

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 7 June 2006

**Before :**

**THE CHANCELLOR OF THE HIGH COURT**

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**Between :**

**ADIDAS-SALOMON AG**

**Claimant**

**- and -**

**(1) ROGER DRAPER and DEREK PAUL  
HOWORTH sued on behalf of themselves  
and the members of the LAWN TENNIS  
ASSOCIATION**

**(2) TIMONTHY DEWE PHILLIPS and  
MARTIN GUNTRIP sued on behalf of  
themselves and the members of the ALL  
ENGLAND LAWN TENNIS AND  
CROQUET CLUB**

**(3) LAWN TENNIS ASSOCIATION OF  
AUSTRALIA LIMITED trading as  
TENNIS AUSTRALIA**

**(4) FEDERATION FRANCAISE DE TENNIS**

**(5) UNITED STATES TENNIS  
ASSOCIATION INCORPORATED**

**(6) ITF LIMITED trading as  
INTERNATIONAL TENNIS  
FEDERATION**

**Defendants**

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**Mr Peter Roth QC, Miss Kelyn Bacon and Mr Julian Gregory (instructed by Addleshaw  
Goddard) for the Claimants**

**Mr Nicholas Green QC and Mr Daniel Jowell (instructed by Cleary Gottlieb) for the 1<sup>st</sup> to  
3<sup>rd</sup> Defendants**

**Mr Charles Hollander QC, Mr John Critchley and Mr Michael Joy (instructed by Onside  
Law) for the 4<sup>th</sup> Defendants**

**Mr Richard Spearman QC (instructed by Skadden Arps Slate Meagher & Flom) for the 5<sup>th</sup>  
Defendants**

**Mr Rhodri Thompson QC and Mr Adam Lewis (instructed by Hammonds) for the 6<sup>th</sup>  
Defendants**

Hearing dates: 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> May 2006  
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**Judgment**

**The Chancellor :**

1. The claimant (“Adidas”) is the parent company of a group which carries on business in the design and marketing of sportswear, including footwear and tennis clothing. For the purpose of promoting and marketing its tennis products it invests significant sums in sponsoring leading players. Its tennis clothing comes in three ranges, ‘the Competition Range’ worn by the leading players it sponsors and others taking part in national and international competitions, ‘the Response Court’ range targeted at club players who seek to emulate the leading players and ‘the Team Range’ for use by club teams. It has three standard logos, namely the Trefoil, the Globe and the Trapezoid. Each of them incorporates, in association with those respective shapes, a three stripe motif (“3-Stripes”) and the name ‘adidas’. In addition it incorporates the 3-Stripes into the design of its clothing and footwear. In that context it comprises three stripes in contrasting tones of equal but variable width and length which it describes, not as a standard logo, but as ‘a distinctive design element’.
  
2. The first five Defendants are or represent the owners, organisers and promoters of four international tennis championships, namely, Wimbledon, the US Open, the Australian Open and the Roland Garros or French Open. They constitute what is known as ‘the Grand Slam’ Tournaments. The sixth Defendant (“ITF”), a Bahamian company, is an umbrella organisation comprising the national governing bodies for tennis from over 100 countries. It is accepted by those national governing bodies as the world governing body for tennis. It organises and promotes a number of international tournaments, including the Davis Cup and the Federation Cup on the basis of rules it promulgates. Representatives of all six defendants comprise what is known as the Grand Slam Committee (“GSC”). GSC has promulgated a Code of Conduct:

"in order to maintain fair and reasonable standards of conduct by players and organisers of Grand Slams, and to protect their respective rights, the rights of the public and the integrity of the Sport of Tennis."
  
3. That code includes dress rules. Until the events which have given rise to this litigation the relevant rule in the GSC code provided that:

“No identification shall be permitted on a player’s clothing, products or equipment on court during a match or at any press conference or tournament ceremony, except as follows (the GSC reserves the right to interpret the following rules so as to give effect to the intent and purposes of these Grand Slam Rules):”

There followed a list of exceptions by reference to shirts, shorts/skirts, socks/shoes, racquets, hats, bags and other equipment. In each case the relevant exception is conferred in relation to one or more “manufacturer’s standard logos” not exceeding a specified size usually two square inches, but in a few cases three or four square inches. The manufacturer is defined as “the manufacturer of the clothing or equipment in question”. The rule concludes with provisions for ascertaining the area of the logo. Similar provisions were to be found in the rules of ITF for the Davis Cup, Federation Cup and other tournaments it promotes, of the International Olympic Committee, the Association of Tennis Professionals (“ATP”) and the Women’s Tennis Association (“WTA”). The purpose of all these rules was to prevent undue commercialisation of the tournaments to which they applied.

4. On 18th October 2004 four clothing manufacturers namely Reebok, Puma, Pentland and Nike wrote to the President of the International Olympic Committee ("IOC") to complain that the use by Adidas of its 3-Stripes motif in the design of clothing worn by competitors in the Athens Olympics infringed the dress code of the IOC. They contended that as a registered trade mark it must be a manufacturer’s identification but as incorporated into the clothing made by Adidas it exceeded the size limits applicable to manufacturers' standard logos. On 29th April 2005 the IOC informed Adidas, having considered its representations, that it would enforce its dress code in the forthcoming winter Olympics based in Turin so that its 3-Stripes motif should not exceed 20 square centimetres. Similar discussions took place within ATP and WTA in late 2004 and early 2005.
5. Nike, amongst others, considered that the 3-Stripes motif used by Adidas should be categorised as a manufacturer's standard logo and the dress code applied so as to ensure that it did not exceed the permitted size. It was concerned that the relevant tournament organisers failed to do so. By way of retaliation it used its 'swoosh' logo on players' clothing in sizes in excess of those permitted by the dress codes, in particular at the Italian Masters Tournament in Rome in early May 2005.
6. On 10th May 2005 GSC resolved to amend its dress code. By a letter of that date GSC informed Adidas:

“Beginning with the 2006 Australian Open, the Adidas “3 Stripe” will be considered a manufacturer’s logo for purposes of the enforcement of the size and placement limitations set forth in Article III C.3 of the Grand Slam Code of Conduct.

The ATP and WTA Tour may or may not align with this Grand Slam position and I am sure you are aware that this decision only applies at the Grand Slam events. ITF will communicate its position separately as well.

With respect to 2005 Roland Garros, in particular, please be assured that in line with this decision these Grand Slam Rules will continue to be enforced against all manufacturers.”

On 13th May 2005 a circular to the same effect was sent by GSC to all manufacturers.

7. On 1st June 2005 the board of directors of ITF resolved that:

“beginning 1 January 2006, the so-called “3 Stripes” identification by Adidas on tennis apparel shall be considered a manufacturer’s logo for the purposes of the enforcement of the size and placement limitations set forth in the relevant Regulations of all ITF Competitions.

In so resolving, the ITF Board of Directors further urges all tennis constituencies to join the ITF in developing a unified approach with respect to the definition and interpretation of manufacturer’s identification on tennis clothing, including but not limited to factors such as registration.”

By a letter dated 8th June 2005 ITF informed Adidas of this decision and offered to meet its representatives with a view to securing that the implementation of the decision was as smooth as possible.

8. On 21st and 22nd June 2005 ATP and WTA resolved to amend their dress codes so as to exclude from the ban on a manufacturer’s identification:

“a logo of the apparel manufacturer, without the name of the manufacturer or any other writing, placed once or repeatedly within an area not to exceed twelve [12] square inches...in one of the following positions:

- a. On each of the shirt sleeves...or
- b. On the outer seams of the shirt.”

ATP and WTA notified clothing manufacturers of this change by an e-mail sent on 6th July 2005 in which they indicated that the amended rule would take effect

“immediately for all manufacturers except that adidas’ use of their three stripes will be brought into compliance with this rule as of January 1 2006. In addition, adidas will be allowed to use a shorter version of their 3 stripes on men’s shorts from January 1 2006 until Wimbledon 2006.”

