

## The Replica Football Kit Appeals

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On 1 October the Competition Appeal Tribunal ("CAT") handed down its long awaited judgment in the Replica Football Kit case. This is the first appeal against a cartel decision under the Competition Act 1998 ("the 1998 Act"). Although only two of the 10 parties found to have participated in the cartel appealed on liability (the appeals against the level of penalties have still to be heard), the judgment runs to 300 pages and 1055 paragraphs.

### *The OFT's decision*

On 1 August 2003 the OFT issued its decision finding that a number of companies had infringed the Chapter I prohibition imposed by section 2 of the 1998 Act by participating in the price fixing of replica football shirts during 2000 and 2001. The decision fined JJB Sports plc ("JJB") £8.373 million, Allsports plc ("Allsports") £1.350 million, Manchester United plc ("MU") £1.652 million and Umbro Holdings Limited ("Umbro") £6.641 million. The OFT's investigation followed a complaint by Sports Soccer (now known as Sportsworld International Limited).

The central findings made in the decision by the OFT against JJB and Allsports concerned two agreements: (i) that they were involved in fixing the retail selling price of the England replica football shirt immediately before and during the Euro 2000 tournament at £39.99 ("the England agreement"); (ii) that they were involved in the fixing of the retail selling price of the new MU home shirt launched for the 2000/2001 Premiership season, also at £39.99 ("the MU agreement").

The OFT also found that JJB was a party to two other agreements or concerted practices: (iii) in respect of the retail prices of other England and MU shirts during the period August 2000 to August 2001 ("the continuation agreement"); and (iv) an agreement whereby the prices of England merchandise sold from the "England Direct" website were "pegged" to JJB's retail prices from February 2000 to August 2001 ("the England Direct agreement").

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### *The appeals*

JJB and Allsports appealed as to both liability and the amount of the penalty. Umbro and MU (in respect of the MU agreement) appealed only against the amount of the penalty. The CAT decided to determine JJB and Allsports' appeals against the findings of infringement first. The hearing of those appeals lasted 14 days, by far the longest hearing conducted before the CAT to date, and involved extensive cross-examination of the Allsports, JJB and Umbro senior executives.

### *The Judgment*

The CAT substantially upheld the OFT's decision and rejected JJB and Allsports' appeals as regards the findings that they participated in both the England and MU agreements. The CAT found in particular that both JJB and Allsports had put pressure on Umbro to prevent Sports Soccer from discounting the relevant England and MU shirts. Sports Soccer agreed not to discount but demanded that Umbro obtain assurances that other retailers would not discount the £39.99 price to avoid its reputation as an established discounter being damaged.

In relation to JJB's alleged involvement in the continuation agreement, the CAT found that there was only sufficient evidence of its involvement with regard to the MU Centenary Shirt. The CAT also allowed JJB's appeal in relation to its alleged participation in the England Direct agreement. That arrangement had originated before the 1998 Act came into force. In those circumstances, the CAT held that the usual principle that required a participant to distance itself from an ongoing arrangement did not apply and JJB could not be presumed to have continued passively to participate in an arrangement which had come into existence before the Act came into force.

### *Standard of proof*

The CAT makes a number of important comments in its judgment on the standard of proof which the OFT must meet in order to establish an infringement (paragraphs 164-208). Since the CAT last dealt with this issue in *Napp* [2002] CAT 1, and *Aberdeen Journals (No.2)* [2003] CAT 11, there have been a number of judgments by the Court of Appeal and House of Lords dealing with the issue of the standard of proof in a wide variety of different contexts. The CAT analysed these cases but reaffirmed its ruling in *Napp*, i.e., that the test was the civil standard of the balance of probabilities. However, the evidence required to meet that standard must be commensurate with the seriousness of the matters alleged. The CAT observed that in a "borderline case" where the decision is finely balanced "and the Tribunal finds itself to-ing and fro-ing", the evidence would not be sufficiently strong to prove an infringement on the balance of probabilities (paragraph 200).

