
Competition Act 1998

Decision of the Office of Fair Trading
No. CA98/06/2003

Price-fixing of Replica Football Kit

1 August 2003 (Version for Publication)
(Case CP/0871/01)

SUMMARY

The Office of Fair Trading has decided that a number of sportswear retailers, Manchester United plc, the Football Association Ltd and Umbro Holdings Ltd have all entered into price-fixing agreements in relation to replica football kit infringing the Chapter I prohibition contained in section 2 of the Competition Act 1998.

Allsports Ltd, Blacks Leisure Group plc, JJB Sports plc, Manchester United plc, Sports Soccer Ltd, The John David Group plc and Umbro Holdings Ltd were involved in various agreements or concerted practices which fixed the prices of the top-selling adult and junior short sleeved replica football shirts manufactured by Umbro Holdings Ltd. These were the replica football shirts of the England team and Manchester United, Chelsea, Glasgow Celtic and Nottingham Forest football clubs. Some of the parties were involved with the shirts of only one or some of the teams and some for longer periods than others. The longest that any of the parties were involved was from April 2000 until August 2001. The agreements or concerted practices took effect during key selling periods after the launch of a new replica football kit and during the Euro 2000 tournament.

Florence Clothiers (Scotland) Ltd (in receivership) (formerly trading as 'Sports Connection') and Umbro Holdings Ltd were involved in an agreement or concerted practice which fixed the prices of Glasgow Celtic's adult and junior short sleeved replica football shirt for a short period during the spring of 2001.

JJB Sports plc, Sportsetail Ltd (in administration) (formerly trading at 'England-direct.com'), the Football Association Ltd and Umbro Holdings Ltd were

involved in an agreement or concerted practice which fixed the prices of the England team adult, junior and infant replica football kit sold at England-direct.com by aligning their retail prices to the high street prices of JJB Sports plc. The agreement lasted from the early spring of 2000 until the late autumn of 2001.

The Office of Fair Trading considers that agreements between undertakings that fix prices are among the most serious infringements of the Competition Act 1998. Financial penalties are therefore being imposed on all parties. However, Florence Clothiers (Scotland) Ltd (in receivership), Sportsetail Ltd (in administration) and the Football Association Ltd have each been granted leniency and the financial penalties imposed on each of them are being reduced accordingly.

Confidential information contained in square brackets is indicated by [C] in the original version of this decision and has been redacted from the published version. Redactions are indicated by [...] or by italic text in square brackets (e.g. [*more than 10 per cent*]).

Factual amendments in relation to the company positions of two people have been made to paragraphs 34, 37, 139, 716 and 753 of the published version of this decision. Other minor typographical amendments have been made in paragraphs 29, 219 and 691. Additional text is contained in square brackets and is indicated by [#]. Redactions are indicated by [...][#]. The original version of this decision has not been changed.

CONTENTS

	Page
I PROCEEDINGS	
1. Complaint	12
2. Investigation & proceedings	13
3. Leniency	15
II BACKGROUND	
1. Agreements	17
2. Parties	17
2.1 Replica Shirts Agreements	
2.1.1 Allsports	
2.1.2 Blacks	
2.1.3 JJB	
2.1.4 JD	
2.1.5 MU	
2.1.6 Sports Soccer	
2.1.7 Umbro	
2.2 Umbro/Sports Connection Celtic Agreement	
2.2.1 Sports Connection	
2.2.2 Umbro	
2.3 England Direct Agreement	
2.3.1 JJB	
2.3.2 Sportsetail	
2.3.3 The FA	
2.3.4 Umbro	
3. Products	25
3.1 Replica Football Kit	
3.1.1 Shirts, shorts and socks	
3.1.2 Home, away, third, goalkeeper and special edition	
3.1.3 Kit launches	
3.1.4 'Replica Kit' and 'Replica Shirts'	
3.1.5 Umbro licensed Replica Kit	
3.2 Other Licensed Merchandise	
3.3 Trade mark owners ('Licensors')	
3.4 Manufacturers ('Licensees')	
3.5 Retailers	
3.6 Customers	
3.6.1 Fans	
3.6.2 Patterns of Demand	
Replica Kit	
Other Licensed Merchandise	
4. Umbro's Supply Arrangements	34
4.1 Umbro's Distribution Policy & Supplies to Supermarkets	
4.1.1 The distribution policy	
4.1.2 Supplies to supermarkets	
4.1.3 Conclusion	
4.2 MU's concerns to maintain the retail prices of its Replica Kit	
Conclusion	
4.3 Embargos & Launch Protocols	

	Conclusion	
4.4	Recommended Retail Prices	
4.4.1	Retail and wholesale prices	
	Conclusion	
4.4.2	Retail mark-up & margins	
	Conclusion	
5.	Activity in the retailing of Replica Kit prior to 1 March 2000	49
5.1	JJB	
5.2	Sports Soccer & Debenhams	
5.3	Allsports & Blacks	
5.4	Umbro	
III	FACTS	
1.	Replica Shirts Agreements	54
	April 2000	
	May 2000	
	June 2000	
	July 2000	
	August 2000	
	September 2000	
	October 2000	
	November 2000	
	December 2000	
	February 2001	
	March 2001	
	April 2001	
	May 2001	
	June 2001	
	July 2001	
	August 2001	
	September 2001	
	Purchase order forms and correspondence about invoices	
2.	Umbro/Sports Connection Celtic Agreement	94
	March 2001	
	April 2001	
	June 2001	
3.	England Direct Agreements	96
	FA/Sportsetail Agreement	
	FA/Sportsetail/Umbro/JJB Agreement	
	November 1999	
	February 2000	
	March 2000	
	June 2000	
	September 2000	
	January 2001	
	February 2001	
	March 2001	
	June 2001	
	August 2001	
	November 2001	

IV	LEGAL ASSESSMENT	
1.	Section 2(1) of the Act	111
2.	Relevant market	111
3.	The Parties as Undertakings	111
4.	Relevant case law in relation to agreements and concerted practices	112
4.1	Agreements	
4.2	Concerted practices	
4.3	Single infringement where acts are in pursuit of a common plan	
4.4	Other legal issues relating to agreements and concerted practices	
5	Replica Shirts Agreements	116
5.1	Overview of Agreements	
5.2	Overview of key evidence relied on by the OFT	
5.2.1	Contemporaneous documents & pricing data	
	Views of the Parties	
	Conclusion of the OFT	
5.2.2	Other evidence	
	Views of the Parties	
	Conclusion of the OFT	
6.	Participation in the Replica Shirts Agreements of Umbro, MU and the relevant retailers	121
6.1	Agreement between at least Umbro and Sports Soccer with respect to major Umbro licensed Replica Shirts	
6.1.1	April 2000 agreement	
6.1.2	May 2000 agreement	
6.1.3	England Euro 2000 agreement	
6.1.4	Fax from Umbro to MU retailers' pricing behaviour	
6.1.5	8 June MU home Replica Shirt agreement	
6.1.6	July 2000 agreements	
6.1.7	Further agreements, and meetings in relation to agreements, between Umbro and Sports Soccer in late 2000 and 2001	
6.1.8	Views of the Parties	
	Celtic, Chelsea and Nottingham Forest Replica Shirts	
	England Replica Shirts	
	MU Replica Shirts	
6.1.9	Conclusion of the OFT	
6.2	Agreement between Allsports, Blacks, JJB and JD, as well as Sports Soccer and Umbro, with respect to England Replica Shirts around the time of the Euro 2000 tournament	
6.2.1	Views of the Parties	
6.2.2	Conclusion of the OFT	
6.3	Agreement between at least Allsports, Blacks, JJB and MU, as well as Sports Soccer and Umbro, with respect to MU home Replica Shirts in 2000	
6.3.1	MU & Umbro	
6.3.2	Allsports, Blacks & JJB	
6.3.3	Views of the Parties	

6.3.4	Conclusion of the OFT Restriction of Competition for SOA	
6.4	Agreement between at least JJB, Sports Soccer and Umbro with respect to England and MU Replica Shirts for the remainder of 2000 and 2001	
6.4.1	Views of the Parties	
6.4.2	Conclusion of the OFT	
6.5	Restriction of competition for the Replica Shirts Agreements	
7.	Umbro/Sports Connection Celtic Agreement	170
7.1	Views of the Parties	
7.2	Conclusion of the OFT	
7.3	Restriction of Competition for Umbro/Sports Connection Celtic Agreement	
8.	England Direct Agreements	171
8.1	FA/Sportsetail Agreement	
8.1.1	Views of the Parties	
8.1.2	Conclusion of the OFT	
8.2	FA/Sportsetail/Umbro/JJB Agreement	
8.2.1	Sportsetail & the FA	
8.2.2	JJB & Umbro	
8.2.3	Views of the Parties	
8.2.4	Conclusion of the OFT	
8.3	Restriction of Competition for England Direct Agreement	
9.	Effect on trade for all agreements	178
10.	Conclusion for all agreements	178
V	Penalties	
1.	Legal Background	180
2.	Relevant market – Replica Kit	181
2.1	Product Market	
2.1.1	Demand side substitutability Fans National and Club Teams Other licensed merchandise	
2.1.2	Supply side substitutability	
2.1.3	Views of the Parties	
2.1.4	Conclusion of the OFT	
2.2	Geographic Market	
3.	Relevant market – Intellectual Property Licences for Replica Kit	186
3.1	Product Market	
3.1.1	Demand side substitutability Other clubs or teams Other licensed merchandise Each product comprising replica kit	
3.1.2	Supply side substitutability	
3.2	Geographic Market	
3.3	Views of the Parties	
3.4	Conclusion of the OFT	
4.	Umbro	189
4.1	Intentional or Negligent Infringement	
4.2	Step 1 – Starting Point	

4.2.1	Type of infringement	
4.2.2	Nature of product	
4.2.3	Structure of market	
4.2.4	Market share of undertaking involved & entry conditions	
4.2.5	Effect on competitors and third parties	
4.2.6	Damage caused to consumers	
4.2.7	Conclusion	
4.3	Step 2 – Adjustment for Duration	
4.4	Step 3 – Adjustment for Other Factors	
4.5	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	
4.5.1	Aggravation	
4.5.2	Mitigation	
4.5.3	Conclusion	
4.6	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
5.	Allsports	197
5.1	Intentional or Negligent Infringement	
5.2	Step 1 – Starting Point	
5.2.1	Type of infringement	
5.2.2	Nature of product	
5.2.3	Structure of market	
5.2.4	Market share of undertaking involved & entry conditions	
5.2.5	Effect on competitors and third parties	
5.2.6	Damage caused to consumers	
5.2.7	Conclusion	
5.3	Step 2 – Adjustment for Duration	
5.4	Step 3 – Adjustment for Other Factors	
5.5	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	
5.5.1	Aggravation	
5.5.2	Mitigation	
5.5.3	Conclusion	
5.6	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
6.	Blacks	201
6.1	Intentional or Negligent Infringement	
6.2	Liability of Blacks	
6.2.1	Views of the Parties	
6.2.2	Conclusion of the OFT	
6.3	Step 1 – Starting Point	
6.3.1	Type of infringement, nature of product & structure of market	
6.3.2	Market share of undertaking involved & entry conditions	
6.3.3	Effect on competitors and third parties & damage caused to consumers	
6.3.4	Conclusion	
6.4	Step 2 – Adjustment for Duration	

6.5	Step 3 – Adjustment for Other Factors	
6.6	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	
6.6.1	Aggravation	
6.6.2	Mitigation	
6.6.3	Conclusion	
6.7	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
7.	Sports Connection	206
7.1	Intentional or Negligent Infringement	
7.2	Step 1 – Starting Point	
7.2.1	Type of infringement, nature of product & structure of market	
7.2.2	Market share of undertaking involved & entry conditions	
7.2.3	Effect on competitors and third parties & damage caused to consumers	
7.2.4	Conclusion	
7.3	Step 2 – Adjustment for Duration	
7.4	Step 3 – Adjustment for Other Factors	
7.5	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	
7.5.1	Aggravation	
7.5.2	Mitigation	
7.5.3	Conclusion	
7.6	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
7.7	‘Leniency Plus’	
8.	JJB	210
8.1	Intentional or Negligent Infringement	
8.2	Step 1 – Starting Point	
8.2.1	Type of infringement, nature of product & structure of market	
8.2.2	Market share of undertaking involved & entry conditions	
8.2.3	Effect on competitors and third parties	
8.2.4	Damage caused to consumers	
8.2.5	Conclusion	
8.3	Step 2 – Adjustment for Duration	
8.4	Step 3 – Adjustment for Other Factors	
8.5	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	
8.5.1	Aggravation	
8.5.2	Mitigation	
8.5.3	Conclusion	
8.6	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
9.	JD	214
9.1	Intentional or Negligent Infringement	
9.2	Step 1 – Starting Point	

9.2.1	Type of infringement, nature of product & structure of market	
9.2.2	Market share of undertaking involved & entry conditions	
9.2.3	Effect on competitors and third parties & damage caused to consumers	
9.2.4	Conclusion	
9.3	Step 2 – Adjustment for Duration	
9.4	Step 3 – Adjustment for Other Factors	
9.5	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	
9.5.1	Aggravation	
9.5.2	Mitigation	
9.5.3	Conclusion	
9.6	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
10	MU	216
10.1	Intentional or Negligent Infringement	
10.2	Step 1 – Starting Point	
10.2.1	Type of infringement & nature of product	
10.2.2	Structure of markets	
10.2.3	Market share of undertaking involved & entry conditions	
10.2.4	Effect on competitors	
10.2.5	Effect on third parties	
10.2.6	Damage caused to consumers	
10.2.7	Conclusion	
10.3	Step 2 – Adjustment for Duration	
10.4	Step 3 – Adjustment for Other Factors	
10.5	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	
10.5.1	Aggravation	
10.5.2	Mitigation	
10.5.3	Conclusion	
10.6	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
11.	Sportsetail	222
11.1	Intentional or Negligent Infringement	
11.2	Step 1 – Starting Point	
11.2.1	Type of infringement, nature of product & structure of market	
11.2.2	Market share of undertaking involved & entry conditions	
11.2.3	Effect on competitors and third parties	
11.2.4	Damage caused to consumers	
11.2.5	Conclusion	
11.3	Step 2 – Adjustment for Duration	
11.4	Step 3 – Adjustment for Other Factors	
11.5	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	

11.5.1	Aggravation	
11.5.2	Mitigation	
11.5.3	Conclusion	
11.6	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
11.7	Leniency	
12.	Sports Soccer	226
12.1	Intentional or Negligent Infringement	
12.2	Step 1 – Starting Point	
12.2.1	Type of infringement, nature of product & structure of market	
12.2.2	Market share of undertaking involved & entry conditions	
12.2.3	Effect on competitors and third parties	
12.2.4	Damage caused to consumers	
12.2.5	Conclusion	
12.3	Step 2 – Adjustment for Duration	
12.4	Step 3 – Adjustment for Other Factors	
12.5	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	
12.5.1	Aggravation	
12.5.2	Mitigation	
12.5.3	Conclusion	
12.6	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
13.	The FA	230
13.1	Intentional or Negligent Infringement	
13.2	Step 1 – Starting Point	
13.2.1	Structure of markets	
13.2.2	Market share of undertaking involved & entry conditions	
13.2.3	Effect on competitors	
13.2.4	Effect on third parties	
13.2.5	Damage caused to consumers	
13.2.6	Damage caused to consumers	
13.2.7	Conclusion	
13.3	Step 2 – Adjustment for Duration	
13.4	Step 3 – Adjustment for Other Factors	
13.5	Step 4 – Adjustment for Further Aggravating and Mitigating Factors	
13.5.1	Aggravation	
13.5.2	Mitigation	
13.5.3	Conclusion	
13.6	Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	
13.7	Leniency	
14.	Payment of Penalty	237
Annex	1 – The Investigation	
	Part A – premises investigated under section 28 of the Act	

Part B – Recipients and dates of section 26 Notices

Part C – Umbro organisational chart

2. Facts – Replica Shirts Agreements Chronology
3. Facts – Retail Pricing Tables
4. Facts – Retail Pricing Graphs

I PROCEEDINGS

1. Complaint

- 1 On 6 August 1999, the Office of Fair Trading ('the OFT')¹ was given non-statutory assurances by *inter alia* the Football Association Ltd ('the FA') and the FA Premier League ('English PL') clubs that they would take action to prevent resale price maintenance in the market for replica football kit.² This followed an OFT investigation prompted by complaints from retailers that they were being prevented from discounting from manufacturers' recommended list prices. The OFT found evidence that clubs encouraged manufacturers to withhold supplies from retailers who were selling at a discount.
- 2 The FA and English PL clubs agreed not to prevent dealers from discounting by including a clause to this effect in new licensing agreements and, for existing licensing agreements, by informing manufacturers of their assurances. In particular, on 11 August 1999 Manchester United Football Club plc ('MUFC')³ wrote to the Umbro group asking it to inform all its dealers that they were free to sell replica football kit at whatever price they might choose.⁴ In September 1999 the Umbro group wrote to all its dealers stating that '*UMBRO...have assured 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.*'⁵

¹ Section 2 of the Enterprise Act 2002 abolished the office of the Director General of Fair Trading and transferred his property, rights and liabilities to the OFT. This section came into force on 1 April 2003. For ease of reference, this document refers to 'the OFT' throughout although at the relevant time the relevant body may have been the Director General of Fair Trading. The Competition Appeal Tribunal ('CAT') was created by Section 12 and Schedule 2 to the Enterprise Act 2002 which also came into force on 1 April 2003. The functions of the Competition Commission Appeal Tribunal ('CCAT') were transferred across to the CAT on this day.

² OFT press release PN 30/99 *Football kit price-fixing ended*, 6 August 1999.

³ On 19 April 2002, MUFC changed its name to Manchester United Football Club Ltd (MU's written representations ('WR') on Rule 14 Notice p.2 (Appendix ('App') 1, document ('doc') 1 to Supplemental Rule 14 Notice).

⁴ Letter attached to MU's WR on Rule 14 Notice, tab 3; MU's WR on Supplemental Rule 14 Notice para 59.

⁵ Doc 3/97 (KMG10). 'Doc' or 'doc' references of this type are to document numbers in the OFT's file. The first number is the file number (where given) and the second is the document number. Some document numbers are prefixed with 'SA'. This means that the document is held by the OFT as a 'stand alone' document because it was too large to insert into the OFT's ordinary paper or electronic files. Nevertheless, 'SA' documents do form part of the OFT's file. Document references preceded by the initials of the relevant OFT official indicate that that document was copied during unannounced visits under warrant.

3 On 3 August 2000, the OFT received a complaint from Sports Soccer Ltd ('Sports Soccer').⁶ This letter stated that, in relation to replica football shirts:

'...the issue of price-fixing is even more prevalent than this time last year. Virtually all the brands and retailers within the Sports Industry are involved...'

2. Investigation & Proceedings

4 OFT officials met with Sports Soccer on 30 March 2001⁷ and the OFT began a formal investigation into the complaint under section 25 of the Competition Act 1998 ('the Act') on 4 June 2001. OFT officials met again with Sports Soccer on 13 August 2001.⁸

5 Subsequently, the OFT applied to the High Court for warrants to enter certain premises under section 28 of the Act. Warrants were issued on 23 August 2001 and unannounced visits took place on 29 August and on 5 September 2001 at the premises of Allsports Ltd ('Allsports'), JJB Sports plc ('JJB'), Nike (UK) Ltd ('Nike'), Sports Soccer and Umbro Holdings Ltd ('Umbro').⁹ Copies of documents were taken by the OFT.

6 On 5 and 12 September 2001, 18 and 23 October 2001, 2 and 14 November 2001, and 15 March 2002, 40 notices under section 26 of the Act ('section 26 Notices') were sent to various persons¹⁰ and responses were subsequently received. Other information was supplied voluntarily by various parties as part of the OFT's investigation.

7 On 16 May 2002 a notice under rule 14(1) of the OFT's rules¹¹ ('the Rule 14 Notice') was given to Allsports, Blacks Leisure Group plc ('Blacks'), Debenhams plc ('Debenhams'), Florence Clothiers (Scotland) Ltd ('Sports Connection'), JJB, John David Sports plc ('JD')¹², MUFC, Sportsetail Ltd ('Sportsetail'), Sports Soccer, the FA and Umbro. All of these persons (except Sportsetail) chose to make written representations to the OFT on the Rule 14 Notice. All of these persons (except Allsports, Blacks, Sportsetail and the FA) chose to make oral representations to the OFT on the Rule 14 Notice. On 21 May 2002 Blacks sold its sport and fashion division to JD. JD subsequently made representations on behalf of those subsidiaries which it had purchased ('the Blacks Subsidiaries').

⁶ Doc 1/1.

⁷ OFT meeting note, doc 1/7.

⁸ OFT meeting note, doc 1/19.

⁹ Listed in part A of annex 1.

¹⁰ Listed in part B of annex 1.

¹¹ Competition Act 1998 (Director's Rules) Order 2000 SI 2000/293.

¹² On 4 October 2002, JD changed its name to The John David Group plc.

- 8 On 13 September 2002, further section 26 Notices were sent to JD, Sports Soccer and Umbro¹³ and responses were subsequently received from them.
- 9 On 26 November 2002 a second notice under rule 14(1) of the OFT's rules ('the Supplemental Rule 14 Notice') was given to Allsports, Blacks, Sports Connection, JJB, JD, Manchester United plc ('MU'), Sportsetail, Sports Soccer, the FA and Umbro (together, 'the Parties'). On the same day, the OFT issued a press release¹⁴ stating that, *inter alia*, following representations from Debenhams, it had dropped its action against Debenhams. Attached to the Supplemental Rule 14 Notice were, amongst other things, versions of the written representations received by the OFT on the Rule 14 Notice and versions of the transcripts of the oral representations which had been made. These versions had had confidential information¹⁵ redacted.
- 10 On 30 January 2003, Blair Nimmo and Gerard Friar of KPMG were appointed joint receivers of Sports Connection by NatWest Bank plc under section 53(1) Insolvency Act 1986 and Regulation 3 of the Receivers (Scotland) Regulations 1986.¹⁶
- 11 All the Parties (except Sportsetail) chose to make written representations to the OFT on the Supplemental Rule 14 Notice. Non-confidential versions of these written representations were circulated to all the Parties on 11 February 2003. On 3 and 5 March 2003, Allsports, JJB, JD, MU, Sports Soccer and Umbro chose to attend a joint meeting in order to make oral representations to the OFT on the Supplemental Rule 14 Notice and were given an opportunity to respond to the representations of the other Parties. Blacks and the FA chose to make further written representations instead of attending that meeting. These further written representations had been circulated to all the Parties before 3 March 2003. In addition, the OFT held separate meetings with Sports Soccer on 25 February 2003 and with Umbro on 4 March 2003 so that they could make oral representations on confidential matters.¹⁷
- 12 On 31 March 2003, Andrew Hosking and Simon Morris of Grant Thornton were appointed joint administrators of Sportsetail under an administration order made under section 21(2) Insolvency Act 1986.¹⁸

¹³ Listed in part B of annex 1.

¹⁴ OFT press release PN 80/02 *OFT issues further notice on replica football kits*, 26 November 2002.

¹⁵ See section 56 of the Act.

¹⁶ Form 1 (Scot) filed at Companies House.

¹⁷ See section 56 of the Act.

13 On 25 April 2003, a third notice under rule 14(1) of the OFT's rules ('the Further Supplemental Rule 14 Notice') was given to MU, Sportsetail, the FA and Umbro. This dealt with one point on market definition and one related issue which only affected those parties. All the Parties received a copy of the Further Supplemental Rule 14 Notice. Umbro, MU and the FA chose to make written representations to the OFT on the Further Supplemental Rule 14 Notice. JJB also corresponded with the OFT about the Further Supplemental Rule 14 Notice.

3. Leniency

14 Total immunity from financial penalties was granted to Sportsetail on 7 March 2002 in accordance with paragraph 3.6 of the OFT's *Guidance as to the Appropriate Amount of a Penalty*¹⁹ ('the OFT's Guidance').²⁰ On 24 April 2002, a reduction in the level of financial penalties of 20 per cent was granted to the FA in accordance with paragraph 3.8 of the OFT's Guidance.²¹

15 [...] ^{22 23 24 25} [C]

16 On 18 October 2002, the OFT granted Sports Connection total immunity from financial penalties in accordance with paragraph 3.6 of the OFT's Guidance in

¹⁸ Administration Order of Lloyd J of 31 March 2003, Form 2.7 filed at Companies House.
¹⁹ Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000.

²⁰ Letter from Director Cartels Investigations to Sportsetail (doc 7/508).

²¹ Letter from Director Cartels Investigations to the FA (doc 7/571).

²² [...] [C].

²³ [...] [C].

²⁴ [...] [C].

²⁵ [...] [C].

respect of infringements of the Act which are not dealt with by this decision.²⁶ This is relevant under paragraph 3.11 of the OFT's Guidance as it entitled Sports Connection to a reduction in financial penalties in respect of infringements dealt with in this decision additional to the reduction which it would have otherwise received for its co-operation by way of mitigation.²⁷ This is often referred to as 'leniency plus'.

²⁶ Letter sent for Director Cartels Investigations to Maclay Murray & Spens for Sports Connection (OFT reference CE/1890-02).

²⁷ See para 656. Sports Connection does not benefit from leniency under paras 3.4-3.8 of the OFT's Guidance in relation to this decision.

II BACKGROUND

1. Agreements

- 17 There are three groups of agreements or concerted practices which are addressed in this decision:
- (a) agreements or concerted practices involving a number of major sportswear retailers, MU and Umbro, which concerned certain Umbro licensed replica football shirts (for Chelsea, Glasgow Celtic ('Celtic'), MU and Nottingham Forest football clubs, and the England national football team) ('the Replica Shirts Agreements');
 - (b) an agreement or concerted practice between Umbro and Sports Connection, which concerned the Celtic replica football shirt ('the Umbro/Sports Connection Celtic Agreement'); and
 - (c) two related agreements involving Umbro, JJB, the FA and Sportsetail which predominantly concerned the England team replica football kit ('the England Direct Agreements').
- 18 Not all the Parties were involved in all of these agreements or sets of agreements. The agreements were of differing durations but all occurred during the period from the beginning of February 2000 to the end of November 2001 although infringements of the Act only ran from 1 March 2000. This decision deals with each of these three in turn. Throughout this decision, where possible, the Parties are referred to in alphabetical order by reference to registered name at the time the investigation began.

2. Parties

2.1 REPLICA SHIRTS AGREEMENTS

2.1.1 *Allsports*

- 19 Allsports is involved in the retail supply of replica football kits and other sportswear and sports equipment. Allsports (Retail) Ltd is a wholly owned subsidiary of Allsports. Allsports has approximately 240 retail outlets trading principally as 'allsports' and 'all:sports'.²⁸ During the period of the infringement, Allsports had a licence from MU to call itself the 'official sports retailer of

²⁸ According to a Mintel report, *Sports Goods Retailing*, January 2001, the figure in 1999 was 240 and in 2000 was 239.

Manchester United'. This was a form of sponsorship. In return for a licence fee, Allsports was also granted TV exposure and advertising opportunities. Allsports also purchased certain products bearing MU's trademarks²⁹ (other than replica football kit) from MU on an arm's length basis and MU supplied some in-store material. During this time, eight other undertakings had similar arrangements with MU but their arrangements only allowed them to use a lesser designation.³⁰

20 During the period of the infringement, **Mr David Hughes** was the Chairman and a director of Allsports. **Mr David Patrick** was the Chief Executive Officer ('CEO') and **Mr Michael Guest** was the buying and marketing director. Neither of these latter two men was on the board of Allsports. **Ms Michelle Charnock** was a replica buyer.

21 In the financial year ending 29 January 2000, Allsports had a total UK turnover of £139.553 million.³¹

2.1.2 Blacks

22 During the period of the infringement, Blacks had a sports and fashion division which was involved in the retail supply of replica football kits and other sportswear and sports equipment. Blacks was also involved in the retail supply of outdoor clothing and equipment. During the period of the infringement, Blacks' wholly owned subsidiary, First Sport Ltd ('First Sport'), was the only company in Blacks' sports and fashion division retailing sportswear and sports equipment including replica football kit. Another company in the group was Blacks Retail Distribution Ltd ('Blacks Retail').³² On 21 May 2002, Blacks sold its sports and fashion division, including First Sport, Blacks Retail and 209 stores, to JD.³³

23 Throughout the period of the infringement, **Mr Tom Knight** was the managing director of First Sport and Blacks Retail as well as being employed by and a director of Blacks. From March 2000 until January 2001, Mr Knight was the acting CEO of Blacks. Mr Knight is now the CEO of JJB. During the same period, **Mr Alan Hodgkiss** was the buying director and on the board of First

²⁹ Commonly referred to in this industry as 'licensed products'.

³⁰ Allsports' WR on Rule 14 Notice p.10 (App 1, doc 10 to Supplemental Rule 14 Notice) and MU's WR on Supplemental Rule 14 Notice para 33 (App 1, doc 1 to Supplemental Rule 14 Notice).

³¹ Annual Report and Accounts for the year ending 29 January 2000.

³² On 9 April 2002 Blacks Retail changed its name to Sport & Fashion Retail Distribution Ltd.

³³ Blacks' WR on Rule 14 Notice para 1 and subsequent response to OFT letter (doc 9/747) (App 1, docs 15 & 19 to Supplemental Rule 14 Notice) and Blacks Subsidiaries' WR on Rule 14 Notice para 4 (App 1, doc 6 to Supplemental Rule 14 Notice).

Sport. During the same period, **Mr Simon Bentley**, group chief executive, and **Mr Andrew Hall**, group finance director, were both directors of Blacks, First Sport and Blacks Retail.³⁴

24 In the financial year ending 29 February 2000, Blacks had a total UK turnover of £207.833 million.³⁵

2.1.3 JJB

25 JJB is involved in the retail supply of replica football kit, other football club merchandise, general sportswear and sports equipment. JJB is the largest sports retailer in the UK with over 430 retail outlets throughout the UK trading principally as 'JJB Sports' and 'J.J.B. Sports'.³⁶ In the Spring of 2000, JJB accounted for [...] per cent of all Umbro business.³⁷ Under an agreement dated 29 January 1999,³⁸ JJB was granted by the FA an exclusive licence to use the trade mark designations 'Official Sports Retailer/Store/Shop' of the FA and the England Team and 'Official Supporter of England's World Cup 2006 Bid' as well as the right to use certain FA licensed trademarks. The licence expires in July 2004.

26 Throughout the period of the infringement, **Mr David Whelan** was chairman of JJB and a member of the board. Until 2000, Mr Whelan was also the Chief Operating Officer ('COO'). During the period of the infringement, **Mr Roger Lane-Smith** was the senior partner at DLA, solicitors, and a non-executive director of JJB. From 2000, the late **Mr Duncan Sharpe** was the CEO of JJB and throughout the period of the infringement he was also a member of the board. During the period of the infringement, **Mr Colin Russell** was an associate director of JJB with overall responsibility for replica kit. During the period of the infringement, **Mr Steve Preston** was an associate director for buying and **Mr Phil Hattersley** was an assistant in the replica department.

³⁴ Blacks' response to OFT letter (doc 9/747) (App 1, doc 19 to Supplemental Rule 14 Notice).

³⁵ Annual Report and Accounts for the year ending 29 February 2000, note 2.

³⁶ According to a Mintel report, *Sports Goods Retailing*, January 2001, the figure in 1999 was 471 and in 2000 was 436.

³⁷ Umbro's WR on Rule 14 Notice para 60 (App 1, doc 4 Supplemental Rule 14 Notice).

³⁸ In its responses dated 2 and 5 November 2001 to the section 26 Notice dated 18 October 2001, JJB denied that it was an official retailer in relation to replica football kit although accepted that it was an official retailer in relation to other FA licensed merchandise (covering letter dated 2 November 2001, para 4, doc SA18). However, Umbro in its response dated 2 November 2001 to the section 26 Notice dated 18 October 2001 provided a copy of the agreement dated 29 January 1999 between the FA and JJB (doc SA19, tab 1). In its leniency application dated 28 January 2002, the FA has also confirmed JJB's status as official retailer of FA licensed merchandise including replica football kit (doc SA21, *executive summary of events*, p.2).

27 In the financial year ending 31 January 2001, JJB had a total UK turnover of £659.169 million.³⁹

2.1.4 JD

28 JD is involved in the retail supply of replica football kit and other sportswear and sports equipment. JD has approximately 130 retail outlets trading principally as 'JD Sports' and 'J.D.'.⁴⁰

29 During the period of the infringement, **Mr Barry Bown** was the COO of JD. On 25 July 2000 he became the CEO of JD and joined its board. During the period of the infringement, **Mr Tim Gard[i]ner** [#] was the marketing director, **Mr Nick Duffield** was the children's apparel and accessories buyer and **Mr Steve Makin** was the head of men's apparel. None of these men was a member of JD's board of directors.

30 In the financial year ending 31 March 2000, JD had a total UK turnover of £171.446 million.⁴¹

2.1.5 MU

31 MU is the ultimate parent company of the Manchester United group of companies. MUFC is a wholly owned subsidiary of MU and during the period of the infringement, Manchester United Merchandising Ltd ('MUM') was also a wholly owned subsidiary of MU. MU is one of the largest and most successful football clubs in the UK. During the 2000/2001 season the club set a new league record for average attendance of 67,542 and has 150,000 registered club members⁴² and over 200 supporters club branches worldwide. In its representations⁴³ MU confirmed that throughout 2000 and 2001 the merchandising activities of the Manchester United group of companies (including its club shop, 'The Megastore') were operated as a business division of MU and were not carried out by any of its subsidiaries. In particular, MU confirmed that all activities and responsibility for activities relating to the licensing and supply of Manchester United replica football kit during 2000 and 2001 were carried out by MU.

³⁹ Annual report and Accounts for the year ending 31 January 2001, note 1.

⁴⁰ According to a Mintel report, *Sports Goods Retailing*, January 2001, the figure in 1999 was 130 and in 2000 was 133.

⁴¹ Annual report and Accounts for the year ending 31 March 2000, note 1.

⁴² MU's oral representations ('OR') on Rule 14 Notice p.52, line 21 (App 1, doc 2 to Supplemental Rule 14 Notice).

- 32 During the period of the infringement, 'Open' was a TV shopping channel operated pursuant to an agreement between MU and BSkyB plc. Under that agreement, MU could sell its official merchandise including replica football kit on the channel with a percentage return on all sales.⁴⁴
- 33 Until May 2002, MU licensed Umbro to manufacture, supply and distribute its replica football kit and certain other merchandise. After this, the Nike group of companies replaced Umbro as MU's manufacturer, supplier and distributor of merchandise including replica football kit. MUM is now a wholly owned subsidiary of Nike Inc.
- 34 During the period of the infringement, **Professor Sir Roland Smith** was the chairman of MU. **Mr Peter Kenyon** has been the CEO of MU since August 2000 and on the board (and deputy CEO) of MU since November 1997.⁴⁵ Mr Kenyon was also on the board of MUM. Before this, Mr Kenyon was the CEO of Umbro. **Mr Peter Draper** has been the marketing director on the board of MU[FC][#] and MUM since September 1999. Prior to this, Mr Draper worked at Umbro. **Mr Steve Richards** was the managing director for MUM from October 1997 to January 2001. Prior to this, Mr Richards worked at Allsports. **Ms Helen Quinn** was on the board of MUM as product development director from August 1999 until June 2001 and was Mr Richards' assistant. **Mr Ronald Gourlay** has been on the board of MUM since February 2001 as the general manager of the merchandising division. Prior to this, Mr Gourlay worked at Umbro. During the period of the infringement, **Mr Nigel Haywood** was the stock merchandiser for MUM.
- 35 In the financial year ending 31 July 2000, MU had a total UK turnover of £113.825 million.⁴⁶

2.1.6 Sports Soccer

- 36 Sports Soccer is involved in the discount retail supply of replica football kit and other sportswear and sports equipment. In the spring of 2001, Sports Soccer had approximately 90 retail outlets trading principally as 'Sports Soccer'.⁴⁷
- 37 During the period of the infringement, **Mr Mike Ashley** was the owner and CEO of Sports Soccer. Other members of the Sports Soccer board included **Mr David**

⁴³ MU's OR on Rule 14 Notice pp.60-62 (App 1, doc 2 to Supplemental Rule 14 Notice).

⁴⁴ See, for example, Marsh w/s para 9 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

⁴⁵ MU's WR on the Rule 14 Notice para 9 (App 1, doc 2 to Supplemental Rule 14 Notice).

⁴⁶ Annual report and Accounts for the year ending 31 July 2001, note 2.

Forsey (managing director and company secretary) and **Mr Sean Nevitt** ([...][#] buying director). During the period of the infringement, **Mr Dotun Adegoke** was a member of the buying team.

38 In the financial year ending 30 April 2001, Sports Soccer had a total UK turnover of £320.328 million.

2.1.7 Umbro

39 Umbro is involved in the manufacture and supply of replica football kit, other licensed sports merchandise, general sportswear and leisurewear. Umbro is the holding company for the Umbro group of companies which includes Umbro Worldwide Ltd, Umbro Europe Ltd and Umbro International Ltd. Umbro International Ltd is the principal UK trading company of the group.

40 During the period of the infringement, the Umbro group had the licence to manufacture and supply replica football kit and other club merchandise for the following five UK football clubs: Celtic, Chelsea, MU, Morecambe and Nottingham Forest. It also had the licence to manufacture and supply England replica football kit and other England merchandise. Until the 2000/2001 football season it also had the licences to manufacture and supply replica football kit for Everton and Scotland.

41 During the period of the infringement, **Mr Peter McGuigan** was on the board of Umbro and its CEO and **Mr Christopher Ronnie** was also on the board as COO. For the relevant period, **Ms Morag Pallett** was Mr Ronnie's personal assistant ('PA'). During the period of the infringement, other members of the board of Umbro included **Mr Martin Prothero** (head of international & marketing). Mr Prothero was also a director of Umbro International Ltd along with **Mr Filippo (Phil) Fellone** (UK sales director) and **Mr Simon Marsh** (sports marketing director). During the period of the infringement members of Umbro's sales team included **Mr Phil Bryan** (JJB's account manager), **Mr Anthony May** (Allsports' and JD's account manager) and **Mr Lee Attfield** (Sports Soccer's account manager). For the relevant period, **Ms Joanna Smith** was the PA to Mr Fellone and to Mr Bryan. An organisation chart for Umbro is at Part C to annex 1.

42 In the financial year ending 31 December 2000, Umbro had a total UK turnover of £83.763 million.

⁴⁷ Doc 1/7 para 9. According to a Mintel report, *Sports Goods Retailing*, January 2001, the figure in 1999 was 62 and in 2000 was 80.

2.2 UMBRO/SPORTS CONNECTION CELTIC AGREEMENT

2.2.1 *Sports Connection*

- 43 Sports Connection is currently in receivership. Sports Connection was the trading name of Florence Clothiers (Scotland) Ltd (in receivership). Florence Clothiers (Scotland) Limited is a wholly owned subsidiary of Sports Connection Ltd (in receivership).⁴⁸ Sports Connection was involved in the retail supply of replica football kit and other sportswear and sports equipment. Sports Connection had approximately 32 retail outlets, the majority of which were located in Scotland.⁴⁹
- 44 During the period of the infringement, **Mr Paul Stern** was the managing director and on the board of both Sports Connection and Sports Connection Ltd. **Mr Alistair Ross** was on the board of both companies as the buying director. Mr Ross subsequently moved to work with JD.
- 45 In the financial year ending 27 August 2000, Sports Connection had a total UK turnover of £35.243 million. On 25 February 2003, the joint receivers of Sports Connection sold part of its business and certain assets to Original Shoe Company Ltd.⁵⁰

2.2.2 *Umbro*

- 46 See paragraphs 39, 41 and 42 above.

2.3 ENGLAND DIRECT AGREEMENTS

2.3.1 *JJB*

- 47 See paragraphs 25, 26 and 27 above.

2.3.2 *Sportsetail*

- 48 Sportsetail is currently in administration. It was incorporated in September 1999 and until June 2000 was wholly owned by Hay & Robertson plc. Hay & Robertson plc's business consists of the sale of leisurewear and the exploitation

⁴⁸ On 30 January 2003, Blair Nimmo and Gerard Friar of KPMG were also appointed joint receivers of Sports Connection Ltd.

⁴⁹ According to a Mintel report, *Sports Goods Retailing*, January 2001, the figure in 1999 was 25 and in 2000 was 32.

⁵⁰ KPMG letter 25 March 2003 (doc 1108).

of a number of well known brands including the 'Admiral' brand. In June 2000, Hay & Robertson plc sold a minority stake (49 per cent) in Sportsetail to Sports Internet Group plc. Later that year, BSkyB plc acquired Sports Internet Group plc. In February 2000, Sportsetail was granted the exclusive right by the FA to operate the FA's 'England Direct' retail operations. During the period of the infringement, Sportsetail, amongst other things, operated the England Direct website and mail order business as well as a limited number of temporary and permanent retail outlets at UK airports.

- 49 During the period of the infringement, **Mr Lance Yates** was the CEO of Hay & Robertson plc and on the board of Sportsetail and **Ms Alison Eves** was the project manager at Sportsetail. From about 1 August 2000 **Mr David Smith** was the marketing director of Sportsetail but was not on the board. He joined Sportsetail from the FA.
- 50 In its first 15 months of trading up to 31 December 2000, Sportsetail had a total UK turnover of £174,576. On 2 April 2003, the joint administrators of Sportsetail sold its business to Chiddingfold Investments Ltd.

2.3.3 The FA

- 51 Founded in 1863, the FA is the governing body for football in England. The FA's rules govern the conduct of football in England and cover not only the playing of football but also the conduct of clubs and players more generally. The FA has devolved some of its powers to other bodies such as the FA Premier League Ltd. The FA is affiliated to FIFA⁵¹ and to UEFA,⁵² the European football governing body. The FA licenses Umbro to manufacture, supply and distribute the England team replica football kit and certain other England merchandise. The current licensing agreement terminates in 2004 but Umbro and the FA have announced an eight-year agreement which will follow. The FA also licenses other companies to manufacture and supply other England team merchandise but not replica football kit.
- 52 Until about 24 July 2000, **Mr David Smith** was the commercial manager of the FA. He subsequently moved to work at Sportsetail. **Mr Marc Armstrong** replaced Mr Smith. During the period of the infringement, the line manager of both Mr Smith and Mr Armstrong was **Mr Phil Carling**, the commercial director of the FA. During the period of the infringement, **Mr Paul Barber** was the marketing director of the FA and **Mr Nick Barron** was the marketing manager of the supporters' members club. None of these men was on the board of the FA.

⁵¹ Fédération Internationale de Football Association.

⁵² The Union of European Football Associations.

53 In the financial year ending 31 December 2000, the FA had a total UK turnover of £109.786 million.

2.3.4 Umbro

54 See paragraphs 39, 41, and 42 above.

3. Products

3.1 REPLICA FOOTBALL KIT

3.1.1 *Shirts, shorts and socks*

55 Replica football kit consists of authentic reproductions of the short- and long-sleeved shirt,⁵³ 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.⁵⁴ Replica football kit is produced by or on behalf of most football clubs in adult, junior and infant sizes. Infant replica football kit is usually sold as a single product whereas the shirts, socks and shorts of the junior and adult replica kits generally can be bought separately.⁵⁵

3.1.2 *Home, away, third, goalkeeper and special edition*

56 The vast majority of clubs in the English PL, the Bank of Scotland Premier League ('Scottish PL') and the Nationwide First, Second and Third Divisions have two or three kits which can be classified as either the 'home' or 'away'. A club's home kit consists of the kit worn by its players when competing in football matches at the club's own stadium and the away kit consists of the kit worn by its players when competing in football matches at the stadia of other clubs. Since it is not always possible to ensure that a team's away kit avoids similarity of colour and design with the home kit of another team, most of the larger teams will have a second away or 'third' or 'change' kit which can be worn as an alternative. There is also a different kit which is worn by the goalkeeper. The same applies to the national teams.

⁵³ Also called the 'jersey'.

⁵⁴ Replica shirts do not generally have players' names and numbers printed on them unless customers pay extra for this.

⁵⁵ See Allsports' WR on Rule 14 Notice section A, para 1 ((App 1, doc 10 to Supplemental Rule 14 Notice).

- 57 A football team's home and away shirts will invariably differ greatly in colour and design; the former usually follow a colour scheme and design historically associated with that team and the latter tend to be designed to avoid similarity of colour and design with the home kit of other teams wherever possible. The shorts and socks will be designed to match the shirt of the relevant kit and, like the shirt, are changed with each new kit launched.
- 58 Some clubs will also issue special edition kits commemorating particular events or successes. For example, MU launched a UEFA Champions League shirt for use when competing in that tournament in the 1998-99 season and another for the 1999-2000 season to mark the club's achievement in winning the UEFA Champions League final against Bayern Munich in 1999. For the 2001-2002 season, MU launched a centenary kit to mark the one hundred years since the Newton Heath club had become MUFC in 1902. The centenary kit was worn by the team as an away kit and replaced the away kit launched in October 2000.

3.1.3 Kit launches

- 59 A new kit launch has become an annual summer fixture for most football clubs in the English PL and Scottish PL. For example, in the run-up to the 2000-2001 season, only two of the twenty teams in the English PL (Bradford City and Southampton) did not launch either a new home or a new away kit. A club will normally wear the same home kit for two consecutive football seasons (which in the UK runs from August each year to the following May) before changing to a new home kit. The same applies to the club's away kit, but changes of home and away kits are normally staggered and take place at the start of consecutive football seasons.
- 60 By keeping a one year interval between changing their home kit and changing their away kit, teams can ensure that at least one new football kit (either home or away depending upon which has reached the end of its two year shelf life and which is only one year old) can be launched by the club immediately prior to the start of each new football season. England kits are usually launched on or around St George's day with alternate home and away kits each year. Celtic kits are often launched on or around St Patrick's day.
- 61 This pattern of keeping a one year interval between changing the home kit and changing the away kit can however be interrupted if the team changes its sponsor or kit manufacturer. For example, in 2000, MU launched five football kits (home, away, third and two goalkeeper kits) having signed a new £30 million sponsorship deal with Vodafone. Similarly, although Chelsea launched a new away kit in May 2000, due to a change of sponsor it launched a new home kit in May 2001 and a new away kit in August 2001.

3.1.4 'Replica Kit' and 'Replica Shirts'

- 62 In this decision, 'Replica Kit' means authentic reproductions of the short- and long-sleeved shirt, shorts and socks (home, away, third, goalkeeper and special edition) in adult, junior and infant sizes to which a football club or national football team's 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.
- 63 The most important element of a Replica Kit, in terms of retail sales, is the shirt. An internal report prepared by Umbro suggests that the sales ratio in 2001 between shirts, shorts and socks was 5:1:1.⁵⁶ Although professional footballers will choose whether to play in long- or short-sleeved shirts when competing for their team, with the exception of goalkeeper shirts, the vast majority of replica football shirts produced for sale in the UK are short-sleeved versions.⁵⁷ In this decision 'Replica Shirt' means the short-sleeved shirt (home, away, third and special edition) in adult or junior sizes. In some of the evidence quoted in this decision, the words 'replica kit' or 'kit' are sometimes used loosely in relation to Replica Shirts.

3.1.5 Umbro licensed Replica Kit

- 64 The Replica Kits which are the subject of this decision are Replica Kits manufactured and supplied by Umbro under licence from Celtic, Chelsea, MU, Nottingham Forest and the FA. The following table sets out relevant details including relevant launch dates for each of the Replica Kits from 1999-2001:

⁵⁶ Doc 3/90 (CK28) and see Umbro's unit sales figures (Umbro response dated 2 November 2001 to section 26 Notice dated 18 October 2001, tab 5b (doc SA19); Allsports agreed, WR on Rule 14 Notice section A, para 4 (App 1, doc 10 to Supplemental Rule 14 Notice). By turnover based on the adult size RRP's relevant to this decision, this would represent a ratio of approximately 23:2:1.

⁵⁷ Allsports agreed that this was correct: WR on Rule 14 Notice section A, para 1 (App 1, doc 10 to Supplemental Rule 14 Notice). MU also agreed: WR on Rule 14 Notice para 14 (App 1, doc 11 to Supplemental Rule 14 Notice).

Table 1 Umbro licensed Replica Kits April 1999 - August 2001

	England	MU	Chelsea	Celtic	Nottm Forest
99	H 23.04.99 GK H 14.07.99 A 07.10.99 A 03.11.99	3 rd 15.07.99 A 11.08.99 A 09.09.99	H 14.05.99 GK 05.08.99	GK 12.08.99 H 14.10.99 ⁵⁸	A 27.05.99 3 rd 28.07.99 GK 12.08.99
00	None	H 01.08.00 GK 01.09.00 GK 3 rd 22.09.00 3 rd 29.09.00 A 18.10.00	A 11.05.00 GK 25.07.00	A 19.05.00 GK 25.07.00	H 07.07.00 A 07.07.00 GK 17.08.00
01	H 23.04.01	Cent 20.07.01 GK H 17.08.01	H 03.05.01 A 23.08.01	H 16.03.01	N/A
T £m	£[...]m[C]	£[...]m[C]	£[...]m[C]	£[...]m[C]	£[...]m[C]

H – home, A – away, GK – goalkeeper (home, away or 3rd where known), Cent – centenary (worn as away)

T – Umbro turnover for relevant Replica Kit for the year ending 31 December 2000

Source: Umbro response dated 3 December 2001 to section 26 Notice dated 18 October 2001 (doc 6/457) and Umbro e-mail dated 1 April 2003 (doc 1121).

3.2 OTHER LICENSED MERCHANDISE

65 In addition to Replica Kits, teams license undertakings to manufacture and supply other merchandise. Most of the larger clubs and the national teams have extensive ranges of merchandise available ranging from sportswear and casual wear through to bags, mugs and pens. Some limited ranges of sportswear will often be licensed to the Replica Kit manufacturer and will bear that manufacturer's trademarks and occasionally those of any sponsor. In this decision, such merchandise (excluding Replica Kit) is referred to as 'Other Licensed Merchandise'.

3.3 TRADE MARK OWNERS ('LICENSORS')

66 In the UK, a football club or a national team's representative body⁵⁹ will typically enter into an agreement with a manufacturer of sportswear under which the manufacturer is granted the exclusive right to manufacture, distribute, promote and/or sell its Replica Kit. In many cases, the agreement will extend to Other Licensed Merchandise. In return, the manufacturer pays a royalty which may be made up of any combination of various lump sum payments, bonus payments (if the team plays in the later stages of high profile tournaments, for example) or percentages of relevant turnover.

67 Such agreements have generally been for a period of four years although recently far longer licences have been negotiated. For example, Umbro recently

⁵⁸ Re-launched home shirt with new fabric. Original home shirt launched 6 August 1999.

⁵⁹ For example, in the case of the England national team the representative body is the FA.

negotiated a 10 year deal with Chelsea and has announced an eight year deal with the FA for the England Replica Kits. Nike, which replaced Umbro as MU's Replica Kit manufacturer in August 2002, has negotiated a 13 year deal with MU. That deal is also unusual in that Nike is exclusively licensed to manufacture and distribute all MU's merchandise (with the exception of television rights and video-related products and services) and to operate MU's retail outlets.

68 Some clubs have recently looked to limiting distribution to their own retail operations rather than, as traditionally has been the case, the manufacturer acting as wholesaler of the Replica Kit.⁶⁰

3.4 MANUFACTURERS ('LICENSEES')

69 Umbro is a significant manufacturer of Replica Kit in the UK. During the period of the infringement, the England and MU Replica Kits that it manufactured were the highest selling Replica Kits in the UK. The OFT estimates that during 2000, Umbro Replica Kit sales accounted for [...] per cent of total football kit (including Replica Kit) sales in the UK.⁶¹ The other key manufacturers and distributors of Replica Kit in the UK are other major sports clothing manufacturers such as Nike, Reebok International Ltd and Adidas (UK) Ltd.

3.5 RETAILERS

70 In 1999 there were estimated to be around 3,500 sports retail outlets in the UK, of which over 1,000 were part of large multiple chains.⁶² Surveys of retail prices for Replica Shirts conducted by OFT officials and the responses to the section 26 Notices have, however, confirmed that a large proportion of smaller independent stores do not regularly stock Replica Kit and the available figures suggest that distribution and supply is heavily concentrated within the larger multiple chains. For example, the OFT estimates that JJB alone supplied around [...] per cent of all Replica Kit sold in the UK in 2000.⁶³

71 Allsports queried the view that a large proportion of smaller retailers do not stock Replica Kit. In Allsports' experience, often a local team's Replica Kit

⁶⁰ See further MU's WR on Rule 14 Notice paras 22-25 (App 1, doc 1 to Supplemental Rule 14 Notice).

⁶¹ Based on Umbro turnover figures referred to in table 1 above, assuming a conservative retail mark-up of 20 per cent and dividing this figure by the estimated total for sales of football kit of £220m (see para 83).

⁶² Key Note Market Report 2000, *Sports Clothing & Footwear*, p.19.

⁶³ Based on JJB's turnover for all replica kit products (not just limited to football) given in KPMG LLP report p.11, second table attached to JJB's WR on Rule 14 Notice (App 1, doc 11 to Supplemental Rule 14 Notice), deducting a notional figure for non-football replica sports kit items and dividing this figure by £220m (see para 83).

would be stocked in such a shop. However, Allsports admits that this contrasts with the much larger range commonly found at Allsports.⁶⁴ Taking into account the responses to section 26 Notices, the OFT takes the view that the difference of view is not material. A number of the retailers have confirmed⁶⁵ the importance to their businesses of stocking at least the major Replica Kits in terms of reputation as well as in terms of profitability, and in particular at launch. Sports Connection, for example, has stated⁶⁶ that *'During the immediate new kit launch periods, the new replica kit can account for up to 20% of turnover which in itself can rise by a third during kit launch periods of trading. Accordingly, it is very important to maintain supply of that product.'*

3.6 CUSTOMERS

3.6.1 Fans

72 Football supporters of a particular team wear Replica Kits to show their attachment and commitment. This was highlighted by the First Report of the Football Task Force which concluded that:⁶⁷

'Football support is not a normal customer-business relationship, but an expression of loyalty by a person to a football club. This is a characteristic accepted and promoted by all in the game, including the FA Premier League and its clubs. At our public meetings and in all submissions we received from football supporters, a foundation of passion and loyalty was evident.

Football support remains largely a matter of loyalty, and fans of English clubs are not "customers" who will move to a different team if theirs is unsuccessful'.

73 The report argued that as a consequence of this supporter behaviour, football clubs differ from most other commercial concerns in that they *'have a loyal*

⁶⁴ Allsports' WR on Rule 14 Notice p.11 (App 1, doc 10 to Supplemental Rule 14 Notice).

⁶⁵ See in particular Sports Soccer's WR on Rule 14 Notice paras 2.2.4, 2.2.28-29 re. reputation (App 1, doc 5 Supplemental Rule 14 Notice); JD's WR on Rule 14 Notice paras 11, 29 and 30 re. reputation (App 1, doc 7 Supplemental Rule 14 Notice); and Sports Connection's WR on Rule 14 Notice p.7 re. profitability (App 1, doc 14 Supplemental Rule 14 Notice).

⁶⁶ Sports Connection's WR on Rule 14 Notice p.7 (App 1, doc 14 Supplemental Rule 14 Notice) and Maclay Murray & Spens letter for Sports Connection dated 3 November 2002 responses para 3 (App 1, doc 25 Supplemental Rule 14 Notice).

⁶⁷ *Football: Commercial Issues*, a submission by the Football Task Force to the Minister for Sport dated 22 December 1999, paras 4.1-2, <http://www.culture.gov.uk/sport/QuickLinks/publications/default.htm?properties=archive%5F1999%2C%2C>.

customer base that is committed to the brand and will not go elsewhere if the quality of the product deteriorates and *'Clubs, as they themselves acknowledge, are effective monopolies, in that their fans will not transfer their affections or custom to other clubs'*.⁶⁸ This conclusion is also supported by the findings of a report commissioned by the FA in 1998 which observed that:⁶⁹

'The commitment of football supporters to their club is of a different order of magnitude to other kinds of "brand loyalty", such as deciding which supermarket chain to buy from...Football supporters are likely to support a club almost from the cradle to the grave'.

and

'The temptation to exploit what is essentially a monopoly position has not always been resisted. Football supporters do not shop around like casual buyers. Parents do not tell their children that they cannot have the Tottenham shirt they want but must settle for an Arsenal one because it is on special offer.'

