IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 May 2012

Before:

LORD CARLILE OF BERRIEW CBE QC
MARGOT DALY
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) TESCO STORES LTD
(2) TESCO HOLDINGS LTD
(3) TESCO PLC

Appellants

– v –

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Respondent

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HEARING (DAY 15)

APPEARANCES

Ms. Dinah Rose QC, Ms. Maya Lester and Mr. Daniel Piccinin (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Appellant.

Mr. Stephen Morris QC, Ms. Kassie Smith, Mr. Thomas Raphael and Ms. Josephine Davies (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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Tuesday, 29 May 2012

(10.30 am)

LORD CARLILE: Good morning. I presume that there are so many people here this morning because it may be one of the cooler places in the West End, for now anyway.

MR MORRIS: Good morning, sir.

LORD CARLILE: Good morning.

Closing submissions by MR MORRIS (continued)

MR MORRIS: I'm going to pick up where I left off yesterday, and I was dealing with the law. I had made I think five points that we drew out in the main cases, and I want to deal with the fourth point about the reduction of uncertainty. As I've said, it's the second main feature of a concerted practice, and there are many ways in which that may arise. A statement about future pricing intentions clearly reduces uncertainty in the mind of the person receiving that statement, and a private statement to your competitor made directly or indirectly would certainly have that effect.

We would say that even a public statement may, in certain circumstances, also reduce uncertainty, as in fact it did in the Dyestuffs case, and in fact the horizontal guidelines to which I will take you in a moment will also demonstrate. To that extent, insofar as it is suggested in Tesco's written closing, and the

references are paragraphs 14(a) and 19(a), that if a matter is public knowledge it can't reduce uncertainty, we submit that as a matter of law that is not correct.

Could I ask you to pick up Tesco's written closing at paragraph 19(b), which is on page 10. This is the proposition that a statement that you are going to -- an indication that you're going to reduce your prices cannot restrict competition.

The suggestion is:

"The disclosure of future ... where the intention is to reduce cannot be unlawful."

Now, our submission, and it is quite an important point, is that that is wrong and shows a misunderstanding of competition economics. It also, we would suggest, shows a failure on the part of Tesco to understand what, in the words of Miss Rose, what real people trying to do business in the real world will do, and I'll come to that in a moment.

Our submission is that to let your competitor know in advance that you are going to reduce your prices equally reduces uncertainty as to your conduct in the market and is likely to affect the other parties' need to act independently on the market.

So if you look at the example at paragraph 19(b),

and coming back to what real people in the real world are likely to do, competitor A here is the person who receives the information that competitor B is going to reduce their prices.

LORD CARLILE: That's competitor C, that was corrected by Miss Rose.

MR MORRIS: Yes, I think for the purposes -- only because that's an A-B-C, but I think for the purposes it doesn't matter, whether B is telling A directly or indirectly. We'll call them C. If competitor A were told by competitor C that it would charge lower prices, in those circumstances the fact that competitor A would probably follow competitor C in coming down, if told in advance of competitor C's intention to reduce, means that we would suggest it is hard to see why competitor C would ever wish to tell competitor A at all about its intended price reduction.

On the assumption that the purpose of competitor C reducing prices is to seek to take competitive advantage in the market, the idea that competitor C will ring up competitor A, or through the middle man, and say "We're going to reduce our prices next week on the equivalent product", and give competitor A advance notice of that is, we would suggest, fanciful. The notion that competitors will be seeking to help each other in that

way does not accord with the reality.

But leaving to one side the unreality of the example, in any event, even if that did happen, there would be a reduction of uncertainty, and the competition that took place on the market would be different from the competition that would take place if competitor C didn't ring up and tell competitor A.

Now, there is also one further important point in Tesco's closing in this area which calls for correction. At paragraph 17, if you go back a page, you will see that Tesco cite passages from the European Commission's recent guidance, they say guidance on information exchanges. Just to let you know, I'll take you to them in a moment, for your note they are to be found in authorities bundle 5 at tab 49, so you might want to mark that.

LORD CARLILE: Already marked it, we were told.

MR MORRIS: I'm grateful.

The guidance isn't the guidance on information exchange, it's the new guidelines on horizontal cooperation generally. To be fair, there is a section in that, a lengthy section which deals with information exchanges, and we do suggest that that section as a whole pays careful attention, it's worth reading, because it is a very clear and helpful explanation about

why the disclosure of future intentions are likely to -- or give rise to a restriction by object.

Now, what is set out there in paragraphs 72 to 74 is an extract, and what is drawn from that extract is the proposition that the guidelines show that, on the one hand, where information disclosed is individualised, and you'll see the word "individualised" highlighted in paragraphs 73 and 74, the exchange or disclosure can be expected to have the object of restricting competition, and we would very much obviously agree with that. But the proposition that's then drawn, at 18(d), is where information is generalised, it does not necessarily follow that the exchange or disclosure will have the object of restricting competition and the context has to be analysed.

What appears to be suggested there is that where an individual company supplies future information about specific prices for specific products, then that is individualised information; but where a company gives only a general statement that it will be raising its prices, say -- "We will raise our prices in two weeks' time", that falls into the category of generalised information. So, for example, a statement that competitors are going to raise by cash margin only, on this analysis, would fall within the generalised

category.

But what we say is that, if you look very carefully at what the Commission is saying when it uses the word "individualised", that information given about a particular company's intentions, whether this cheese is going to be £8.19 or we're going to raise cheese prices in two weeks, that is individualised; and the contrast is with information which is not individualised but aggregate information, and that is information about the market in general, about what players in the market, across the market, have done in an aggregated way. Prices in the market have gone up.

That sort of information is the sort of information that would be prepared by a trade association or by a market intelligence agency, such as Mintel.

If I can just take you to the guidelines just to demonstrate that point. If you go to authorities bundle 5 at tab 49, this section starts, and I've just marked it, on page 13 [Magnum], C11/13, top right-hand corner, and it's headed "General Principles on the Competitive Assessment of Information Exchange".

LORD CARLILE: When was this document issued?

MR MORRIS: 2011 I think, last year.

LORD CARLILE: So you're saying that the principles in this 2011 document were applicable in 2002.

MR MORRIS: I'm saying that to the extent that they're sought to be relied on by Miss Rose, they're not principles of law, they're guidance.

I perfectly accept that this isn't binding authority, but Miss Rose seeks to draw from this a contrast between individualised and generalised, and I wish to demonstrate to you that that is an incorrect distinction to be drawn for her purposes.

It is a very, very helpful summary of both information exchanges and concerted practices together, and I don't propose to read it. I've marked 60, 61, 62, which is useful background, and then you go to paragraphs 72 to 74, which are the paragraphs that are set out in the written closing. You see the words in 73:

"Exchanging information on companies' individualised intentions concerning future conduct regarding ... is particularly likely to lead to a collusive outcome."

And 74, again that has been read to you.

Then it's worth just noting 76 across the page, and they're dealing here with effect rather than object. It says at the top of page 17 [Magnum], four lines down:

"For this reason, it is important to assess the restrictive effects of the information exchanged in the context of both initial market conditions and how the

information exchange changes those conditions."

Then it says -- then it identifies the factors that will be taken into account:

"... an assessment of the specific characteristics of the system concerned, including its purpose, conditions of access to the system and conditions of participation."

Next sentence:

"It will also be necessary to examine the frequency of the information exchanges ..."

Then the next words:

"... the type of information exchanged, for example whether it is public or confidential, aggregated or detailed and historical or current."

What one then sees is that, in the next few paragraphs, they pick up each of those factors and say something about them. The aggregated or detailed factor is then picked up under the heading on the next page, above paragraph 86, "Characteristics of the Information Exchange". Then there are three or four topics, or five, in fact more than five.

If you go then to the bottom of that page, you'll see the heading "Aggregated/Individualised", and it is this paragraph upon which I rely to support the proposition I have just made that "individualised" means

individual company and "aggregate" means all companies:

"Exchanges of genuinely aggregated data, that is to say where the recognition of individualised company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition than the exchanges of company level detail. Collection and publication of aggregated market data, such as sales data, data on capacities or data on costs of inputs and components by a trade organisation or market intelligence firm may benefit suppliers and customers alike by allowing them to get a clearer picture of the economic situation of the sector. Such data collection and publication may allow market participants to make better informed individual choices in order to adapt efficiently their strategy to the market conditions. More generally, unless it takes place in a tight oligopoly, the exchange of aggregated data is unlikely to give rise to restrictive effects on competition. Conversely, the exchange of individualised data facilitates a common understanding on the market and punishment strategies by allowing the coordinating companies to single out a deviator or entrant. Nevertheless, the possibility cannot be excluded that even the exchange of aggregated data may facilitate a collusive outcome."

So the point there is that "individualised" means information in relation to a particular company, whether that is about one price or about a general statement of pricing intentions, and we say that that is an important point to bear in mind because, in our submission, it establishes the proposition that a general statement by company A, "I will raise my prices in two weeks' time", alone is individualised data rather than aggregated data.

So that was my point about reduction of uncertainty.

LORD CARLILE: What effect does that have on the declaration by, I think he was Mr Leahy in those days, "We are going to ensure that farmers are given 2p per litre more at the farmgate and we will reflect that in our business strategy"? I summarise.

MR MORRIS: You might say that the statement -- there was no statement, "We are going to raise our prices".

LORD CARLILE: No, it doesn't take a rocket scientist to deduce that.

MR MORRIS: It is not part of the OFT's case that that was an indication at that point that Tesco were going to raise their retail prices, and I don't press that. In fact, I can't look into Mr Leahy's mind nor what was going on at the time, but we do know that they were very conscious of the issue, of the advice they'd had two

years previously, and the statement was not even, "We will pay more to the processors". There was nothing about what Tesco was going to do and I'm not going to suggest that they were making that statement.

You may conclude that it was obvious that that was the outcome but I don't think it's part of my case, nor is it fair for me to suggest that that's what that statement was.

The statement was about, "We want farmers to get more money".

