been that of 8 June 2001:

“What I do distinctly recall is that, at that meeting, JJB’s representatives were worried that Sports Soccer would discount the new gold Centenary kit on launch, and that they wanted reassurance from us that Sports Soccer would not do this.

I also recall distinctly that, before this meeting, I had spoken to Mike Ashley of Sports Soccer about the issue of pricing for the Centenary kit at launch. I remember telling him that it was very important that he didn’t discount. I remember clearly that he told me that Sports Soccer would charge full price for the first 3 to 4 weeks after launch. That was the most I could get.

When it then came to the meeting with JJB, I or Phil Fellone told the JJB representatives that Sports Soccer would not discount for the first few weeks after launch.”

That evidence was not challenged by JJB.

*- Mr. Fellone’s evidence*

976. At paragraph 18 of Fellone III Mr. Fellone stated, seemingly with reference to the meeting of 8 June:

“We requested a meeting with JJB to understand why such a big order had been cancelled. Duncan Sharpe, Colin Russell and Steve Preston were present. I attended the meeting with Chris Ronnie. The JJB representatives asked us if we could guarantee the price at which Sports Soccer would sell the Centenary shirts at launch. We said that we could not guarantee the price but we were confident that Sports Soccer were not going to discount the product at least for the first few weeks after launch, as Mike Ashley had told us that was his intention. JJB then reinstated the order. In fact Sports Soccer did discount the kit one month after launch, however by that time JJB was selling its shirts so well that it did not react.”

977. In cross-examination Mr. Fellone agreed that Paragraph 18 of Fellone III was not intended to suggest that it was an agreed condition of that deal that Sports Soccer would not discount the MU Centenary shirt (Day 7, p. 29). It was put to Mr. Fellone that one of JJB’s commercial concerns at the time was that Umbro might sell the Centenary shirts to Sports Soccer at a clearance price. Mr. Fellone did not have a clear recollection of that, but he agreed that JJB might have had that mind. He accepted that that might have been the thrust of paragraph 18 of Fellone III (Day 7, pp. 30-31).

978. In re-examination Mr. Fellone was further asked about paragraph 18 of his witness statement. The exchange was as follows (Day 7, p. 63):

“Q. What if anything sticks in your mind about that meeting?

A. I think that – well, I think it was the question of the centenary shirt, whether we could guarantee what Sports Soccer would sell the centenary shirt at. I remember the comment. What I cannot recall unfortunately is who actually made that statement, whether it was Mr. Sharpe or Mr. Preston, I really cannot recall.

Q. And why does that particularly stick in your mind?

A. I think because not too long before Chris Ronnie had informed me that Mike Ashley, he and Mike Ashley had agreed that Sports Soccer at the time would not discount the Manchester United Centenary jersey at launch, so it was very close to the conversation that I had had with Chris Ronnie. So I knew the answer to the question very, very quickly, because we had talked about it previously.”

- *Mr. Russell’s evidence*

979. Mr. Russell was only at the meeting in question for a short time, so we do not think that his evidence is sufficient to contradict the evidence of Mr. Fellone and Mr. Ronnie.

- *Mr. Preston’s evidence*

980. Mr. Preston's evidence at paragraph 11 of his witness statement is at variance with that of Mr. Fellone and Mr. Ronnie. However, Mr. Preston was not called by JJB, despite the OFT's request to cross-examine him. We do not think that we can permit Mr. Preston's written statement to prevail over the evidence of witnesses that we have seen and heard cross-examined.

*Conclusion on the evidence*

981. Mr. Fellone is accepted as an honest witness. On the basis of his evidence, and that of Mr. Ronnie, who corroborates Mr. Fellone, we find that at some point during a meeting with representatives of JJB, most probably the meeting of 8 June 2001, Mr. Sharpe or Mr. Preston expressed their concern that Sports Soccer might discount the MU Centenary shirt and asked Mr. Fellone and Mr. Ronnie for an assurance that Sports Soccer would not do so. Mr. Fellone and Mr. Ronnie then gave JJB that assurance, Mr. Ronnie having reached an agreement with Mr. Ashley to that effect shortly before.

982. In our view that factual conclusion, which we reach on the basis of the evidence we have heard, is reinforced by the surrounding circumstances. As JJB has itself pointed out, JJB would at that stage have been very concerned that Umbro would give Sports Soccer a price that would allow Sports Soccer to discount, as had happened on the MU home shirt. JJB would in our view also have been concerned that Sports Soccer would discount in any event, given that this was the last MU shirt to be produced by Umbro before the transfer to Nike. Despite Mr. Russell's reluctance to accept that there was an issue as to the retail price that the Centenary shirt was capable of sustaining (Day 9, pp. 170 to 173), paragraph 5 of Mr. Preston's statement makes it clear that there was doubt in JJB's mind as to whether a reasonable margin was in fact available on the Centenary shirt, given the recent discounting on the MU home shirt. In all those circumstances it seems to us logical that JJB would have sought reassurance from Umbro that Sports Soccer did not intend to discount, before committing itself to reinstating a substantial order for 40,000 Centenary shirts. Such an assurance would protect JJB both from the consequences of Umbro offering Sports Soccer lower prices, and from any decision by Sports Soccer to discount in any event.

983. We accept that, as Mr. Fellone said, that it was not “an agreed condition of the deal” (Day 7, p. 29) that JJB would reinstate the order provided that Sports Soccer had agreed not to discount. However, in our view the assurance asked for by JJB was nonetheless given by Umbro. In our judgment that assurance would not have been immaterial to JJB’s decision to reinstate the order.

*Agreement or concerted practice*

984. As already seen earlier in this judgment, the disclosure of the future pricing intentions of one competitor to another, where the latter requests it, or at the very least accepts it, is capable of constituting a concerted practice: *Cimenteries*, at paragraph 1849. Such a communication discloses to one competitor the course of conduct which another competitor has decided to adopt, or contemplates adopting on the market, thus breaching the strict prohibition on direct or indirect contact between competitors having the object or effect of preventing or restricting competition: *Suiker Unie* at paragraphs 173 and 174. As we have already held, it is immaterial that the contact between the competitors concerned takes place *indirectly* through the medium of a common supplier.

985. In the present case Umbro revealed Sports Soccer’s future pricing intentions to JJB. That, in our judgment, significantly reduced uncertainty on the part of JJB, and is likely in any event to have had an influence on JJB’s willingness to reinstate its order. In addition in our view it is implicit in the assurance that JJB sought and received that JJB itself did not intend to discount the Centenary shirt unless provoked by Sports Soccer. In the event, both companies charged £39.99 at launch.

986. Moreover, it is not disputed that Mr. Ronnie had already put pressure on Mr. Ashley to agree to go out at High Street prices on the MU Centenary shirt, as a result of which a price fixing agreement between Umbro and Sports Soccer had already come into being. The evidence set out above is that Mr. Ronnie had reached that agreement with Sports Soccer not long before the meeting of 8 June 2001, which was why it was fresh in Mr. Fellone’s mind. It is in those circumstances in our view reasonable to infer that the cancellation or threatened cancellation of JJB’s order on the MU Centenary shirt put pressure on Mr. Ronnie to procure Sports Soccer’s agreement not to discount that shirt. Indeed, in our view, at that time Mr. Ronnie would have been under very considerable pressure to procure that

agreement from Sports Soccer, in order to give reassurance to JJB in the context of the negotiations for the reinstatement of the cancelled order.

987. In those circumstances the price fixing agreement between Umbro and Sports Soccer can also in our view be attributed to a material extent to pressure from JJB.

988. On those grounds we conclude that JJB was party to at least a concerted practice with Umbro, and indirectly Sports Soccer, having as its object or effect to maintain the retail price of the MU Centenary shirt at £39.99 at launch on 20 July 2001, contrary to the Chapter I prohibition.

#### *Conclusion as to the Continuation Agreement*

989. We find that JJB was a party to a concerted practice having as its object or effect to maintain the retail price of the MU Centenary shirt at £39.99 at launch on 20 July 2001, contrary to the Chapter I prohibition. It would appear that that concerted practice ceased at the end of August 2001 when the OFT made its unannounced visits. Save as aforesaid, we allow JJB's appeal on liability in respect of the Continuation Agreement

### **XIX. THE ENGLAND DIRECT AGREEMENT/ SPORTSETAIL**

#### *Introduction*

990. In 1999 the FA decided to develop a website from which various items of "England" merchandise could be offered for sale direct to the public via the internet. In February 2000 the FA granted Sportsetail, then a subsidiary of Hay & Robertson plc, the exclusive right to operate the FA's "England Direct" retail operations. Pursuant to that agreement Sportsetail operated the FA's website during 2000. In the 15 months to 31 December 2000 Sportsetail's total turnover was some £175,000.

991. According to the decision, these arrangements gave rise to two infringements of the Chapter I prohibition. The first infringement, described in the decision as the FA/Sportsetail Agreement, is an agreement between the FA and Sportsetail made on 4 February 2000 whereby the FA acquired the right to control Sportsetail's retail prices

(paragraphs 502 to 510 of the decision). There is no appeal against that part of the decision.

992. The second infringement, with which this appeal is concerned, is described in the decision as the FA/Sportsetail/Umbro/JJB Agreement. According to the decision, the essence of that agreement, which we refer to as “the England Direct Agreement”, is that an agreement or concerted practice came into being on 7 February 2000 whereby JJB, the FA, Sportsetail and Umbro agreed that Sportsetail’s retail prices for England replica kit would be aligned with JJB’s retail prices for the same products to avoid Sportsetail undercutting JJB: see paragraphs 511 to 528 and 531 of the decision. According to the OFT, as far as concerns JJB and Umbro, the England Direct Agreement infringed the Chapter I prohibition from 1 March 2000, the date when the Act came into force, until August 2001 when the OFT made its unannounced visits.

993. Umbro, the FA and Sportsetail (now in administration) have not contested their participation in the England Direct Agreement. JJB does, however, contest that it was a party to any such agreement or concerted practice.

994. It is common ground that at an initial stage of the negotiation of the Sportsetail arrangements, it was envisaged that Umbro would supply JJB with the relevant merchandise and that JJB would then on supply to Sportsetail. The relevant arrangements are, according to the OFT, set out in a fax of 7 February 2000 from the FA to JJB. That fax states, notably:

“The retail price charged by England Direct for these products will not be less than the price charged by JJB. As agreed, you [i.e. JJB] will supply us [i.e. the FA] with details of all price changes implemented by JJB in respect of these products ...”