- 74 The First Report of the Football Task Force also refers to a report it commissioned from the Sir Norman Chester Centre at Leicester University and states:⁷⁰

'The researchers pointed out the monopoly nature of this activity - that fans want to buy only their club's shirt, so there is no realistic competition between producers to bring the price down...'

- 75 In an internal email dated 3 May 2001, Mr Armstrong of the FA notes in discussions as to whether discounts should be given on purchases of Replica Kit from Sportsetail to members of the FA's *'England Members Club'* that:⁷¹

'As we discussed, there is an argument for not offering any kind of discount on the England kit, because fans are likely to buy it even without a discount. If this was the case, any discount on Umbro products would be for Umbro products, excluding kit.'

⁶⁸ *Football: Commercial Issues*, paras 1.12 and 4.7 respectively.

⁶⁹ Sir John Smith report *Football, its Values, Finances and Reputation* (1998) commissioned by the FA as quoted by the Football Task Force in *Football: Commercial Issues* at paras 4.3 and 6.4 respectively.

⁷⁰ *Football: Commercial Issues*, para 6.5.

⁷¹ The FA's response dated 9 October 2001 to section 26 Notice dated 12 September 2001 (doc SA16, tab 7).

- 76 The FA subsequently agreed a 5 per cent discount on all merchandise other than Replica Kit.⁷²
- 77 Allsports commented that where a local team is in a lower division, fans often additionally support another team, in the English or Scottish PL for example.⁷³

3.6.2 Patterns of Demand

REPLICA KIT

- 78 Supporter loyalty is often reflected in Replica Kit purchases since Replica Shirts in particular⁷⁴ represent a highly visible method of expressing support for a particular football team and identifying oneself as a supporter of that particular football team to others. This is also relevant for supporters who are prevented from attending football matches due to cost or the geographical distance between their homes and their team's stadium.
- 79 Due to the launch cycles, Replica Kit generally has a shelf life of two years. Supporter loyalty combined with the typical two year shelf life of Replica Kits induces a fairly predictable pattern of repeat purchases as supporters can easily identify which of the strongly branded Replica Kits are up to date with the kit worn by their teams and which are effectively obsolete insofar as the team's players will not be seen competing in that kit again.
- 80 Sports Connection commented that older versions of Replica Kit are still worn by some fans and that the cycle of redesign and re-launch every two years is an essential aspect of a product which is worn as a fashion item.⁷⁵ Some retailers have commented that Replica Shirts are often worn as part of general leisure wear.⁷⁶

⁷² An FA internal e-mail dated 13 June 2001 from Mr Armstrong to Mr Barron; the FA's response dated 9 October 2001 to section 26 Notice dated 12 September 2001 (doc SA16, tab 7).

⁷³ Allsports' WR on Rule 14 Notice section A, para 8 (App 1, doc 10 to Supplemental Rule 14 Notice).

⁷⁴ And particularly home Replica Shirts, see MU's WR on Rule 14 Notice para 14 (App 1, doc 1 to Supplemental Rule 14 Notice).

⁷⁵ Sports Connection's WR on Rule 14 Notice, p.4 (App 1, doc 14 to Supplemental Rule 14 Notice).

⁷⁶ Allsports' WR on Rule 14 Notice section A, para 4 (App 1, doc 10 to Supplemental Rule 14 Notice); Sports Soccer's WR on Rule 14 Notice para 2.2.1 *et seq* (App 1, doc 5 to Supplemental Rule 14 Notice).

- 81 The pattern of demand also tends to be front loaded.⁷⁷ Launch dates and the first half of the football season are crucial periods for sales of Replica Kit when manufacturers, retailers and football clubs seek to maximise sales and revenues. The OFT estimates that approximately 90 per cent of the total sales of a Replica Kit occur in the first year following its launch, and in turn 90 per cent of those sales occur between the date on which the Replica Kit is launched (for league clubs, usually between June and September) and Christmas of the same year.⁷⁸
- 82 Whereas the pattern of demand for Replica Kit of football clubs tends to cluster around kit launches, the pattern of demand for national team Replica Kit appears somewhat more volatile and is more dependent upon success in qualifying to compete in international tournaments such as the UEFA European Football Championships or the FIFA World Cup.⁷⁹ Sales of England Replica Kit were significantly boosted by the UEFA European Football Championships held in Belgium and the Netherlands in June 2000 and July 2000 ('Euro 2000'), with Umbro's June monthly management report prepared on 14 July 2000 confirming:⁸⁰

'Euro 2000 proved to be a great success for most of our UK accounts – with strong replica sales from some of the key accounts. JJB in particular reported very high like for like sales based on England shirt sales. Their sales reached a peak in one week of [...] units – Umbro finished the tournament with tight England stocks having sold out of all adult sizes'.

- 83 Subsequently, following England's 5-1 defeat of Germany in a World Cup qualifying game in September 2001, it has been estimated that as a direct result

⁷⁷ Allsports agreed. WR on Rule 14 Notice p.11 (App 1, doc 10 to Supplemental Rule 14 Notice). Sports Connection agreed commenting on the importance of Replica Kit to retailers. WR on Rule 14 Notice p.7 (App 1, doc 14 to Supplemental Rule 14 Notice).

⁷⁸ MU agreed, WR on Rule 14 Notice para 27 (App 1, doc 1 to Supplemental Rule 14 Notice); Umbro broadly agreed, WR on Rule 14 Notice para 36 (App 1, doc 4 to Supplemental Rule 14 Notice); JD agreed that towards the end of the two year cycle prices are discounted heavily, WR on Rule 14 Notice para 22 (App 1, doc 7 to Supplemental Rule 14 Notice); Allsports agreed, WR on Rule 14 Notice section A, para 1 (App 1, doc 10 to Supplemental Rule 14 Notice); JJB said 80-90 per cent, WR on Rule 14 Notice paras 4.2 and p.15 (App 1, doc 11 to Supplemental Rule 14 Notice); Sports Connection agreed, Letter from Maclay Murray & Spens for Sports Connection of 3 October 2002 (App 1, doc 25 to Supplemental Rule 14 Notice).

⁷⁹ MU agreed. WR on Rule 14 Notice para 27 (App 1, doc 1 to Supplemental Rule 14 Notice). The England national team has been described by Steven Lloyd of the Football Unit of KPMG as having a more 'fickle fan base' than most league clubs and consequently 'sales of the England kit tended to reflect the relative success of the team' (BBC Online News: Business Section, 9 April 1999 http://news.bbc.co.uk/1/hi/business/the_economy/314473.stm).

⁸⁰ Umbro's response dated 2 November 2001 to section 26 Notice dated 18 October 2001 p.3 (doc SA19, folder 1, tab June 00).

of this win £10 million was spent on England Replica Shirts in the weeks immediately after the game.⁸¹ Demand for Replica Kits in general reached a peak in the early 1990s, which coincided with increased levels of interest in football in general, especially in England. This followed the success of the 'Italia 90' FIFA World Cup Finals and the introduction of the English PL in 1992 when live televised games became more frequent and crowd numbers steadily increased. Demand has since fallen although surveys suggest '*...there is a permanent demand for replica kit, despite earlier fears that it would turn out to be a fad*'.⁸² Concerns over pricing and frequency of kit changes were expressed by the First Report of the Football Task Force and other commentators and a '*flood of negative publicity from such practices has seen the market begin to flatten out...*'.⁸³ The prices of some clubs' Replica Kits have fallen and a more sustainable level of demand for Replica Kits appears to have emerged in the second half of the 1990s. In 2000 total sales of football kit (including Replica Kits) in the UK were estimated at approximately £220 million.⁸⁴ In 2001, sales have been estimated to be in the region of £238 million.⁸⁵

OTHER LICENSED MERCHANDISE

- 84 Other Licensed Merchandise is not subject to the same demand patterns or distribution as Replica Kit and sales in value terms are much smaller relative to Replica Kit.⁸⁶

4. Umbro's Supply Arrangements

- 85 In the following paragraphs of this part and to a limited extent in Part III, there are references to facts which arose before the Act came into force on 1 March 2000. The OFT notes the view of the CCAT expressed in *Napp* concerning such facts:⁸⁷

'It goes without saying that there can be no infringement of the Chapter I and Chapter II prohibitions on any date earlier than 1 March 2000... Nonetheless, in a case such as the present it is impossible to understand the situation as it was during the period of alleged infringement...without also understanding how that situation arose as a result of facts arising

⁸¹ Mintel Retail Intelligence *Sportswear Retailing*, January 2002, p.28.

⁸² Retail Intelligence *Consumer Goods UK* No 513, November 2000, p.107.

⁸³ Mintel Retail Intelligence *Sports Goods Retailing*, January 2001, p.24.

⁸⁴ Mintel Retail Intelligence *Sports Goods Retailing*, January 2001, p.25, figure 9. This may include a relatively small amount for associated products.

⁸⁵ Mintel Retail Intelligence *Sportswear Retailing*, January 2002, p.21, figure 6.

⁸⁶ Allsports agreed. WR on Rule 14 Notice section A, para 8 (App 1, doc 10 to Supplemental Rule 14 Notice).

⁸⁷ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1 at [217], [2001] Comp AR 1.

before 1 March 2000. In our view it is relevant to take facts arising before 1 March 2000 into account for the purpose, but only for the purpose, of throwing light on facts and matters in issue on and after that date.'

86 The OFT takes the view that the facts recorded in this section (and in other parts of this decision) which arose before 1 March 2000 throw light on facts and matters in issue on and after 1 March 2000.

4.1 UMBRO'S DISTRIBUTION POLICY & SUPPLIES TO SUPERMARKETS

4.1.1 *The distribution policy*

87 During the period of the infringement, Umbro operated a selective distribution policy both in relation to its own products and also for Replica Kit and Other Licensed Merchandise it manufactured. Umbro only supplied to selected so-called 'authentic sports retailers', defined by Umbro as those retailers which normally traded in sporting goods. Umbro did not supply and resisted supplying mass-market retailers such as the major supermarket chains.

88 An undated document entitled 'Selective Distribution Policy' set out the criteria which all Umbro sales and marketing personnel could use '*in order to ward off retail organisations which do not fall into Umbro's selective group*'.⁸⁸ The document made clear that such retail organisations included '*mass market companies*' and that in terms of such retailers '*probably THE most important and relevant criteria*' was that other products sold should not detract from the quality of Umbro products. The document states:

'We can quite legally refuse to supply our product into a store such as a supermarket, whereby the consumer would find Umbro product situated between baked beans, toilet rolls and ladies' underwear.

Umbro can require that other goods sold will not be to the detriment of its products or deter consumers entering the shop who are seeking to buy sportswear.'

89 During the period of the infringement, Umbro also precluded retailers from selling Umbro licensed Replica Kit purchased from Umbro other than from their own retail outlets. Documents sent from Umbro to the retailers concerning the handling of a Replica Kit launch refer to the prohibition on sales of Replica Kit other than through those retailers' named outlets. For example, the MU Kit

⁸⁸ Doc 3/92 (KMG1), p.2.

Launch Protocol for the 1 August 2000 home Replica Kit launch expressly provided that:⁸⁹

‘This product must only be sold through your named retail outlets only and under no circumstances sold onto a third party.’

90 As of September 2002, Umbro has indicated that it *‘does not have an active retail distribution system or policy. The document setting out the retail distribution [policy] already in the possession of the OFT is no longer used as an operational document.’*⁹⁰ However, the OFT is satisfied that, during the period of the infringement, this policy was in operation.

4.1.2 Supplies to supermarkets

91 A number of supermarkets⁹¹ confirmed that, as at September 2001, they had made various attempts to obtain supplies of Replica Kit, including from Umbro, but without success. Asda Stores Ltd has made limited purchases of Umbro licensed Replica Kit on the grey market⁹² and has retailed such kits at significant discounts. For example, it retailed the England home adult Replica Shirt launched in April 2001 at £29.99 as compared to a ‘high street’ price of £39.99.⁹³ Asda Stores Ltd was also in discussions in February 2001 with the FA and Umbro to try to obtain supplies of FA merchandise including the England Replica Kit. An internal FA e-mail dated 5 February 2001⁹⁴ reports on discussions with Asda Stores Ltd and states:

‘Had a further meeting with Asda representatives this morning, they are keen to do a deal as outlined in my last email, if you can confirm to them that they will be allowed to retail [...] kit at fair prices.

Fair prices means below high street, they understand that the sports retail

⁸⁹ Doc 3/155 (BJP8), last para.

⁹⁰ Umbro response to the section 26 Notice dated 13 September 2002 para 3 (App 1, doc 3 to Supplemental Rule 14 Notice).

⁹¹ Responses by Asda Stores Ltd and Tesco plc to section 26 Notices dated 5 September 2001 Q1 (Doc SA13 Part 1 and Part 2 respectively).

⁹² Purchases made by a retailer from distributors usually located outside the UK which are not authorised by Umbro to supply Umbro products in the UK.

⁹³ During the period of the infringement, £39.99/£40.00 for an adult Replica Shirt was perceived by retailers, clubs and manufacturers alike to be a ceiling price for such shirts, see further para 119 below.

⁹⁴ The FA’s response dated 9 October 2001 to section 26 Notice dated 12 September 2001 tab 7 (doc SA16).

trade may have a problem with this, but they are prepared to buy at [...] [C] from Umbro, in volumes [...] [C]

...

We need to talk so I can give you a real feel for where they are coming from, they are worried that their positioning may be out of kilter with what you want to do.....'

- 92 No supplies were made to Asda Stores Ltd during the period of the infringement. An internal FA e-mail dated 22 July 2001⁹⁵ from Mr Armstrong, commercial manager, to Mr Barber, marketing director, discusses the various issues surrounding the renewal of the England Replica Kit licence with Umbro. Mr Armstrong states:

'Product Pricing - I don't think that Umbro can set RRP's for England Kit but we should have an input into any discussions between Umbro and retailers about the price of the kit and associated products. This would be especially important in the case of any new England Supermarket deal.'

- 93 Tesco Stores Ltd has confirmed⁹⁶ that it requested supplies of Replica Kit from Umbro on 9 February 2001 but was refused on the grounds '*that they did not have sufficient capacity in their factories*'. Tesco Stores Ltd has on occasion obtained supplies on the grey market. Like Asda Stores Ltd, it has sold such kit at significant discounts. For example, it retailed, in April 2001, the MU adult Replica Shirt launched in August 2000 at £19.99 as compared to a 'high street' price of £39.99.

- 94 However, manufacturers and their licensors (i.e. the football clubs) generally have come under increasing pressure in recent years to supply supermarkets with Replica Kit. At a meeting between *inter alia* Mr McGuigan, CEO, and Mr Prothero, head of international & marketing, of Umbro and Mr Kenyon, Mr Richards, and his assistant, Ms Quinn, all of MU, on 16 August 1999⁹⁷ Umbro's selective distribution policy was discussed. Umbro's file note of the meeting prepared by Mr Prothero states that '*UMBRO believes there is an inevitability about the change in distribution mix but clearly at this point do not wish to lead it*'. A subsequent Umbro file note prepared by Mr Marsh, sports marketing director, of Umbro of a meeting between Mr Prothero and Mr Marsh

⁹⁵ The FA's response dated 9 October 2001 to section 26 Notice dated 12 September 2001 tab 7, p.5 embedded in an e-mail dated 30 July 2002 (doc SA16).

⁹⁶ Tesco's response to section 26 Notice dated 5 September 2001 App 2 para 2 (doc SA13 Part 2).

⁹⁷ Doc 3/85 (DPT12), last page.

of Umbro and Mr Richards and Ms Quinn of MU on 11 January 2000,⁹⁸ in relation to a *'reference [by Mr Richards] to distribution and the supposed Adidas deal that has been concluded with ASDA'*, refers to Umbro considering that *'it will only be a matter of time before the situation changes'*.

- 95 MU has confirmed⁹⁹ that it was opposed to supermarkets retailing its Replica Kit and, as indicated from the above meeting notes, Umbro was well aware of MU's opposition to it supplying supermarkets. In its written representations, MU has stated:

'The main problem is grey-market supplies, obtained below the wholesale price and thus available for discounting as a loss-leader...MU supplies merchandise to supermarkets, but not replica kit. MU's position is that, given the premium nature of the product, supermarkets are not an appropriate environment for replica kit. This objection is however based on brand, not price, considerations: loss-leading is conducted by supermarkets at little cost to themselves but at great cost to brand-owners.

Another factor is that supermarkets promoting grey-market supplies give a false impression of the availability of kit: they buy only a small amount, which they use as loss-leaders, but give the impression that supplies are plentiful. This can lead to criticism by consumers, who consider that the ...¹⁰⁰ product should also be supplied at the loss-leader price in other retail outlets.'

- 96 Umbro has confirmed that as of September 2002 it was *'actively in discussions with alternative retail outlets such as department stores, fashion retail outlets and supermarkets in respect of the distribution of replica football kit.'*¹⁰¹

4.1.3 Conclusion

- 97 The OFT is satisfied that during the period of the infringement, Umbro had no desire to supply alternative retail outlets such as supermarkets and did not do so. This policy was known to the FA and supported by MU as licensors. The OFT takes the view that Umbro's selective distribution system, and in particular its refusal or failure to supply the major supermarkets, while not objected to of

⁹⁸ Doc 3/84 (DPT11.)

⁹⁹ MU's WR on Rule 14 Notice paras 48-50 and OR on Rule 14 Notice pp.54 (line 32)-56 (line 1) (App 1, docs 1 & 2 respectively to Supplemental Rule 14 Notice).

¹⁰⁰ 'genuine' has been deleted as MU confirmed in OR that there is no difference between Replica Kit sold in supermarkets and in other retail outlets.

itself in this decision, nevertheless facilitated and reinforced the effectiveness of the price-fixing agreements or concerted practices described in this decision and protected major retailers from external competition.

4.2 MU'S CONCERNS TO MAINTAIN THE RETAIL PRICES OF ITS REPLICA KIT

98 Mr Richards of MU faxed Mr Marsh of Umbro on 24 March 1999,¹⁰² copying the document to key personnel at Umbro and MU, including Mr Kenyon. The fax explained why MU did not give formal approval for the creation of a new lower priced (£23.00) junior shirt. The fax is entitled 'Replica v Authentic Shirts'. In this fax, 'authentic' refers to Replica Shirts and 'replica' refers to a type of shirt which would not be identical to that worn by the players.¹⁰³ The fax states:

'We feel that production of a shirt for £10 less than the authentic devalues the product.

This season we are likely to win something and can expect very buoyant sales at the existing price.

The shift of business from the higher price to the lower price product will reduce our profitability.

I hope this direction leaves you with no doubt about our requirements for the Manchester United brand.'

99 At that time, Umbro's recommended retail price for the junior sized Replica Shirt was £32.99.

100 Following a meeting between Umbro and MU, in a responding fax dated 7 April 1999 from Mr Marsh to Mr Richards,¹⁰⁴ Umbro offered to compensate MU for its loss of margin in respect of the proposed lower priced junior shirt.¹⁰⁵ It then went on to offer compensation in respect of Replica Shirts if the retail price were to become £39.99 for the adult size and £29.99 for the junior size notwithstanding Umbro's recommended retail prices at the time of £42.99 and £32.99.¹⁰⁶

¹⁰¹ Umbro response to the section 26 Notice dated 13 September 2002 para 3 (App 1, doc 3 to Supplemental Rule 14 Notice).

¹⁰² Doc 7/551 U24.

¹⁰³ MU's WR on Rule 14 Notice para 55 (App 1, doc 1 to Supplemental Rule 14 Notice).

¹⁰⁴ Doc 7/551 U26 which begins, 'Further to our meeting this morning...'

¹⁰⁵ Paragraph 2 of the fax.

¹⁰⁶ Paragraph 5 of the fax.

101 In that fax, Umbro reiterated the concerns it had expressed to MU at having a RRP of £39.99 as this would be likely to result in retailers retailing even lower at £34.99:

‘In addition to this we have also aired our concerns regarding the £39.99 price point and the fact that this could instigate a price war with the jersey being marketed at £34.99.’

102 The fax goes on to say that if the retail price became £34.99, no further compensation would be offered.

103 On 5 August 1999, MU cancelled an order for 5,000 MU away shirts as a result of Umbro and MU failing to resolve their pricing issues. In a fax¹⁰⁷ from Mr Richards of MU to Mr Ronnie of Umbro copied to various senior personnel of both companies, MU made it clear that Umbro’s unacceptable cost prices had resulted in ‘*a highly disgruntled Licensor*’. Mr Richards went on to say, ‘*I hope this does not characterise our relationship going forward*’. The issue of cost prices came up again at a meeting of Umbro and MU on 16 August 1999¹⁰⁸ where some compromises were made by Umbro.

104 On 6 August 1999, MU, together with the other English PL clubs, gave assurances to the OFT that they would not prevent dealers from discounting Replica Kit. In September 1999, the Umbro group wrote to all its dealers to confirm that they also would not take any such action.¹⁰⁹

105 By the beginning of 2000,¹¹⁰ Umbro was in negotiations with respect to the renewal of the key MU Replica Kit licensing and supply agreement (‘Licensing Agreement’) which was ultimately awarded to Nike. A file note¹¹¹ prepared by Mr Marsh of Umbro of a meeting between Mr Prothero and Mr Marsh of Umbro and Mr Richards and Ms Quinn of MU on 11 January 2000, refers to the main purpose of the meeting being the issue of the price of Replica Shirts for the 2000/2001 season. The note states:

‘[MU h]aving been quoted [by Umbro] that the price of the licensed jersey would retail at £39.99 with a subsequent wholesale selling price that enables the club to gain its usual margin...[Steve Richards] is somewhat aggrieved to learn that the w[hole]s[ale] p[rice] and subsequent rrp will be £42.99. His main issue is that he believes the market place will not put

¹⁰⁷ Doc 3/86 (DPT13).

¹⁰⁸ Doc 3/85 (DPT12) para 3.

¹⁰⁹ See paragraph 2 above.

¹¹⁰ Umbro’s WR on Rule 14 Notice para 81 (App 1, doc 4 to Supplemental Rule 14 Notice).

¹¹¹ Doc 3/84 (DPT11).

the jersey at £42.99 and will merely retail the product at £39.99 and subsequently believes that there is no way that they can market the product at anything above £39.99.

...he believes that the onus is on UMBRO...

We subsequently tried to find a solution to the issue but agreed to adjourn and review the matter internally and come back to the table.

Upon the commencement of the debate we demonstrated the fact that we have been a willing and able partner... Unfortunately these actions do not seem to be taken into account when discussing this particular issue’.

106 MU has said:¹¹²

’12. ...The MU brand is an extremely important asset which MU recognises needs to be both nurtured and protected. It is a high-quality brand with a significant heritage built up over a period exceeding 35 years. In keeping with this heritage and quality, the brand is not one which is naturally associated with poor-quality products or performance.

13. At several critical points...the [OFT] mistakes MU’s concern about brand for concern about the retail price charged by other suppliers of MU replica kit...

19. ...Quality is extremely important: consumers expect that sports apparel items will survive rough wear and the frequent washing which rough wear necessitates...

21. ...On the one hand [MU]...wanted to protect the brand by ensuring a high quality product; but on the other hand it needed to ensure that the resulting wholesale price which Umbro charged it enabled MU to achieve retail margins consistent with its experience of the recognised price points.’

107 However, it cannot be said that MU’s actions, prior to or during the period of infringement, were all only legitimate attempts to protect the value of its brand. There are three interlocking issues which come out of the above documents: first MU’s concerns about protecting the quality of the MU brand and in particular the question of whether Replica Kit should be sold in supermarkets;

¹¹² MU’s WR on Rule 14 Notice paras 12-13 & 17-21 (App 1, doc 1 to Supplemental Rule 14 Notice).

secondly MU's concerns about the wholesale prices that it had to pay Umbro for Replica Kit; and thirdly, MU's concerns about the retail price of Replica Kit.

- 108 These issues become more complex because both MU and Umbro both bought from and sold to each other; MU sold its trademark and bought Umbro Replica Kit and Umbro sold its Replica Kit and bought the MU trademark. MU's reference to being '*a highly disgruntled Licensor*' in its fax of 5 August 1999 following a discussion about wholesale prices illustrates this. In its note of the meeting on 11 January 2000,¹¹³ Umbro noted that it had demonstrated that it was a '*willing and able partner...*'. Mr Prothero has confirmed that negotiations between Umbro and MU were delicate¹¹⁴ and as a result, the OFT takes the view that Umbro, as a result, would have had a clear incentive to try and keep up retail prices where MU indicated that this was what it wanted.
- 109 MU has stated¹¹⁵ that the fax of 24 March 1999 only reflected MU's concern for its brand should a lower priced and lower quality product be manufactured. However, if MU simply wanted to protect its brand, in its responding fax of 7 April 1999¹¹⁶ after a meeting with MU, Umbro would not have persisted with its proposal for a lower quality and lower cost shirt and simply offered MU financial compensation for lost profits. Umbro must have felt that MU would be more concerned about a price war on Replica Shirts than it was about protecting its brand. Umbro, therefore, could not have been particularly sensitive to MU concerns other than those which related to price.
- 110 The OFT accepts that MU may have had concerns about its brand. However, the OFT considers that MU also had concerns, in particular, about the price competition that supplying supermarkets would bring about. This would have had a knock-on effect on the value of the MU licence which would have had an effect on MU's income.¹¹⁷ MU even refers to the primary problem in relation to supermarkets as '*loss leading*'¹¹⁸ since the supermarkets are, given the lower wholesale price paid, able to retail Replica Kit at a significant discount compared to MU. In addition, MU also states¹¹⁹ that the output of Replica Kit is limited and that stocks being held by supermarkets gives a misleading impression to consumers. The OFT is not aware of any serious technical barriers to the mass

¹¹³ Para 105 above.

¹¹⁴ Prothero w/s para 6-7 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

¹¹⁵ MU's WR on Rule 14 Notice paras 56-57) (App 1, doc 1 to Supplemental Rule 14 Notice).

¹¹⁶ Para 100 above.

¹¹⁷ See, Whelan 1st w/s para 4 and Sharpe w/s para 7 attached to JJB's WR on Rule 14 Notice para 5.5 (App 1, doc 11 to Supplemental Rule 14 Notice).

¹¹⁸ See para 95 above. This is not meant in its technical sense, see MU's OR on Rule 14 Notice p.55 line 2 (App 1, doc 2 to Supplemental Rule 14 Notice).

production of Replica Kit and so the OFT assumes that any limitation on production of Replica Kit must be simply to reduce supply and thus maintain prices.

- 111 In addition, if MU was solely concerned about its brand, it could have chosen not to allow the brand to be used on a plethora of Other Licensed Merchandise some of which, for example, was sold in supermarkets.¹²⁰ In any event, the primary way that MU protects the value of its brand is by success on the football pitch. Without this, the brand would have a greatly reduced value.

Conclusion

- 112 The OFT accepts that MU may have had concerns about its brand and engaged in legitimate commercial negotiations about the wholesale prices it had to pay to Umbro. However, 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.

4.3 EMBARGOS & LAUNCH PROTOCOLS

- 113 Umbro sends all retailers embargo agreements prior to them receiving deliveries of Replica Kit.¹²¹ Under the terms of Umbro's standard embargo agreement,¹²² the retailer is precluded from retailing the relevant Replica Kit prior to the launch date. The retailer is also precluded from selling the Replica Kit other than from its own retail outlets. In addition, Umbro circulates a kit launch protocol to retailers.¹²³ The terms vary slightly between different Replica Kit launches but generally the kit launch protocol sets out restrictions on advertising, publicity and pre-selling Replica Kits prior to their launch. In particular, all the kit launch protocols seen by the OFT provide:

'All advertising/publicity/pre selling of the kit must be approved by Umbro prior to its intended use date.'

- 114 Some embargo agreements expressly incorporate the terms of Umbro's kit launch protocol and similarly the kit launch protocols sometimes refer to the

¹¹⁹ See para 95 above.

¹²⁰ See MU's OR on Rule 14 Notice p.55 line 17 – p.56 line 1 (App 1, doc 2 to Supplemental Rule 14 Notice).

¹²¹ Umbro response to section 26 Notice dated 13 September 2002 para 4 (App 1, doc 3 to Supplemental Rule 14 Notice).

¹²² Doc 3/163 (BJP16).

prohibition contained in the embargo agreements precluding sales of Replica Kit other than through a retailer's named outlets.¹²⁴

Conclusion

115 While no objection is taken in this decision to such restrictions in themselves, the OFT regards the restrictions in Umbro's embargos and launch protocols, including the restriction on resale, as having supported Umbro's selective distribution policy and having restricted retail supplies. This facilitated and reinforced the effectiveness of the agreements described in this decision.

4.4 RECOMMENDED RETAIL PRICES

4.4.1 Retail and wholesale prices

116 Umbro recommends resale prices to all retailers it supplies for all its Replica Kit. Umbro's product lists for Replica Kit sent to retailers in advance of product launches not only described the relevant products including colour and specifications, provided details of the launch and expiry dates and listed the wholesale prices but also listed the recommended retail prices ('RRPs') applying.¹²⁵

117 In the summer of 1999, or possibly in 1998, JJB announced that it would not retail any adult Replica Shirt above £40.00.¹²⁶ At the time, this was approximately £3¹²⁷ below most Replica Kit manufacturers', including Umbro's, RRP for an adult Replica Shirt. JJB's announcement, combined with general unease over Replica Kit pricing,¹²⁸ put substantial downward pressure on RRP's for Replica Shirts. In turn, some retailers placed significant pressure on manufacturers to lower their wholesale prices to maintain their standard minimum mark-up.¹²⁹

¹²³ Doc 3/155 (BJP8) and 3/163 (BJP16).

¹²⁴ See para 89 above.

¹²⁵ Umbro response dated 2 November 2001 to section 26 Notice dated 18 October 2001, tab 5d/e (doc SA19).

¹²⁶ JJB's WR on Rule 14 Notice para 5.6 says that this happened in 1998 (App 1, doc 11 to Supplemental Rule 14 Notice). However, newspaper and analyst reports attached to DLA letter for JJB of 13 March 2003 (doc 1079) indicate that the announcement was somewhat later. The OFT does not regard the difference as material.

¹²⁷ Umbro's RRP for an adult Replica Shirt in 1999 was £42.99. In 1998 it had been £46.99 (see JJB's WR on Rule 14 Notice para 5.6 (App 1, doc 11 to Supplemental Rule 14 Notice)).

¹²⁸ *Football: Commercial Issues*, para 6.2 *et seq* (see footnote 70 above).

¹²⁹ See in particular WR of MU on Rule 14 Notice para 53 (App 1, doc 1 to Supplemental Rule 14 Notice) and WR of Umbro on Rule 14 Notice paras 53-59 (App 1, doc 4 to Supplemental Rule 14 Notice); c.f. Allsports' WR on Supplemental Rule 14 Notice p.15.

118 For Replica Kit launched in 2000 and 2001, Umbro's RRP's were as follows:

Table 2 Umbro's RRP's 2000-01

	Adult 2000	Adult 2001	Junior 2000	Junior 2001
Short-sleeved Replica Shirt¹³⁰	£42.99	£39.99	£32.99	£29.99
Long-sleeved Replica Shirt	£47.99	£44.99	£37.99	£34.99
Shorts	£21.99	£19.99	£18.99	£16.99
Socks	£8.99	£8.99	£7.99	£7.99

Source: Umbro response dated 2 November 2001 to section 26 Notice dated 18 October 2001 (doc SA19, tab 5d/e)

119 Thus, the RRP's for the replica shirts in particular fell between 2000 and 2001. However, during the entire period relevant to this decision (2000 and 2001), £39.99/£40.00 for an adult Replica Shirt and £29.99/£30.00 for a junior Replica Shirt was generally perceived by retailers, clubs and manufacturers alike to be a ceiling price for such shirts.¹³¹ These prices are often referred to as 'high street' prices. By 2001, the 'high street' price for a Replica Shirt had become the RRP.

120 During the period of the infringement, Umbro made it clear that it wished retailers to adhere to its RRP's or 'high street' prices for the resale of its Replica Kit and that discounting of its key products was detrimental to its brand. For

¹³⁰ Goalkeeper Replica Shirts had the same RRP's as short-sleeved Replica Shirts. However, due to relative unimportance in terms of sales, they are not included in the definition of a Replica Shirt.

¹³¹ DLA letter dated 30 August 2002 for the Blacks Subsidiaries paras 1-3 '*...the maximum price for adult replica shirts is £39.99...*' (App 1, doc 16 to Supplemental Rule 14 Notice); Sports Connection's WR on Rule 14 Notice p.10 '*The price of £39.99 was what S[ports]C[onnection] judged the market could bear*' (App 1, doc 14 to Supplemental Rule 14 Notice); JD's WR on Rule 14 Notice para 73 '*...£39.99 and...£29.99...correlates with the maximum market price*' (App 1, doc 7 to Supplemental Rule 14 Notice); Sports Soccer's WR on Rule 14 Notice para 2.2.37 '*...prices of £29.99 and £39.99 were recognised price points*' (App 1, doc 5 to Supplemental Rule 14 Notice); Umbro file note of a meeting on 11 January 2000 stating MU's view '*the market place will not put the jersey at £42.99 and will merely retail the product at £39.99*' (doc 3/84 (DPT11)) at para 105 above; Umbro's WR to the Rule 14 Notice para 33 '*£40 is currently perceived to be the ceiling price for a short sleeve adult replica shirt*' (App 1, doc 4 to Supplemental Rule 14 Notice).

example, JD and First Sport have confirmed¹³² that Umbro pursued policies designed to persuade retailers to adhere to its RRPs or ‘high street’ prices and that their own respective policies of generally pricing at Umbro’s RRPs were well known to Umbro. Umbro’s internal monthly management reports show that Umbro monitored retail prices at key stores operated by the largest retailers.¹³³ Umbro also discussed retail prices and retail pricing intentions with retailers as set out in Part III below.

- 121 Allsports stated that there is nothing unlawful about RRPs and that it is inevitable that retail prices will be discussed when wholesale prices are being set between manufacturers and retailers.¹³⁴ Umbro has commented that it pre-retails for some customers which involves labelling products with retail price-tags.¹³⁵ Umbro therefore needs to know what retail prices are going to be.
- 122 A number of retailers and manufacturers¹³⁶ have confirmed that there is a ‘standard’ industry mark-up for Replica Kit (and indeed other sportswear products) of 60 per cent plus VAT (where applicable). Umbro has confirmed¹³⁷ that it determines its wholesale prices by reference to its RRPs.¹³⁸ Its standard wholesale price is calculated back by applying the standard mark up of 60 per cent plus VAT. For example in 2001, with an RRP of £39.99, Umbro’s standard wholesale price for an adult Replica Shirt for all the clubs it manufactured for and the England team was £21.30.¹³⁹ Retailers also generally worked back from the RRP to negotiate their wholesale price. A note of a meeting¹⁴⁰ between Umbro and MU on 11 January 2000 illustrates this. It states:

¹³² JD’s WR on Rule 14 Notice paras 3, 69, 95 and 98 (App 1, doc 7 to Supplemental Rule 14 Notice) and First Sport WR on Rule 14 Notice paras 62, 64, 74 and 79 (App 1, doc 6 to Supplemental Rule 14 Notice).

¹³³ Umbro’s monthly management reports January 2000 to September 2001 (doc SA19).

¹³⁴ Allsports’ WR on Rule 14 Notice p.12 (App 1, doc 10 to Supplemental Rule 14 Notice).

¹³⁵ Umbro’s WR on Rule 14 Notice paras 45-6 (App 1, doc 4 to Supplemental Rule 14 Notice).

¹³⁶ Responses to section 26 Notices dated 5 September 2001 by TY McGurk Ltd (doc SA11); D&D Sports & Leisure Ltd (doc 5/364); John More Sports Ltd (doc 5/382); Exsports Ltd (doc 5/411); note of meeting with Nike (UK) Ltd (doc 5/409) and Umbro response dated 2 November 2001 to section 26 Notice dated 18 October 2001 (doc SA19). See also JJB’s WR on Rule 14 Notice para 5.3 (App 1, doc 11 to Supplemental Rule 14 Notice).

¹³⁷ WR of Umbro on Rule 14 Notice paras 33-37 (App 1, doc 4 to Supplemental Rule 14 Notice) Umbro response dated 14 October 2002 to the section 26 Notice dated 13 September 2002; (doc 3 to Supplemental Rule 14 Notice); see also WR of Sports Soccer on the Rule 14 Notice para 2.2.19 (App 1, doc 5 to Supplemental Rule 14 Notice).

¹³⁸ Most other manufacturers adopted similar policies in relation to Replica Kit thus reinforcing the perception of standard industry retail prices for Replica Kit.

¹³⁹ £21.30*1.6*1.175 = approx £40.

¹⁴⁰ Document 3/84 (DPT11), first page, last para.

‘Having been quoted that the price of the licensed jersey would retail at £39.99 with a subsequent wholesale selling price that enables the club to gain its usual margin [Mr Richards of MU]...is somewhat aggrieved to learn that the...rrp will be £42.99.’

- 123 MU has confirmed¹⁴¹ that under its agreement with Umbro it paid a fixed wholesale price dependent on Umbro’s RRP. Consequently if retail prices fell relative to a constant RRP, its profits from its own retail sales also fell.

CONCLUSION

- 124 Although the term ‘high street prices’ reflected the retailers’, licensors’ and manufacturers’ terminology for what they perceived should be the standard price, this did not equate with the competitive price.
- 125 The OFT accepts that RRPs are not unlawful when they simply operate as *recommended* prices. In this case, however, the OFT is satisfied that RRPs and ‘high street’ prices during the period of the infringement operated as focal points for concerted behaviour. Umbro applied pressure to certain retailers for them to adhere to RRPs or ‘high street’ prices, and the announcement by JJB (the largest retailer) on its policy for the pricing of Replica Shirts is likely to have acted as a similar focal point where the RRP was higher than this.
- 126 The OFT does not accept Allsports’ contention that it is inevitable that retail prices will be discussed whenever wholesale prices are being set between manufacturers and retailers, but, in any event, the use of RRPs as a focal point for concerted behaviour is certainly not inevitable. Although Umbro has made a general comment with respect to pre-retailing,¹⁴² no other parties have done so, and the OFT does not accept that the retail pricing communications referred to in this decision between Umbro and the retailers were limited to that context.

4.4.2 Retail mark-up & margins

- 127 In 2001, Umbro’s standard wholesale price (before any file discount for the Replica Shirts relevant to this decision) was £21.30 and in 2000 was £22.90.¹⁴³ Many retailers obtained significant discounts off Umbro’s standard wholesale

¹⁴¹ MU’s WR on Rule 14 Notice paras 30 & 53-54 (App 1, doc 1 to Supplemental Rule 14 Notice). See also clause 5.2 of Umbro/MU Licensing Agreement attached to DLA letter for MU of 25 March 2003 (doc 1106).

¹⁴² Para 121 above.

¹⁴³ Umbro response dated 2 November 2001 to section 26 Notice dated 18 October 2001, tab 6 (doc SA19).

price. The largest retailers obtained discounts of between [...] [C] per cent.¹⁴⁴ Even JD which, by its own account, is a small retailer of Replica Kit obtained a discount of [...] [C] per cent.¹⁴⁵ Actual wholesale prices paid by retailers in 2001 for an adult Replica Shirt therefore varied from around £[...] [C] through to the maximum wholesale price of £21.30.

- 128 Those retailers selling an adult Replica Shirt at £39.99 who paid Umbro's standard wholesale price enjoyed mark-ups excluding VAT very close to 60 per cent. The largest retailers enjoyed average mark-ups in excess of [...] [C] per cent excluding VAT. Umbro has confirmed¹⁴⁶ that retail margins on Replica Kit are high by comparison with many other sportswear and leisurewear garments although a KPMG LLP report prepared for JJB indicates JJB's gross margins are not '*excessive or out of line with those which other retailers, and in particular clothing retailers, are achieving*'.¹⁴⁷
- 129 Sports Soccer has confirmed that its business model is to sell large volumes at retail prices discounted from Umbro's RRP. Sports Soccer is of the view¹⁴⁸ that it can sell at least [...] [C] times the volume of stock of its competitors when applying a [...] [C] per cent discount against Umbro's RRP in 2000 which would generate satisfactory profits given the extra volumes.
- 130 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

¹⁴⁴ Umbro's WR on Rule 14 Notice para 35 (App 1, Doc 4 to Supplemental Rule 14 Notice); Sports Soccer's WR on Rule 14 Notice para 2.2.20 (App 1, doc 5 to Supplemental Rule 14 Notice).

¹⁴⁵ JD's WR on Rule 14 Notice paras 11 and 16 (App 1, doc 7 to Supplemental Rule 14 Notice).

¹⁴⁶ Umbro's WR on Rule 14 Notice para 53 (App 1, doc 4 to Supplemental Rule 14 Notice). Sports Soccer has similarly made reference to the need for other retailers to maintain high margins on Replica Kit in particular Replica Shirts, letter from CMS Cameron McKenna for Sports Soccer of 20 August 2002 pp.9-10 (App 1, doc 8 to Supplemental Rule 14 Notice).

¹⁴⁷ Submission prepared in response to the Rule 14 Notice, para 3.3.5 based on OneSource '*on-line "advanced search" function, using the selection parameters of the top 100 companies by turnover in the Primary Industry group of "Retail (apparel)"*' attached to JJB's WR on Rule 14 Notice (App 1, doc 11 to Supplemental Rule 14 Notice); JJB has also indicated that its (gross) margin was about [...] [C] per cent if it sold at RRP, Sharpe w/s para 21 attached to JJB's WR on Rule 14 Notice (App 1, doc 12 to Supplemental Rule 14 Notice); Sports Soccer has indicated that its gross margin on Replica Shirts is about [...] [C] per cent (WR on Rule 14 Notice para 3.2.26-7 and Annex 2 (App 1, doc 5 to Supplemental Rule 14 Notice)).

¹⁴⁸ WR of Sports Soccer para 2.2.21 (App 1, doc 5 to Supplemental Rule 14 Notice); letter from CMS Cameron McKenna for Sports Soccer of 20 August 2002 p.10 (App 1, doc 8 to Supplemental Rule 14 Notice).

early September 2001 Sports Soccer discounted these kits at launch. Similarly, Sports Soccer has confirmed¹⁴⁹ 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.

CONCLUSION

- 131 The fact that there was a standard mark-up in this industry indicates that the parties had to be vigilant to avoid collusion. The OFT regards the mark-up obtained on Replica Kit and Replica Shirts as sufficient to allow for discounting and a wider variety of prices than was seen during the period of the infringement. JJB, Sports Soccer and the major supermarkets, in particular, have shown that significant discounting on Replica Kit is a commercially viable option.

5. Activity in the retailing of Replica Kit prior to 1 March 2000

5.1 JJB

- 132 As stated in paragraph 119 above, JJB announced in the summer of 1999, or possibly in 1998, that it would not retail any adult Replica Shirts above £40.00. That put significant pressure on wholesale and retail prices at the time.
- 133 In 1998/1999, Sports Soccer significantly increased its presence on the high street and established itself as a major sports goods retailer.¹⁵⁰ Its policy was (and is) to discount heavily and as such it became a key competitor of JJB. JJB had responded in 1999 and early 2000 operating, amongst other things, a general 20 per cent discount on all products including Replica Kit at strategic outlets near to Sports Soccer.¹⁵¹ The following documents illustrate this.
- 134 A letter dated 21 May 1999¹⁵² from the general manager of Nike¹⁵³, Mr. Tucker, to the chairman of Rangers football club, Mr. Murray, referred to JJB's announcement that JJB planned to sell all Replica Shirts at £40.00. It stated:

¹⁴⁹ Sports Soccer's response dated 4 October 2002 to section 26 notice dated 13 September 2002 (App 1, doc 17 to Supplemental Rule 14 Notice).

¹⁵⁰ Umbro's WR on Rule 14 Notice para 56 (App 1, doc 4 to Supplemental Rule 14 Notice).

¹⁵¹ JJB's WR on Rule 14 Notice para 5.8 (App 1, doc 11 to Supplemental Rule 14 Notice).

¹⁵² Doc 4/296 (SH02) p.1.

'However in the short term we face restricted options in that the production is well under way and my objective is to avoid the JJB action sparking any kind of price war and thereby depress further the value of replica in the mind of the consumer.'

135 An internal Nike letter dated 24 October 1999 states:¹⁵⁴

'Subject: JJB – Very important

...

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

I think we need possibly...[Gary Schammel] and Jim to try and talk some sense into the two companies otherwise this will cau[se] massive problems in the run up to Xmas.

I realise this is dodgy legal ground but it is certain to be on David Makin[']s [of JD] agenda at footwear pre- line on Monday and possibly Tom Knight[']s [of Blacks] today?'

136 However, Umbro's monthly management report for April 2000¹⁵⁵ referred to JJB having ceased its blanket discounting for the first time in six to nine months, but questioned for how long that would persist. In fact, that point appeared to mark the change in JJB's pricing policy.

137 It should, however, be noted that, according to JJB, it had operated a consistent policy of launching '*new kit*' at high street prices since 1996.¹⁵⁶

5.2 SPORTS SOCCER AND DEBENHAMS

138 An internal Nike e-mail dated 25 October 1999¹⁵⁷ reporting on a recent meeting with Sports Soccer states:

'Met with Sean [Nevitt of Sports Soccer] today. Broached the subject of Football Replica at £30 and as we both expected his answer was "This is

¹⁵³ References to Nike (UK) Ltd documents in this section are incorporated by reference to paras 58-90 Umbro's WR on the Rule 14 Notice in note 30 of the Supplemental Rule 14 Notice.

¹⁵⁴ Doc 4/288 (NW11).

¹⁵⁵ Doc 3/79 (DPT5).

¹⁵⁶ JJB's WR on Supplemental Rule 14 Notice para 2.64.

a direct attack at JJB, we must be seen to be competing in the Football market". "During the period since JJB have taken an extra 20% off Replica at £39.99 we have seen a dramatic dip in Football Replica sales".

- 139 An Umbro file note prepared by Mr Attfield, Sports Soccer's account manager, on 1 March 2000¹⁵⁸ of a meeting between Mr Attfield and Mr Nevitt, [...] buying director of Sports Soccer, on 22 February 2000 states:

'Discussed prices of England jerseys, shorts and socks.

Indications from S[ean]N[evitt of Sports Soccer] are that the kit will be:-

Jersey	j[u]n[io]r £24 s[e]n[io]r £32
Shorts	j[u]n[io]r £14 s[e]n[io]r £18
Socks	j[u]n[io]r £6 s[e]n[io]r £7

Called off England home and away shorts and socks from allocated fax for delivery as soon as possible.'

The file note was circulated to Mr Fellone, UK sales director, at Umbro.

- 140 The OFT notes Umbro's January and April 2000 monthly management reports on the extent of Sports Soccer's discounting on Umbro Replica Kit.¹⁵⁹ In particular, Umbro's monthly management report for April 2000¹⁶⁰ refers to Sports Soccer continuing to discount '30% off S[tandard]S[ale]P[rice] across all brands'.
- 141 The section of Umbro's March 2000 monthly management report prepared by Mr Attfield¹⁶¹ which relates to Sports Soccer and Debenhams (trading as Champion) states:

¹⁵⁷ Doc 4/293 (NW16)

¹⁵⁸ Doc 3/109 (HC8).

¹⁵⁹ Doc SA19, folder 1, tab Jan 00, pp.7 (para 2) 20 (para 2) and tab April 00, pp.6 (para 4) (see para 153 below) and 17 (para 4).

¹⁶⁰ Doc 3/79 (DPT5).

¹⁶¹ Doc SA19, folder 1 tab March 00, page 17.

'Jersey prices all marked down. Sales very slow on England home and away, Manchester Utd home and Chelsea home at £28 and £32'.

142 These documents illustrate that in 1999 and early 2000 Sports Soccer was discounting heavily.

5.3 ALLSPORTS & BLACKS

143 As stated in paragraph 119 above, by 2000, £39.99 and £29.99 had become the recognised retail or 'high street' prices for the adult and junior Replica Shirts respectively notwithstanding the RRP's of £42.99 and £32.99 respectively.

144 Certain retailers, in particular Allsports and Blacks, were particularly concerned as they considered that £39.99 was too low and, at least for the largest selling Replica Shirts, wanted retail prices in the region of £45.00. MU has confirmed¹⁶² that it was aware in early 2000 that Allsports and Blacks were considering charging £44.99 for the adult MU home Replica Shirt to be launched in August 2000.¹⁶³ This is also clear from the events after 1 March 2000 which are described below.

145 In addition, a letter dated 20 April 1999¹⁶⁴ from Mr Guest, buying and marketing director of Allsports, to Mr Gourlay, then at Umbro, headed 'Re: England Contract' states:

'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.

...

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.'

146 Allsports has stated that this letter is the expression of legitimate commercial views on the quality of brands and on margins on Replica Kit.¹⁶⁵ The OFT takes the view that this letter was a firm indication of Allsports' likely pricing strategy which facilitated the agreements described in this decision.

¹⁶² View of Mr Kenyon in MU's OR on Rule 14 Notice page 6, lines 6-11 (App 1, doc 2 to Supplemental Rule 14 Notice).

¹⁶³ Allsports accepts that it believed that prices for Replica Shirts should be £49.99, WR on Supplemental Rule 14 Notice p.17.

¹⁶⁴ Doc 3/103 (HC02).

¹⁶⁵ Allsports' WR on Rule 14 Notice p.20 (App 1, doc 10 to Supplemental Rule 14 Notice).

5.4 UMBRO

- 147 Umbro was due to launch the Celtic and Chelsea away Replica Kits in May 2000. The England team was also due to participate in Euro 2000 in June 2000 and it was anticipated that in the lead up to the tournament that sales of the England Replica Kit launched in 1999 would be high. The MU home Replica Kit launch was on the horizon for August 2000.
- 148 Against that background, as set out below, from April 2000 onwards, Umbro took action aimed at ensuring that the principal Replica Kit retailers did not discount Umbro licensed Replica Kits. As described in paragraph 81 above, demand for club Replica Kit is highly concentrated at launch. Concerns over maintaining retail prices were therefore focused on ensuring that retail prices were maintained over this key selling period (and for England, during the key tournament at the time, Euro 2000).
- 149 This coincided with a change in pricing policy adopted by JJB (the abandonment of blanket discounting in April 2000) and pressure being exerted on Umbro by JJB as its single biggest customer to see that retail prices were maintained by other retailers.¹⁶⁶ The OFT is also satisfied that this coincided with pressure also being exerted on Umbro by MU to see that other retailers maintained the retail price of its own Replica Shirts.
- 150 The facts relating to these issues are examined in Part III below.

¹⁶⁶ JJB's UK annual turnover in 2000 was twice that of Sports Soccer, three times that of Blacks and JD and more than four times that of Allsports.

III FACTS

1. Replica Shirts Agreements

- 151 This part of the decision records events after 1 March 2000 chronologically, by reference to the evidence on which the OFT relies. The key events are also summarised in a chronology in annex 2.¹⁶⁷ Tables of relevant Replica Kit prices are in annex 3. Annex 4 contains two graphs showing broad pricing trends for England adult home Replica Shirts during 1999/2000 and the launch of the MU home adult Replica Shirt in August 2000.
- 152 The principal events in the Replica Shirts Agreements during 2000 and 2001 involved:
- (a) an agreement or concerted practice between, at least, Sports Soccer and Umbro between April 2000 and August 2001, with respect to the prices of the major Umbro licensed Replica Shirts (namely Celtic, Chelsea, England, MU and, at least during 2000, Nottingham Forest);
 - (b) an agreement or concerted practice between Allsports, Blacks, JD, and JJB, as well as Sports Soccer and Umbro, with respect to England home and away Replica Shirts around the time of the Euro 2000 tournament;
 - (c) an agreement or concerted practice between, at least Allsports, Blacks, JJB and MU, as well as Sports Soccer and Umbro, with respect to MU home Replica Shirts launched in 2000; and
 - (d) an agreement or concerted practice between, at least, JJB, Sports Soccer and Umbro with respect to England and MU Replica Shirts launched for the remainder of 2000 and in 2001.

APRIL 2000

- 153 Umbro's April 2000 monthly management report¹⁶⁸ (prepared at the beginning of May and looking back) stated on page 6:

¹⁶⁷ Some facts set out in this section are incorporated by reference to paras 58-90 of Umbro's WR on the Rule 14 Notice in fn 30 of the Supplemental Rule 14 Notice and by reference to the WR of Sports Soccer and Umbro in App 2 to the Supplemental Rule 14 Notice. For ease of reference, in some cases fuller quotes have been given than were in the Rule 14 Notice or the Supplemental Rule 14 Notice.

¹⁶⁸ Doc 3/79 (DPT5) para 4, doc SA19 tab April 00, pp.6 and 8.

'JJB after recently reporting record profit for 1999, have ended all blanket promotions in store and for the first time for 6/9 months, are not currently discounting – for how long who knows?

...

Sports Soccer continue to discount 30% off S[tandard]S[ale]P[rice] across all brands but have agreed to sell all new UMBRO licensed kits at £40 mens and £30 kids [i]n line with the rest of the high street.'

That part of the report has *inter alia* the initials of Mr Fellone, UK sales director, at the bottom.

154 Page 8 of the same report states:

'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?'

That part of the report was prepared by Mr Bryan, JJB's account manager at Umbro.

155 Page 17 of the same report states:

'Licensed jersey prices are all over the place for the forthcoming launch.
Chelsea away at: [Debenhams trading as] Champion £35/£25
Sports Soccer £32/£24
CFC £40/£30'

That part of the report was prepared by Mr Attfield, Sports Soccer's account manager at Umbro.

156 Mr Attfield, Mr Fellone and Mr Ronnie (Umbro's COO) have all given witness statements explaining their view of competitive conditions during this initial period.

157 In his witness statement, Mr Attfield states in particular:¹⁶⁹

'Retailers have always complained about Sports Soccer. The complaints, however, became particular[ly] intense from around 1999, when Sports Soccer started to develop as a credible and important competitor to

¹⁶⁹ Attfield w/s paras 9, 14, 15 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

established major retailers, such as JJB. On a number of occasions, JJB made threats to cancel orders because of Sports Soccer's pricing practices...

In April 2000, I understand that JJB had threatened to cancel orders because of Sports Soccer's discounting of the England home kit. The Euro 2000 tournament was approaching, as well as the autumn launch of new MUFC kits. At one of our regular meetings with Sports Soccer, therefore, Chris Ronnie [of Umbro] and I raised the issue of the pricing of the England home kit. Sports Soccer agreed to raise the prices to £39.99 adults/£29.99 junior. When we discussed the new MUFC kit, Mike Ashley [of Sports Soccer] stated that he intended to launch this at the recommended retail price.

The meeting was reported in the April 2000 management report...This was not, however, entirely accurate as it stated that Sports Soccer had agreed to sell "all new Umbro licensed kit at £40 mens and £30 kids [i]n line with the rest of the high street". In fact the discussions at our meeting had concerned only the England home shirt and new MUFC kits.'

158 In his witness statement, Mr Ronnie states in particular:¹⁷⁰

'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.

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.

¹⁷⁰ Ronnie w/s paras 12–14 and 23-26 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

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. [171]

...

Lee Attfield attended a meeting with Sports Soccer on 20 March 2000 and provided a copy of the agenda to me. Sports Soccer was due to place a repeat order for England home kit. One of the points for discussion was retail prices of replica products. We wanted to have some idea of Sports Soccer’s intended pricing policy. At the time, Sports Soccer was selling its England home shirts at £28, and a number of retailers had complained to Umbro.