9. Adidas consulted solicitors. On 25th August 2005 they wrote to ITF asserting that the conduct of ITF infringed Articles 81 and 82 of EC Treaty. They sought undertakings to the effect that the changes to the dress code would not be enforced against Adidas until July 2006 and that the various national associations should be so informed. After certain intermediate correspondence and meetings the solicitors for Adidas wrote again on 12th October 2005 indicating that unless ITF undertook not to implement the amended dress code against Adidas until after the conclusion of the French Open in June 2006 proceedings would be instituted seeking both interim and permanent injunctions and damages. By letters dated 19th October 2005 from solicitors for both ITF and GSC those bodies agreed to extend ‘the grace period’ for the application of its dress rules to Adidas’s 3-Stripes until 26th June 2006.
10. Discussions between the parties continued until the end of January 2006. On 26th January 2006 GSC resolved to amend its dress code again. The ban on identification (para 3 above) remained unaltered. The exceptions were amended so that (a) the words “manufacturer’s identification” were substituted for all references to a “manufacturer’s standard logo”, and (b) the size limits were increased to 3 or in some cases 4 square inches. The decision of GSC was communicated to manufacturers on 2nd February 2006. On the same day the President of ITF invited the members of his board to ratify his decision to amend the ITF rules in the same way. Ratification was duly received on 7th February 2006. In the light of these decisions negotiations, between Adidas, GSC and ITF ceased.
11. On 20th March 2006 the solicitors for GSC wrote to those for Adidas to inform them that GSC had under consideration a working definition of ‘manufacturer’s identification’ which should help to identify other manufacturers who might become subject to the relevant dress code. Notwithstanding earlier requests from Adidas a draft of the working definition was not produced until after these proceedings had been instituted. It is in the following form:

#### “Definition of Manufacturer’s Identification

In addition to the Standard Logo Manufacturer Identification (name of the manufacturer and/or standard logo), the GSC may, in its sole discretion, determine whether the continued use of design patterns, themes, colourings, markings or other identifications becomes a Manufacturer’s Identification for purposes of the Grand Slam Rules.

Registration of any such design as a trademark shall be prima facie evidence of a Manufacturer's Identification. "Continued use" of a design is defined as [tbd] consecutive years and/or [tbd] or more seasonal collections."

12. The claim form in these proceedings was issued by Adidas on 5th April 2006. On the same day it issued an application for interlocutory injunctions supported by witness statements from Mr Cartwright, its Global Business Unit Manager Tennis and Indoor, and Mr Latham, its head of Global Sports Marketing Tennis. The causes of action relied on are breaches of Articles 81 and 82 of the EC Treaty. The defendants, except the fifth defendant the US Tennis Association, countered with applications issued between 3rd and 10th May 2006 seeking orders to strike out or summarily dismiss these claims under CPR Rules 3.4(2)(a) or 24.2(a)(i) on the grounds that the particulars of claim disclose no reasonable grounds for bringing the claim, that Adidas has no reasonable prospect of succeeding on the claims and there is no other reason why the case should be disposed of at a trial. These applications are supported by witness statements from Mr Ian Ritchie and Mr Babcock, on behalf of the organising committee for the forthcoming Wimbledon Championships, Mr Ian Todd and Mr Stephen Rubin, on behalf of clothing manufacturers in competition with Adidas namely Nike and Lacoste, Geoffrey Pollard, the President of the Lawn Tennis Association of Australia, M.Stephane Simian, director of sport of the French Tennis Association, and Mr James Curley on behalf of the US Tennis Association and Mr John Garnham, the executive director of ITF.
13. Thus the issues before me are (1) whether all or any of the causes of action relied on by Adidas should be struck out or summarily dismissed on any of the grounds advanced before me and (2) whether, in the light of my decision on the first issue, I should grant injunctions against any and if so which of the defendants and if so in what form. I will deal with them in that order and relate the further facts relevant to the specific issues when I come to deal with them.

### **The Claims**

14. In paragraphs 1 to 37 of the particulars of claim the relevant facts as I have summarised them are set out. In paragraphs 32 and 33 the decisions of GSC and ITF made on 10th May and 1st June 2005, as described in paragraphs 6 and 7 above, are defined as "the Grand Slam decision" and "the ITF decision". In paragraph 38 it is alleged that the facts previously alleged give rise to exclusionary and discriminatory effects on the position of Adidas vis-à-vis its competitors as set out in paragraph 45. In paragraphs 39 to 44 Adidas alleges that each of the defendants is an undertaking or an association of undertakings carrying on economic or commercial activities within the European Community and that the Grand Slam decision and the ITF decision constitute agreements between undertakings. As foreshadowed in paragraph 38 the alleged effect is set out in paragraph 45.

15. In paragraph 45(a) Adidas claims that the postponement of the application of the amended dress code until 26th June 2006 was insufficient to enable it to change its designs. This claim was subjected to trenchant criticism by counsel for all the defendants on the basis that it was not supported by the evidence and was inadequate to found a breach of Article 81 in the absence of any allegation that the time allowed was objectively unreasonable. Counsel for Adidas did not seek to support this part of the particulars of claim and effectively abandoned this part of his case.
16. Accordingly the relevant allegation of a breach of Article 81 is contained in paragraph 45(b). On the third day of the hearing before me counsel for Adidas proposed amendments to this paragraph to deal with an argument of counsel for the first three defendants advanced on the first day. In its proposed amended form paragraph 45(b) is in the following terms:

“(b) Further or alternatively, regardless of the date on which the Grand Slam and ITF decisions are implemented, those decisions will have the effect of putting the Claimant at a competitive disadvantage vis-à-vis its competitors in the incorporation of distinctive design elements in its tennis clothing. Specifically:

(1) Until 2005, the interpretation by the Grand Slams and the ITF of the manufacturer's identification rules permitted the use of distinctive design elements while restricting the use of manufacturer's standard logos. The Claimant repeats paragraphs to 29 to 31 above.

(2) That interpretation was applied equally to the Claimant and to competing manufacturers.

(3) Use and visibility of the adidas 3-Stripes on its tennis clothing has been, for over 30 years, a key element in the Claimant's designs, which has both identified the clothing as the Claimant's and has provided a link to the Claimant's long tradition and heritage as an aspirational sportswear manufacturer.

(4) Competition between manufacturers in the sale of their ranges of tennis clothing is heavily influenced by the uniformity of those ranges with the clothing worn by their sponsored players competing in the Grand Slam tournaments

and major ITF tournaments such as the Davis Cup and Fed Cup, and the manufacturers expend considerable sums in sponsoring players to that end.

(5) Under the terms of the Grand Slam and ITF decisions, the Claimant will no longer be permitted to use the adidas 3-Stripess as a distinctive design element on clothing for use by players in the four Grand Slam tournaments or any of the ITF tournaments, including players sponsored by the Claimant, since the 3-Stripess are regarded as identifying the Claimant as the manufacturer. National associations may also adopt the same ~~rule~~ interpretation. The Claimant repeats paragraph 37 above.

(6) However, the Claimant's competitors continue to be permitted to incorporate their own distinctive design elements, which identify them as the manufacturers, into their clothing for use by players (including sponsored players) in the four Grand Slam tournaments and the ITF tournaments, as well as tournaments organised by national associations. Such design elements include, but are not limited to, the use of stripe designs.

(7) In the premises the Grand Slam and ITF decisions discriminate against the Claimant vis-à-vis its competitors.

(8) That discrimination has and will have a significant impact upon the level of sales by the Claimant of tennis clothing to retailers and ultimately to consumers.”

17. In paragraphs 46 to 49 Adidas alleges that the Grand Slam decision and the ITF decision affect trade between Member States and either constituted an unlawful agreement between undertakings or were the product of such an agreement. The conclusion asserted in paragraph 49 is that both the Grand Slam decision and the ITF decision are void pursuant to Article 81(1) EC Treaty.
18. In paragraphs 50 to 57 Adidas alleges that both the Grand Slam decision and the ITF decision constituted an abuse of a dominant position within the meaning of Article 82 of the EC Treaty. The constituent elements of this cause of action are that each of the defendants is an undertaking carrying on economic or commercial activities (paragraph 50). The market dominance alleged varies. In the case of ITF it is



alleged to exist in the provision and promotion of premium international team tennis tournaments (paragraph 51) and in the provision of organised individual tennis tournaments for players whose rankings are not good enough to compete on the ATP or WTA tours (paragraph 52). In the case of the first five defendants collective dominance is alleged to exist on the market for the provision and promotion of premium international tennis tournaments for individuals (paragraph 53) and the provision and promotion of international tennis tournaments (paragraph 54). The abuse on those markets relied on are set out in the facts and matters set out in paragraph 45. Thus, as counsel for the claimant accepted, if he fails to establish a real prospect of success on the Article 81 claim he is unlikely to do so on the Article 82 claim.