995. At some stage on or after 11 February 2000 JJB made it known that it did not wish to be involved in supplying Sportsetail with the merchandise in question. JJB’s case is that it never gave its approval to the arrangements, and in particular never agreed that Sportsetail’s prices would be pegged to JJB’s prices. In any event, its participation in any of the alleged arrangements ceased on or about 11 February 2000, before the Act came into force. The OFT’s case is that JJB was knowingly party to a price pegging agreement and

continued to be, in effect, a party to that agreement even after JJB dropped out of the distribution arrangements relating to Sportsetail.

*The main events*

996. In 1999 JJB was appointed as the FA's Official Retailer for England merchandise. On 21 October 1999, Messrs. Russell and Sharpe (of JJB), Prothero (of Umbro) and Smith (of the FA) met to discuss the Sportsetail agreement.

997. On 2 November 1999, Mr. Prothero wrote a letter to Mr. Russell:

“to confirm, for the purpose of good order, the issues discussed relative to the meeting held with yourself, Duncan, David Smith and myself on 21<sup>st</sup> October 1999. (...) The real issue as I understand it, however, is that JJB are not happy with Hay and Robertson buying UMBRO products directly from UMBRO and wish to be the point of contact in this regard.”

998. On 25 November 1999 Mr. Prothero wrote to Mr. Russell stating:

“Following the meetings that we have held over the last few weeks in relation to the FA Direct Retail issues and against the backdrop of JJB's concern about UMBRO supplying Hay & Robertson directly I would propose the following solution:-

1. JJB Sports to supply the FA any UMBRO/FA Licensed merchandise at wholesale price.
  2. UMBRO will thereafter not supply the FA directly with any of these products for its Retail Division.
  3. The FA will agree to look at a “hot spot” link from the FA's website to the JJB's website and vice versa.
  4. The FA will continue to retail England products at venue and this opportunity is not of interest to JJB.
  5. The FA and UMBRO will continue to look at ways and means of driving traffic towards JJB retail stores, thus further promoting the Official England Retailer status along the lines already established
- I would obviously welcome your comments on the above”.

999. On or about 24 or 25 January 2000, a meeting was held at JJB's office in Wigan at which Mr. Russell (of JJB), Messrs. Armstrong and Smith (of the FA) and Mr. Marsh (of Umbro) were present. According to paragraph 15 of Mr. Smith's witness statement dated 27 February 2002, cited at paragraph 277 of the decision, the arrangements in relation to the supply and pricing of Umbro kit were discussed.

1000. On 3 February 2000 Mr. Armstrong of the FA sent a fax to Mr. Marsh of Umbro stating:

“Please find enclosed the letter to Colin Russell that I have drawn up following our meeting with JJB last week. Before I send the letter out, please can you confirm that all the points made in the letter concur with your understanding of the situation.”

1001. The draft letter states under the heading “England Direct – Provision of Umbro Licensed Product by JJB”:

“Further to our meeting last week to discuss the above, I am just writing to confirm our agreement in respect of England Direct. JJB will supply Umbro England licensed product to England Direct for sale via mail order and the England Direct website (...) The price charged by JJB to England Direct will be Umbro’s wholesale selling price. (...) The retail price charged by England Direct for these products will not be less than the price charged by JJB. As agreed, you will supply us with details of all price changes implemented by JJB in respect of these products...”

1002. On 7 February 2000, the final version of the draft letter attached to the fax of 3 February was sent by the FA to JJB. The letter of 7 February was in the same terms as the earlier draft of 3 February and in particular included the words:

“The retail price charged by England Direct for these products will not be less than the price charged by JJB”.

1003. On 11 February 2000, Mr. Marsh sent a fax to Mr. Russell with an e-mail attached. The e-mail, dated 8 February 2000, is from Mr. Marsh to Mr. Bryan of Umbro and states:

‘Further to a recent meeting between JJB, The FA and ourselves regarding the supply of England licensed product we have agreed to the following procedure. JJB will supply Umbro England licensed product to England Direct for sale via mail order, at venue retail and the England Direct website. Umbro will present the product range to JJB and will then advise the contact at E[ngland] D[irect] of the styles that have been selected. E[ngland] D[irect] will then place their commitment with JJB prior to the overall orders being submitted to Umbro. E[ngland] D[irect] would also have the ability of ordering styles outside of those that have been selected by JJB. E[ngland] D[irect] have also made a commitment to hot link their website to JJB’s in order that the consumer also has the option of buying the JJB SMU product offering. Any additional stock requirements that E[ngland] D[irect] may have will be directed to JJB in the first instance. In the eventuality that JJB cannot facilitate the request JJB will then request the stock from Umbro. Any product will be invoiced directly to E[ngland] D[irect] by JJB at Umbro’s wholesale selling price and therefore all payments will be made by E[ngland] D[irect] directly to JJB. E[ngland] D[irect] have agreed that the retail price point will be the same as JJB and as and when JJB start to clear their stock E[ngland] D[irect] will be notified



accordingly. (...) Umbro contact for this process is Phil Bryan... I trust this clarifies the process for everyone concerned. Regards, SIMON”.

1004. In the version of this email found in Mr. Russell’s files at JJB, a handwritten ‘NO’ appears in the left hand margin with an arrowhead pointing to the words “have been selected”. We reproduce the document:

“Umbro will present the product range to JJB and will then advise the contact at ED of the styles that [NO+arrowhead in the left hand margin] have been selected.”

1005. It appears that on or about 11 February 2000, Mr. Russell of JJB informed Mr. Marsh of Umbro that it did not wish to be involved in the arrangements for supplying Sportsetail. Mr. Russell did so after he had spoken to Mr. Sharpe who had intimated that JJB should not get involved (paragraphs 44 and 45 of Russell I).

1006. On 25 February 2000 an internal Umbro e-mail was sent from Mr. Marsh to Ms Smith (PA to Messrs. Fellone and Bryan) which stated:

“Subject: ENGLAND DIRECT Phil, Further to our discussion on Thursday regarding the above I hereby enclose a modus operandi that was waiting for JJB approval. Obviously JJB are now out of the loop and therefore we need to establish how we shall handle this account. If you could revert back to me I’d be grateful, SIMON”.

1007. The modus operandi enclosed was the message faxed by Mr. Marsh on 11 February 2000 to Mr. Russell asking for JJB’s comments: see paragraph 281 of the Decision.

1008. On 1 March 2000, the Competition Act 1998 came into force.

1009. On 28 March 2000 Mr. Smith of the FA stated in an email to Ms. Eves of Sportsetail:

“The RRP must be ‘pegged’ to the price offered within JJB stores. If you need that information I’m sure Colin Russell at JJB will provide if you mention my name.  
If those prices are ok can you confirm again the royalty.  
Thanks  
David”.

1010. On 29 March 2000, Ms Eves of Sportsetail sent a fax to Mr. Hattersley of JJB stating:

“I am not sure if you have heard of Sportsetail Ltd. We are setting up the England-direct Website for the FA where we are selling all England football merchandise including Umbro kit. The retail price

for the kit on our site has to be pegged to the JJB price so David Smith at the FA suggested that you could confirm your retail prices to me so that we don't go out at a lower price. (...) Just to confirm I am looking for retail price for Replica shirts – adult and kids; Replica shorts – adult and kids; Replica socks; Infants kit with socks; Infants kit without socks.”

1011.JJB did not reply to that fax of 29 March 2000 from Sportsetail.

1012.According to Ms. Eves of Sportsetail, JJB's retail prices were subsequently verbally confirmed to her by Umbro. As far as we know, Sportsetail did not undercut JJB's retail prices.

1013.On 9 June 2000 Ms. Eves of Sportsetail sent an email to Mr. Smith at the FA which stated:

‘I am getting together a list of products that we would look to put onto the Nationwide page and I need to know if it will be ok for me to put the replica home shirt on for the EURO 2000 period. This page will only be accessible by Nationwide members and the shirt will only be on there for the tournament period so the discounted price will be available for Nationwide customers only. Hope this is ok.’

1014.In his response of the same day, Mr. Smith states:

‘Would it be possible for the price at discount to be no lower than the offer within JJB? If not what is the price differential?’

1015.It was subsequently agreed that no discount would be offered to Nationwide members on England replica kits. The price offered to Nationwide customers on the England Direct site was the same as JJB's retail price.

1016.On 24 September 2000 Mr. Armstrong of the FA sent an email to Mr. Smith, who by now was working for Sportsetail, which states:

“Is the Umbro/England product sold via England Direct supplied by JJB? I thought that we had agreed after our meeting with Umbro and JJB in January that everything would be supplied by JJB – is this the case? You mentioned to me recently that you are not getting the best possible wholesale price from Umbro for the product supplied to England Direct. Is it that JJB supply the actual stock but you are billed by Umbro?”

1017. In various emails passing between Sportsetail and the FA on 15 January, 17 January, 18 January and 22 January 2001 Sportsetail sought the FA's permission to reduce its prices on various items, including the then England home replica kit which was about to be replaced by the new kit to be launched on St. George's Day 2001.

1018. By an email dated 13 February 2001 from Mr. Marsh of Umbro to a Mr. Blissett of Nationwide and Mr. Armstrong of the FA, Umbro declined to allow the new England home replica kit to be launched in April 2001 to be sold at a discount to Nationwide members via Nationwide's website link to the England Direct site operated by Sportsetail. By an email of the same date Mr. Armstrong agreed that no discount on the new England home replica kit should be allowed.

1019. On 25 September 2000, Mr. Smith replied to Mr. Armstrong's email of 24 September stating:

“Originally JJB were to supply, but it was felt that it would be better to go direct. An Umbro/JJB decision not mine, hence the need for The FA/England-direct to be able to buy at the JJB price.”

*Mr. Russell's evidence*

1020. In Russell I at paragraphs 35 to 47 Mr. Russell effectively denies any knowledge of discussions regarding Sportsetail's retail prices (paragraphs 41 and 47). He says that that was a matter that was entirely between Umbro and the FA (paragraphs 48 to 51). He also says that it was Umbro who was concerned about supplying Hay & Robertson; that he was prepared to explore the proposal in order to maintain JJB's relationship with the FA; that by 11 February at the latest he told Umbro that JJB were not proceeding with the supply arrangement; that he wrote 'no' on the email of 8 February because JJB would never disclose its styles; and that he never supplied JJB's prices to Sportsetail.