The issue was discussed further at a meeting in April 2000. At that meeting, Sports Soccer agreed to raise its prices to £39.99 adult/£29.99 junior on the England home shirt. It also stated that it was intending to launch the MUFC kits at the recommended retail price. However socks, shorts and infant kits were going to be discounted.

I knew that if Sports Soccer continued to discount the England socks, shorts and infant kits, JJB in particular would continue to complain and make threats to Umbro. In order to prevent this happening, I spoke to Mike Ashley to ask him not to discount the socks and shorts. I cannot remember the date when I spoke to Mike Ashley. Initially he refused. I stopped a delivery of [...] [C] or [...] [C] shirts to Sports Soccer. Mike Ashley then agreed to put the prices of the socks, shorts and infant kits back to full recommended retail price. The delivery of shirts was then reinstated. That was the only time we ever actually refused a delivery to Sports Soccer.

Phil Fellone reported the April meeting in the April 2000 management report as follows:

“Sports Soccer...have agreed to sell all new UMBRO licensed kit at £40 mens and £30 kids on line with the rest of the high street”.

¹⁷¹ See also Fellone w/s para 16 attached to Umbro’s WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

In fact this is inaccurate: the April meeting concerned only the current England home kit and the new MUFC kit. There was no agreement on any other licensed kits.'

- 159 Umbro's monthly management reports were circulated to all the senior managers in Umbro including Mr McGuigan, the CEO.¹⁷²
- 160 Umbro states that JJB would generally only communicate retail prices to Umbro in the context of complaints about the retail prices of its competitors. It also accepts that '*on the occasions when information was communicated by retailers, those retailers would have known (and often intended) that Umbro would use the information in its discussions with other retailers. Again, this was particularly the case for JJB...*'.¹⁷³

MAY 2000

- 161 Allsports, Blacks, JJB, JD and Sports Soccer all retailed at launch on 11 May 2000 the Chelsea adult and junior Replica Shirts at high street prices (£39.99 and £29.99 respectively) and, with one exception, all other items of Replica Kit at RRP. Sports Soccer discounted the socks.¹⁷⁴
- 162 JD has confirmed¹⁷⁵ that on or around 15 May 2000 it launched the 'hat trick' promotion, under which customers spending £24.99 or more on England merchandise (including JD's own brand of newly designed England team associated leisurewear products as well as the Umbro licensed England Replica Kit and Other Licensed 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. JD states that the promotion was '*an unqualified success*' and JD soon had low stocks of England Replica Shirts.¹⁷⁶
- 163 Allsports, Blacks, JJB, JD and Sports Soccer all retailed at launch on 19 May 2000 the Celtic adult and junior Replica Shirts at high street prices (£39.99 and £29.99 respectively) and, with two exceptions, all other items of Replica Kit at

¹⁷² See Umbro's WR on Rule 14 Notice para 61 and McGuigan w/s paras 7-8 (App 1, doc 4 to Supplemental Rule 14 Notice).

¹⁷³ Umbro's WR on Rule 14 Notice paras 200-1 (App 1, doc 4 to Supplemental Rule 14 Notice).

¹⁷⁴ Annex 3, table 7.

¹⁷⁵ JD's WR on Rule 14 Notice paras 24-30 (App 1, doc 7 to Supplemental Rule 14 Notice) and OR on Rule 14 Notice p.37 lines 26 *et seq* (App 1, doc 18 to Supplemental Rule 14 Notice).

¹⁷⁶ Bown w/s para 25 attached to JD's WR on Rule 14 Notice (App 1, doc 7 to Supplemental Rule 14 Notice).

RRPs or above. Sports Soccer discounted the socks and JD discounted the adult shorts.¹⁷⁷

- 164 An Umbro note of 'discussion points' with handwritten comments dated 24 May 2000¹⁷⁸ prepared by Mr Ronnie for a meeting with Sports Soccer states at item two:

'England + Licen[s]ed retail price - until after the England v Germany game.'

This item has a handwritten tick against it. The initials of Mr Ronnie and Mr Prothero, head of international and marketing, are at the bottom of the note.

- 165 A handwritten Umbro file note prepared by Mr Attfield on 25 May 2000¹⁷⁹ of the meeting between *inter alia* Mr Ronnie and Mr Attfield of Umbro and Mr Ashley and Mr Nevitt of Sports Soccer on 24 May 2000 states:

'S[ports]/Soccer agreed to increase the price of England (H)[ome] + (A)[way] kits and for a set period of 60 days to maintain the prices of licensed kits (include G[oal]keepers/infantkit).

'M[ike] A[shley of Sports Soccer] stated that by matching the high st[reet] price would mean a reduction in his buying within the category and therefor[e] the target of [...] [C] may not be achieved.'

The file note was copied to *inter alia* Mr Fellone of Umbro. Umbro has stated that agreement not to discount for 60 days following launch applied also to MU Replica Kit.¹⁸⁰ Sports Soccer has confirmed¹⁸¹ that in its discussions with Umbro over retail prices at meetings of this sort it requested and received assurances over the pricing intentions of other retailers. Sports Soccer would require such information in order to ensure that agreements reached with Umbro on retail pricing did not put it at a disadvantage.

¹⁷⁷ Annex 3, table 6.

¹⁷⁸ Doc 3/68 (CK21).

¹⁷⁹ Doc 3/69 (CK22), p.2.

¹⁸⁰ Umbro's WR on Rule 14 Notice para 100, Ronnie w/s paras 29-30 and Attfield w/s para 16 (App 1, doc 4 to Supplemental Rule 14 Notice).

¹⁸¹ Sports Soccer's WR on Rule 14 Notice para 3.2.20 (App 1, doc 5 to Supplemental Rule 14 Notice), OR on Rule 14 Notice pp.28-29 lines 32-17 (App 1, doc 9 to Supplemental Rule 14 Notice) and CMS Cameron McKenna letter for Sports Soccer dated 20 August 2002 p.8 (App 1, doc 8 to Supplemental Rule 14 Notice).

- 166 Mr Ashley of Sports Soccer has said¹⁸² that during May and/or June 2000 Mr Ronnie of Umbro contacted Mr Ashley, Mr Hughes of Allsports, Mr Knight of Blacks, Mr Sharpe of JJB and possibly Mr Makin of JD, although Mr Ashley was 'particularly unsure' about the latter. The contact was by telephone to seek agreement that each retailer would price the England home Replica Shirt for the duration of England's participation in Euro 2000 at £39.99. Sports Soccer had agreed to this and had understood from Umbro that Allsports, Blacks, JJB and possibly JD had made similar agreements with Umbro, (Umbro states that Mr Ashley's agreement was conditional upon this¹⁸³). Mr Ashley also said that Mr Knight of Blacks had contacted Sports Soccer directly to confirm that Sports Soccer had indeed agreed with Umbro to retail the England Replica Shirt at £39.99. Mr Ashley had confirmed this to Mr Knight. Mr Ashley also confirmed that there was essentially a 'standard understanding' between Sports Soccer and Umbro as to the pricing of Umbro Replica Kit. Sports Soccer said that it had agreed with Umbro on pricing because of the 'usual' threats that Sports Soccer would otherwise not get supplies of other Umbro sportswear products or a full delivery of Replica Kit.¹⁸⁴ Sports Soccer has also confirmed¹⁸⁵ that to the extent to which it retailed Umbro Replica Kit at high street prices throughout the period of the infringement this was as a result of pressure from Umbro.¹⁸⁶
- 167 In their witness statements,¹⁸⁷ Mr Ronnie and Mr Fellone of Umbro state that, following the meeting with Sports Soccer on 24 May 2000, between them they telephoned Allsports, Blacks, Debenhams, JJB, JD and John Lewis to seek their agreement not to discount the England Replica Kit or Shirt. Mr Ronnie said that

¹⁸² At a meeting with OFT officials on 13 August 2001 (doc 1/19, paras 10-11) and in WR on Rule 14 Notice paras 3.2.2-7 (App 1, doc 5 to Supplemental Rule 14 Notice). At the meeting with OFT officials on 30 March 2001, Mr Ashley of Sports Soccer had said that it had attended a meeting with several other retailers, organised by Umbro, to agree the price of England Replica Kit (doc 1/7, para 6).

¹⁸³ See Ronnie w/s para 32, Fellone w/s para 26 and Attfield w/s para 17 attached to Umbro's WR on Rule 14 Notice para 102 (App 1, doc 4 Supplemental Rule 14 Notice).

¹⁸⁴ The refusal to supply England Replica Shirts is described in para 158 above. Sports Soccer referred to a refusal to supply MU Replica Kit (OR on Rule 14 Notice p.25 lines 29-37 (App 1, doc 9 to Supplemental Rule 14 Notice)) but was unsure whether it related to MU Replica Kit. There were also threats with respect to a promotional football and pro-training which are referred to chronologically below. Umbro also delayed supplies to Debenhams and JD of the MU home Replica Kit. This is also referred to chronologically below.

¹⁸⁵ Sports Soccer OR on Rule 14 Notice p.23 lines 12-29 (App 1, doc 9 to Supplemental Rule 14 Notice) and letter from CMS Cameron McKenna for Sports Soccer dated 20 August 2002 p.7 (App 1, doc 8 to Supplemental Rule 14 Notice).

¹⁸⁶ Sports Soccer regards the telephone call with Mr Knight during May 2000 concerning England Replica Kit and the meeting on 8 June concerning MU Replica Kit (referred to below) as the only exceptions to this, letter from CMS Cameron McKenna for Sports Soccer dated 20 August 2002 p.6 (App 1, doc 8 to Supplemental Rule 14 Notice).

¹⁸⁷ Ronnie w/s paras 32-3 and Fellone w/s paras 26-7 attached to Umbro's WR to Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

'JJB and all:sports agreed' and Mr Fellone's statement says that Blacks agreed to sell the England home Replica Shirt at RRP. Both Mr Ronnie and Mr Fellone say that JD refused to cease its 'hat trick' promotion. However, they were in fact mistaken about that.¹⁸⁸

168 Mr Bown of JD has confirmed¹⁸⁹ that Umbro at the time placed pressure on JD to increase its prices. In his witness statement, Mr Bown says:

'At this time, JD Sports did become subject to pressure from Umbro to increase the retail price of replica England shirts. Chris Ronnie of Umbro made telephone calls both to myself and Tim Gardiner (our Marketing Director) asking us to remove our window display and return the England replica kit to full price. They were told that this could not be done.'

169 Debenhams has also confirmed¹⁹⁰ that Mr Fellone of Umbro contacted Mr Ryman of Debenhams on or around 22 May 2000 and asked Debenhams to *'increase the price of the England shirt on or before 3rd June 2000 as all other major retailers had agreed to do so'*. Several subsequent telephone calls were made. Debenhams refused to co-operate. Debenhams has also stated¹⁹¹ that since March 2000, *'Umbro have contacted us orally in relation to our [retail] prices'* of Replica Kit.

170 A fax timed at the bottom of the page at 12.00 hours, from Mr Draper, marketing director, of MU dated 25 May 2000¹⁹² 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.

We are clearly concerned about the effect such activities may have on our own abilities to re-sell our premium product when launched in August and would welcome, specifically, knowing the following:

¹⁸⁸ See para 180 below.

¹⁸⁹ Bown w/s para 30 attached to JD's WR on Rule 14 Notice para 31 (App, 1 doc 7 to Supplemental Rule 14 Notice).

¹⁹⁰ Debenhams' WR on Rule 14 Notice paras 7-8 (App 1, doc 13 to Supplemental Rule 14 Notice).

¹⁹¹ Debenhams' response dated 1 October 2001 to section 26 Notice dated 5 September 2001, para 9 (doc SA10).

¹⁹² Doc 3/88 (DPT15).

Kit Bag dot.com Did this customer ask/advise you that they would be running the Sun promotion and have you had any conversations about promo activity for the launch of our new shirt?

Debenhams Clearly their discounting offer on the new Celtic shirt is an indicator of their intentions (as in the rest of their store offer) to have a price advantage as a major marketing tool. Again, has any dialogue taken place with them about the new MU product and pricing.

Sport Soccer Whilst we accept that the Liverpool product has nothing to do with Umbro can you please advise what you understand S[ports]S[occer]'s position is with regard to pricing new product on the replica category.

To date Manchester United has maintained a price in line with market conditions for shirts and had promotional practices regarded as the norm. We have turned down literally dozens of requests to use MU product, shirts included, as loss leaders in major promotions with a view that this is in the best long term interest...s of the club, you as a major sponsor partner and the traditional sports retail distribution base. What assurances can you now give us that our stance is still the best one to adopt in light of the activities highlighted?

We look forward to your earliest reply.'

In the version of the fax taken by OFT officials from the premises of Umbro, Mr Marsh wrote by hand at the top:¹⁹³

'Chris [Ronnie]
Could we please discuss',

Against the paragraph concerning Debenhams, Mr Ronnie wrote by hand:¹⁹⁴

'Agreed to return to 39 [*text following illegible*]'.

The fax was copied to Mr Prothero at Umbro and Mr Kenyon, Mr Richards and Mr Gourlay at MU. Umbro has stated¹⁹⁵ that Mr Ronnie does not recall reaching

¹⁹³ See Marsh w/s para 15 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

¹⁹⁴ See Marsh w/s para 15 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

¹⁹⁵ Umbro's WR on Rule 14 Notice paras 144-148 (App 1, doc 4 to Supplemental Rule 14 Notice).

any agreement with Debenhams although it did put Debenhams under pressure to raise retail prices.

171 In relation to this fax, Mr Draper has said:¹⁹⁶

'15. Both Manchester United and Umbro felt that such promotions [as referred to in the fax]...should not be encouraged and because the product is unique such promotions create the possibility of devaluing the brand and the product itself.

16. The view taken by Manchester United is that its replica kit is a premium product and therefore can properly command a premium price. This therefore was what was regarded as natural and proper support as between an exclusive licensor and the licensee.

...

28.1 **KitBagdotcom**...There was a general intention that Umbro as the manufacturer and licensee would routinely gather information about promotional activity so as to enable MU as the brand owner and licensor to be informed about this activity and therefore enabling MU to consider the impact on the brand in relation to the various promotions which took place.

28.2 **Debenhams**...I was seeking to understand...what was going on in the marketplace which...would enable MU to fix its plans. ...it was nothing whatsoever to do with trying to agree or fix prices or influence the price that others chose to sell at.

...

I accept that the sentence asking whether dialogue has taken place, "*about the new MU product and pricing*" suggests that I was asking Umbro whether they had talked to Debenhams about what they (Debenhams) were going to charge.'

28.3 **Sport[s] Soccer**...I am aware that Liverpool replica kit is produced by Reebok but I think Sport[s] Soccer was one of Umbro's very large customers and therefore I assumed that whatever Sport[s] Soccer did on the launch of Liverpool replica kit, they would also do with MU replica kit. This was requesting information as to approach rather than what Sport[s] Soccer intended to actually sell MU replica kits for.

¹⁹⁶ Draper 1st w/s para 15 *et seq* at App 1, doc 1 to Supplemental Rule 14 Notice. See also MU's OR on Rule 14 Notice p.33 (App 1, doc 2 to Supplemental Rule 14 Notice).

Retail pricing was a particular concern of Manchester United in 2000 as it was planning to launch five new Replica Kits (home, goalkeeper, goalkeeper third, third and away).¹⁹⁷

- 172 In his witness statement¹⁹⁸ in a section entitled 'MUFC's retail interests', Mr Prothero of Umbro states:

'The issue of the retail price would be raised by the management of the club to either Simon Marsh or myself [of Umbro], usually by Peter Kenyon...Steve Richards...or Ron Gourlay [of MU] requesting details of what price the other retailers would set for each product.

When retailers discounted, MUFC consistently complained to Umbro, and put pressure on Umbro to ensure that other retailers were "playing the game" i.e. selling the product at the recommended retail price ("rrp"). They would try to place the onus on Umbro to find a solution, and would suggest that Umbro suspend supplies to recalcitrant retailers...

...the general trend was that we would receive a call at around the time of launch or specifically when Sports Soccer discounted the MUFC shirt. During 1999-2000 we were continually aware that, if retailers discounted an MUFC shirt, we would get complaints within a day. If this occurred on the day of a launch, MUFC would complain within an hour.

MUFC used the renewal of the sponsorship contract as an implied threat: while not ever explicitly stated, Umbro were clearly given to understand that if we did not make an effort regarding the price of replica kit, this would jeopardise the renewal of the sponsorship contract'.

Mr Marsh of Umbro makes similar points about contacts with MU.¹⁹⁹ Mr Ashley of Sports Soccer also said that football club shops did not want discounting on Replica Shirts.²⁰⁰

- 173 Also on 25 May 2000, Allsports organised a golf day at Stockport Golf Club. In its written representations, Umbro has stated²⁰¹ that Allsports put pressure on it

¹⁹⁷ See Table 1 at para 64 above.

¹⁹⁸ Prothero w/s paras 14-17 attached to Umbro's WR on Rule 14 Notice para 61, (App 1, doc 4 to Supplemental Rule 14 Notice).

¹⁹⁹ Marsh w/s para 13 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

²⁰⁰ At a meeting with OFT officials on 30 March 2001 (doc 1/7, para 9).

²⁰¹ Umbro's WR on Rule 14 Notice paras 105-122 (App 1, doc 4 to Supplemental Rule 14 Notice) which refers *inter alia* to Ronnie w/s paras 34-39, 40-49, 50, 52-59, 67-8, Fellone w/s paras 22-25, Attfield w/s para 19.

and retailers concerning the MU Replica Shirt to be launched on 1 August 2000. Umbro has confirmed that its representatives attended the golf day. At the dinner which followed in the evening, Mr Hughes of Allsports arranged for the representatives of Nike, Adidas (UK) Ltd, Umbro and MU to sit at Mr Hughes' table.²⁰² In his witness statement, Mr Ronnie of Umbro states:²⁰³

'During the dinner David Hughes [of Allsports] said words to the effect of "I bet that you are wondering why you are all sat at the same table!". David Hughes stated that he was concerned about licensed products i.e. replica shirts, shorts and socks and the price at which they are sold. He wanted to know what the "brands" who were represented by the people around the table could do about the situation. I cannot remember the exact flow of the conversation but the general gist was that the "brands" explained that there was nothing that they could do about the situation. My impression was that David Hughes was concerned and frustrated at the inability of the "brands" i.e. Umbro, Nike and Adidas to help with the retail price.

The conversation moved from a general comment on licensed products onto Manchester United product specifically. David Hughes mentioned that he had concerns about the MUFC home shirt that was due for launch in August 2000 being discounted at launch, in particular by Sports Soccer.

...I recollect Peter Draper [of MU] saying that "it will bastardise the product if it is discounted at launch".'

Mr Fellone of Umbro, who was also at the dinner table, made a similar statement.²⁰⁴

- 174 On 30 May 2000, Sports Soccer discounted the Celtic and Chelsea Replica Kit shorts launched earlier that month. The adult and junior Replica Shirts and socks which were discounted in June, July and August.²⁰⁵

²⁰² Allsports' bank manger was also at the same table, see Draper 2nd w/s para 20 attached to MU's WR on Supplemental Rule 14 Notice and Allsports' OR on Supplemental Rule 14 Notice, 3 March 2003, p.18, line 2.

²⁰³ Ronnie w/s paras 36-39 attached to Umbro's WR on Rule 14 Notice para 106 (App 1, doc 4 to Supplemental Rule 14 Notice).

²⁰⁴ Fellone w/s paras 22-24 attached to Umbro's WR on Rule 14 Notice para 106 (App 1, doc 4 to Supplemental Rule 14 Notice).

²⁰⁵ Annex 3 tables 6 and 7.

JUNE 2000

175 On 2 June 2000 at 10.30, Mr Ronnie of Umbro met Mr Hughes of Allsports. Mr Ronnie states:²⁰⁶

'We spoke initially about the golf day and business in general. 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.

Towards the end of the meeting David Hughes called Tom Knight (Managing Director of First Sport [part of Blacks]) to ask him whether he had seen the promotion that JD Sports were running. This was an England shirt being sold at £39.99²⁰⁷ 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.

...

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.

...

The discussion then moved onto MUFC. David Hughes said to me that "if Umbro cannot ensure that the product will not be discounted it will affect Umbro re-signing the Manchester United deal".

²⁰⁶ Doc 7/551 U6 for timed diary reference referred to in Ronnie w/s para 40 *et seq* attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

²⁰⁷ It is not disputed that until the following day, this was incorrect. The promotional price was £29.99. See JD's WR on Rule 14 Notice para 67 (App 1, doc 7 to Supplemental Rule 14 Notice) and an internal Nike e-mail of 2 June 2000 reporting a discussion between 'Steve' of JD and Nike, '*The England replica jersey [h]as been priced @ £29.99 and is being used as a los[s]... leader ([...] [C] % Margin), this has not been advertised and is not promoted instore, but the aim is to sell the shirt plus items from the[ir] own collection (Wouldn't give away the margin), suffice to say they can also give away an England cap with every £25 spent on England Euro 2000 product. This campaign is having great success...*' (doc 286 (NW9)).

Umbro states that Mr Hughes requested the mobile telephone number of Mr Ashley of Sports Soccer from Mr Ronnie.²⁰⁸

176 Blacks has confirmed that Umbro exerted pressure on it to maintain retail prices at various times.²⁰⁹

177 A fax dated 2 June 2000²¹⁰ timed at the top of the page at 12.39 hours from Mr Fellone of Umbro 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 3rd June.

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

178 Blacks has confirmed²¹¹ that on 2 June 2000 it increased the price of the England adult home Replica Shirt to £39.99 from £32.99. Similarly in relation to the junior home Replica Shirt, Blacks increased the price to £29.99 on 2 June 2000 from £24.99.

179 Sports Soccer has confirmed²¹² that on 2 June 2000 it increased the prices of the adult home England Replica Shirt from £32.00 to £39.99. Sports Soccer has no information about the adult away or the junior home or away England Replica Shirts.

180 JD has confirmed²¹³ that although it continued with the free cap aspects of the ‘hat trick’ promotion for purchases of England Other Licensed Merchandise, on 3 June 2000 it 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.

²⁰⁸ Umbro’s WR on Rule 14 Notice paras 110 and 113 (App 1, doc 4 to Supplemental Rule 14 Notice) and this is confirmed in Allsports’ WR on Supplemental Rule 14 Notice p.21 (although the day of the request is in dispute).

²⁰⁹ Blacks Subsidiaries’ WR on Rule 14 Notice paras 7-8 (App 1, doc 6 to Supplemental Rule 14 Notice).

²¹⁰ Doc 7/551 U34.

²¹¹ Blacks’ e-mails dated 27 March 2002 (doc 7/531) and 8 April 2002 (doc 7/555) to OFT letter dated 13 March 2002 (doc 7/509) and see Annex 3 tables 1 and 2.

²¹² Sports Soccer’s response dated 20 November 2001 to section 26 Notice dated 2 November 2001 (doc 6/451); Annex 3 table 1.

²¹³ JD’s WR on Rule 14 Notice para 29 and Bown w/s para 26 (App 1, doc 7 to Supplemental Rule 14 Notice), JD’s OR on Rule 14 Notice p.37 lines 16 *et seq* (App 1, doc 18 to Supplemental Rule 14 Notice) and Annex 3 tables 1 and 2.

181 At this time, JJB and Allsports maintained their prices for England adult and junior home and away Replica Shirts at £39.99 and £29.99 respectively. Blacks maintained its prices for the adult and junior away Replica Shirts at £39.99 and £32.99 respectively.²¹⁴

182 In his witness statement, Mr Ronnie of Umbro states:²¹⁵

‘On the morning of Monday 5 June 2000, I spoke to Mike Ashley [of Sports Soccer] as I usually do at the beginning of the week.

...

Mike told me that he had received a call from David Hughes [of Allsports] who said that he had spoken to Dave Whelan at JJB. ...I was told by Mike Ashley that David Hughes had invited Mike Ashley to a meeting with himself and Dave Whelan of JJB to be held on 8 June 2000 at David Hughes’ house...which is quite close to the Umbro office.

...

Mike Ashley and I decided to have a meeting in the afternoon on 8 June 2000, after the earlier meeting between the retailers at David Hughes’ house, as he would be in the area.

...

I did give Mike Ashley the telephone number of David Hughes in case Mike needed it as he was getting the train to Chelford. I do not remember whether Mike Ashley asked for the number or if I was just being helpful. I wrote David Hughes’ home telephone number in my diary in case Mike Ashley needed it...’

183 Sports Soccer has confirmed²¹⁶ that it felt under indirect pressure from MU not to discount. The pressure was all channelled through Umbro. Sports Soccer also states in its written representations that it had regular weekly meetings with Umbro, and repeated telephone calls between those meetings.²¹⁷

184 A fax²¹⁸ dated 6 June 2000 from Mr Marsh of Umbro to Mr Draper at MU (responding to his fax of 25 May 2000) says:

²¹⁴ Annex 3 tables 1 and 2.

²¹⁵ Ronnie w/s para 48 *et seq* attached to Umbro’s WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

²¹⁶ Sports Soccer OR on Rule 14 Notice pp.29-30 lines 18-32 (App 1, doc 9 to Supplemental Rule 14 Notice) and CMS Cameron McKenna letter for Sports Soccer dated 20 August 2002 p.9 (App 1, doc 8 to Supplemental Rule 14 Notice).

²¹⁷ Sports Soccer’s WR on Supplemental Rule 14 Notice, pp.11 and 20.

²¹⁸ Doc 7/551 U28.

'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.'

This fax was copied *inter alia* to Mr Kenyon and Mr Richards at MU and to Mr Prothero, Mr Ronnie and Mr Fellone at Umbro. In his witness statement, with respect to the paragraph concerning assurances from Sports Soccer and JJB, Mr Marsh states:²¹⁹

'On the issue of pricing, more generally, I had heard from Chris Ronnie and Phil Fellone [of Umbro] that there had been discussions with the major retailers concerning current pricing of England jerseys, which many retailers had been discounting...

[The]...statement was not intended to refer to any specific agreement, as at the time I was not aware of any agreements having actually been concluded.'

In his witness statement, Mr Prothero of Umbro states:²²⁰

²¹⁹ Marsh w/s paras 18-19 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

²²⁰ Prothero w/s para 9 attached to Umbro's WR on Rule 14 Notice paras 81-82 (App 1, doc 4 to Supplemental Rule 14 Notice).

'Throughout the spring and summer of 2000, therefore, while the negotiations were continuing, I was anxious to reassure MUFC that Umbro was taking pro-active steps to protect the interests of MUFC, and to respond to MUFC's concerns. The delicacy of the MUFC situation was well-known within Umbro, and I knew that my colleagues – and in particular Simon Marsh – were also making similar efforts in relation to MUFC'.

- 185 An Allsports general memorandum dated 6 June 2000²²¹ circulated to branch managers and announcing the end of the 'price promise'²²² states:

'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.'

- 186 An Umbro fax dated 8 June 2000 from Mr Fellone, timed at the top of the page at 11.53 hours, to Mr Ryman of Debenhams (trading as Champion)²²³ states:

'Due to an overwhelming demand for the new Manchester home jersey to be launch[ed] in August 2000, we will be unable to fulfil the majority of your order for the launch date.

I would appreciate a call to discuss this matter further.'

- 187 On 8 June 2000 at about 13.00 hours, Mr Hughes of Allsports, Mr Whelan and Mr Sharpe of JJB and Mr Ashley of Sports Soccer met in Mr Hughes' house.

- (a) Allsports has confirmed in its written representations²²⁴ that Mr Hughes invited representatives of JJB and Sports Soccer to the meeting. Allsports' written representations state that the purpose of the meeting was to discuss '*the state of the market for replica kit including the crippling price war between*' Allsports, JJB and Sports Soccer. Allsports denies that any agreement was reached at the meeting and states that the JJB representatives merely restated JJB's public pricing policy on

²²¹ Doc 3/186 (RM15).

²²² Under which Allsports matched their competitors offers, see Doc 3/103 (HC02) at para 2.

²²³ Doc 7/551 U35.

²²⁴ Allsports' WR on Rule 14 Notice pp.14-15 (App 1, doc 10 to Supplemental Rule 14 Notice).

Replica Kit and that Sports Soccer refused to give an indication as to its future pricing policy.

- (b) However, Sports Soccer has stated²²⁵ that, at this meeting, it agreed with Allsports and JJB that it would price the MU home adult Replica Shirts at £39.99 at launch and for an unspecified period thereafter. Mr Ashley said:

‘The home shirt was discussed. It was agreed that we would have to be £39.99 for it. That was the end of the meeting. It didn’t take very long.’

Mr Ashley of Sports Soccer has also confirmed²²⁶ that Umbro had requested it to attend a meeting with Allsports and JJB to discuss retail pricing on the MU home Replica Kit as Sports Soccer’s assurances to Umbro regarding its pricing intentions were not sufficient for the other retailers.

- (c) JJB has also confirmed²²⁷ that Mr Whelan and Mr Sharpe attended this meeting. Mr Whelan has stated he was not aware in advance of the purpose of the meeting or that a representative of Sports Soccer would also be there. Mr Whelan has also said that the meeting had been convened by Allsports at very short notice and that he and Mr Sharpe arrived by helicopter at 13.06 hours and left, again by helicopter at 13.56²²⁸ hours. The safety procedures on landing and take off occupied some of this period. Mr Whelan’s witness statement goes on:

‘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

²²⁵ Sports Soccer OR on Rule 14 Notice pp.25-26 (App 1, doc 9 to Supplemental Rule 14 Notice).

²²⁶ Sports Soccer OR on Rule 14 Notice p.25 lines 8-38 (App 1, doc 9 to Supplemental Rule 14 Notice).

²²⁷ JJB’s WR on Rule 14 Notice 14 paras 3.10 and pp.16-17 (App 1, doc 11 to Supplemental Rule 14 Notice), Whelan 1st w/s pp.5-6 (App 1, doc 12 to Supplemental Rule 14 Notice) and Sharpe w/s p.6 (App 1, doc 12 to Supplemental Rule 14 Notice).

²²⁸ The reference in Whelan 1st w/s para 27 to ‘13.58’ appears to be wrong; see DW3 p.3.

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.'

188 In his witness statement, Mr Ronnie of Umbro states:²²⁹

'After the meeting at David Hughes' house, Mike Ashley came to the Umbro office in Cheadle. Mike Ashley proceeded to tell me what had been discussed at the meeting and who had attended.

I understand that Dave Whelan and Duncan Sharpe of JJB arrived in Dave Whelan's helicopter...Apparently, they thought that Mike Ashley was David Hughes'... gardener as he was dressed in casual clothes. The meeting was held in David Hughes' kitchen.

My understanding from Mike Ashley is that the price of the Manchester United adult home shirt to be launched on 1 August 2000 was discussed during the meeting. The attendees agreed to sell the Manchester United home shirt at £39.99 at launch. They did not agree a price on shorts, socks or goalkeepers shirts. Mike Ashley did not tell me if any other issues were discussed.

Mike Ashley commented to me that Peter Kenyon (CEO of Manchester United) was mentioned during the meeting at David Hughes' house and that David Hughes stated that he had spoken to Manchester United about the price of the shirt at launch. Mike Ashley also reported that Dave Whelan had said to him, "there's a club you know in the North, son, and you're not part of it". I understood this to refer to the fact that most sports retailers (including JJB and all:sports) are based in the north, but Sports Soccer is based in the south.

...

Phil 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 meeting on 8 June 2000 were no longer "hands-on" in the business, as the agreement should have covered all products.

²²⁹ Ronnie w/s paras 53-6, 58-9 and 66 attached to Umbro's WR on the Rule 14 Notice (App 1, doc 4 to the Supplemental Rule 14 Notice).

I understand that the agreement on the price of the MUFC adult home shirt was also later made with JD Sports and First Sport, however I do not have any exact information on this as I was not party to the agreement or the discussions surrounding it.

...

I believe that I prepared the May monthly report on the evening of 8 June 2000, following my meeting with Mike Ashley.'

189 The section of Umbro's May 2000 monthly management report²³⁰ prepared by Mr Ronnie on 8 June 2000²³¹ reports:

'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^[232] 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 [a]...ffect 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'.

The section of the report prepared by Mr Fellone states:²³³

'The prices on England, Chelsea and Celtic across the account base has settled at £39.99 mens and £29.99 kids...'

The section of the report prepared by Mr May states:²³⁴

²³⁰ Doc 3/78 (DPT4) para 5, doc SA19 tab May 00, page 3.

²³¹ Mr Ronnie's and Mr Prothero's initials are on page 2 at SA19 tab May 00.

²³² The OFT takes the view that this is incorrect. The offer was £29.99 with a free cap at JD. See JD's WR on Rule 14 Notice para 67 (App 1, doc 7 to Supplemental Rule 14 Notice).

²³³ Doc SA19 tab May 00, page 7, para 4.

'...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...'

Umbro's monthly management reports were circulated to senior managers in Umbro including Mr McGuigan.

- 190 An Allsports internal memorandum numbered 700²³⁵ dated 9 June 2000 from Mr Hughes to Mr Patrick, copied to *inter alia* Mr Guest states:

'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 Sports...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.'

- 191 An Allsports internal memorandum numbered 701²³⁶ dated 9 June 2000 from Mr Hughes to Mr Patrick copied *only* to Mr Guest states:

'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]

- 192 England played and beat Germany in Euro 2000 on 17 June 2000. England played and lost to Romania on 20 June 2000 and was thereby eliminated from the competition. The day after the England team's elimination from Euro 2000, on 21 June 2000, Sports Soccer discounted the England Replica shirt to £20.00.²³⁷

²³⁴ Doc SA19 tab May 00, page 13, para 2.

²³⁵ Doc 3/148 (BJP1).

²³⁶ Doc 3/149 (BJP2).

²³⁷ Annex 3, table 1.

- 193 A handwritten Umbro file note prepared by Mr Attfield²³⁸ about a meeting on 28 and 29 June 2000 between himself and Mr Ronnie of Umbro, and Mr Ashley and Mr Nevitt of Sports Soccer, states:

‘S[ports]/S[occer] to increase the retail price of England (H[ome]) + (A[way]) jerseys + infantkits.’

The file note was copied *inter alia* to Mr Fellone of Umbro. Umbro have confirmed that Sports Soccer did not comply with the undertaking recorded in this file note.²³⁹ Sports Soccer has confirmed that this is an example of the speed with which Umbro would monitor its retail prices and apply pressure to increase them.²⁴⁰

JULY 2000

- 194 A handwritten Umbro file note prepared by Mr Attfield²⁴¹ of a meeting between Mr Attfield and Mr Nevitt of Sports Soccer on 3 July 2000 states:

‘Told S[ean] N[evitt of Sports Soccer] prices of England (H[ome]) + (A[way]) jerseys/infantkits needed to be raised as part of a deal involving the promotional football. No movement planned’.

In the column headed ‘Action’ next to the above note it states ‘*C[hris]R[onnie of Umbro] talk to S[ean]N[evitt]*’. The note also records a discussion of a wholesale pricing formula for licensed products. It continues ‘*The problem arises as to who dictates the selling price*’. The file note was copied to Mr Ronnie and Mr Fellone of Umbro. Sports Soccer has confirmed that it continued to discount the England Replica Kit.²⁴²

- 195 Throughout July 2000, Umbro continued to place significant pressure on JD over the ‘hat trick’ promotion which as described above continued in relation to the free cap on relevant purchases above £24.99. On 12 July 2003, Mr Ronnie and Mr Fellone of Umbro and Mr Bown of JD met to discuss this.²⁴³ Umbro has

²³⁸ Doc 3/70 (CK23).

²³⁹ Umbro’s WR on Rule 14 Notice para 124 (App 1, doc 4 to Supplemental Rule 14 Notice).

²⁴⁰ Sports Soccer’s WR on Rule 14 Notice para 2.2.41 (App 1, doc 5 to Supplemental Rule 14 Notice).

²⁴¹ Doc 3/107 (HC06).

²⁴² Sports Soccer’s response dated 20 November 2001 to section 26 Notice dated 2 November 2001 (doc 6/451).

²⁴³ JD’s WR on Rule 14 Notice para 31 (App 1, doc 7 to Supplemental Rule 14 Notice) and doc 3/93 (KMG5).

confirmed²⁴⁴ that that meeting dealt with Umbro's prime concern in relation to JD at the time which was JD promoting England products with a free cap manufactured, Umbro believed, by a competitor and JD's unwillingness to order non-Replica Kit Umbro products.

196 On 7 July 2000, the Nottingham Forest home and away Replica Kits were launched. Allsports, JJB and Sports Soccer all retailed the Replica Shirts at £39.99 for adults and £29.99 for juniors. Blacks initially retailed at RRP (£42.99) for certain larger sizes and at 'high street' prices for others, but aligned with 'high street' prices shortly thereafter.²⁴⁵

197 A letter dated 13 July 2000²⁴⁶ from Mr Prothero of Umbro to Mr Richards of MU says:

'[I]...wished to drop you a line to get your view on a specific issue.

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 [of Allsports], Ashley [of Sports Soccer] and Whelan [of JJB] 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.

I look forward to discussing this with you later in the day.'

198 On the same day, in a fax timed at the bottom of the page at 13.07 hours,²⁴⁷ Ms Quinn of MU responded to Mr Prothero of Umbro saying:

'I am in receipt of your letter dated 13 July addressed to Steve Richards.

Please be assured that the Manchester United jersey is not being sold at a discounted price on Open. This is purely to compensate for the customer

²⁴⁴ Ronnie w/s paras 60-64 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

²⁴⁵ Annex 3, table 8.

²⁴⁶ Doc 7/551 U15.

²⁴⁷ Doc 7/551 U16.

paying postage and packaging. With immediate effect I have withdrawn the football and will replace this with an item of smaller value.'

- 199 The section of Umbro's June 2000 monthly management report²⁴⁸ prepared by Mr Ronnie on 14 July 2000²⁴⁹ reports:

'Euro 2000 proved to be a great success for most UK accounts - with strong replica sales from some of the key accounts. JJB in particular reported very high like for like sales based on England shirt sales. Their sales reached a peak in one week of [...] [C] units - Umbro finished the tournament with tight England stocks having sold out of all adult sizes. '

The section of the report prepared by Mr Fellone states:²⁵⁰

'As expected the build up to Euro 2000 provided a major increase in sales in the high street.

Sales across all England related product across the retail sector exceeded all expectations with reports from the likes of JJB and All:sports that sales have surpassed those achieved during the World Cup 98 and Euro 96.'

The section of the report prepared by Mr May, JD's account manager at Umbro, states:²⁵¹

'Great month with Euro 2000 creating great sell through - All:sports selling [...] [C] jerseys in the week leading up to the Germany game surpassing by far any sales during World Cup 98/Euro 96.'

Umbro's monthly management reports were circulated to senior managers in Umbro including Mr McGuigan.

- 200 At meetings in July and August 2000, Sports Soccer informed Umbro that, notwithstanding its previous agreements with Umbro, it wished to recommence discounting on Umbro Replica Kits. A handwritten Umbro file note prepared by Mr Attfield²⁵² of a meeting between *inter alia* Mr Ronnie and Mr Attfield of Umbro and Mr Ashley and Mr Nevitt of Sports Soccer on 18 July 2000 states:

²⁴⁸ Doc SA19 tab June 00, page 3, para 3.

²⁴⁹ Mr Ronnie's and Mr Prothero's initials are on page 2 at SA19 tab June 00.

²⁵⁰ Doc SA19 tab June 00, page 7, para 1.

²⁵¹ Doc SA19 tab June 00, page 13, para 2.

²⁵² Doc 3/66 (CK19).

'M[ike]A[shley of Sports Soccer] concerned with current OFT investigation.²⁵³ Agreed 60 days ruling allowing M[ike]A[shley] to [put] the prices down.

Chelsea (A[way]), N[ottingham] Forest (H[ome]) + (A[way]) to be reduced to £30/£20 with immediate effect.

MUFC (H[ome]) to begin retail life at £40/£30 as will 3rd jersey.

MUFC (A[way]) + goalkeepers jersey S[ports/Soccer to inform Umbro of retail price strategy.'

The file note was copied to *inter alia* Mr Fellone of Umbro.

201 On 23 July 2000 Blacks reduced the price of England adult and junior home Replica Shirts to £34.99 and £24.99 respectively.²⁵⁴

202 On 24 July 2000, an Umbro file note records a telephone conversation between Mr Ronnie of Umbro and Mr Bown of JD. It states:²⁵⁵

'CR: "...JD Sports unfortunately are no longer a priority account for Umbro and as such, we are in a position where we are over su[b]scribed with Manchester United product and we will unfortunately have to ensure that our priority accounts are supplied first."

BB: "We'll see you in Court."

...

CR: "...we cannot have a situation where Umbro product is being promoted by another brand and a giveaway manufactured by another brand is being used to help sales of Umbro product. We did have a couple of discussions, you and I, regarding our request for you to withdraw the promotion and I know Phil [Fellone of Umbro] had several conversation[s] with yourself and your colleagues for you to stop the promotion."

BB: "Even if we have to go to the press, we will make sure that we are seen to be taking action against Umbro and as you know, we can get

²⁵³ There was no active OFT investigation at this point although Sports Soccer had made a number of complaints to the Department of Trade & Industry and the OFT during 1999 see CMS Cameron McKenna letter for Sports Soccer dated 20 August 2002, Annex 1 (App 1, doc 8 to Supplemental Rule 14 Notice).

²⁵⁴ Annex 3, tables 1 and 2.

²⁵⁵ Doc 3/93 (KMG5).

hold of Manchester United shirts anyway and even if I have to sell them at £5, I will, just to get one back.”

- 203 A handwritten Umbro file note prepared by Mr Attfield²⁵⁶ of a meeting between Mr Attfield and Mr Nevitt of Sports Soccer on 24 July 2000 states:

‘Jersey prices being reduced 25th July 00. Junior to £22. Adults to £30.
Kits in question: Chelsea home & away
[Nottingham] Forest home & away
Celtic home only!!

S[ean]N[evitt of Sports Soccer] also proposed the following price policy of Man Utd kits:

Home – will remain £40/£30
Away – will launch with MegaPrices of £30/£22
3rd – will be reviewed after 60 days.

The file note was copied to Mr Ronnie and Mr Fellone of Umbro.

- 204 On 25 July 2000, the Celtic and Chelsea goalkeeper Replica Kits were launched and Sports Soccer discounted the Chelsea Replica Shirts and the Nottingham Forest adult and junior home and junior away Replica Shirts.²⁵⁷

AUGUST 2000

- 205 A handwritten Umbro file note prepared by Mr Attfield²⁵⁸ of a meeting between Mr Attfield of Umbro and Mr Ashley, Mr Forsey and Mr Nevitt of Sports Soccer on 1 August 2000 states:

‘Problems in Derby, Manchester, Nottingham. M[ike]A[shley of Sports Soccer] has summons to appear in Derby.

...

Wants to reduce MUFC (3rd) jersey from the day of launch from £40 to £30 and J[u]n[i]o[r £30 - £22. This is also linked into point (1).

Not happy about being excluded from buying “pro training”.^[259] Insisting he will stock pro training from Q[uar]ter]3 2001 in twelve stores at full price. Fear is that other brands will get to h[ear] of his exclusion and also tell S[sports]/Soccer they cannot buy into some of their product ranges.’

²⁵⁶ Doc 3/67 (CK20).

²⁵⁷ Annex 3, table 8.

²⁵⁸ Doc 3/65 (CK18).

²⁵⁹ ‘Pro training’ products were a specialist range of Umbro sportswear.

The file note was copied to Mr Ronnie of Umbro.

- 206 Sports Soccer has confirmed²⁶⁰ that it was under '*intense pressure*' from Umbro not to discount Umbro Replica Kit. Sports Soccer stated that this pressure included refusals to supply Replica Kit and other Umbro products. Sports Soccer referred to this meeting note to illustrate this point. Sports Soccer has confirmed²⁶¹ that, in attempting to resist the pressure from Umbro, it generally had to find justifications for discounting. The reference to '*point (1)*' is a reference to a simple labelling issue which was taken to court in Derby. However, according to Sports Soccer,²⁶² '*Mike Ashley claimed to Umbro that this was in fact related to price-fixing, in order to avoid having to price the replica shirts at Umbro's prices*'.
- 207 The MU home Replica Kit (with a new corporate sponsor in addition to Umbro named on the Replica Shirts) was launched on 1 August 2000. Allsports, Blacks, JJB, JD and Sports Soccer all retailed the adult and junior Replica Shirts at £39.99 and £29.99 respectively. With two exceptions, the retailers sold all other elements of the Replica Kit at RRP. JD discounted the adult shorts (when it received supplies) and Sports Soccer discounted all other Replica Kit products.²⁶³ Sports Soccer maintained Replica Shirt prices until 1 October 2000. Most other retailers did not discount most items until late 2000 or 2001.
- 208 Sports Soccer has confirmed²⁶⁴ that Umbro contacted it immediately after the launch of the MU Replica Kit demanding that Sports Soccer increase its prices on all MU home Replica Kit products as had been agreed. Sports Soccer denied that the agreement had been that wide despite threats by Umbro with regard to future deliveries. Further to the telephone conversation between Mr Ronnie of Umbro and Mr Bown of JD on 24 July 2000,²⁶⁵ JD has confirmed that Umbro delayed delivery of the MU home Replica Kit for two weeks after its official launch.²⁶⁶

²⁶⁰ Sports Soccer WR on Rule 14 Notice paras 2.2.22-26 (App 1, doc 5 to Supplemental Rule 14 Notice).

²⁶¹ Sports Soccer WR on Rule 14 Notice paras 2.2.25 and 2.2.44 (App 1, doc 5 to Supplemental Rule 14 Notice).

²⁶² Sports Soccer WR on Rule 14 Notice para 2.2.44 (App 1, doc 5 to Supplemental Rule 14 Notice).

²⁶³ Annex 3, table 4.

²⁶⁴ CMS Cameron McKenna letter for Sports Soccer dated 20 August 2002 p.4 (App 1, doc 8 to Supplemental Rule 14 Notice) and Sports Soccer OR on Rule 14 Notice p.25 lines 26-38 (App 1, doc 9 to Supplemental Rule 14 Notice).

²⁶⁵ See para 202 above.

²⁶⁶ JD's OR on Rule 14 Notice p.22 lines 22-24 (App 1, document 18 to Supplemental Rule 14 Notice).

- 209 On 3 August 2000 Sports Soccer complained²⁶⁷ to the OFT about '*continued price-fixing on Football Replica Shirts*'.
- 210 An Umbro internal e-mail dated 7 August 2000²⁶⁸ from Mr Prothero to Ms Pallett (PA to Mr Ronnie) and Ms Smith (PA to Mr Fellone and Mr Bryan) states:

'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.

When questioned on this it appears that contractually both retailers are contractually obliged to sell at prices not including VAT, in other words the pricing including VAT is over £42.00 which may lead to some confusion if other retailers become aware of this.'

- 211 On 10 August 2000, Sports Soccer discounted the Celtic away Replica Shirts which had been launched earlier that year.
- 212 On 17 August 2000, the Nottingham Forest goalkeeper Replica Kit was launched.
- 213 On 21 August 2000 JJB discounted the England home adult and junior Replica Shirts.²⁶⁹

SEPTEMBER 2000

- 214 On 1 September 2000, the MU goalkeeper Replica Kit was launched.
- 215 On 17 September 2000 JJB discounted again the England home adult and junior Replica Shirts and discounted for the first time the England away adult and junior Replica Shirts.²⁷⁰
- 216 On 22 September 2000, the MU third goalkeeper Replica Kit was launched.
- 217 On 27 September 2000 it was leaked to the press that the new MU Licensing Agreement would be signed with Nike and not Umbro.

²⁶⁷ Doc 1/1.

²⁶⁸ Doc 3/87 (DPT14).

²⁶⁹ Annex 3, tables 1 and 2, based on KPMG LLP report app 1, attached to JJB's WR on Rule 14 Notice pp.15-16 (App 1, doc 11 to Supplemental Rule 14 Notice).

²⁷⁰ Annex 3, tables 1 and 2, based on JJB's WR on Rule 14 Notice.

- 218 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 and, with one exception, other elements of the Replica Kit at RRP. JD discounted the adult shorts. Sports Soccer discounted all elements of the Replica Kit at launch. Blacks does not appear to have retailed the MU third Replica Kit.²⁷¹ Most other retailers did not discount most items until late 2000 or 2001.²⁷²
- 219 In late September and early October, Allsports and JD reduced the price of the England adult home Replica Shirt to [...]£29.99²⁷³ [and t]hey [#] also reduced the price of the junior England home Replica Shirt.

OCTOBER 2000

- 220 On 1 October 2000, Sports Soccer discounted the adult and junior MU home Replica Shirts which had been launched on 1 August 2000.²⁷⁴
- 221 On 18 October 2000 the MU away Replica Kit was launched. 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.²⁷⁵ Most other retailers did not discount most items until late 2000 or 2001.²⁷⁶
- 222 In the middle of various paragraphs dealing with stocks and sales of MU Replica Kit, an Umbro file note prepared by Mr May on 27 October 2000²⁷⁷ of a meeting on 24 October 2000 between Mr May and Ms Charnock, a replica buyer of Allsports states:

‘The concern being that since contract announcement^[278] and price discounting by Sports Soccer/JJB sales have dropped 50%. M[ichelle]C[harnock of Allsports] felt the above needed to be a P[hil]F[ellone of Umbro]/M[ichael]G[uest of Allsports] conversation as she would not bring into the business.’

²⁷¹ Annex 3, table 3.

²⁷² The pattern of discounting by the other retailers covered by this decision is shown in Annex 3, table 4.

²⁷³ See Annex 3, table 1.

²⁷⁴ Annex 3, table 4.

²⁷⁵ Annex 3, table 4.

²⁷⁶ The pattern of discounting by the other retailers covered by this decision is shown in Annex 3, table 4.

²⁷⁷ Doc 3/71 (CK24).

The file note was copied to Mr Ronnie and Mr Fellone of Umbro.

NOVEMBER 2000

- 223 A handwritten Umbro file note prepared by Mr Attfield on 8 November 2000²⁷⁹ of a meeting between Mr Attfield and Mr Adegoke, member of the buying team, of Sports Soccer on 6 November 2000 states:

'D[otun]A[degoke of Sports Soccer] placed orders for Kits England (H[ome]) Celtic (H[ome]). Comparisons to 1999 are shown below.

<u>Jersey</u>	<u>Size</u>	<u>1999</u>	<u>2001</u>
England (H[ome])	J[u]n[i]o[r]	[...][C]	[...][C]
	Ad[u]lt	[...][C]	[...][C]
Celtic (H[ome])	J[u]n[i]o[r]	[...][C]	[...][C]
	Ad[u]lt	[...][C]	[...][C]

D[otun]A[degoke] was told before ordering that High St[reet] prices were applicable and he should place numbers accordingly across all kit options L[ong]/S[leeved], shorts, socks G[oa]l[K[eeper]J[ersey]], infantkits.'

The file note was copied to Mr Ronnie and Mr Fellone of Umbro. Sports Soccer has confirmed that '*Orders for volumes which were large relative to the size of the operation compared to those ordered by other retailers would indicate to Umbro that Sports Soccer wanted to keep discounting*'.²⁸⁰

- 224 An Umbro file note prepared by Mr May on 9 November 2000²⁸¹ of a meeting between Mr May and Mr Duffield of JD on 7 November 2000 states:

'Have [...][C] home jerseys for December. N[ick]D[uffield of JD] was not happy with sell through due to discounting and to propose what he will take pre Christmas...

No repeats on any licensed and concern expressed over pricing.'

The file note was copied to *inter alia* Mr Ronnie and Mr Fellone of Umbro.

²⁷⁸ The OFT assumes that this means the announcement that Nike had been awarded the new MU Licensing Agreement.

²⁷⁹ Doc 3/64 (CK17).

²⁸⁰ Sports Soccer's WR on Rule 14 Notice para 2.2.40 (App 1, doc 5 to Supplemental Rule 14 Notice).

²⁸¹ Doc 3/73 (CK26).

225 An Umbro note of 'outstanding issues' with handwritten comments dated 13 November 2000²⁸² prepared by Mr Attfield and apparently sent to Sports Soccer in advance of a meeting with Sports Soccer states:

'In preparation for the forthcoming meeting, please find below, issues that are still not resolved, or that I feel should be discussed:

...

- Retail prices to be conveyed and agreed for products expected pre-Christmas'.

Mr Prothero's and Mr Attfield's initials are at the bottom of the note.

DECEMBER 2000

226 A Nike internal e-mail dated 6 December 2000²⁸³ reporting on a meeting with JJB states:

'Subject: JJB Replica Update

Chaps, visited JJB yesterday to review replica business – thought I'd let you know some of their thoughts;

...

Given the impetus of a new brand – and a potential increase in training styles from us – I think they wou[ld] come in with an opening order for Man Utd at about [...] [C] pcs – based on a shirt retailing a[t] £40.

The £40 price mark is very important to them - and they do not see themselves moving from this in the near future.'

FEBRUARY 2001

227 An Umbro file note prepared by Mr Attfield on 12 February 2001²⁸⁴ of a meeting between Mr Attfield and Mr Adegoke of Sports Soccer on 6 February 2001 states:

'Presented all season [20]01/02 licensed kit and associated product.

²⁸² Doc 3/63 (CK16).

²⁸³ Doc 4/285 (NW8).

²⁸⁴ Doc 3/57 (CK10).

Sports Soccer have reduced their commitment on the licensed category and are using the following formula. Previous shirt launch first 12 weeks sales ÷ 2.

M[ike] A[shley of Sports Soccer] has also stated that the kits, G[oa]lK[eeper] kits will be retailed in line with the high street.

...

Retail prices of licensed shorts/socks is to be taken up with M[ike] A[shley].[*]

Sales of the new Celtic (h[ome]) jerseys are poor. In a 10 day period since launch (16/03/01), Sports Soccer have sold no more than [...] units across junior/senior sizes.'

Mr Ashley's and Mr Ronnie's initials are next to the text marked with an asterisk in a column entitled 'Action'. The file note was copied to Mr Ronnie and Mr Fellone of Umbro.

MARCH 2001

- 228 On 16 March 2001, the day before St Patrick's day, the Celtic home Replica Kit was launched. Allsports, Blacks, JJB and JD retailed all Replica Kit products at RRP's (which for adult and junior Replica Shirts was now £39.99 and £29.99 respectively). Sports Soccer retailed the Replica Shirts at RRP's and discounted all other elements of the Replica Kit at launch.²⁸⁵ It was reported in the press that there was a fan boycott of this jersey because of design changes.²⁸⁶
- 229 An Umbro file note prepared by Mr Attfield on 29 March 2001²⁸⁷ of a meeting between Mr Attfield and Mr Nevitt of Sports Soccer on 27 March 2001 states:

'S[ean]N[evitt of Sports Soccer] shown sample of the next promo ball (£3).

...

Spoke to S[ean]N[evitt] 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 S[ean]N[evitt] said that it was a decision that can only be rectified by M[ike]A[shley of Sports Soccer].'

²⁸⁵ Annex 3, table 6.

²⁸⁶ *Celtic fans to boycott kit launch* The Scotsman, 13 February 2001; *Shirt Hits The Fan* Sunday Mail, 25 February 2001.

²⁸⁷ Doc 3/58 (CK11).

In the version of this document taken from Mr Ronnie's office,²⁸⁸ '(£3)' in the first line quoted above is circled and a handwritten '*To discuss with M[ike]A[shley of Sports Soccer]*' appears next to it. The file note was copied to Mr Ronnie and Mr Fellone of Umbro.

230 On 30 March 2001 OFT officials met with Sports Soccer.²⁸⁹

APRIL 2001

231 On 9 April 2001, Sports Soccer discounted the Celtic adult and junior Replica Shirts which had been launched on 16 March 2001.

232 In an Umbro internal e-mail dated 17 April 2001²⁹⁰ from Mr Attfield to Ms Pallet, Mr Ronnie's PA, Mr Attfield states:

'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.'

The e-mail was copied to Ms Smith, PA to Mr Fellone and Mr Bryan.

233 On 23 April 2001, St George's day, England home Replica Kit was launched. Allsports, Blacks, JJB, JD and Sports Soccer, with one exception, retailed all elements of the Replica Kit at RRP or above.²⁹¹ Sports Soccer launched the England infant kit at a discount, but within three days it put the price back up to Umbro's RRP, and has attributed this action to '*considerable pressure*' from

²⁸⁸ See record at doc 3/50.