LORD CARLILE: When the Dairy News, I think it's called, through the work of a no doubt astute and experienced journalist, ventures a punt on retail prices rising across the supermarket sector, and it appears in an article in the Dairy News, what conclusions are we to draw from that? Where does that stand in the exposure or disclosure of aggregated and individualised data?

MR MORRIS: If the following happened, and I'm not saying it did, I don't know where the journalists get their information and I'm not suggesting how they got it.

LORD CARLILE: I thought they made it up a lot of the time? Sorry.

MR MORRIS: No, we're in the wrong court at the moment.

LORD CARLILE: Yes, we are.

MR MORRIS: If company A speaks to a journalist and tells

a journalist, "We are going to raise our prices next week", that would be a statement of individualised intent.

LORD CARLILE: And if company A says to the same journalist, off the record, "The whole sector is going to increase its prices, it's a no brainer, it's inevitable"?

MR MORRIS: Well, if that information is actually a collection of pieces of information about each company, then it would be a collection of individualised.

I mean, really, a lot of the aggregated data cases are cases of historic information about what sales have been and market trends, where market intelligence, Mintel, gather information. I'll be corrected if I'm wrong, but I would imagine that the aggregated data cases are unlikely to necessarily be future data because you have to see that all the information exchange cases generally, they don't just cover future -- the bald case that we have of future pricing intentions, they cover market trends. If you disclose your historic data and trends, that also has a potential of affecting competition. We're not in that field.

If you're wanting me to answer -- well, not wanting me to -- if the answer -- I couldn't answer the question: that would be aggregated data. It might be a

collection of individuals.

Can I now pick up on the fifth point, which is the "knowingly" point. Established by the case law that the substitution of cooperation has to be knowing, and this is where -- it's not in issue -- this is where the requirement for state of mind comes in, and I'm going to come back to that in a moment when I get to Kit which I'm coming to next. But I ask the Tribunal to note that the word in Suiker Unie is simply "knowingly", and that knowledge, one might say, is a protean concept, and one might also say that it can involve complex, and I'm no philosopher, philosophical issues. It is not always a question of whether somebody knows or does not know.

Most significantly, in the legal context, knowledge addresses the question: when is a person to be held responsible in law for their actions? It is a question that has occupied the attention of lawyers in many and varied areas of the law, perhaps since time historic. I was thinking about what Roman law attitude was to questions of knowledge and I couldn't cast my memory back far enough.

LORD CARLILE: We were discussing Roman law this morning.

MR MORRIS: But you will be familiar, obviously, sir, that in the field of criminal law it is the subject of the key concept of mens rea, and in the fields of property

and trust law it is an important question when somebody receives property belonging to another. There are a variety of answers which can be given to the question of what constitutes knowledge, depending on what is in issue, the nature of the conduct and the policy behind the particular area of law. We say -- it goes without saying that the law recognises that there are different degrees of knowledge, and in our submission, the reference to the word "knowingly" in Suiker Unie does not provide a conclusive answer to what does or does not constitute knowledge.

Can I now turn to Kit and Toys and the so-called A-B-C test and perhaps invite you to take up bundle of authorities 2, tab 9 [Magnum], which is where you will find the judgment of the Court of Appeal. What I would propose doing, subject to your indication, because I would like briefly to take you through the judgment to have a look at it as a whole to see what the case is about, but can I just give you some basic facts before we get there.

The basic facts of Kit were that there were four infringements. The two main ones were the Manchester United agreement and the England agreement. The sports cartel meeting was a direct meeting between the competitors and related wholly to the Manchester United

agreement. When the case got to the Court of Appeal, the Manchester United agreement was not in issue. What was in issue was the other main agreement, the England agreement, and the England agreement was a case of indirect contact. The principal players in that A-B-C were JJB, who you might call retailer A, and the two key individuals there were Mr Whelan and Mr Sharpe, Umbro you might call supplier B, and the key individual there was Mr Ronnie, and Sports Soccer, who you might describe as retailer C, and the key individual there was Mr Ashley.

Essentially, JJB was putting pressure on Umbro, B, to ensure that Sports Soccer, C, did not discount its prices, as pointed out in the Tesco note on the case from yesterday, particularly at a key selling period which was up and coming which, actually, in many ways, is almost -- I can't remember the year, but we are now 12 years on because Euro 2012 is about to start and it was precisely at this time 12 years ago that the Euro 2000 tournament was about to take place.

JJB told Umbro that it would not discount its prices, Umbro passed that information on to Sports Soccer, C, there is your A-B-C. Then, in turn, Sports Soccer, C, told Umbro that it would not discount but conditionally. That's an important thing to note, only

if the others did not do so. Then Umbro passed on that information back to JJB.

Now, as far as the Toys case was concerned, with which, I have to say, I'm not as familiar as I am with the first case. Ms Smith, if she were here, might have taken over at this stage.

LORD CARLILE: Yes, we can see that we're going over territory familiar to some of you at least.

MR MORRIS: Yes. In that case, there were two retailers. Argos and Littlewoods. Argos retailer, call them A, and the key individual there was Mr Needham, Hasbro was the supplier in the middle, B, the key individual Mr Wilson, Littlewoods, retailer C, key individual Mr Burgess. Hasbro were unhappy with its margins and sought to introduce initiatives to persuade retailers to price at RRP level and information exchanges went A-B-C both ways.

If I can just go to the judgment, and if I can first of all take you to paragraph 32 [Magnum], you will see there that one of the centrepieces of the appeal:

"Since the appeals to this court are on points of law only, the question is whether, on the facts found by the Tribunal, its findings of trilateral agreements (and a bilateral agreement between Argos and Hasbro) are correct in law. It is therefore necessary, in each

case, to examine the facts ... Common to the challenges by each Appellant is the theme that the Tribunal failed to accord enough weight to the requirement of subjective consensus ... In particular Counsel criticised what the Tribunal said at paragraph 659 of its judgment in Football Shirts ... as follows:

"'Thus, for example, if one retailer A privately discloses to a supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to ... C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The prohibition on direct or indirect contact between competitors on prices has been infringed'."

Then it says:

"It is said that this statement is, at the very least, too general, and that a finding that each of A, B and C is involved in a single concerted practice would require other connecting factors ..."

That's the criticism of the reasonable foreseeability test which had been applied by the Tribunal.

Then you see that in paragraph 35, I don't need to take you to, because it just identifies the four agreements that I've taken you through.

The other two by the way were called MU Centenary Kit and England Direct agreement. That's just for your -- so that when you read the judgment...

Then we have passages taken from the judgment of the Tribunal in the Kit case and, in particular, a passage at 422:

"Similarly in our view Mr Whelan [of JJB] --"

LORD CARLILE: Sorry --

MR MORRIS: I apologise, I'm looking at 54 of the judgment which quotes 422 [Magnum]:

"Similarly in our view Mr Whelan [of JJB], who is even more experienced, would have realised that conversations such as those he had with Mr McGuigan or Mr Ronnie [for your note, Umbro] would or might lead Umbro to consider ways of limiting discounting by Sports Soccer, so as to mollify JJB. In our view that was one of the principal purposes, or at least the reasonably foreseeable effect, behind the conversations about Sports Soccer's discounting that took place in the relevant period between Mr Whelan and Mr McGuigan [that's JJB and Umbro], Mr Whelan and Mr Ronnie [JJB and Umbro], Mr Russell and Mr Fellone, and Mr Russell and Mr

Bryan."

For your note, Mr Russell was JJB, Mr Fellone was Umbro, Mr Bryan was Umbro.

"'Getting better terms for JJB' does not seem to us to be an adequate explanation and there is no evidence of any discussion of 'better terms' in the period prior to Euro 2000. In this case, in our view, JJB was making complaints and using its bargaining power with a view to affecting the discounting activities of a competitor."

That, again, in a moment you will see, is one of the paragraphs that is subjected to analysis because of the sentence "principal purposes or at least reasonably foreseeable effect".

Then, 56, at the bottom of the page, Mr Ronnie of Umbro gave evidence that Umbro did feel under pressure, the Tribunal said, this is quoting from 425:

"In our view it was JJB's intention, or at least the reasonably foreseeable effect, of JJB's complaints, that Umbro would be prevailed upon to do something..."

Then you find at --

LORD CARLILE: Where do we find the Court of Appeal's conclusion on that argument, because the Tribunal's --

MR MORRIS: I'm coming to that now. If you go to 90. That's why I quoted what I quoted.

"In paragraph 422 ... the Tribunal referred to what

Mr Whelan would have realised. Towards the end of that paragraph, it is said that JJB was making complaints and using its bargaining power 'with a view to affecting...' that is to say, in order to see that Umbro did something to prevent Sports Soccer from discounting ... In the middle of the paragraph, the Tribunal said that leading Umbro to consider ways of limiting discounting by Sports Soccer was 'one of the principal purposes, or at least the reasonably foreseeable effect' of the conversations in which JJB complained..."

That's reflected late in paragraph 596, which is what I was going to take you to.

If you go down the bottom towards about ten lines up from the bottom, seven or eight lines up from the bottom of 90 [Magnum]:

"Nothing that the Tribunal said about Mr Whelan suggests that he is someone who would not realise the reasonably foreseeable consequences of something said by him in this sort of commercial context. Accordingly, it seems to us that the pressure applied by JJB to Umbro should be seen, as the Tribunal described it, as imposed with a view to affecting. For the reasons set out above, it also seems to us that JJB cannot escape responsibility by saying that for all it knew, Umbro might ... lawful way."

So what they're saying there is that actually in the facts he realised what was reasonably foreseeable.

What they then do is go on to comment about the reasonable foreseeability test in 91, and they say this [Magnum]:

"That being so, we do not need to decide in the context of the Football Shirts appeal whether Mr Lasok's criticism of 659 is justified. But it does seem to us that the Tribunal may have gone too far in that paragraph insofar as it suggests that, if one retailer, A, privately discloses to supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions [and it's there quoting from the Tribunal's judgment], and then passes it on to C, then A, B and C are all to be regarded as parties to a concerted practice having as its object or effect [et cetera]. The Tribunal may have gone too far if it intended that suggestion to extend to cases in which A did not in fact foresee that B would..."