1021. In Russell III Mr. Russell states at paragraph 15:

“In my previous witness statement of 15 August 2002 I stated, in relation to the meeting held on 24 January 2000 at JJB's offices, that “the question of Sportsetail's prices being pegged to JJB's prices was not a matter with which I, or JJB, had any involvement, and it was not mentioned at the meeting”. On reflection, though I cannot recall the issue of price pegging being mentioned, I cannot be certain that it was not mentioned by someone in circumstances in which I was unaware of it.”

1022.Mr. Sharpe’s witness statement is to the same effect as Russell I. According to Whelan I, Mr. Whelan was against being involved in any arrangements with Sportsetail, but he had no knowledge of the discussions.

1023.In cross-examination, Mr. Russell maintained that it was originally Umbro who were unhappy about supplying Sportsetail direct, because Sportsetail was owned by Hay & Robertson, a competitor (Day 9, p. 9). He denied that the benefit to JJB of the arrangement was that JJB could control Sportsetail’s prices. JJB were never intending to enter into the arrangements discussed and were simply paying lip service to the FA (pp 23, 28). Although Mr. Marsh and Mr. Smith may have spoken about price pegging among themselves, that was never discussed by Mr. Russell with either Umbro or the FA. JJB never entered into a price pegging agreement and Mr. Russell was not party to any such conversations (pp. 33, 39, 40). Mr. Russell had read the letter of 7 February 2000 but there was never any price arrangement (pp. 42-43, 48). Mr. Russell wrote ‘no’ on the email of 11 February 2000 because JJB would never disclose it styles to a competitor, but in Mr. Russell’s mind he meant ‘No’ to the whole arrangement (p. 51). Neither the FA nor Sportsetail were ever informed by JJB that there was no need to peg prices (pp. 52-53). Mr. Russell had seen Ms. Eves’ fax of 29 March 2000 (p. 57) and took no steps to reply to it (p. 59).

*JJB’s submissions*

1024.JJB’s position in relation to the England Direct Agreement as set out in its notice of appeal comprises a single paragraph:

“In relation to the Sportsetail Agreement, the Decision alleges that an agreement or concerted practice was entered into between JJB, the FA, Sportsetail and Umbro on 7 February 2000, pursuant to which the parties agreed that Sportsetail’s retail prices for England replica kit would be aligned with JJB’s retail prices. JJB denies that it entered into any such agreement or concerted practice. In particular, whilst proposals for the supply of replica products to Sportsetail were discussed at the meeting of 24 January 2000, it was clear that the making of any agreement was subject to JJB’s subsequent approval. JJB never gave its approval. On or about 11 February JJB informed Umbro that it did not wish to proceed with the agreement. This must have become apparent to the FA and Sportsetail. JJB played no further part in the discussions relating to Sportsetail.”

1025. In its closing submissions JJB submits that there are two areas of factual conflict. First, was it Umbro or JJB who was concerned about who would supply Sportsetail? Mr. Russell maintained that it was Umbro who were concerned about supplying Sportsetail directly because Sportsetail was operated by Hay & Robertson, who were competitors of Umbro (Day 8, pages 17-19). Secondly, was Mr. Russell privy to any conversations in which the proposal to peg Sportsetail's prices to those of JJB was discussed? Mr. Russell was adamant that he had not participated in any such conversations (Day 9, page 34). However, according to JJB, it is unnecessary to decide these points, since it is uncontested that it was Mr. Smith of the FA who suggested that Sportsetail should not sell below JJB's retail prices. The suggestion did not emanate from JJB. Moreover, Mr. Russell telephoned Mr. Marsh on or around 11 February 2000 to inform him that JJB did not wish to proceed with the arrangement.

1026. In those circumstances JJB submits (a) Even if the question of pegging Sportsetail's prices to JJB's prices was discussed at a meeting in early 2000, the discussions that took place constituted proposals for an agreement, not a concluded agreement: see the e-mail from Mr. Marsh of 25 February 2000. (b) JJB never gave its approval to the proposal that had been discussed. Mr. Russell telephoned Mr. Marsh on or around 11 February 2000 to inform him that JJB did not wish to proceed with the arrangement: see again the email of 25 February 2000, which stated that JJB were "out of the loop". (c) Even if an agreement had been entered into on 7 February 2000, it would have been terminated on or about 11 February 2000. (d) It is artificial to suggest that JJB was merely saying that it did not wish to be involved in part of the arrangements relating to Sportsetail, whilst remaining party to certain others e.g. that Sportsetail's prices would be pegged to those of JJB. JJB was saying "no" to any involvement by Sportsetail, as was clearly the understanding of Mr. Marsh: see again the email of 25 February 2000. (e) All the evidence subsequent to 11 February 2000 indicates that, far from participating in a price pegging arrangement with Sportsetail, JJB was not prepared to have anything to do with it. JJB did not respond to Ms. Eves' fax to Mr. Hattersley of JJB of 29 March 2000. If JJB had been party to a price pegging arrangement, it would have provided the relevant information to Sportsetail.

*The OFT's submissions*

1027. The OFT submits (a) The reason for the making of the price-pegging agreement was JJB's concern to avoid being undercut by a competitor, and Umbro's concern to avoid disturbing its relationship with JJB. (b) Mr. Russell was party to the meeting on 24 January 2000 at which the agreement to peg prices was made. The contemporaneous documents and the statements of the other individuals present leave no doubt but that Mr. Russell was aware of, and was a party to, the price-pegging agreement. As to the FA's letter dated 7 February 2000 Mr. Russell said "I read correspondence that is put in front of me": Day 9, p. 42. (c) The price-pegging arrangement having been established, there was then no further commercial need for JJB to remain involved in the distribution "loop" for products destined for Sportsetail. (d) On 11 February 2000, Mr. Russell informed Mr. Marsh of Umbro that JJB did not intend to participate in the distribution arrangements for Sportsetail. It is clear that Mr. Russell did not refer to the price-pegging aspect of the agreement when speaking to Mr. Marsh, but only to the distribution aspect of the agreement: see paragraph 24 of Mr. Marsh's statement of 15 July 2002. (e) The copy of the fax that Mr. Marsh sent to Mr. Russell on 11 February 2000 taken from Mr. Russell's office had a manuscript notation "NO" on it, which referred only to a limited part of the points of agreement, not including the price-pegging sentence. The inference from the way in which Mr. Russell marked up the fax is that any disagreement which he then orally expressed to Mr. Marsh did not extend to the price-pegging arrangement. (f) Mr. Russell does not claim that he ever told Umbro, the FA or Sportsetail that JJB did not consider the price-pegging arrangement to be relevant or necessary or in force any longer. This is a consequence of Mr. Russell's refusal to accept that he knew anything at all about the price-pegging arrangement until after the OFT investigation had started: Day 9, pp. 35 to 36. (g) The price-pegging arrangement continued to be operated: see the email exchange on 28 March 2000 between Ms. Eves of Sportsetail and Mr. Smith of the FA. (h) Ms. Eves' fax on 29 March 2000 would have put Mr. Russell in no doubt that the price pegging agreement was fully in operation: see Day 9, pp. 57 to 58. Mr. Russell did not take other steps to make clear to Sportsetail or the FA that the price-pegging agreement was no longer relevant or necessary, or that JJB did not regard it as being in force. (g) The price rigging arrangement persisted, to the benefit of JJB, until the FA took steps to bring it to an end in September 2001.

### *Analysis and findings*

1028. We do not need to determine, for the purposes of this case, whether it was originally Umbro or JJB who were concerned about Sportsetail being supplied by Hay & Robertson. The contemporary documents, namely Mr. Prothero's letters of 2 and 25 November 1999 suggest that JJB had concerns, and we have no reason to doubt those documents. JJB would, in our view, have had an interest in seeing that Sportsetail was set up in a way that did not undermine JJB's retail pricing structure.

1029. On the other hand, Mr. Smith's statement of 27 February 2002 on behalf of the FA makes it clear that the FA itself did not wish to see price competition between Sportsetail and the retail outlets supplying England merchandise. Mr. Smith saw the England Direct website "as an arm of the FA's merchandising operation" and that it made sense for the FA to be in control of Sportsetail's prices. It was also Mr. Smith's view that Sportsetail should not undercut JJB, who was the FA's Official Retailer. Mr. Smith considered that the FA had the right to require this, since Sportsetail was effectively part of the FA's own merchandising operation (paragraphs 10 to 18 of that statement).

1030. From Umbro's point of view, Umbro itself would not have wished to see Sportsetail undercutting High Street prices. Paragraph 5 of Mr. Prothero's letter of 25 November 1999 refers to both Umbro and the FA "looking at ways of driving traffic towards JJB's stores".

1031. Against that background, a meeting took place between the parties on 24 or 25 January 2000 at JJB's offices at Wigan. The result of that meeting is set out in Mr. Armstrong's draft sent to Umbro on 3 February 2000, and the subsequent letter sent to JJB by the FA on 7 February 2000. Both those documents clearly state that it had been agreed that

"The retail price changed by England Direct for these products will not be less than the price charged by JJB".

1032. That is also confirmed by Mr. Marsh's internal email to Mr. Bryan of 8 February 2000 "ED have agreed that the retail price point will be the same as JJB".

1033. We find it very difficult to believe that Mr. Russell was, as he suggests, unaware of, or not involved in, any discussions about England Direct's price being "pegged" to that of JJB, during the meeting on 24 or 25 January 2000. The issue of Sportsetail's prices was potentially of concern to JJB, even if it was also of concern to the FA and Umbro. The meeting itself was held in JJB's own offices and would presumably have dealt with points

affecting JJB's interests. In the light of the evidence we conclude that Mr. Russell could not have been unaware, at the time, of the proposal that Sportsetail's prices were to be pegged to those of JJB.

1034. In any event it is common ground that at least by 7 February 2000 Mr. Russell was fully aware of the proposed arrangements, including the agreement by England Direct not to sell below JJB's retail selling prices, since Mr. Russell himself saw and read the letter of 7 February. That letter shows clearly that Sportsetail's prices were to be pegged to those of JJB. On the other hand it is true, as JJB submits, that at that stage the proposals had not been finally approved by JJB.

1035. We accept that about 11 February 2000 Mr. Russell telephoned Mr. Marsh and intimated that JJB wished to drop out of the arrangements concerning Sportsetail. Exactly what Mr. Russell said is not established. It is common ground that from then onwards Umbro regarded JJB as "out of the loop".