²⁸⁹ Doc 1/7.

²⁹⁰ Doc 3/110 (HC9).

²⁹¹ Annex 3, table 3.

Umbro.²⁹² Sports Soccer continued to maintain prices at RRP's on adult and junior Replica Shirts until 20 August 2001.

- 234 An Umbro file note taken from the working area of Mr Ronnie²⁹³ dated 23 April 2001²⁹⁴ states that Mr Bryan and Mr Fellone of Umbro contacted Mr Russell of JJB several times raising Umbro's concerns in relation to JJB's Carlisle branch²⁹⁵ which was offering a 25 per cent 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 [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.'

MAY 2001

- 235 On 3 May 2001, the Chelsea home Replica Kit was launched. Allsports, Blacks, JJB and JD retailed all elements of the Replica Kit at RRP's. Sports Soccer retailed the Replica Shirts at RRP's but discounted all other elements of the Replica Kit.²⁹⁶ Sports Soccer maintained prices on adult and junior Replica Shirts until 20 August 2001.²⁹⁷
- 236 Sports Soccer has confirmed²⁹⁸ that on 23 May 2001 it reduced the MU home adult and junior Replica Shirts to £20.00 and £15.00 respectively.

²⁹² Annex 3, table 3 and Sports Soccer's WR on Supplemental Rule 14 Notice p.21.

²⁹³ Doc 3/50.

²⁹⁴ Doc 3/53 (CK4).

²⁹⁵ There is a more formal but otherwise identical file note in relation to JJB's Bury branch (doc 3/104 (HC03)) although the fact that the wording is identical may imply that the reference to Bury is a mistake.

²⁹⁶ Annex 3, table 7.

²⁹⁷ Annex 3, table 7.

²⁹⁸ Doc 6/451.

JUNE 2001

- 237 An e-mail dated 1 June 2001²⁹⁹ from Mr David McNally of Celtic football club to Mr Marsh of Umbro states:

'Subject: Home Kit Price war

...

We appear to have a serious problem with the new home jersey being sold for £29.99 by a number of major and independent accounts throughout Scotland.

I am aware of the legal position but would ask what you are doing to solve the problem. If it continues for too long, £29.99 will become the standard price. Clearly, this has serious implications and I am particularly concerned about how this may affect the new away kit launch.

Help!!'

This e-mail was forwarded to Ms Smith (PA to Mr Fellone and Mr Bryan) of Umbro.

- 238 A fax dated 1 June 2001 from Mr Russell of JJB to Mr Bryan of Umbro cancelled a significant order for MU centenary Replica Shirts. In its representations,³⁰⁰ JJB has stated that the reason for the cancellation was that Umbro had been supplying Sports Soccer with MU home Replica Shirts (launched on 1 August 2000) at significant discounts notwithstanding a request by JJB to Umbro in April 2001 that it be given an opportunity to match any offer made by another retailer for such shirts. Sports Soccer, having bought a stock of MU home Replica Shirts at significantly reduced wholesale prices, began retailing such shirts at heavily discounted prices. JJB at the time had considerable stocks left of the MU home Replica Shirt which had been bought at various wholesale prices. JJB states that it was therefore concerned that it would have to discount these Replica Shirts significantly in order to be able to compete with Sports Soccer. JJB therefore wanted a better deal on the MU centenary Replica Shirts to absorb some of the losses.

²⁹⁹ Doc 3/94 (KMG6).

³⁰⁰ JJB's WR on Rule 14 Notice pp. 20-22 (App 1, doc 11 to Supplemental Rule 14 Notice); Whelan 1st w/s para 23 attached to JJB's WR on Rule 14 Notice (App 1, doc 12 to Supplemental Rule 14 Notice); fax at tab 5 to JJB's WR on Supplemental Rule 14 Notice.

239 The section of Umbro's May 2001 monthly management report³⁰¹ prepared by Mr Bryan and finalised in early June³⁰² addresses the same issue. It 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.'

Umbro's monthly management reports were circulated to senior managers in Umbro including Mr McGuigan.

240 In his witness statement,³⁰³ in relation to the threatened cancellation referred to in the Umbro May 2001 monthly management report, Mr Fellone states:

'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.'

241 According to JJB, Mr Whelan also attended this meeting which took place on 15 June 2001. JJB states that the order was reinstated because Umbro offered it a substantially better wholesale price.³⁰⁴

242 An internal Nike note dated 20 June 2001³⁰⁵ found on Mr Boyes' computer at Nike saved at 'Outlook Express\Personal Folder\Sport & Soccer' states:

³⁰¹ Doc 3/82 (DPT8) p.6, section 2, para 2 and p.7 section 5; doc SA19 tab May 01, pp.6 and 7.

³⁰² See p.3 for reference to 8 June 2001.

³⁰³ Attached to Umbro's WR on Rule 14 Notice para 61, w/s Fellone paras 17-18 (App 1, doc 4 to Supplemental Rule 14 Notice).

³⁰⁴ Russell 1st w/s para 27 attached to JJB's WR on Rule 14 Notice pp.20-21 (App 1, doc 11 to Supplemental Rule 14 Notice).

³⁰⁵ Doc 4/290 (NW13).

'I spoke to Sean [Nevitt of Sports Soccer] today about the pricing of apparel product they agreed to keep at full margin Mercurial, Premier, and Women's Tech Training, all the rest of his selection is core, he was under the impression it was a full price. he has assured me by Monday morning all these prices will be back to recommended

They have not received any fall product yet.

PS: as from this week price maintenance carries a jail sentence.'

243 A fax dated 18 June 2001 (and apparently sent the following day)³⁰⁶ from Mr Ronnie of Umbro to Mr Whelan of JJB confirms 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. It 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 [...] net net and the junior jersey is [...] 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 [...] of Manchester United and England apparel product based on JJB Sport[s] plc's current terms.'

244 A fax dated 26 June 2001³⁰⁷ from Mr Whelan of JJB to Mr Jim Tucker, managing director of Nike, states:

'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 [...] units, but no further shirts can be made. This should enable a

³⁰⁶ Doc 3/52 (CK3). JJB's confirmation of the reinstatement was a fax dated 19 June 2001 from Mr Russell to Mr Bryan at tab 5 to JJB's WR on Supplemental Rule 14 Notice.

³⁰⁷ Doc 4/244 (NS1).

smooth transition from Umbro to Nike, and ensure that the MU shirt is not bastardised on price around the country.'

The fax was copied to Mr Kenyon at MU.

- 245 By the end of June 2001, negotiations between MU, Nike and JJB on a new retailing scheme for MU had reached a relatively developed stage.³⁰⁸ MU has also confirmed³⁰⁹ that by this stage Umbro had lost interest in its dealings with MU because Nike had been awarded the next contract.

JULY 2001

- 246 On 20 July 2001, the MU centenary Replica Kit was launched. Allsports, Blacks, JJB, JD and Sports Soccer retailed Replica Shirts at RRP's or above.³¹⁰ Sports Soccer continued to maintain prices at RRP's on adult and junior Replica Shirts until 20 August 2001.³¹¹

AUGUST 2001

- 247 On 13 August 2001, during a meeting with OFT officials, Sports Soccer said³¹² it could contact Umbro to discuss retailers' pricing intentions on the MU centenary Replica Shirt. Sports Soccer also stated that the OFT would not find any retailer selling the MU Replica Shirt at less than £39.99.
- 248 An e-mail dated 13 August 2001³¹³, from Mr May of Umbro to Mr Guest of Allsports states:

'Subject: England away

Michael [Guest]

spoke to C[hris]R[onnie of Umbro], not clearing this presently as per conversation with M[ichelle]C[harnock of Allsports], will prob[ably] hold off until Nov[ember]/Dec[ember]. C[hris]R[onnie] may be tempted if you offer something in between normal terms and clearance (approx[imately]

³⁰⁸ See correspondence at doc 4/271 (JW5) and MU's OR on Rule 14 Notice p.40 lines 5-26 (App 1, doc 2 to Supplemental Rule 14 Notice).

³⁰⁹ MU's OR on Rule 14 Notice pp.39-40 lines 35 *et seq* (App 1, doc 2 to Supplemental Rule 14 Notice).

³¹⁰ Annex 3, table 5.

³¹¹ Annex 3, table 5..

³¹² Doc 1/19, para 12.

³¹³ Doc 3/224 (NW8).

£[...][C]) and commit not to discount for a period of time. Worth a try!’

- 249 On 20 August 2001, a week or so after the meeting with OFT officials, 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 2001.³¹⁴
- 250 On 23 August 2001, the Chelsea away Replica Kit was launched. Allsports, Blacks, JJB, and JD retailed at RRP. Sports Soccer discounted all elements of the Replica Kit.³¹⁵
- 251 On 29 August 2001 OFT officials conducted unannounced on-site investigations under section 28 of the Act at the premises of Allsports, JJB and Umbro.

SEPTEMBER 2001

- 252 An internal Nike e-mail dated 4 September 2001³¹⁶ reporting on a recent meeting with Mr Whelan of JJB states:

‘2. There is a growing concern over replica product pricing in the UK market place and JJB made the decision to clean up all remaining Manchester United product in an attempt to protect the MU business in the future.

Dave Whelan has received a visit from the Office of Fair Trading and fears they are on the offensive to review the disparate retail pricing of replica product.

3. Dave Whelan showed great interest in JJB’s involvement in Man Utd product distribution and is awaiting a call from MUFC to discuss further the JJB role in being lead distribution in the UK. All parties anticipate an impactful launch in August 02.’

- 253 On 5 September 2001 OFT officials conducted unannounced on-site investigations under section 28 of the Act at the premises of Nike and Sports Soccer. The OFT also sent the first batch of a large number of section 26 Notices.

³¹⁴ Sports Soccer’s WR on Rule 14 Notice para 2.2.61 and Annex 1 (App 1, doc 5 to Supplemental Rule 14 Notice) and Annex 3, tables 3, 5 and 7 below.

³¹⁵ Annex 3, table 7.

³¹⁶ Doc 4/278 (NW1)

PURCHASE ORDER FORMS AND CORRESPONDENCE ABOUT INVOICES

- 254 The Blacks purchase order forms prepared by Blacks and sent to Umbro³¹⁷ for the MU home shirt launched on 1 August 2000 contain a column headed '*Unit Sell Price*' completed by Blacks. This price for '*MUFC Home Jer[sey] '00*' is '*39.99*'. This is an example of a number of Blacks' purchase order forms for orders in 2000 which have the same column.
- 255 A fax dated 7 September 2000³¹⁸ from Mr Forsey of Sports Soccer to Mr Ronnie of Umbro concerning invoices dated 20 July gives details of Sports Soccer's '*Sell Price*' for Nottingham Forest Replica Shirts of £39.99 and £29.99.
- 256 An Allsports purchase order form prepared by Allsports and sent to Umbro³¹⁹ for Celtic Replica Kit dated 3 November 2000 contains not only details of the products, numbers ordered, wholesale price and the '*nett*' price but also the '*sell*' price completed by Allsports. For example, the '*Sell*' figure for a 'home jersey senior s[hort]/s[leeved] is £39.99. Allsports has confirmed that this is the retail price and that this information is included for administrative convenience. Allsports has also confirmed that this document is an example of a standard purchase order form which was used for other manufacturers as well. Allsports has said that at least when discussing wholesale prices, it discussed retail pricing expectations with Umbro and that Umbro monitored retail prices. Allsports has also confirmed that '*in future, it will remove such information from its order forms so that there is no room for misunderstanding as to the basis for the inclusion of such information...*'.³²⁰
- 257 JJB's purchase order input form³²¹ for Replica Kit contains details of the RRP for each relevant product, the '*Trade*' price (standard wholesale price), the '*Cost*' price (actual wholesale price paid) and the '*Sell price*' (JJB's retail price). This is a standard internal JJB document but the bundle of these dated May to August was copied by OFT officials at the premises of Nike on 5 September 2001. The OFT has also seen JJB's standard purchase order forms which were sent to Umbro which do not contain this information.³²²

³¹⁷ Umbro response dated 14 October 2002 to section 26 Notice dated 13 September 2002 tab A, 'Man Utd First Sport' (App 1 doc 3 to Supplemental Rule 14 Notice). The orders were placed by and received by its wholly owned subsidiary Blacks Retail.

³¹⁸ Doc 3/60 (CK13).

³¹⁹ Doc 3/152 (BJP5).

³²⁰ Allsports' WR on Rule 14 Notice pp.12, 18-19 (App 1, doc 10 to Supplemental Rule 14 Notice).

³²¹ Doc 4/251 (HML2).

³²² Umbro's response dated 14 October 2002 to section 26 notice dated 13 September 2002, tab JJB.

2. Umbro/Sports Connection Celtic Agreement

258 This agreement involved Umbro and Sports Connection and concerned the withdrawal of Sports Connection's 'everything reduced' promotion in respect of the Celtic home Replica Shirt launched in 2001. This part of the decision details the events in 2001 relating to this agreement.

MARCH 2001

259 Sports Connection has stated:³²³

- ' • We believe that it was a term of supply by a number of replica football kit manufacturers that we sell their replica kit at the RRP at least for 6-8 weeks after launch. However, there are few specific instances which illustrate this belief.
- From March 2000 until early July 2001 sportsconnection ran a general ["everything reduced"] promotion with all footwear and clothing reduced. This was applied to ensure that all products were reduced by a minimum of £1 [from] a previous reference price. There were no problems with this until March 2001.
- sportsconnection were contacted by Umbro in March 2001 and asked if the soon to be launched Celtic home jersey would be included in the promotion. sportsconnection was asked to exclude this jersey from its promotion. sportsconnection raised the price from £38.99 to £39.99 and in addition removed the product from the website. In fact, sportsconnection thereafter excluded all replica kit from the promotion. The contact was made by telephone by Phil...[Fellone] of Umbro to Alistair Ross (sportsconnection buying director).'

260 Mr Stern of Sports Connection states:³²⁴

'It is my understanding that the calls our then Buying Director, Alistair Ross, received from Phil Fellone of Umbro in March 2001 contained an implied threat; either of outright non-supply or of "messaging about" with our deliveries of stock should we not "play ball" with Umbro in respect of pricing. ...On this occasion Mr Ross advised me of the communication

³²³ Sports Connection's response dated 8 October 2001 to section 26 Notice dated 5 September 2001 answer 9, p.7 (doc SA15).

³²⁴ Stern w/s para 4 attached to Sports Connection's WR on Rule 14 Notice (App 1, doc 26 to Supplemental Rule 14 Notice).

and as a result of this pressure, I decided that we would still continue [with] the [“everything reduced”] promotion, but rather than just exclude the Celtic replica, I excluded all replica from the promotion. This meant that we would not be discriminating against any other football product.’

Sports Connection ended its ‘everything reduced’ promotion at the end of April 2001.³²⁵

261 Mr Fellone of Umbro states:³²⁶

‘In March 2001, when the new Celtic shirt was launched, I received details of a complaint from Celtic F.C. from Simon Marsh [of Umbro]...

I then discovered that Sportsconnection were selling the shirt at £1 below rrp. Sports Soccer had a policy that if any retailer discounted the product below rrp by any amount, they would also discount, and usually by a greater amount.

In order to prevent further pressure from the club and also alleviate the potential threat from other retailers, I contacted Sportsconnection to ask them to return to rrp. They agreed.’

APRIL 2001

262 Sports Connection has confirmed³²⁷ that it retailed the adult Celtic home Replica Shirt launched on 16 March 2001 at £38.99 until 2 April 2001 whereupon it increased the price to £39.99, in line with Umbro’s recommended resale prices. It discounted again for a very limited period on 22 May 2001 in order to reduce stocks.³²⁸ Similarly, in relation to the junior Celtic home Replica Shirt, Sports Connection increased the price to £29.99 on 2 April 2001 (having initially priced it at £28.99) and discounted again for a short period at the end of May 2001 again in order to reduce stocks.

³²⁵ Sports Connection’s WR on Rule 14 Notice p.10 and Annex 3 (App 1, doc 14 to Supplemental Rule 14 Notice).

³²⁶ Fellone w/s paras 28-30 attached to Umbro’s WR on Rule 14 Notice paras 149-151 (App 1, doc 4 to Supplemental Rule 14 Notice).

³²⁷ Sports Connection’s response dated 8 October 2001 to section 26 Notice dated 5 September 2001 answer 8, section Umbro p.3 (doc SA15).

³²⁸ Attachment to Maclay Murray & Spens letter dated 3 October 2002 for Sports Connection, para 5 (App 1, doc 25 to Supplemental Rule 14 Notice).

JUNE 2001

263 Umbro's May 2001 monthly management report³²⁹ prepared by Mr Kevin Huntley and finalised in early June³³⁰ states:

'**Sports Connection** – discounting Celtic kit to match JJB and Sports Soccer. P Stern deciding how long to run promotion and would not confirm when full price would go back on.'

264 Sports Connection has confirmed³³¹ that when it discounted the Celtic home Replica Shirt at the end of May 2001 Umbro again put pressure on Sports Connection to increase its prices. However, Sports Connection has confirmed that it did not make any further price-fixing agreement with Umbro.

3. England Direct Agreements

265 There are two interlinked agreements which make up this part of the case:

- (a) the FA/Sportsetail agreement – this was a formal written agreement which the FA and Sportsetail interpreted as giving the FA the right to control Sportsetail's retail prices for FA licensed merchandise. This agreement was signed in February 2000 and the FA formally terminated its right to control Sportsetail's retail prices in November 2001.
- (b) the FA/Sportsetail/Umbro/JJB agreement – this was an agreement under which the parties agreed to peg Sportsetail's internet and other retail prices to those in JJB's high street stores in order to avoid Sportsetail's prices undercutting high street prices. This agreement was made in February 2000 and ran until August 2001 for JJB and Umbro and until November 2001 for Sportsetail and the FA.

266 This part of the decision summarises the key parts of the FA/Sportsetail agreement and then gives details of the events in 2000 and 2001 relating to the England Direct Agreements as a whole.

³²⁹ Doc SA19, folder 3, tab May 01, p.20, section 4.

³³⁰ See p.3 for reference to 8 June 2001.

³³¹ Sports Connection's OR on Rule 14 Notice pp.42 lines 24 *et seq* -43 (App 1, doc 23 to Supplemental Rule 14 Notice).

FA/SPORTSETAIL AGREEMENT

- 267 The FA/Sportsetail Agreement was made on 4 February 2000 between *inter alia* the FA and Sportsetail.³³² Under that agreement the FA granted Sportsetail the right to sell FA licensed merchandise using the 'England Direct' trade name developed by the FA and Sportsetail.³³³ FA licensed merchandise is defined in the agreement as '*products produced from time to time under licence from The F.A. and bearing any of The F.A. Marks*', the relevant trademarks being set out in Schedule 1³³⁴ and this included the England Replica Kit ('FA Licensed Merchandise').
- 268 In particular, Sportsetail was granted the exclusive right to sell FA Licensed Merchandise via the 'England Direct' internet site, by mail order and at retail outlets located at high tourist traffic locations such as airports where such outlets were to be dedicated solely to the sale of FA Licensed Merchandise. However, the FA reserved the right to retail FA Licensed Merchandise from its own official website and the agreement made clear that FA Licensed Merchandise would continue to be sold by third party retailers.³³⁵
- 269 Clauses 4.1.3, 4.3.1 and 5.3 provided that:
- '4.1.3 [Sportsetail]...shall provide the following materials to The F.A. ...before 1 March 2000:
- (a) a list of the proposed Content;
- (b) a mock up of the proposed Content including the process that Users will follow to purchase F.A. Merchandise;
- ...
- 4.3.1 [Sportsetail]...shall submit to The F.A., for its written approval...samples of:
- (a) any Content which [Sportsetail]...wishes to include on the Web Site; and
- (b) all advertising and promotional materials to be used in connection with the Web Site from time to time

³³² The FA's response dated 9 October 2001 to section 26 Notice dated 12 September 2001 tab 1 (doc SA16).

³³³ See the recitals.

³³⁴ Clause 1.1.

³³⁵ Clause 3.

at least 14 days prior to the proposed use of the same.

...

5.3.1 [Sportsetail]...shall submit to the F.A., for its written approval...representative samples of all advertising and promotional materials to be used on or within or in connection with the Retail Stores from time to time at least 14 days prior to the proposed use of the same.

5.3.2 [Sportsetail]...shall not use or issue or authorise the issue of any advertising and promotional materials in relation to the Retail Stores which have not been approved by The F.A. ...'

- 270 The FA initially stated³³⁶ that the agreement did not concern Sportsetail's retail prices but more general matters such as registrations, usage, complaints and refunds procedures as well as rules for participation in promotions and competitions. However, the FA later elaborated on, in particular Clause 4.1.3 of the FA/Sportsetail Agreement:³³⁷

'Mr Smith [then commercial manager of the FA] said that his interpretation was that it allowed The F.A. to approve all web content to be used on the England Direct site, including the prices quoted. He has said that he did not discuss this with, nor express this interpretation to, the in-house lawyer involved in the drafting of the Agreement. From the information we have at present, it does not appear that Mr Smith discussed his view with anyone else at The F.A.'

The FA's external solicitors were not aware of Mr Smith's view.³³⁸

- 271 Mr Smith has said:³³⁹

'My understanding of the England Direct contract was that it gave the FA right of approval over all of the content to be posted on the England Direct web site including the prices which Sportsetail could charge. This was my interpretation of the contract and it was in keeping with my view that the England Direct arrangement was an arm of the FA's own merchandising operation.'

³³⁶ Letter from the FA dated 9 November 2001 para 1 (doc 6/438).

³³⁷ Letter from the FA dated 30 November 2001 section 1, para 3 (doc 6/455).

³³⁸ Letter 23 August 1999 from the FA to Bird & Bird attached to the FA's leniency application, tab 13 (doc SA21).

³³⁹ Smith 1st draft w/s para 11 in support of the FA's leniency application dated 28 January 2002 (doc SA21, tab 47) and Smith 2nd w/s para 11 in support of Sportsetail's leniency application (doc 7/508).

272 Under the terms of the FA/Sportsetail Agreement, Sportsetail paid a royalty to the FA on all FA Merchandise sold calculated by reference to the net sales value. A letter from the FA to all its licensees dated 8 September 2000 states:³⁴⁰

‘With regard to the supply of products to England Direct by licensees, all items should be supplied to Sports etail at the **best possible wholesale price, net of royalty**. The reason that the usual royalty to The F.A. should be deducted from the wholesale price is that Sports etail pay the royalty to The F.A., on the retail price, rather than the licensee.’

FA/SPORTSETAIL/UMBRO/JJB AGREEMENT

November 1999

273 A letter dated 2 November 1999³⁴¹ from Mr Prothero of Umbro to Mr Russell of JJB states:

‘Following our telephone conversation this morning I would like to confirm, for the purpose of good order, the issues discussed relative to the meeting held with yourself, Duncan [Sharpe of JJB], David Smith [then at the FA] and myself on 21st 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.

I appreciate the de-brief Colin and will continue the dialogue once I have discussed the aforementioned issue[s with] David Smith at the FA.’

274 A letter dated 25 November 1999³⁴² from Mr Prothero of Umbro to Mr Russell of JJB states:

‘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.

³⁴⁰ The FA’s response dated 9 October 2001 to section 26 Notice dated 12 September 2001, tab 7 (doc SA16).

³⁴¹ The FA’s leniency application, tab 15 (doc SA21).

³⁴² The FA’s leniency application, tab 16 (doc SA21).

2. UMBRO will thereafter not supply the FA directly with any of these products for its Retail Division.'

This letter was copied to Mr Smith at the FA and internally to Mr Fellone at Umbro.

February 2000

275 A fax dated 3 February 2000³⁴³ from Mr Armstrong of the FA to Mr Marsh of Umbro states:

'Please find enclosed the letter to Colin Russell [of JJB] 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'.

The draft letter to JJB sets out the terms upon which JJB would supply Sportsetail with FA merchandise licensed to Umbro ('Umbro Licensed FA Merchandise'). The draft letter states:

'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...'

276 The FA/Sportsetail agreement having been signed on 4 February 2000, the final version of the above letter was sent by the FA to JJB on 7 February 2000 and

³⁴³ The FA's leniency application, tab 19 (doc SA21).

contained the same provisions.³⁴⁴ The letter was copied to Mr Marsh at Umbro and Mr Yates of Hay & Robertson plc as well as being copied internally to Mr Armstrong and Mr Carling.

277 Mr Smith states:³⁴⁵

'13. From around October 1999 and in the following months, during which time the negotiations in respect of the England Direct Agreements were taking place, Martin Prothero, the Head of Marketing at Umbro, expressed to me his concern that the operation of England Direct might disturb Umbro's relationship with JJB. I was informed by Martin that JJB was not happy with the possibility of Sportsetail purchasing items direct from Umbro and that, although JJB did not wish to operate the web site itself, it wished to remain the point of contact for supply.

14. As such, Martin advised me that for this reason, and because it was easier from an administrative perspective (to avoid Umbro having to set up a further account to service Sportsetail which was expected to make relatively small amounts of sales), Umbro would not supply direct to Sportsetail. Rather, he advised me that Sportsetail must obtain its stock from JJB. Further, I sought to alleviate some of Umbro's concerns by advising Martin that Sportsetail would not be selling at a price lower than JJB's.

14.1. ...I viewed the England Direct operation as part of the FA's own merchandising operation and, as such, I believed that it was entirely appropriate that the FA had right of approval over the prices that could be charged by Sportsetail...

14.2. It was entirely logical for the prices to be charged through the England Direct operation to be the same as those charged by JJB. As part of the FA's overall strategy in relation to the England brand, JJB had already been established as the FA's Official Sports Retailer. The strategy was being further fulfilled by the establishment of the England Direct web site. The site was to be held out to the public as the Official FA web site. As such, I saw JJB (in so far as it related to its role as the official FA retailer) and the England Direct web site as two outlets of the

³⁴⁴ The FA's leniency application, tab 21 (doc SA21). The letter was received by JJB, see JJB's responses dated 2 and 5 November 2001 to section 26 Notice dated 18 October (doc SA18).

³⁴⁵ Smith 1st draft w/s paras 13-16 in support of the FA's leniency application dated 28 January 2002 (doc SA21, tab 47) and Smith 2nd w/s paras 13-16 in support of Sportsetail's leniency application (doc 7/508).

FA's own merchandising operation. It made sense for the prices on the FA's official web site to be the same as the prices charged at the FA's official sports retailer.

...

15. These arrangements were discussed and agreed over a series of meetings and telephone calls throughout the period of about December 1999 to early February 2000. On or about 24 or 25 January 2000, a meeting was held at JJB's office in Wigan at which Colin Russell of JJB, Marc Armstrong and myself from the FA and Simon Marsh of Umbro were present. I cannot remember precisely what was said at this meeting. However, I believe that the arrangements in relation to the supply and pricing of Umbro kit were discussed.

16. Simon Marsh sought confirmation of the matters discussed at the meeting and, in particular, of the agreement reached in respect of England Direct. On my instruction, Marc Armstrong drafted a letter to be sent to Colin Russell at JJB and sent that draft on 3 February 2000 to Simon Marsh at Umbro for confirmation of the accuracy of the content. I then sent the letter to Colin Russell at JJB on 7 February 2000.'

278 On 11 February 2000,³⁴⁶ Mr Marsh of Umbro sent a fax to Mr Russell of JJB with an e-mail attached entitled 'ENGLAND DIRECT', with the following message:

'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.

³⁴⁶ JJB's responses dated 2 and 5 November 2001 to section 26 Notice dated 18 October (doc SA18).

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.'

- 279 Mr Marsh asked for JJB's comments. On the original version obtained from JJB, at the asterisk marked above (which, if it was contained in the original version, would be at the left hand margin) there is an arrowhead leading from a handwritten 'NO' which is written in the left hand margin. There are no other handwritten comments or marks. This e-mail was copied *inter alia* to Ms Pallett (PA to Mr Ronnie) and Mr Prothero at Umbro.
- 280 An internal Umbro e-mail dated 25 February 2000³⁴⁷ from Mr Marsh to Ms Smith (PA to Mr Fellone and Mr Bryan) states:

'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.

- 281 The '*modus operandi*' was the message that had been faxed by Mr Marsh of Umbro on 11 February 2000³⁴⁸ to Mr Russell of JJB asking for JJB's comments.

³⁴⁷ Doc 3/54 (CK7).

³⁴⁸ JJB's responses dated 2 and 5 November 2001 to section 26 Notice dated 18 October (doc SA18).

March 2000

282 Mr Smith, then of the FA, states:³⁴⁹

‘On 28 March 2000, I advised Alison Eves at Sportsetail that the price of replica kit charged by Sportsetail must be “pegged” to the price offered within JJB stores’.

283 A fax dated 29 March 2000³⁵⁰ from Ms Eves of Sportsetail to Mr Hattersley of JJB states:

‘I am not sure if you have heard of sportsetail Ltd. We are setting up the england-direct Websi[t]e 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.’

284 The fax was received at JJB. Ms Eves has stated³⁵¹ that JJB did not respond to the request and that JJB’s retail prices were subsequently confirmed by Sportsetail with Umbro.

June 2000

285 An e-mail dated 9 June 2000³⁵² from Ms Eves of Sportsetail to Mr Smith at the FA states:

‘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

³⁴⁹ Smith 1st draft w/s para 17 in support of the FA’s leniency application dated 28 January 2002 (doc SA21, tab 47) and Smith 2nd w/s para 17 in support of Sportsetail’s leniency application (doc 7/508); see also the FA e-mail from Mr Smith dated 28 March 2000 to Ms Eves (the FA’s leniency application tab 23 (doc SA21)).

³⁵⁰ JJB’s responses dated 2 and 5 November 2001 to section 26 Notice dated 18 October (doc SA18).

³⁵¹ Eves w/s in support of Sportsetail’s leniency application para 5 (doc 7/508).

³⁵² The FA’s leniency application, tab 25 (doc SA21).

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.'

286 In his response of the same day,³⁵³ 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?.'

It was subsequently agreed that no discount would be offered to Nationwide members on England Replica Kits. The price offered to Nationwide customers was the same as JJB's retail price.³⁵⁴

September 2000

287 An e-mail dated 24 September 2000³⁵⁵ from Mr Armstrong of the FA to Mr Smith, then at Sportsetail, 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?'

The e-mail was copied to Mr Barber at the FA.

288 In his response dated 25 September 2000,³⁵⁶ Mr Smith states:

'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.'

³⁵³ The FA's leniency application, tab 25 (doc SA21).

³⁵⁴ Letter from Buchanan Ingersoll for Sportsetail dated 15 April 2002 (doc 7/563).

³⁵⁵ The FA's leniency application, tab 29 (doc SA21).

³⁵⁶ The FA's leniency application, tab 30 (doc SA21).

January 2001

- 289 An e-mail dated 15 January 2001³⁵⁷ from Ms Eves of Sportsetail to Mr Armstrong at the FA attaches a spreadsheet giving a list of products, including the then current England home Replica Kit, and states:

‘This document shows all of the styles that we want to mark down and includes the full price and the mark down price.’

The e-mail was copied to Mr Smith, then at Sportsetail.

- 290 Mr Armstrong’s response of 17 January 2001 to Ms Eves states:³⁵⁸

‘Why are you wanting to reduce the price of the TOFFS^[359] shirts and the Corinthian figures? These items are not out of date or discontinued so I don’t see why we should be reducing the price. If we are going to be selling the entire TOFFS England range (11 different styles), as per my e-mail to Alison [Eves] yesterday, why would we reduce the price of some of the range now?

...

With regard to the items of current England home kit, please can you provide me with details of your costs in respect of these items. David [Smith] mentioned that, with the price reduction, Sports Etail would not be making any profit at all on these items and that you would be able to provide figures to substantiate this...’

This e-mail was copied to Mr Smith at Sportsetail and to Mr Barber at the FA.

- 291 Ms Eves’ response dated 18 January 2001³⁶⁰ to Mr Armstrong attaches the cost information on the England home Replica Kit and states:

‘...Home Kit figures

³⁵⁷ The FA’s response dated 9 October 2001 to section 26 Notice dated 12 September 2001 tab 7 (doc SA16).

³⁵⁸ The FA’s response dated 9 October 2001 to section 26 Notice dated 12 September 2001, tab 7 (doc SA16).

³⁵⁹ ‘TOFFS’ is short for ‘The Old Fashioned Football Shirt Co Ltd’ which manufactures and supplies ‘retro’ Replica Shirts such as the England World Cup Replica Shirt from 1966 and other nostalgia items.

³⁶⁰ The FA’s response dated 9 October 2001 to section 26 notice dated 17 September 2001, tab 7 (doc SA16).

We have to peg the Home shirt to the same price as JJB £19.99, which means that we are actually losing money as you will see however, the loss is smaller than being left with stock.'

This e-mail was copied to Mr Smith at Sportsetail.

292 Mr Armstrong's response dated 22 January 2001³⁶¹ states:

'As discussed with David [Smith] on Friday afternoon, I can confirm F.A. approval for you to reduce the prices, as requested, on the current (soon to be old) England Home Kit and I can also confirm that The F.A. will waive its [...] [C] royalty on these items.

...

With regard to the other items you wanted to reduce in price, as discussed with David, I am happy for you to reduce the prices of...the Corinthian 1999-2000 Squad set (featuring the current (soon to be old) home kit design...

However, as discussed, you will NOT reduce the price of the TOFFS England Retro shirts...

While we are happy for you to go ahead with these reductions, we need to have a meeting with Paul [Barber] to decide how we are going to approach this kind of thing in the future. We need to decide what the policy is going to be regarding price reductions in the future.'

The email was copied to Mr Smith at Sportsetail and Mr Barber at the FA.

February 2001

293 An e-mail dated 16 February 2001³⁶² from Ms Eves of Sportsetail to Mr Armstrong at the FA states:

'We thought that to try to really move it we could do the following:

1. Email all of those on our database advising that the sale is finishing 23/02/01 so better get it while they can.

³⁶¹ The FA's response dated 9 October 2001 to section 26 notice dated 17 September 2001, tab 7 (doc SA16).

³⁶² The FA's response dated 9 October 2001 to section 26 notice dated 17 September 2001, tab 7 (doc SA16).

2. Make the sale pages available only to FA and Nationwide staff (probably with a password protection) and offer them a further 20% discount on the sale prices...'

294 In February 2001, Umbro and the Nationwide Building Society ('Nationwide'), sponsor of the England team, discussed the terms of a promotion by Nationwide in the run up to the launch of the new England kit in April 2001. The promotion was to include a 10 per cent discount on the new kit to all Nationwide members living in England who ordered the England kit via Nationwide's website link to Sportsetail's England Direct site. An e-mail dated 13 February 2001³⁶³ from Mr Marsh of Umbro to Mr Blissett of Nationwide and Mr Armstrong of the FA states:

'...we would be delighted to assist with the promotion in the format you have suggested. The only exception to this would be the element of discount you proposed. We would therefore not sanction this element as we believe that the kit is a Premium product and should be sold at it...s full retail price.'

295 Mr Armstrong then endorses this by an e-mail of the same date³⁶⁴ to Mr Marsh and Mr Blissett, stating:

'I agree with Simon's comments on the discount. The kit should be sold at the full retail price.

The fact that supporters can have the new kit delivered to their door on the day of the launch should be enough of a hook.'

March 2001

296 During 2001, the England team played various international matches at club grounds throughout the UK. The FA in conjunction with Sportsetail arranged for many of the relevant club shops to retail the England Replica Kit immediately prior to, during and for a short period after the game. The stock was supplied on a sale or return basis and the relevant clubs were given full details of the RRP. The clubs were entitled to a [...] [C] per cent royalty of the retail price of the FA merchandise sold.³⁶⁵

³⁶³ The FA's response dated 9 October 2001 to section 26 Notice dated 12 September 2001, tab 7 (doc SA16).

³⁶⁴ The FA's response dated 9 October 2001 to section 26 Notice dated 12 September 2001, tab 7 (Document SA16).

³⁶⁵ See e-mail from Mr Armstrong to Newcastle United FC dated 9 August 2001 which also states '*attached, for your information, a list of the Official England Products currently*

297 An FA e-mail from Mr Armstrong dated 4 March 2001³⁶⁶ to Ms Eves at Sportsetail states:

‘Please can you also supply me with the RRP for all of these products. Did we tell Aston Villa that they had to sell at our RRP’s?’

298 Ms Eves’ response dated 5 March 2001³⁶⁷ states:

‘We did give Aston Villa all the RRP’s so there should not have been any reason why they sold them at any other price.’

June 2001

299 An internal FA e-mail from Mr Armstrong dated 12 June 2001³⁶⁸ to Mr Barron states:

‘David [Smith] is not in a position to approve the amount of discount etc. Sports Etail operate England Direct under licence from The F.A. and they have to get everything approved by The F.A. - layout/content of site/mail order catalogue, special offers etc.

The revenue we receive from England Direct comes into my budget and a discount to the E[ngland]M[embers’]C[lub] will not affect David [Smith]’s bottom line at all, as it is coming out of The F.A.’s royalty from Sports Etail. Therefore, it is me you need to be speaking to and not David.

The mechanic for implementing the discount needs to be agreed with David but please can you copy me in on any correspondence relating to this.

The actual 5% discount on all merchandise other than the England kit is fine but please can you send me the proposed copy and mechanic for this discount scheme before you go to print.’

available from Sports Etail, along with the retail price of each product’. A similar e-mail was sent to MU on 9 September 2001. (The FA’s response dated 9 October 2001 to section 26 notice dated 17 September 2001 (doc SA16, tab 7)).

³⁶⁶ The FA’s response dated 9 October 2001 to section 26 notice dated 17 September 2001, tab 7 (doc SA16).

³⁶⁷ The FA’s response dated 9 October 2001 to section 26 notice dated 17 September 2001, tab 7 (doc SA16).

³⁶⁸ The FA’s response dated 9 October 2001 to section 26 notice dated 17 September 2001, tab 7 (doc SA16).

August 2001

- 300 An agenda for a meeting between the FA and Sportsetail on 10 August 2001, refers as an agenda item to '*Discounts/sell offs*'.³⁶⁹

November 2001

- 301 On 30 November 2001³⁷⁰ the FA wrote to Sportsetail to confirm that the FA did not consider that the FA/Sportsetail Agreement entitled the FA to control Sportsetail's retail prices. Sportsetail has confirmed this.³⁷¹

³⁶⁹ Sportsetail's response dated 29 November 2001 to section 26 Notice dated 14 November 2001, section 2 (doc SA20).

³⁷⁰ The FA's leniency application, tab 50 (doc SA21).

³⁷¹ Letter from Buchanan Ingersoll for Sportsetail of 5 April 2002 (doc 7/563).

IV LEGAL ASSESSMENT

1. Section 2(1) of the Act

302 The Chapter I prohibition provides that agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK and which have as their object the prevention, restriction or distortion of competition within the UK, are prohibited unless they are exempt in accordance with the provisions of Part I of the Act.³⁷²

2. Relevant market

303 It is necessary to define the market only where it is impossible, without such a definition, to determine whether an agreement is liable to affect trade in the UK and have as its object the prevention, restriction or distortion of competition.³⁷³ There is no such need in the present case, as the agreements involved are all price-fixing agreements that have as their object the prevention, restriction and distortion of competition. However, market definition is the first step in the process of assessing penalties.³⁷⁴ It is therefore addressed further in Part V below.

3. The Parties as Undertakings

304 All the Parties are undertakings within the meaning of section 2(1) of the Act.

305 Although the FA is a football governing body, it is an undertaking to the extent to which it undertakes economic activities such as licensing the commercial rights of the England teams, concluding sponsorship and licensing agreements, selling broadcasting rights and selling tickets for games involving the England teams.³⁷⁵ In entering into the agreements which are the subject of this decision, the FA was carrying on economic and commercial activities and was therefore acting as an undertaking.

³⁷² Under section 60 of the Act, the OFT is required, in applying the Chapter I prohibition, to ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Courts or any relevant decision of the European Courts. The OFT must also have regard to any relevant decision or statement of the European Commission.

³⁷³ Case T- 62/98 *Volkswagen AG v Commission* [2000] ECR II-2707 para 230.

³⁷⁴ OFT's Guidance, para 2.3.

³⁷⁵ Commission Decision *Football World Cup 1990* [1994] 5 CMLR 253; Commission Decision *UEFA's Broadcasting Regulations* OJ No L171 26.6.2001, p.12 at paras 47 and 50-51.

4. Relevant case law in relation to agreements and concerted practices

4.1 AGREEMENTS

306 An agreement within the meaning of the Chapter I prohibition exists in circumstances where there is a concurrence of wills in that a group of undertakings adhere to a common plan that limits or is likely to limit their individual commercial freedom by determining lines of mutual action or abstention from action.³⁷⁶ This is irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed. No formalities are required for an agreement or any enforcement mechanisms. An agreement may be express or implied from conduct of the parties.³⁷⁷ Where a manufacturer adopts certain measures in the context of its ongoing contractual relations with its customers such measures will be agreements if there is an express or implied acquiescence or participation by those customers in such measures.

4.2 CONCERTED PRACTICES

307 A concerted practice does not require an actual agreement (whether express or implied) to have been reached. A concerted practice covers any form of collusive conduct which knowingly substitutes practical co-operation between undertakings for the risks of competition.³⁷⁸ As the Commission held in *Polypropylene*:³⁷⁹

'The importance of the concept of a concerted practice does not thus result so much from the distinction between it and an "agreement" as from the distinction between forms of collusion falling under Article [81](1) and mere parallel behaviour with no element of concertation.'

308 The requirement of independence between economic operators 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

³⁷⁶ Case T-41/96 *Bayer v European Commission* [2000] ECR II-3383 at para 69.

³⁷⁷ Case 41/69 *ACF Chemiefarma v European Commission* [1970] ECR 661 at, for example, paras 110-4; Case T-7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711 at paras 256-258.

³⁷⁸ Joined Cases 40 to 48, 50, 54 to 56, 11, 113 and 114/73 *Suiker Unie and others v European Commission* [1975] ECR 1663 para 26; Cases 48/69 *ICI v European Commission* [1972] ECR 619 at para 64.

³⁷⁹ *Polypropylene* OJ No L230 18.8.1986, p.1 at para 87. See also Case C-49/92P *European Commission v Anic Participazioni* [1999] ECR I-4125 at para 108.

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.³⁸⁰

309 It is also clear³⁸¹ that it is not necessary for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice. The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two. This is particularly the case in complex infringements involving a series of measures by several undertakings over a period of time which manifests itself both in agreements and concerted practices with a common objective.

4.3 SINGLE INFRINGEMENT WHERE ACTS ARE IN PURSUIT OF A COMMON PLAN

310 Where a group of undertakings pursues a single plan involving at the same time agreements or concerted practices it would be artificial to split up the conduct by treating it as consisting of a number of separate infringements. In *Hercules*³⁸² the Court of First Instance stated:

‘..the Court points out that, in view of their identical purpose, the various concerted practices followed and agreements concluded formed part of systems of regular meetings, target-price-fixing and quota-fixing.

Those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would thus be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements. The fact is that the applicant took part – over a period of years – in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.’

311 The Chapter I prohibition applies therefore not only to any particular agreement establishing a common plan but to the whole continuing process of collusion in which the parties are involved. Such collusion can manifest itself in a whole

³⁸⁰ Joined Cases 40 to 48, 50, 54 to 56, 11, 113 and 114/73 *Suiker Unie and others v European Commission* [1975] ECR 1663 at para 174.

³⁸¹ Case T-7/89 *Hercules Chemicals v European Commission* [1991] ECR II 1711 at para 264; Case T-1/89 *Rhône Poulenc v European Commission* [1991] ECR II-867 at para 127; Case T-305/94 *Limburgse Vinyl Maatschappij v European Commission* [1999] ECR II 931 at 697.

³⁸² One of the appeals arising out of the *Polypropylene* decision, Case T –7/89 *Hercules Chemicals v European Commission* see footnote 377 above at paras 262-3.

series of measures and initiatives including express agreements, regular meetings, ongoing contact and other conduct or practices where they are aimed at influencing the conduct of others on the market.³⁸³

312 In *Anic*,³⁸⁴ the European Court of Justice said:

‘When...the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, 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.’

313 Further an undertaking that has taken part in an agreement or concerted practice through conduct of its own ‘*which was intended to bring about the infringement as a whole [will] also be responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement*’.³⁸⁵

314 Moreover, the fact that a party may come to recognise that in practice it can ‘cheat’ on the agreement or concerted practice at certain times does not preclude a finding that there was a continuing single overall infringement.³⁸⁶

4.4 OTHER LEGAL ISSUES RELATING TO AGREEMENTS AND CONCERTED PRACTICES

315 A finding of an agreement or concerted practice does not require a finding that all the parties have given their express or implied consent to each and every aspect of the agreement.³⁸⁷ The mere fact that a party does not abide fully by an agreement which is manifestly anti-competitive does not relieve that party of

³⁸³ Joined Cases 40/73 *et seq Suiker Unie v European Commission* at para 173 see note 378 above; Case 86/82 *Hasselblad v European Commission* [1984] ECR 883 at paras 24-28; Joined Cases 100-103/80 *Musique Diffusion française v European Commission* [1983] ECR 1825 at para 84; *Ford Agricultural* OJ No L20 28.1.1993 p.1 at paras 11-17; *Gosme/Martell-DMP* OJ No L185 11.07.1991, p.23 at paras 31-32.

³⁸⁴ Another of the appeals arising out of the *Polypropylene* decision, Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125 at para 87.

³⁸⁵ Case C-49/92P *European Commission v Anic Partecipazioni* see note 384 above at para 83.

³⁸⁶ Case C-246/86 *Belasco v European Commission* [1989] ECR 2117 paras 10-16.

³⁸⁷ Case C-49/92P *European Commission v Anic Partecipazioni* para 80 see note 384 above; Case T-28/99 *Sigma Technologie di rivestimento v European Commission* [2002] ECR II-1845 para 40.

responsibility for it.³⁸⁸ The parties may show varying degrees of commitment to the common plan, there may well be internal conflict, some parties may not fully implement the agreement at all times and some parties may be acting under pressure from others. The key element is concertation as evidenced by the party's knowledge that its participation was part of a wider overall plan.

316 The fact that certain undertakings may have been acting unwillingly or did not fully implement the agreement does not preclude a finding of infringement although it may be a factor in determining the level of any penalty imposed.³⁸⁹ Further, it is for a party '*to adduce evidence to show that its participation in the 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 which was different from theirs*'.³⁹⁰

317 Where a particular party (such as a manufacturer) holds a central position in relation to other parties (such as retailers), that party must exercise particular vigilance to prevent the concerted conduct of the kind described in this decision.³⁹¹

318 The European Courts have said³⁹² that it can be presumed that an undertaking which has participated in discussions having as their purpose price-fixing, which is informed of prices that its competitors intend to charge and who remains on the market could not fail to take account directly or indirectly of the information obtained about its competitors' conduct. This is particularly the case when the concertation occurs on a regular basis over a long period. An undertaking which knowingly adopts or adheres to collusive measures which facilitate the co-ordination of competing undertakings' behaviour infringes the Chapter I prohibition.

³⁸⁸ Case T-305/94 *et seq Limburgse Vinyl Maatschappij v European Commission* para 773 see note 381 above; Case T-141/89 *Tréfileurope v European Commission* [1995] ECR II-791 paras 60 and 85.

³⁸⁹ Case T-9/89 *Hüls v European Commission* [1992] ECR II-499, para 128; Case 16/61 *Modena v High Authority* [1962] ECR 289 at p.303; Joined Cases 100/80 *et seq Musique Diffusion française v European Commission* paras 88-90 see note 383 above. See also the OFT's Guidance.

³⁹⁰ Case T-9/89 *Hüls v European Commission* [1992] ECR II-499, para 126, as affirmed by the ECJ in Case C-199/92 *Hüls v European Commission* [1999] ECR I-4287, para 155.

³⁹¹ Joined Cases 100/80 *et seq Musique Diffusion française v European Commission* para 75 see note 383 above.

³⁹² Case C-199/92 *Hüls v European Commission* para 162 see note 390 above and Joined Cases T-25/95 and others *Cimenteries CBR v European Commission* [2000] ECR II-491 para 1389.

319 The fact that an agreement may have had other objects or that it was not the subjective intention of the parties to restrict competition does not preclude a finding by the OFT that the agreement had as its object price-fixing.³⁹³

5. Replica Shirts Agreements

5.1 OVERVIEW OF AGREEMENTS

320 In the Rule 14 Notice or the Supplemental Rule 14 Notice, the OFT proposed to find that there was a single overall arrangement involving Allsports, Blacks, JJB, JD, MU, Sports Soccer and Umbro, relating to the price-fixing of all Umbro licensed Replica Kit (other than Morecambe, and other than Nottingham Forest after 31 December 2000).

321 Having regard to the representations of the Parties and the evidence, the OFT is satisfied that those parties took part in a number of agreements or concerted practices relating, at least, to the pricing of certain Umbro licensed Replica Shirts during key selling periods. These were:

- (a) an agreement or concerted practice between, at least, Sports Soccer and Umbro between April 2000 and August 2001, with respect to the prices of the major Umbro licensed Replica Shirts (namely Celtic, Chelsea, England, MU and, at least during 2000, Nottingham Forest);
- (b) an agreement or concerted practice between Allsports, Blacks, JD, and JJB, as well as Sports Soccer and Umbro, with respect to England home and away Replica Shirts around the time of the Euro 2000 tournament;
- (c) an agreement or concerted practice between, at least Allsports, Blacks, JJB and MU, as well as Sports Soccer and Umbro, with respect to MU home Replica Shirts launched in 2000; and
- (d) an agreement or concerted practice between, at least, JJB, Sports Soccer and Umbro with respect to England and MU Replica Shirts launched during the remainder of 2000 and in 2001.

322 The Replica Shirts covered by those agreements or concerted practices were the biggest selling elements of Umbro licensed Replica Kit, involving the most

³⁹³ Cases 96/82 *et seq IAZ International Belgium and others v European Commission* [1983] ECR 3369 para 25 and Cases 29 and 30/83 *CRAM & Rheinzink v European Commission* [1984] ECR 1679 para 26.

important teams in Umbro's portfolio. For convenience, all references below to an agreement includes a reference to a concerted practice.

323 All the agreements were vertical or horizontal price-fixing agreements or concerted practices within the meaning of section 2(1) of the Act with the object of directly or indirectly fixing the retail prices of adult Replica Shirts at £39.99 and junior Replica Shirts at £29.99 (together 'High Street Prices') at least during key selling periods. For all Replica Shirts, the key selling periods were the months immediately following their respective launch dates. For the England Replica Shirts the key selling period was also in the run up to and during the England team's participation in the major international tournament at this time, Euro 2000.

5.2 OVERVIEW OF KEY EVIDENCE RELIED ON BY THE OFT

324 It is necessary to assess the various items of direct and circumstantial evidence as a whole, rather than in isolation, and to have regard to the overall context within which the events in issue took place.³⁹⁴

5.2.1 *Contemporaneous documents & pricing data*

325 The OFT has relied principally on the contemporaneous documents created by the various parties and taken by the OFT during unannounced visits under warrant or supplied subsequently. The contemporaneous documents in this case broadly comprise:

- (a) notes for and of meetings or telephone conversations created shortly before or shortly after a particular meeting or conversation;
- (b) correspondence by e-mail, fax, letter and internal memoranda; and
- (c) Umbro's monthly management reports.

326 The OFT also relies on contemporaneous pricing data supplied by the Parties in response to section 26 Notices and otherwise. The pricing data set out in annex 3, in particular, shows a remarkable consistency over time in the behaviour of the retailers covered by this decision.

VIEWS OF THE PARTIES

327 The principal general issue raised by several parties on the contemporaneous documents concerns Umbro's monthly management reports. They are said to be

³⁹⁴ Cf. Case 48/69 *ICI v European Commission* at para 68; see note 378 above.

exaggerated as they are intended to present issues in a good light for senior managers.³⁹⁵ It is said that they cannot be regarded as an independent or objective account of events.³⁹⁶ It is also said that some Umbro correspondence with MU was exaggerated because Umbro was trying to persuade MU to sign the new Licensing Agreement with it.³⁹⁷

328 JJB, JD and MU submitted jointly a report from Lexecon which examined the pricing of Replica Kit.³⁹⁸

‘The main conclusion of the pricing analysis is that the actual pricing behaviour of each of the different retailers seems fairly similar across the shirts produced by the various different manufacturers... The OFT alleges that there was a price-fixing agreement in place in relation to Umbro shirts, but no allegations of this kind are made in the Rule 14 Notice in relation to any other manufacturers. Hence, according to the OFT’s case, we should observe that the pricing behaviour on the shirts manufactured by Umbro is in clear contrast...to the pricing behaviour observed on the shirts manufactured by rival manufacturers...in respect of which no price-fixing agreement is alleged.

While this evidence cannot conclusively prove the absence of an agreement between Umbro and the major retailers, ***it casts doubt on the existence of such an agreement or, alternatively, it certainly suggests that if there was such a price-fixing agreement, its effect was quite limited.***’ (Lexecon’s emphasis)

CONCLUSION OF THE OFT

329 The OFT does not accept that the Umbro monthly management reports are exaggerated. The management reports are frank and detailed, and were circulated widely within the company. Different parts of the management reports were also prepared by different members of staff at different levels, and generally the various parts of the reports are consistent between themselves.

330 The OFT accepts that it is likely that one part of one of Umbro’s faxes to MU was exaggerated in order to impress MU.³⁹⁹ However, that does not neutralise

³⁹⁵ JJB’s WR on Supplemental Rule 14 Notice para 3.4.

³⁹⁶ JD’s WR on Rule 14 Notice para 56 (App 1, doc 7 to Supplemental Rule 14 Notice); JD’s WR on Supplemental Rule 14 Notice para 3.6.1; Black Subsidiaries’ WR on Rule 14 Notice para 38 (App 1, doc 6 to Supplemental Rule 14 Notice).

³⁹⁷ See para 105 and, for example, JD’s WR on Supplemental Rule 14 Notice para 3.6.1.

³⁹⁸ Attached to JJB’s WR on Rule 14 Notice Conclusions, p.2 (App 1, doc 11 to Supplemental Rule 14 Notice).

³⁹⁹ This was the fax of 13 July 2000 from Mr Prothero of Umbro to Mr Richards of MU, in which Mr Prothero claimed that Umbro had organised the meeting between Allsports,

the evidential value even of that contemporaneous document: the fact that the fax evidences serious infringements of the Act, and that there is no evidence that MU reacted to distance itself from the correspondence (and, in fact, there is evidence to the contrary) indicates that MU acquiesced in Umbro's policies and approach to price-fixing in this industry.

331 As respects the Lexecon report, it cannot be concluded that price-fixing agreements did not exist simply because, according to Lexecon, pricing across the entire industry '*seems fairly similar*'. The OFT has not made any positive findings in this decision about competitive conditions in relation to other aspects of the industry. Moreover, the OFT has made all due allowance for the context in which documents have been produced but this does not affect the fact that the contents of the documents, viewed individually and cumulatively, and in the light of extraneous evidence such as pricing data, add up to compelling evidence of an infringement.

5.2.2 Other evidence

332 The OFT has also relied on or referred to witness statements submitted by the Parties, and the written and oral representations of some of the Parties.

VIEWS OF THE PARTIES

333 The principal issue raised by several parties relates to the allegedly self-serving nature of Umbro's witness statements (Attfield, Fellone, Marsh, McGuigan, Prothero and Ronnie w/s) and its written and oral representations.⁴⁰⁰ The accusation is that, as a manufacturer, Umbro was interested in resale price maintenance based on its RRP's because:

- (a) its wholesale prices were dependent on RRP's;
- (b) it was under pressure financially and needed to maintain its margins; and
- (c) there was the possibility that Umbro might become more closely associated with retailing under the proposed new structure of the new Licensing Agreement with MU.