19. In paragraph 58 Adidas alleges that it has suffered significant loss and damage and will do so in the future unless implementation of the Grand Slam decision and the ITF decision is restrained by the court. Sub-paragraph (a) specifies the losses said to have been incurred already. Sub-paragraphs (b) and (c) set out alleged future losses under two heads. The first, set out in sub-paragraph (b), relates to the Fall/Winter Season 2006. Adidas claims that it will face significant cancellations of orders by retailers arising from the loss of promotional value derived from sponsored players and the inability of other players to wear Adidas clothing. In addition it envisages consequential loss of sales in its mid-price clothing ranges, confusion arising from the adoption of the ITF rule by national associations and damage to its reputation and credibility with players and consumers.
20. In sub-paragraph (c) Adidas sets out the losses it anticipates incurring in respect of seasons later than the Fall/Winter 2006 season. It considers that either it will have to design and produce a new range of clothing for use in Grand Slam and ITF tournaments and some national association tournaments or remove the 3-Stripes as a distinctive design element across all its ranges. In either case it will lose market share and player and consumer confidence.
21. The relief sought in the particulars of claim is a declaration that the Grand Slam decision and the ITF decision are unlawful and void and an order restraining the defendants from implementing them. The interlocutory injunctions sought were amended on the fourth day of the hearing so as to incorporate a cross-undertaking in damages in favour of other manufacturers of tennis clothing who sponsor players at Grand Slam tournaments and to limit the injunction sought against ITF to its tournaments held in the European Community. Subject to that limitation the interlocutory injunction initially sought against all defendants would restrain them until trial or further order

“from implementing in relation to the Claimant’s 3-Stripess their decisions that the said 3-Stripess shall be considered Manufacturer’s Identification for the purpose of the rules regarding Dress and Manufacturers Identification at their tournaments.”

22. At an early stage, namely on 28th April 2006, the first three defendants applied for an expedited hearing. It was apparent that no party opposed such an order. Accordingly I indicated at an early stage of the hearing before me that if I did not strike out or summarily dismiss the whole of the claim I would make such an order with a view to the trial commencing at the beginning of October 2006. This would be after Wimbledon (26th June/9th July 2006) and the US open (28th August/10th September 2006). Such a trial should be completed and judgment given well before the next Australian or French Open Tournaments in, respectively, January and May 2007. The arguments in relation to whether I should grant an interlocutory injunction were presented on that understanding.

### **Applications under CPR Rules 3.4(2)(a)/24.2(a)(i)**

23. CPR rule 3.4(2)(a) entitles the court to strike out any statement of case if it discloses no reasonable ground for bringing or defending the claim as the case may be. Rule 24.2(a)(i) enables the court to give summary judgment against a claimant on the whole of the claim or on a particular issue if it considers that he has no real prospect of succeeding on the claim or issue. The latter provision is wider than the former so that, in practice, it is only necessary to consider whether or not there is a real prospect of success on the claim or particular issue.
24. In that context I have been referred to the well known statements of Lord Woolf in **Swain v Hillman** [2001] 1 AER 91 that the words of the rule speak for themselves but that "real" is to be contrasted with "fanciful". He pointed out later that on an application under Rule 24.2 the judge should not conduct a mini-trial. The latter observation was reinforced by Lord Hope in **Three Rivers Council v Bank of England** [2003] 2 AC 1, 260 at paragraphs 94 and 95. I was also referred to my judgment in **Intel Corporation v Via Technologies** [2002] AER (D) 346 with which Mummery and Tuckey LJ agreed. In paragraph 32 I affirmed the views of Lawrence Collins J that (a) claims and defences under Articles 81 and 82 require careful scrutiny so as to prevent cases lacking in merit going to long and expensive trials but (b) often raise questions of mixed law and fact which are not suitable for summary determination. I added two notes of caution the second of which may be material to this case, namely:

"where it can be seen that the jurisprudence of the European Court of Justice is in the course of development it is dangerous to assume that it is beyond argument with real prospect of success that the existing case law will not be extended or modified so as to encompass the [claim or] defence being advanced."

Thus in **Bavarian Lager Co Ltd v DTI** [2002] 2 UKCLR 160 Tomlinson J declined summarily to dismiss a claim for the enforcement of a beer tie on the ground, as claimed by the defendant, that it was contrary to Article 28 EC Treaty as amounting to a quantitative restriction on imports. At page 170 he observed:

"[Counsel] has done sufficient to satisfy me that the questions which arise are highly complex ones...I cannot regard it as very likely that the claimants in this action will succeed...but I cannot say that they have no prospect. The test which has to be applied is whether they have a real prospect and of course a prospect can be real, notwithstanding that it is a small prospect or one that does not seem terribly likely to eventuate."

### **The claim under Article 81 EC Treaty**

25. Article 81 EC Treaty provides:

“(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

(3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

Pursuant to Article 6 of Council Regulation 1/2003 national courts now have the power to apply this and Article 82 in their entirety.

26. In support of their applications the defendants (or one or more of them) raised a number of issues with which I must deal. I summarise them as follows:

(1) The pleading of the claim under Article 81 in paragraph 45(b) is defective. In its original form it dealt with what were described as 'distinctive design elements'.

As such it wholly missed the point as such elements are not the subject matter of the rule and might or might not be manufacturers' identifications or logos. It was not accepted that Adidas should be allowed to amend paragraph 45(b)(5) and (6) as shown in paragraph 16 above. It was objected that even as amended paragraph 45(b)(6) is defective in failing to identify the competitors of Adidas referred to or how, when or by whom they were given the permission alleged. The defendants asserted that this was not a mere pleading point because even now Adidas has made no formal complaint to either GSC or ITF concerning the application of the dress rules to any other manufacturer.

(2) None of the defendants is an undertaking for the purposes of Article 81 except if and to the extent that it engages in an economic activity. It is contended that the dress code is not concerned with any economic activity, rather it relates wholly to a 'sporting activity' to which the EC Treaty does not apply even if it has economic consequences.

(3) GSC and ITF as regulatory sporting bodies rather than commercial organisations have a discretion as to the application of the dress code with which the court should not interfere except on the basis recognised by the Court of Appeal in **Bradley v The Jockey Club** [2005] EWCA Civ 1056.

(4) Even if the EC Treaty does apply to the dress code and even if the dress code restricts competition (a) it is objectively justifiable and (b) is not being nor is it intended to be applied in a discriminatory fashion.

(5) Even if Article 81 is prima facie applicable to the dress code of GSC and ITF it cannot apply to the US Open, the Australian Open or the tournaments organised by ITF which take place outside the European Community.

I will deal with those issues in that order.

27. The first issue is not a mere pleading point. In its original form paragraph 45(b) was defective because it failed adequately to link the 3-Stripes motif of Adidas and the comparable distinctive design elements allegedly used by its competitors with the relevant part of the dress code. That defect was remedied in the amended form of pleading put forward during the hearing. Accordingly in reply the focus of the argument on this point was directed to the identity of the competitors referred to and who granted the alleged permission, when and how. I accept that these are defects but they are capable of being cured by further information given in due course if the claim proceeds; they do not, of themselves, indicate that Adidas has no real prospect of success in its claim under Article 81. The evidence of Mr Cartwright in the five witness statements he has made so far provides a clear factual basis for the allegation that the defendants have applied and threatened to apply the dress code in a discriminatory fashion. This can be seen from the terms of the May and June 2005 decisions made by GSC and ITF which singled out Adidas. Whether the factual basis will be enough depends on the other issues. In my judgment the pleading deficiencies do not of themselves indicate any lack of merit in the claim under Article 81 or justify the orders sought by the defendants.