1036. There is thus no doubt that Mr. Russell had informed Umbro by 11 February 2000 that JJB did not wish to take part in the arrangements for supplying Sportsetail. Although Mr. Marsh refers to JJB having said that it was "logistically too difficult" for them to participate (paragraph 24 of his statement) we do not think we can place much reliance on that. There is no evidence that Mr. Russell said anything explicit in his conversation with Mr. Marsh about the arrangement in relation to Sportsetail's retail prices set out in the letter of 7 February 2000.

1037. It is true that the manuscript 'No' on Mr. Russell's copy of that letter is written against the mention of the supply of JJB's styles, and that there is no similar annotation against the part of that letter dealing with retail prices. However, we find it difficult to attach much weight to that since, once Mr. Russell had seen Mr. Sharpe, it was clear that it was not just the matter of styles that concerned JJB: JJB did not wish to be involved with the supply arrangements either.

1038. On 29 March 2000, after the Act came into force, Ms. Eves of Sportsetail sent a fax to JJB, which Mr. Russell saw, asking for JJB's retail prices since "The retail price for the kit on our site has to be pegged to the JJB price so David Smith at the FA suggested that you



could confirm your retail prices to me so that we don't go out at a lower price". Again it is clear from Mr. Smith's statement (paragraph 17), and his fax to her of 28 March 2000, that it was the FA who told Ms. Eves to contact JJB. JJB did not reply to Ms. Eves' fax, and Sportsetail obtained JJB's retail prices verbally from Umbro.

1039. It follows that, as at 29 March 2000, Mr. Russell of JJB must have been aware that Sportsetail and the FA were still proceeding on the basis that the prices on the England Direct website were pegged to JJB's retail prices. He must, in our view, have also been aware that the arrangement set out in the letter of 7 February 2000 regarding Sportsetail's retail prices was still being observed by Sportsetail and the FA. That, in turn, was part of the arrangements originally discussed in the meeting in JJB's offices on 24 or 25 January 2000.

1040. Sportsetail did in fact continue to respect JJB's retail prices until August 2001. Since Sportsetail's website is publicly available, JJB must in our view have known that the prices on that site were in line with those of JJB.

1041. The issue that arises on those facts is whether JJB continued after 1 March 2000 to be a party to an agreement or concerted practice to the effect that the prices on the England Direct website were pegged to those of JJB in circumstances where (i) JJB was originally party to a discussion in its offices where that was agreed at least in principle (ii) JJB knew that at least the FA and Sportsetail (and almost certainly Umbro) regarded such an arrangement as still being in force as regards Sportsetail (iii) Sportsetail in fact continued to honour that arrangement (iv) JJB considered that it had dropped out of the Sportsetail arrangements (v) JJB did no overt act after 1 March 2000 in implementation of the agreement or concerted practice alleged but (vi) after 1 March 2000 JJB had at least passive knowledge that the FA and Sportsetail were implementing the price pegging arrangement.

1042. The Court of Justice said in *Aalborg Portland*, cited above, at paragraphs 81 et seq:

“[81] According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for the undertaking to put forward evidence to establish that its participation in those meetings

was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.

[82] The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.

[83] The principles established in the case-law cited at paragraph 81 of this judgment also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (*Commission v Anic*, paragraph 87).

[84] In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.

[85] Nor is the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate material to the establishment of the existence of an infringement on its part. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (see, to that effect, *Commission v Anic*, paragraph 90).”

1043. It is thus plain that an undertaking may be passively party to an infringement of the Chapter I prohibition. That is so, in particular, where it has taken part in a meeting or other contacts, and has done nothing to distance itself from the matters discussed. In those circumstances the undertaking is taken to have tacitly approved of the unlawful initiative, unless it has publicly distanced itself or informed the OFT. In our view that principle is extremely important as far as the enforcement of the Act is concerned.

1044. Applying that approach, in our view the situation in the present case is that JJB originally participated in arrangements whereby Sportsetail pegged its prices to JJB’s retail prices, by

participating in the meeting at JJB's offices of 24 or 25 January 2000, and by its receipt of the letter of 7 February 2000.

1045. It follows from *Aalborg Portland*, cited above, that if an undertaking A originally participated in the setting up of an arrangement with undertakings B and C restricting competition, and A knows that B and C are continuing to operate that arrangement, A is normally to be regarded as continuing to participate passively in the arrangement, unless it has publicly distanced itself therefrom, or reported the matter to the OFT. In our view that principle applies particularly if the arrangement between B and C benefits A.

1046. At the very least, in order for A to distance itself from the continuing arrangement between B and C, what in our view is required is that A should genuinely and explicitly state to B and C that as far as A is concerned they are entirely free to disregard any previous arrangements there may be restricting competition, and that A wishes to play no part, tacitly or otherwise, in any such arrangements. Reporting what transpired to the OFT puts the matter beyond doubt.

1047. Although JJB told the FA that it did not wish to participate in the Sportsetail arrangements, and Umbro believed that JJB was "out of the loop", there is no evidence that in his conversation with Mr. Marsh on or around 11 February 2000 Mr. Russell explicitly distanced himself from the continuation of the "price pegging" arrangements in a way that led Umbro, the FA and Sportsetail to believe that as far as JJB was concerned Sportsetail could sell at any price it wished. JJB did not clarify that matter and nothing was put in writing.

1048. As from 29 March 2000, after the Act came into force, JJB knew that that Sportsetail was still continuing to peg its prices to JJB's, and was required to do so by the FA. Again, JJB took no steps to say to Sportsetail that its retail prices were no concern of JJB's. JJB simply did nothing.

1049. On those facts, in ordinary circumstances we would be prepared to hold that, by virtue of its passive acquiescence, JJB would properly be regarded as a party to the agreement or concerted practice between the FA, Sportsetail and Umbro, to peg the prices on the England Direct website to JJB's prices.

1050. However, in our view the *Aalborg Portland* principles are based primarily on antecedent participation in an “unlawful initiative”: see [84] of that judgment. For example, in the case of the MU Agreement already discussed, it is not contested that on any view Mr. Hughes had engaged in an unlawful initiative within the meaning of that judgment. The difficulty we see in applying *Aalborg Portland* strictly in relation to the England Direct Agreement is that the “initiative” relied on by the OFT was not unlawful under the Act when it occurred, since the Act was not yet in force. The substratum of the OFT case is JJB’s participation in the meeting of 24 or 25 January and its knowledge of the contents of the letter of 7 February 2000. But those matters predate the Act. Although there may have been issues under the Resale Prices Act 1976, JJB’s actions, and indeed those of the FA, Sportsetail and Umbro, were not unlawful under the Act before 1 March 2000.

1051. It seems to us difficult to say that JJB was required by *Aalborg Portland* to distance itself from the Sportsetail pricing arrangements more explicitly than it did when it dropped out on 11 February 2000, since at that time those arrangements were not unlawful.

1052. As to whether JJB’s knowledge, after 1 March 2000, that the FA and Sportsetail were operating the agreement is, of itself, sufficient to make JJB a party to that agreement, again it seems to us that it was in fact the FA who were requiring Sportsetail to operate the website in a way that did not undermine High Street prices: see Mr. Smith’s statement, cited above. From Mr. Russell’s point of view, we can see that, subjectively speaking, Mr. Russell may well have considered that JJB was “out of the loop”, and that if the FA wished to impose a particular pricing policy on Sportsetail, that was up to them. Moreover, the evidence does not establish any overt act or positive step on the part of JJB taking place after 1 March 2000 which might tend to show that they continued to be a party to, or regarded themselves as being a party to, the arrangements between the FA and Sportsetail, or that they encouraged the continuation of such arrangements.

#### *Conclusion on the England Direct Agreement*

1053. On those unusual facts we conclude that, on balance, the evidence taken as a whole is not sufficiently convincing for us to find that JJB was a party after 1 March 2000 to the England Direct Agreement found in the decision.

## **XX. CONCLUSIONS**

1054. For the foregoing reasons we unanimously find as follows as regards the appeals on liability by JJB and Allsports against the findings made by the OFT in decision no. CA98/06/2003 of 1 August 2003:

(1) As regards the England and MU Agreements, JJB's appeal on liability is dismissed.

(2) As regards the Continuation Agreement, the Tribunal finds that JJB was a party to an agreement or concerted practice falling within the Chapter I prohibition to maintain the retail price of the new MU Centenary shirt launched on 21 July 2001. Save as aforesaid, JJB's appeal on liability is allowed as regards the Continuation Agreement.

(3) JJB's appeal on liability is allowed as regards the England Direct/ Sportsetail Agreement.

(4) Allsports' appeal on liability as regards the England and MU Agreements is dismissed.

1055. The Tribunal will now proceed to hear the appeals on penalty of JJB, Allsports, Umbro and MU. All consequential orders and directions are adjourned to the date of the next case management conference to be notified by the Registry.

Christopher Bellamy

Barry Colgate

Richard Prosser

Charles Dhanowa  
Registrar

1 October 2004



NEUTRAL CITATION: [2004] CAT 17

**IN THE COMPETITION  
APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A 2EB

**Case: 1021/1/1/03  
1022/1/1/03**

1 October 2004

**Before:**

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

**Sitting as a Tribunal in England and Wales**

**BETWEEN**

**JJB SPORTS PLC**

*Appellant*

**-and-**

**OFFICE OF FAIR TRADING**

*Respondent*

**ALLSPORTS LIMITED**

*Appellant*

**-and-**

**OFFICE OF FAIR TRADING**

*Respondent*

**ANNEX I TO THE JUDGMENT ON LIABILITY**

**CHRONOLOGY BASED ON DOCUMENTS**

## CHRONOLOGY BASED ON DOCUMENTS

1. This chronology of events is based on the principal documents and matters that have not been disputed. Umbro's monthly management reports are referred to as "MMR." The material MMRs contain a bundle of reports prepared by the various responsible persons in sales, finance, etc. and are prefaced by a covering report prepared by Mr. Chris Ronnie as Chief Operating Officer of Umbro. Excluded from the chronology are matters relating to Sportsetail. Also excluded are the various documents relating to licensing arrangements between Umbro and Sports Soccer.