334 In addition, some parties are concerned that once Umbro knew that the OFT had sufficient material following the unannounced visits under section 28 of the Act,

JJB and Sports Soccer about the price of the MU home Replica Shirt: see para 197 above.

⁴⁰⁰ See, for example, Allsports' WR on Supplemental Rule 14 Notice paras 13 and 14; JJB's WR on Supplemental Rule 14 Notice paras 1.4-10; MU's WR on Supplemental Rule 14 Notice paras 21-32.

Umbro tried to blame its participation in the Replica Shirts Agreements on the other Parties.

335 Some parties also question the reliability of Sports Soccer's evidence as self-serving, uncertain or inconsistent.⁴⁰¹ Further, JJB has claimed that the extent of documents originating from JJB is negligible, that the OFT has taken a selective view of the evidence before it and that relying on documents from third parties against JJB is unreliable.⁴⁰²

CONCLUSION OF THE OFT

336 The OFT accepts the general proposition that witness statements, and oral and written representations supplied by parties during investigations under the Act, may sometimes seek to limit the extent of their involvement and the degree of their culpability. This is an issue that affects all the parties, not merely Umbro, and which needs to be taken into account in assessing the evidence overall.

337 It is accepted that Umbro probably has an interest in maintaining the level of retail prices; however, it is equally clear that parties other than Umbro also had an interest in maintaining retail prices. Thus, for example, Allsports stated that this was why it organised the 8 June 2000 price-fixing meeting;⁴⁰³ JJB made this point clear in its fax to Nike of 26 June 2001;⁴⁰⁴ neither Blacks or JD were discounters; and the lower the retail price for Replica Kit, the lower the royalty payments that MU or other licensors would earn.

338 Moreover, it was not in Umbro's commercial interest to admit to anything in witness statements, written or oral representations which might implicate any of its customers if this might damage future relations with them after the OFT investigation had been concluded.

339 So far as Sports Soccer is concerned, Sports Soccer 'blew the whistle' on the price-fixing agreements and risked being penalised by the OFT for its own role in the agreements set out in this decision. Sports Soccer's business strategy is to discount as much as it can. It was being prevented from doing so by the price-fixing agreements and came to see the OFT. Sports Soccer's evidence corroborates much of Umbro's account of events.

⁴⁰¹ See, for example, Allsports' WR on Supplemental Rule 14 Notice para 6; JD's WR on Rule 14 Notice para 57 (App 1, doc 7 to Supplemental Rule 14 Notice); Blacks Subsidiaries' WR on Rule 14 Notice para 39 (App 1, doc 6 to Supplemental Rule 14 Notice); JJB's WR on Rule 14 Notice para 3.5 (App 1, doc 11 to Supplemental Rule 14 Notice); MU's WR on Rule 14 Notice para 123 (App 1, doc 1 to Supplemental Rule 14 Notice).

⁴⁰² JJB's WR on Rule 14 Notice para 6 (App 1, doc 11 to Supplemental Rule 14 Notice).

⁴⁰³ See para 187(a) above.

⁴⁰⁴ See para 244 above.

340 The OFT does not accept that it is unable to rely against party A on documents generated by party B. The fact that there is limited documentary evidence from any particular party is not unusual in cartel cases. Finally, the OFT does not expect witnesses necessarily to be able to remember all the details of all events which took place several years previously and factors this in to its assessment of the evidence as a whole.

6. Participation in the Replica Shirts Agreements of Umbro, MU and the relevant retailers

341 This section addresses, in turn, each of the agreements that together comprise the Replica Shirts Agreements, and the participation of Umbro, MU and each of the major retailers in those agreements. For ease of reference, those are:

- (a) an agreement between, at least, Sports Soccer and Umbro between April 2000 and August 2001, with respect to the prices of the major Umbro licensed Replica Shirts (namely Celtic, Chelsea, England, MU and, at least during 2000, Nottingham Forest);
- (b) an agreement between Allsports, Blacks, JD, and JJB, as well as Sports Soccer and Umbro, with respect to England home and away Replica Shirts around the time of the Euro 2000 tournament;
- (c) an agreement between, at least Allsports, Blacks, JJB and MU, as well as Sports Soccer and Umbro, with respect to MU home Replica Shirts launched in 2000; and
- (d) an agreement between, at least, JJB, Sports Soccer and Umbro with respect to England and MU Replica Shirts launched during the remainder of 2000 and in 2001.

6.1 AGREEMENT BETWEEN AT LEAST UMBRO AND SPORTS SOCCER WITH RESPECT TO MAJOR UMBRO LICENSED REPLICA SHIRTS

6.1.1 *April 2000 agreement*

342 The Umbro monthly management report of April 2000 showed that Umbro had received specific information about the intended retail prices of various of its retail customers in relation to the forthcoming launches of Replica Kit that year, including in particular JJB and Sports Soccer.⁴⁰⁵

⁴⁰⁵ See paras 153 to 155 above.

- 343 Messrs Attfield, Ronnie and Fellone of Umbro describe in their statements the pressure to which they were subjected, in particular by JJB, to see that Sports Soccer, the principal discounter, sold Replica Shirts at prices that fell in line with the rest of the high street.⁴⁰⁶ Mr Attfield and Mr Ronnie describe the circumstances that led to the meetings between themselves and Sports Soccer in March and April 2000, prior to the writing of the Umbro April 2000 monthly management report.
- 344 The OFT notes that, in Mr Fellone's section of the Umbro April 2000 monthly management report, it was reported that Sports Soccer had **'agreed to sell all new UMBRO licensed kits at £40 mens and £30 kids [i]n line with the rest of the high street'**⁴⁰⁷ (OFT's emphasis). According to the ordinary meaning of these words, this includes Chelsea, Celtic, MU and Nottingham Forest Replica Shirts, which were each due to be launched that year. This also includes new deliveries of the England Replica Shirts in 2000, even though the next launch of England Replica Kit was not expected until 2001.
- 345 So far as the England Replica Shirts are concerned, the OFT also notes the admission by Mr Ronnie of Umbro in his witness statement that, around April 2000, Umbro stopped a delivery of England Replica Shirts to Sports Soccer because Sports Soccer had not agreed to retail all other items of England Replica Kit at RRP.⁴⁰⁸ Umbro must have been aware of the commercial importance to retailers such as Sports Soccer of having stock of the England Replica Kit in the run-up to Euro 2000, and used this in order to gain co-operation. The delivery was reinstated once Sports Soccer subsequently changed its mind.
- 346 Sports Soccer complied with the agreement in relation to the launches of the Chelsea and Celtic launches in May 2000, when all the relevant retailers sold the Replica Shirts at High Street Prices. The *'price war'* anticipated by Mr Bryan on page 8 of the Umbro monthly management report for April 2000 did not materialise. This is also reflected in Mr Fellone's section of Umbro's May 2000 monthly management report in respect of Celtic and Chelsea which states, *'Prices on...Chelsea and Celtic across the account base has settled at £39.99 mens and £29.99 kids...'*⁴⁰⁹
- 347 The fact that Sports Soccer acted in accordance with the agreement is also particularly evident in relation to the Chelsea launch, since, as page 17 of the Umbro April 2000 monthly management report (prepared by Mr Attfield) noted,

⁴⁰⁶ See paras 157 to 158 above.

⁴⁰⁷ Para 153 above.

⁴⁰⁸ Para 158 above.

⁴⁰⁹ Para 189 above.

it was expected at that time that Sports Soccer would sell the new Chelsea away Replica Shirt at launch at £32 for adults and £24 for junior sizes.

- 348 Sports Soccer also complied with this agreement concerning Celtic, Chelsea, England, MU (home, away and Centenary) and Nottingham Forest Replica Shirts in 2000 and 2001.

6.1.2 May 2000 agreement

- 349 Messrs Ronnie and Attfield of Umbro next met with Messrs Ashley and Nevitt of Sports Soccer on 24 May 2000.⁴¹⁰ According to the note of that meeting prepared the next day, Sports Soccer agreed to sell England home and away Replica Shirts (at least) at High Street Prices.⁴¹¹ The OFT regards the tick against the agenda item dated 24 May 2000 '*England + Licensed retail price - until after the England v Germany game*' as acknowledgement by Umbro that Sports Soccer had agreed again to retail at High Street Prices from the date of the meeting until after the England v Germany game, which was due to be held on 17 June 2000.⁴¹² This was a logical date to select because of the expectation that Germany would beat England, which would eliminate England from the tournament.

- 350 This is also confirmed by the separate manuscript file note of the relevant meeting prepared by Mr Attfield, which records that Sports Soccer '*agreed to increase the price of England (H[ome]) + (A[way]) kits*' and that '*matching the high st[reet] price would mean a reduction in*' its sales.⁴¹³

- 351 Although an agreement on England Replica Shirts had already been made in April 2000, the issue needed to be raised again with Sports Soccer in May 2000, because, following the April agreement, Sports Soccer did not in fact increase its prices of England Replica Shirts to High Street Prices.⁴¹⁴

- 352 In the same manuscript file note of the meeting on 24 May 2000, it is recorded that Sports Soccer agreed: '*for a set period of 60 days to maintain the prices of licensed kits (include G[oal]keepers/infantkit)*'⁴¹⁵ (OFT's emphasis).⁴¹⁶ The OFT is satisfied that this meeting note refers to all new Umbro licensed Replica Shirts

⁴¹⁰ Para 165 above.

⁴¹¹ Paras 164 to 165 above.

⁴¹² Paras 164 and 192 above.

⁴¹³ Para 165 above.

⁴¹⁴ Paras 158 and 165 above.

⁴¹⁵ Para 165 above.

⁴¹⁶ The OFT notes that, on 25 July 2000, Celtic and Chelsea's goalkeepers' Replica Kits were due to be launched. On 1 and 22 September 2000, MU's goalkeepers' and third goalkeepers' Replica Kits were due to be launched.

at least. In particular, the OFT notes that although on 30 May 2000 Sports Soccer **did** discount the Celtic and Chelsea Replica Kit shorts launched earlier that month, Sports Soccer did **not** discount the Replica Shirts until at least 60 days after their launch (25 July for the Chelsea Replica Shirt, and 10 August for the Celtic Replica Shirt).

- 353 This agreement was also given effect to in respect of the Celtic, Chelsea, England and MU home, away and Centenary Replica Shirts launched in 2000 and 2001.
- 354 The OFT does not consider it inconsistent that Sports Soccer had already agreed in April 2000 with Umbro not to discount all new Replica Shirts, and yet was repeating that agreement in May 2000. Umbro repeatedly sought confirmation that Sports Soccer would retail at High Street Prices.

6.1.3 England Euro 2000 agreement

- 355 During the meeting with OFT officials in August 2001, Mr Ashley of Sports Soccer described an agreement that had been concluded by telephone between Umbro and the major retailers, including Sports Soccer, during May and June 2000 concerning the England Replica Kit.⁴¹⁷
- 356 This account is supported by the witness statements of Mr Ronnie and Mr Fellone of Umbro, who describe how, between the two of them, they sought and obtained agreement from each of the major retailers.⁴¹⁸ A full account of the involvement of the parties other than Umbro and Sports Soccer in the England Euro 2000 agreement is given in paragraph 415 below.
- 357 So far as Sports Soccer is concerned, it has admitted that a telephone conversation took place between Mr Ashley and Mr Knight of Blacks, during which Mr Ashley confirmed Sports Soccer's pricing intentions for England Replica Shirts.⁴¹⁹ Moreover, Sports Soccer increased the prices of adult England home Replica Shirts to High Street Prices on 2 June 2000, to fall in line with each of the other major retailers.⁴²⁰ This was in marked contrast to the information given to Umbro by Sports Soccer during their meeting on 22 February 2000 where it was noted:⁴²¹

'Discussed prices of England jerseys, shorts and socks.

⁴¹⁷ Para 166 above.

⁴¹⁸ Para 167 above.

⁴¹⁹ Para 166 above.

⁴²⁰ Annex 3, table 1.

⁴²¹ Para 139 above.

Indications from S[ean]N[evitt of Sports Soccer] are that the kit will be:-

Jersey j[u]n[i]o)r £24
 s[e]n[i]o)r £32...'

- 358 The OFT further relies on the section of the Umbro May 2000 monthly management report prepared on 8 June 2000 by Mr Ronnie, which referred expressly to an agreement on the England adult Replica Shirts involving Sports Soccer, as well as JJB, Blacks, JD and Allsports. It said:⁴²²

'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^[423] 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.'

- 359 After England's exit from the Euro 2000 tournament, Sports Soccer discounted the England Replica Shirt on 21 June 2000.⁴²⁴ The OFT notes that Umbro raised the issue of England Replica Shirt pricing again with Sports Soccer during a meeting on 28 and 29 June 2000, and that Sports Soccer then agreed that it would increase its prices back up to High Street Prices. The relevant meeting file note states:⁴²⁵

'S[ports]/S[occer] to increase the retail price of England (H[ome]) + (A[way]) jerseys + infantkits.'

- 360 However, Sports Soccer failed to do this and during the meeting on 3 July 2000, Sports Soccer was told:⁴²⁶

'prices of England (H[ome]) + (A[way]) jerseys/infantkits needed to be raised as part of a deal involving the promotional football. No movement planned'.

⁴²² Para 189 above.

⁴²³ The OFT takes the view that this is incorrect. The offer was £29.99 with a free cap at JD. See JD's WR on Rule 14 Notice para 67 (App 1, doc 7 to Supplemental Rule 14 Notice).

⁴²⁴ Para 192 above.

⁴²⁵ Para 193 above.

361 In the column headed 'Action' next to the above note it states '*C[hris]R[onnie of Umbro] talk to S[ean]N[evitt of Sports Soccer]*'. The OFT also notes that the reference during this meeting to there being a '*problem...as to who dictates the selling price*' when discussing a wholesale pricing formula was indicative of Umbro's approach of trying to secure resale price maintenance on Replica Kit.

6.1.4 Fax from Umbro to MU about retailers' pricing behaviour

362 On 6 June 2000, Mr Marsh of Umbro sent a fax to Mr Draper of MU (copied widely within Umbro) which referred to 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**' (OFT's emphasis).⁴²⁷ The OFT considers that, in the light of the ordinary meaning of the words used, the fax reflected Umbro's knowledge of Sports Soccer's agreements concerning **all** Umbro licensed Replica Shirts, as reflected in the various meeting notes and Umbro management reports of April and May 2000.

363 Mr Marsh, however, has stated in his witness statement that, at the time he wrote the fax, he had heard simply '*that there had been discussions with the major retailers concerning current pricing of England jerseys, which many retailers had been discounting*'.⁴²⁸ The OFT does not consider that the meaning of Mr Marsh's fax can be limited to England Replica Shirts only. The fax contained an assurance given to MU, who was principally concerned with the pricing of their own club Replica Shirts rather than England Replica Shirts. Moreover, the OFT notes that, in his witness statement, one of the copy recipients of this fax, Mr Prothero of Umbro, stated:⁴²⁹

'Throughout the spring and summer of 2000, therefore, while negotiations were continuing, I was anxious to reassure MUFC that Umbro was taking pro-active steps to protect the interests of MUFC, and to respond to MUFC's concerns. The delicacy of the MUFC situation was well-known within Umbro, and I knew that my colleagues – and in particular Simon Marsh – were also making similar efforts in relation to MUFC'.

364 In the light of the totality of the evidence, the OFT is satisfied that the fax at least provides additional evidence of agreement by Sports Soccer in relation to its pricing for the forthcoming launches of MU Replica Shirts.

⁴²⁶ Para 194 above.

⁴²⁷ Para 184 above.

⁴²⁸ Para 184 above.

⁴²⁹ Para 184 above.

6.1.5 8 June 2000 MU home Replica Shirts Agreement

- 365 Mr Ashley has confirmed that Sports Soccer felt under indirect pressure from MU to retail at High Street Prices and that all this pressure was channelled through Umbro.⁴³⁰ Sports Soccer states in its written representations that it had regular weekly meetings with Umbro, and repeated telephone calls between those meetings.⁴³¹
- 366 In his witness statement, Mr Ronnie of Umbro stated that he spoke to Mr Ashley on the morning of 5 June 2000 by telephone, when Mr Ashley said that he had been invited to a meeting at the house of Mr Hughes of Allsports on 8 June 2000, together with Mr Whelan of JJB. Mr Ronnie facilitated events by passing Mr Hughes' home telephone number to Mr Ashley, and Mr Ashley's mobile telephone number to Mr Hughes.⁴³²
- 367 Sports Soccer has also acknowledged that Umbro asked it to attend a meeting with Allsports and JJB, in order to provide them with assurances as to its pricing intentions for the forthcoming launch of, at least, the MU home Replica Shirt and because its assurances with Umbro in April and May were not sufficient for the other retailers.⁴³³
- 368 Mr Hughes of Allsports organised the 8 June 2000 price-fixing meeting with an anti-competitive purpose,⁴³⁴ and the OFT is satisfied that an agreement was reached at that meeting between Allsports, JJB and Sports Soccer to retail at launch on 1 August 2000 the MU home Replica Shirts at High Street Prices. A full account of the agreement reached at the meeting between the retailers concerned is given at paragraph 450 below.
- 369 The Allsports internal memoranda of 9 June 2000⁴³⁵ provide contemporaneous accounts of what transpired. These memoranda 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,

⁴³⁰ Para 183 above.

⁴³¹ Para 183 above as confirmed by Umbro, see para 182 above.

⁴³² Paras 175 and 182 above.

⁴³³ Para 187 (b) above.

⁴³⁴ Para 187 (a) above.

⁴³⁵ Paras 190 to 191 above.

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]** (OFT's emphasis)

370 The OFT also relies on the accounts of Mr Ashley and Mr Ronnie⁴³⁶ of that meeting. Both men expressly state that Allsports, JJB and Sports Soccer agreed to price the MU adult home Replica Shirt at £39.99. The OFT is satisfied that this was sufficient for the parties to have 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 such key price points.⁴³⁷

371 Finally, the Umbro May 2000 monthly management report, in the section prepared by Mr Ronnie on 8 June 2000, referred expressly to an agreement having been reached on adult MU Replica Shirts involving JJB, Sports Soccer, Blacks, JD and Allsports. It said:⁴³⁸

'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...**

Following a month of dialogue with all the above accounts, Umbro cannot allow our statement product to be discounted.' (OFT's emphasis)

372 The monthly management report also refers to prices being consistent across all national accounts in the sections prepared by Mr Fellone and Mr May.⁴³⁹

⁴³⁶ Paras 187(b) and 188 above.

⁴³⁷ Para 119 above.

⁴³⁸ Para 189 above.

⁴³⁹ Para 189 above.

6.1.6 July 2000 agreements

- 373 Sports Soccer made further price-fixing agreements with Umbro at meetings in July 2000.
- 374 The first meeting was on 18 July 2000, and is evidenced by the manuscript file note prepared by Mr Attfield of Umbro.⁴⁴⁰ The OFT notes Umbro's confirmation of Sports Soccer's previous agreement to a '*60 days ruling allowing*⁴⁴¹ Sports Soccer '*to [put] the prices down...with immediate effect*'. That permitted Sports Soccer to reduce the prices of the Celtic and Chelsea away Replica Shirts which had been launched two months previously.⁴⁴²
- 375 The same meeting note also records immediate price reductions for the Nottingham Forest Replica Shirts even though they had only been launched earlier that month. The OFT does not consider that this undermines the fact of the 60-day agreement: this may well have been accepted by Umbro due to the relative unimportance of Nottingham Forest in terms of total sales.
- 376 The Umbro meeting note⁴⁴³ also recorded agreement by Sports Soccer as to the price of the forthcoming MU Replica Shirts, to be launched in August and September 2000: '*MUFC (H[ome]) to begin retail life at £40/£30 as will 3^d jersey*' but that '*MUFC (A[way]) + goalkeepers jersey S[ports/Soccer to inform Umbro of retail price strategy.*'
- 377 The second meeting was on 24 July 2000. At that meeting, the permitted 60 day price reductions for Chelsea and Celtic Replica Shirts were recorded along with reductions for Nottingham Forest Replica Shirts. The OFT notes that, in the end, Sports Soccer decided not to reduce the price of the Celtic away Replica Shirt at that stage:⁴⁴⁴

'Jersey prices being reduced 25th July 00. Junior to £22. Adults to £30.
Kits in question: Chelsea home & away
[Nottingham] Forest home & away
Celtic home only!!'

⁴⁴⁰ Para 200 above.

⁴⁴¹ As agreed on 24 May 2000, see para 165 above.

⁴⁴² Para 161 and 163 above.

⁴⁴³ Para 200 above.

⁴⁴⁴ Para 203 above.

378 The Chelsea adult and junior away Replica Shirts were discounted by Sports Soccer on 25 July 2000, and the Celtic away adult and junior Replica Shirts were reduced on 10 August 2000.⁴⁴⁵

379 During the meeting on 24 July 2000,⁴⁴⁶ Sports Soccer also gave further information to Umbro about its pricing intentions for the MU Replica Shirts:

‘S[ean]N[evitt of Sports Soccer] also proposed the following price policy of Man Utd kits:

Home – will remain £40/£30

Away – will launch with MegaPrices of £30/£22

3rd – will be reviewed after 60 days.’

380 Sports Soccer then went on to retail the MU home Replica Shirt at High Street Prices on 1 August 2000 in line with other retailers.⁴⁴⁷

381 The OFT also notes that Umbro contacted Sports Soccer on 1 August 2000 because it had, in the event, failed to price all items of Replica Kit (other than Replica Shirts) at RRP.⁴⁴⁸

6.1.7 Further agreements, and meetings in relation to agreements, between Umbro and Sports Soccer in late 2000 and 2001

382 On 1 August 2000, Sports Soccer discussed with Umbro its intended pricing of, at least, MU Replica Shirts. The OFT notes that Sports Soccer felt it necessary to give an excuse to Umbro to justify any discounting behaviour.⁴⁴⁹ Sports Soccer told Umbro that it wanted ‘to reduce MUFC (3rd) jersey from the day of launch from £40 to £30 and J[u]n[i]o[r] £30 - £22’. That Replica Kit was due for launch on 29 September 2000. Sports Soccer used the excuse of ‘Problems in Derby, Manchester, Nottingham. M[i]ke[A]shley of Sports Soccer has summons to appear in Derby’, to justify its need to discount the MU third Replica Shirt from launch.⁴⁵⁰

383 On 6 November 2000,⁴⁵¹ representatives of Umbro and Sports Soccer met and reached agreement to sell, at least, the Celtic and England home Replica Shirts at launch in 2001 at High Street Prices. The file note prepared by Mr Atfield of Umbro stated:

⁴⁴⁵ Annex 3, tables 6 and 7.

⁴⁴⁶ Para 203 above.

⁴⁴⁷ Annex 3 table 4.

⁴⁴⁸ Para 208 above.

⁴⁴⁹ Para 206 above.

⁴⁵⁰ Para 205 above.

'D[otun]A[degoke of Sports Soccer] placed orders for Kits England (H[ome]) Celtic (H[ome]).

...

D[otun]A[degoke] was told before ordering that High St[reet] prices were applicable and he should place numbers accordingly across all kit options L[ong]/S[leeved], shorts, socks G[oal]K[eeper]J[ersey], infantkits.'

Therefore, Sports Soccer placed orders with Umbro for the England home Replica Kit and the Celtic home Replica Kit on the basis that they would be sold at £39.99 and £29.99 for adults and juniors respectively.

- 384 On 13 November 2000, Mr Attfield of Umbro sent a pre-meeting agenda to Sports Soccer, which confirms the extent of the agreement between those parties as to the pricing of, at least, all Umbro licensed Replica Shirts. The agenda stated: '*Retail prices to be conveyed [to Sports Soccer] and agreed for products expected pre-Christmas*'.⁴⁵²
- 385 A further agreement on Replica Shirt pricing was reached between Sports Soccer and Umbro during the meeting on 6 February 2001.⁴⁵³ In his meeting note of 12 February 2001, Mr Attfield of Umbro noted that Mr Ashley had given an assurance that '*kits, G[oal]K[eeper] kits will be retailed in line with the high street*.' The OFT is satisfied that this assurance related to, at least, all Umbro licensed Replica Shirts.⁴⁵⁴
- 386 It is noted that Umbro apparently wanted to widen the agreement to cover other items of Replica Kit as well, since Mr Attfield's meeting note also recorded that '*Retail prices of licensed shorts/socks is to be taken up with M[ike]A[shley]*'.⁴⁵⁵ The concern to widen the agreement to embrace other elements of Replica Kit was also evident from Mr Attfield's internal Umbro e-mail dated 17 April 2001, which gave Sports Soccer's prices for the forthcoming launch (on 23 April 2001) of new England home Replica Kit. Mr Attfield said in his email that he thought it best that Mr Ronnie was aware of that information, given '*...the recent reaction to the pricing of the Celtic (H[home]) shorts, socks and*

⁴⁵¹ See para 223 above.

⁴⁵² Para 225 above. The OFT also notes the complaints which Umbro received from Allsports about Sports Soccer's and JJB's discounting and from JD about pricing generally during meetings at this time; see paras 222 and 224 above.

⁴⁵³ Para 227 above.

⁴⁵⁴ The OFT notes that, with respect to Umbro's continuing infringement, Umbro also made an agreement shortly after this with respect to the price of Celtic Replica Shirts with Sports Connection; paras 258 to 264 above.

⁴⁵⁵ Para 227 above.

Infantkit'.⁴⁵⁶ In context, the OFT infers that the '*recent reaction*' referred to was the reaction of Umbro or other major retailers, but most probably JJB, to Sports Soccer's discounting of elements of the Celtic Replica Kit at the time of the launch in March 2001.

387 The OFT also notes further pricing pressure being applied by Umbro to Sports Soccer during a meeting on 27 March 2001, in relation to the offer of a promotional ball. Umbro spoke '*about the price of the ball going back up to £4 as it is causing problems at £3*' and the '(£3)' is circled and a handwritten '*To discuss with M[ike]A[shley of Sports Soccer]*' appears next to it.⁴⁵⁷

388 Similarly, there is evidence of pressure exerted by Umbro on Sports Soccer, at the instigation of JJB, for Sports Soccer to cease discounting the MU home Replica Shirts in mid 2001. The section of Umbro's May 2001 monthly management report⁴⁵⁸ that was prepared by Mr Bryan, and finalised in early June 2001,⁴⁵⁹ stated:

'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 the 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.'** (OFT's emphasis)

389 Umbro's objective appears to have been achieved, in that Sports Soccer sold the MU Centenary Replica Shirts upon their launch on 20 July 2001 at High Street Prices.⁴⁶⁰

390 The OFT further notes that:

- (a) Sports Soccer retailed the Celtic home Replica Shirt launched on 16 March 2001 at High Street Prices.⁴⁶¹ Although Sports Soccer discounted that jersey less than one month after its launch, in breach of the '60 day rule', Sports Soccer was able to rely on the fan boycott of

⁴⁵⁶ Para 232 above.

⁴⁵⁷ Para 229 above.

⁴⁵⁸ Doc 3/82 (DPT8) p.6, section 2, para 2 and p.7 section 5; doc SA19 tab May 01, pp.6 and 7.

⁴⁵⁹ See p.3 for reference to 8 June 2001.

⁴⁶⁰ Annex 3 table 5.

⁴⁶¹ Annex 3, table 6.

the Replica Shirt following certain design changes as its excuse 'to cheat' on the agreement;⁴⁶²

- (b) Sports Soccer retailed the England home Replica Shirt at High Street Prices at its launch on 23 April 2001, in line with the internal Umbro e-mail of 17 April 2001;⁴⁶³ and
- (c) Sports Soccer retailed the Chelsea home adult and junior Replica Shirts launched on 3 May 2001 at High Street Prices.⁴⁶⁴

In the light of the context, the OFT infers that Sports Soccer set all these prices in fulfilment of its obligations to Umbro and not by way of any independent competitive commercial decisions.

- 391 In general, the OFT also notes Sports Soccer's statements that it retailed at High Street Prices only because of pressure from Umbro,⁴⁶⁵ and that Umbro speedily sought to apply pressure whenever Sports Soccer discounted.⁴⁶⁶ Sports Soccer has made the point that Umbro would threaten to refuse supplies of important items, not limited to Replica Shirts, in order to coerce Sports Soccer into compliance.⁴⁶⁷ The OFT also notes Sports Soccer's acceptance that there was a 'standard understanding' between it and Umbro about the pricing of Umbro Replica Kit. Although this was very much contrary to Sports Soccer's wishes, Sports Soccer complied because it wished to avoid being denied deliveries.⁴⁶⁸
- 392 In the light of the above facts and matters, the OFT is satisfied that there was an agreement between, at least, Umbro and Sports Soccer, which related to the prices at which Sports Soccer would sell all the major Umbro licensed Replica Shirts during key selling periods between April 2000 and August 2001 (the time when the OFT conducted unannounced visits to the premises of some of the Parties, and when Sports Soccer began to discount across a range of Replica Shirts).⁴⁶⁹
- 393 The OFT considers it probable that the overall arrangement between Umbro and Sports Soccer also encompassed the other major retailers. In particular, the

⁴⁶² Para 228 above.

⁴⁶³ Annex 3, table 3.

⁴⁶⁴ Annex 3, table 7.

⁴⁶⁵ Paras 166 and 193 above.

⁴⁶⁶ Paras 193 and 208 above.

⁴⁶⁷ An example of such behaviour was the threatened refusal (expressed by Umbro at the meeting on 1 August 2000) to supply Sports Soccer with 'pro training' products.

⁴⁶⁸ Para 166 above.

⁴⁶⁹ The OFT does not make a finding that the agreement extended to the less important Replica Shirts of Nottingham Forest in 2001.

other major retailers, including Allsports, Blacks, JJB and JD, consistently priced all Umbro licensed Replica Shirts during key selling periods at High Street Prices which is incompatible with independent behaviour under competitive conditions. Moreover, Sports Soccer has confirmed that it sought from Umbro, and received, assurances as to the pricing intentions of the other retailers in order to ensure that its agreements with Umbro would not put it at a commercial disadvantage.⁴⁷⁰ The examples of pricing information given to Umbro by JJB⁴⁷¹ and Sports Soccer⁴⁷², and given by Umbro to MU⁴⁷³ and to Debenhams⁴⁷⁴, support this. In addition, there is evidence that similar price information exchanges took place between the retailers themselves.⁴⁷⁵ Finally, the other retailers took part in express price-fixing agreements in relation to England and MU Replica Shirts in May and June 2000. It is likely that the express understandings reached between them as to selling those Replica Shirts at High Street Prices implicitly extended to their behaviour during other key selling periods for other Replica Shirts. Nevertheless, the OFT does not propose to find that any of the Parties other than Umbro and Sports Soccer were involved in a single overall agreement of this magnitude.

6.1.8 Views of the Parties

CELTIC, CHELSEA AND NOTTINGHAM FOREST REPLICA SHIRTS

394 Umbro has stated in its written representations⁴⁷⁶ that the April 2000 agreement with Sports Soccer related to pricing only on the England home Replica Kit, and that Sports Soccer merely stated, rather than agreed, that its intention was to launch the MU home Replica Kit at High Street Prices. Both Mr Ronnie and Mr Attfield state⁴⁷⁷ that Umbro's April 2000 monthly management report should be read as being limited to England and MU Replica Kit.⁴⁷⁸ Umbro has stated that the '60 day rule' referred to in its meeting with Sports Soccer on 24 May 2000 extended only to MU Replica Kit. Umbro states that the '60 day rule' agreement in July 2000 related only to future Replica Kit launches.⁴⁷⁹ Further,

⁴⁷⁰ Para 165 above.

⁴⁷¹ For Celtic and Chelsea, paras 153 to 154 above.

⁴⁷² For Chelsea paras 153 and 155, Celtic paras 153, England paras 139 and e.g 165, MU e.g paras 153 and 165, and Nottingham Forest para 165 above.

⁴⁷³ For MU and generally paras 184 and 197 above.

⁴⁷⁴ For England, para 169 above.

⁴⁷⁵ See the communications between Blacks and Sports Soccer, at para 166 above; and two exchanges between Blacks and Allsports, including a reference to JJB's and Sports Soccer's pricing, at paras 175 and 190 above.

⁴⁷⁶ Umbro's WR on Rule 14 Notice paras 91-96 (App 1, doc 4 to Supplemental Rule 14 Notice), Umbro's WR on Supplemental Rule 14 Notice paras 18-32.

⁴⁷⁷ Ronnie w/s para 27 and Attfield w/s para 15 attached to Umbro's WR on Rule 14 Notice (App 1, doc 4 to Supplemental Rule 14 Notice).

⁴⁷⁸ Paras 157 to 158 above.

⁴⁷⁹ Umbro's WR on Rule 14 Notice para 13 (App 1, doc 4 to Supplemental Rule 14 Notice).

to the extent that the meeting notes of 18 and 24 July 2000 evidence the existence of an agreement at all, Umbro asserts that this agreement was pro-competitive, in that it allowed Sports Soccer to put its prices down.⁴⁸⁰

395 Sports Soccer, however, has not contested that in April and May 2000 it agreed retail prices on all Umbro licensed Replica Kits to be launched in 2000 at High Street Prices.⁴⁸¹ Sports Soccer⁴⁸² *'acknowledges that during 2000 and 2001, it was party to certain agreements that had as their object or effect the fixing of the retail price of certain licensed replica football kit thus infringing Chapter I' of the Act.*

396 Generally, both Umbro and Sports Soccer have stated that the OFT should not characterise much of what happened between them as 'agreements'. Sports Soccer has said that it has never used the phrase contained in the Rule 14 Notice of a 'standing understanding' to imply that there was an *'effective agreement'* but that Agreement Prices were *'recognised price points'*.⁴⁸³ In relation to the May 2000 agreement, for example, Sports Soccer states that the reference to an agreement in Umbro's file note simply signified Umbro *'being satisfied from the tenor of the normal ongoing conversations that Sports Soccer was likely to stick to the RRP for a time'*.⁴⁸⁴ Sports Soccer has stated that it only agreed to anything in order to avoid refusals of supplies and tried 'to cheat' on the agreement whenever possible. Umbro also stated that it knew that Sports Soccer's assurances were unreliable.⁴⁸⁵ Both Sports Soccer⁴⁸⁶ and Umbro⁴⁸⁷ deny being parties to any overall continuing agreement, as opposed to a series of isolated bilateral agreements.

397 Umbro has also denied that it was involved in any agreement beyond February 2001.⁴⁸⁸ Nevertheless, Sports Soccer has said⁴⁸⁹ that *'the pressure became more intense during 2001 than it had been in 2000'*. It believes that this was

⁴⁸⁰ Umbro's WR on Supplemental Rule 14 Notice para 22.

⁴⁸¹ Sports Soccer's WR on Supplemental Rule 14 Notice para 17.

⁴⁸² Sports Soccer WR on Rule 14 Notice para 2.1 (App 1, doc 5 to Supplemental Rule 14 Notice).

⁴⁸³ Sports Soccer's WR on Rule 14 Notice para 2.2.37 (App 1, doc 5 to Supplemental Rule 14 Notice).

⁴⁸⁴ See, for example, Sports Soccer's WR on Rule 14 Notice paras 2.2.34 (generally) and 3.2.13 (App 1, doc 5 to Supplemental Rule 14 Notice).

⁴⁸⁵ Umbro's WR on Rule 14 Notice para 194 re July 2000 paras 197-9 re 2001 (App 1, doc 4 to Supplemental Rule 14 Notice).

⁴⁸⁶ Sports Soccer's WR on Rule 14 Notice para 3.2.21 (App 1, doc 5 to Supplemental Rule 14 Notice) and WR on Supplemental Rule 14 Notice p.28.

⁴⁸⁷ Umbro's WR on Rule 14 Notice para 13 (App 1, doc 4 to Supplemental Rule 14 Notice) and WR on Supplemental Rule 14 Notice paras 71-4.

⁴⁸⁸ Umbro's WR on Rule 14 Notice para 14 (App 1, doc 4 to Supplemental Rule 14 Notice) and WR on Supplemental Rule 14 Notice paras 75-7.

⁴⁸⁹ Sports Soccer's WR on Supplemental Rule 14 Notice p.10-11.

because of its growing presence in the market. Sports Soccer adds: *'The pressure which Sports Soccer was told that JJB was placing on Umbro...gave rise to mounting pressure being placed on Sports Soccer by Umbro to ensure that Sports Soccer did not discount.'* However, Sports Soccer has noted⁴⁹⁰ that in August 2001, after many months of discussions with the OFT, it *'felt that finally action was likely to be taken and that it could afford to reject outright all manufacturer requirements to stick to set prices'* and, as of July 2002, that *'Sports Soccer is no longer subject to pressure from manufacturers to fix football replica kit prices and believes that in general this specific market is no longer subject to price-fixing'*.

ENGLAND REPLICIA SHIRTS

398 Sports Soccer has acknowledged⁴⁹¹ that the tick against the agenda item for the meeting on 25 May 2000 signifies *'Umbro being satisfied from the tenor of the normal ongoing conversations that Sports Soccer was likely to stick to RRP for a time'*.

399 Sports Soccer also has acknowledged that it priced the England home Replica Kit at High Street Prices in the run up to and during Euro 2000⁴⁹² and infant kits (as well as other Replica Kit products) shortly after launch in April 2001⁴⁹³ as a result of pressure from Umbro. Umbro does not challenge this in respect of pricing in 2000.

MU REPLICIA SHIRTS

400 Sports Soccer has stressed that the meeting on 8 June 2000 was unusual and that it attended under duress.⁴⁹⁴

401 Sports Soccer has stated that it was not prepared to discuss its general pricing policy at that meeting but does not deny that it stated that it would price the MU home Replica Shirt at High Street Prices.⁴⁹⁵

402 Umbro has stated that its role in the agreement relating to MU home Replica Shirts was limited.⁴⁹⁶ It has denied putting any pressure on Sports Soccer to attend the meeting.⁴⁹⁷

⁴⁹⁰ Sports Soccer WR on Rule 14 Notice p.6 and para 1.4 (App 1, doc 5 to Supplemental Rule 14 Notice).

⁴⁹¹ Sports Soccer's WR on Rule 14 Notice para 3.2.13 (App 1, doc 5 to Supplemental Rule 14 Notice).

⁴⁹² Sports Soccer's WR on Supplemental Rule 14 Notice pp.11-2.

⁴⁹³ Sports Soccer's WR on Supplemental Rule 14 Notice p.21.

⁴⁹⁴ Sports Soccer's WR on Rule 14 Notice para 3.2.9 (App 1, doc 5 to Supplemental Rule 14 Notice) and WR on Supplemental Rule 14 Notice p.17.

⁴⁹⁵ Sports Soccer's WR on Supplemental Rule 14 Notice p.17. The WR refer to RRP's but the OFT assumes that this is a typographical error.

6.1.9 Conclusion of the OFT

- 403 Contrary to the claims of Umbro, the OFT remains of the view that the agreement reached with Sports Soccer in April 2000 did not relate solely to the England home Replica Kit, nor did Sports Soccer merely 'state its intentions' on the MU Replica Kit. It appears that Mr Fellone was aware of an agreement with Sports Soccer on '*all new licensed kit*'⁴⁹⁸ which was made in April 2000, and which he specifically noted in Umbro's April 2000 monthly management report. As it turned out, Sports Soccer retailed, *inter alia*, Chelsea Replica Shirts at High Street Prices in circumstances where Mr Attfield had observed, in Umbro's April 2000 monthly management report, that (among others) Sports Soccer's '*licensed jersey prices [for Chelsea] are all over the place for the forthcoming launch*'.
- 404 The OFT also notes Sports Soccer's view⁴⁹⁹ that the 'assurances' referred to in Umbro's fax to MU of 6 June 2000 '*refer to the tone of the frequent conversations it had with Umbro as Umbro monitored retailer activity... . Sports Soccer presumes that Umbro was satisfied that this time Sports Soccer would at least for a period maintain the standard prices*'. This supports the OFT's view that Umbro's fax of 6 June 2000 referred to an agreement between Umbro and Sports Soccer which extended, in particular, to the prices of MU Replica Shirts.
- 405 The subsequent evidence shows that Sports Soccer's obligations extended also to Celtic, Chelsea and (in 2000) Nottingham Forest. In particular, the file notes of the meetings on 25 May 2000 and 18 July 2000 refer to an agreement to maintain Replica Kit prices for 60 days after launch, enabling the prices of Celtic and Chelsea Replica Shirts launched in mid May 2000 to be reduced. If there had been no pre-existing agreement to retail all Replica Shirts at High Street Prices, then there would have been no need to limit that agreement to 60 days after launch. Umbro has admitted that the meeting on 18 July 2000 took place to discuss Chelsea, MU and Nottingham Forest Replica Kits.⁵⁰⁰ Given that Sports Soccer did not discount the Celtic and Chelsea Replica Shirts until 60 days after their launch in May 2000, and taken together with the ordinary meaning of the words in the respective file notes, the OFT is satisfied that this part of a continuing agreement that extended to Celtic and Chelsea Replica

⁴⁹⁶ Umbro's WR on Rule 14 Notice para 13 (App 1, doc 4 to Supplemental Rule 14 Notice).

⁴⁹⁷ Umbro's WR on Supplemental Rule 14 Notice para 42-3.

⁴⁹⁸ Para 153 above.

⁴⁹⁹ Sports Soccer's WR on Rule 14 Notice para 3.2.8 (App 1, doc 5 to Supplemental Rule 14 Notice).

⁵⁰⁰ Umbro's WR on Rule 14 Notice para 128 (App 1, doc 4 to Supplemental Rule 14 Notice).

Shirts launched in 2000 and 2001 and to Nottingham Forest Replica Shirts launched in 2000.

- 406 So far as concerns the allegation that Sports Soccer could not have made an agreement because it was acting under coercion, the key point is that there was clearly co-operation and co-ordination between Umbro and Sports Soccer which was sufficient to amount to an agreement or at least a concerted practice. Sports Soccer was fully aware of the policy being pursued by Umbro and facilitated, even if unwillingly, that policy by giving the reassurances sought and agreeing as a condition of supply to resell at High Street Prices. In determining its pricing policy it took into account the discussions with Umbro including the information provided as to other retailers' pricing policies. The fact that Sports Soccer was the weakest link in the Replica Shirts Agreements, and came to recognise that it could 'cheat' by discounting on certain Umbro licensed Replica Shirts does not preclude a finding that there was an agreement as described above.
- 407 Moreover, in the present case, contrary to Umbro and Sports Soccer's assertions, Sports Soccer altered its conduct in accordance with Umbro's requests. The OFT is satisfied that Sports Soccer was accurate in its claim that whenever it priced Umbro licensed Replica Shirts in accordance with High Street Prices, this was as a result of an agreement with Umbro and that were it not for the pressure exerted by Umbro it would have discounted the relevant products.⁵⁰¹ The OFT refers to annex 3 containing details of Sports Soccer's pricing on Umbro licensed Replica Shirts launched in 2000 and 2001 and described above. This falls to be compared with the extent to which Sports Soccer has discounted Umbro licensed Replica Shirts in late 2001 and 2002.⁵⁰²
- 408 As regards Umbro's assertions that it was not involved in any infringement after February 2001, the OFT notes that, in addition to the evidence referred to above, Umbro encouraged Allsports to engaged in resale price maintenance. In an e-mail dated as late as 13 August 2001, Mr May said, in relation to wholesale prices of the England away Replica Kit, that Umbro 'may be tempted if you...commit not to discount for a period of time'.⁵⁰³
- 409 Finally, as respects Umbro's contention that its role in relation to the agreement on 8 June 2000 was limited, while Umbro did not organise that meeting, it encouraged Sports Soccer to attend, facilitated the meeting by giving out telephone numbers to attendees, and arranged to hold a subsequent de-briefing meeting with Sports Soccer later that day. It even subsequently claimed credit

⁵⁰¹ Para 166 above.

⁵⁰² Para 130 above.

for arranging the meeting in Mr Prothero's fax of 13 July 2000 to Mr Richards of MU.

- 410 The OFT remains satisfied that Umbro and Sports Soccer operated a continuing agreement in relation to the retail pricing of Umbro licensed Replica Shirts during key selling periods throughout the period of the infringement. In particular, the fact that Sports Soccer discounted the MU away and third Replica Shirts from launch in 2000 contrary to the assurances given in April and May 2000 does not undermine the existence of an agreement within the meaning of section 2(1) of the Act. This is especially so given Sports Soccer's statement that Umbro gave it permission to discount in exchange for Sports Soccer's commitment to launch the MU Centenary Replica Shirts at High Street Prices the following year.⁵⁰⁴ Given Sports Soccer's central role as a discounter, this contributed to stabilising retail prices generally.
- 411 The OFT notes that from 20 August 2001 Sports Soccer began discounting across a wide range of Replica Shirts, and by July 2002 it felt that price-fixing had ended in respect of Replica Kit. The OFT takes the time when Sports Soccer starting discounting across a wide range of Replica Shirts as the time at which the Replica Shirts Agreements with respect to Celtic, Chelsea, England and MU Replica Shirts ended. Given its relative unimportance in terms of sales volumes, the OFT is content to find only that the Replica Shirts Agreement in respect of Nottingham Forest Replica Shirts operated in 2000.

6.2 AGREEMENT BETWEEN ALLSPORTS, BLACKS, JJB AND JD, AS WELL AS SPORTS SOCCER AND UMBRO, WITH RESPECT TO ENGLAND REPLICA SHIRTS AROUND THE TIME OF THE EURO 2000 TOURNAMENT

- 412 The lead up to and participation by the England national team in Euro 2000, commencing at the beginning of June 2000, was a key selling period for the England home and away Replica Shirts manufactured by Umbro.
- 413 The Umbro staff who have provided witness statements, and in particular Mr Ronnie and Mr Attfield, have said that Umbro's early price-fixing meetings and agreements with Sports Soccer in March and April 2000 related specifically to Sports Soccer's pricing of the England home and away Replica Kit, and also that those agreements took place at the instigation of JJB.⁵⁰⁵ However, in the light of the England Direct Agreements concluded in February 2000 involving, *inter alia*, Umbro and JJB, the OFT considers it probable that JJB at least was a party to an agreement to fix the prices of England Replica Shirts at this early

⁵⁰³ Para 248 above.

⁵⁰⁴ Sports Soccer's WR on Supplemental Rule 14 Notice p.25.

stage. Nevertheless the OFT does not make a finding to this effect in the light of all the evidence.

- 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.⁵⁰⁶ 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 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).⁵⁰⁷
 - (c) Mr Fellone of Umbro faxed Mr Ryman of Debenhams on 2 June 2000⁵⁰⁸ 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 2000⁵⁰⁹ 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*

⁵⁰⁵ Paras 157 and 158 above.

⁵⁰⁶ Para 165 above.

⁵⁰⁷ Although Mr Fellone called JD, he says that JD refused to end their 'hat trick' promotion; para 167 above.

⁵⁰⁸ Para 177 above.

⁵⁰⁹ Para 186 above.

*all the other retailers had agreed to do so.*⁵¹⁰ 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.⁵¹¹ 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'*.⁵¹²
- (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.⁵¹³
- (g) On 2 and 3 June 2000⁵¹⁴: (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.⁵¹⁵
- (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.'*⁵¹⁶ Mr Marsh states that, at the time he wrote the fax, he had heard *'that there had been*

⁵¹⁰ Para 169 above.

⁵¹¹ Para 176 above.

⁵¹² Para 168 above.

⁵¹³ Para 175 above.

⁵¹⁴ Paras 178 to 181 above.

⁵¹⁵ Annex 3, tables 1 and 2.

discussions with the major retailers concerning current pricing of England jerseys, which many retailers had been discounting'.⁵¹⁷ 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:⁵¹⁸

'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^[519] 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.'

- 416 Furthermore, the implementation of the pricing agreement between the major retailers was facilitated in that the standard purchase order forms of Allsports and Blacks, submitted to Umbro, included intended actual retail selling prices.⁵²⁰ There was no legitimate commercial rationale for this practice. The OFT also notes Umbro's written representations which state that JJB generally only communicated its retail prices to Umbro in the context of complaints about other retailers and that retailers, including JJB, '*would have known (and often intended) that Umbro would use the information in its discussions with other retailers*'.⁵²¹

⁵¹⁶ Para 184 above.

⁵¹⁷ Para 184 above.

⁵¹⁸ Para 189 above.

⁵¹⁹ The OFT takes the view that this is incorrect. The offer was £29.99 with a free cap at JD. See JD's WR on Rule 14 Notice para 67 (App 1, doc 7 to Supplemental Rule 14 Notice).

⁵²⁰ Paras 254 and 256 above.

⁵²¹ Para 160 above.

6.2.1 Views of the Parties

- 417 Allsports has stated that evidence that it failed to change its prices is not evidence that it colluded on them.⁵²² Allsports has stated that it is perfectly normal for products to remain highly priced during a buoyant sales period such as at the launch of the MU home Replica Shirt.⁵²³
- 418 Allsports has questioned why Umbro would have telephoned Allsports and JJB to confirm their retail pricing intentions on England Replica Shirts if it was Allsports and JJB who were in fact placing pressure on Umbro to secure higher retail prices from Sports Soccer.⁵²⁴
- 419 Allsports denies Mr Ronnie's account of the meeting on 2 June 2000 (when Mr Ronnie said that Mr Hughes called Mr Knight of Blacks in relation to JD's 'hat trick' promotion).⁵²⁵
- 420 Allsports contends that Umbro's May 2000 monthly management report may simply have been exaggerated, and considers that the report was referring to *'indications that [Umbro]...may have been given (perfectly properly) by retailers as to their retail pricing intentions'*.⁵²⁶ While Allsports has confirmed⁵²⁷ that, at least when discussing wholesale prices, it did discuss with Umbro its retail pricing intentions, and has accepted that Umbro monitored retail prices, Allsports claims that Umbro required information as to retailers' pricing intentions in order to determine its own wholesale prices. Allsports has also said that the reference to agreed prices in the Umbro May 2000 monthly management report was a *'loose reference to it having obtained information from allsports and others on order forms as to expected retail price'*. It denies that the OFT should attach any significance to these standard documents which reflected nothing more than Allsports' administrative convenience and the structure of its computer system.
- 421 JJB has denied participation in any infringement of the Act. JJB has stated that neither Mr Russell nor Mr Whelan took a call from Umbro about the pricing of the England home Replica Shirt and that had Mr Sharpe taken such a call,

⁵²² Allsports' WR on Rule 14 Notice p.23-25 (App 1, doc 10 to Supplemental Rule 14 Notice).

⁵²³ Allsports' WR on Rule 14 Notice p.23 (App 1, doc 10 to Supplemental Rule 14 Notice).

⁵²⁴ Allsports' WR on Supplemental Rule 14 Notice para 14.

⁵²⁵ Allsports' WR on Supplemental Rule 14 Notice pp.21-22.

⁵²⁶ Allsports' WR on Rule 14 Notice p.15 (App 1, doc 10 to Supplemental Rule 14 Notice).

⁵²⁷ Allsports' WR on Rule 14 Notice pp.12 and 19 (App 1, doc 10 to Supplemental Rule 14 Notice).

Mr Sharpe would have had to inform Mr Russell and Mr Whelan if the agreement was to have any effect. JJB has said that he did not do this.⁵²⁸

422 The Blacks Subsidiaries have said that the decision to increase prices of England Replica Shirts was based on demand and supply. Although Mr Knight recalls a *'casual conversation with Mike Ashley of Sports Soccer whilst walking along Oxford Street after a merchandising event for retailers given by Nike'*, the Blacks Subsidiaries have denied that retail prices were agreed.⁵²⁹

423 Umbro and JD have denied that any agreement was reached between them. In particular, both JD and Umbro referred to the fact that JD continued with the 'hat trick' promotion throughout Euro 2000 notwithstanding that Umbro was concerned that the free cap was effectively a discount. Following the telephone conversation between Mr Ronnie and Mr Bown in July 2000,⁵³⁰ JD has also stressed that relations worsened to the extent that Umbro failed to deliver on time the MU home Replica Kit to be launched on 1 August 2000.⁵³¹

424 Moreover, JD stated that the reason it increased the prices of the England adult and junior Replica Shirts on 3 June 2000 was because the promotion had been a huge success and as a result JD's stocks of England Replica Shirts were very low. It was therefore in danger of running out of England Replica Shirts before Euro 2000 had even commenced. In JD's view it would not have been credible for it not to have a flagship product such as the England Replica shirts in its stores during Euro 2000.⁵³²

425 JD has also stated that it is not generally a discounter of Replica Shirts and so pricing at High Street Prices is in accordance with its general policy.⁵³³

6.2.2 Conclusion of the OFT

426 As respects Allsports' point about price levels, evidence of sustained high or parallel pricing in isolation is not necessarily sufficient in all cases to find an infringement of the Chapter I prohibition. However, the OFT does not rely on this evidence in isolation. The OFT accepts that it may be normal for price to rise as demand for something rises. However, it would also be normal for

⁵²⁸ JJB's WR on Supplemental Rule 14 Notice para 2.45.

⁵²⁹ Blacks Subsidiaries' WR on Rule 14 Notice paras 10, 47 and others (App 1, doc 6 to Supplemental Rule 14 Notice); DLA letter for Blacks Subsidiaries para 8 (App 1, doc 16 to Supplemental Rule 14 Notice).

⁵³⁰ Para 202 above.

⁵³¹ JD's WR on Rule 14 Notice paras 31 *et seq* (App 1, doc 7 to Supplemental Rule 14 Notice) and para 208 above; Umbro's WR on Supplemental Rule 14 Notice paras 59-60.

⁵³² JD's WR on Rule 14 Notice para 29-30 (App 1, doc 7 to Supplemental Rule 14 Notice).

⁵³³ JD's WR on Supplemental Rule 14 Notice paras 3.2.1-2.

retailers to compete with each other on high profile branded goods, particularly during key selling periods. In the light of the totality of the evidence, it cannot be accepted that a mere increase in demand was the explanation for the parties all simultaneously retailing England Replica Shirts at High Street Prices.

- 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.
- 428 As respects Allsports' criticisms of Mr Ronnie's account of his meeting with Mr Hughes on 2 June 2000, the OFT notes that Mr Ronnie's account of the organisation and planning of the meeting on 8 June 2000 with respect to MU Replica Kit has been broadly corroborated, and there is no reason to doubt Mr Ronnie's account of Mr Hughes' conversation with Mr Knight with respect to England Replica Kit.
- 429 As respects the contention that Umbro's monthly management report for May 2000 was exaggerated,⁵³⁴ this is not accepted for the reasons given at paragraphs 329 and 330 above.
- 430 Further, the OFT does not accept that it was '*perfectly proper*' for retailers to have given Umbro information about their retail pricing intentions shortly before key selling periods, as this facilitated indirect collusion between retailers. As respects Allsports' argument that the intended retail prices communicated to Umbro could have been relevant to Umbro's determination of its wholesale prices, the OFT notes that Allsports' standard purchase order forms were submitted **after** agreement would have been reached between Allsports and Umbro over discount levels. It is accordingly unclear how such information was relevant. Given the unambiguous concerns of Mr Hughes of Allsports about discounted retail prices,⁵³⁵ the OFT considers that Allsports' (and Blacks')⁵³⁶ routine communication of its retail pricing intentions to Umbro in its purchase order forms at the very least facilitated implementation of Umbro's pricing policy.
- 431 As to JJB's denial that its officials received a call from Umbro about the pricing of England Replica Shirts, the OFT is satisfied on the basis of the totality of the evidence (including paragraphs (a)-(c) and (g)-(i) of 415 and 416 above) that, during April or May 2000, Umbro did expressly contact JJB to confirm both that

⁵³⁴ Para 189 above.

⁵³⁵ Paras 173 and 187 above.

Umbro was speaking to other retailers about the pricing of the England Replica Shirt, and to confirm that JJB's pricing intentions were still in line with expectations. If this call was taken by the late Mr Sharpe, who did not directly address this specific point in his witness statement, it is noted that he would not have needed to inform either Mr Russell or Mr Whelan of this call as JJB was already retailing at High Street Prices.