28. I turn then to the second issue. It is common ground that certain decisions of regulatory sporting bodies do not fall within the scope of the EC Treaty in general and Articles 81 and 82 in particular because they do not relate to any economic activity. This led to a dispute between counsel for the first three defendants and for Adidas whether in respect of that activity the regulatory sporting bodies are undertakings at all or whether, as in this case they undertake some economic activity, they are undertakings but their non-economic activities are beyond the scope of the particular article in the Treaty under consideration. Counsel for the first three defendants contended for the first of these alternatives counsel for Adidas the second. I was referred to a number of judgments and decisions of the European Court and the Commission, including **Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie** [1999] ECR I-5751; **Aéroports de Paris v Commission** [2000] ECR II-3929; **Ferlini v Centre hospitalier de Luxembourg** [2000] ECR I-8081; **Hydrotherm v Compact** [1984] ECR 2999; **Piau v Commission** [2005] 5 CMLR 42 and **ENIC v UEFA** (Comp. 37.806). I can well understand that in some circumstances it may be important to determine whether the body is an undertaking but that a specific activity is beyond the scope of the relevant treaty provision or whether in respect of that activity it is not an undertaking for the purposes of the EC Treaty at all. But I do not think it is necessary to determine that point in this case. What matters is whether the dress code is subject to the provisions of Articles 81 and 82. If it is then the defendants are undertakings in respect of that activity notwithstanding that they were formed to pursue and do pursue non-commercial purposes; if it is not then those articles do not apply in this case. In those circumstances it appears to me to be immaterial to determine whether or not the defendants are undertakings because of or in relation to some different activity.
29. I turn then to the cases to which I was referred in relation to the so-called 'sporting exception'. **Walrave and Koch v Association Union Cycliste Internationale** [1974] ECR 1405 concerned motor-paced bicycle racing. Such racing involves teams of two one of whom, known as the 'pacer', is on a motorcycle, the other, the 'stayer', is on a bicycle. The former creates a vacuum for the latter who is thereby enabled to achieve speeds he could not reach unaided. The UCI, an association of national bodies, amended its rules to provide in respect of the forthcoming world championships for national teams that the pacer should be of the same nationality as the stayer. Both Walrave and Koch were outstanding pacers and of Dutch nationality but found it difficult to find stayers of Dutch nationality of equivalent ability to make up their respective teams. They challenged the rule as being incompatible with Articles 39 (ex 48) and 49 (ex 59) of the EC Treaty. These contentions were rejected by the ECJ. In paragraphs 4 to 9 it said:

"4 Having regard to the objectives of the community, the practice of sport is subject to community law only in so far as it constitutes an economic activity within the meaning of article 2 of the treaty.

5 When such activity has the character of gainful employment or remunerated service it comes more particularly within the scope, according to the case, of Articles 39 to 42 (ex 48 to 51) or 49 to 55 (ex 59 to 66) of the treaty.

6 These provisions, which give effect to the general rule of article 7 of the treaty, prohibit any discrimination based on nationality in the performance of the activity to which they refer.

7 In this respect the exact nature of the legal relationship under which such services are performed is of no importance since the rule of non-discrimination covers in identical terms all work or services.

8 This prohibition however does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity.

9 This restriction on the scope of the provisions in question must however remain limited to its proper objective.”

The ECJ summarised its conclusion in the answer it gave to the question submitted to it in the following terms:

"Having regard to the objectives of the Community, the practice of sport is subject to Community law only insofar as it constitutes an economic activity within the meaning of Article 2 of the Treaty."

30. That proposition has been consistently applied in a number of subsequent cases. It is necessary to refer to them for the illustrations they provide and the further propositions to which the ECJ has given expression. **Donà v Mantero** [1976] ECR 1333 concerned the rules of the Italian Football Federation, the controlling body for football clubs in Italy. By its rules its membership was, with limited exceptions, confined to those of Italian nationality who were resident in Italy and only those who were members might take part in games in Italy as professionals or semi-professionals. It was objected that such rules were incompatible with Articles 39 (ex 48) and 49 (ex 59). In paragraphs 12 to 16 and 19 the ECJ said:

"12 ( 2 ) Having regard to the objectives of the community , the practice of sport is subject to community law only in so far as it constitutes an economic activity within the meaning of article 2 of the treaty.

This applies to the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service.

13 Where such players are nationals of a member state they benefit in all the other member states from the provisions of community law concerning freedom of movement of persons and of provision of services.

14 However, those provisions do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.

15 This restriction on the scope of the provisions in question must however remain limited to its proper objective.

16 Having regard to the above, it is for the national court to determine the nature of the activity submitted to its judgment.

....

19 The answer to the questions referred to the court must therefore be that rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the state in question, are incompatible with article 7 and, as the case may be, with articles 48 to 51 or 59 to 66 of the treaty unless such rules or practice exclude foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only .

Thus, in that case, the ECJ reaffirmed the principle and its limits and pointed out that it was for the national court to determine the nature of the activity in issue.

31. **Delière v Ligue Francophone de Judo** [2000] ECR I-2549 concerned the selection of judokas to participate in the European and International Championships leading up to the Olympic Games. The claimant was a Belgian national. She claimed that the system of selection was incompatible with, inter alia, Articles 49 (ex 59), 81 (ex 85) and 82 (ex 86). The ECJ dealt with the reference in relation to incompatibility with Article 59. In that context it emphasised a number of principles of fundamental importance which I summarise as follows:



- (1) sport is subject to Community law only insofar as it constitutes an economic activity within the meaning of Article 2 EC Treaty (paragraph 41);
- (2) the relevant Treaty provisions do not prevent the adoption of selection rules for reasons which are not of an economic nature;
- (3) any such restriction must be limited to its proper object and cannot be relied on to exclude the whole of a sporting activity (paragraph 43);
- (4) it is important to verify whether an activity is capable of constituting an economic activity but as that concept defines the field of application of some of the fundamental freedoms guaranteed by the Treaty it may not be restrictively construed (paragraphs 49 and 52);
- (5) the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the Treaty (paragraph 53);
- (6) sporting activities and, in particular, a high-ranking athlete's participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of the Treaty even if some of those services are not paid for by those for whom they are performed (paragraph 56);
- (7) it is for the national court to determine, on the basis of those criteria, whether particular sporting activities constitute an economic activity;
- (8) selection systems, though inherently discriminatory, are matters for the relevant sporting bodies (paragraphs 64 to 68).

The ECJ concluded in paragraph 69:

"The answer to the question submitted must therefore be that a rule requiring professional or semi-professional athletes or persons aspiring to take part in a professional or semi-professional activity to have been authorised or selected by their federation in order to be able to participate in a high-level international sports competition, which does not involve national teams competing against each other, does not in itself, as long as it derives from a need inherent in the organisation of such a competition, constitute a restriction on the freedom to provide services prohibited by Article 49 (ex 59) of the Treaty."

32. **Lehtonen v Castors Canada Dry Namur-Braine ASBL v Fédération Royale Belge des Sociétés de Basketball** [2000] ECR I-2681 concerned the transfer rules governing basket ball players in Belgium. In summary such transfers might only take

place in particular periods of the year. The sanction for a breach of the rules was that the acquiring club might not field that player for the first two matches following his transfer. The rule was challenged as incompatible with Articles 39 (ex 48), 81 (ex 85) and 82 (ex 86). ECJ reiterated its jurisprudence as laid down in the cases to which I have referred but noted that an obstacle to the free movement of workers may be objectively justified (paragraph 51) so long as it does not go beyond what is necessary for achieving the aim pursued (paragraph 56). It considered that, at first sight, the transfer provisions might be regarded as going beyond what was necessary to the aim pursued (paragraph 58) but that it was for the national court to determine whether "objective reasons, concerning only sport as such" justified the differential treatment (paragraph 59 and 60). Thus the justification must be based, objectively, on reasons concerning sport only and it is for the national court to determine if that test is satisfied.

33. In Case T-313/02 **Meca-Medina v Commission** the claimant challenged the anti-doping rules imposed by the International Swimming Federation. In summary he had been tested and found to have an excess of a prohibited substance in his body and in August 1999 was suspended for four years. Two years later his suspension was reduced in the light of the discovery that the prohibited substance might be naturally produced by eating boar's meat. He complained that the anti-doping rule was contrary to Articles 81 and 82. His complaint was rejected by the Commission and he instituted proceedings before the Court of First Instance. The CFI enunciated a number of propositions to which I should refer, namely:

(1) the jurisprudence of the ECJ in relation to Articles 39 (ex 48) and 49 (ex 59) laid down in the cases to which I have referred applies equally to the Treaty provisions relating to competition (paragraph 42);

(2) though high-level sport has become, to a great extent, an economic activity, the campaign against doping does not pursue any economic objective as it is intended to preserve the spirit of fair play and safeguard the health of the athletes (paragraph 44);

(3) sport is essentially gratuitous and not an economic act, even when the athlete performs it in the course of professional sport such that the anti-doping legislation concerns a non-economic aspect of the sporting action "which constitutes its very essence" (paragraph 45);

(4) the anti-doping rules had no discriminatory aim but that if they were discriminatorily applied the restriction on the scope of the Treaty accepted by the ECJ in respect of purely sporting rules would not apply because the rules would not, in that event have been limited to their proper object (paragraph 49);

(5) the limitation on the scope of the Treaty so as to exclude purely sporting rules may apply notwithstanding that it gives rise to economic consequences for some and may have gone further than was necessary (paragraphs 51 to 55).