### 1999

2. On 20 April 1999 Mr. Guest of Allsports wrote a letter to Mr. Gourlay (then at Umbro), headed 'Re: England Contract' stating
  - “1. We are opposed to discounting as a matter of policy – what you are allowing to happen to your products is not in the long term interest of the brand or the category.
  2. Allsports operate a “Price Promise” and we are obligated to match our competitors’ offer.
  3. If the new prices are to be dictated by a specific retailer it would be right to compensate Allsports to allow us to achieve our normal margin.
  4. We have reduced the quantities of our order solely because you have failed to authorise the appropriate credit adjustment. As I explained at length we are happy to land the full quantity from the official order as long as the original intake margin is maintained at the new market prices”.
3. On 23 April 1999 the FA launched the new England home kit. This is the kit that was later subject to the alleged England Euro 2000 Agreement in May and June 2000. 23 April 1999 was also the date on which the management buyout at Umbro formally took effect.
4. On 26 April 1999, Mr. Gourlay replied to Mr. Guest's letter of 20 April 1999 under the heading 'England Contract' stating:



“Further to your letter and several meetings between you, Peter Draper and myself, I feel it equally important that I clarify Umbro’s position regarding the above subject.

I am fully aware that Allsports operates a “price promise” and are obligated to match your competitors’ offer, however, I would like to stress that we only offer guidance on retail pricing.

Unfortunately with the England launch I have been unable, as fully explained, to compensate Allsports to allow you to achieve your target margin. However, as you are aware, Umbro have addressed the market place going forward by reducing WSP in adult sizes to allow you to achieve a higher margin within the licensed category.”

5. On 6 August 1999, prior to the present proceedings, the FA and the FA Premier League gave the OFT a non-statutory assurance that they would take action to prevent resale price maintenance in the market for replica football kit. That assurance was given following an OFT investigation which found evidence that clubs encouraged manufacturers to withhold supplies from retailers who were selling at a discount.
6. On 11 August 1999, pursuant to that assurance to the OFT, MU wrote to Umbro asking it to inform its dealers that they were free to sell replica kit at whatever price they might choose.
7. In September 1999, Umbro wrote to all its dealers stating:

“Umbro have informed the OFT ... that we will not withhold supply of or take any action to prevent the display/advertising or the sale of licensed football kit at whatever price you, the retailer may choose.”

## **2000**

### *Umbro’s MMR for January 2000*

8. Mr. Fellone, United Kingdom Sales Director, reported Umbro’s United Kingdom sales for January 2000 in these terms:

“January as always is very quiet at retail with the majority of new product hitting the stores at the back end of the month and all the focus on the “sale” product.

There was a mixed message regarding the Christmas trading period in 1999 across the multiples and the independents. JJB along with

Sports Soccer performed well achieving turnover targets but at the expense of margins over what was a particularly aggressive trading period.

JD Sports and First Sports reported good like for like growth against 1998 with Allsports falling behind considerably after their change in direction and re-badging their business all:sports.

The independents consistently continued to struggle with a poor Christmas period resulting in a number of key retailers with almost a total of 100 outlets going into receivership, with I am sure many more to come.”

9. Mr. Bryan (account manager for JJB) reported:

“JJB continue to buck the trend in the licensed category by being one of the few who are maintaining licensed jersey prices.”

10. Mr. Richards (at that time account manager for Allsports) reported:

“Allsports  
New window “crisis prices today”

Reduced MUFC kit	-	away	junior £24.99	adult	£29.99
	-	home	junior £19.99	adult	£24.99

Allsports continue to move away from main stream Essential product to distance themselves from JJB and Sports Soccer

Remain in sale mode. All Manchester Utd associated product reduced due to sponsor change”.

11. Mr. Attfield (account manager for Sports Soccer) reported:

“Sports Soccer attacking price points compromising their margin”.

“Licensed

Excellent sell in of England kit and associated products. Sports Soccer figures doubled from similar period leading up to the World Cup.

Jersey retail prices from £28 - £42.99. Sports Soccer averaging 50 adult jerseys a week on England home and Manchester Utd home – both jerseys £28”.

*Meeting Umbro/Sports Soccer 22 February 2000*

12. On 22 February 2000 Mr. Attfield of Umbro met Sean Nevitt of Sports Soccer, as recorded in an Umbro file note to Mr. Fellone of 1 March 2000: “Discussed prices of England jerseys, shorts and socks. Indications from SN are that the kit will be:

Jersey	jnr	£24
	snr	£32
Shorts	jnr	£14
	snr	£18
Socks	jnr	£6
	snr	£7”

*Umbro’s MMR for February 2000*

13. In Umbro’s MMR for February 2000, Mr. Ronnie reported:

“February results are attached to this report.

Retailers are still experiencing very tough trading conditions. This is now throughout the whole of the UK.

JJB and Sports Soccer continue to go to war with each other – JJB with a very aggressive T.V. campaign ‘JJB pay your VAT’. Duncan Sharpe has stated that JJB will be spending between £9m and £11m in 2000 on T.V. advertising. This is the most they have ever spent in one year. Margins at JJB will obviously be effected this year.

Sports Soccer marketing campaign has been ‘Sale of the Century’. This promotion is across all their product and brand offering.

Sports Soccer have experienced a growth in volume sales but margin has been effected.”

14. Mr. Fellone reported:

“February at retail continued on the lines of January with ‘sales’ product being the focus on the high street.

JJB launched their 17.5% off everything ‘we pay the VAT’ on TV with a reported excellent uplift in sales.

Allsports promoted their ‘Shoe sell out’ with little reaction and Sports Soccer ran with ‘Sale of Century’ up to 50% off. JD continued with their ‘Massive Cuts’ moving their old lines through the store.

Overall with new Spring Summer lines slowly hitting the stores from all the brands, the success certainly came from the 'sale' products.

Concerns from the sector is that sale mode will continue in various forms for the foreseeable future placing further pressure on those retailers with no significant point of difference to compete or fall by the way side."

15. Mr. May of Umbro reported, under the heading "Competitor Activity":

"Nike – Have been presenting Licensed and according to customers and catalogue are still running Dri – fit @ £40/30  
(...)  
Adidas –  
Replica kit price strategy is to continue @ £42.99  
(...)  
Reebok –  
Licensed price to be £40.00"

*Meeting with Sports Soccer on 20 March 2000*

16. On 20 March 2000 Mr. Attfield had a meeting with Sports Soccer. The agenda for that meeting mentions, among other things, "retail prices".

*Umbro MMR for March 2000*

17. Mr. Ronnie reported Umbro's results for March 2000 in these terms:

"March results are attached to this report.

The sports retail sector remains very tough with more retailers experiencing problems with paying their bills. Two more retailers have come to face closure – these being Edwards Sports and Hereward Sports.

Distribution continues to be an ongoing debate with certain key accounts.

JJB are selecting certain strategic sites with a 20% discount off all product over 100 stores, but are experiencing strong like for like sales.

Sports Soccer are now taking **30%** off all product under £60.00 across all the brands.

With the continuous battle that is taking place between the two accounts, the effect that this is having on the trade is a major concern”.

18. Mr. Fellone reported (in a note apparently dated 10 April 2000):

“March in retail has continued where February left off, relatively quiet and generally down on last year’s like for like, due to Easter being much earlier this year.

JJB have ended their “We Pay the VAT” promotion with reported record increases in sales. This has been replaced with a 20% off everything in a limited 50-100 stores nationally.

Sports Soccer are currently running a 30% off suggested retail prices across “all” the brands, including Nike, Adidas and Reebok.

all:sports have finally launched their new look in their Trafford Centre store focusing on lifestyle/leisure. Their main brands being Kickers, Airwalk, Pod and Kangol with a limited representation from Nike, Adidas and Reebok. Umbro currently feature in their football area only with boots, astros and licensed kits.”

19. Mr. May reported “The High Street appears “cleaner” at present than at any time during 2000. On the whole less price reductions but an emphasis from key retailers to promote brand awareness and key marketing concepts.”

20. Mr. Attfield reported:

“Jersey prices all marked down. Sales very slow on England home and away. Manchester Utd home and Chelsea home at £26 and £32.”

*Umbro MMR for April 2000*

21. Mr. Ronnie reported as follows for April 2000, in a report which carries the date 18 May 2000 (Easter Sunday that year fell on 23 April):

“April results are attached to this report.

April in the trade has been another difficult month – JJB and Sports Soccer continue to grow like for like sales. JD and First Sport are

seeing very small increases in like for like sales but are still unable to compete with the major two retailers.

Allsports are reporting like for like sales minus 15% - 18%.  
(...)

The UK sales team continue to be up against the barrier of Sports Soccer and JJB from the rest of the key accounts in the UK i.e. JD, First Sport and Allsports.”

22. Mr. Fellone reported, in a report dated “April 2000”:

“April in retail has improved slightly against previous months as was expected with Easter coming late this year.

JJB after recently reporting record profit for 1999, have ended all blanket promotions in store for the first time for 6/9 months, are not currently discounting – for how long who knows?

The feedback from Wigan is that April ended ahead of plan and up on 1999 like for like.

Sports Soccer continue to discount 30% off SSP across all brands but have agreed to sell all new Umbro licensed kits at £40 mens and £30 kids on line with the rest of the high street.

Feedback from them is that sales are against plan but margins are down vs target.

JD and First Sport as we move into the better weather are all reporting good like for like sales. The independents on the other hand continue to struggle as the gap between them and the nationals widens.”

23. Mr. Bryan reported:

“The Easter holiday period provided some significant increases in sell through and with JJB withdrawing the 20% discount in strategic outlets it also provided a welcome upturn in margin.  
(...)

Once again, Easter was very good with significant increases achieved however this category will have the benefit of 3 major kit launches in May (Chelsea/Celtic/Liverpool) and it appears that a price war will develop with at least 2 retailers other than JJB going with significant discounts from launch. JJB will start at £29.99/£39.99 but for how long? Sell through should therefore be very good.”

24. Mr. May reported:

“all:sports’ performance in April running slightly behind plan as bad weather affected Easter period but expected to be pulled back through May with licensed England and kit launches to kick in.

(...)

England sales in all:sports not yet kicked in. Awaiting “build-up” of tournament.

(...)

Objectives:

(...)

Ensure all England product booked in – all:sports to be end/mid May”.

25. Mr. Attfield reported:

“Easter trade – slight increase in business reported within Champion and Sports Soccer however the weather has not helped at all.

Sports Soccer continue with the 30% off to combat JJB “price down”.

Champion enter into price battle on licensed jerseys £20/£30 on all existing jerseys (England away and home included).

(...)

Licensed jersey prices are all over the place for the forthcoming launch.

Chelsea away at:	Champion	£35/£25
	Sports Soccer	£32/£24
	CFC	£40/£30”.