- 432 As to the contentions of the Blacks' subsidiaries, the OFT accepts the version of events described by Mr Ashley in the light of the totality of the evidence (including paragraphs (a)-(d) and (f)-(i) of 415 and 416 above). The OFT does not consider that the simultaneous and identical price increases of different retailers could have been a coincidence, not least in the light of the contact between Blacks and Sports Soccer. The fact that Blacks may also have had other commercial reasons for increasing its prices at the specific time in question is immaterial.
- 433 As to JD, the OFT is satisfied on the totality of the evidence (including paragraphs (a)-(c), (e) and (g)-(i) of 415 and 416 above) that it took part in the agreement on England Replica Shirts together with Umbro and the other retailers identified.
- 434 As respects JD's 'hat trick' promotion, the OFT notes that JD actually withdrew the offer of a free cap on England Replica Shirts on 3 June 2000, at the same time as it raised its price for England Replica Shirts to High Street levels, even though it maintained the 'hat trick' offer on other items. This was accordingly fully consistent with the proposition that JD took part in the agreement on England Replica Shirts.
- 435 As respects the state of relations between Umbro and JD, the OFT accepts that the file note of the conversation on 24 July 2000 illustrates that relations between JD and Umbro were not necessarily good by that date. However, relations were poor, not because of JD's refusal to retail England Replica Shirts at High Street Prices, but because first, Umbro mistakenly believed that JD had refused to withdraw the offer of a free cap on all items, and secondly, JD was not buying sufficient non-Replica Kit products from Umbro. However, although by the end of July 2000 relations between JD and Umbro had worsened, this does not affect the OFT's view that, at the end of May or beginning of June 2000, an agreement was reached with JD concerning the England Replica Shirts.

⁵³⁶ Paras 254 and 256 above.

436 Finally, the OFT does not consider that the simultaneous price increases on 2 and 3 June 2000 were a coincidence, not least in the light of the immediately prior contact between Umbro and JD which included Umbro informing JD of the agreement reached with at least Sports Soccer. The fact that JD may also have had other commercial reasons for increasing its prices around this time is immaterial. JD immediately altered its prices directly in line with the request from Umbro and there is no documentary evidence whereby JD expressly distanced itself from this Replica Shirts Agreement. The OFT is therefore satisfied that JD altered its retail prices and removed the free cap promotion in relation to the England Replica Shirts at least in part as a result of the pressure from Umbro and in the knowledge of the agreement reached with Sports Soccer.

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.

6.3 AGREEMENT BETWEEN AT LEAST ALLSPORTS, BLACKS, JJB AND MU, AS WELL AS SPORTS SOCCER AND UMBRO, WITH RESPECT TO MU HOME REPLICA SHIRTS IN 2000

6.3.1 *MU & Umbro*

438 On 1 August 2000, MU launched its new home Replica Kit. The months immediately following the launch were a key selling period.

439 The Umbro staff who have provided witness statements, and in particular Mr Prothero and Mr Marsh, have referred to (a) the fact that MU asked for advance details of other retailers' selling prices, (b) the pressure that MU placed upon Umbro to ensure that other retailers of its Replica Kit did not discount the product, and (c) the fact that MU would consistently and immediately complain to Umbro where discounting occurred.⁵³⁷

440 Mr Prothero also pointed out in his witness statement⁵³⁸ that relations between Umbro and MU were delicate in the Spring and Summer of 2000, as a result of

⁵³⁷ Para 172 and 184 above.

⁵³⁸ Para 184 above.

the licensing negotiations taking place between the parties, and that as a result Umbro was anxious to show MU that it was addressing MU's concerns. Less than a year earlier, Mr Richards of MU had written to Mr Ronnie of Umbro saying that a wholesale price dispute at that time had created '*a highly disgruntled Licensor*'.⁵³⁹

- 441 In a fax dated 25 May 2000,⁵⁴⁰ Mr Draper of MU raised concerns with Mr Marsh of Umbro relating to the retail pricing by other retailers of Replica Shirts and Replica Kit in general. MU took the view that retailers discounting MU Replica Shirts and other non-MU Replica Shirts would affect '*our own abilities to re-sell our premium product when launched*', because MU assumed that this was an indication of their likely pricing strategy for MU Replica Kit to be launched on 1 August 2000. Thus, in relation to Debenhams, Mr Draper wrote: '*Clearly their discounting offer on the new Celtic shirt is an indicator of their intentions...*'.
- 442 The fax asked for information about Kit Bag dot.com's and Debenhams' MU Replica Shirt or Replica Kit pricing strategies and asked what Umbro understood generally Sports Soccer's position was '*with regard to pricing new product on the replica category*'. Mr Draper concluded by stating that MU had turned down many requests to use MU product as '*loss leaders*' in major promotions, and asked: '*What assurance can you now give us that our stance is still the best one to adopt in light of the activities highlighted?*'.
- 443 Mr Marsh responded by fax on 6 June 2000, apparently following a conversation between himself and Mr Draper, in terms clearly intended to provide an assurance to MU about the retail pricing of MU Replica Kit. This fax made the general statement that Umbro did '*not use premium products such as replica jerseys for promotions*'. It then informed MU specifically about 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*'.⁵⁴¹
- 444 Mr Marsh has stated 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*'.⁵⁴² Nevertheless, the primary purpose of the fax was undoubtedly to give reassurance to MU about the prospective retail pricing of its home Replica Kit due to be launched at the beginning of August 2000.⁵⁴³

⁵³⁹ Para 103 above.

⁵⁴⁰ Para 170 above.

⁵⁴¹ Para 184 above.

⁵⁴² Para 184 above.

⁵⁴³ Paras 363 and 364 above.

445 Also, that fax, which was copied widely within Umbro, has to be read in the context of:

- (a) Umbro's knowledge of Sports Soccer's agreements with it, which specifically concerned MU Replica Shirts as well as other Replica Shirts, as reflected in the various meeting notes of April and May 2000;⁵⁴⁴
- (b) the impending meeting between retailers on 8 June 2000 to discuss retail pricing of MU Replica Shirts, which Mr Ronnie of Umbro, one of the copy recipients of this fax, had already been told about by Messrs Ashley and Hughes on 2 and 5 June 2000 respectively;⁵⁴⁵ and
- (c) the pressure that JJB was, at that time, exerting on Umbro to reduce the amount of discounting on Replica Shirts by other retailers.⁵⁴⁶

446 In summary, the OFT is satisfied that Mr Marsh's fax to Mr Draper showed not only that MU was seeking information regarding its retail competitors' intended prices (which MU has accepted), but also that Umbro provided an assurance to MU, in response to pressure from MU, in relation to the intended future levels of retail prices of its Replica Shirts by at least two of its major retail competitors (JJB and Sports Soccer).

447 The subsequent evidence, viewed as a whole, also shows that MU was aware of, contributed to, and took part in, arrangements involving the price-fixing of its Replica Shirts at High Street Prices by the relevant retailers:

- (a) During a dinner on the Golf Day organised by Allsports on 25 May 2000, Mr Hughes of Allsports spoke to a group, including representatives of Umbro (Mr Ronnie) and MU (Mr Draper), about his concerns regarding discounting. Mr Ronnie remembers that Mr Hughes '*mentioned that he had concerns about the MUFC home shirt that was due for launch in August 2000 being discounted at launch, in particular by Sports Soccer*' and that Mr Draper of MU said that pricing below High Street Prices would '*bastardise the product...at launch*'.⁵⁴⁷ MU as a retailer thereby received information about Allsports' pricing ambitions with respect to the MU home Replica Shirt to be launched on 1 August 2000, and

⁵⁴⁴ Paras 153 and 165 above.

⁵⁴⁵ Paras 175 and 182 above.

⁵⁴⁶ Paras 157 to 158 above.

⁵⁴⁷ Para 173 above.

conveyed its own preferences. MU as a licensor thereby acquiesced in this exchange of information.⁵⁴⁸

- (b) Although a representative from MU was not physically present at the meeting held on 8 June 2000 at the house of Mr Hughes of Allsports, when the pricing of MU home Replica Shirts was discussed, it appears that Mr Ashley of Sports Soccer reported that Mr Hughes told the others he had spoken to MU about the price of the shirt at launch. This is consistent with the account given by Mr Ronnie of Umbro himself of his earlier meeting with Mr Hughes on 2 June 2000, in which Mr Hughes apparently also said *'he had been in conversation with Manchester United regarding the price of the home shirt to be launched on 1 August 2000'*.⁵⁴⁹
- (c) On 13 July 2000, Mr Prothero of Umbro wrote to Mr Richards of MU about the pricing of MU Replica Shirts.⁵⁵⁰ Pointing to the risks of a *'price war'* on Replica Shirts, Umbro's letter states *'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'* (OFT's emphasis). This shows knowledge, at this stage, on the part of MU, about co-ordinated pricing behaviour among a group of its major retail competitors.
- (d) Mr Prothero's fax continued by expressing concern about MU selling its Replica Shirts via the TV shopping channel 'Open' at effectively a discounted price because of the inclusion of certain premium items such as free autographed balls. Mr Prothero said: *'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. I look forward to discussing this with you later in the day.'* MU's swift response in the middle of that day was to indicate that MU would withdraw that promotion *'with immediate effect'* and to state *'Please be assured that the Manchester United jersey is not being sold at a discounted price on Open'*. By its response, MU thereby sought to give an assurance to Umbro and avert any 'price war' between the major retailers.
- (e) On or before 7 August 2000, having monitored retail prices in the market of its home Replica Shirt following its launch on 1 August 2000, MU raised a complaint with Umbro that Debenhams (trading as Champion)

⁵⁴⁸ Para 173 above.

⁵⁴⁹ Para 175 above.

was discounting. An internal Umbro e-mail from Mr Prothero reports *'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.'*⁵⁵¹ Mr Richards had no legitimate interest in drawing to the attention of Mr Prothero the fact that its retail competitors were selling MU Replica Shirts at discounted prices.

448 As of 27 September 2000 when it was leaked to the press that Nike had been awarded MU's next Licensing Agreement, MU's influence over Umbro began to fade. The OFT therefore takes this date as the last expression of MU's participation in this Replica Shirts Agreement.

449 Although the OFT does not make a finding that MU took part in an agreement to fix the prices of its Replica Shirts after the end of September 2000, the OFT nevertheless considers that this appears probable on the evidence. Given the context of MU's involvement in price-fixing activity at least until the end of September 2000, and in the absence of any evidence to suggest that MU subsequently distanced itself from this, the OFT notes the following:

(a) In his fax of 26 June 2001 to Nike (copied to Mr Kenyon at MU),⁵⁵² Mr Whelan 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'*. It therefore appears that JJB purchased these MU home Replica Shirts in order to maintain retail prices as high as possible, and JJB informed MU, by copying the fax, that it had done so. In the context of MU's on-going licensing and 'official retailer' negotiations with Nike and JJB, the fact that MU failed to distance itself from a statement by JJB that it wished to maintain retail prices at higher levels indicates at least that MU acquiesced in this policy.

(b) The MU Centenary Replica Shirt was launched on 20 July 2001 at High Street Prices by all the major retailers.⁵⁵³

6.3.2 Allsports, Blacks & JJB

450 The position of Sports Soccer (as well as Umbro) has been dealt with at paragraphs 342 to 372 above. The OFT is also satisfied that at least Allsports,

⁵⁵⁰ Para 197 above.

⁵⁵¹ Para 210 above.

⁵⁵² Para 244 above.

⁵⁵³ Annex 3, table 5.

Blacks and JJB also took part in an unlawful agreement relating to the price of the new MU home Replica Shirt, and 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: see paragraphs 362 to 364 above.
- (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: see paragraph 173 above. 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'*: see paragraphs 178 and 188 above.
- (c) Further with respect to Allsports, at the meeting between Mr Ronnie of Umbro and Mr Hughes on 2 June 2000,⁵⁵⁴ 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.⁵⁵⁵
- (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.⁵⁵⁶ In substance, there is little difference between the accounts of the meeting given by Mr Hughes of Allsports, Mr Whelan of JJB,

⁵⁵⁴ Para 175 above.

⁵⁵⁵ Paras 187 to 191 above.

⁵⁵⁶ Para 187(b) above.

Mr Ashley of Sports Soccer and Mr Ronnie of Umbro (who met privately with Mr Ashley shortly after the retailers' meeting).⁵⁵⁷

- (f) On 9 June 2000, Mr Hughes of Allsports produced two significant internal memoranda⁵⁵⁸ 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 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.⁵⁵⁹

- (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

⁵⁵⁷ Para 187 and 188 above.

⁵⁵⁸ Para 190 and 191 above.

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:⁵⁶⁰

‘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...

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

- (i) Mr Ronnie⁵⁶¹ said that 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.⁵⁶²

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 2000.⁵⁶³ 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

⁵⁵⁹ Para 119 above.

⁵⁶⁰ Para 189 above.

⁵⁶¹ Para 188 above.

⁵⁶² Annex 3 table 4.

⁵⁶³ The OFT does not make a finding against JD in respect of the pricing of the MU home Replica Shirts, even though it notes the reference in the Umbro May management report to JD being party to the agreement, and that JD’s pricing of the MU home Replica Shirts was in the event, when it eventually received supplies, in line with the rest of the high street. This is because, unlike the other retailers, it did not have supplies of MU home Replica Shirts on 1 August 2000 and there is no compelling evidence of its involvement such as attendance at the 8 June price-fixing meeting or contacts with Umbro or the other retailers.

24 October 2000 Allsports informed Umbro that their sales had dropped dramatically due to *'discounting by Sports Soccer/JJB'*.⁵⁶⁴ 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.

6.3.3 Views of the Parties

453 MU has denied that it put Umbro under pressure to engage in resale price maintenance, or engaged in price-fixing itself.⁵⁶⁵ In particular

- (a) Mr Draper says in his witness statement that, in his fax of 25 May 2000 to Mr Marsh of Umbro, he was not seeking to agree or fix prices or influence the prices at which others chose to sell (although both he and Mr Kenyon concede that the phrase *'about the new MU product and pricing'* was seeking information about Debenhams pricing strategy for MU Replica Kit.⁵⁶⁶ Similarly, MU has admitted that Mr Richard's statement about Debenham's pricing of its Replica Shirts, referred to in the internal Umbro e-mail of 7 August 2000, was an attempt by MU *'to know how the market was operating in order to assess its own retail position'*).⁵⁶⁷
- (b) Although, at the Golf Day dinner on 25 May 2000, Mr Draper recalls an unusual *'outburst'* (which he thought was premeditated) from Mr Hughes as the meal drew to a close, in which Mr Draper says that Mr Hughes *'proceeded to berate the brands'*, Mr Draper gives a clear context for Mr Hughes' words:⁵⁶⁸

'To understand what he said it needs to be remembered not only that allsports is a major retailer of sports goods, but also that it positions itself at the top end of the market. It does not discount, except when market conditions suggest that it should; on the contrary, it often exceeds the RRP, if it thinks that the market will bear it.'

⁵⁶⁴ Para 222 above.

⁵⁶⁵ MU's WR on Supplemental Rule 14 Notice para 32 and MU's WR on Further Supplemental Rule 14 Notice pp.2-3.

⁵⁶⁶ Draper 1st w/s para 28.2 attached to MU's WR on Rule 14 Notice (App 1, doc 1 to Supplemental Rule 14 Notice).

⁵⁶⁷ MU's WR on Rule 14 Notice para 102 (App 1, doc 1 to Supplemental Rule 14 Notice).

⁵⁶⁸ Draper 2nd w/s, para 23.

Mr Draper goes on to describe what was said. He recalls Mr Hughes complaining that Allsports did not get the support that it deserved as a *'good friend of each brand'* and that he referred to *"statement products", meaning the top branded products in all ranges of goods'*. He does not recall the *'selling price of any particular product being raised by David Hughes or any one else at the table'* nor does he recall saying that discounting the MU Replica Kit at launch would *'bastardise the product'*. However, he says that he *'cannot say that it is impossible'* that he said this. He continues:

'I would express my view from the perspective of a brand owner that to discount the premium brand product (the home shirt) at the moment of its introduction has the effect of devaluing the brand. To me, this is obvious, and I do not see how anyone would have interpreted such a remark as an invitation to collude on prices'.

- (c) MU has stated that its letter of 13 July 2000⁵⁶⁹ to Umbro about the MU Replica Shirts sold via the 'Open' shopping channel reflected an independent commercial decision by MU to replace the offer of a free autographed ball with an item of smaller value for each Replica Shirt. MU has also stated that there was a sound commercial reason for withdrawing the offer: *'it overcompensated the consumer for post and packing and therefore unfairly discriminated...in favour of one particular group of fans'*.⁵⁷⁰ Umbro takes the same view.⁵⁷¹

454 Allsports has denied the accuracy of Mr Ronnie's account of his meeting with Mr Hughes on 2 June 2000, in relation to which Mr Ronnie had said that Mr Hughes reported he had spoken to MU about prices for the launch of the new MU home Replica Shirt.⁵⁷²

455 Allsports also takes issue with Mr Ronnie's account of events at the Golf Day dinner on 25 May 2000, stating that Mr Draper's version is *'clearly to be preferred to the account of Mr Ronnie'*.⁵⁷³ Having denied that any discussion of the type described by Mr Ronnie took place,⁵⁷⁴ Allsports then admitted that Mr Hughes broadly said that *'if the brands wanted to set up a selective*

⁵⁶⁹ Para 198 above.

⁵⁷⁰ MU's WR on Supplemental Rule 14 Notice para 47.

⁵⁷¹ Umbro's WR on Rule 14 Notice paras 113-115 (App 1, doc 4 to Supplemental Rule 14 Notice).

⁵⁷² Allsports' WR on Supplemental Rule 14 Notice pp. 21-22.

⁵⁷³ Allsports' OR on Supplemental Rule 14 Notice 3 March 2003, p.17, line 4.

⁵⁷⁴ Allsports' WR on Supplemental Rule 14 Notice p.21.

*distribution system then it was not sensible for them to supply quality products like the David Beckham boot to pile 'em high outlets'.*⁵⁷⁵

- 456 Allsports has stated that the retailers' meeting on 8 June 2000 at Mr Hughes' house was an isolated incident which effectively confirmed the parties' intentions to continue their aggressive competition with each other.⁵⁷⁶ Allsports has also asserted that this meeting can have had no meaningful effect if Sports Soccer and Umbro had already agreed in April and May 2000 that Sports Soccer would retail all Umbro licensed Replica Shirts at High Street Prices.⁵⁷⁷ Allsports has questioned why neither Sports Soccer nor Umbro told Allsports about the private meeting between them which followed the meeting at Mr Hughes' house, and it has denied any contact with MU on retail pricing.⁵⁷⁸
- 457 Finally, Allsports has submitted that the internal Allsports internal memoranda of 9 June 2000 were written because Mr Hughes was about to undergo surgery, the prognosis for which was uncertain, and that they merely reflected JJB's widely known stance of pricing at £40.00.⁵⁷⁹ Allsports takes the view that the reference in the first memorandum to Sports Soccer's pricing was no more than guesswork.⁵⁸⁰
- 458 The Blacks Subsidiaries have said that there was no agreement to fix the prices of MU home Replica Shirts. They were unable to confirm whether the conversation recorded in the Allsports' internal memorandum of 9 June 2000 took place. The Blacks Subsidiaries note that a decision to increase prices based on normal competitive conditions of demand and supply does not infringe the Act.⁵⁸¹
- 459 As respects JJB, it has stressed that it was invited to the meeting on 8 June 2000 but that Mr Hughes did not disclose in advance the reason for the meeting. JJB had assumed that since Mr Hughes was due to have surgery that he wished to sell his business to JJB.⁵⁸² JJB denies the accounts of Mr Ashley and Mr Ronnie of that meeting, and asserts that the meeting was not long enough to fix the prices of Replica Shirts.⁵⁸³

⁵⁷⁵ Allsports' OR on Supplemental Rule 14 Notice 3 March 2003, p.18, lines 25-28.

⁵⁷⁶ Allsports' WR on Rule 14 Notice p.15 (App 1, doc 10 to Supplemental Rule 14 Notice).

⁵⁷⁷ Allsports' WR on Supplemental Rule 14 Notice p.19.

⁵⁷⁸ Allsports' WR on Supplemental Rule 14 Notice pp.22-23.

⁵⁷⁹ Allsports' WR on Rule 14 Notice p.17 (App 1, doc 10 to Supplemental Rule 14 Notice).

⁵⁸⁰ Allsports' WR on Supplemental Rule 14 Notice p.22.

⁵⁸¹ Blacks Subsidiaries' WR on Rule 14 Notice para 10 and others (App 1, doc 6 to Supplemental Rule 14 Notice); DLA letter for Blacks Subsidiaries para 9 (App 1, doc 16 to Supplemental Rule 14 Notice).

⁵⁸² Sharpe w/s para 29 and Whelan 1st w/s para 25-6 attached to JJB's WR on Rule 14 Notice p.16 (App 1, doc 12 to Supplemental Rule 14 Notice).

⁵⁸³ JJB's WR on Supplemental Rule 14 Notice para 2.34.

460 JJB also stressed that the 8 June 2000 meeting was discussed at JJB's next Board meeting, and that this corroborates Mr Whelan's version of events.⁵⁸⁴ In his witness statement, Mr Lane-Smith recalls Mr Whelan telling the JJB Board on 27 June 2000 of his meeting on 8 June 2000 at Mr Hughes' house and of Mr Hughes' suggestion that the parties should fix prices. Mr Lane-Smith states:

'7. Mr Whelan told the Board of JJB that he had immediately responded to Mr Hughes by saying that JJB had never agreed to maintain 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. ...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...which I would retain on my own file. ...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.'

461 As respects the first Allsports' internal memorandum of 9 June 2000, JJB has said that this showed that Allsports failed to achieve an agreement to retail Replica Shirts at £44.99 or £45.00.⁵⁸⁵ JJB has also referred to the second Allsports internal memorandum of 9 June 2000, and asserted that JJB was not involved in any dialogue with Allsports or any other party in relation to retail prices.⁵⁸⁶

462 Mr Russell of JJB has addressed the statement made by Mr Ronnie⁵⁸⁷ 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'. Mr Russell stated, in his second

⁵⁸⁴ Lane-Smith draft w/s paras 5-9 attached to JJB's WR on Rule 14 Notice p.17 (App 1, doc 12 to Supplemental Rule 14 Notice).

⁵⁸⁵ JJB's WR on Supplemental Rule 14 Notice para 2.23 and 2.25.

⁵⁸⁶ JJB's WR on Rule 14 Notice p.18 (App 1, doc 12 to Supplemental Rule 14 Notice).

⁵⁸⁷ Para 188 above.

witness statement, that he did in fact recall Mr Bryan of Umbro mentioning the agreement relating to MU home Replica Shirts, and continued:⁵⁸⁸

‘...it is possible that I said something to the effect that if they had of agreed the price of the shirts, they might as well have agreed the price of the other items. If I did say any such thing it was not to suggest that it was a good idea to agree the prices of the other items but merely that I accepted his point that if you were going to agree the price of shirts there would seem to be nothing stopping you agreeing the prices of other things. I was shocked and puzzled by what Phil Bryan had told me and I therefore went to see Duncan Sharpe and asked him about the meeting...Duncan said that they had walked out of the meeting on discovering that David Hughes wanted a price-fixing arrangement and that no agreement had been made...’

6.3.4 Conclusion of the OFT

- 463 So far as MU is concerned, the OFT is satisfied that evidence shows the club was involved not only in putting pressure on Umbro, but also in an agreement to fix the prices of its home Replica Shirts.
- 464 The OFT does not accept that Mr Draper’s fax to Mr Marsh of Umbro dated 25 May 2000 was meant to be, or was interpreted, as narrowly as MU maintains. The fax asked whether ‘*any dialogue [has] taken place with [Debenhams]... about the pricing of MU product and pricing*’ (OFT emphasis). It did not simply seek to obtain information about Debenhams’ pricing intentions for the MU launch. It went much wider than that, and was actively encouraging Umbro to seek to influence Debenhams by ‘*dialogue*’. Mr Draper has also indicated that MU’s interest in Kit Bag dot.com’s pricing intentions was relevant to MU as a ‘*brand owner and licensor*’. This suggests that MU was concerned that the pricing of its branded goods should be maintained at a high level to ensure that it could maximise returns on its licensing agreements generally.
- 465 As respects the Umbro e-mail of 7 August 2000 (referring to MU’s concerns about Debenham’s retail pricing),⁵⁸⁹ the only reason for this enquiry could have been that MU, as a retailer and as a licensor, was trying to maintain retail prices at High Street Price levels generally, by applying pressure on Umbro. MU was attempting to substitute co-ordinated behaviour for an independent competitive reaction on its part.

⁵⁸⁸ Russell 2nd w/s para 15 attached to JJB’s WR on Supplemental Rule 14 Notice para 2.40.

- 466 So far as Mr Kenyon of MU is concerned, the OFT notes that he has admitted that he must have seen the correspondence of 25 May and 6 June 2000 with Umbro, but that he *'did not particularly focus on them at the time. I believe that I would have looked at them quickly as being attempts by Peter [Draper] to acquire information about what was going on in the market...'*⁵⁹⁰. The OFT notes that the Board of MU discussed its compliance policy under the Act only the day after the MU fax dated 25 May 2000 had passed across Mr Kenyon's desk, and less than two weeks before Umbro's response by fax of 6 June 2000 stating, *inter alia*, that Umbro had received pricing assurances from two major retailers.⁵⁹¹
- 467 As regards Mr Draper's account of the Golf Day on 25 May 2000, the OFT does not believe that this materially differs from that given by Mr Ronnie, or undermines the point that MU clearly conveyed (including to Mr Hughes of Allsports and Mr Ronnie of Umbro) its attitude to the discounting by retailers of its Replica Shirts, and also received information about Allsports' pricing ambitions with respect to MU home Replica Shirt to be launched on 1 August 2000.
- 468 The OFT does not accept that the contents of the fax sent by MU to Umbro on 13 July 2000⁵⁹², about the marketing by MU of its Replica Shirts on the 'Open' shopping channel, reflected an independent commercial decision by MU:
- (a) MU's fax was a direct response to a concern expressed by Umbro in its fax of earlier that day, and it was sent within a very short time after receipt of Umbro's fax;
 - (b) MU failed to distance itself at that time from an unambiguous written description by Umbro of a horizontal price-fixing agreement between Allsports, JJB and Sports Soccer; and
 - (c) MU's offer of a promotional ball would have afforded Sports Soccer in particular an excuse to discount the MU Replica Shirts, and so trigger a 'price war'. When notified by Umbro about this 'danger', MU took rapid steps which amounted to acquiescence in Umbro's policy of trying to maintain retail prices at High Street Prices.

⁵⁸⁹ Para 210 above.

⁵⁹⁰ Kenyon w/s para 26-7 attached to MU's WR on Supplemental Rule 14 Notice.

⁵⁹¹ Minutes of board meeting of 26 May 2000 attached to MU's WR on Rule 14 Notice at tab 2.

⁵⁹² Para 198 above.

- 469 Turning to Allsports, the OFT is satisfied that the evidence supports the proposition that, on both 2 and 8 June 2000, Mr Hughes referred to a conversation with MU about the launch prices for the MU home Replica Shirts. The reports about what Mr Hughes said from Mr Ronnie of Umbro, and, indirectly, from Mr Ashley of Sports Soccer, are credible.
- 470 As regards Mr Draper's account of the Golf Day on 25 May 2000, the OFT does not believe that this materially differs from that given by Mr Ronnie: see paragraph 467 above.
- 471 As regards the retailers' meeting in Mr Hughes' house on 8 June 2000, the OFT cannot accept that it had no material effect. Sports Soccer has said in its written representations that Umbro requested Sports Soccer to attend the meeting to give reassurance to JJB and Allsports about its pricing intentions, and that Umbro told Sports Soccer to expect a call from Allsports, which then duly happened.⁵⁹³ The OFT refers to the events subsequent to the meeting on 8 June 2000 that show that the meeting was effective: these include the internal memoranda from Allsports on 9 June 2000, and the consistent pricing behaviour of all the relevant retailers who were involved in the arrangement when the MU home Replica Shirt was launched on 1 August 2000.
- 472 So far as concerns Allsports' allegation that neither Sports Soccer nor Umbro told Allsports about the private meeting which they held following the meeting at Mr Hughes' house on 8 June 2000, this seems immaterial.
- 473 So far as concerns Allsports' contention that its internal memoranda of 9 June 2000 can be explained as a result of the fact that Mr Hughes was due to undergo surgery, the OFT does not accept this to be a credible or sufficient explanation for the anti-competitive content of the documents. Taken together, those memoranda show an involvement in price-fixing activities with other major retailers. In addition, it is noted that Mr Hughes chose to write two internal memoranda on 9 June 2000, even though they deal with the same issue. The second memorandum, which suggested that Allsports should actively '*continue any necessary dialogue*' with JJB and Sports Soccer, had a more limited circulation.
- 474 Turning to Blacks, in the light of the totality of the evidence described at paragraph 450 (f)-(i) above, the OFT remains of the view that Blacks did enter into a price-fixing agreement to retail MU home Replica Shirts at launch at High Street Prices.

⁵⁹³ Sports Soccer's WR on Supplemental Rule 14 Notice p.15-6.

- 475 Turning to JJB, the OFT regards the issue of whether or not JJB was aware in advance of the purpose of the 8 June 2000 meeting as unimportant, given what transpired. However, the OFT does not find it credible that JJB allegedly made no efforts to confirm in advance the reason for being invited to a meeting with a competitor.
- 476 As respects JJB's denial of the accounts of Messrs Ashley and Ronnie about the meeting on 8 June 2000, the issue is whether, before leaving the meeting, Mr Whelan or Mr Sharpe of JJB led the other attendees to believe that JJB would sell the MU home Replica Shirt at High Street Prices from launch. The OFT is satisfied that they did do so and notes:
- (a) Mr Ashley agreed to retail at High Street Prices although he would not have done so unless comparable assurances had been given by the other representatives of the major retailers who attended the meeting. He was the 'whistleblower' in this case, and Sports Soccer did not have any interest in admitting to an infringement of the Act.
 - (b) Sports Soccer has also confirmed that, although Mr Hughes of Allsports '*wanted the retail price to be around £44.99, he was happy to accept a retail price of £39.99. **JJB stated that its position was that it would retail the shirt at £39.99***'⁵⁹⁴ (OFT's emphasis). The OFT regards Mr Ashley as credible.
 - (c) Mr Ashley's version of what was agreed at the meeting on 8 June 2000 is corroborated by Mr Ronnie's section of the Umbro May 2000 monthly management report.
 - (d) Contrary to Mr Whelan's suggestion, there was clearly sufficient time at the meeting, on any view,⁵⁹⁵ for JJB to have agreed to retail the MU home Replica Shirt at High Street Prices.
 - (e) The evidence of Mr Lane-Smith does not shed any conclusive light on what was said in Mr Hughes house on 8 June 2000 as he was not there.
 - (f) The day after the retailers' meeting, Mr Hughes of Allsports informed his senior colleagues by internal memorandum to '*continue any necessary dialogue*' with, among others, JJB. If JJB's account of the 8 June 2000 meeting is to be believed, Mr Whelan would have left no doubt in

⁵⁹⁴ Sports Soccer WR on Supplemental Rule 14 Notice p.16.

⁵⁹⁵ See para 187(c) above.

anyone's mind that he did not want any further discussions with Mr Hughes, and this memorandum would not have been written.

- (g) Moreover, in the other Allsports internal memorandum of that day, Mr Hughes stated that *'JJB are going at £39.99 on 1st August in adult sizes and Sport[s...] Soccer will also do that'*. Mr Hughes therefore clearly had no doubt, the day after the price-fixing meeting, that JJB would retail at High Street Prices.
- (h) Finally and in any event, even if Mr Whelan did only say to the other attendees at the meeting on 8 June 2000 that *'JJB had on a number of occasions stated publicly that the company would never sell a replica shirt at a price in excess of £40'*, this would, in context, have been understood by the other attendees to operate as a maximum and as a minimum price for launch of the MU home Replica Shirt. In particular, the OFT notes:
- JJB has confirmed that the *'£39.99 price point was of key importance to JJB [and this] was evident to all parties within the sports retail sector...[and this was] reiterated by Mr Whelan when he left the meeting...on 8 June 2000'*.⁵⁹⁶
 - JJB has stated that it has been its *'policy since 1996 to go out at the £39.99 price point at launch'* and that *'JJB's policy was, as it had been since 1998, to set its prices at the £39.99 price point during these periods...'*.⁵⁹⁷

477 As respects the statement from Mr Russell of JJB, who belatedly remembered his conversation with Mr Bryan of Umbro about the meeting between retailers on 8 June 2000, the OFT notes that even though JJB was aware at the highest levels (through Mr Sharpe) that Umbro knew about the events of 8 June 2000, no attempt was made by JJB to distance itself from those arrangements, nor to inform Umbro that it must have been mistaken about JJB's involvement.

6.4 AGREEMENT BETWEEN AT LEAST JJB, SPORTS SOCCER AND UMBRO WITH RESPECT TO ENGLAND AND MU REPLICA SHIRTS FOR THE REMAINDER OF 2000 AND IN 2001

478 As described at paragraphs 342 to 410 above, the OFT is satisfied that Umbro and Sports Soccer were engaged in an agreement to maintain the prices of all

⁵⁹⁶ JJB's WR on Rule 14 Notice p.17 (App 1, doc 11 to Supplemental Rule 14 Notice).

⁵⁹⁷ JJB's WR on Supplemental Rule 14 Notice paras 2.6 and 2.8.

major Umbro licensed Replica Shirts during key selling periods, which persisted from April 2000 through until the end of August 2001.

- 479 Furthermore, the OFT notes that all the relevant retailers covered by this decision consistently priced Umbro licensed Replica Shirts at High Street Prices, with some minor exceptions, during key selling periods until the end of August 2001: see annex 3.
- 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: see paragraphs 157-158 above.
- 482 Secondly, Sports Soccer has stated that it only retailed at High Street Prices because of pressure from Umbro⁵⁹⁸, 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.⁵⁹⁹ Sports Soccer has said that *'the pressure became more intense during 2001 than it had been in 2000.'*⁶⁰⁰
- 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 its 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:

⁵⁹⁸ Para 166 above.

⁵⁹⁹ Para 165 above.

- (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*'.⁶⁰¹ In fact, on 1 June 2001, JJB did cancel such an order. According to JJB,⁶⁰² 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*'.⁶⁰³ 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),⁶⁰⁴ 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*'.⁶⁰⁵ 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

⁶⁰⁰ Sports Soccer's WR on Supplemental Rule 14 Notice p.10-11.

⁶⁰¹ Para 239 above.

⁶⁰² Para 241 above.

⁶⁰³ Para 240 above.

⁶⁰⁴ Para 244 above.

⁶⁰⁵ Para 232 above.

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,⁶⁰⁶ 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 branch⁶⁰⁷ 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

⁶⁰⁶ Annex 3, table 3.

⁶⁰⁷ There is a more formal but otherwise identical file note in relation to JJB's Bury branch (doc 3/104 (HC03)) although the fact that the wording is identical may imply that the reference to Bury is a mistake.

involvement of JJB at the material time in a separate arrangement which restricted the pricing of England Replica Shirts sold on the internet.

6.4.1 Views of the Parties

486 JJB denies involvement in any infringement. As regards the MU Replica Shirts, JJB does not accept Umbro's account of the meeting on 15 June 2001 regarding the reasons for reinstating its order for the MU Centenary Replica Kit.⁶⁰⁸

487 As respects Mr Whelan's fax to Nike of 26 June 2001 which was concerned with preventing Replica Shirts from being 'bastardised on price', Mr Whelan states in his first witness statement:⁶⁰⁹

'I had told...Nike...I wanted to purchase as many as possible of the remainder of the shirts at the lowest possible prices to dilute JJB's current high priced stock and allow JJB to discount its own retail prices without making a loss...The risk was that, to clear the stocks, Umbro would sell, at very low prices, large quantities of shirts that could end up on the grey market and with market traders. High street retailers cannot compete with market traders in those conditions'.

488 However, in his second witness statement explaining the same fax, Mr Whelan gives a slightly different picture:⁶¹⁰

'What I was concerned about was what is called in the trade "bastardisation". I foresaw that Umbro might offload large quantities of shirts that could end up with market traders. Where authentic replica shirts are being sold at very low wholesale prices to market traders, the door is open to counterfeit goods.'

489 As respects the Umbro file note⁶¹¹ relating to JJB's discounting of England Replica Shirts at its Carlisle store in April 2001, JJB submits that this in fact shows that no agreement was made concerning England Replica Shirts in 2001.⁶¹²

⁶⁰⁸ JJB's WR on Supplemental Rule 14 Notice para 2.51.

⁶⁰⁹ Whelan 1st w/s para 23 attached to JJB's WR on Rule 14 Notice (App 1, doc 12 to Supplemental Rule 14 Notice).

⁶¹⁰ Whelan 2nd w/s para 23 attached to JJB's WR on Supplemental Rule 14 Notice.

⁶¹¹ Para 234 above.

⁶¹² JJB's WR on Rule 14 Notice p.19 (App 1, doc 11 to Supplemental Rule 14 Notice).

6.4.2 Conclusion of the OFT

490 As respects JJB's reasons for cancelling the deliveries of the MU Centenary Kit in June 2001, the OFT remains of the view that this was, as Mr Fellone of Umbro has said, because of an objection to Sports Soccer's retail discounting activities. The OFT notes that Mr Fellone's account is supported by the contemporaneous evidence of the Umbro May 2001 monthly management report. It is also consistent with the pattern of behaviour established by JJB in 2000, to which each of the Umbro witnesses refers.

491 As respects the meaning of Mr Whelan's fax of 26 June 2001 to Nike, the OFT regards Mr Whelan's assertion that the term 'bastardisation' was, in context, linked to the risk of counterfeiting as implausible. The OFT notes that:

- (a) Mr Whelan's explanation in his first witness statement makes it clear that his reason for purchasing the MU home Replica Shirts was to avoid the effect of price competition from market traders, and thereby to keep up retail prices.
- (b) Mr Whelan explained to Nike his reasoning for purchasing the MU home Replica Shirts to Nike at a meeting later that summer. In the context of *'concern over replica product pricing in the UK market place, JJB made the decision to clean up all remaining Manchester United product in an attempt to protect the MU business in future.'* This was to JJB's own commercial advantage, particularly in the light of the advanced stage of the negotiations with MU over new retail arrangements at Old Trafford.⁶¹³
- (c) The term 'bastardisation' was also used by Mr Draper at the time of the Golf Day dinner on 25 May 2000, in relation to pricing at the launch of the MU home Replica Kit.⁶¹⁴ That was plainly not a reference to counterfeiting, but to the 'dangers' of price discounting.

492 In summary, the OFT remains of the view that Mr Whelan was seeking to prevent a disturbance to settled retail price levels for MU Replica Shirts in 2001.

493 Finally, with respect to JJB's discounts on England Replica Kit at its Carlisle branch, the OFT remains of the view that the reaction of JJB to Umbro's voiced concerns, as recorded in Umbro's contemporaneous file note, is, when considered in context, indicative of the continued existence of a pricing arrangement in relation to England Replica Shirts in 2001. Neither Mr Russell

⁶¹³ Para 245 above.

⁶¹⁴ Para 173 above.

nor Mr Sharpe distanced themselves by informing Umbro unequivocally that JJB's retail prices were none of its business. Instead, Umbro noted that Mr Russell '*could see our point of view*' and that '*he would speak to Duncan [Sharpe] when he came back to the office*'. Mr Sharpe was also reported as being '*aware of our concerns*' about the special offer potentially causing a price war.

6.5 RESTRICTION OF COMPETITION FOR THE REPLICA SHIRTS AGREEMENTS

- 494 It is settled law that agreements which fix resale prices⁶¹⁵ or horizontal price-fixing agreements have as their object the restriction of competition. The OFT considers that minimum resale prices, agreed in a series of related vertical agreements, have the same aims as a price-fixing system fixed by a single horizontal agreement.⁶¹⁶ In the present case all the parties took part in agreements to sell Umbro licensed Replica Shirts during key selling periods at High Street Prices. These included both horizontal agreements (between retailers) and vertical agreements (between Umbro, MU and the retailers). The OFT considers that the agreements described above have as their object an appreciable restriction of competition.
- 495 Although, once an agreement or concerted practice has been found to have as its object a restriction of competition it is not necessary for the OFT also to prove its anti-competitive effect.⁶¹⁷ The OFT considers in any event that the Replica Shirts Agreements also had as their effect an appreciable restriction of competition. The agreements prevented retailers from freely determining their retail prices by reference to their own costs and commercial policies, and prevented, or at least substantially reduced, the passing on to consumers of any benefits resulting from competition. The Replica Shirts Agreements related in particular to sales of the UK's largest selling, in terms of volume, Replica Shirts; England and MU. The evidence shows that a number of the retailers involved adopted retail prices that were higher than would have been the case in the absence of the agreement.

⁶¹⁵ Case 243/83 *Binon & Cie v Agence et Messageries de la Presse* [1985] ECR 2015 para 44; Case 123/83 *BNIC v Clair* [1985] ECR 391 para 22.

⁶¹⁶ Case 27/87 *Louis Erauw-Jacquery v La Hesbignonne* [1988] ECR 1919 para 15.

⁶¹⁷ Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235 at p.249; Cases 56 and 58/64 *Consten and Grundig v European Commission* [1966] ECR 299 at p.342; Case C-199/92 P *Hüls v European Commission* para 163 see note 392 above; Joined Cases T-374/94 *et seq European Night Services v European Commission* [1998] ECR II-3141 para 136.

7. Umbro/Sports Connection Celtic Agreement

496 The OFT is satisfied that an agreement or concerted practice between Umbro and Sports Connection within the meaning of section 2(1) of the Act was made in March 2001 (the price change taking effect on 2 April 2001) and operated until 22 May 2001 when Sports Connection discounted the Celtic home Replica Shirt again. For convenience, all references in this section to an agreement include a reference to a concerted practice. Under that agreement, Sports Connection agreed to retail the adult and junior Celtic Replica Shirts launched in March 2001 at High Street Prices.

497 Both Mr Stern of Sports Connection and Mr Fellone of Umbro have said that Sports Connection agreed to increased the price of the Celtic home Replica Shirt at Umbro's request.⁶¹⁸ Mr Fellone states that '*I contacted Sportsconnection to ask them to return to rrp. They agreed*' and this is not disputed.

7.1 VIEWS OF THE PARTIES

498 Umbro has confirmed⁶¹⁹ that it entered into the agreement with Sports Connection.

499 Sports Connection has also confirmed⁶²⁰ that it entered into the agreement with Umbro but has stated that it ended at the end of April 2001 when its 'everything reduced' promotion ended. Sports Connection has also said that it entered into the agreement under duress.

7.2 CONCLUSION OF THE OFT

500 The OFT accepts that Sports Connection was in an economically weaker position than Umbro although this does not deny the existence of the agreement. As Sports Connection made no attempt to distance itself from the agreement it until it reduced its prices at the end of May 2001, the OFT takes the view that the agreement continued until then.

⁶¹⁸ See paras 259 to 261 above.

⁶¹⁹ Umbro's WR on Rule 14 Notice para 208 (App 1, doc 4 to Supplemental Rule 14 Notice).

⁶²⁰ Sports Connection's WR on Rule 14 Notice p.8 and 10 (App 1, doc 14 to Supplemental Rule 14 Notice) and Sports Connection's WR on Supplemental Rule 14 Notice paras 13 and 21.

7.3 RESTRICTION OF COMPETITION FOR UMBRO/SPORTS CONNECTION CELTIC AGREEMENT

501 As noted above, agreements which fix prices have as their object a restriction of competition. The OFT considers that the agreement under which Sports Connection agreed not to discount the Celtic Replica Shirt made in March 2001 was a price-fixing agreement and therefore has as its object an appreciable restriction of competition. Sports Connection was a leading sports retailer in Scotland⁶²¹ and as a result of the agreement it increased its prices on one of the largest selling Replica Shirts in Scotland and other parts of the UK.

8. England Direct Agreements

8.1 FA/SPORTSETAIL AGREEMENT

502 The OFT is satisfied that a pricing agreement between the FA and Sportsetail was made on 4 February 2000 which operated until 30 November 2001 when it was formally terminated by the FA. The FA/Sportsetail Agreement gave the FA the right to control Sportsetail's retail prices for FA Licensed Merchandise.

503 The agreement was operated initially principally by Mr Smith at the FA and Ms Eves at Sportsetail. After Mr Smith left the FA in late July 2000 to join Sportsetail, the agreement was operated principally by Mr Smith's successor at the FA, Mr Armstrong, and Mr Smith, who was then at Sportsetail. However, at all times, Mr Armstrong, Mr Carling and Mr Barber of the FA were aware of the scope of this agreement. For example, Mr Armstrong attended the meeting with JJB and Umbro in January 2000⁶²² and Mr Carling was copied with various pieces of correspondence including the letter of 7 February 2000.⁶²³ Mr Barber was also copied in on various pieces of correspondence.⁶²⁴

504 The FA/Sportsetail agreement was not an agency agreement because Sportsetail bore financial risk.⁶²⁵

505 On several occasions in June 2000, January 2001, February 2001, June 2001 and August 2001, Sportsetail's possible discounts on certain products were

⁶²¹ In 2001, Sports Connection was the [...] [C] largest purchaser of Celtic Replica Kit from Umbro by turnover in 2001 after [...] [C] (Umbro e-mail dated 14 April 2003 (doc 1134)).

⁶²² Para 277 above.

⁶²³ Para 276 above.

⁶²⁴ Paras 287, 290 and 292 above.

⁶²⁵ The FA's WR on Rule 14 Notice appendix A, line 3 (App 1, doc 24 to Supplemental Rule 14 Notice).

raised with the FA and on several occasions these were refused by the FA.⁶²⁶ The OFT also notes that under this agreement the FA's revenue was calculated by reference to Sportsetail's retail prices and that, consequently, the FA had a vested interest in ensuring that Sportsetail's retail prices were maintained.⁶²⁷

506 The OFT also notes the various e-mails from the FA about sales at club grounds during 2001 which show the FA's concern at ensuring that none of the relevant clubs discounted the England Replica Kits.⁶²⁸ However, the OFT also accepts that the clubs were '*acting (almost always) as sales agents for F.A., with no risk, taking products on sale or return basis*'.⁶²⁹

8.1.1 Views of the Parties

507 The FA has admitted that it entered into the FA/Sportsetail Agreement but has stated that this was an integral part of the England Direct Agreements as a whole involving both JJB and Umbro.⁶³⁰ The FA has said that its involvement was limited to Mr Smith and Mr Armstrong because other copy recipients were not aware of the relevant context.⁶³¹

508 The FA's other points are examined in the section relating to the FA/Sportsetail/Umbro/JJB agreement.

8.1.2 Conclusion of the OFT

509 Although JJB and Umbro were not parties to the FA/Sportsetail Agreement, under the wider agreement involving all four parties, Umbro supplied England Replica Kit to Sportsetail on the understanding that Sportsetail would align its retail prices to those of JJB. The FA's control of Sportsetail's prices through the FA/Sportsetail Agreement was the way of ensuring that this happened. To that extent, the OFT accepts that the two England Direct Agreements may be viewed as a single integrated agreement, but the FA/Sportsetail Agreement also covered all FA Licensed Merchandise.

⁶²⁶ Paras 285, 289 to 295 and 299 to 300 above.

⁶²⁷ Para 272 above and WR of the FA on Rule 14 Notice appendix A line 9 (App 1, doc 24 to Supplemental Rule 14 Notice).

⁶²⁸ Paras 296 to 298 above.

⁶²⁹ The FA's WR on Rule 14 Notice appendix A, line 7e (App 1, doc 24 to Supplemental Rule 14 Notice).

⁶³⁰ The FA's WR on Rule 14 Notice para 2 (App 1, doc 24 to Supplemental Rule 14 Notice).

⁶³¹ The FA's WR on Rule 14 Notice appendix A line 7f (App 1, doc 24 to Supplemental Rule 14 Notice).

510 Given that key correspondence which evidenced horizontal and vertical price-fixing was copied to Mr Carling and Mr Barber,⁶³² the OFT does not accept that the FA's involvement was limited to Mr Smith and Mr Armstrong.

8.2 FA/SPORTSETAIL/UMBRO/JJB AGREEMENT

511 The OFT takes the view that an agreement or concerted practice between JJB, the FA, Sportsetail and Umbro was made on 7 February 2000. It operated until August 2001 in so far as it involved JJB and Umbro and until 30 November 2001 in so far as it involved the FA and Sportsetail. For convenience, all references in this section to an agreement include a reference to a concerted practice. The FA/Sportsetail/Umbro/JJB Agreement infringed the Act from when it came into force because the parties agreed to align Sportsetail's retail prices for England Replica Kit with JJB's retail prices for the same products to avoid Sportsetail undercutting JJB.

8.2.1 *Sportsetail & the FA*

512 The subject matter of the agreement was confirmed in the FA's letter of 7 February 2000 which had previously been sent to Umbro for comment.⁶³³ This letter was copied to all the parties. The FA and Sportsetail have confirmed⁶³⁴ that the 7 February 2000 letter was the result of a series of meetings between Umbro, JJB, the FA and Sportsetail to determine how Sportsetail was to be supplied with FA merchandise licensed to Umbro.

513 For Sportsetail and the FA, the OFT takes the date of formal termination as indicating the relevant duration of the agreement.

8.2.2 *JJB & Umbro*

514 JJB was involved due to its position as official retailer of FA merchandise⁶³⁵ and because of its arrangements with Umbro.⁶³⁶ JJB was concerned at Sportsetail acting as another official retailer for the FA and wished to control Sportsetail's access to the key FA merchandise manufactured by Umbro. Umbro and JJB therefore originally agreed that Umbro would not supply Sportsetail but that Sportsetail would obtain its supplies from JJB. Umbro and JJB also sought and obtained agreement from the FA that the FA would not allow Sportsetail to price below JJB's retail prices. This is reflected in the FA letter of 7 February 2000.

⁶³² Paras 275 to 276 above.

⁶³³ Para 275 to 276 above.

⁶³⁴ Para 277 above.

⁶³⁵ Para 25 above.

⁶³⁶ Paras 273 to 275 and 278 above.

- 515 Umbro acted as the co-ordinator of discussions between the FA and JJB and in particular in emphasising JJB's concerns to the FA in order to obtain the necessary agreements from the FA and Sportsetail as to Sportsetail's retail pricing. Umbro and JJB also agreed between themselves that JJB would supply Sportsetail at Umbro's standard wholesale prices.⁶³⁷ Sportsetail wrote to JJB on 29 March 2000 requesting details of JJB's retail prices for England Replica Kit. Although JJB did not respond, as noted above, Sportsetail ultimately obtained JJB's retail prices from Umbro.
- 516 By the end of February 2000, Umbro and JJB had agreed that JJB would not supply Sportsetail with Umbro licensed FA merchandise but that Umbro would supply direct.⁶³⁸ The OFT takes the view that the handwritten 'NO' in the copy of Mr Marsh's e-mail which was faxed to JJB on 11 February 2000⁶³⁹ means that JJB did not agree with the particular supply arrangements being proposed by Umbro. This is demonstrated by the fact that by 25 February 2000 Umbro knew that JJB was '*out of the loop*'.⁶⁴⁰ However, the remainder of the e-mail, including that part dealing with Sportsetail needing to set prices at the same point as JJB, does not appear to have raised any concerns with JJB. It was at least implicitly approved. JJB had secured the FA's agreement as to the appropriate level of Sportsetail's retail prices and therefore JJB's need to control supply to Sportsetail was no longer paramount.
- 517 The OFT does not consider that JJB's apparent lack of response to the 7 February 2000 or 29 March 2000 letters signifies that JJB was not party to the agreement or no longer considered the terms of the 7 February 2000 letter as regards Sportsetail's retail prices to be in force. JJB was present at the meeting in January 2000 at which the agreement was made. JJB took no active steps to inform any of the parties to the agreement that the 7 February 2000 letter did not reflect what had been agreed at the meeting attended by JJB at its offices at the end of January 2000. It did not take any steps to inform the other parties that it regarded the agreement as terminated following the decision to allow Umbro to supply Sportsetail direct or that it no longer wished to be party to the agreement.
- 518 Particularly given JJB's participation in the Replica Shirts Agreements during 2000 and 2001, there is no basis for supposing that JJB did not believe that the agreement was being implemented by the other parties. The agreement was to JJB's benefit and had been proposed by JJB together with Umbro to meet JJB's

⁶³⁷ Para 278 above.

⁶³⁸ Paras 279 to 280 above.

⁶³⁹ Para 279 above.

⁶⁴⁰ Para 280 above.

commercial concerns. The OFT also considers that Umbro would have kept JJB informed of Sportsetail's retail activities given Umbro's close relationship with JJB and the nature of the discussions between them leading up to the 7 February 2000 letter. In addition, in 2000 and 2001, JJB was party to the Replica Shirts Agreements with Umbro amongst others to maintain the prices of England and MU Replica Shirts. In summary, the OFT therefore considers that JJB was also party to the 7 February 2000 agreement, and was fully aware that it was being implemented by Sportsetail, the FA and Umbro.

- 519 Although supply was no longer being made by JJB and therefore the agreement between JJB and Umbro as to the wholesale prices that JJB would charge was never implemented, the FA, Sportsetail and Umbro continued to adhere to the policy that Sportsetail was required to price no lower than JJB.⁶⁴¹
- 520 The OFT takes the view that it is unlikely that JJB and Umbro would have continued as parties to the FA/Sportsetail/Umbro/JJB Agreement after they had ceased participating in the Replica Shirts Agreements at the end of August 2001. Therefore, for JJB and Umbro, the OFT takes the date of the OFT investigations under section 28 of the Act as marking the relevant end of the agreement. For the FA and Sportsetail, the OFT takes the date of formal termination of that part of the FA/Sportsetail Agreement which entitled the FA to control Sportsetail's prices as indicating the end of their participation in the FA/Sportsetail/Umbro/JJB Agreement.

8.2.3 Views of the Parties

- 521 The FA has argued that the agreement did not appreciably restrict competition and was pro-competitive as, without the agreement, Sportsetail would not have received any supplies of Umbro England licensed Replica Kit and that in any event Sportsetail's share of the relevant market was less than [...] [C] per cent. The FA also submitted a report prepared by Frontier Economics to support this.⁶⁴²
- 522 JJB has said that the agreement was made because '*Umbro did not wish to be seen to be supplying Hay & Robertson, through Sportsetail, direct because Hay & Robertson also owned Admiral Sports, which was not only a competitor, but also owned the licence for England leisurewear*'.⁶⁴³ JJB has denied the accuracy of the contemporaneous documents which state that the agreement was made because of JJB's concerns.⁶⁴⁴ JJB has stated that the FA wanted a price-fixing

⁶⁴¹ Paras 282 to 284, 286 and 291 above.

⁶⁴² The FA's WR on Rule 14 Notice tab D (App 1, doc 24 to Supplemental Rule 14 Notice).

⁶⁴³ JJB's WR on Rule 14 Notice p.23 (App 1, doc 11 to Supplemental Rule 14 Notice).

⁶⁴⁴ JJB's WR on Rule 14 Notice p.24 (App 1, doc 11 to Supplemental Rule 14 Notice).

clause with Sportsetail.⁶⁴⁵ JJB stresses that it was '*out of the loop*' and wrote '*NO*' against part of the e-mail faxed by Mr Marsh on 11 February 2000.⁶⁴⁶

523 Umbro has said that it was not party to the agreement in so far as it involved price-fixing and, in any event, its participation terminated in July 2000 when Mr Smith left the FA to work for Sportsetail.⁶⁴⁷ Umbro agrees with Mr Smith's account of JJB's involvement in the agreement.⁶⁴⁸ Umbro denies that it put any pressure on the FA in relation to this agreement.⁶⁴⁹

8.2.4 Conclusion of the OFT

524 The OFT is satisfied that the agreement had price-fixing as its object. Whilst Umbro and JJB were clearly concerned as to how to deal with Sportsetail, the parties have supplied no evidence that Umbro would have refused to supply Sportsetail; the parties have given the OFT no reason to think that price-fixing was indispensable to the conclusion of any agreement. Given the FA's position as licensor and its relationship with Umbro generally, the OFT is of the view that Umbro would have supplied Sportsetail irrespective of any price-fixing agreement. Moreover, the fact that the agreement may have had other objects or that it was not the subjective intention of the parties to restrict competition does not preclude the finding by the OFT that the agreement had as its object price-fixing.