The claimant has appealed to the ECJ. The opinion of Advocate-General Lèger delivered on 23rd March 2006 supports all the conclusions of the CFI. The hearing before the ECJ has not yet taken place.

34. I have considered these cases at some length as the necessary foundation for the proper consideration of the submissions made by the parties. The defendants contend that the dress code consists of rules relating to the regulation of the sport or game of tennis having no reference to any economic activity. They submit that this is so even if the dress code has economic repercussions for others and even if it goes further than is strictly necessary. They seek to draw an analogy with rules as to the size or marking of the court, the weight and construction of the balls or the height of the net.
35. The complaint made by Adidas is limited in that it accepts the need for a dress code and that the object of the dress codes of GSC and ITF is not the restriction of competition. But Adidas does not accept that the dress codes are entitled to the benefit of the so-called sporting exception. Adidas points out that each of the defendants is engaged in economic activities of considerable substance. In the organisation and promotion of the tournaments each of them sells admission tickets, media rights, advertising and sponsorship rights as well as providing prizes for the competitors. It observes that the object of the dress code is to restrict the commercialisation of the tournament which is itself a commercial activity. It points out that the dress code has considerable implications for the players and manufacturers in relation to sponsorship income and advertising opportunities. Adidas submits that the dress codes are not indispensable to individual games of tennis in the way that, for instance, rules as to the height of the net are.
36. In my view if and to the extent that it may be necessary for the claimant to establish that the defendants are not entitled to the sporting exception in respect of the dress code it has a real prospect of success. The jurisprudence of the European Court to which I have referred establishes that the exception is to be restrictively interpreted when applied to fundamental aspects of the Treaty such as the competition rules to be found in Articles 81 and 82. It is for the national court to determine the nature of the activities in question. High level professional sport may involve the provision of a number of separate, but closely related, services which may fall within the scope of the Treaty and require close scrutiny. At trial it would be necessary to analyse the activities of all the parties involved in some detail. In principle, as it seems to me, the preservation of the appeal of a tournament to the public as a whole by restricting on-court advertising, which is the object of the dress code, must be part of the economic activity of the promotor. It is not indispensable to playing a game of tennis that the player's shirt should not identify its maker but it may well be necessary to the maintenance of the economic value of the tournament as a whole.
37. I turn then to the third issue I summarised in paragraph 26 above. In **Bradley v The Jockey Club** [2005] EWCA Civ 1056 the claimant, a jockey, challenged the findings of a disciplinary tribunal constituted under the rules of the Jockey Club. The grounds of the challenge were breach of contract and unreasonable restraint of trade. Richards J dismissed the claim. He considered that the role of the court in such a dispute was supervisory only to be carried out in accordance with principles similar to those applicable to judicial review. That conclusion was upheld by the Court of Appeal. The appeal was dismissed.

38. Counsel for ITF emphasised the regulatory role of ITF as the 'supreme governing body of the sport of tennis'. He asserted that it was not a commercial organisation and pointed to the witness statement of its executive director, Mr John Garnham, in which he expressed the view, amongst others, that "the underlying purpose of the dress code is purely sporting". Counsel submitted that it was a matter for the discretion of ITF whether there should be such a code and if so its terms and enforcement. He submitted by analogy with **Bradley v Jockey Club** that the court could only interfere with the exercise of that discretion on principles analogous to those applicable to judicial review.
39. I do not accept this submission for the reasons given by counsel for Adidas. Articles 81 and 82 contain competition rules of the European Community. They are of direct effect and impose on all undertakings to which they apply external constraints as to what they may do. If it is alleged that the ITF is in breach of either Article then it is the duty of the court to scrutinise its activities of which complaint is made and, if the case is made out, to give judgment against it. The principles applicable to decisions of domestic regulatory sporting bodies who are not in breach of either Article are not in point. But even if the latter principles did apply the discriminatory enforcement of sporting rules based on a fundamental misunderstanding of what the rule required, which Adidas submits is the case here, would entitle the court to interfere.
40. I turn then to the fourth issue summarised in paragraph 26 above. It is contended by all the defendants that the dress code is objectively justifiable. Adidas accepts that a dress code may be objectively justified and does not challenge that relevant to this case. Its claim is that the defendants threaten and intend to enforce it against Adidas in a discriminatory manner. The defendants do not seek to justify any discriminatory application, they just deny that that is their intention.
41. The case for Adidas is simply put. Adidas accepts that the 3-Stripes motif is a manufacturer's identification to which the dress code might always have been applied. It points out that the interpretation put on the dress code by all the defendants effectively limited its application to manufacturer's standard logos. Such logos were permitted but only if they did not exceed the specified size. When the defendants came to revise their interpretation of their dress codes in May and June 2005 they singled out Adidas and indicated that the revised interpretation would be applied to its 3-Stripes motif. Adidas contends that although all the defendants have indicated on a number of occasions that the dress codes would be enforced against all manufacturers indiscriminately they have consistently failed to do so. Adidas has produced a number of photographs of tennis clothing made by others which embody distinctive design elements which, they submit, may well have become a manufacturer's identification, yet the defendants have done nothing.
42. The defendants deny discrimination. They point to a number of passages in the witness statements of their deponents to the effect that the dress code has been and will be applied to all manufacturers alike. The point is dealt with most fully by Mr Babcock, the administrator of the GSC, in paragraphs 44, 45, 99 and 100 of his first witness statement. In paragraph 45 he suggests that unless the distinctive design element is a registered trade mark, protected by some other intellectual property right, or proceedings for its enforcement have been taken by the manufacturer then it is unlikely that it will be a 'manufacturer's identification'. It would appear that the draftsman of the working definition was of a similar opinion.

43. Adidas contends that the criteria adopted by Mr Babcock are inadequate. Counsel for Adidas points out that there can be a manufacturer's identification without a trade mark, that other intellectual property rights, such as copyright, are irrelevant and that the absence of any attempt to prevent others using a distinctive design element may indicate no more than the absence of any reason, commercial or otherwise, to seek to do so.
44. Whether there are or in recent times have been any other manufacturers' identifications on garments worn by players at international tennis tournaments in excess of the size limits permitted for standard logos are questions of fact which I cannot and should not attempt at this stage to resolve. It is sufficient for the purpose of these applications to hold that Adidas has a real prospect of success in establishing that there have been and are other manufacturers who incorporate distinctive design elements in such a way as to constitute manufacturers' identifications. In my view this is demonstrated by the photographs produced by Mr Cartwright of clothing worn in tournaments held in 2005 and 2006, in particular the Diadora two stripes and the Nike sunray. There is no evidence that any of the defendants have sought to apply the dress code to any manufacturer other than Adidas. If and so long as they seek to apply the criteria referred to by Mr Babcock then it is likely that the defendants will fail to apply the dress code to other manufacturers' identifications. Any such failure will give rise to discrimination against Adidas.
45. I turn then to the fifth issue set out in paragraph 26 above. This raises the territorial scope of Articles 81 and 82. In **Ahlstrom Osakeyhtio v European Commission** [1988] ECR 5193 the ECJ considered this issue in the context of producers outside the Community selling to purchasers established in the Community. The external producers had engaged in price fixing and therefore restricted competition. The Commission determined that there had been an infringement of Article 85 (now 81). On appeal it was contended that such a finding was inconsistent with public international law. The ECJ disagreed. It observed (paragraph 16) that infringement of Article 81 involved two elements, namely the agreement, decision or concerted practice on the one hand and its implementation on the other. The ECJ concluded:

"16....If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

17 The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.

18 Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the

territoriality principle as universally recognized in public international law."

46. Counsel for Adidas also referred me to **Gencor Ltd v European Commission** [1999] ECR II-753. That case was concerned with Council Regulation 4064/89 which by Article 2(3) provided that there should be declared to be incompatible with the common market:

"A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.."