26. The information available to the Tribunal suggests that JJB’s main discounting campaigns ended on or about 23 April 2000 (JJB board meeting minutes of 24 August 2000).

27. According to the witness statements of Mr. Ronnie and Mr. Attfield, the parties reached the agreement on prices which is referred to in Umbro’s MMR for April 2000, at a meeting with Sports Soccer during April 2000.

*May 2000*

28. On 11 May 2000, Chelsea launched a new away kit. Allsports, Blacks, JJB, JD and Sports Soccer all retailed the Chelsea adult and junior replica shirts at launch at High Street prices. Sports Soccer discounted the socks.
29. On or around 15 May 2000, JD launched the 'hat trick' promotion, under which customers spending £24.99 or more on England merchandise would receive a free England cap worth £9.99. In addition, as part of the promotion, JD reduced the price of the adult England replica shirts (home and away) to £29.99.
30. On 16 May 2000, Messrs Hughes, Guest and Patrick of Allsports met to abandon the Allsports 'Price Promise', (possibly precipitated, according to the evidence before the Tribunal, by Sports Soccer's cut price offer on the 'Predator' football boot).
31. On 19 May 2000, Celtic launched its new away kit. Allsports, Blacks, JJB, JD and Sports Soccer all retailed at launch the Celtic adult and junior replica shirts at High Street prices. Sports Soccer discounted the socks and JD discounted the adult shorts.
32. On 22 May 2000 Debenhams was contacted by Mr. Fellone and asked to increase prices for the English shirt (decision, paragraph 169).

*May 24 to May 31 2000*

33. On Wednesday 24 May 2000, Messrs Ashley and Nevitt of Sports Soccer met with Messrs Ronnie and Monaghan of Umbro at Dunstable. An Umbro note of 'discussion points' with handwritten comments dated 24 May 2000 and prepared by Mr. Ronnie states at item two: "England + Licensed retail price –until after the England v Germany game".
34. On Thursday 25 May 2000, Mr. Attfield prepared a hand-written note of the meeting, which states "s/soccer agreed to increase the price of England (H) + (A) Kits and for a set period of 60 days to maintain the prices of licensed kits (include Gkeepers/infant kit)."



35. Also on 25 May 2000, a fax timed at 12.00 hours sent by Mr. Draper, marketing director of MU to Mr. Marsh, sports marketing director of Umbro states:

“Further to our conversation at your offices yesterday and my telephone conversation with Martin [Prothero of Umbro] we would ask for written confirmation of the circumstances surrounding the recent pricing and promotions practices of some of your customers as it relates to replica shirts. (...) What assurances can you now give us that our stance is still the best one to adopt in light of the activities highlighted?”

36. On the morning of 25 May 2000, Mr. Hughes met with Mr. Richards of MU.

37. On 25 May 2000, Allsports organised a golf day at Stockport Golf Club. At the dinner which followed in the evening, Mr. Hughes of Allsports arranged for the representatives of Nike, Adidas (UK) Ltd, Umbro and MU, among others, to sit at Mr. Hughes’s table. During the dinner Mr. Hughes made remarks about discounting that is the subject of evidence before the Tribunal.

38. On Friday 26 May 2000, Mr. Ronnie sent a thank-you letter to Mr. Hughes thanking him for arranging the Golf Day.

39. Monday 29 May 2000 was a Bank Holiday.

40. On Tuesday 30 May 2000, Mr. Hughes’s diary reads “Phone David Whelan/Mike Ashley – Man Utd Shirt Price (get number from Chris Ronnie)”. Mr. Hughes phoned Mr. Ronnie on that day. The 3D cap promotion on the England shirt was among the matters discussed.

41. On Wednesday 31 May 2000 Mr. Ronnie of Umbro had lunch with Mr. Guest of Allsports.

42. It appears that during May 2000 JJB maintained its prices for the adult and junior England home shirt which had been at £39.99 and £29.99 respectively since the last week of April 2000. Allsports had already been selling at those prices for some time, apparently since the sales period earlier in the year.

*Friday 2 June 2000*

43. On 2 June 2000, Mr. Hughes's diary reads: "Chris Ronnie (Man Utd Shirt Sample)".
44. On 2 June 2000 at 10.30, Mr. Ronnie met Mr. Hughes at his office near Stockport. One purpose of the meeting was to get Mr. Ashley's phone number. During the meeting, the 3D cap promotion was discussed. Mr. Hughes phoned Tom Knight (then at Blacks/FirstSport) regarding the JD Sport promotion in respect of the England shirt and a conversation took place between Mr. Knight and Mr. Hughes. Mr. Ronnie apparently let Mr. Hughes have, or arranged for him to have, a sample of the new MU shirt. Shortly after the meeting, Mr. Hughes unsuccessfully tried to phone Mr. Ashley.
45. A fax dated 2 June 2000 timed at the top of the page at 12.39 hours from Mr. Fellone to Mr. Ryman of Debenhams (trading as Champion) says: "Further to our conversation yesterday regarding our licensed kits, the other retailers including John Lewis have agreed to our requests which will take effect from opening of business Saturday 3<sup>rd</sup> June."
46. On 2 June 2000 Blacks/First Sport increased the price of the England adult home replica shirt to £39.99 from £32.99. During the afternoon, Mr. Knight contacted Mr. Ashley to obtain his confirmation that Sports Soccer was increasing its prices.
47. On 2 June 2000, in the evening, Mr. Ronnie started getting calls on his mobile phone from the Sports Soccer area managers to inform him that Sports Soccer had increased its prices to High Street prices. The calls continued until the early hours of the next morning and there were numerous messages left.

*Saturday 3 June 2000*

48. On 3 June 2000 JD stopped offering a free cap with sales of England replica shirts and raised prices of the adult and junior home and away replica shirts to £39.99 and £29.99 from £29.99 and £24.99 respectively.

49. On the weekend of 3/4 June 2000 Mr. Hughes slipped a disc in his back getting into his car. He had previously had an operation on his back in February 2000, following an earlier slipped disc.

*Monday 5 June 2000*

50. On 5 June 2000 Mr. Hughes's diary reads "Agree Man Utd + England prices with everyone incl Mike Ashley (...) Sports trade cartel-arrange a meeting regularly (...) Visit David Whelan".

*Tuesday 6 June 2000*

51. On 6 June 2000, Mr. Hughes's diary reads "Phone + visit D Whelan with Man United Shirt (...) Man Utd information by 2 pm".

52. On 6 June 2000 Mr. Marsh sent a fax to Mr. Draper at MU (responding to his fax of 25 May 2000): "... We have subsequently received assurances from Sport[s]... Soccer and JJB that they will revise their current pricing of jerseys to reflect a price point which falls in line with market conditions."

53. On 6 June 2000 an Allsports memorandum dated 6 June 2000 circulated to branch managers announced the end of the 'price promise'. It includes "Price Promise. Great news ... as part of our continuing drive to move our business upmarket we no longer intend to 'slug' it out with the gutter sports retailers whose only weapon is price, we are better than that, more aspirational and smarter."

*Wednesday 7 June 2000*

54. On 7 June 2000, Mr. Hughes's diary reads: "Phone S[teve] W R[ichards] – Man Utd info from Mike Donnelly".

*Thursday 8 June 2000*

55. On 8 June 2000 Mr. Fellone sent a fax (at 11.53 hours) to Mr. Ryman of Debenhams (trading as Champion) stating that Umbro was unable to fulfil the majority of Champion's order for England shirts.
56. On 8 June 2000, Mr. Hughes's diary reads: "12.30 Mike Ashley (Lisa G[regory] to pick up from Macc[lesfield]. (...) 1 p.m. Sandwiches H[olly]T[ree]H[ouse] David Whelan, Duncan Sharpe, Mike Ashley (...) 3.45 Mr. Leggatte [Mr. Hughes' neurologist] at Alexandra".
57. On 8 June 2000 at about 13.00 hours, Messrs Hughes, Whelan, Sharpe and Ashley met in Mr. Hughes's house in Cheshire. Mr. Hughes had met Mr. Ashley at the station and driven him to his house. According to Mr. Whelan's helicopter log, Messrs Whelan and Sharpe arrived at Mr. Hughes's house at 13.06 and departed at 13.58.
58. On 8 June 2000, after the meeting at Mr. Hughes's house, Mr. Hughes took Mr. Ashley back to the station. It appears that Mr. Ashley then met with Mr. Ronnie at Umbro's offices in Cheadle.

*Friday 9 June 2000*

59. On 9 June 2000 Mr. Hughes phoned Mr. Knight of Blacks/First Sport.
60. An Allsports internal memorandum numbered 700 dated 9 June 2000 entitled "MUTD Replica Shirt Launch 1<sup>st</sup> August 2000" from Mr. Hughes to Mr. Patrick, copied to Mr. Guest and Mr. Donnelly of Allsports states:

"I have already told you that JJB are going at £39.99 on 1<sup>st</sup> August in adult sizes and Sport Soccer will also do that. After speaking to Tom Knight this morning to appraise him of that information, he went on to say that he will be tactical in his pricing i.e. £39.99 where he is in proximity to a JJB or Sport Soccer and £44.99 elsewhere.

Now that we can do different prices at different tills around the company, I think that we should do the same."

61. A further internal memorandum numbered 701 also dated 9 June 2000 entitled “Discussions with JJB and Sports & Soccer” from Mr. Hughes to Mr. Patrick, copied only to Mr. Guest states:

“In my absence you should continue any necessary dialogue with JJB and Sports & Soccer. JJB’s Head Office number is 01942 221400 and Mike Ashley only operates from his mobile which is [ ]”.

62. On 9 June 2000 Mr. Hughes was admitted to hospital for an emergency operation on his back which took place the following day. He did not return to work until 21 June 2000.

*Umbro’s MMR for May 2000*

63. Mr. Ronnie’s report for May 2000, which is dated 8 June 2000 (although when Mr. Ronnie wrote it is disputed) states as follows:

“May results are attached to this report.

May has been yet another difficult trading month with the expected uplift in sales of the Euro 2000 tournament not happening.

UK sales spent the last two weeks of May trying to force England Licensed product into not only the independents, but also the major account base. All:sports were the main issue, having committed to orders in the region of £[1]m for April and May, they were still holding back on a booking-in date. This has now been resolved and all:sports will have taken 75% of the outstanding amount by 12th June 2000.

Other accounts that are holding back on firm bookings until after the first England game are First Sport, Lillywhites, Champion and other independent accounts.