525 In the light of the contemporaneous documents and other evidence on which the OFT relies, the OFT does not regard JJB's account of events as credible. Mr Whelan states he was '*strongly of the view*' that JJB should not participate in the agreement⁶⁵⁰ and yet the documentary and other evidence does not demonstrate this. In addition, the OFT notes that the Umbro letter from Mr Prothero dated 25 November 1999⁶⁵¹ to Mr Russell of JJB continues:

'...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'.

⁶⁴⁵ JJB's WR on Rule 14 Notice p.24 (App 1, doc 11 to Supplemental Rule 14 Notice).

⁶⁴⁶ JJB's WR on Rule 14 Notice p.25 (App 1, doc 11 to Supplemental Rule 14 Notice).

⁶⁴⁷ Umbro's WR on Rule 14 Notice 162-164 (App 1, doc 4 to Supplemental Rule 14 Notice) and on Supplemental Rule 14 Notice para 79.

⁶⁴⁸ Umbro's WR on Rule 14 Notice 153 (App 1, doc 4 to Supplemental Rule 14 Notice).

⁶⁴⁹ Umbro's WR on the Further Supplemental Rule 14 Notice, para 2.

⁶⁵⁰ Whelan 1st w/s para 33 attached to JJB's WR on Rule 14 Notice (App 1, doc 11 to Supplemental Rule 14 Notice).

⁶⁵¹ The FA's leniency application, tab 16 (doc SA21).

The OFT takes the view that this indicates the nature of JJB's concerns in relation to Sportsetail; JJB did not want to lose business to a rival 'official' supplier of England Replica Kit or FA Licensed Merchandise. For this reason, JJB insisted that Sportsetail's retail prices should be pegged to its own.

526 The OFT does not accept that Umbro was not a party to the agreement in so far as it related to price-fixing; an important aspect of the arrangement of which Umbro was aware involved this. The OFT takes the view that part of Umbro's relationship with the FA, either expressly or inadvertently led the FA to believe that supplies to Sportsetail were dependent upon the FA controlling Sportsetail's prices. Umbro made no efforts to distance itself from the arrangement.

527 The OFT does not accept that Mr Smith was the only person at the FA who understood how the agreement operated. The relevant correspondence was widely copied within the FA and Mr Armstrong was present at the meeting in Wigan when the terms of the agreement were discussed.

528 The OFT notes Umbro's e-mail of 13 February 2001 concerning the refusal to allow a reduction in the price of England Replica Kits and the FA's response together with Umbro's and JJB's continued participation in the Replica Shirts Agreements. The OFT is satisfied that Umbro's and JJB's participation in the England Direct Agreements continued until the end of August 2001.

8.3 RESTRICTION OF COMPETITION FOR ENGLAND DIRECT AGREEMENTS

529 Agreements which fix prices have as their object a restriction of competition. The OFT considers that the England Direct Agreements is a price-fixing agreement and that given Sportsetail's position as the FA's official retailer and against the background of the other price-fixing agreements to which Umbro and JJB were also a party to at the time, the agreement had as its object the appreciable restriction of competition.

530 The OFT notes that Sportsetail's share of supply by value of England replica kits was 1 per cent or less in 2000 but between 2 and 3 per cent in 2001. JJB's share of supply was significant (around [...] **[C]** per cent)⁶⁵² and the agreement must be assessed in light of the other agreements to which JJB and Umbro were a party at the time; the Replica Shirts Agreements and the Umbro/Sports Connection Celtic Agreement. Moreover, as the FA's official retailer and primary mail order and internet retailer of the important England Replica Kit, any agreement to fix prices in line with JJB at least potentially restricted competition in particular price competition. Had Sportsetail not been required to price in line

⁶⁵² See para 70 above.

with JJB, potentially at least, its sales may have been more significant, this may have prompted discounting by other retailers including JJB. Customers would potentially have benefited from increased price competition.

9. Effect on trade for all agreements

531 All the agreements described in this decision may have affected trade within the UK. All the agreements have as their object maintaining minimum retail prices for certain Umbro licensed Replica Shirts and in the case of the England Direct Agreements certain Other Licensed Merchandise. The agreements were all implemented throughout the UK and related to the Umbro's largest selling Replica Shirts. In 2000, Umbro's sales of MU Replica Kit alone exceeded £[...] million.

10. Conclusion for all agreements

532 For the reasons given above, the OFT is satisfied that Allsports, Blacks, JJB, JD, MU, Sports Soccer and Umbro took part in a number of agreements relating, at least, to the pricing of certain Umbro licensed Replica Shirts during key selling periods. These were:

- (a) an agreement between, at least, Sports Soccer and Umbro between April 2000 and August 2001, with respect to the prices of the major Umbro licensed Replica Shirts (namely Celtic, Chelsea, England, MU and, at least during 2000, Nottingham Forest);
- (b) an agreement between Allsports, Blacks, JD, and JJB, as well as Sports Soccer and Umbro, with respect to England home and away Replica Shirts around the time of the Euro 2000 tournament;
- (c) an agreement between, at least Allsports, Blacks, JJB and MU, as well as Sports Soccer and Umbro, with respect to MU home Replica Shirts launched in 2000; and
- (d) an agreement between, at least, JJB, Sports Soccer and Umbro with respect to England and MU Replica Shirts launched for the remainder of 2000 and in 2001.

533 All the agreements were vertical or horizontal price-fixing agreements within the meaning of section 2(1) of the Act with the object of directly or indirectly fixing the retail prices of Replica Shirts at least during key selling periods.

- 534 Further, for the reasons given above, the OFT is satisfied that a price-fixing agreement in relation to Celtic Replica Shirts between Umbro and Sports Connection within the meaning of section 2(1) of the Act was made in March 2001 (the price change taking effect on 2 April 2001) and operated until 22 May 2001 when Sports Connection discounted the Celtic home Replica Shirt again.
- 535 Finally, for the reasons given above, the OFT is satisfied that a price-fixing agreement in relation to England Replica Kit between JJB, the FA, Sportsetail and Umbro was made on 7 February 2000 which was caught by the Act with effect from 1 March 2000 and which operated until August 2001 in so far as it involved JJB and Umbro and until 30 November 2001 in so far as it involved the FA and Sportsetail. This built upon an underlying price-fixing agreement made between the FA and Sportsetail in relation to all FA Licensed Merchandise, which was caught by the Act with effect from 1 March 2000 and which operated until 30 November 2001 when it was finally terminated by the FA. These two agreements or concerted practices formed the England Direct Agreements in respect of England Replica Kit.

V PENALTIES

1. Legal Background

536 Section 36(1) of the Act provides that on making a decision that the Chapter I prohibition has been infringed, the OFT may require the undertaking concerned to pay it a penalty in respect of the infringement. The undertaking comprises those legal bodies forming a single economic entity with the person found to have infringed the Chapter I prohibition. No penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act (Determination of Turnover for Penalties) Order 1998⁶⁵³ ('the Penalties Order').

537 Section 39(3) of the Act provides that a person is immune from the effect of section 36(1) if he is party to a 'small agreement' and that agreement is not a price-fixing agreement. A small agreement is defined, pursuant to section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000⁶⁵⁴ ('the Small Agreements Regulations') as an agreement between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding the one during which the infringement occurred does not exceed £20m.

538 The OFT may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently⁶⁵⁵ although the OFT is not obliged to specify whether it considers the infringement to be intentional or merely negligent.⁶⁵⁶ The CAT has said:⁶⁵⁷

'in our judgment an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition'.

In accordance with section 38(8) of the Act, the OFT has had regard to the OFT's Guidance.⁶⁵⁸

⁶⁵³ Section 36(8) of the Act and SI 2000/309.

⁶⁵⁴ SI 2000/262.

⁶⁵⁵ Section 36(3) of the Act.

⁶⁵⁶ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1 at [457] and [459], [2001] Comp AR 1.

⁶⁵⁷ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1 at [456], [2001] Comp AR 1.

⁶⁵⁸ See note 19 above.

539 The starting point for determining the level of penalty is calculated by applying a percentage rate to the 'relevant turnover' of the undertaking, up to a maximum of 10 per cent. The 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year.

2. Relevant market – Replica Kit

540 For the reasons given below, the OFT considers that the first relevant product market in this case is each club's or national team's Replica Kit. The OFT does not consider it appropriate to extend the relevant product market to encompass other team's Replica Kits or Other Licensed Merchandise. The OFT also considers that the relevant geographic market for each club's or national team's Replica Kit in this case is as least as wide as the UK.⁶⁵⁹

2.1 PRODUCT MARKET

541 The Commission's Notice on the definition of the relevant market for the purposes of Community competition law⁶⁶⁰ (based on the case law of the European Courts⁶⁶¹) says that a relevant product market comprises *'all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'*.

2.1.1 Demand side substitutability

FANS

542 Demand side substitution between the Replica Kits of different teams is virtually non-existent. The Replica Kit of any team is by its very nature designed to be easily distinguishable from the Replica Kit of other football teams. It will prominently feature the club logo and current sponsors' name. The home Replica Kit in particular follows the designs and colour schemes historically associated with the relevant team.

⁶⁵⁹ The geographic market for some the largest teams such as MU may be wider than the UK but the OFT does not consider it necessary in this case to define the market any wider than the UK.

⁶⁶⁰ OJ No C 372 3.12.1997 p.5 at para 7. See also OFT Guideline *Market Definition*, OFT 403, March 1999.

⁶⁶¹ See, for example, Case 85/76 *Hoffman-La Roche v European Commission* [1979] ECR 461, para 28.

543 As the Football Task Force report makes clear, football support involves allegiance and commitment to a particular team. Supporters who are sufficiently committed to purchase items of their favoured team's Replica Kit will not regard the Replica Kit of other teams as being interchangeable with that of their own: football clubs *'have a loyal customer base that is committed to the brand and they will not go elsewhere if the quality of the product deteriorates'*.⁶⁶² In the vast majority of cases, the intended use of a Replica Kit is demonstrating the wearer's support of and commitment to a particular football team. A fan wearing the Replica Kit of any other football team to the one actually supported is anathema since this would not only indicate a positive allegiance to the other team but also a lack of allegiance to their own.

NATIONAL AND LEAGUE CLUB TEAMS

544 The only exception is in relation to those teams which do not compete with the team supported i.e. national teams do not compete with league club teams. However, such Replica Kits are not substitutes for the Replica Kit of the primary supported team and therefore the OFT is satisfied that the price of such Replica Kits would not constrain the price of other Replica Kits. For example, those supporters of the England national team who also support an English league club (which typically represent the primary focus of their support throughout most of the year) will not be subject to any conflict of loyalty. Purchases of an England Replica Shirt will typically be an additional purchase rather than a substitute for the shirts of their own clubs. They are not therefore part of the same product market.

OTHER LICENSED MERCHANDISE

545 In addition to Replica Kits, football clubs and the national teams often have extensive ranges of Other Licensed Merchandise. All the teams for which Umbro manufactured Replica Kits during the period of the infringement had a small range of clothing manufactured by Umbro and worn by the teams when travelling or training which also bore the team's sponsors' trademarks. All the relevant clubs also had further ranges of clothing manufactured by Umbro and by other manufacturers bearing the club's logo and those of Umbro where applicable. Such clothing was not generally worn by the team's players and ranged from T-shirts through to scarves, hats, babywear, bathrobes and pyjamas. In addition to clothing, the clubs also have extensive ranges of Other Licensed Merchandise including bags, footballs, mugs, towels, water bottles, bed linen and keyrings.

546 The OFT takes the view that Other Licensed Merchandise is unlikely to be substitutable with Replica Kit even when it is a similar item of clothing. The

⁶⁶² See further paras 72 to 74 above.

importance and key distinguishing feature of Replica Kit compared to Other Licensed Merchandise is that it is more or less identical to the kit worn by the supported team's players when competing in tournaments. It is seen as a prime means of showing support for the current team including individual players. The on-going success of the market demonstrates to the OFT that a significant number of consumers of Replica Kit must routinely replace their Replica Kit or purchase Replica Kit for the first time when a new season's Replica Kit is released. These characteristics set Replica Kit apart from Other Licensed Merchandise.

547 Moreover, Other Licensed Merchandise is not subject to the same predictable demand cycles as Replica Kit, usually only being replaced due to changes of sponsor or manufacturer rather than seasonally.⁶⁶³ It is also not subject to the same marketing arrangements, being primarily sold through the team's own retail operations and in much lower volumes. The launch of a Replica Kit is seen as a major event for a team and it will be the subject of a highly advertised launch date with competitions, advanced orders being taken and frequently extended retail opening hours.

548 The OFT also notes the considerable price differentials between Replica Kit and other similar items of clothing. For example, the adult Celtic Replica Shirt was retailed by the club at £39.99 during the period of the infringement whereas the RRP for the adult training shirt which also carried the club's, Umbro's and the other sponsor's trademarks was £24.99.⁶⁶⁴ In terms of quality and costs of production the products were not materially different. Similarly, the adult Chelsea Replica Shirt was retailed by the club at £39.99 whereas the training shirt, again carrying the same trademarks, retailed at £24.99.⁶⁶⁵

549 Therefore, the OFT considers that the first relevant product market in this case is each club's or national team's Replica Kit.

2.1.2 Supply side substitutability

550 From August 2002, Nike replaced Umbro as the official manufacturer and supplier of MU Replica Kit with exclusive rights to produce and distribute all of MU's licensed merchandise (with the exception of television and video related products and services) for a period of 13 years. Other relatively lengthy Replica Kit supply agreements have also been entered into recently by Umbro. In 2001,

⁶⁶³ See para 84 above.

⁶⁶⁴ Umbro response dated 2 November 2001 to section 26 notice dated 18 October 2001, tab 5d/e (doc SA19).

⁶⁶⁵ www.chelseamegastore.com; this was also the RRP, Umbro response dated 2 November 2001 to section 26 notice dated 18 October 2001, tab 5d/e (doc SA19).

Chelsea announced that its Replica Kit supply agreement had been extended for a further ten years with Umbro and, in 2000, Celtic announced a further five year contract with Umbro (which had already been the club's Replica Kit supplier for 25 years).

551 Manufacturers are generally exclusively licensed to manufacture all Replica Kit items and, in the case of Umbro during the period of the infringement, to distribute and sell all products comprising a club or team's Replica Kit. Each product comprising a Replica Kit is not the subject of separate licensing arrangements or distribution and marketing nor are the various Replica Kits (home, away, third, and goalkeeper's); once a manufacturer has such a licence, it is not difficult for it to manufacture all the constituent products which make up a Replica Kit.

2.1.3 Views of the Parties

552 Although some of the Parties have sought to argue that the relevant product market is narrower than each club's or team's Replica Kit, none of the Parties, with the exception of the FA, has sought to argue that the market is wider. A number of the Parties⁶⁶⁶ have sought to argue that each product comprising a Replica Kit is a distinct product market or that the different types of Replica Kit (i.e. the home, away, third and goalkeeper's) of a club or team constitute distinct product markets. Some parties have argued that the key selling Replica Shirts are primarily leisure items whereas other items of Replica Kit are often purchased as sportswear and are more specialist items.⁶⁶⁷ The OFT notes certain Parties' arguments that adult Replica Shirts and socks, for example, are sold as separate items and that shorts are not substitutable for shirts on the demand side, for example.

2.1.4 Conclusion of the OFT

553 First, the OFT is satisfied that all but one of the agreements covered by this decision had as their object the price-fixing of various Umbro licensed Replica Shirts. The England Direct Agreements went wider than this and extended to other FA Licensed Merchandise. In each case, sales of Replica Shirts are the most important item of Replica Kit and drive sales of replica shorts and socks. Therefore, whilst a Replica Kit is comprised of several products (adult and junior

⁶⁶⁶ See e.g. Allsports' WR on Rule 14 Notice paras 2-5 (App 1, doc 10 to Supplemental Rule 14 Notice); JJB's WR on Supplemental Rule 14 Notice para 3.1; JD's WR on Supplemental Rule 14 Notice para 5; Umbro's WR on Supplemental Rule 14 Notice paras 81-85.

⁶⁶⁷ Allsports WR on Rule 14 Notice p.4 para 4 (App 1, doc 10 to Supplemental Rule 14 Notice); DLA letter for JJB dated 14 May 2003 (doc 1178).

shirt, shorts, socks and infant kits) which are sold separately and whilst a fan who wants to wear a pair of shorts cannot substitute this for a Replica Shirt, this does not necessarily mean that each kind of product is a distinct relevant product market. A Replica Kit is designed and marketed at launch as a single product⁶⁶⁸ and with the same purpose of showing visible support for a particular club or team by distinguishing itself from the Replica Kits of other clubs or teams. The home, away, third and goalkeeper's Replica Kits have the same characteristics, prices and intended use as each other.⁶⁶⁹

- 554 Secondly, a manufacturer is normally exclusively licensed to manufacture all these items together and, in the case of Umbro during the period of the infringement, to distribute and sell all products comprising a club or team's Replica Kit. The OFT therefore remains satisfied that the most appropriate market definition in the present case, for the purposes of the imposition of a penalty, is each club or team's Replica Kit and in particular that the relevant product market is not narrower than this.
- 555 As to whether the market should be wider, the OFT notes that there does not appear to be any relationship between the pricing of one Replica Kit and demand for another. First, in a year in which England launches a Replica Kit and participates in a tournament, there would appear to be no significant fall in demand for club Replica Kits. Secondly, the discounting of one club's Replica Kit will not affect demand for or pricing of another club's Replica Kit.⁶⁷⁰ MU has confirmed⁶⁷¹ that irrespective of the cost of a Celtic or Chelsea Replica Shirt, a customer for a MU Replica Shirt will not switch to the Replica Shirt of another club. Whilst pricing of one club's Replica Kit may act as a potential upper limit on retail prices of a second club's Replica Kit, this influence is not sufficient to constrain the price of the second club's Replica Kit to the competitive level. Therefore, in the light of the above and the fact that no party has introduced any evidence to the contrary, the OFT is satisfied that there is no basis for defining the market more widely.

⁶⁶⁸ See paras 59 to 60 above.

⁶⁶⁹ The OFT notes Sports Soccer's view in footnote 1 in its WR on the Supplemental Rule 14 Notice p.27: 'Sports Soccer submits that it is not necessarily the case that an away kit is less important than a home kit...In some instances, the away kit is just as or even more popular than the home kit. ...For example, when the England team is engaged in a major tournament match overseas, the away strip becomes particularly important'.

⁶⁷⁰ As to pricing, see Annex 3, tables 1 to 8.

⁶⁷¹ MU's OR on Rule 14 Notice, p.6 lines 12-21 (App 1, doc 2 to Supplemental Rule 14 Notice).

2.2 GEOGRAPHIC MARKET

556 Although many of their supporters, and particularly those supporters who actually attend games, are drawn from relatively local areas, the larger teams such as England, MU, Celtic and Chelsea have supporters located across the UK (and indeed worldwide) who purchase Replica Kit. Even clubs which have been less successful over recent years such as Nottingham Forest nevertheless have supporters located throughout the UK purchasing Replica Kit. Umbro licensed Replica Kits are sold by high street retailers across the country as well as being available from mail order and internet shopping facilities operated by the teams as well as by national retailers. Moreover, the agreements which are the subject of this decision applied nationally. The OFT therefore considers that the relevant geographical market for the supply of each of the Replica Kits which are the subject of this decision is at least UK wide.

3. Relevant market – Intellectual Property Licences for Replica Kit

557 For the reasons given below, the OFT considers that a second relevant product market in this case is the granting of club or team trademark IP licences for the manufacture or sale of Replica Kit for each respective club or team. The OFT also considers that the relevant geographic market is also as least as wide as the UK. This second market defined for the purposes of calculating a financial penalty affects only MU and the FA, as only their businesses are active in it.

3.1 PRODUCT MARKET

558 The right to use relevant intellectual property ('IP') is an essential input for the manufacture and supply of Replica Kit. Demand for IP licences is derived from the demand for each Replica Kit. The product market for the granting of IP licences for use on Replica Kit is not part of the same product market as Replica Kit itself. However, the market for IP licences is relevant when considering the agreements in this case.

559 The value of MU's and the FA's IP licences for Replica Kit are affected by the wholesale and retail prices of MU and England Replica Kit. That created an interest for MU and the FA, as licensors, in the retail and wholesale prices of their respective Replica Kits. This manifested itself in the dealings between for example:

- (a) MU and Umbro - evidenced by the pressure exerted by MU on Umbro (in the context of its licence renewal negotiations) to maintain retail prices

evidenced by, for example, the exchange of correspondence between them on 25 May 2000 and 6 June 2000 and on 13 July 2000;⁶⁷² and

- (b) the FA and Sportsetail - evidenced by, for example, the FA's letter of 7 February 2000 and the subsequent correspondence.⁶⁷³

560 The OFT takes the view that the granting of club or team trademark IP licences for the manufacture or sale of Replica Kit for each respective club or team is a relevant product market in this case.

3.1.1 Demand side substitutability

OTHER CLUBS OR TEAMS

561 The only licensors involved in this case are MU and the FA. For both MU and the FA, the turnover for the purposes of calculating penalties is the revenue obtained from their the grant of IP licences for MU and England Replica Kit respectively. Therefore, for these purposes, the OFT does not need to decide whether the relevant market is any wider than the market for each club or team's IP licence for the manufacture or sale of its own Replica Kit.

OTHER LICENSED MERCHANDISE

562 As demand for IP licences is derived from the demand for each product covered by that licence, the OFT regards the market for licences for Replica Kit as distinct from the market for licences for other non-Replica Kit products. This is for the same reasons as are given with respect to Replica Kit.⁶⁷⁴ The OFT therefore takes the view that the markets for licences for the manufacture or sale of Replica Kit products and non-Replica Kit products are distinct.

563 The OFT notes that IP licences for the manufacture or sale of Replica Kit are usually granted in the same agreements as IP licences for the manufacture and sale of non-Replica Kit products. Nevertheless, for the reason given in the paragraph above, the OFT has decided to give MU and the FA the benefit of the doubt in this respect (as the parties affected by the points in issue with respect to financial penalties) and to limit the relevant market to Replica Kit products.

EACH PRODUCT COMPRISING REPLICAS KIT

564 Also on the demand side, each product comprising a Replica Kit is not the subject of separate licensing arrangements or distribution and marketing. Although it might be possible for each product to be manufactured or sold by different undertakings, in practice this does not happen. The value of licences

⁶⁷² See paras 170, 184, 197 to 198 above.

⁶⁷³ See paras 275 to 276 above.

for Replica Kit would be very much lower if licences were not granted exclusively to one manufacturer for all Replica Kit products. The OFT therefore takes the view that all Replica Kit products are contained in the same relevant market.

3.1.2 Supply side substitutability

565 As MU and the FA have total control over the supply of IP licences for the manufacture or sale of MU and England Replica Kits respectively, supply side substitution is impossible.

3.2 GEOGRAPHIC MARKET

566 As IP licences for the manufacture or sale of Replica Kit generally cover at least the UK, the OFT takes the view that the geographic market is at least UK wide.

3.3 VIEWS OF THE PARTIES

567 MU states that IP licences for the different clubs and for England constitute different markets.⁶⁷⁵ The FA does not take issue with this aspect of the OFT's case.⁶⁷⁶

3.4 CONCLUSION OF THE OFT

568 The OFT is satisfied that that the granting of club or team trademark IP licences for the manufacture or sale of Replica Kit for each respective club or team is a relevant product market in this case.

569 Having defined the relevant market, the OFT considers the penalty for each party in turn. As Umbro is involved in all the infringements, it is analysed first. The other parties follow in alphabetical order by registered name. The decision does not repeat legal background material set out in the section concerning Umbro in relation to other parties. All figures used to calculate the penalties in this decision are quoted in millions of pounds sterling and have been rounded to the nearest thousand.

⁶⁷⁴ See paras 545 to 555 above.

⁶⁷⁵ MU's WR on Further Supplemental Rule 14 Notice p.1.

⁶⁷⁶ The FA's WR on Further Supplemental Rule 14 Notice.

4. Umbro

4.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

570 The OFT is satisfied that Umbro has intentionally infringed the Chapter I prohibition. Umbro adopted and systematically implemented a policy of seeking to prevent discounting of Umbro licensed Replica Shirts. It entered into price-fixing agreements with major national high street retailers, MU, the FA and a smaller regional retailer. Umbro encouraged price-fixing agreements between retailers and generally facilitated price collusion between retailers in particular by exchanging retail pricing information. Such agreements and concerted practices had as their object a restriction of competition within the meaning of the Chapter I prohibition.

571 The conduct was carried out and known to individuals at the highest levels of the company including Mr McGuigan, Mr Ronnie and Mr Prothero. Moreover, although Umbro was under pressure from MU and JJB to prevent discounting, it is clear that Umbro played a key and active role in the agreements. In addition, Umbro was well aware of non-statutory assurances given to the OFT by, *inter alia*, MU and the FA following an investigation by the OFT into resale price maintenance of Replica Kit.⁶⁷⁷ Umbro wrote to all its account holders in September 1999 stating that it supported the OFT and in particular that:⁶⁷⁸

‘We, UMBRO in turn support...[the assurances] and have assured 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.

If you are concerned that a minimum re-sale price is being imposed, you should contact the Office of Fair Trading Competition Policy Division 1B.’

4.2 STEP 1 – STARTING POINT⁶⁷⁹

572 The starting point for determining the level of penalty is calculated by applying a percentage rate to the ‘relevant turnover’ of the undertaking, up to a maximum of 10 per cent. The ‘relevant turnover’ is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year. To be consistent with the Penalties

⁶⁷⁷ See para 2 above.

⁶⁷⁸ Doc 3/97 (KMG10).

⁶⁷⁹ Steps for determining the level of a penalty, section 2, the OFT’s Guidance.

Order, the OFT considers that the last financial year is the business year preceding the date when the infringement ended.

- 573 Umbro's participation in the Replica Shirts Agreements and England Direct Agreements ended at the end of August 2001. The Umbro/Sports Connection Celtic Agreement ended at the end of May 2001. Umbro's relevant financial year is therefore the year ending 31 December 2000. Umbro's turnover in the markets for Celtic, Chelsea, MU, Nottingham Forest and England Replica Kits was £[...]m[C] in that year.⁶⁸⁰
- 574 The percentage rate applied depends on the nature of the infringement. The more serious the infringement, the higher the percentage rate is likely to be. There are a number of factors which the OFT takes into account in assessing the seriousness of the infringement.

4.2.1 Type of infringement

- 575 Umbro was engaged in resale price maintenance or vertical price-fixing of Replica Shirts. It also encouraged or facilitated horizontal price-fixing between certain retailers. The infringements were aimed at key selling periods i.e. immediately following the launch of a Replica Kit or in the run-up to and during the major international tournament at the time. In addition, the price-fixing on Replica Shirts was effective during these times despite the fact that Sports Soccer discounted other elements of Replica Kit generally or outside the key selling periods when it could. The pricing of Replica Shirts during the period of the infringement is to be contrasted with more recent evidence since the OFT investigation began.⁶⁸¹ The OFT therefore does not accept that the infringements were not implemented or had no or limited effect on the market.⁶⁸²

4.2.2 Nature of product

- 576 Replica Shirts are consumer goods sold to mass market. Football is one of the UK's most important national sports and pastimes. Many consumers of Replica Shirts are children or parents who are asked by their children to purchase the latest Replica Shirt. In addition, fan loyalty creates further demand particularly when there are regular changes of Replica Kit. Two flagship Replica Shirts were involved in two of the infringements: MU and England. MU and England Replica Shirts are very strong selling products. In addition, the Replica Shirts Agreements coincided with MU's launch of a Replica Kit with a new corporate

⁶⁸⁰ E-mail from Umbro dated 1 April 2003 (doc 1121).

⁶⁸¹ *c.f.* Annex 3, tables 1 to 8 with para 130 above.

⁶⁸² Umbro's WR on Rule 14 Notice para 244 (App 1, doc 4 to Supplemental Rule 14 Notice).

sponsor in 2000, the centenary Replica Kit in 2001 and considerable success on the pitch. The Replica Shirts Agreements and the England Direct Agreements also coincided with England playing in Euro 2000. If sold at RRP, Replica Shirts allow retailers significant mark-up of 60 per cent or more.

4.2.3 Structure of market

577 Umbro is an important manufacturer but is not one of the world's biggest. Adidas (UK) Ltd's total UK turnover alone to the year ending 31 December 2000 was £262.2m⁶⁸³ and in the previous year was £345.0m which is more than twice the size of Umbro. Nike (UK) Ltd's turnover to the year ending 31 May 2001 was £40.7m and in the previous year was £26.5m although Nike's group worldwide turnover for the same years was approximately £6,325.9m and £5,996.7m⁶⁸⁴ respectively. These figures compare with Umbro's UK turnover to the year ending 31 December 2000 of £83.8m and in the previous year of £130.4m and its worldwide turnover for the same years of £100.0m and £146.8m⁶⁸⁵ respectively. Umbro has only retained the England and Chelsea Replica Kit licences.

4.2.4 Market share of undertaking involved & entry conditions

578 Due to markets being defined relatively narrowly and exclusive licences being granted for the manufacture and sale of Replica Kit, Umbro has 100 per cent of each market between licence contracts. The infringements affected around [...] per cent of Umbro's business. The infringements (other than the England Direct Agreements) are limited to Replica Shirts within the relevant markets, but this is the largest selling element of Replica Kit with approximately five shirts sold for every pair of shorts and pair of socks.⁶⁸⁶ Following the granting of exclusive licenses for the manufacture and supply of Replica Kit, barriers to entry are absolute in each market for each club or team.

4.2.5 Effect on competitors and third parties

579 The effect of the infringements on Umbro's competitors may not have been that great due to the relatively small size of Umbro although the OFT notes that MU and England are key brands which may have acted as price leaders for other Replica Kits. More importantly, the effect of the infringements on third parties was significant. Sports Soccer and others were coerced into retailing at High

⁶⁸³ The figures in this paragraph are rounded to the nearest hundred thousand pounds sterling; Adidas (UK) Ltd's ultimate parent company is Adidas-Salomon AG.

⁶⁸⁴ Nike Inc Form 10-K for year ending 31 May 2001 (total revenues in US\$/1.5)

⁶⁸⁵ Grossed up from Umbro Holdings Ltd.

⁶⁸⁶ See para 63 above.

Street Prices and this supported the pricing policies of the other major national retailers which had been agreed between them. Umbro's failure to supply Sportsetail without the England Direct Agreements prevented Sportsetail from beginning its operations and then restricted its ability to compete. The infringements are likely to have covered [at least 50][C] per cent of total sales for each Replica Shirt involved.⁶⁸⁷

4.2.6 Damage caused to consumers

580 It is not possible to measure this accurately and this is not necessarily useful.⁶⁸⁸ However, for the Replica Shirts Agreements damage is likely to have been much more significant than for either of the other infringements because it involved more retailers and covered a wider range of Replica Kit products. In any event, it is noted that the infringements involved leading brands of Replica Kit and focussed on retail sales during key selling periods.

4.2.7 Conclusion

581 The OFT regards vertical price-fixing as amongst the most serious types of infringement. In addition, Umbro was aware of and facilitated horizontal price-fixing between retailers in relation to the Replica Shirts Agreements and the England Direct Agreements. Although the market definition is relatively narrow, the Replica Shirts Agreements and the Umbro/Sports Connection Celtic Agreement did not include all products in the relevant markets. The percentage rate applied is [at least 7][C] per cent of relevant turnover. The starting point is therefore £[...]m[C].

4.3 STEP 2 – ADJUSTMENT FOR DURATION

582 The starting point may be increased to take into account the duration of the infringement. Penalties for infringements which last more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for these purposes.

583 Umbro's participation in Replica Shirts Agreements lasted for up to one year and five months. The Umbro/Sports Connection Celtic Agreement lasted for three months and Umbro's participation in the England Direct Agreements lasted for one year and six months.

⁶⁸⁷ Estimates taken from Umbro turnover figures for the retailers involved and comparing this with total Umbro turnover for each Replica Kit, e-mail from Umbro dated 14 April 2003 (doc 1134).

⁶⁸⁸ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1 at [508 *et seq*], [2001] Comp AR 1.

584 In order to encourage undertakings to terminate infringements as quickly as possible, the OFT has decided, where necessary, to round-up the duration in the second year to the nearest quarter rather than the nearest whole year. The OFT does not propose to treat the infringements separately for the purpose of calculating penalties. Therefore, the starting point is multiplied by 1.5 giving a revised figure of £[...]m[C].

4.4 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

585 The most important factor under step 3 is deterrence. This involves deterring the undertaking involved in the infringement and others. This may result in a substantial adjustment of the figure calculated in steps 1 and 2.

586 Particularly in the light of the non-statutory assurances given to the OFT in 1999, the OFT takes the view that deterrence is a very important policy objective in this sector.⁶⁸⁹ Irrespective of the various non-statutory assurances given in 1999 to the OFT, Umbro engaged in serious vertical price-fixing shortly thereafter. There can have been no doubt about the seriousness of the infringements.

587 However, the OFT is aware that the figure calculated in steps 1 and 2 is already a significant sum in view of the relatively high proportion of Umbro's total turnover which has been taken into account at step 1. Therefore, the OFT takes the view that a multiplier of 2 produces a sufficient deterrent in this instance. Therefore, the figure from step 2 is multiplied by 2 giving a revised figure of £[...]m[C].

4.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

588 The basic amount of the financial penalty, adjusted at steps 2 and 3, may be increased where there are aggravating factors or decreased where there are mitigating factors.

4.5.1 Aggravation

589 Umbro was an instigator of the infringements. It played an essential role in all of the infringements although it was under some commercial pressure from JJB as a large customer (with respect to the Replica Shirts Agreements and the England

Direct Agreements) and MU as an important licensor (with respect to the Replica Shirts Agreements). The OFT accepts that retailers are bound to complain to a manufacturer about the discounting of other retailers in an attempt to secure a lower wholesale price. However, Umbro should have resisted the temptation to engage in vertical price-fixing. The OFT regards this as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

- 590 The OFT notes that Umbro ‘punished’ other undertakings which did not cooperate with the price-fixing agreements or with it by refusing or delaying supplies to Sports Connection, JD and Sports Soccer. This was a key part of Umbro’s role within the infringements. Noting that [...] [C] per cent has already been applied because of Umbro’s role as an instigator, the OFT regards the retaliatory measures taken by Umbro as a further aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.
- 591 Senior managers were involved in the infringements. Mr Ronnie was the COO of Umbro International Ltd, the trading company, and director of Umbro, the group parent company. Mr Fellone was also a director of the trading company. Mr Prothero was a director of the trading company and Umbro. Mr Marsh was a director of the trading company. Mr McGuigan as CEO was also aware of what was going on because he received the monthly management reports. As management at the very highest level was involved, the OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.
- 592 Although the OFT regards the Replica Shirts Agreements as distinct infringements, there is a good deal of overlap between them. Conservatively, the OFT has decided to count them together when assessing whether any party has engaged in repeated infringements (an aggravating factor). The Umbro/Sports Connection Celtic Agreement and the England Direct Agreements are counted as additional heads of infringement. Umbro was involved in all three of the infringements so counted set out in this decision. The OFT regards the repeated infringements as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.
- 593 The OFT could have imposed separate penalties for each of the distinct infringements set out in this decision. However, the object of all of the infringements set out in this decision was to restrict competition in the retailing of particular Replica Shirts or Replica Kit amongst major national retailers, smaller regional retailers and on the internet. Therefore, the OFT takes the view

⁶⁸⁹ See also Umbro’s statement that ‘*the problem of replica kit prices was not specific to Umbro but was endemic throughout the replica kit industry*’, WR on Rule 14 Notice para

that, in this case, a single penalty duly increased to take into account the multiple infringements is the correct approach.

4.5.2 Mitigation

594 Although it was an instigator of the infringements because of its key role, Umbro was acting under commercial pressure from JJB (as a large customer) and MU (as an important licensor). Umbro is a relatively small manufacturer and was more susceptible to this sort of commercial pressure. Although its role was crucial within the price-fixing agreements, the OFT does not regard Umbro as the sole instigator or leader. The OFT regards its role as predominantly (although not exclusively) reactive and therefore decreases the basic amount of the penalty by [...] [C] per cent.

595 During the period of the infringement, Umbro did not have a compliance programme in place. However, its General Counsel joined in October 2001 having previously advised that an investigation should take place and having given compliance training in September 2001. Umbro's General Counsel has introduced measures to avoid infringements going forward. This is a mitigating factor and the OFT therefore decreases the basic amount of the penalty by [...] [C] per cent.

596 Umbro has co-operated with the OFT's investigation principally in its responses to section 26 Notices and in its written and oral representations on the Rule 14 Notice and Supplemental Rule 14 Notice. No significant admissions or co-operation were given until Umbro submitted its written representations on the Rule 14 Notice. The admissions at this stage did assist the OFT by enabling the enforcement process to be concluded more effectively in respect of the Replica Shirts Agreements. It gave the OFT a more complete picture of events and this led partly to the issue of the Supplemental Rule 14 Notice as a result. The OFT relies on the admissions made as set out in detail in Part III above particularly in relation to the Replica Shirts Agreements. This is a mitigating factor and the OFT therefore decreases the basic amount of the penalty by [...] [C] per cent.

4.5.3 Conclusion

597 The net result of step 4 is that the OFT [*changes*] [C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £6.641m subject to step 5.

4.6 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

- 598 Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined under the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings or consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.⁶⁹⁰ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended ('Year t-1')⁶⁹¹ and, where the infringement lasts for between 12 and 24 months, from the applicable turnover during the business year preceding that ('Year t-2').⁶⁹² For Year t-2, only a proportion of the applicable turnover is taken relative to the length of the infringement.⁶⁹³
- 599 The applicable turnover for Year t-1 (the financial year ending 31 December 2000) was £83.763m.⁶⁹⁴ Umbro's turnover for Year t-2 (the financial year ending 31 December 1999) was £89.988m.⁶⁹⁵ However, this does not cover a full calendar year because Umbro, as a holding company, did not start trading until 23 April 1999. Under the Penalties Order, Umbro's turnover for Year t-2 must be grossed up to a full calendar year.⁶⁹⁶ Therefore the applicable turnover for Year t-2 is 50 per cent of £130.417m on the basis that the infringement in the second year lasted only six months. The statutory maximum financial penalty is finally calculated by taking 10 per cent of the applicable turnovers for Year t-1 and Year t-2 and adding them together, i.e. £8.376m + £6.521m = £14.897m.
- 600 The financial penalty calculated at the end of step 4 does not exceed £14.897m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

⁶⁹⁰ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

⁶⁹¹ Article 3(1) Penalties Order.

⁶⁹² Article 3(2) Penalties Order.

⁶⁹³ Article 3(2) Penalties Order.

⁶⁹⁴ Note 2 to Umbro's annual accounts.

⁶⁹⁵ Note 2 to Umbro's annual accounts.

⁶⁹⁶ Definition of 'applicable turnover' in Article 2 Penalties Order; trading only from 23 April 1999 i.e. 252 days = 69% of 12 months => grossed-up turnover = (89.988*100)/69 = £130.417m.

601 It is also clear from the above, that any agreement to which Umbro was a party would have exceeded the £20m small agreements threshold in the Small Agreements Regulations. In addition the agreements to which Umbro was a party were price-fixing agreements within the meaning of section 39(1)(b) of the Act. Accordingly, Umbro does not benefit from the provisions of section 39(3) of the Act.

602 The final penalty imposed on Umbro is therefore £6.641m.

5. Allsports

5.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

603 The OFT is satisfied that Allsports has intentionally infringed the Chapter I prohibition. Allsports was party to two agreements between a number of major national retailers to fix the price of MU and England Replica Shirts. It played an active role in obtaining other retailers' agreement to maintain prices on the MU Replica Shirt by organising the price-fixing meeting on 8 June 2000. The conduct was carried out by and known to individuals at the highest level of the company including Mr Hughes and Mr Patrick. The Replica Shirts Agreements had as their object a restriction of competition and there can be no doubt that Allsports must have been fully aware that its conduct was unlawful.

5.2 STEP 1 – STARTING POINT

604 Allsports' participation in the Replica Shirts Agreements ended in June 2000 for England Replica Shirts and at the beginning of October 2000 for MU Replica Shirts. Allsports' relevant financial year is therefore the year ending 29 January 2000. Allsports' turnover in the markets for MU and England Replica Kits was £[...]m[C].⁶⁹⁷

5.2.1 *Type of infringement*

605 Allsports was engaged in resale price maintenance or vertical price-fixing on Replica Shirts and in horizontal price-fixing between certain retailers. The infringements were aimed at key selling periods immediately following the launch of a Replica Kit or in the run up to and during the major international tournament at the time. The price-fixing was also effective during these times although Sports Soccer discounted elements of the Replica Kits either outside the key selling periods or otherwise when it could. The pricing of Replica Shirts during

⁶⁹⁷ Letter from Addleshaw Booth & Co for Allsports dated 28 February 2003 (doc 1042).

the period of the infringement is to be contrasted with more recent evidence of competitive pricing since the OFT investigation began.⁶⁹⁸

5.2.2 Nature of product

606 See paragraph 576 above in relation to Umbro.

5.2.3 Structure of market

607 There are a number of major national sports goods retailers all of which are involved in the infringements. A number of other retail outlets stock Replica Kit such as certain department stores. The retailers tend to aim for one end of the market or the other. Allsports is generally not a discounter. Allsports had MU official retailer status until 30 June 2002. A number of other undertakings had similar arrangements with MU.

5.2.4 Market share of undertaking involved & entry conditions

608 Allsports is a relatively small national sports goods retailer. By UK turnover it was the 5th largest after JJB, Sports Soccer, Blacks and JD in 2000⁶⁹⁹ and the 2nd largest by number of stores after JJB.⁷⁰⁰ The infringement affected only around [...] [C] per cent of Allsports' business. The infringements were limited to Replica Shirts within the relevant markets, but this is the largest selling product with approximately five shirts sold for every pair of shorts and pair of socks.⁷⁰¹ Barriers to entry are similar throughout the high street retail sector.

5.2.5 Effect on competitors and third parties

609 The infringement had a significant effect on competitors because the horizontal price-fixing agreement involved Blacks, JJB, JD and Sports Soccer and this would have given price signals to other retailers. In addition, MU and England are key brands which may have acted as price leaders for other markets. The infringements are likely to have covered [at least 50] [C] per cent of total sales for each Replica Shirt involved and during key selling periods. The OFT notes that Umbro may have interpreted Allsports' participation in the Replica Shirts Agreements as more significant than it actually was in terms of the commercial pressure that Allsports could bring to bear on Umbro.

⁶⁹⁸ *c.f.* Annex 3, tables 1 to 8 with para 130 above.

⁶⁹⁹ See turnover figures quoted in step five for these retailers below.

⁷⁰⁰ Mintel Report *Sports Goods Retailing*, January 2001.

⁷⁰¹ See para 63 above.

5.2.6 Damage caused to consumers

610 See paragraph 580 above in relation to Umbro.

5.2.7 Conclusion

611 The OFT regards horizontal price-fixing as the most serious type of infringement and, in this case, more serious than resale price maintenance. However, although the market definition is relatively narrow, the infringements did not include all products in the relevant markets. The percentage rate applied is [*at least 7*][C] per cent of relevant turnover. The starting point is therefore £[...][C].

5.3 STEP 2 – ADJUSTMENT FOR DURATION

612 Allsports participation in the Replica Shirts Agreements lasted for at least five months which included key selling periods for the England and MU home Replica Shirts. This period of time is significantly longer than the duration of the infringement found in *Aberdeen Journals*.⁷⁰² There is no adjustment for duration.

5.4 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

613 Particularly in the light of the non-statutory assurances given to the OFT in 1999, the OFT takes the view that deterrence is a very important policy objective in this sector. There can have been no doubt about the seriousness of the infringements. Therefore, the figure from step 2 is multiplied by 3 giving a revised figure of £[...][C]. This multiplier is used for Allsports and all other Parties other than Sports Soccer, the FA and Umbro in order to create an adequate deterrence for the undertakings involved and others.

5.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

5.5.1 Aggravation

614 Allsports was the primary organiser of the price-fixing meeting on 8 June 2000 in relation to the MU home Replica Shirt. Allsports organised that meeting with anti-competitive intent.⁷⁰³ Further, it also rang Blacks to inform it of the outcome of that meeting, having earlier contacted it about JD's 'hat trick'

⁷⁰² Cf *Aberdeen Journals Ltd v OFT* [2003] CAT 11 at [498].

⁷⁰³ See para 187(a) above.

promotion. The OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

615 Senior managers were involved in the infringement. Mr Hughes was the chairman and a director and Mr Patrick was the CEO. As management at the very highest level was involved, the OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

5.5.2 Mitigation

616 Allsports' compliance programme was only put into place in January 2003.⁷⁰⁴ This was too late to be taken into account as a mitigating factor. For the avoidance of doubt, the OFT has not approved Allsports' compliance programme or any others which it has been sent by the Parties.⁷⁰⁵

617 Allsports has never accepted that it infringed the Act. However, it did admit to organising the meeting on 8 June 2000 with anti-competitive intent and otherwise fully co-operated with the OFT. The OFT regards this admission as a mitigating factor because it went beyond the standard ordinarily expected of an undertaking subject to an investigation. The OFT therefore decreases the basic amount of the penalty by [...] [C] per cent.

5.5.3 Conclusion

618 The net result of step 4 is that the OFT [*changes*] [C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £1.350m subject to step 5.

5.6 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

619 The statutory maximum financial penalty for Allsports is £13.955m.⁷⁰⁶

620 The financial penalty calculated at the end of step 4 does not exceed £13.955m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

621 It is also clear from the above, that any agreement to which Allsports was a party would have exceeded the £20m small agreements threshold in the Small

⁷⁰⁴ Allsports' WR on Supplemental Rule 14 Notice para 23.

⁷⁰⁵ See Allsports' OR on Supplemental Rule 14 Notice p.24 lines 24-8.

Agreements Regulations. In addition the Replica Shirts Agreements were price-fixing agreements within the meaning of section 39(1)(b) of the Act. Accordingly, Allsports does not benefit from the provisions of section 39(3) of the Act.

622 The final penalty imposed on Allsports is therefore £1.350m.

6. Blacks

6.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

623 The OFT is satisfied that Blacks has intentionally infringed the Chapter I prohibition. Blacks was party to an agreement between, *inter alia*, all the major retailers to fix the price of MU and England Replica Kit in 2000. It informed Umbro and other retailers of its proposed pricing strategy. The conduct was carried out by and known to individuals at the highest level of the company, including Mr Knight. The Replica Shirts Agreements had as their object a restriction of competition and there can be no doubt that Blacks must have been aware that its conduct was unlawful.

6.2 LIABILITY OF BLACKS

624 The OFT finds that Blacks was party to the Replica Shirts Agreements concerning England and MU Replica Shirts in 2000.

6.2.1 Views of the parties

625 Blacks has argued⁷⁰⁷ that its subsidiary company, First Sport, was the relevant party, that Blacks had no knowledge of the infringement and that accordingly, as Blacks was not responsible for the infringement no penalty could be imposed on it. As noted in paragraph 22 above, Blacks sold its sportswear and sports equipment business, including First Sport, to JD on 21 May 2002. Blacks argued that, as First Sport was the party to the infringements and as Blacks had sold First Sport to JD, liability for any penalties rested with JD. Blacks has also said that the pricing policy of First Sport was the responsibility of First Sport.⁷⁰⁸

⁷⁰⁶ Allsports' annual accounts; UK see note 2.

⁷⁰⁷ Blacks' WR on Rule 14 Notice (App 1, doc 15 to Supplemental Rule 14 Notice).

⁷⁰⁸ Blacks' WR on Supplemental Rule 14 Notice para 3(c).

626 However, the Blacks Subsidiaries⁷⁰⁹ have argued that Blacks was responsible for any infringement in particular given the role of Mr Knight in the alleged infringement.

6.2.2 Conclusion of the OFT

627 The OFT remains of the view that Blacks and its subsidiaries First Sport and Blacks Retail⁷¹⁰ were, until the sale of First Sport in May 2002, a single economic entity and contributed to Blacks' turnover during the period of the infringement. First Sport and Blacks Retail were wholly owned subsidiaries of Blacks and as such it may be presumed, absent evidence to the contrary, that they followed the policy laid down by their parent.⁷¹¹ First Sport operated the sports retail part of Blacks whilst Blacks Retail placed and received orders with manufacturers including Umbro for products including Replica Kit and operated the Blacks group's warehousing and internal distribution operations. Blacks has not provided any evidence to support its assertion that First Sport acted autonomously or that Blacks did not control its subsidiaries.

628 It is to be noted that Mr Knight, who was the person with whom Umbro and certain retailers reached agreement, was not only managing director of First Sport but also acting CEO of Blacks throughout the period. Mr Knight had responsibility for the buying directors of First Sport and would make the final decision regarding price.⁷¹² He was additionally an employee of Blacks. Four other members of the Blacks board were also directors of First Sport. Blacks has also confirmed⁷¹³ that First Sport's Replica Kit buyer reported directly to Mr Hodgkiss who was in 2000 and 2001 a buying director of Blacks and on the board of Blacks Retail. The Blacks Subsidiaries have confirmed⁷¹⁴ that Mr Hodgkiss was generally responsible for the pricing of Replica Kit, that the prices of high profile Replica Kits such as the England and MU would be discussed with Mr Knight prior to any launch and that final decisions as to pricing lay with Mr Knight. Blacks kept itself regularly informed of the activities of its subsidiaries. In particular, First Sport's sales figures were passed to Blacks on a daily basis and compared against budgets with exceptional store

⁷⁰⁹ Blacks Subsidiaries' WR on Rule 14 Notice para 87 (App 1, doc 6 to Supplemental Rule 14 Notice).

⁷¹⁰ See para 22 above.

⁷¹¹ Case C-286/98 P *Stora Kopparbergs Bergslags v European Commission* [2000] ECR I-9925 at para 79.

⁷¹² Blacks Subsidiaries' WR on Rule 14 Notice para 26 (App 1, doc 6 to Supplemental Rule 14 Notice).

⁷¹³ Letter from Blacks dated 28 August 2002 (App 1, doc 19 to Supplemental Rule 14 Notice).

⁷¹⁴ Letter from DLA for the Blacks Subsidiaries dated 30 August 2002 para 11 (App 1, doc 16 to Supplemental Rule 14 Notice).

performance being highlighted weekly.⁷¹⁵ First Sport's management accounts were consolidated into the management accounts of the Blacks' sport and fashion division which included other businesses operated by Blacks and which were formally tabled at the division's board meetings every month.⁷¹⁶

629 In addition, Blacks has confirmed⁷¹⁷ that issues which related to First Sport's pricing of products including Replica Kit were discussed in general terms by the Blacks' board. The fact that the Replica Shirts Agreements may not have been discussed by Blacks at its board meetings is not sufficient to show that First Sport acted autonomously or that Blacks did not exercise decisive influence over its subsidiary. Indeed given the nature of the Replica Shirts Agreements it is not surprising that they were not formally discussed at board level. The fact that other board members of Blacks may not have been aware of the relevant conduct is similarly not material not least given Mr Knight's position within the undertaking.

630 For these reasons, the OFT remains of the view that Blacks is the relevant party to the Replica Shirts Agreements. The OFT therefore remains of the view that Blacks is responsible for the penalty imposed notwithstanding the sale of its sportswear and sports equipment business to JD in May 2002.⁷¹⁸

6.3 STEP 1 – STARTING POINT

631 Blacks participation in the Replica Shirts Agreements ended in or around the end of June 2000 for England Replica Shirts and in or around the beginning of October 2000 for MU Replica Shirts. Blacks' relevant financial year is therefore the year ending 29 February 2000. Blacks' turnover in the markets for MU and England Replica Kits was £[...]m[C].⁷¹⁹

⁷¹⁵ Blacks' response to OFT letter (doc 9/747) (App 1, doc 19 to Supplemental Rule 14 Notice).

⁷¹⁶ Blacks' response to OFT letter (doc 9/747) (App 1, doc 19 to Supplemental Rule 14 Notice).

⁷¹⁷ Blacks' WR on Rule 14 Notice paras 3 and 4 (App 1, doc 15 to Supplemental Rule 14 Notice).

⁷¹⁸ See further Case 48/69 *ICI v European Commission* paras 133-134 see note 394 above; Case 107/82 *AEG v European Commission* [1983] ECR 3151 paras 49-50; Case T-65/89 *BPB Industries and British Gypsum v European Commission* [1993] ECR II-389 para 149; and Case T-308/94 *Cascades v European Commission* [2002] ECR II-925 para 144.

⁷¹⁹ Letter from DLA for the Blacks Subsidiaries dated 2 April 2003 (doc 1126).

6.3.1 Type of infringement, nature of product & structure of market

632 The OFT does not accept that the Replica Shirts Agreements had no or limited effects on the market.⁷²⁰ See paragraphs 605, 606 and 607 above in relation to Allsports.

6.3.2 Market share of undertaking involved & entry conditions

633 Blacks is a medium sized national retailer but First Sport was only part of the undertaking. By total UK turnover Blacks was the 3rd largest retailer selling sports goods after JJB and Sports Soccer in 2000⁷²¹ and the 3rd largest retailer after JJB and Allsports by total sports goods stores (i.e. those stores which were in the sport and fashion division trading as First Sport, Active Venture and Pure Woman which represented about 40 per cent of Blacks total stores).⁷²² The infringements affected only products sold in First Sport, around [...] [C] per cent of Blacks' and less than [...] [C] per cent of First Sport's business.⁷²³ The infringements were limited to Replica Shirts within the relevant markets, but this is the largest selling product with approximately five shirts sold for every pair of shorts and pair of socks. Barriers to entry are similar throughout the high street retail sector.

6.3.3 Effect on competitors and third parties & damage caused to consumers

634 See paragraphs 609 and 610 above in relation to Allsports.

6.3.4 Conclusion

635 The OFT regards horizontal price-fixing as the most serious type of infringement and more serious than resale price maintenance. However, although the market definition is relatively narrow, the infringements did not include all products in the relevant markets. The percentage rate applied is [at least 7] [C] per cent of relevant turnover. The starting point is therefore £[...]m [C].

6.4 STEP 2 – ADJUSTMENT FOR DURATION

636 Blacks participation in the Replica Shirts Agreements lasted for at least five months although this included key selling periods for the England and MU home

⁷²⁰ Blacks Subsidiaries' WR on Rule 14 Notice para 81 (App 1, doc 6 to Supplemental Rule 14 Notice).

⁷²¹ See turnover figures quoted in step five for these retailers.

⁷²² Mintel Report *Sports Goods Retailing*, January 2001.

⁷²³ Blacks reps on Supp R14, para 2.

Replica Shirts. For the reasons given in relation to Allsports, there is no adjustment for duration.

6.5 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

637 For the reasons given in relation to Allsports, the figure from step 2 is multiplied by 3 giving a revised figure of £[...]m[C].

6.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

6.6.1 Aggravation

638 Mr Knight was the key person at Blacks involved in the infringements. During the period of the infringements he was acting CEO of Blacks. As management at the very highest level was involved, the OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

6.6.2 Mitigation

639 The OFT takes the view that there are no relevant mitigating factors to take into account. Although Blacks has co-operated with the OFT's enquiries, this was not over and above the standard ordinarily expected of an undertaking subject to an investigation.

6.6.3 Conclusion

640 The net result of step 4 is that the OFT [*changes*] [C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £0.197m subject to step 5.

6.7 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

641 The statutory maximum financial penalty for Blacks is £20.783m.⁷²⁴

642 The financial penalty calculated at the end of step 4 does not exceed £20.783m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

⁷²⁴ Note 2 to Blacks' annual accounts.

643 It is also clear from the above, that any agreement to which Blacks was a party would have exceeded the £20m small agreements threshold in the Small Agreements Regulations. In addition the Replica Shirts Agreements were price-fixing agreements within the meaning of section 39(1)(b) of the Act. Accordingly, Blacks does not benefit from the provisions of section 39(3) of the Act.