You've read it obviously.

"... make use ..."

This is not such a case on the facts.

LORD CARLILE: So it depends to a great extent on what we as a Tribunal make of Ms Oldershaw's evidence, as to what

she foresaw?

MR MORRIS: I'll come back to that if I may. It absolutely does. There's a wrinkle I would wish to take you to about this, in the light of your questions which have been quite specific throughout. Can I get to the --

LORD CARLILE: Forgive me.

MR MORRIS: -- get to the -- I'm not going to -- can I encourage you to read what happened on the facts in 94 to 98 in due course, and can I then invite you to look at the conclusion in the football shirts case at 102 [Magnum]:

"In these circumstances, it seems to us that the Tribunal was entitled to find that JJB provided confidential pricing information to Umbro in circumstances in which it was obvious that it would or might be passed on to Sports Soccer."

I just ask you to emphasise the words "would or might" there and I'll explain in a moment why.

"In support of Umbro's attempt to persuade Sports Soccer to raise prices."

Then:

"2. Umbro did use the information in relation to Sports Soccer in that way. 3. Sports Soccer did agree to raise its prices in reliance of this information and foreseeing that others, JJB, would be told of its

agreement. 4. Umbro did tell JJB of this thereby making it clear that it would be able to maintain its prices at their current level."

The significance of that paragraph is that that is the Court of Appeal's finding on the application of the law to the facts.

LORD CARLILE: With great respect to Lord Justice Lloyd, can you help me to coordinate paragraph 91 and paragraph 102; 91 on page -- the second part of 91:

"The Tribunal may have gone too far if it intended that suggestion to extend to cases in which A did not in fact foresee that B would make use of the pricing information ..."

And the use of the phrase "would" or "might" in paragraph 102, that is a wrinkle.

MR MORRIS: That's the wrinkle I'm coming to, sir.

LORD CARLILE: I'm very bad at ironing, I'll leave it to you.

MR MORRIS: The reason I've identified this wrinkle, to be perfectly honest, is in the light of your questions two or three times about what happens if somebody foresees that it might happen, actually foresees that it might happen. I've gone back to look at the Court of Appeal judgment, and I'll come in a moment to explain to you, but we submit that that judgment and that finding on the

fact that you've just read at 102 supports the proposition that actual foresight that B might pass it on is sufficient in law. Not constructive knowledge that it might happen, but actual foresight that it might happen.

So if you were to conclude that Ms Oldershaw did in fact foresee that it was possible that the information she was giving in document 63 would be passed on, we submit that actually, on the proper analysis of the Court of Appeal, never mind about all the stuff they didn't decide, that would be sufficient.

LORD CARLILE: But within paragraph 102 there is a wrinkle repeated because, if you go further down the paragraph you see, third line from the end, "would be told", last line, "would be able to".

I have the feeling that this illustrates the difficulty of becoming deeply involved in an obiter dictum, however important.

MR MORRIS: Well, indeed, but what I'm trying to look for is the ratio here. I'm going to jump ahead because you're on to the point I'm trying to deal with.

If we go to 140 and 141 [Magnum], I'm not going to take you -- this is the equivalent analysis in relation to Toys. Just to summarise, 141 is the statement of the test they did apply, or part of the test that they did

apply on the facts of Toys, and that is where A "may be taken to intend", in circumstances where they "may be taken to intend". 140 is the same wrinkle point.

Before I take you to the actual words of 140 and compare them with 102 and 90, can I summarise the position in this way. It is common ground, I believe, that the Court of Appeal posited first a primary test that they applied, which is 141, that's "may be taken to have intended". We'll come back to what the "may be taken to" means in a moment.

They also posited as a test, which would also be sufficient, actual foresight that B would pass on or that would be included in their test, and that we get from a combination of 91 and 140. That so far, apart from a debate between the parties as to whether that is cumulative or alternative, and we say in any event it's alternative so either of those can be satisfied, that is where matters have stood.

Now, you, as I said, raised the possibility about "What about actual foresight that it might be?" If you look at 91, I accept, it seems to suggest that actual foresight that B might, I'm looking at the top of the page of 91, might not -- is not sufficient. But if you then go to 140, I'm going to invite you to read that -- I'm going to read it to you. 140 says [Magnum]:

"We have expressed our view in paragraph 91, when discussing the Tribunal's judgment in Football Shirts, that the Tribunal may have gone too far in 659 with its suggestion that if a retailer A privately discloses to a supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information, and B then passes that on to a competitor retailer, that is a sufficient basis for concluding, even if A did not in fact foresee what was reasonably foreseeable, or C did not appreciate the basis upon which A had provided the information, A, B and C are ultimately to be regarded as participants of a concerted practice."

Now, we suggest that actually that paragraph does indicate that if A in fact foresees what was reasonably foreseeable, that is sufficient. Then if you look at the words "what was reasonably foreseeable" in the second part, line 8, and you relate it back to what is being considered three lines above, "where it is reasonably foreseeable that B might make use of that information", what 140 is saying is that, if A did in fact foresee that B might make use of the information, that is sufficient.

I am extremely reluctant to, in some ways, sort of start construing a judgment as if it were a statute, but

we do say this, that the combination of paragraph 140 and the combination of the conclusion at paragraph 102 leads to the conclusion that the ratio of this case is that where A actually foresees that B might, not "would" but "might" pass on, that that as a matter of law is sufficient.

LORD CARLILE: Just pause for a moment.

(Pause)

So if I foresee the consequence of an action, and I then go on to take the action, in effect that is a form of conditional intention? If the action is taken, and I have foreseen it, it's as close to intention as you can get, isn't it?

MR MORRIS: Yes. We would say -- I mean, it's either intent or foresight, but if you want to link intent or -- foresight into the concept of intent we would say, if one needs to do that, and we say you don't need to actually, it's an either/or, either you intend -- but if you go back to intention -- because remember it's ultimately about knowledge about what would or might happen, and we would say if you want to link it back to the question of intention, that if you foresee something as a possible or probable -- let's call it possible at the lower end, possible consequence of your action, that that is to be regarded as intending that consequence, in

the legal sense of "intent", not in the sense of motive, but in the sense of intent. It's going back to intending the consequences of your actions.

LORD CARLILE: It's rather like the difference between reasonable grounds to suspect that something might happen and reasonable grounds to believe that something will happen which has been much litigated.

MR MORRIS: Yes. I'm not quite sure the point -- the litigation that you're referring to.

LORD CARLILE: It's actually counter-terrorism litigation.

MR MORRIS: Yes.

So the answer that we say to your question, well, what happens if she was aware that it might get passed on, is that that would be sufficient on the law as it stands.

LORD CARLILE: We need to read paragraph 141 carefully, don't we?

MR MORRIS: Yes. Well actually, for that purpose, it's really 91, 140. 141, as I'm coming to now, is the undisputed test of "may be taken to intend". The oddity also is that they set out a test at 141, having already decided the Kit case, and not set that test out in Kit. I mean, I'm not -- it's not a criticism but it's slightly -- in terms of reading the judgment, one might have expected that that 141 test would have been stated

at the outset and applied to both.

Now, the next point I'd like to make is the concept of "may be taken to intend". It doesn't say "intend", it says "may be taken to intend". We accept that in that paragraph they're talking about actual intention rather than some form of constructive knowledge, but what we say the significance of the words "in circumstances where A may be taken to intend" are is this, that that question of what A may be taken to intend is a question for the Tribunal and the court to decide based on its assessment of all the evidence. It is an objective assessment at that stage of a subjective state of mind.

We make the points in paragraphs 49 to 51 of our defence [Magnum], perhaps for your note, and paragraph 63 of our skeleton [Magnum], that when a court is reaching a conclusion about what A may be taken to intend or have intended, it must look at all the evidence, all the surrounding circumstances, and come to its own conclusion. The fact that the person himself stands up in the witness box and says "I did not intend", I'm putting it openly -- we use the example of -- it's the example of possession with intent to supply. I don't need to say any more.

But there is a nice passage in the judgment of

Lord Hoffmann, and we will give you the reference in due course, where he talks about: you have no window into a person's mind, and ultimately you have to work out what was going on at the time from everything, all the information you have before you. We say that really is what the "may be taken to intend" goes to.

The reason that is also significant is that, when you read the conclusions at paragraph 142 and 3 and 4, in relation to Argos [Magnum], which again I'm not going to waste time taking -- not waste, I'm not going to take you through now, what you see persistently are findings that Mr X must have realised. And the "may be taken to intend", and I can tell you this slightly anecdotally, but this whole debate came up in the Court of Appeal, because they were grappling with the same thing, and Lord Justice Chadwick referred to a mortgage case called Bristol and West v Mothew, I think it was, where this concept, this wording of "must have" or "may be taken" came into the debate. It was that, they must have realised, that set off this whole debate. The findings here are not findings directly, "he realised", it's "he must have realised". That is an indication of, of course, assessment ultimately of what must have happened rather than a direct finding. Those findings of "must have realised", "must have been aware", "must have

known" -- I'm looking at 142.1 and 142.2 -- "must be taken to have intended", 142.4, are a reflection of that sort of finding.

LORD CARLILE: But there is no real difference, is there, between the expression "must have realised" and "realised".

MR MORRIS: That's right, I accept that, but the use of the words are an indication of the exercise that the court is undertaking.

LORD CARLILE: Yes, "We've considered the evidence and we have come to the conclusion that he must have realised" equals "Having heard his evidence, he realised".

MR MORRIS: Yes, it does.

Can I then, and I'm taking all the various points that arise, can I then make a point about the particular knowledge of the position of C, the recipient. Now, we make this point at paragraph 52 of our defence [Magnum], and it's probably worth just going there, although I don't --

LORD CARLILE: Pleadings bundle?

MR MORRIS: It's the pleadings bundle, and I'm just trying to deal with these points by reference to the pleadings so that I can take it shortly.

LORD CARLILE: Tab 15?

MR MORRIS: Paragraph 52.

LORD CARLILE: Are you looking at the amended defence?