The case concerned a merger through wholly-owned subsidiaries incorporated and carrying on business in South Africa of the platinum interests of Gencor and Lonrho, undertakings carrying on business in the European Community. It was contended that the merger was beyond the jurisdiction of the European Commission. In paragraphs 78 et seq the ECJ considered the territorial scope of the regulation. In paragraph 82 it held that the regulation applied to concentrations which, while relating to activities outside the Community, have the effect of creating or strengthening a dominant position as a result of which effective competition in the common market is significantly impeded. In paragraph 87 the ECJ rejected a submission that the finding of the Commission was inconsistent with **Ahlstrom Osakeyhtio v European Commission** [1988] ECR 5193. In paragraphs 89 to 92 the ECJ held:

"2. Compatibility of the contested decision with public international law

89 Following the concentration agreement, the previously existing competitive relationship between Implats and LPD, in particular so far as concerns their sales in the Community, would have come to an end. That would have altered the competitive structure within the common market since, instead of three South African PGM suppliers, there would have remained only two. The implementation of the proposed concentration would have led to the merger not only of the parties' PGM mining and production operations in South Africa but also of their marketing operations throughout the world, particularly in the Community where Implats and LPD achieved significant sales.

90 Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.

91 In that regard, the concentration would, according to the contested decision, have led to the creation of a dominant duopoly on the part of Amplats and Implats/LPD in the platinum and rhodium markets, as a result of which effective competition would have been significantly impeded in the common market within the meaning of Article 2(3) of the Regulation.

92 It is therefore necessary to verify whether the three criteria of immediate, substantial and foreseeable effect are satisfied in this case."

47. Counsel for the defendants suggested that the principle there enunciated applied only to the application of the regulation there under discussion and not Articles 81 and 82. Certainly its formulation suggests that it is so limited. But as it restricts the territorial scope of Articles 81 and 82 and is advanced by Counsel for Adidas I see no reason to reject the requirement of substantiality as being of general application even if the qualities of immediacy and foreseeability are referable to the requirements of the regulation in question.
48. Accordingly the issue is whether the implementation of the GSC decision and the ITF decision of May and June 2005 would produce a substantial effect on trade between Member States by preventing, restricting or distorting competition within the Common Market. In the case of the third and fifth defendants their Grand Slam tournaments do not take place within the European Community. In the case of the ITF some of the tournaments or parts of them take place outside the European Community. But each of them is a party to the GSC decision and ITF made the ITF decision. Each of those decisions affects the Tennis Championships at Wimbledon. In my view that is sufficient to confer jurisdiction on this court to apply Articles 81 and 82 to each of those decisions. Whether or not that jurisdiction should be exercised by granting injunctions against the third and fifth defendants in relation to their own Grand Slam tournaments in Australia and the United States is another matter.
49. For all these reasons I conclude that Adidas has a real prospect of success in its claim, as set out in paragraph 45(b) of its proposed amended particulars of claim, that the GSC decision and the ITF decision were and are incompatible with Article 81 and may, at the trial, be declared to have been void. The case advanced in paragraph 45(a) was effectively abandoned at the hearing. Accordingly I will strike it out.

## Article 82

50. Article 82 is in the following terms:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

51. I have described the material parts of the particulars of claim in paragraph 18 above. The objections taken by the defendants, in addition to those also taken in respect of the claim under Article 81, arise from the allegations in relation to the market. As the defendants point out the market alleged in paragraphs 45(a), 45(a)(10) and 45(b)(4) of the particulars of claim is the market in the retail sale of tennis clothing. They contend that though, no doubt, that is the relevant market for Adidas it is not one in which they are or are alleged to be dominant. By contrast the markets in which they are said to be dominant are variously described in paragraphs 51 to 54 in relation to the provision of tennis tournaments. But those are not markets in which Adidas is said to compete. Counsel for ITF accepted that the only relevant market ITF



controlled was the on-court advertising on tennis shirts but that that was not alleged against ITF.

52. Counsel for Adidas sought to justify this part of the claim on the basis that the abuse does not have to take place on the same market as that in which the alleged abusers are dominant so long as the two are connected. He relied on a passage to this effect in Whish on Competition Law 5th Edition page 200(iv). He also relied on paragraph 36 of the judgment of the ECJ in **Compagnie Maritime Belge Transports v Commission** [2000] ECR I-1365 in which the concept of collective dominance was recognised.
53. The principal issues in relation to the claim under Article 82 are substantially the same as those in relation to the claim under Article 81. I have concluded that Adidas has a real prospect of success under the latter. In those circumstances I do not consider that the points made in relation to the relevant market or markets are sufficient to require me to conclude that Adidas does not have any real prospect of success in relation to its claim under Article 82 as well. Accordingly I shall not strike out or summarily dismiss any part of the claim under Article 82 based on paragraph 45(b) of the particulars of claim.

#### **Application of Adidas for interlocutory injunctions**

54. I turn then to the application of Adidas for injunctions pending trial in October 2006. In the light of the arguments advanced before me the form of injunction and the defendants against whom they are sought has changed. Adidas offers a cross-undertaking, in addition to that normally given to the defendants,

"to pay any damages which other manufacturers of tennis clothing who sponsor players at Grand Slam tournaments sustain by reason of this Order in the event that the injunction is discharged at trial and which the Court considers that the claimant should pay."

In respect of the first, second and fifth defendants the injunction sought would restrain them and those whom they represent until trial or further order in the meantime

"from implementing in relation to the Claimant's 3-Stripess their decisions that the said 3-Stripess shall be considered Manufacturers Identification for the purpose of the rules regarding Dress and Manufacturers Identification at their tournaments."

Such an injunction would have effect in relation to Wimbledon and the US Open. No interlocutory injunction is sought against the third and fourth defendants on the basis that the trial will have been concluded before the Australian and French Opens take place in January and May 2007.

55. In relation to ITF the injunction sought would restrain ITF until trial or further order in the meantime

"from implementing in relation to the Claimant's 3-Stripess its decision that the said 3-Stripess shall be considered a Manufacturers Identification for the purpose of the rules regarding Dress and Manufacturers Identification at its tournaments held in the European Community."

In addition Adidas suggests that all parties should have liberty to apply to discharge or amend the terms of the order. It was suggested that these injunctions, though negative in form, are in substance mandatory. I do not agree. They might, if granted, lead to some revision of the dress code, the working definition or the application of either but that does not mean that the injunctions are themselves mandatory.

56. Before considering the submissions made for the parties I should relate the facts in more detail. In his first witness statement Mr Cartwright described how the manufacturing cycle of the clothing made by Adidas from design to availability for sale lasts 18 months. He also explained the various ranges of clothing produced by Adidas at six monthly intervals. The range for Fall/Winter is launched in June and that for Spring/Summer in January in each year timed to coincide with Wimbledon and the Australian Open respectively. According to Mr Cartwright by the end of April 2005 the designs for the Fall/Winter 2006 range had been finalised and the fabrics chosen and handed to the development section of Adidas. The designs included the 3-Stripess motif though somewhat reduced in size.
57. As I have already related, by then other manufacturers had complained to the IOC and Nike had supplied clothing to its sponsored players on which its 'swoosh' logo well in excess of the permitted size was emblazoned. On 5th May 2005 Mark Miles of ATP e-mailed all manufacturers indicating that in the light of recent events ATP intended to reconsider its dress code. The following day, 6th May 2005, Mr Babcock the administrator of GSC wrote a memorandum addressed to all Grand Slam chairmen and the ITF President. After recounting recent events he indicated that he was putting into writing the reasons why he had recommended and they had supported a decision consistent with that of the IOC and favouring strict enforcement of the current Grand Slam Rules thereby requiring the "3 Stripe logo" to conform. He pointed out that Adidas should be given a grace period over the next three Grand Slams to create and produce clothing which fully complied with the Grand Slam Rule by the 2006 Australian Open in January. He then set out eight reasons for that recommendation. The eighth reason included the following:

"Adidas may feel aggrieved and under appreciated if a relevant factor in this decision were whether Adidas is a "better" member of the tennis family. On the other hand, Adidas has a decade of extra advertising because of a relaxed interpretation of its 3-Stripes as a "design" that went unchallenged until now."

He concluded:

"For all these reasons, therefore, my recommendation is to strictly enforce the current Grand Slam Rules so that the Adidas 3 Stripe logo is required to comply with the logo size and placement restrictions which all other manufacturers follow."