There has been a major step forward in the retail price of England the launch of Manchester United. JBB, Sports Soccer, First Sport, JD Sports and all:sports have all agreed to retail their adult shirts at £39.99. This is following England being sold at various retail prices through April and May ranging from £24.99 to £29.99, £32.99 or £32.99 with a free £9.99 cap at JD Sports.

Following a month of dialogue with all the above accounts, Umbro cannot allow our statement product to be discounted.

It has also been decided that meetings will now take place with JD Sports and First Sport to advise those accounts that unless Umbro are

now supported across other product categories, it will effect their deliveries of Manchester United Home, Away and Third shirts.

We, as a business, cannot allow these three accounts to buy licensed product and nothing else.  
(...)

As reported in April, Manchester United Home kit will be delivered to all:sports, Manchester United and JJB on the 28th June and to **100%** of their orders placed”.

64. Mr. Fellone reported in a document dated “May 2000”, but apparently written in early June:

“May out in the retail sector continues to be difficult.

The multiples in general are behind target with reports of like for like sales being down with the exception of JJB and Sports Soccer who seem to be trading ahead of 1999 but down on margin.

May in general has seen price points in the stores back at RRP with very limited sale product in store.

The prices on England, Chelsea and Celtic across the account base has settled at £39.99 mens and £29.99 kids which has certainly boosted the confidence across the sector and with the Euro Championships upon us, the signs are positive based on the above and the level of daily business we have achieved over the first few days of June.”

65. According to the report on United Kingdom sales (apparently prepared by Mr. P Masters, Financial Controller, and dated 5 June 2000):

“Allsports account for the majority of the unshipped England orders (approx. £1m) booking in dates have now been agreed for 75% of the outstanding value”.

66. Mr. Bryan, responsible for JJB, reported:

“Business is tough and the weather is not helping. Euro 2000 is offering the best opportunity for retailers to get the till ringing along with the recent very successful kit launches.  
(...)

England jerseys really starting to take off but stock levels are still high and Colin Russell, JJB is holding off on any further orders until England qualify for the 2nd phase of Euro 2000.

The recent exposure of the away kit has seen sales of the away almost match home last week.”

67. Mr. May, responsible for Allsports, reported:

“In retail terms, England is the main talking point with prices now being maintained across nationals. Sales of licensed have been vital to all:sports over the past month with England, Celtic, Liverpool and Leeds bringing turnover **not** being generated by branded category.

all:sports allegedly losing considerable turnover versus 1999 as new concept is not generating volume sales enjoyed by main high street competition.

Branded

all:sports not getting sell through in volume required on the category but talking up margin. The all:sports concept is limiting on their essential/core business.

Talking to store managers, the “summer sell out” window was failing to generate sales required. This could obviously be partly attributed to the weather which is not helping the category.

Licensed

Superb Celtic away launch considering ‘relatively’ poor season. Style, fabric and the overall look of garment are the main reasons.

all:sports also had good initial sales on Chelsea away.

England is currently the main focus as the tournament approaches and sales have been good.”

68. Mr. Attfield, responsible for Sports Soccer, reported:

“Licensed

Domestic club spring products virtually sold out.

England products performing ‘sell out’ exceptional.

Slightly disappointing sales on the launch of Chelsea away – everyone at full RP(...)

Celtic away launch much better and again full RP.”

*Later in June 2000*

69. On 17 June 2000 England played and beat Germany in Euro 2000.
70. On 20 June 2000 England played and lost to Romania and was eliminated from Euro 2000.
71. On 21 June 2000, Sports Soccer discounted the England Replica shirt to £20.00.
72. On 21 June 2000, Mr. Hughes returned to work after his operation.
73. On 27 June 2000 a JJB Board meeting took place.
74. On 28 and 29 June 2000 Mr. Attfield met with Sports Soccer at Cheadle. A hand-written file note prepared by Mr. Attfield (dated 14 June 2000) records the meeting and states that “S/S to increase the retail price of England (H) + (A) jersey + infantkits”.

*July 2000*

75. On 3 July 2000 Mr. Attfield met Mr. Nevitt at Dunstable. A hand-written file note prepared by Mr. Attfield (dated 14 June 2000) records the meeting and states that: “told S[ean] N[evitt] prices of England (H) + (A) jersey/infantkits need to be raised. As part of deal involving the promotional football. No movement planned.”
76. On 7 July 2000, Nottingham Forest launched its Home and Away kit. Allsports, JJB, Sports Soccer and Blacks all retailed the replica shirts at £39.99 for adults and £29.99 for juniors, although Blacks initially retailed at RRP (£42.99) for certain larger sizes.
77. On 12 July 2000 Messrs Ronnie and Fellone of Umbro met with Mr. Bown of JD to discuss the ‘hat trick’ promotion.
78. On 13 July 2000 Mr. Prothero wrote to Mr. Richards of MU:

“As you know Umbro have worked very hard in agreeing a consensus to the price of the new Manchester United jersey. At one stage we even managed to get Messrs Hughes, Ashley and Whelan in the same



room to agree this issue. It therefore causes me real concern that I am led to believe that the Manchester United jersey is being sold by the Club via “Open” at effectively a discounted price because of the inclusion of certain premium items such as free autographed balls etc. I guarantee that if any of the aforementioned gentlemen see this, which I am sure they will, we will have the makings of a price war on our hands”.

79. On the same day, Ms Quinn of MU responded to Mr. Prothero’s letter of 13 July 2000 by fax (timed at 13.07) “Please be assured that the Manchester United jersey is not being sold at a discounted price at Open”.
80. On 14 July 2000 Mr. Ronnie prepared the Umbro MMR. for June. It states that “Euro 2000 proved to be a great success for most of our UK accounts ...”.
81. On 18 July 2000 Mr. Attfield met with Sports Soccer at Dunstable. A hand-written file note prepared by Mr. Attfield (dated 14 June 2000) records the meeting and states that “Chelsea (A), N Forest (H) + (A) to be reduced to £30/£20 with immediate effect”.
82. On 23 July 2000 Blacks/First Sport reduced the price of England adult and junior home replica shirts to £34.99 and £24.99 respectively.
83. On 24 July 2000 Mr. Ronnie telephoned Mr. Bown of JD (recorded in a typed file note, prepared by Mr. Ronnie on 25 July) to tell him that “JD Sports unfortunately are no longer a priority account for Umbro...”.
84. Also on 24 July 2000, Mr. Attfield met with Mr. Nevitt at Dunstable. A hand-written note of the meeting records that “Jersey prices being reduced 25<sup>th</sup> July 00. junior to £22 adults to £30. Kits in question: Chelsea home & away; Forest home & away; Celtic home only!! S.N also proposed the following pricing policy for Man Utd kits. Home – will remain £40/£30; Away – will launch with mega prices of £30/£22; 3<sup>rd</sup> will be reviewed after 60 days.”
85. On 1 August 2000, MU launched its new home kit with a new sponsor, Vodafone.

86. Umbro delayed delivery of the MU home replica kit to JD for two weeks after its official launch.
87. Allsports, Blacks, JJB, JD (when it received supplies) and Sports Soccer all retailed the adult and junior MU replica shirts at £39.99 and £29.99 respectively. JD discounted the adult shorts and Sports Soccer discounted all other replica kit products.
88. On 1 August 2000 Mr. Attfield met with Sports Soccer at Dunstable. A hand-written file note prepared by Mr. Attfield (dated 14 June 2000) records the meeting and states that “want to reduce MUFC (3) jersey from the day of launch from £40 to £30 and JNR £30 – £22. (...) not happy at being excluded from buying “pro training”. Insisting he will stock pro training from Q3 2001 in twelve stores at full price.”
89. On 3 August 2000, the OFT received a complaint from Sports Soccer relating to price-fixing of replica shirts. Sports Soccer complained of “continued price-fixing on Football Replica Shirts”.
90. On 7 August 2000 Mr. Prothero sent an email to Ms Pallett (PA to Chris Ronnie) and Ms Smith (PA to Messrs Fellone and Bryan) stating: “Subject: Conversation with Steve Richards [of MU]. Steve Richards rang me to inform me that he had been informed that House of Champions [Debenhams] and Alpha are selling the adult jersey at £36.99.”
91. On 14 August 2000, Mr. Hughes’s diary entry reads: “Phone Mike Ashley to review Man. Utd launch + other issues”<sup>1</sup>.
92. On 21 August 2000 JJB discounted the England home adult and junior replica shirts.
93. On 24 August, 25 August and 30 August 2000, Mr. Hughes’ diary entry reads: “Phone Mike ASHLEY”<sup>1</sup>.
94. On 4 September, 5 September, 7 September and 11 September 2000, Mr. Hughes’s diary entry reads: “Phone Mike Ashley”<sup>1</sup>.

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<sup>1</sup> This is masked with heavy felt tip pen in the original diary.

95. On 12 and 13 September 2000, Mr. Hughes's diary entry reads: "Mike Ashley?"<sup>1</sup>.
96. On 17 September 2000 JJB discounted the England away adult and junior replica shirts.
97. On 23 September 2000, Mr. Hughes's diary entry reads: "Mike Ashley"<sup>1</sup>. On 25 September 2000, Mr. Hughes' diary entry reads: "Phone Mike Ashley!"<sup>1</sup>.
98. On 27 September 2000 it was leaked to the press that the new MU Licensing Agreement would be signed with Nike and not with Umbro. At this time JJB had a substantial number of MU shirts in stock.
99. On 29 September 2000 the MU third replica kit was launched. Allsports, JJB and JD retailed the adult and junior replica shirts at £39.99 and £29.99 respectively, JD discounted the adult shorts. Sports Soccer discounted all elements of the replica kit at launch.
100. In late September or early October 2000, Allsports and JD reduced the price of the England adult home replica shirt to £32.99.
101. In October 2000 JJB placed an order with Umbro for approximately 50,000 mixed pieces of adult and junior replica shirts.
102. On 1 October 2000, Sports Soccer discounted the adult and junior MU home replica shirts which had been launched on 1 August 2000.
103. On 29 September 2000 MU launched a new third kit. Allsports, JJB and JD retailed the adult and junior shirts at £39.99 and £29.99 respectively. JD discounted the shorts and Sports Soccer discounted all other products.
104. On 18 October 2000, MU launched its Away kit. Allsports, Blacks, JJB and JD retailed the adult and junior replica shirts at £39.99 and £29.99 respectively, and all other replica kit products at RRP. Sports Soccer discounted all elements of the replica kit at launch.
105. On 24 October 2000 Mr. May met Ms Charnock at Allsports. A note of the meeting, prepared by Mr. May on 27 October 2000, states: "The concern being that since contract

announcement [i.e. the MU/Nike sponsorship deal] and price discounting by Sports Soccer/JJB sales have dropped 50%. Michelle Charnock felt the above needed to be a PF (Phil Fellone) / MG (Michael Guest) conversation as she would not bring into the business”.