MR MORRIS: It doesn't matter, either will do.

LORD CARLILE: Tab 15, paragraph 52.

Yes.

MR MORRIS: What we say there, as regards the knowledge of C:

"It must be found that C may be taken to have known that A passed on the information to B."

That you find from -- well, we say the first element is you must -- C must realise that A was the source of B's information.

"Further, paragraph 91 of the Court of Appeal's judgment suggests that C's relevant knowledge should include an appreciation that B was passing the information to him with A's concurrence."

So, there are two elements there, one is C knows that it's come from A, and two is that C knows that A consented to being passed through.

Now, we say on the facts that, in circumstances where C is aware of a plan for coordinated price increases, aware that A's information has come from A and aware that A is also aware of the plan, it follows as a matter of necessary inference that C is aware of A's concurrence in the passing-on of the information. That this is so is borne out by the decision in Replica

Kit and Toys".

What is interesting, and this is the next bit, is:

"Applying the law to the facts, the Court of Appeal actually makes no reference at all in either case to any express finding that C knew or appreciated that A had concurred with passing on its pricing information as opposed to knowing or appreciating that the source of the information was A. There were no such express findings of fact in the Tribunal's judgment."

So the point we make is this: whilst the test indicates -- well, 141, can I just take you to 141 [Magnum]. 141 is actually more general, because 141 of Toys & Kits talks about "may be taken to note the circumstances in which the information was disclosed by A to B". Okay? Now, that's a general statement. But 91 suggests --

LORD CARLILE: Can you just pause for a second, I think we need to read 141 to ourselves if you're making submissions on it, it might be helpful, so just give us a couple of minutes.

Do sit down.

(Pause)

Yes, I think we've read it.

MR MORRIS: It might be worthwhile at the same time just going back to 91 at the same time and the last bit of

91, top of the page [Magnum]. It's the reference in the penultimate sentence to "passed to him with A's concurrence".

LORD CARLILE: Hmm-hmm.

MR MORRIS: The point I'm making is this, whilst it does appear from those two paragraphs that when you're looking at what C's knowledge is, the circumstances of the A to B are -- A -- have two elements, that it had come from A to B, rather than B making it up, and that C realised, or may be said to have known, that A had consented to B passing it on.

The point I'm making is this, that whilst that is stated as the test there, on the facts in Kit and Argos, there is no express finding that C knew that A consented. They reached the conclusion that C knew it had come from A, and that was sufficient, and what we say in paragraph 52 of our defence is that that finding must be inferred somewhere on the basis of the facts, and we say that a similar finding can be inferred from -- if you know that it's come from A and you know generally what's going on, I'm saying that in a very general sense, it can be inferred that you must also know that A has consented.

But it is another oddity, and if you look at footnote 44 in our defence, we identify the paragraphs

in Kit and Toys where the findings about what C knew are made or recorded and, indeed -- and none of those, we suggest, refer to any express finding of fact that C knew or appreciated that A had concurred with. If you look at that paragraph 50, we've italicised the words "concurred with".

MISS ROSE: You might find paragraph 143 assists.

LORD CARLILE: Let's read paragraph 143 for completeness.

(Pause)

MR MORRIS: Well, that is the buyer point, which is the manifestation of the wish of party A. Obviously Miss Rose can make submissions in reply on that paragraph, but we would suggest, and the point I'm making, is that there is no finding on the facts that Mr Needham or Mr Wilson or the individuals... 142, there is no finding on the facts that they knew -- for example, if you go to 142.1, Mr Burgess, three quarters of the way down, he knew that Hasbro had been in discussion with Argos, rather than knew that Argos had consented to the information being passed through.

I'm not saying necessarily that it's not part of the test, but what I'm saying is they were at least prepared to find, hold that that happened as a basis of inference of what was going on.

There is then a further point we make which is at

paragraph 53 of our defence [Magnum], which goes to the use point, which is the third limb of the test in 141. What we say there is:

"Where it is established as a fact that C used, in the sense of took account of the information provided by B about A, such use is itself strong evidence of C's knowledge that A was the source of B's information. This is particularly the case in a market where A and C's willingness to move is conditional upon the conduct of its competitor. C would not adjust its market conduct unless it thought that it had actually received those intentions."

So that is my analysis of the legal test as it is in Kit.

I just want to move on to a slightly different aspect but, before I do, let me say that our case is that on the facts of this case you can be satisfied that the standard of knowledge applied by the Court of Appeal in Kit is met, and you need to go -- need go no further. Nevertheless, if you're not -- if you don't find on that basis, which we urge you to do, and if you were to conclude that Lisa Oldershaw and John Scouler cannot be taken to have intended or known or did not foresee, then we say two further things.

First, as a matter of law, you should -- or it is

open to you to decide, and we invite you to decide, that lesser degrees of knowledge are sufficient to establish liability and, secondly, and in any event, we would invite you to make findings of fact on the basis that there were -- of these such lesser degrees of knowledge. That is in our defence, it's been there from the outset. This is not to do with the wrinkle, this is to do with something less than actual knowledge.

We say, and we do say this, that if you're not -- if you are unable to make the findings of fact which we urge you to make you should make findings of fact on these alternative bases, even if you do not accept our submission as a matter of law, that would enable the legal questions to be canvassed further if the need arose.

What do I mean by lesser degrees of knowledge? I mean two things really. I mean blind eye, recklessness, and I mean constructive. You will be familiar with all the divisions of knowledge, but I'm going to basically -- there's actual, reckless and constructive. What I mean by reckless is where somebody is aware of the risk and acted nevertheless and closed their eyes to the risk, wilful shutting of the eyes. How different that is from foresight that something might happen is another issue, but let's assume we're

talking recklessness. Constructive knowledge is what the Court of Appeal were considering and saying, we don't need to decide that. That's no actual knowledge but, in all the circumstances, somebody ought to have been aware or, put another way, a reasonable person in the position of the person involved would have known.

We say that those alternatives are open as a matter of principle and we -- if you just give me a moment.

(Pause)

LORD CARLILE: Do I still need Toys & Kits? Because I have quite a lot of paper on the desk in front of me.

MR MORRIS: No, I think probably not, save to note that the point was left open but you're aware of that fact. I think we can actually put it away.

Can I make my short submissions on why we submit that, as a matter of law, that is a legal test which can be an appropriate test.

Competition law prohibits agreements and concerted practices which have as their object the restriction of competition. There is no need for the parties' subjective purpose to be taken into account for there to be a restriction of competition. Competition law guards against the risk of a restriction of competition. The overall submission is that the Chapter I -- it's appropriate that the Chapter I prohibition will be found

to be infringed in circumstances where A suspected or could have known or ought to have known that B would pass on. This is all the more so where there is no compelling reason for A to have given the information to B and where A did not ask B to keep its information confidential. In our submission, retailers in this situation ought not to be permitted to take known, and it is submitted, obvious risks of anticompetitive outcomes.

We would also suggest that another factor which links to that comes into the balance is where you have a company of Tesco's size and sophistication which makes a virtue of the fact that it has a detailed compliance programme for all its relevant employees and, in particular, buyers, and where on the facts of this case it was fully aware of the specific competition law issues thrown up by the Farmers for Action protests, in those circumstances there is a good reason for the law to place the burden upon Tesco to ensure that those risks are not even run and to ensure that it took positive steps to avoid those risks.

So we say as a matter of principle that the lesser degrees of knowledge should be sufficient to establish the liability but also on the particular facts of this case.

There is one further aspect to this which arises from the case of Anic, to which attention was drawn in the legal questions raised by the court, the Tribunal. We will in due course be putting in a written submission on that, on that particular issue, and it raises an issue about single overall infringement. But what we do say is that the passage in Anic, which I think is paragraph 83, supports the proposition that lesser degrees of knowledge are sufficient where it talks about obvious risks and -- I need to find the passage itself. Paragraph 83.

LORD CARLILE: We have got Anic. Miss Davies will tell us where we have got Anic.

MR MORRIS: It's authorities bundle 4, tab 31, I believe [Magnum].

LORD CARLILE: So it is.

MR MORRIS: I'm going to read it from here. It's paragraph 83, and it's a passage that actually also appears in a case called Aalborg Portland, and that passage itself was cited in Kit in the Tribunal and I think is to be found in the Kit judgment in the Tribunal.

LORD CARLILE: There's not much that isn't in the Tribunal's judgment in Kit. It's a stately home of a judgment.

MR MORRIS: I can assure you that it was nothing to do with

me.

LORD CARLILE: There's a Regency drawing room and a Chinese drawing room.

MISS ROSE: We're expecting the same in this case, sir.

LORD CARLILE: You'll be disappointed.

Carry on.

MR MORRIS: The passage, and I wasn't proposing, although I certainly can if it would assist, to take you through Anic and actually the context of it, because the context of this judgment is the context of deciding when, and I'll be corrected if I'm wrong, a party is to be regarded as participating in a single overall infringement when it has only been shown to have participated directly in a part -- one of the many concerted practices within the overall infringement. We say that that's relevant to this case as well as a separate issue, but it was in that context that the Court of Justice made this observation:

"The Court of First Instance was entitled to consider that an undertaking that had taken part in such an infringement through conduct of its own which formed an [I invite you to emphasise the word "an"] agreement or concerted practice having anticompetitive object for the purposes of Article 85(1), and which was intended to help bring about the infringement as a whole, was also

responsible through the entire period of its participation in that infringement as a whole for conduct put into effect by other undertakings in the context of the same infringement."

So just pausing there for a moment, assume you have ten information exchanges or ten meetings and the conclusion is that they all form part of a single overall infringement, which is in fact what we have got here, we have got a number of information exchanges, some involving Tesco, some not, and the OFT found that there was a single overall infringement.

The question being addressed here is, if it is established that party A participated actually directly only in one of those ten, are they to be held liable for all of them? What the Court of Justice said was, yes, and the reason they say -- the reason why they say yes is that:

"That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and was prepared to take the risk."