At the same time, the CAT highlighted that its reference in *Napp* to the need for "strong and compelling" evidence in penalty cases should not be used to introduce the criminal standard via the "back door". Although explicit evidence of cartel activity may be "fragmentary and sparse" due to the clandestine nature of such arrangements, unexplained coincidences and other indicia may well constitute sufficient proof to establish an infringement. In this regard the CAT prominently cited comments of the ECJ on the nature of evidence in cartel cases in the *Cement* case (Cases 204/00P etc.).

In comments of potentially wide significance, the CAT reiterated its concerns expressed in another case (*Claymore Dairies v OFT* [2003] CAT 18) that the standard of proof should not be applied in an unduly cautious way so as to interfere with the proper enforcement of the Act. Tantalisingly, the CAT said that this issue arose in “certain Chapter II cases currently pending” before it. These comments are likely to be of particular interest to third parties who have had their complaints rejected by the OFT on the basis that the evidence available was not sufficient to meet the *Napp* standard.

### *Evidence*

This case was the first occasion on which the CAT has heard extensive cross-examination of witnesses. In its judgment, the CAT observed that it is almost inevitable that matters will be gone into in more detail at the appeal stage than is possible during the OFT’s investigation. Although the decision remains the central focus of an appeal, the CAT held that provided each party has a proper opportunity to answer the allegations made and the issues remain within the broad framework of the original decision it will take into account all the material before it (paragraph 284). In this case, the CAT considered that in response to the appellants’ pleadings the OFT had in its defence somewhat narrowed the findings made in the decision. However, as the result of cross-examination which the appellants chose to conduct, the CAT found that it was in possession of much fuller evidence which tended to support the wider case originally made in the decision (paragraph 285). This demonstrates the very difficult decisions that may have to be made in deciding how best to deploy cross-examination before the Tribunal.

The CAT referred to the particular credibility of contemporaneous documents and the need to make allowances for the memories of witnesses asked to testify to events now distant in time. The CAT described its approach to the oral evidence as “cautious”. Most, if not all the witnesses had commercial interests to protect in one way or another which could consciously or unconsciously influence their evidence. The Tribunal’s approach was to look for corroboration, whether from context, documents, or other witnesses, wherever possible (paragraphs 286-294). This approach to witness evidence is likely to be followed in other cartel cases as there will generally be an absence of genuinely “independent” evidence in this type of case.

The judgment also highlights the fact that in penalty cases, and especially where there are a number of co-appellants, the rights of defence may make it difficult to restrict an appellant from being granted a certain “latitude” to explore matters of a commercially confidential nature in open court (see paragraphs 324-326).

### *Concerted practice*

The judgment contains a useful summary of the legal definition of an agreement or concerted practice. The CAT set out passages from the leading cases of the ECJ and CFI and pointedly refers to a number of cases dealing with a situation where distributors make complaints to a supplier about the discounting of its products by other distributors (paragraphs 160-163). In such a situation a supplier must show “particular vigilance” to prevent collusion between distributors.

The judgment also highlights the fact that a market in which RRP’s are regularly discussed between manufacturers and retailers gives rise to the risk that such discussions may in practice lead to an agreement as to the actual retail selling price (paragraphs 368-372).

Businesses and their advisers will note that the CAT found that its conclusions on the evidence in relation to the MU agreement were reinforced by the fact that JJB's attendance at a meeting with Allsports and Sports Soccer had not been minuted. "To do so would have been an obvious precaution to protect the company." (paragraph 883)

### *Penalty appeals*

The CAT will now proceed to deal with the appeals against penalty by JJB, Allsports, MU and Umbro. It indicated that the hearing on this issue may take place in early December.

### *Future cases : individual sanctions*

Although not applicable in this case, individuals involved in infringements of a similar kind committed after 20 June 2003 will now be liable to disqualification as a director or criminal prosecution under new powers introduced by the Enterprise Act 2002. The 2002 Act also includes provisions that facilitate damages claims by individual or groups of consumers against companies and firms found to have committed competition law infringements.

**In the appeal, Jon Turner and Anneli Howard from Monckton Chambers acted for the OFT and George Peretz acted for Allsports. Rupert Anderson QC and Andrew Macnab acted for Sports Soccer and MU are represented by Peter Roth QC and Paul Harris.**

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