58. The GSC decision was made on 10th May 2005 and communicated as I have described in paragraph 6 above. On 12th May 2005 Mr Riehl of Adidas wrote to the President of ITF setting out the investment made by Adidas over many years in its 3-Stripes, suggesting that it would be extremely unfair to prohibit all 3-Stripes in the future and suggesting that discussions with a view to finding a lasting solution should take place during the French Open later that month. Notwithstanding such discussions ITF made and communicated its decision as described in paragraph 7 above.
59. By the end of June 2005 Adidas had received the first samples of clothing for the Fall/Winter 2006 range. They bore the 3-Stripes motif but limited to 12 square inches (77 square centimetres). At the prototype product review held on 30th June 2005 Adidas decided to see if it were possible to remove the 3-Stripes motif from the Competition range of clothing altogether. At the end of July 2005 Adidas returned the samples to the factory with instructions to remove the 3-Stripes motif from the Competition range.
60. On 25th August 2005 the solicitors for Adidas wrote to the President and members of the board of ITF. They set out at some length the case for infringement of Articles 81 and 82 the solicitors had advised Adidas that it had, including the serious economic consequences which were likely to follow. They indicated that Adidas would have a claim for very substantial damages if the decision were implemented in January 2006 with effect on the Spring/Summer 2006 range. The solicitors sought an undertaking from ITF not to implement its ruling until July 2006 and to notify all national associations to that effect. On 26th August 2005 Mr Riehl sent a copy of that letter to GSC.
61. Between 9th and 13th September 2005 Adidas held its product finalisation meeting with its representatives from each country. They considered the Competition Range without the 3-Stripes motif. It did not work because without the distinctive design element it looked boring and lacked appeal. It was too late to design a new product

for the Fall/Winter 2006 range. In the light of the reaction of their representatives from overseas Adidas decided to reinstate the 3-Stripes motif on its Competition Range for its Fall/Winter collection.

62. On 20th September 2005 solicitors for GSC responded to the letter from the solicitors for Adidas dated 25th August 2005. They rejected all the allegations made by the solicitors for Adidas and stated that GSC would defend itself vigorously against any such allegations. The solicitors for Adidas replied on 12th October 2005. They concluded that in the absence of an unqualified undertaking that ITF would postpone the implementation of its ruling until at least after the French Open in May/June 2006 proceedings for injunctive relief both permanent and interim and damages would be instituted. On 19th October 2005 the solicitors for ITF replied to the effect that the GSC had decided "as a sign of its goodwill to extend the grace period for the application of its dress rules to Adidas' 3 Stripes logo until June 26th 2006".
63. The solicitors for Adidas wrote again to those for ITF on 11th November 2005. They set out at some length why it was claimed that Adidas would be subject to discrimination if the new interpretation of the rules were put into effect. They concluded with a statement that Adidas was convinced that a compromise solution that would be fair to all brands should be possible. Further discussions took place between Adidas and GSC and ITF in Shanghai on 16th November 2005, and in Melbourne in January 2006. None of these discussions produced a solution. The cut-off date by which Adidas had to order its Fall/Winter collection if it was to be made ready for delivery by 1st June 2006 was 9th January 2006. Three weeks later GSC and ITF made the decisions I have described in paragraph 10 above and all further negotiations then ceased.
64. On 10th March 2006 the solicitors for Adidas wrote again to the solicitors for ITF complaining that their client was the victim of discrimination, indicating that they were instructed to commence proceedings and asking if the solicitors for ITF were authorised to accept service on behalf of each Grand Slam organiser. They sought a further extension to the period of grace so as to obviate the need to seek interim relief. The further extension was refused in a letter from the solicitors for ITF dated 20th March 2006. They added:

"the Grand Slam Committee would like to make sure your client is aware that the Grand Slam Committee, as part of its decision in Australia, reviewed a working definition of "Manufacturers Identification" that, subject to further input from the industry, should help identify other identifications which could become subject to the relevant Dress and Equipment provisions."
65. On 22nd March 2006 the solicitors for Adidas responded to the effect that Adidas had been wholly unaware of the 'working definition'. They asked for a copy and for information as to when it was envisaged that it would be introduced. On 28th March 2006 the solicitors for GSC indicated that they had instructions to accept service only

on behalf of the organisers of Wimbledon. With regard to the 'working definition' they wrote

"the Grand Slam Committee developed at the Australian Open a draft definition of what constitutes a Manufacturer's Identification, so as to avoid the issues raised by your client with respect to the 3-Stripess, which the Grand Slam Committee intends to circulate to all manufacturers for discussion at the [French Open] or Wimbledon. For the avoidance of doubt, and as indicated repeatedly, the Grand Slam Committee considers Adidas's registered 3-Stripess to be a Manufacturer's Identification."

Thus they ignored the request for a copy and for information as to when the working definition would be introduced.

66. As I have indicated, the claim form and the application for interlocutory relief were issued on 5th April 2005. A copy of the draft 'working definition' was eventually disclosed as an exhibit to the witness statement of Mr Babcock made on 3rd May 2006. I have quoted its terms in paragraph 11 above. As can be seen it is still incomplete. It is in these circumstances that Adidas seeks the interlocutory injunctions in the forms and on the terms I have set out in paragraphs 54 and 55 above.
67. Counsel for Adidas submitted that in these circumstances I should consider the application for interlocutory injunctions on the conventional **American Cyanamid** basis. This was disputed by counsel for the first, second, fifth and sixth defendants (to whom on this part of the case I shall refer as "the relevant defendants") on the footing that my decision at this stage would be likely to decide the matters in issue for there would be no point in any trial in October 2006. They referred me to the well-known cases of **NWL Ltd v Woods** [1979] 1 WLR 1294, 1306C-1307B and **Cayne v Global Natural Resources plc** [1984] 1 All ER 225, 231. I shall defer consideration of that issue until I have considered the matter on the conventional **American Cyanamid** basis.
68. Thus the first question is whether if I grant no injunction as sought now but Adidas is successful at the trial damages in the measure appropriate to infringements of Articles 81 and 82 for the period from early June to late October will be an adequate remedy to Adidas. During this period Wimbledon and the US Open will have taken place. If it is assumed that the GSC and ITF dress codes will be enforced against Adidas at those tournaments then its sponsored players will have to wear clothing which does not bear the 3-Stripes motif of a size in excess of 3 or 4 square inches depending on the article of clothing. The cost of alternative clothing is obviously quantifiable, but what of the knock-on effect on the sales of its Fall/Winter range in the period June to end October 2006? The relevant defendants contend that this can be estimated with some degree of accuracy by forensic accountants. Adidas disputes this.

69. In my judgment damages would not be an adequate remedy to Adidas in these circumstances. Sales of different clothing in past periods are a very uncertain guide to the likely sales in the period June to October 2006. The market is different, the fashions are different and the attractive force of any particular distinctive design element on an article of clothing worn by a particular sponsored player at either of the Grand Slam tournaments impossible to gauge. It may, for example, depend on who wins!
70. I turn then to consider whether if I grant the interlocutory injunctions sought now but at the trial in October 2006 Adidas fails to establish its claims to injunctive relief the remedy available to the relevant defendants on the cross-undertaking in their favour would be adequate. The relevant defendants submit not. They fear that if I grant an injunction against them they will lose authority in the eyes of the players and public. They contend that such authority is essential if a regulatory body is to do its job properly and once lost is hard to regain. This submission is disputed by Adidas. How, it says, can any body lose 'face' or authority by obeying an injunction? For my part I think the fears expressed by the relevant defendants are exaggerated. But I do not doubt that in the circumstances under consideration they would suffer some loss for which money could not provide adequate compensation.
71. At this stage it is also appropriate to consider the position of other manufacturers. If I grant the interlocutory injunctions sought Adidas will continue to use its 3-Stripes motif to an extent greater than the space allowed by the dress code for a logo. In that event the existing competition from Adidas will continue over the next four months or so. If the injunction is discharged at the trial will the cross-undertaking in damages to be given in favour of other manufacturers who sponsor players at Wimbledon and the US Open be an adequate remedy to them? No doubt the cross-undertaking offered is better than nothing but all the reasons why damages would not be an adequate remedy to Adidas if no injunction is granted now also indicate that damages could not be an adequate remedy to rival manufacturers if it is.
72. I turn then to what is conventionally known as the status quo. The present position is that notwithstanding the form of the dress code, Adidas has been permitted over the last few years to incorporate into its clothing worn by players a distinctive design element which is also a manufacturer's identification in excess of the sizes permitted to standard logos. It seeks injunctions now in the forms I have set out in paragraphs 54 and 55 above in order that that position may be perpetuated until after the trial.
73. Counsel for the USTA submits that the status quo is to be identified in accordance with the decision of the House of Lords in **Garden Cottage Foods Ltd v Milk Marketing Board** [1984] 1 AC 130. At page 140 Lord Diplock said:

"The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately

preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo."