So there is an application of either a constructive knowledge or at least a recklessness test in a slightly different context, of course I accept, but what it shows

there is that Community law is prepared to make a finding that a company is to be responsible for concerted practices in which it did not directly participate, namely, the overall infringement. We would say, apart from the fact that that applies in this case as well, that that is an indication from Community law that you can be responsible where you could have foreseen and taken -- and you took the risk.

LORD CARLILE: Semantically there's a wrinkle in paragraph 83, isn't there?

MR MORRIS: There is.

LORD CARLILE: Because if you don't foresee it, how can you be prepared to go on to take a risk that you haven't foreseen?

MR MORRIS: Exactly, and I don't disagree that the two bits of 83, I might be getting a note coming shortly, yes, I think that's ... My learned junior suggests that the "prepared to take the risk" aspect of it relates into the jurisprudence relating to not distancing yourself, and the "prepared to take the risk" is not excluding yourself from what was going on.

The first bit, "could reasonably have foreseen it", we would say is constructive knowledge, but you're right, how can you take the risk if you could only reasonably have foreseen it? But even putting it the

other way, that is at least recklessness, ie you are conscious of something and you've shut your eyes and you're prepared to take the risk.

Now, I'm nearly at the end of the law. There is one issue that has been raised which is the question of attribution.

LORD CARLILE: I was just commenting that this is a very enjoyable argument, but it is a form of semantic bliss, isn't it?

MR MORRIS: It is. Well, I don't need to say this to the Tribunal, you will obviously wish to, when you're looking at the evidence, consider what it is that you're looking -- that needs to be decided. When it comes to -- that's why I came to the point that knowledge is a very difficult area, or can be.

Now, the attribution point I'm going to take very shortly. I'm just going to give you in summary what our position is and you will have more detail in writing.

The propositions are as follows. As we understand it, it is not disputed by Tesco that if you find that Lisa Oldershaw or John Scouler had the requisite state of mind, then it follows that Tesco is liable. We submit that this issue of so-called attribution is and falls to be decided in this field by reference to Community competition law principles and not directly by

reference to English common law principles which include the concepts of directing mind and will, agency and vicarious liability. We say that you can see that from the CAT's own judgment in the Willis case, which is volume 2B, tab 17, at paragraphs 27 to 36 [Magnum].

I don't know if I need to take you to it. The basic analysis is as follows: in this field, liability is imposed upon undertakings, not companies.

LORD CARLILE: I think everybody agrees about this.

MR MORRIS: Well, then I don't --

LORD CARLILE: No. When Miss Rose shakes her head I know I'm wrong, subject to being right.

MISS ROSE: But there's no dispute about it.

LORD CARLILE: There's no dispute. Thank you.

MISS ROSE: I was agreeing with you that there was no dispute, sir.

LORD CARLILE: I'm very gratified to see that Miss Rose is agreeing.

MR MORRIS: Sir, I'm not going to take it any further. We'll see where we are.

LORD CARLILE: No, it's as I thought.

MR MORRIS: The final point I would make is going back to the overall infringement point here. We would ask you to bear in mind two things. One is that each transmission of information, if we're applying the A-B-C

test, is itself an infringement, which means that if you are satisfied, for example, that there was a transmission of information on 30 October 2002 from Lisa Oldershaw to Neil Arthey, and then from Dairy Crest to Sainsbury's, with all the requisite state of mind, that is an infringement and that is sufficient to found liability. Now, obviously, we say, and you know we say, that actually once you establish that, the rest almost follows and then all the others.

So the first point is that it's a simple A-B-C effectively, but the second point is the single continuous infringement, and we do submit that, in those circumstances, and it's not disputed, we submit that Tesco is also to be found to be party to the single overall infringement that involved everybody.

Now, those I think, subject to anything that those behind me want to say, are my legal submissions, and I was going to move on to the matters of evidence.

You're looking at the clock and a break.

LORD CARLILE: I'm thinking of the transcription system, yes.

MISS ROSE: Sir, can I just raise one matter very quickly.

LORD CARLILE: Yes, of course.

MISS ROSE: Mr Morris has referred on a number of occasions to the fact that he's going to put some of his

submissions in writing but he hasn't supplied us with any text. Now, I'm concerned that we're obviously going to have to reply to these submissions on Thursday and, if he's not making his submissions all orally but some of them are going to be provided in writing, we will be prejudiced in doing that if we don't get notice of the document. So I would like to know when we will receive the written submissions that Mr Morris has referred to on a number of occasions.

LORD CARLILE: I'm observing the absence of two notable counsel from the court and I guess that they're beavering away on it -- one of them anyway, one is in court elsewhere.

MR MORRIS: Yes, that is a fair -- can I take instructions and come back to you after the break?

LORD CARLILE: It is a fair point, we would like it too.

Okay, we will adjourn for a quarter of an hour.

(11.42 am)

(A short break)

(11.58 am)

MR MORRIS: Sir.

LORD CARLILE: I saw Miss Rose on her feet. Gentlemen first.

MR MORRIS: I'm grateful.

Miss Rose asked through the Tribunal an indication

about the written closing submissions. The position is that we will have it ready tomorrow and that is where we are at, as you can obviously tell by the beavering away. All I can say is that it will be as soon as possible tomorrow.

Miss Rose, I believe, would wish to say something in the light of that information.

LORD CARLILE: Miss Rose.

MISS ROSE: Sir, the position is that we closed our case immediately on the ending of the OFT's evidence, indeed I believe within two minutes of the ending of the OFT's evidence, and we produced our written closing submissions.

LORD CARLILE: You are covered in virtue from that.

MISS ROSE: Sir, they had all weekend to produce a text, haven't done it, and now say it will come tomorrow at an unspecified time. We've also heard repeatedly from Mr Morris that there are matters that he is not covering in detail orally but which he says are covered in the written text, and he's said that about four times yesterday and today.

Now, I'm placed in an impossible position because I cannot reply to submissions that I've neither heard orally nor seen in writing. Tomorrow is simply going to be too late to enable me to read the whole text, digest

it, identify what's in it that hasn't been said orally and deal with it.

Now, in that situation, and I say this with the utmost regret for myself and my team as well as everybody else, we will have to reserve the right to put in a further written reply because I am not going to be in a position to respond to this written document if we don't get it until tomorrow.

LORD CARLILE: Well, let's see how we go. The request I would make is that, when it is ready, please may it be pinged to us all electronically.

MR MORRIS: Of course.

LORD CARLILE: Along with all the other things I've asked to be pinged electronically, none of which have reached us.

MR MORRIS: Oh. Have you asked us for something that we have not pinged?

LORD CARLILE: I asked for Miss Rose's very helpful closing. Oh, apparently I haven't received it electronically, I apologise. It has arrived.

MR MORRIS: You're not a direct pingee.

LORD CARLILE: Yes, I guess I'm not a direct pingee.

MISS ROSE: Sir, at the very least could we have confirmation that we'll have the document by 9 o'clock tomorrow morning?

MR MORRIS: No, I can't give that confirmation. I said as

soon as possible.

LORD CARLILE: We're going to have to see how we go on this. I do understand what's being said. I'm not keen on further written submissions because it raises the possibility of yet more iterations, I hope we won't need further written submissions, but let's see how we go.

Let's get on and see how we --

MISS ROSE: Let me just explain my personal position tomorrow. I have to attend the Supreme Court to take judgment in the Assange matter which is obviously going to take some time.

LORD CARLILE: Right. Well, I've got a very busy day tomorrow as well, knowing that we were not sitting here. Not quite as exalted as that.

MR MORRIS: Sir, can I say this, we are using all our endeavours to be as efficient as we can and to provide you with as much information as we can as soon as possible.

I do recognise Miss Rose's point about an ability to reply and, as you say, sir, we'll see how we go. Can I make this other observation. I can't quite remember all the points I've said are going to be dealt with in writing, but certainly I have covered most of them in any event. The attribution question was one of them. The question of single overall infringement in the Anic

case, I've effectively made the point. The points are all going to be made, there may be more detail in the writing, but we'll see how we go. We will get it to everybody as soon as possible tomorrow, and we hear what both you and Miss Rose says about it.

LORD CARLILE: Thank you very much.

MR MORRIS: Can I make one minor point on Kit before I go on, and I'm not sure I need to take you back to the judgment.

In the note that Tesco prepared on the facts of Kit, which you will have seen, at paragraph 6 there is the submission made that there are significant differences on the facts between Kit and Toys on the one hand and our case on the other. This is one of the notes -- supplementary notes on Toys and Kit.

LORD CARLILE: I can't immediately find it.

MISS ROSE: Sir, I think you filed it at the back of the closing submissions.

LORD CARLILE: Yes. Got it, thank you very much.

MR MORRIS: It was paragraph 6(c) I just wanted to pick up on. The point that was made there, it's page 4:

"Similarly, whereas in Kit the infringements found by the Tribunal were all associated with the launch of new products or the lead-up to a major tournament, at which time the suppliers or retailers would be

particularly concerned about retailer discounting, there was nothing remarkable about autumn 2002 and 2003 from a cheese retailing perspective."

The point that is being made is that, in both Toys and in Kit, there were effectively decisions which had to be set in stone, and there was a key selling period, particularly -- you'll remember in Kit, the launch was a key selling period but Euro 2000 was a key selling period.

The short point I want to make on that is this, we would suggest there is a direct analogy here. This isn't a general increase in the market price in normal market conditions in 2002. There was a very key point of pressure, which was the farmer pressure and Christmas coming up. The Christmas period, together with the farmer pressure, we would suggest, is an equivalent reason for -- I don't want to use the word "key selling period", it's not quite the same, but an equivalent reason for why the price increase had to happen at that specific time.

With that additional point, can I now turn to the third part of my closing which deals with matters relating to evidence. What I propose to do is deal with this under a number of different heads. First of all, some general observations on the relevance of the issues

that have arisen; secondly, to remind you of the nature and structure of the competition enforcement regime; thirdly, to make some submissions about what happened in this case at the administrative stage; then what has happened at the appeal stage; then to look at the effect, if any, on issues of weight which arise; then I was going to look at the question of admissions; then I was going to look at assessing the different types of evidence very briefly; then I was going to make some observations on Tesco's position; and, finally, I was going to make some observations on the witnesses that you have heard.