644 The final penalty imposed on Blacks is therefore £0.197m.

7. Sports Connection

7.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

645 The OFT is satisfied that Sports Connection intentionally infringed the Chapter I prohibition. Sports Connection can have been in no doubt that in acquiescing to Umbro's request to alter its prices and agreeing to price the Celtic home Replica Shirt at High Street Prices, it was entering into an agreement which had as its object an appreciable restriction of competition. The OFT notes that Sports Connection was responding to pressure exerted upon it by Umbro. The OFT also notes that Sports Connection confirmed the existence of the agreement with Umbro in its response to the section 26 Notice.⁷²⁵

7.2 STEP 1 – STARTING POINT

646 The Umbro/Sports Connection Celtic Agreement ended in May 2001. Sports Connection's relevant financial year is therefore the year ending 27 August 2000. The OFT has estimated that Sport Connection's turnover in the market for Celtic Replica Kit was £[...]m[C].⁷²⁶

7.2.1 Type of infringement, nature of product & structure of market

647 See paragraphs 605, 606 and 607 above in relation to Allsports.

⁷²⁵ Sports Connection's response dated 8 October 2001 to section 26 Notice dated 5 September 2001 (doc SA15).

⁷²⁶ Estimate based on the turnover for the nine months from March to December 2001 with a deduction for VAT and some allowance for the fact that in the year ending 27 August 2000 only a Celtic away Replica Kit was launched; Sports Connection's WR on Rule 14 Notice p.13 (App 1, doc 14 to Supplemental Rule 14 Notice).

7.2.2 Market share of undertaking involved & entry conditions

648 Sports Connection was a regional retailer and the agreement affected around [...] [C] per cent of its business. Sports Connection is the smallest high street retailer involved in the decision. However, because of the location of its stores in Scotland and northern England, its turnover of Celtic Replica Kit is significant being [...] [C].⁷²⁷ The infringements were limited to Replica Shirts within the relevant markets, but this is the largest selling element of Replica Kit with approximately five shirts sold for every pair of shorts and pair of socks. Barriers to entry are similar throughout the high street retail sector.

7.2.3 Effect on competitors and third parties & damage caused to consumers

649 Sports Connection states that it gained a minimal sum from entering into the agreement because its effect was to increase the price of the Celtic home Replica Shirt by only £1 over only three months.⁷²⁸ Sports Connection states that it sold around [...] [C] Replica Shirts during this period so its total gain was only around £[...] [C]. Given lost sales and the possible knock-on effect for other Replica Shirts of the increase in the retail prices of one of Scotland's most important Replica Shirts, the OFT does not equate Sports Connection's likely gain with damage caused to consumers. However, the OFT accepts that the loss to consumers is not likely to have been as great as a result of the Umbro/Sports Connection Celtic Agreement as opposed to that from the Replica Shirts Agreements. Otherwise, see paragraphs 609 and 610 above in relation to Umbro.

7.2.4 Conclusion

650 The OFT regards vertical price-fixing as amongst the most serious types of infringements. However, Sports Connection was very much a reactive participant in the agreement responding, as an economically weaker player, to pressure applied by Umbro and threats with respect to future supplies if it did not comply. Although the market definition is relatively narrow, the infringements did not include all products in the relevant markets. The percentage rate applied is [*at least 6*] [C] per cent of relevant turnover. The starting point is therefore £[...]m [C].

⁷²⁷ Umbro e-mail dated 14 April 2003 (doc 1134).

⁷²⁸ Sports Connection's WR on Supplemental Rule 14 Notice para 38.

7.3 STEP 2 – ADJUSTMENT FOR DURATION

651 The Umbro/Sports Connection Celtic Agreement lasted only three months although this included a key selling period for the Celtic home Replica Shirt. This period of time is longer than the duration of the infringement found in *Aberdeen Journals* and, in any event, given the OFT’s approach in step 4 and the granting of ‘leniency plus’, the OFT has decided not to make any further adjustment for duration.⁷²⁹

7.4 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

652 For the reasons given in relation to Allsports, the figure from step 2 is multiplied by 3 giving a revised figure of £[...]m[C].

7.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

7.5.1 *Aggravation*

653 Senior management up to and including Mr Stern, Sports Connection’s managing director were involved in the infringement. As management at the very highest level was involved, the OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

7.5.2 *Mitigation*

654 Sports Connection played a minimal role in the infringement. Umbro had threatened the security of its future supplies if Sports Connection did not co-operate.⁷³⁰ There was also pressure on Umbro from Celtic FC about discounting although this did not result in a further agreement with Sports Connection. However, Sports Connection was not a minor retailer, particularly in relation to Celtic Replica Shirts and relative to Umbro by total turnover, was not that small. The infringement involved one of the most important Replica Shirts in Scotland and so the OFT does not consider it appropriate to reduce the penalty to zero at this stage.⁷³¹ However, the OFT regards Sports Connection’s role in the infringement as a significant mitigating factor and decreases the basic amount of the penalty by [...] [C] per cent.

⁷²⁹ Cf *Aberdeen Journals Ltd v OFT* [2003] CAT 11 at [498].

⁷³⁰ See paras 759 to 760 above.

⁷³¹ *c.f.* decision of the OFT No. CA98/18/2002 *Agreements between Hasbro UK Ltd and distributors fixing the price of Hasbro toys and games* (Hasbro No 1) para 100.

655 In June 2002 Sports Connection wrote to all its suppliers reminding them that it was free to determine prices.⁷³² Around this time, Sports Connection also introduced compliance training for staff. The OFT regards both of these as relevant mitigating factors and decreases the basic amount of the penalty by [...] [C] per cent.

656 Sports Connection co-operated fully with the OFT as soon as it was sent a section 26 Notice. It has admitted to the infringement. The OFT regards this co-operation as an important mitigating factor and decreases the basic amount of the penalty by [...] [C] per cent.

7.5.3 Conclusion

657 The net result of step 4 is that the OFT [*changes*] [C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £0.027m subject to step 5 and 'leniency plus'.

7.6 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

658 The statutory maximum financial penalty for Sports Connection is £3.524m.⁷³³

659 The financial penalty calculated at the end of step 4 does not exceed £3.524m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

660 It is also clear from the above, that any agreement to which Sports Connection was a party would have exceeded the £20m small agreements threshold in the Small Agreements Regulations. In addition the agreement to which Sports Connection was a party was price-fixing agreement within the meaning of section 39(1)(b) of the Act. Accordingly, Sports Connection does not benefit from the provisions of section 39(3) of the Act.

7.7 'LENIENCY PLUS'

661 As it was granted total immunity from financial penalties with respect to other infringements, Sports Connection has also been granted leniency ('leniency plus') with respect to the infringement dealt with in this decision. This is in addition to the reduction which it obtained for co-operation under step 4

⁷³² Sports Connection's WR on Rule 14 Notice, annex 6 (App 1, doc 14 to Supplemental Rule 14 Notice).

⁷³³ Sports Connection's annual accounts; UK see note 2.

above.⁷³⁴ The OFT therefore reduces the amount of penalty by a further 25 per cent.

662 The final penalty imposed on Sports Connection is therefore £0.020m.

8. JJB

8.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

663 The OFT is satisfied that JJB has intentionally infringed the Chapter I prohibition. JJB must have been fully aware of the unlawfulness of the agreements to which it was party and that such agreements had as their object a restriction of competition. Those involved in the agreements and concerted practices operated at the highest level of JJB. The agreements were known to or negotiated by Mr Whelan, the chairman, and the late Mr Sharpe, the then CEO. JJB did not enter into the agreements and concerted practices unwillingly. JJB actively took steps to minimise discounting by other retailers and placed significant pressure on Umbro to induce other retailers to maintain retail prices.⁷³⁵

8.2 STEP 1 – STARTING POINT

664 JJB's participation in the Replica Shirts Agreements and England Direct Agreements ended at the end of August 2001. JJB's relevant financial year is therefore the year ending 31 January 2001. JJB's turnover in the markets for MU and England Replica Kits was £[...]m[C].⁷³⁶

8.2.1 Type of infringement, nature of product & structure of market

665 Throughout the period of the infringement, JJB was an official England retailer. In 2001, JJB began negotiations with Nike and MU and from 1 July 2002 JJB became the official MU retailer. Otherwise see paragraphs 605, 606 and 607 above in relation to Allsports.

8.2.2 Market share of undertaking involved & entry conditions

666 JJB is the biggest sports goods retailer in the UK with nearly twice the number of stores as Allsports and Blacks' sport and fashion division. Its turnover in 2000 was twice that of Sports Soccer, three times that of Blacks and JD and

⁷³⁴ See para 16 above.

⁷³⁵ See para 157 to 158 above.

⁷³⁶ Letter from DLA for JJB dated 25 March 2003 (doc 1107).

more than four times that of Allsports.⁷³⁷ Total replica sports kit sales (not just limited to football Replica Kit) amounted to about 9 per cent of JJB's business in 2000⁷³⁸ although the infringements affected only around [...] [C] per cent of JJB business. The infringements (other than the England Direct Agreements) are limited to Replica Shirts within the relevant markets, but this is the largest selling element of Replica Kit with approximately five shirts sold for every pair of shorts and pair of socks. Barriers to entry are similar throughout the high street retail sector.

8.2.3 Effect on competitors & third parties

667 JJB's stance in relation to supplies to Sportsetail initially prevented Sportsetail from beginning its operations and then restricted its ability to compete. In addition, JJB's size means that it had a reasonable degree of buyer power vis-à-vis Umbro which is a relatively small manufacturer. Therefore, JJB had an influence over Umbro which contributed to the establishment of the Replica Shirts Agreements and the England Direct Agreements. Otherwise see paragraph 609 above in relation to Allsports.

8.2.4 Damage caused to consumers

668 See paragraph 580 above in relation to Umbro.

8.2.5 Conclusion

669 The OFT regards horizontal price-fixing as the most serious type of infringement and more serious than resale price maintenance. However, although the market definition is relatively narrow, the Replica Shirts Agreements did not include all elements in the relevant markets. The percentage rate applied is [at least 7] [C] per cent of relevant turnover. The starting point is therefore £[...]m [C].

8.3 STEP 2 – ADJUSTMENT FOR DURATION

670 JJB's involvement in the Replica Shirts Agreements lasted for one year and four months and the England Direct Agreements lasted in total for one year and six months.

671 In order to encourage undertakings to terminate infringements as quickly as possible, the OFT has decided, where necessary, to round-up duration in the

⁷³⁷ See turnover figures quoted in step five for these retailers.

⁷³⁸ Mintel Report *Sports Goods Retailing*, January 2001. See also Report by KPMG LLP second table on p.11 attached to JJB's WR on Rule 14 Notice (App 1, doc 11 to Supplemental Rule 14 Notice).

second year to the nearest quarter. The OFT does not propose to treat the infringements separately for the purpose of calculating penalties. Therefore, the starting point is multiplied by 1.5 giving a revised figure of £[...]m[C].

8.4 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

672 For the reasons given in relation to Allsports, the figure from step 2 is multiplied by 3 giving a revised figure of £[...]m[C].

8.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

8.5.1 Aggravation

673 JJB pressurised Umbro into securing resale price maintenance with respect to MU and England Replica Shirts (in the Replica Shirts Agreements) and England Replica Kit (in the England Direct Agreements) because of its buyer power. The OFT therefore regards JJB as an instigator of the infringements. The OFT regards JJB's role as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

674 Senior management including Mr Whelan, chairman, and the late Mr Sharpe, then CEO, were involved in the infringements. As management at the very highest level was involved, the OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

675 Although the OFT regards the Replica Shirts Agreements as distinct infringements, there is a good deal of overlap between them. Conservatively, the OFT has decided to count them together when assessing whether any party has engaged in repeated infringements (an aggravating factor). JJB was involved in the Replica Shirts Agreements and the England Direct Agreements and regards these two (so counted) repeated infringements as an aggravating factor. The OFT therefore increases the basic amount of the penalty by [...] [C] per cent.

676 The OFT could have imposed separate penalties for each of the distinct infringements set out in this decision. However, the object of all of the infringements set out in this decision was to restrict competition in the retailing of particular Replica Shirts or Replica Kit amongst major national retailers, smaller regional retailers and on the internet. Therefore, the OFT takes the view that, in this case, a single penalty duly increased to take into account the multiple infringements is the correct approach.

8.5.2 Mitigation

677 The OFT takes the view that there are no relevant mitigating factors to take into account.

8.5.3 Conclusion

678 The net result of step 4 is that the OFT [*changes*][C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £8.373m subject to step 5.

8.6 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

679 The applicable turnover for Year t-1 (the financial year ending 31 January 2001) was £659.169m.⁷³⁹ The applicable turnover for Year t-2 (the financial year ending 31 January 2000) is 50 per cent of £609.923m⁷⁴⁰ on the basis that the infringement in the second year lasted only six months. The statutory maximum financial penalty is calculated by taking 10 per cent of the applicable turnovers for Year t-1 and Year t-2 and adding them together, i.e. £65.917m + £30.496m = £96.413m.

680 The financial penalty calculated at the end of step 4 does not exceed £96.413m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

681 It is also clear from the above, that any agreement to which JJB was a party would have exceeded the £20m small agreements threshold in the Small Agreements Regulations. In addition the agreements to which JJB was a party were price-fixing agreements within the meaning of section 39(1)(b) of the Act. Accordingly, JJB does not benefit from the provisions of section 39(3) of the Act.

682 The final penalty imposed on JJB is therefore £8.373m.

⁷³⁹ Note 1 to JJB's annual accounts.

⁷⁴⁰ Note 1 to JJB's annual accounts.

9. JD

9.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

683 The OFT is satisfied that JD has intentionally infringed the Chapter I prohibition. JD was party to one of the agreements which made up the Replica Shirts Agreements with respect to England Replica Shirts in 2000. The agreement had as its object a restriction of competition and was known to individuals at the highest level of the company. There is no doubt that JD must have been fully aware that its conduct was restrictive of competition and that it was unlawful.

9.2 STEP 1 – STARTING POINT

684 JD's participation in the relevant Replica Shirts Agreement ended in or around the end of June 2000. JD's relevant financial year is therefore the year ending 31 March 2000. JD's turnover in the markets for England Replica Kit was £[...]m[C].⁷⁴¹

9.2.1 Type of infringement, nature of product & structure of market

685 The OFT does not accept that the Replica Shirts Agreement had no or limited effect on the market.⁷⁴² See paragraphs 605, 606 and 607 above in relation to Allsports.

9.2.2 Market share of undertaking involved & entry conditions

686 JD is a medium to small sized national sports goods retailer. By UK turnover it was the 4th largest after JJB, Sports Soccer and Blacks in 2000.⁷⁴³ It was also the 4th largest by total stores after JJB, Allsports and Blacks' sport and fashion division.⁷⁴⁴ The relevant Replica Shirts Agreement affected only around [...] [C] per cent of JD's business. The infringement was limited to Replica Shirts within the relevant markets, but this is the largest selling element of Replica Kit with approximately five shirts sold for every pair of shorts and pair of socks. Barriers to entry are similar throughout the high street retail sector.

9.2.3 Effect on competitors and third parties & damage caused to consumers

687 See paragraphs 609 and 610 above in relation to Allsports.

⁷⁴¹ Letter from DLA for JD dated 2 April 2003 (doc 1126).

⁷⁴² JD's WR on Rule 14 Notice para 98 (App 1, doc 7 to Supplemental Rule 14 Notice).

⁷⁴³ See turnover figures quoted in step five for these retailers.

9.2.4 Conclusion

688 The OFT regards horizontal price-fixing as the most serious type of infringement and more serious than resale price maintenance. However, although the market definition is relatively narrow, the infringement did not include all products in the relevant markets. The percentage rate applied is [*at least 7*][C] per cent of relevant turnover. The starting point is therefore £[...]m[C].

9.3 STEP 2 – ADJUSTMENT FOR DURATION

689 JD’s participation in the relevant Replica Shirts Agreement lasted for at least two months although this included a key selling period for England Replica Shirts. For the reasons given in relation to Allsports, there is no adjustment for duration.

9.4 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

690 For the reasons given in relation to Allsports, the figure from step 2 is multiplied by 3 giving a revised figure of £[...]m[C].

9.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

9.5.1 Aggravation

691 Senior JD managers were involved in the infringement but not at top board level. During the period of the infringement, Mr Bown was the COO but was not on the board. Mr Gard[i]ner [#] was also not on the board. The OFT regards the fact that senior management were involved as an aggravating factor but takes account of the fact that none of these men was on the board of JD. The OFT therefore increases the amount of the basic penalty by [...] [C] per cent.

9.5.2 Mitigation

692 Although JD has co-operated with the OFT during its enquiries,⁷⁴⁵ this was not over and above the standard ordinarily expected of an undertaking subject to an investigation. In addition, JD has not accepted that it infringed the Act. The OFT therefore does not regard co-operation as a relevant mitigating factor. There is no evidence of severe pressure on JD with respect to the England agreement which was made in May/June 2000. Although Umbro threatened

⁷⁴⁴ Mintel Report *Sports Goods Retailing*, January 2001.

⁷⁴⁵ JD’s WR on Rule 14 Notice para 99 (App 1, doc 7 to Supplemental Rule 14 Notice).

delayed supplies of MU home Replica Kit in August 2000,⁷⁴⁶ this was because JD had not withdrawn the ‘hat trick’ promotion with respect to Other Licensed Merchandise rather than because JD was discounting the England Replica Shirt. There are no other relevant points.

9.5.3 Conclusion

693 The net result of step 4 is that the OFT [*changes*][C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £0.073m subject to step 5.

9.6 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

694 The statutory maximum financial penalty for JD is £17.145m.⁷⁴⁷

695 The financial penalty calculated at the end of step 4 does not exceed £17.145m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

696 It is also clear from the above, that any agreement to which JD was a party would have exceeded the £20m small agreements threshold in the Small Agreements Regulations. In addition the relevant Replica Shirts Agreement was a price-fixing agreement within the meaning of section 39(1)(b) of the Act. Accordingly, JD does not benefit from the provisions of section 39(3) of the Act.

697 The final penalty imposed on JD is therefore £0.073m.

10. MU

10.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

698 The OFT is satisfied that MU intentionally infringed the Chapter I prohibition. MU was party to the Replica Shirts Agreement which fixed the price of MU Replica Shirts in 2000. The relevant Replica Shirts Agreement had as its object a restriction of competition. Further, MU put significant pressure on Umbro to induce Umbro to engage in resale price maintenance with other retailers. The agreements were known at the highest levels of MU including Mr Kenyon, CEO,

⁷⁴⁶ See JD’s WR on Rule 14 Notice para 96 (App 1, doc 7 to Supplemental Rule 14 Notice).

⁷⁴⁷ JD’s annual accounts; UK see note 2.

Mr Draper, marketing director, and Mr Richards, director of merchandising. In addition, MU gave an non-statutory assurances to the OFT in 1999 following an OFT investigation into resale price maintenance of Replica Kits. The spirit of these assurances has not been followed.

10.2 STEP 1 – STARTING POINT

699 MU's participation in the relevant Replica Shirts Agreement ended at the end of September 2000. MU's relevant financial year is therefore the year ending 31 July 2000. As a retailer, MU's turnover in the market for MU Replica Kit was £[...]m[C].⁷⁴⁸

700 In addition, MU has turnover in the market for the granting of club or team trademark IP licences for the manufacture or sale of Replica Kit for each respective club or team. The relevant IP licence fee paid by Umbro to MU in the relevant year was £[...]m[C].⁷⁴⁹ In addition to this fee securing for Umbro the worldwide IP licence to manufacture and sell Replica Kit, it also secured Umbro the worldwide IP licence to manufacture Other Licensed Merchandise⁷⁵⁰ and certain advertising or sponsorship rights. These included the right to perimeter fence and programme advertising, the right to certain promotional appearances by members of the squad in Umbro clothing and so on.⁷⁵¹ The OFT accepts that the relevant licence fee received by MU must be apportioned between the constituent elements of the sponsorship agreement since the relevant market is limited to UK turnover for licence income for MU's Replica Kit. This apportionment cannot be an exact science.

701 For the year ending 31 July 2000, Umbro reported sales of £[...]m[C] to MU under its licence agreement.⁷⁵² These included sales outside the UK and sales of Other Licensed Merchandise. Umbro UK sales for MU Replica Kit for the same

⁷⁴⁸ MU's WR on Supplemental Rule 14 Notice para 53.

⁷⁴⁹ MU's WR on Rule 14 Notice table at para 23 (App 1, doc 1 to Supplemental Rule 14 Notice) based on MU and Umbro's Licensing Agreement dated 9 February 1996, clause 12.2 and Schedule 7 (attached to doc 1106). The agreement provided for certain other initial and bonus payments from Umbro (see clauses 12.1 and 12.9) which have been ignored by the OFT.

⁷⁵⁰ MU and Umbro's Licensing Agreement dated 9 February 1996, clause 2.1 and Schedule 2 (attached to doc 1106).

⁷⁵¹ MU and Umbro's Licensing Agreement dated 9 February 1996, clauses 6 and 8 and Schedules 5 and 6 (attached to doc 1106).

⁷⁵² MU's WR on Rule 14 Notice table at para 23 (App 1, doc 1 to Supplemental Rule 14 Notice) and further explained in letters from DLA for MU dated 28 February 2003 (doc 1041) and 11 April 2003 (doc 1133).

period were £[...]m[C].⁷⁵³ The OFT therefore regards only [...]m[C]⁷⁵⁴ as being attributable to UK sales of Replica Kit and some or all of the advertising or sponsorship rights.

702 Finally, the OFT has to estimate what proportion of the remaining [...]m[C] is attributable to Replica Kit. [...]m[C]⁷⁵⁵ The OFT regards the amount attributable to Replica Kit as being between £[...]m[C] and £[...]m[C]. It is impossible to put an accurate figure on the value of the advertising and sponsorship rights in question so the OFT has decided to give MU the benefit of the doubt and has taken the lowest figure. Therefore, MU's turnover in the market for the granting of club or team trademark IP licences for the manufacture or sale of Replica Kit is £[...]m[C].

703 MU has argued that the question for the purposes of step 1 is '*whether MU's turnover in [the relevant]...product market in the year ended...31.7.0[0]... was affected by the alleged infringement*'.⁷⁵⁶ However, the OFT's Guidance refers to '*the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year*'.⁷⁵⁷ The question is therefore first, what were the markets affected by the infringement and secondly, what was MU's turnover in those markets in the last financial year. The markets affected by the infringements are the markets for the Replica Kit (given that the Replica Shirts Agreements involved the fixing of prices for Replica Shirts) and the granting of club or team trademark IP licences for the manufacture or sale of Replica Kit (for the reasons given in paragraphs 558 to 560 above). MU's submissions are therefore rejected and MU's total relevant turnover is therefore £[...]m[C].

10.2.1 Type of infringement & nature of product

704 The OFT does not accept that the relevant Replica Shirts Agreement had no or limited effect on the market.⁷⁵⁸ See paragraphs 605 and 606 above in relation to Allsports.

⁷⁵³ Umbro e-mail dated 1 April 2003 (doc 1121).

⁷⁵⁴ [...]m[C]

⁷⁵⁵ MU and Umbro's Licensing Agreement dated 9 February 1996, clause 12.4 and Schedule 7 (attached to doc 1106).

⁷⁵⁶ MU's WR on Further Supplemental Rule 14 Notice pp.1-2.

⁷⁵⁷ OFT's Guidance para 2.3.

⁷⁵⁸ MU's WR on Rule 14 Notice paras 152-3 (App 1, doc 1 to Supplemental Rule 14 Notice).

10.2.2 Structure of markets

705 MU, like many football clubs, is a retailer and licensor and so has a double interest in the sale of Replica Kit. A club or team's primary interest is in its own Replica Kit, but a club also has an indirect interest in the Replica Kit of other clubs or teams to the extent that this might have a knock-on effect on its own Replica Kit.

10.2.3 Market share of undertaking involved & entry conditions

706 MU has 100 per cent of the market for the granting of MU trademark IP licences for the manufacture or sale of Replica Kit. Although compared to the national retailers, MU's total retail turnover is relatively small, in 2000, MU was still the [...] [C] largest purchaser of MU Replica Kit from Umbro [...] [C].⁷⁵⁹ The relevant Replica Shirts Agreement affected only around [...] [C] per cent of MU's business. The infringement was limited to Replica Shirts within the relevant markets, but this is the largest selling element of Replica Kit with approximately five shirts sold for every pair of shorts and pair of socks. Barriers to entry are similar throughout the high street retail sector although as the owner of Old Trafford, MU can control retailing at the stadium. Barriers to entry to the market for the supply of MU trademark IP licences for the manufacture or sale of Replica Kit are obviously very high.

10.2.4 Effect on competitors

707 Given that the level of royalty fees is a matter of confidential commercial negotiation, the OFT suspects that the effect of MU's participation in the relevant Replica Shirts Agreement on other licensors would have been limited. The effect of MU's participation on other retailers is likely to have been relatively small due to the relatively small size of MU's retailing business. However, MU Replica Shirts are a key brand which may act as price leader for other markets so it is difficult to come to a view.

10.2.5 Effect on third parties

708 MU's participation in the relevant Replica Shirts Agreement had a significant effect on Umbro at least until it was announced that Nike would be awarded the next Licensing Agreement at the end of September 2000. From the

⁷⁵⁹ Umbro e-mail dated 14 April 2003 (doc 1134). [...] [C]

correspondence between JJB and Nike, MU's subsequent negotiations with Nike and JJB appeared to have had an impact on JJB's approach to pricing.⁷⁶⁰

10.2.6 Damage caused to consumers

709 See paragraph 580 above in relation to Umbro.

10.2.7 Conclusion

710 The OFT regards horizontal and vertical price-fixing as the most serious types of infringements. However, although the market definition is relatively narrow, the infringements did not include all products in the relevant markets. The percentage rate applied is *[at least 7][C]* per cent of relevant turnover. The starting point is therefore £[...]m[C].

10.3 STEP 2 – ADJUSTMENT FOR DURATION

711 MU's participation in the relevant Replica Shirts Agreement lasted for five months and this included the key selling period for the MU home Replica Shirt in 2000. For the reasons given in relation to Allsports, there is no adjustment for duration.

10.4 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

712 For the reasons given in relation to Allsports, the figure from step 2 is multiplied by 3 giving a revised figure of £[...]m[C].

10.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

10.5.1 Aggravation

713 MU pressurised Umbro into securing resale price maintenance with respect to Replica Shirts because of its leverage in the related market for the granting of club or team trademark IP licences for the manufacture or sale of Replica Kit. The OFT therefore regards MU as an instigator of the relevant Replica Shirts Agreement. The OFT regards MU's role as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

714 Senior management including Mr Kenyon, CEO, Mr Draper, marketing director, and Mr Richards, merchandising director, were involved in or aware of the

⁷⁶⁰ See para 244 above.

infringement. As management at the very highest level was involved, the OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by [...] **[C]** per cent.

715 Although MU was in the process of setting up a compliance programme in the summer of 2000, the programme was not followed by the personnel involved. The OFT notes that the board of MU discussed its compliance policy under the Act the day after Mr Draper's fax of 25 May 2000 crossed Mr Kenyon's desk, and less than two weeks before Mr Marsh of Umbro sent his fax of 6 June 2000 describing express price-fixing arrangements with major retailers in respect of MU Replica Shirts.⁷⁶¹ Particularly in the light of the non-statutory assurances given to the OFT in 1999 in relation to Replica Kit, the OFT regards the fact that MU's compliance policy was not being adhered to as an aggravating factor and increases the basic amount of the penalty by [...] **[C]** per cent.

10.5.2 Mitigation

716 The OFT accepts that Mr Kenyon did not personally instigate MU's participation in the relevant Replica Shirts Agreement but he knew or ought to have been aware of MU's involvement given the documents passing over his desk. In any event, Mr Draper was involved in the infringement and he is a director of MU[FC][#]. In these circumstances, the OFT cannot take Mr Kenyon's role into account as a mitigating factor.

717 MU has stated that under the rules of the English PL, resale price maintenance is prohibited and any breach of those rules will render MU subject to disciplinary procedures.⁷⁶² This is a matter for the English PL and whether or not the English PL takes this decision into account under its rules is not a matter for the OFT.

718 MU has belatedly admitted to unlawfully seeking and receiving information about competitors prices⁷⁶³ and otherwise has generally co-operated with the OFT during its investigation. Nevertheless, the OFT regards the limited admission as a mitigating factor because it went beyond the standard ordinarily expected of an undertaking subject to an investigation. The OFT therefore decreases the basic amount of the penalty by [...] **[C]** per cent.

⁷⁶¹ See paras 170, 184 and 466 above.

⁷⁶² MU's WR on Supplemental Rule 14 Notice para 60.

⁷⁶³ See para 453(a) above.

10.5.3 Conclusion

719 The net result of step 4 is that the OFT [*changes*][C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £1.652m subject to step 5.

10.6 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

720 The statutory maximum financial penalty for MU is £11.383m.⁷⁶⁴

721 The financial penalty calculated at the end of step 4 does not exceed £11.383m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

722 It is also clear from the above, that any agreement to which MU was a party would have exceeded the £20m small agreements threshold in the Small Agreements Regulations. In addition the relevant Replica Shirts Agreement was a price-fixing agreement within the meaning of section 39(1)(b) of the Act. Accordingly, MU does not benefit from the provisions of section 39(3) of the Act.

723 The final penalty imposed on MU is therefore £1.652m.

11. Sportsetail

11.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

724 The OFT is satisfied that the Sportsetail has intentionally infringed the Chapter I prohibition. Sportsetail entered into an agreement under which the FA dictated all Sportsetail's retail prices for FA Licensed Merchandise. Sportsetail was also party to an agreement under which it agreed not to price below JJB's prices for England Replica Kit. These agreements had as their object a restriction of competition. Sportsetail can have or should have been in no doubt that such agreements were restrictive of competition. The agreements were known to and operated by individuals at the highest level of the company including Mr Yates, the CEO of Hay & Robertson plc (Sportsetail's parent company at the time the agreements were entered into) and who was on the board of Sportsetail.

⁷⁶⁴ Note 2 to MU's annual accounts.

11.2 STEP 1 – STARTING POINT

725 Sportsetail’s participation in the England Direct Agreements ended in November 2001. Sportsetail’s relevant financial year is therefore the year ending 31 December 2000. Sportsetail’s turnover in the market for England Replica Kit was £[...]m[C].⁷⁶⁵ The OFT has not defined a market for FA Licensed Merchandise and therefore does not take this into account when calculating the starting point for the penalty.

11.2.1 Type of infringement, nature of product & structure of market

726 See paragraphs 605, 606 and 607 above in relation to Allsports.

11.2.2 Market share of undertaking involved & entry conditions

727 Sportsetail is small scale web retailer with a licence to run a few England retail outlets in particular locations such as airports. The infringements affected [...] [C] per cent of Sportsetail’s business. The infringements were not limited to Replica Shirts within the relevant markets. Market entry as an internet retailer of Replica Kit or Other Licensed Merchandise requires an IP licence from the relevant club or team.

11.2.3 Effect on competitors and third parties

728 Due to its low market share and weak market position as a new entrant (only after having made the relevant agreement with the FA), Sportsetail was involved in the infringements at the behest of the other parties. The impact of its participation on competitors and third parties was low.

11.2.4 Damage caused to consumers

729 See paragraph 580 above in relation to Umbro.

11.2.5 Conclusion

730 The OFT regards horizontal price-fixing as the most serious type of infringement. However, Sportsetail was very much a reactive participant in the England Direct Agreements responding to pressure applied by the FA, Umbro and JJB and threats with respect to supplies if it did not comply. The percentage rate applied

⁷⁶⁵ Sportsetail’s response dated 29 November 2001 to section 26 Notice dated 14 November 2001, covering letter and section 7.

is *[at least 6]*[C] per cent of relevant turnover. The starting point is therefore £[...]m[C].

11.3 STEP 2 – ADJUSTMENT FOR DURATION

731 Sportsetail’s participation in the England Direct Agreements lasted for one year and nine months

732 In order to encourage undertakings to terminate infringements as quickly as possible, the OFT has decided to round-up duration in the second year to the nearest quarter. The OFT does not propose to treat the two constituent parts of the England Direct Agreements as separate infringements for the purpose of calculating penalties. Therefore, the starting point is multiplied by 1.75 giving a revised figure of £[...]m[C].

11.4 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

733 For the reasons given in relation to Allsports, the figure from step 2 is multiplied by 3 giving a revised figure of £[...]m[C].

11.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

11.5.1 Aggravation

734 Senior management including Mr Yates, CEO of Hay & Robertson plc were involved in the infringement. As management at the very highest level was involved, the OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

735 The OFT does not propose to treat the two constituent parts of the England Direct Agreements (the FA/Sportsetail Agreement and the FA/Sportsetail/Umbro/JJB Agreement) as separate infringements for the purpose of calculating penalties. This is because the two elements were intrinsically linked; the latter could not have operated without the former although the former had a wider subject matter.

11.5.2 Mitigation

736 Sportsetail played a minimal role in the infringement. It was reacting to the pressure of others in order to secure supplies. However, during the period of the infringement, Sportsetail was 51 per cent owned by Hay & Robertson plc, a much larger undertaking, and so the OFT does not consider it appropriate to

reduce the penalty at step 4 to zero.⁷⁶⁶ However, the OFT regards Sportsetail's role in the infringement as a significant mitigating factor and decreases the basic amount of the penalty by [...] [C] per cent.

737 Sportsetail benefits from the leniency policy and as a condition of being granted leniency it agreed to co-operate with the OFT. The OFT does not consider that there should be an additional reduction in the penalties under this head to reflect that co-operation.

11.5.3 Conclusion

738 The net result of step 4 is that the OFT [*changes*] [C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £0.004m subject to step 5 and leniency.

11.6 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

739 Sportsetail's turnover for Year t-1 (the financial year ending 31 December 2000) was £0.175m.⁷⁶⁷ However, this does not cover a full calendar year because Sportsetail only started trading on 31 March 2000. Under the Penalties Order, Sportsetail's turnover for Year t-1 must be grossed up to a full calendar year.⁷⁶⁸ The applicable turnover for the Year t-1 is therefore £0.233m. Sportsetail does not have any turnover for Year t-2 as it was not trading. Under the Penalties Order, the OFT must take the turnover for the Year t-1 and treat this as the turnover for Year t-2.⁷⁶⁹ The applicable turnover for Year t-2 is 75 per cent of £0.233m on the basis that the infringement in the second year lasted nine months. The statutory maximum financial penalty is calculated by taking 10 per cent of the applicable turnovers for Year t-1 and Year t-2 and adding them together, i.e. £0.023m + £0.017m = £0.040m.

740 The financial penalty calculated at the end of step 4 does not exceed £0.040m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

741 Although Sportsetail's turnover does not exceed the £20m small agreements threshold in the Small Agreements Regulations, the combined turnover of all the

⁷⁶⁶ *c.f.* decision of the OFT No. CA98/18/2002 *Agreements between Hasbro UK Ltd and distributors fixing the price of Hasbro toys and games* (Hasbro No 1) para 100.

⁷⁶⁷ Note 2 to Sportsetail's annual accounts.

⁷⁶⁸ Definition of 'applicable turnover' in Article 2 Penalties Order; trading only from 1 April 2000 = 75% of 12 months => grossed-up turnover = (0.175 * 100)/75 = £0.233m.

⁷⁶⁹ Penalties Order, Article 4.

parties to the England Direct Agreements does. In addition, the England Direct Agreements were a price-fixing agreement within the meaning of section 39(1)(b) of the Act. Accordingly, Sportsetail does not benefit from the provisions of section 39(3) of the Act.

11.7 LENIENCY

742 Sportsetail was granted total immunity from financial penalties under the OFT's leniency policy provided that it complied with the conditions set out in paragraph 3.4 of the OFT's Guidance. The OFT is satisfied that Sportsetail has complied with the conditions for leniency and the final penalty imposed on it is therefore reduced to zero.

12. Sports Soccer

12.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

743 The OFT is satisfied that Sports Soccer has intentionally infringed the Chapter I prohibition. Sports Soccer was party to the Replica Shirts Agreements throughout 2000 and 2001 which had as their object a restriction of competition. It was fully aware that its conduct was unlawful and it continued such conduct notwithstanding its complaint to the OFT and in the knowledge that the OFT regarded such conduct as a serious infringement of the Act. The agreements were negotiated by individuals at the highest level of the company, including Mr Ashley, CEO of Sports Soccer.

12.2 STEP 1 – STARTING POINT

744 Sports Soccer's participation in the Replica Shirts Agreements ended in August 2001. Sports Soccer's relevant financial year is therefore the year ending 30 April 2001. Sports Soccer's turnover in the markets for Celtic, Chelsea, MU, Nottingham Forest and England Replica Kit was £[...]m[C].⁷⁷⁰

12.2.1 Type of infringement, nature of product & structure of market

745 See paragraphs 605, 606 and 607 above in relation to Allsports.

⁷⁷⁰ CMS Cameron McKenna letter for Sports Soccer dated 12 March 2003 (doc 1073). Sports Soccer response dated 29 November 2001 to section 26 Notice dated 14 November 2001, covering letter and section 7.

12.2.2 Market share of undertaking involved & entry conditions

746 Sports Soccer is a large to medium sized national retailer. It is first and foremost a discounter and is a relatively new entrant in market. By UK turnover it was the 2nd largest UK sports good retailer after JJB.⁷⁷¹ However, in 2000, it had fewer stores than any of JJB, Allsports, Blacks' sport and fashion division or JD.⁷⁷² The price-fixing agreements affected only around [...] [C] per cent of Sports Soccer's business. The infringements were limited to Replica Shirts within the relevant markets, but this is the largest selling element of Replica Kit with approximately five shirts sold for every pair of shorts and pair of socks. Barriers to entry are similar throughout the high street retail sector.

12.2.3 Effect on competitors and third parties

747 As the key discounter in the industry, Sports Soccer's participation in the Replica Shirts Agreements was essential to avoid undermining the price-fixing agreements completely. Any hint by Sports Soccer that it might co-operate with the price-fixing agreements was welcomed by the other retailers. For the same reasons, Sports Soccer's participation was also key for Umbro.

12.2.4 Damage caused to consumers

748 See paragraph 580 above in relation to Umbro.

12.2.5 Conclusion

749 The OFT regards horizontal price-fixing as the most serious type of infringement and more serious than resale price maintenance. However, although the market definition is relatively narrow, the infringements did not include all products in the relevant markets. The percentage rate applied is [*at least 7*] [C] per cent of relevant turnover. The starting point is therefore £[...]m [C].

12.3 STEP 2 – ADJUSTMENT FOR DURATION

750 Sports Soccer's participation in the Replica Shirts Agreements lasted for one year and five months.

751 In order to encourage undertakings to terminate infringements as quickly as possible, the OFT has decided to round-up duration in the second year to the

⁷⁷¹ See turnover figures quoted in step five for these retailers.

⁷⁷² Mintel Report *Sports Goods Retailing*, January 2001.

nearest quarter. Therefore, the starting point is multiplied by 1.5 giving a revised figure of £[...]m[C].

12.4 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

752 For the reasons given in relation to Allsports, the figure from step 2 could be multiplied by 3. However, the OFT’s policy objective of deterring other undertakings from infringing the Act is satisfied by the multiplier used with respect to other parties in this case. Given Sports Soccer’s role as the whistleblower in this case, there is no need to deter Sports Soccer itself further from infringing the Act by applying a multiplier at step 3. In addition, Sports Soccer’s participation in the Replica Shirts Agreements operated against its business strategy of discounting and, during the period of the infringement, it discounted where it could. Therefore, no multiplier is applied to the figure from step 2.

12.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

12.5.1 Aggravation

753 Senior management including Mr Ashley, CEO, and Mr Nevitt, [...][#] buying director were involved in the infringement. Although Sports Soccer’s management team is small,⁷⁷³ this does not absolve the undertaking from this being an aggravating factor. As management at the very highest level was involved, the OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

12.5.2 Mitigation

754 Sports Soccer was under significant pressure from Umbro including threats of refusal to supply. Sports Soccer did resist the pressure when it could and discounted. The OFT regards this as a significant mitigating factor and reduces the basic amount of the penalty by [...] [C] per cent.

755 Sports Soccer was the whistleblower in this case and has admitted to infringements in its representations. However, Sports Soccer’s original complaint in August 2000 made no reference to Umbro licensed Replica Kit notwithstanding the fact that this was a key period during the infringement. Sports Soccer only began giving information about Umbro licensed Replica Kit in

⁷⁷³ Sports Soccer’s WR on Rule 14 Notice para 6.2 (App 1, doc 5 to Supplemental Rule 14 Notice).

March 2001 and Sports Soccer continued to infringe the Act after that time. Sports Soccer also informed other parties of the OFT's investigation despite requests to the contrary and from time to time was slow in supplying further information when requested. Sports Soccer has said that it had no choice but to continue to co-operate to some extent with the price-fixing agreements until the OFT took decisive action by conducting on-site investigations under section 28 of the Act.⁷⁷⁴ Nevertheless, Sports Soccer's assistance was central to the OFT's investigation. The OFT recognises Sports Soccer's role as a whistleblower and regards this as a significant mitigating factor. The basic amount of the penalty is therefore reduced by [...] [C] per cent. However, the OFT notes that this figure is lower than otherwise would have been the case had Sport Soccer co-operated promptly and effectively with the OFT.

12.5.3 Conclusion

756 The net result of step 4 is that the OFT [*changes*] [C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £0.123m subject to step 5.

12.6 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

757 Sport Soccer's applicable turnover for Year t-1 (the financial year ending 30 April 2001) was £320.238m.⁷⁷⁵ The applicable turnover for Year t-2 (the financial year ending 30 April 2000) is 41.67 per cent of £269.487m on the basis that the infringement in the second year lasted for five months. The statutory maximum financial penalty is calculated by taking 10 per cent of the applicable turnovers for Year t-1 and Year t-2 and adding them together, i.e. £32.024m + £11.230m = £43.254m.

758 The financial penalty calculated at the end of step 4 does not exceed £43.254m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

759 It is also clear from the above, that any agreement to which Sports Soccer was a party would have exceeded the £20m small agreements threshold in the Small Agreements Regulations. In addition the Replica Shirts Agreements were price-fixing agreements within the meaning of section 39(1)(b) of the Act.

⁷⁷⁴ Sports Soccer's WR on Rule 14 Notice para 7.1 (App 1, doc 5 to Supplemental Rule 14 Notice).

⁷⁷⁵ See note 2 to Sports Soccer's annual accounts.

Accordingly, Sports Soccer does not benefit from the provisions of section 39(3) of the Act.

760 The final penalty imposed on Sports Soccer is therefore £0.123m.

13. The FA

13.1 INTENTIONAL OR NEGLIGENT INFRINGEMENT

761 The OFT is satisfied that the FA has intentionally infringed the Chapter I prohibition. The FA entered into an express agreement under which it dictated Sportsetail's retail prices and an agreement under which it agreed that Sportsetail's prices would not be lower than JJB's. Both agreements had as their object a restriction of competition. The FA can have and should have been in no doubt that such agreements were unlawful. In addition, in its capacity as the governing body of English football, the FA had given non statutory assurances to the OFT in 1999 following an OFT investigation into resale price maintenance of Replica Kits. The spirit of these assurances has not been followed.

762 The FA has said that it was not its intention to determine Sportsetail's retail prices and that this was primarily the interpretation placed by Mr Smith on the agreement. The FA states that there is some uncertainty as to whether the England Direct Agreements infringed the Act as it was pro-competitive or because it may have merited exemption.⁷⁷⁶

763 The OFT considers that as those responsible for negotiating and implementing the agreement within the FA⁷⁷⁷ considered that the agreement expressly provided for the FA to determine Sportsetail's prices and implemented it in that way, the FA has intentionally infringed the Chapter I prohibition.⁷⁷⁸ Such personnel were senior employees of the FA and were fully empowered to operate in the way they did. The mere fact that the FA's internal counsel may not have turned his mind to the point when drafting the agreement between Sportsetail and the FA or that the FA's external lawyers did not consider the point is not sufficient to negate the clear intentions of key senior employees of the FA. Similarly, the fact that the FA's legal advisers were not aware of the agreement between the FA, JJB, Umbro and Sportsetail is irrelevant not least as those at the FA who entered into the agreement were employees given the

⁷⁷⁶ The FA's WR on Rule 14 Notice Part III and para 50 *et seq* (App 1, doc 24 to Supplemental Rule 14 Notice).

⁷⁷⁷ Including Mr Smith, his successor, Mr Armstrong, and Mr Carling to whom Mr Smith and Mr Armstrong reported.

⁷⁷⁸ See paras 271 and, e.g., 299 above.

responsibility for that part of the FA's business. Moreover, it is clear that other personnel within the FA including Mr Barber, director of marketing, and Mr Barron were closely involved in the relationship with Sportsetail and knew or at least ought to have known how the agreement was being operated.⁷⁷⁹

764 The OFT does not accept that there can have been any uncertainty about whether:

- (a) a horizontal agreement between, amongst others, JJB and Sportsetail to fix prices; or
- (b) a vertical agreement between Sportsetail and the FA which resulted in price-fixing,

had the object of restricting competition.

13.2 STEP 1 – STARTING POINT

765 The FA's participation in the England Direct Agreements ended in November 2001. The FA's relevant financial year is therefore the year ending 31 December 2000. The FA's turnover in the relevant markets is limited to the royalties it receives for granting trademark IP licences for the manufacture or sale of England Replica Kit from both Sportsetail and Umbro.⁷⁸⁰ The OFT has not defined a market for FA Licensed Merchandise and therefore does not take this into account when calculating the starting point for the penalty.

766 During the year ending 31 December 2000, the FA received £[...]m[C] from Sportsetail as the part payment of a lump sum payable over four years.⁷⁸¹ [...] [C] In addition to this fee securing for Sportsetail a worldwide IP licence to sell Replica Kit via the 'England Direct' website and elsewhere, it also secured Sportsetail a worldwide IP licence to sell other FA Licensed Merchandise. The OFT accepts that this income received by the FA must be apportioned between the constituent elements of the agreement since the

⁷⁷⁹ See para 299 above.

⁷⁸⁰ See the FA's WR on Rule 14 Notice para 71 (App 1, doc 24 to Supplemental Rule 14 Notice) as further explained in letters from Freshfields Bruckhaus Deringer for the FA dated 28 February 2003 (doc 1077), 13 March 2003 (doc 1078) and 16 April 2003 (doc 1132).

⁷⁸¹ Clause 7.1.1 of the agreement dated 4 February 2000 between the FA and Sportsetail in the FA's response dated 9 October 2001 to section 26 Notice dated 12 September 2001 tab 1 (doc SA16).

relevant market is limited to UK turnover for England Replica Kit. This apportionment cannot be an exact science.

767 For the year ending 31 December 2000, [...] [C] per cent of Sportsetail's total world-wide turnover (i.e. £[...]m [C]) was attributable to sales of Replica Kit with the remainder being attributed to sales of other FA Licensed Merchandise.⁷⁸² Sportsetail's published accounts do not report any non-UK turnover, but Sportsetail have supplied data showing that [...] [C] per cent of its sales was to UK customers.⁷⁸³ The OFT has decided to give the FA the benefit of the doubt and takes the view that the FA's turnover from Sportsetail for UK Replica Kit sales was therefore £[...]m [C].

768 During the year ending 31 December 2000, the FA also received £[...] [C]. Of that, £[...]m [C] was expressly attributed to sales of Replica Kit and Other Licensed Merchandise. For the year ending 31 December 2000, Umbro reported world-wide sales of England Replica Kit and Other Licensed Merchandise of £[...]m [C] to the FA under its licence agreement. Umbro paid the FA during the relevant year an additional £[...] [C].⁷⁸⁴ Therefore, the FA's income from Umbro for world-wide sales of Replica Kit and Other Licensed Merchandise was £[...]m [C]. The OFT accepts that this income received by the FA must be apportioned between the constituent elements of the agreement since the relevant market is limited to UK turnover for England Replica Kit. Umbro UK sales for England Replica Kit for the same period were £[...]m [C].⁷⁸⁵ The OFT therefore regards [...] ⁷⁸⁶ [C] as being attributable to UK sales of England Replica Kit.

769 The FA's total relevant turnover is therefore £[...] [C]m.

13.2.1 Type of infringement & nature of product

770 See paragraphs 605 and 606 above in relation to Allsports.

⁷⁸² Sportsetail's response dated 29 November 2001 to section 26 notice dated 14 November 2001, covering letter and section 7 (doc SA20).

⁷⁸³ Letter from Freshfields Bruckhaus Deringer for the FA dated 10 April 2003 (doc 1132).

⁷⁸⁴ Clause 15.1 of the Licensing Agreement between the FA and Umbro dated 7 October 1998 in the FA's Leniency Application, tab 3 (doc SA21) as explained by a letter from Freshfields Bruckhaus Deringer for the FA dated 10 April 2003 (doc 1132).

⁷⁸⁵ Umbro e-mail dated 1 April 2003 (doc 1121).

⁷⁸⁶ [...] [C]

13.2.2 Structure of markets

771 The FA does not directly retail products. It is only involved in the market to the extent that it licenses or authorises retailing by others. A club or team's primary interest is in its own Replica Kit, but a club or team also has an indirect interest in the Replica Kit of other clubs or teams to the extent that this might have a knock-on effect on its own Replica Kit.

13.2.3 Market share of undertaking involved & entry conditions

772 The FA has 100 per cent of the market for the granting of trademark IP licences for the manufacture or sale of England Replica Kit. The infringements were not limited to Replica Shirts within the relevant markets. Barriers to entry to the market for the supply of trademark IP licences for the manufacture or sale of England Replica Kit are obviously very high.

13.2.4 Effect on competitors

773 Given that the level of royalty fees is a matter of confidential commercial negotiation, the OFT suspects that the effect the FA's participation in the England Direct Agreements on other licensors would have been limited.

13.2.5 Effect on third parties

774 The FA's role in the England Direct Agreements had a significant effect on the retail prices of Sportsetail although both Umbro and JJB also had influence over Sportsetail by virtue of the agreement. Without a price-fixing agreement, internet sales may have provided a greater competitive threat to high street retail prices.

13.2.6 Damage caused to consumers

775 See paragraph 580 above in relation to Umbro.

13.2.7 Conclusion

776 The OFT regards vertical price-fixing as amongst the most serious types of infringements. In addition, the FA was aware of and encouraged horizontal price-fixing between Sportsetail and JJB. The percentage rate applied is [at least 7][C] per cent of relevant turnover. The starting point is therefore £[...]m[C].

13.3 STEP 2 – ADJUSTMENT FOR DURATION

777 The FA's participation in the England Direct Agreements lasted for one year and nine months. The FA states that the agreement did not begin until its implementation on 30 March 2000.⁷⁸⁷ However, the OFT takes the view that the England Direct Agreements existed from the beginning of February 2000 and the infringement thus began as soon as the Act came into force on 1 March 2000.

778 In order to encourage undertakings to terminate infringements as quickly as possible, the OFT has decided where necessary to round-up duration in the second year to the nearest quarter. Therefore, the starting point is multiplied by 1.75 giving a revised figure of £[...]m[C].

13.4 STEP 3 – ADJUSTMENT FOR OTHER FACTORS

779 For the reasons given in relation to Allsports, the figure from step 2 could be multiplied by 3. However, the OFT's policy objective of deterring other undertakings from infringing the Act is satisfied by the multiplier used with respect to other parties in this case. The OFT is very conscious that the FA is a non-profit making body which invests heavily in the 'grass roots' of football. Any penalty imposed on the FA may reduce the amount of money that the FA can spend on such investment. The OFT has balanced this with the need for the regulator of English football to be seen to set high standards and to be deterred from infringing the Act in future. The OFT does not regard adverse press speculation about this decision as relevant when assessing penalties.⁷⁸⁸ The OFT has decided that the figure from step 2 should be multiplied by 2 giving a revised figure of £[...]m[C].

13.5 STEP 4 – ADJUSTMENT FOR FURTHER AGGRAVATING AND MITIGATING FACTORS

13.5.1 Aggravation

780 The FA was an essential participant in the England Direct Agreements and exercised clear influence over the retail prices of Sportsetail. However, the FA was only one of three parties which influenced Sportsetail. The OFT regards the FA's role as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

⁷⁸⁷ The FA's WR on Rule 14 Notice para 73 (App 1, doc 24 to Supplemental Rule 14 Notice).

⁷⁸⁸ The FA's WR on Rule 14 Notice para 75(d) (App 1, doc 24 to Supplemental Rule 14 Notice).

781 Senior management including Mr Smith and Mr Armstrong were involved in the infringement and other senior managers were aware of what was going on. The OFT regards the fact that senior management were involved as an aggravating factor but takes account of the fact that none of these men was on the board of the FA. The OFT therefore increases the basic amount of the penalty by [...] [C] per cent.

782 The OFT does not propose to treat the two constituent parts of the England Direct Agreements (the FA/Sportsetail Agreement and the FA/Sportsetail/Umbro/JJB Agreement) as separate infringements for the purpose of calculating penalties. This is because the two elements were intrinsically linked; the latter could not have operated without the former although the former had a wider subject matter.

13.5.2 Mitigation

783 The FA did introduce a compliance programme soon after the start of the OFT's investigation. Given that the FA has admitted to the infringement, the OFT regards the compliance programme as a relevant mitigating factor and decreases the basic amount of the penalty by [...] [C] per cent.

784 The FA denied that it had infringed the Act until it applied for leniency. The FA was sent a section 26 Notice on 12 September 2001 but it did not formally terminate the FA/Sportsetail agreement with respect to price-fixing until 30 November 2001. Although Mr Smith had since left the FA and joined Sportsetail, Mr Armstrong remained an employee of the FA and was involved in the events which resulted in the infringement. Thereafter, the FA co-operated fully with the OFT's investigation. The FA benefits from the leniency policy and as a condition of being granted leniency it agreed to co-operate with the OFT. The OFT does not consider that there should be an additional reduction in the penalties under this head to reflect that co-operation.

13.5.3 Conclusion

785 The net result of step 4 is that the OFT [*changes*] [C] the basic amount of the financial penalty by [...] [C] per cent. The financial penalty therefore will be £0.198m subject to step 5 and leniency.

13.6 STEP 5 – ADJUSTMENT TO PREVENT MAXIMUM PENALTY BEING EXCEEDED AND TO AVOID DOUBLE JEOPARDY

786 The applicable turnover for Year t-1 (the financial year ending 31 December 2000) was £109.786m.⁷⁸⁹ The applicable turnover for Year t-2 (the financial year ending 31 December 1999) is 75 per cent of £101.473m⁷⁹⁰ on the basis that the infringement in the second year lasted nine months. The statutory maximum financial penalty is calculated by taking 10 per cent of the applicable turnovers for Year t-1 and Year t-2 and adding them together, i.e. £10.979m + £7.610m = £18.589m.

787 The financial penalty calculated at the end of step 4 does not exceed £18.589m. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

788 It is also clear from the above, that any agreement to which the FA was a party would have exceeded the £20m small agreements threshold in the Small Agreements Regulations. In addition the England Direct Agreements were price-fixing agreements within the meaning of section 39(1)(b) of the Act. Accordingly, the FA does not benefit from the provisions of section 39(3) of the Act.

13.7 LENIENCY

789 The FA was granted 20 per cent immunity from financial penalties under the OFT's leniency policy provided that it complied with the conditions set out in paragraph 3.4 of the OFT's Guidance. The OFT is satisfied that the FA has complied with the conditions for leniency and the final penalty imposed on it is therefore reduced to £0.158m.

⁷⁸⁹ Note 2 to the FA's annual accounts.

⁷⁹⁰ Note 2 to the FA's annual accounts.

14. Payment of Penalty

790 All Parties must pay their respective penalties by close of banking business on Friday 3 October 2003. If any of the Parties fails to pay the penalty within the deadline specified above, and has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and determined, the OFT can commence proceedings to recover the required amount as a civil debt.

John Vickers
Chairman
1 August 2003

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