*November and December 2000*

106. On 6 November 2000 Mr. Attfield met Mr. Adegoke (a member of the buying team at Sports Soccer) at Dunstable. A hand-written note of the meeting, prepared by Mr. Attfield on 8 November 2000, states:

“D[otun] A[degoke] was told before ordering that High St prices were applicable and he should place numbers accordingly across all kit options L/S, shorts, socks GKJ, infantkits”.

107. On 7 November 2000 Mr. May met Mr. Duffield of JD at JD Sports. A note of the meeting prepared by Mr. May on 9 November 2000 states:

“Have [1000] home jerseys for December. ND was not happy with sell through due to discounting and to propose what he will take pre Christmas...”

108. On 13 November 2000 Mr. Attfield prepared a note headed “SPORTS SOCCER, OUTSTANDING ISSUES”. The note states at the ninth bullet point “Retail prices to be conveyed and agreed for products expected pre-Christmas”.

109. On 21 November 2000, Mr. Hughes had a third operation on his back.

110. On 6 December 2000 Martin Boyes of MU sent an internal e-mail headed “JJB REPLICA UPDATE”. It states “The £40 price mark is very important to them – and they do not see themselves moving from this in the near future”.

**2001**

111. On 6 February 2001, Mr. Attfield met Mr. Adegoke of Sports Soccer at Dunstable. A file note of the meeting prepared by Mr. Attfield on 12 February 2001 (the file note states “12/02/00” but it is assumed this is a mistake) states:
- “Presented all season 01/02 licensed kit and associated product. Sports Soccer have reduced their commitment on the licensed category and are using the following formula. Previous shirt launch first 12 weeks sales ÷ 2. MA has also stated that the kits, GK kits will be retailed in line with the high street. (...) Retail prices of licensed shorts/socks is to be taken up with MA – Action CR / MA”.
112. On 16 March 2001, Celtic launched its new Home kit. Allsports, Blacks, JJB and JD retailed all replica kit products at RRP (which for adult and junior Replica Shirts were now aligned with High Street prices at £39.99 and £29.99 respectively). Sports Soccer retailed the replica shirts at RRP and discounted the shorts and the socks. There was apparently a supporter boycott of this shirt reported in the Sunday Mail of 26 February 2001 under the heading “Shirt hits the fan”.
113. On 26 and 27 March 2001 Mr. Attfield met Messrs Nevitt and Adegoke at Dunstable. A file note of the meeting prepared by Mr. Attfield on 29 March 2001 states: “SN shown sample of the next promo ball (£3). (...) Spoke to SN about the price of the ball going back up to £4 as it is causing problems at £3. The sales volume shows it should be £3 in Sports Soccer’s eyes and SN said that it was a decision that can only be rectified by MA”. In the version of this document taken from Mr. Ronnie’s office, ‘(£3)’ in the first line quoted above is circled and a handwritten “TO DISCUSS with MA” appears next to it.
114. On 30 March 2001, OFT officials met with Sports Soccer.
115. On 9 April 2001 Sports Soccer discounted the Celtic adult and junior Replica Shirts which had been launched on 16 April 2001.
116. During April 2001, Umbro approached JJB asking for offers on a further package of Manchester United home shirts. JJB made an offer to purchase the stock at certain clearance prices.
117. On 17 April 2001 Mr. Attfield sent an email to Ms. Pallett, Mr. Ronnie’s PA:  
“Subject: Sports/ Soccer England Launch

Please find below the pricing structure for the forthcoming England home Kit.

	Junior	MEGA	Adult	MEGA
Jersey	£29.99		£39.99	
Shorts	£16.99	(£12)	£19.99	(£15)
Socks	£7.99	(£6)	£9.99	(£7)
Inf[ant]/ Kit	£29.99	(£22)		

In view of the recent reaction to the pricing of the Celtic (H[ome] shorts, socks and infantkit I thought it best you are aware of this information.”

118. On 23 April 2001, the FA launched a new England Home kit. Allsports, Blacks, JJB , JD and Sports Soccer retailed the adult replica kit at RRP or above. Sports Soccer launched the England infant kit at a discount, but within three days it put the price back up to Umbro’s RRP.

119. An Umbro file note dated 23 April 2001 states that Mr. Bryan and Mr. Fellone contacted Mr. Russell several times raising Umbro’s concerns in relation to JJB’s Carlisle branch<sup>2</sup> which was offering a 25% discount off the new England Replica Kit on the day of its launch. The note continues:

“Concerns were raised that this could give other retailers the perfect opportunity to reduce their stock and start a price war. Colin [Russel of JJB] said that he could see our point of view but the discount applied to all product as a result of a commercial decision made by Duncan Sharpe [of JJB]. He did say, however, that he would speak to Duncan when he came back to the office that afternoon (...) Phil Bryan [of Umbro] spoke to Colin at 4.45p.m who advised that Duncan was aware of our concerns but stood by the original decision to apply the discount”.

120. In Umbro’s May 2001 MMR Mr. Bryan wrote in the UK Sales Trading Report / National Accounts section, under Section 2 “General Market Overview”:

“The licensed market continues to have fantastic England home kit sales however the focus is back on Sports Soccer discounting policy in this sector with their reductions on MUFC home jerseys. JJB have

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<sup>2</sup> There is a more formal but otherwise identical file note in relation to JJB’s Bury branch, although the fact that the wording is identical may imply that the reference to Bury is a mistake. See footnote 295 of the Decision and Day 9, pp. 96 to 98.

voiced their concerns and are threatening cancellations on the centenary kit as a result!”

Under Section 5 “Objectives / AOB” Mr. Bryan wrote “Resolve current Sports Soccer issue”.

121. On 3 May 2001, Chelsea launched a new Home kit. Allsports, Blacks, JJB and JD retailed all elements of the replica kit at RRP. Sports Soccer retailed the replica shirts at RRP but discounted all other elements of the replica kit.
122. On 23 May 2001, Sports Soccer reduced the MU home adult and junior replica shirts to £20.00 and £15.00 respectively.
123. On 1 June 2001 Mr. Russell of JJB sent a fax to Mr. Bryan of Umbro cancelling a significant order of MU Centenary replica shirts.
124. On 8 June 2001 Messrs Sharpe, Preston and Russell met with Messrs Ronnie and Fellone to discuss the MU home shirts issue.
125. On 15 June 2001, Messrs Fellone and Ronnie met with Messrs Whelan, Sharpe, Russell and Preston to discuss the cancellation of the Centenary kit order. At this meeting, JJB agreed to reinstate the order.
126. On 19 June 2001, Mr. Ronnie faxed a letter dated 18 June 2001 to Mr. Whelan confirming the terms of an agreement under which JJB would purchase all remaining stock of the MU home jersey which had been launched on 1 August 2000:

“a) UMBRO International Ltd will sell the total balance of stock in the UK and the full amount of production that is currently taking place in the Far East of the Manchester United Home jersey in adults and junior sizes and confirm no more production of Manchester Utd home shirts will be made (see attached size breakdown). The net price of the adults jerseys is £9.00 net net and the junior jersey is £8.00 net net. The Manchester United product is to be sold to JJB Sports plc on an exclusive basis and the current order for Manchester United Away product is to be reinstated.

b) Due to the impact this sales promotion will have on UMBRO International Ltd's Profit & Loss account for 2001, JJB Sports plc will agree to purchase a total of £2.0m of Manchester United and England apparel product based on JJB Sport plc's current terms."

127. On 19 June 2001, Mr. Russel sent a fax to Mr. Bryan reinstating the orders which had been cancelled in his letter of 1 June 2001.

128. On 26 June 2001, Mr. Whelan sent a fax to Mr. Tucker of Nike which states,

"...I had a meeting with Chris Ronnie last week and JJB have agreed to buy the total production of the MU home shirt, which is around 85,000 units, but no further shirts can be made. This should enable a smooth transition from Umbro to Nike, and ensure that the MU shirt is not bastardised on price around the country".

129. On 20 July 2001, MU launched its Centenary kit. Allsports, Blacks, JJB, JD and Sports Soccer retailed replica shirts at RRP's or above.

130. On 13 August 2001 Sports Soccer met with OFT officials for a second time.

131. On 13 August 2001, Mr. May sent an e-mail to Mr. Guest stating "Subject: England away. Spoke to C[hris] R[onnie], not clearing this presently as per conversation with M[ichelle] C[harnock], will prob hold off until Nov/Dec. CR may be tempted if you offer something in between normal terms and clearance (approx 12.50/13.50) and commit not to discount for a period of time. Worth a try!"

132. On 20 August 2001, Sports Soccer discounted across a range of Umbro licensed replica kits including the England home replica kit, the MU Centenary replica kit and the Chelsea home replica shirts which had all been launched earlier in 2001.

133. On 23 August 2001 the High Court issued warrants to enter certain premises under section 28 of the Act. On 29 August and on 5 September 2001 unannounced inspections took place at the premises of Allsports, JJB, Nike (UK) Ltd, Sports Soccer and Umbro.

134. Paragraph 130 of the Decision states:



“The OFT also notes the extensive discounting by, in particular, JJB and Sports Soccer, of Umbro licensed Replica Kits since August 2001 when the OFT conducted unannounced visits under section 28 of the Act. In relation to the Celtic away and Chelsea away Replica Kits launched at the end of August and early September 2001 Sports Soccer discounted these kits at launch. Similarly, Sports Soccer has confirmed that it has not sold any Umbro Licensed Replica Kits launched in 2002 at Umbro’s RRP’s. In particular, it discounted at launch the England away Replica Kit launched in April 2002 retailing the adult Replica Shirt at £32.00 and junior Replica Shirt at £24.00 compared to Umbro’s RRP’s of £39.99 and £29.99 respectively and similarly discounted the Celtic away and Chelsea away Replica Shirts launched in August 2002. JJB has also during 2002 significantly discounted at or near launch Umbro licensed Replica Kits such as the England away Replica Kit”.