If I may start, as I remarked yesterday, the issues, particularly the issue in relation to the alleged failure to call witnesses, I'll put it that way, arise or give rise to a number of possible consequences. The first is whether the Tribunal should fill in the gaps, if it sees that there are gaps, when evidence should or could have been filed by the OFT, which might have filled in the gaps. The second was the weight that should be attached to documentary hearsay when the witness should be called. That, if I understand the Tribunal, is the Tribunal -- I'm not going to -- it's a central concern.

LORD CARLILE: It's a question I raised, certainly.

MR MORRIS: And in particular, as we understand it, in particular in relation to the Mr Meikle and the events of 2003, and in particular the weight to be attached to document 112 [Magnum].

The third area is the suggestion that in some way the OFT's failures have worked unfairness in the case, and the fourth was the proposition that the Tribunal should draw the inference that the Office of Fair Trading decided not to contact witnesses because it thought that the evidence would be -- would not help its case or be unhelpful in either way.

So that's the background to why these issues are said to arise.

My second area is the nature and structure of the competition enforcement regime, and we do submit that this is a very, very significant factor to be taken into account in this context. Our overriding submission is that the competition -- the regime for the enforcement of competition law in this country is, to use Latin, sui generis, and that that is a very important factor to bear in mind. These are not normal adversarial proceedings in civil litigation between private parties, that's the first proposition. Nor, we submit, are they analogous to a criminal prosecution. For that reason, the issues of what evidence the Tribunal does and does

not have before it, and the assessment of that evidence, should not be determined by reference to principles that apply either in civil -- private civil litigation or in criminal proceedings.

These appeal proceedings form an essential part of the overall statutory regime for the enforcement of the Chapter I prohibition. There is necessarily a prior administrative stage at which the OFT gathers evidence for and ultimately takes a decision.

When considering how the evidence now before the Tribunal is to be assessed, regard should be had to the entire process of enforcement from investigation to decision to appeal. That overall process has two significant features. The first significant feature is that the OFT does have statutory powers of investigation in sections 25 and following of the act. They confer a power on the part of the OFT to obtain documents and information but, crucially, they do not contain a power to compel a witness to give evidence or to attend to give evidence or to be cross-examined.

Secondly, and this is the second very significant feature, there is the general rule that, once a case reaches the Tribunal on an appeal from an OFT decision, the OFT is, in general, precluded from bolstering its case by relying upon new evidence, by relying upon

evidence not relied upon in the decision where that evidence goes to support or expand upon matters already covered by the decision. That is an element which is, we submit, very significant too. The foundation for that, and I won't take you to it unless you'd like me to, is Napp preliminary issue, paragraph 77 to 80, or paragraph 77 and 80. It is also repeated in the Allsports judgment.

That second feature -- of course, just pausing there for a moment, there are exceptions when you are responding to new points raised by the appellant, but the general rule is the Office of Fair Trading cannot bolster its case by relying on new evidence. That second feature creates a strong link back to the constraints upon the Office of Fair Trading at the administrative stage.

Thirdly, and without wishing to labour the point, we would remark that you will be well aware of the provisions in the Tribunal's own guide about how the rules, general rules of evidence are to apply or not to apply to proceedings in this Tribunal. I'm referring in particular, for the note, to paragraphs 12.1, 3.2 and 3.4.

Against that background, we submit that whilst it may be appropriate for the Tribunal to take account of

or consider rules of evidence which are in place in ordinary civil litigation, those rules ought not to be transplanted wholesale into this wholly significantly different environment of the overall regime for the enforcement of competition law.

Now, some other features of the regime. The OFT, when it begins its investigation, it will do so largely on the basis of documentary evidence. A conclusion that, in the absence of documentary evidence, the OFT must always adduce witness evidence at the administrative stage would, in our submission, make it entirely impossible for the Office of Fair Trading ever to take a decision or, subsequently, to succeed on appeal where it is precluded from bolstering.

The initial process that the Office of Fair Trading undertakes, in our submission, is one which not only allows but envisages an investigation being based on documentary evidence.

With that background, can I just turn to summarise what happened in this case at the administrative stage by reference to the general principles. If you take the first stage, which is before the issue of the SO, and in this case that covered a period up to 2007, the nature of the process, and this is a general point, and the nature of cartel cases means that it is highly unlikely

that the victim of the cartel, ultimately the consumer or the customer, will be the person who comes forward to the Office of Fair Trading. This is not the case of a criminal prosecution where the complainant victim of the criminal act is the person who goes to the police and the police take a statement and that is the evidence which forms the foundation of the prosecution.

The most likely starting point is market intelligence and leniency applicants, and in the present case the trigger for the investigation was a leniency application made by Arla, and I ask you to note that that application was made in respect of fresh liquid milk.

Now, that gave the Office of Fair Trading reasonable grounds for suspicion, suspecting that an investigation into fresh liquid milk was opened, and section 26 notices were sent to Asda, Dairy Crest, Tesco and Wiseman in relation to fresh liquid milk in June 2004. Section 26 notices required documents and specified information but did not require and cannot require the power to compel witnesses to attend to give oral evidence.

Now, may I, sir, at this juncture, pause for a moment and invite at this stage the Tribunal to go into closed session for a few moments.

LORD CARLILE: Because? You're going to refer to red box documents?

MR MORRIS: No, I'm going to refer to confidential matters.

LORD CARLILE: Well, you had better explain to Miss Rose --

MR MORRIS: Well, I can explain it to Miss Rose quietly.

LORD CARLILE: Please do, so I can know if there's any objection, because this is a public forum.

(Pause)

Do you want to refer us to a document?

MR MORRIS: Yes, if you go to the decision, that's probably...

LORD CARLILE: Bundle 1, yes.

MR MORRIS: Paragraph 2.75 [Magnum].

MISS ROSE: Sir, I'm not sure why there is a need for a closed session. That paragraph can be read.

LORD CARLILE: It was probably thought that a closed session would be one that you would have liked because of the contents of the paragraph.

MISS ROSE: Yes, but I'm not sure what my learned friend is seeking to do other than ask the Tribunal to read that paragraph.

MR MORRIS: I would like to be able to just orally describe -- it's a matter of narrative. It is a passage which -- as you pointed out, sir, I've risen for the benefit of Tesco, and it's a matter for Tesco, but

I would like -- it's only going to take a few minutes.

MISS ROSE: Sir, I don't object.

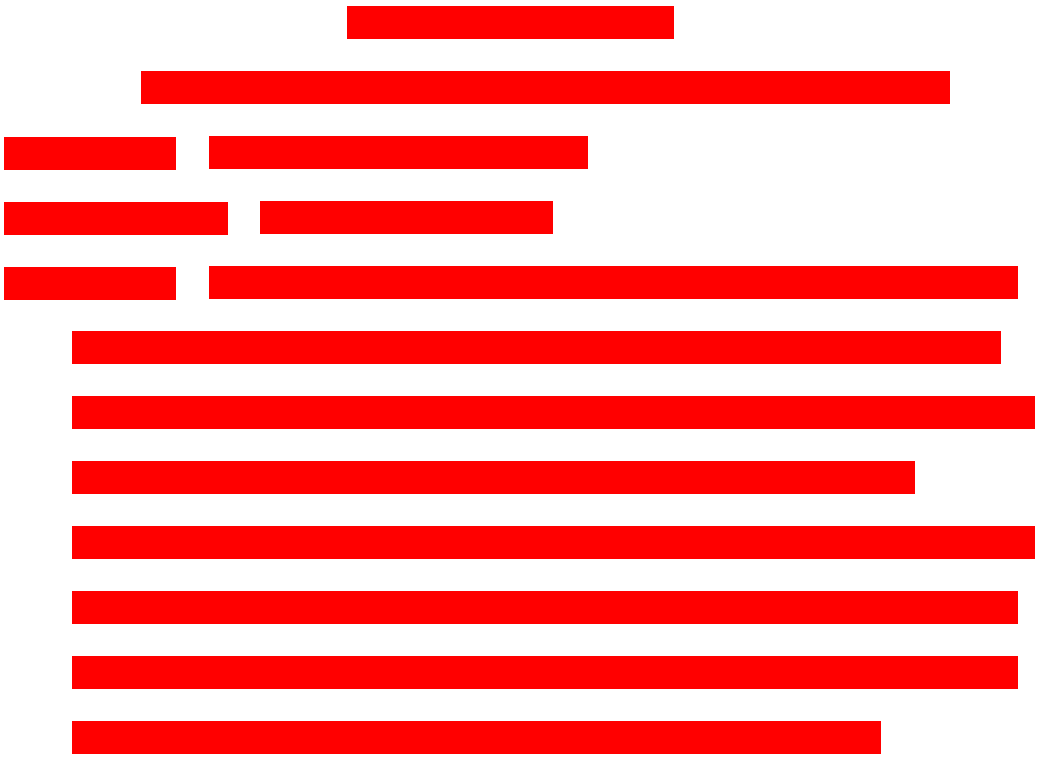
LORD CARLILE: Could everybody who is not within the confidentiality ring please --

MR MORRIS: No, it's not the ring. It's not Tesco at all, I think.

Yes, everybody who is not a party to the proceedings.

LORD CARLILE: Would everybody who is not a party to the proceedings leave the room, please, and we will make sure that you're told as soon as you can return.

Perhaps the solicitors on either side would just check that there's nobody who should not be here.



[redacted]

Yes, thank you.

MR MORRIS: Thank you, sir.

In January 2005, the Office of Fair Trading extended the scope of the investigation to cheese and also included Safeway and Sainsbury's and, in April 2005, the investigation was extended to cover Glanbia and McLelland. I'm told that the process resulted in the provision of 136 lever-arch files of documents. Arla agreed that the OFT -- Arla, the leniency applicant -- could interview four of its employees, and that took place in February and April 2005. Those interviewees could only provide information about fresh liquid milk.