74. Counsel for USTA submits that on that basis the status quo is not that prevailing in May 2005 before the GSC decision and the ITF decision but that brought about by the rule changes effected in January and February 2006. This is disputed by counsel for Adidas. He contends that the status quo is that prevailing in April 2006, namely that Adidas sponsored players are entitled to wear Adidas clothing with the 3-Stripes in excess of the maximum size for logos.
75. In my view the *status quo ante bellum*, to complete the expression, is that prevailing before this dispute arose in May/June 2005. Since then there have been many attempts to resolve the dispute both at meetings and in correspondence. I do not think parties should be penalised for trying to reach an amicable settlement. If there has been such delay as to justify identification of a different status quo then the delay itself is likely to be a sufficient reason to refuse interlocutory relief.
76. I turn then to the question of delay. The claim form was issued just over 11 months after the GSC decision and the ITF decision of which Adidas complain. The relevant defendants are not so concerned at the length of time which has elapsed but at the fact that in the negotiations which took place in October 2005 Adidas was then given all it asked for, namely a period of grace until June 2006. The relevant defendants contend that as Adidas was then granted all it asked it would be unjust that Adidas should now have a further extension of the grace period to October 2006. Counsel for Adidas points out that Adidas always made it clear that the grace period could only be an interim measure pending an overall agreement and, notwithstanding its attempts to find one, negotiations were brought to an end by GSC and ITF determining on the dress code changes in January/February 2006.
77. I do not think that the period between May 2005 and April 2006, given what took place within it, can be regarded as unreasonable delay. Nor do I think that the fact that Adidas was granted on 19th October 2005 the grace period it sought on 12th October 2005 would make it unjust to grant now the interlocutory injunctions sought. Neither GSC, ITF nor any rival manufacturer could have thought that the grace period was all that Adidas sought. To the contrary Adidas has consistently sought to find an overall settlement of the issue whereby the GSC and ITF dress codes are applied in a manner Adidas thinks would be indiscriminate.
78. Thus far the balance of the relevant considerations suggests that I should grant the injunctions sought, but there are two further matters on which the relevant defendants rely which might point in the opposite direction. They submit that the relief sought is not appropriate to the causes of action relied on because it seeks to perpetuate an advantage to which Adidas is not entitled. They contend that if Adidas is right then it should be seeking orders requiring GSC and ITF to apply its dress codes in a manner which does not discriminate between rival traders. But they also submit that there

could be no justification for such orders given the assurances given by all the deponents for all the defendants.

79. Thus in paragraph 44 of his first witness statement Mr Babcock said:

"The GSC's aim is to use the working definition as an objective tool to help determine what constitutes a manufacturer's identification on a case by case basis. We will, of course, endeavour to apply and enforce the rule (in accordance with the working definition) without fear of favour to all manufacturer's clothing covered by the rule."

Mr Pollard, the president of the Lawn Tennis Federation of Australia, agreed with Mr Babcock and deposed in paragraph 13 to assurances he had given to Nike at the Australian Open in January 2006 that

"all manufacturers would be treated equally from 26th June 2006".

In paragraph 67 of his witness statement M.Simian, the director of sport of the French Federation, states his opinion that "if there is a manufacturer's identification on a player's clothing then the rule must be applied to all in a consistent manner". In paragraph 3.14 of his first witness statement Mr Garnham, the executive director of ITF, states that "the dress rule is applied to all participants in ITF events in an objective, transparent and non-discriminatory way".

80. I do not doubt the sincerity of these statements. It is not the subjective intention of any of the defendants to discriminate between rival manufacturers in the application of the respective dress codes. But their evidence also shows that they do not believe they have done so in the past or, if they apply the working definition, would do so in the future. If they are wrong in either belief then it is clear that they do threaten to continue to discriminate in the future and the grant of the injunctions sought is justified.

81. For the reasons given in paragraph 44 above I consider that there are substantial grounds for the view that, notwithstanding their good intentions, the defendants have in the past and, if they apply the working definition, will in the future discriminate against Adidas by failing to apply their dress codes to other manufacturer's identifications. It is for the regulatory bodies, not this court, to devise and then apply a dress code which is fair to all. Unless and until they do, when they could apply for the discharge or amendment of the order, the only effective remedy for Adidas is to grant the injunctions it seeks.



82. Accordingly, I return to the issue to which I referred in paragraph 67 above. If I grant the injunctions sought will there be a trial in October? The defendants suggest not. They claim that my order will effectively decide the action. I do not agree. It is possible that in the intervening period the defendants will devise a form of dress code and a method of enforcement so as to remove any element of discrimination. But the fact that the parties may settle their differences before the trial takes place is no reason for withholding injunctions if, in the absence of such a settlement, the action is likely to proceed. That is the position here; absent any such dress code and means of enforcement there is every reason to think that the trial will take place in October.
83. It was submitted on behalf of the USTA that the court has no jurisdiction to grant injunctions concerning the conduct of the US Open in August/September 2006. Counsel for Adidas accepted that USTA alone might make what rules it liked regulating players' clothing at the US Open. He contended that USTA was not entitled to implement the GSC dress code because if the case under Articles 81 and 82 is made out the GSC decision and the ITF decision are void and their implementation in the US would have substantial effect within the European Community in general and England in particular. This would arise from the media coverage and its effect on domestic sales of tennis clothing.
84. That this risk is real and not merely theoretical is apparent from the witness statements of Mr Latham, the head of global sports with Adidas, and Mr Lepere, the managing director of TennisPlanet one of the largest specialist retailers in Europe. The former, in paragraph 26.1 of his first witness statement gives some details as to the extent of the media coverage of the US Open world wide, the latter its effect on retail sales in England. Mr Lepere states that:
- "It is my experience from twenty years in the business (and I consider that it is self-evident) that consumers want to buy the clothing that they see their favourite players wearing on court or on television. This has an enormous impact on consumer purchasing. Consumers want to emulate the players and perhaps hope that a little of their favourites' 'star quality' might rub off on them. Consumers regularly contact us, in particular at the start of one of the big tournaments such as Wimbledon or the US Open, to ask for the "Safin shirt" or "Federer's blue polo".
85. It was suggested that identification by reference to the name of the player is not indicative of the selling potential of the 3-Stripes. That is true but that is not the point at issue. The evidence of Mr Lepere shows clearly that the media coverage of the US Open has substantial effect on the market for tennis clothing in England. As such it establishes the jurisdiction to grant an injunction against the USTA in the form sought. Counsel for Adidas explained the procedure by which such an injunction might be enforced with which counsel for USTA did not disagree. I do not suggest that USTA would not comply with an order of this court but means of enforcement is relevant in deciding whether to grant it.

86. In this case it is also, in my judgment, appropriate to have some regard to the strength of the parties' cases. I cannot forecast how the facts will be found at trial. But given the evidence before me I am satisfied that there is a serious issue to be tried based on evidence of substance. If the facts alleged are proved the prospects of success at trial, in addition to all the other matters to which I have referred, in my judgment, justify the grant now of the interlocutory relief sought.
87. For all these reasons I will grant injunctions in the form set out in paragraph 54 above against the first, second and fifth defendants and in the form set out in paragraph 55 above against ITF. In each case I will make the order against the usual cross-undertaking in damages in favour of the respective defendants and in favour of rival manufacturers in the form set out in paragraph 54 above. In each case the order is to include liberty to any party, on not less than 48 hours written notice to all other parties, to apply to amend or discharge the order.
88. I will also make an order for an expedited trial to commence in early October 2006. I invite counsel for the parties to agree a form of order setting out a timetable for pleadings, disclosure, expert evidence and other similar matters designed to achieve the commencement of the trial on or about 9th October 2006.

### **Summary of conclusions**

89. For all these reasons I will:
- (a) summarily dismiss paragraph 45(a) of the particulars of claim but make no other order on the various applications to strike out/summarily dismiss the claims issued by the defendants;
  - (b) grant injunctions in the form and against the defendants indicated in paragraph 87 above;
  - (c) direct an expedited trial on the basis of a timetable to be agreed by counsel for all parties to commence on or about 9th October 2006 as indicated in paragraph 88 above.

I will hear further argument on any consequential matters and on costs.