I ask you to note that although Pinsent Masons conducted interviews with Glanbia in September and October 2005, the notes of those interviews were not provided to the Office of Fair Trading until after Glanbia had entered into an early resolution agreement

in 2008.

So that's what happened before the SO. Once the OFT, as in all cases, has analysed the evidence it has obtained during the course of that stage of the investigation, if the OFT proposes to make an infringement decision it will issue an SO. This means, although I haven't got the precise wording of the rule to hand, that at that stage -- this is an important point -- the Office of Fair Trading must be satisfied on the evidence that it has that there has been an infringement provided to the requisite standard subject to hearing representations. So it has to be satisfied on what it has then that the threshold -- well, the threshold -- the test has been passed. In this case, that's what the Office of Fair Trading was satisfied, based on the documentary evidence which it then had.

At that point, each addressee is given the opportunity to inspect the file, make written and oral reps. Oral representations are limited to what is said in the written representations, and witnesses of fact, as a matter of general principle or general practice, rarely appear at such oral hearings. You will be familiar with the process. Of course, there is no facility for cross-examination.

It is at this stage in general that the Office of

Fair Trading may invite recipients of the statement of objections to, if they wish, enter into discussions for early resolution. In the present case, the statement of objections was issued on 20 September of 2007 and addressees were invited to consider early resolution. Early resolution agreements were concluded with Asda, Safeway, Sainsbury's, Dairy Crest, Glanbia and Wiseman in December 2007, and with McLelland in February 2008. So we're now at 2007, end of 2007.

Can you just give me a moment.

(Pause)

Once the ERAs were in place, Asda, Dairy Crest, Glanbia and Wiseman provided the Office of Fair Trading with notes of interviews and further interviews -- those interviews, I understand, were conducted in the autumn of 2007 but they were conducted by the firms themselves rather than by the OFT. Tesco made written representations and chose not to make oral representations. In 2008, the Office of Fair Trading itself conducted taped interviews with a number of individuals.

After considering the representations, the OFT considered that further investigation was necessary on milk but not required on cheese, and the Office of Fair Trading prioritised interviews with the early resolution

parties in relation to milk. The supplementary statement of objections was issued on 23 July 2009; memoranda of factual inaccuracies were received from early resolution parties and Arla. At that point Tesco made no oral representations and they made written representations limited to milk and butter. You will recall, sir, the reason why that was, because at that stage Tesco was considering not contesting the cheese allegations, without admission of liability, provided that the milk and butter cases were closed. Tesco's decision not to contest cheese was announced on 30 April 2010. However, following reconsideration by the Office of Fair Trading of the calculation of Tesco's penalty, Tesco withdrew its noncontest and then submitted written representations on the SSO in relation to cheese. Somebody will tell me the date of that but I think that was the end of 2010.

Following the SSO, the OFT reconsidered all the evidence, as it does in all cases, and at that stage it had three options. It could decide that the threshold for an infringement decision was met; it could decide that it would carry out further investigation which would lead to a second SSO; or it could close the investigation. In the present case, the OFT considered that the evidence following the SSO was sufficient to

establish an infringement and the Office of Fair Trading proceeded to make the decision. So that is what happened as a narrative.

The key points in the process are as follows. The focus on the Office of Fair Trading's statutory powers is the obtaining of documentary evidence. Secondly, no party is required to produce sworn narrative witness evidence at any stage. The Office of Fair Trading has no powers to compel witnesses, unlike the position of the police. It may be possible to arrange for voluntary attendance of individuals, most particularly leniency applicants, but there is in any case, in any particular case, no guarantee that there will be a leniency applicant. There was in this case but, of course, the leniency applicant was only in relation to milk.

The fifth point, voluntary attendance of individuals may be possible where that individual's employer or ex-employer has signed an early resolution agreement. Now, in general, early resolution agreements are not entered into until after the undertaking has seen the statement of objection and thus the detail of the evidence and proposed findings relied on by the OFT. Thus such ERA interviews are, most often, only available after the statement of objections has been issued. Thus, in the present case, the first opportunity for

witnesses to be interviewed about cheese was in 2008. We would ask you to note that, by that time, Mr Arthey and Mr Beaumont had left Dairy Crest and Mr Meikle had left McLelland.

Sixthly, and this is an important point because -- it's an important point of detail, ERAs do not impose any obligation upon individuals who are potential witnesses of fact to attend or assist the Office of Fair Trading. At most, they require the company in question to use reasonable endeavours to secure the cooperation of such employees or ex-employees.

LORD CARLILE: I'm fast getting the impression, as I look at for example the Asda early resolution agreement, that paragraphs 2 and 3 aren't worth the paper they're written on.

MR MORRIS: I need to look at the -- it's in the decision.

LORD CARLILE: And indeed paragraph 11. What's the point of having paragraphs 2, 3 and 11 if the reality is that there's no realistic possibility of anyone coming to give evidence?

MR MORRIS: I'm not suggesting there's no realistic possibility but what I'm suggesting, and you've picked on, is that they don't impose a direct obligation. I will take instructions, if I may, on your observation, but it is obviously an observation on the basis of what

is there. There is no direct obligation, there's(?) an obligation on the company to use reasonable endeavours.

LORD CARLILE: I understand everything you're saying. So far we have seen no evidence that anyone was even asked.

MR MORRIS: I'll come to that in a moment.

As I say, I mention this, sir, because the ERAs are not the forceful instrument of coercion which you might think they ought to be but which Tesco suggests that they are. There was a suggestion made: it does impose an obligation, and I'm making that point -- sir, you're obviously clear about it now -- that it is not that straightforward.

Even if the individual is found and is persuaded to speak to the Office of Fair Trading, it further follows that the interests of the individual may not necessarily be aligned with those of the Office of Fair Trading or indeed the company at whose behest he has come to give evidence, given that such evidence might inculpate the individual himself and the individual might still work in the industry and will be motivated by personal considerations. That is a factor which the Tribunal -- I'll come back to it if need be -- pointed out in the Kit case, that it is not always readily easy to obtain evidence from people voluntarily when they are still working in the industry.

LORD CARLILE: I understand that completely and I'm sure my colleagues do but let's take Mr Meikle just as an example because he's a significant potential or possible witness in this case. The ERA, with his employers, McLelland, obliged them to use all reasonable endeavours -- and those are my words, not the words of the agreement -- to secure the cooperation of a former officer or employee of the company, which would include Mr Meikle, on pain of the ERA being invalidated, paragraph 11.

Once the OFT have clear notice that what Mr Meikle put in key documents is disputed as to its meaning or even its honesty, then it's a little surprising not to find correspondence from the OFT to Lactalis McLelland saying, "You now have to deliver Mr Meikle to us if you can", and then follow the paper trail from there. I think we need some help on this.

We may, in the final analysis, conclude that Miss Rose is wrong in her criticism of evidence not being called by the OFT but we need to dig a little deeper, I think, for the satisfaction of the Tribunal, because at the moment we just have a picture of inertia.

MR MORRIS: That I would resist. There was no inertia. And the reason this happened is that, at the administrative stage, the decisions that were taken were decisions

based on priority and resource. What I must emphasise to you is that at the administrative stage the OFT decided, having considered all the available evidence, this is post SO and representations, to prioritise witness interviews in relation to the milk allegations. As is always the case, and given the breadth of the investigation, the OFT needed to manage appropriately the time and resources it had available during this interview exercise, which was an interview exercise directed towards the milk allegations, there was opportunity to ask questions about cheese of two witnesses, who were Mr Storey of Asda and Sarah Mackenzie of Sainsbury's. Those questions were -- what's the word I'm thinking, not tangential, that's the wrong -- they were...

In the OFT's assessment, the result of their interviews was that they didn't significantly affect the overall evidential position on the cheese allegations as they stood one way or the other. We would submit that those transcripts themselves are relatively vague in comparison, on the specific issue of cheese, in comparison to the documentary evidence. In those circumstances at that stage, and bearing in mind the strength of the documentary evidence on cheese, and the admissions, the OFT's decision not to prioritise

interviewing witnesses in relation to the cheese allegations was taken, and it is the OFT's submission that that decision, based on prioritisation and resources, was reasonable and appropriate in the administrative context at that stage.

That is the administrative stage, a decision was taken to basically -- which is still the OFT's position, that the documents on cheese are and were very strong, and on that basis a decision was taken not to -- or to prioritise in relation to milk and not to pursue interviews in relation to cheese.

So that was the position, sir, at the administrative stage, and that decision, we submit -- put it this way, you as a Tribunal may or may not have views about that decision, but the Office of Fair Trading has a discretion as to how it investigates, and that discretion has to be exercised within the bounds of reasonableness and proportionality.

We do suggest that there is no basis for saying that that decision at that stage not to interview those witnesses or not to take the matter further was in any way unreasonable or not proportionate or appropriate.

So that is what happened at the administrative stage and that, I believe, is reflected in what is said in the decision.

You then get to the appeal stage, and in relation to the appeal stage, as I've already pointed out, as you know, the appellant can rely on any evidence that it chooses, whether or not it is provided in the course of the investigation, and at that stage may include detailed narrative witness statements. That is in fact what happened here, and you will have seen the very detailed narrative witness statements put in.

The Office of Fair Trading, I'm now on the appeal stage, sir, is then constrained by the bolstering rule. The Office of Fair Trading can introduce new evidence where a new point is raised by the appellant but not otherwise, and it cannot add or embellish what is in the decision.

We would suggest this, sir, that if, and I'll come back -- in a moment I will explain to you what happened post the CMC, but if the OFT had in the appeal stage sought to use the judgments in Construction and Tobacco to justify the introduction of witness evidence at the appeal stage, it would have exposed itself to allegations of bolstering insofar as that evidence was merely seeking to add witness evidence to support the documentary evidence.

Tesco's submission before you that the OFT should, on this appeal, have conducted an exercise of filling

gaps, which we don't accept but the gaps that they say, where there was no direct evidence at the decision stage is flawed because, by definition, that would have constituted bolstering. So, for example, a witness statement from Mr Meikle explaining document 112 [Magnum] would or was highly susceptible to the contention that that was impermissible adducing of evidence which should have been adduced at the administrative stage.

Now, you then go back to my original submission which is that there is no duty upon the OFT to prove its case at the administrative stage by witness evidence. If you have those two rules, the bolstering rule places a very substantial constraint on the OFT's position at an appeal.

Now, can I just tell you --

MS POTTER: Mr Morris, are you going to come on to the question of the unsworn witness statements? Because I do have a particular concern about the fact that those were relied on to some extent in the decision, that in your defence it was stated that you were no longer relying on them and therefore Tesco shouldn't be placing any reliance on them, but I think it does place us in some difficulty in relation to the decision, that we do have various aspects of that witness evidence, and also

raises questions in my mind about why those particular elements, which were already in the decision, for example, were not then supported by any sworn witness evidence before this Tribunal?

MR MORRIS: Yes, I will deal with that. I think our position does remain -- the OFT would suggest that it is, by the various judgments, it is put in a very difficult position, because on the one hand you've got the bolstering rule and on the other hand you've got Construction which says, you can't rely on witness interviews unless the witness provides a witness statement and comes along.

That is a very difficult position for the Office of Fair Trading to be in, and for that reason, and in light of -- I mean, let me say this. In this appeal, it is Tesco that relies on those interviews and not the Office of Fair Trading.

MS POTTER: But they are cited in the decision.

MR MORRIS: They are cited in the decision.

MS POTTER: Therefore one is left with the slightly difficult position in relation to those passages of the decision where they're cited.

MR MORRIS: I accept that, but I think you will see that we have been very careful to say to you that we do not rely on those parts to support our case in this appeal. It

is our submission, they are one or two but they are not many. If you take the view, despite Construction, that those witness statements are material evidence -- transcripts, I'll call them. They're different types. There's interviews by the Office of Fair Trading and there's notes provided by the solicitors. We do say that, in the light of Construction, there are concerns that you should be careful about placing too much reliance on them.

I think it's fair that Construction talks about weight, the weight of the evidence, and this is ultimately a question of weight. If you take the view that they are things upon which weight should be placed, then we would say to you, well, you should look at them in the round and you should take them into account either way. There's no reason why they shouldn't be taken into account where they're both for and against either party, and it's a matter of weight. I do not place before you, in the light of Construction, great reliance upon them because of what Construction says.

The position is that Construction is confined to the issue of what do you do with witness interviews which are not -- where the witness doesn't come -- it doesn't deal with the situation where there's no witness interviews at all, and we would make that point, or

impress that point upon the Tribunal. So what we say is, if you feel that these matters are matters which are proper for the Tribunal to take into account, you give them the weight that you consider appropriate and you give them the weight either way in whose favour particular passages are.

You will see that some of these interview transcripts go both ways, and you might then conclude, well, that's rather difficult, and that's a good reason not to give them much weight. But we do say this, that we don't seek to uphold the decision on the basis of those interviews. We don't need to. The documents are sufficient and the evidence you've heard, and to the extent that they are additional material, I don't positively rely upon them.

MS POTTER: So where in the decision there is a reference to an interview as a means of supporting the OFT's case, would you be inviting us to sort of blue pencil that, effectively?

MR MORRIS: No. No, I think I would be inviting you to assess for yourself what weight you accord to such interviews in general. If you take the view -- if you took the view that no weight should be attached either way, then -- you're asking me how much weight you should attach, perhaps, but if you took the view that there

should be no weight, then yes, you can't take them into account. But if you took the view, well, actually they are matters which we can take into account but because they've not been tested by cross-examination we accord lesser weight, then I would say that in those circumstances, yes, you can take it into account as some additional support for the OFT's case in those circumstances where they support the Office of Fair Trading's case. Obviously, I can't -- sauce for the goose against me, I can't also then say, but you can't take account when it goes the other way.

We would say that Construction puts the -- it goes to weight, ultimately, anyway.

Now, it is the case, sir, as you have pointed out, that at the CMC we did indicate that we were contemplating --

LORD CARLILE: Can I just see that document? I was looking for it before and I couldn't find it readily. Can you help?

MR MORRIS: Which document is this? The transcript or the --

LORD CARLILE: The transcript of the CMC.

MR PICCININ: I have the document.

LORD CARLILE: Thank you very much, Mr Piccinin. Can I just borrow it for a moment. (Handed)

MISS ROSE: I actually have it behind a second tab 15 in the pleadings bundle, 15A. I'm not sure if everybody has the same, but I have two tab 15s and it's 15A.

LORD CARLILE: 15A hasn't found its way into my bundle. There's a divider but no documentation behind it.

Anyway, I have Mr Piccinin's. Just give me a moment just to look at this.

(Pause)

MISS ROSE: I'm told it may be tab 16.

LORD CARLILE: Yes, it is. Thank you very much.

MS POTTER: Or is that the disclosure actually at 16?

LORD CARLILE: Tab 16, page 17 [Magnum].

MISS ROSE: It's page 16 of the transcript.

LORD CARLILE: Yes, it's page 17, flag 16.

(Pause)

Yes, thank you. I've reminded myself.

MR MORRIS: I've reminded myself as well. It's lovely when that happens.

LORD CARLILE: Mr Piccinin can have his copy back.

MR MORRIS: Sir, the position is, as was stated there, that prior to the CMC, the Office of Fair Trading was considering and had considered the issue. We said:

"We have considered it, we have not taken any view as to whether it is likely that we will call them."

LORD CARLILE: You wouldn't even tell me at the time whether

you had taken any steps. I asked the question at that hearing whether any steps had been taken to contact witnesses and I was not given the advantage of a reply.

MR MORRIS: No. You know now that steps haven't been taken because the Office of Fair Trading has said quite clearly and openly in correspondence that no steps to contact were taken. What happened was that, following the CMC, the Office of Fair Trading considered the issue and reached the conclusion in the light both of the strength of the documentary evidence, the issue of witness recollection, the issue of bolstering and the extent to which any further evidence from -- or any witness evidence from a witness would have been met by an objection of bolstering. And it concluded that, in those circumstances, it would not seek to adduce witness evidence.

If I can give you an example, a pure witness statement from Mr Meikle either saying "What I say in 112 is true", or expanding upon what is in 112 [Magnum], would have rung the objection -- it wasn't rebuttal, it wasn't reply. We'd run the objection that this was bolstering what was in the document.

Now, the next thing that happened was that the Tobacco judgment came out and the Office of Fair Trading read the Tobacco judgment and it reconsidered the

position again in the light of that, not least because Tesco drew the Tobacco judgment to the Office of Fair Trading's account. Further deliberations took place and the outcome was the same. The Office of Fair Trading took the decision on the balance of all the relevant factors that it would not seek to contact witnesses and it would put its case on the basis that it had always put it.

We submit that taking into account a matter of resources, the state of play in the proceedings, the issue of recollection and the strength of documentary evidence and the bolstering issue, that the decision not then to contact witnesses was a decision which was reasonable and proportionate.

Now, that is what happened. And then there is the further issue, and this is in the context of section 4 that Miss Rose raised it, the issue under section 4, whether the circumstances in which the evidence is adduced is hearsay or such as to suggest an attempt to prevent proper evaluation of its weight. The circumstances in which the evidence in this case has been adduced as hearsay, to the extent that it is hearsay, flow originally from the statutory defined nature of the investigation and the OFT's practice. That is why there is documentary evidence at the outset.

It is our submission that there is absolutely no basis to conclude that the Office of Fair Trading had any other motive in seeking to rely on the evidence which it relies where it considers that that evidence establishes the infringements to the requisite legal standard. This situation is very far removed from that of a private party who, obtaining a witness' statement, chooses not to call him or her so as to avoid highlighting a real weakness in the case.

In her closing speech, Miss Rose submitted that the Office of Fair Trading had made a tactical decision not to call a witness because they think that the witness might not actually support their case, somebody at the OFT decided that they did not want those people to give evidence.

That is not the position, that is not what happened, and the OFT regards that as a serious allegation which is unsubstantiated and it resists it very forcefully indeed.

Those are the circumstances in which matters happened and those are the reasons why the Office of Fair Trading decided on a balance of all the factors not to seek to call witnesses.

Application by MISS ROSE

MISS ROSE: Sir, in the light of what has just been said by

Mr Morris, I will have an application and I don't know whether it's convenient for me to make it now while it's fresh in everybody's mind?

LORD CARLILE: Would you like to tell Mr Morris what the application is?

MISS ROSE: Of course. I'm happy to tell everybody what the application is.

For the first time, Mr Morris has just put forward a positive explanation of reasons why he says the Office of Fair Trading took the decision on two occasions following the case management conference not to call witnesses. He puts forward a positive case that the reasons were, this is [draft] page 77, line 6 of the transcript, he says:

"What happened was that, following the CMC, the Office of Fair Trading considered the issue and reached the conclusion in the light both of the strength of the documentary evidence, the issue of witness recollection, the issue of bolstering and the extent to which any further evidence from -- or any witness evidence from a witness would have been met by an objection of bolstering. And it concluded that, in those circumstances, it would not seek to adduce witness evidence."

So there's a positive explanation given of reasons

why they decided not to after the CMC.

There's then another explanation given at [draft] page 78, line 1, where it says:

Further deliberations took place [this is after the Tobacco judgment] and the outcome was the same. The Office of Fair Trading took the decision on the balance of all the relevant factors that it would not seek to contact witnesses and it would put its case on the basis that it had always put it."

He also denies that a tactical decision was taken by the OFT not to call witnesses because there was a concern they might not support the OFT's case.

Sir, in the light of that being put forward now for the first time, I apply for specific disclosure of all documents in the possession or control of the OFT that demonstrate the taking of that decision and the reasons for it. I would submit that privilege on any of that material has clearly been waived by the submission that has just been made by Mr Morris to the Tribunal. This is clearly a matter of considerable significance.

LORD CARLILE: If there is a consideration between, let's call it lawyer and client, for convenience, as to whether a particular witness should be interviewed, proofed, that's obviously privileged. You're saying that the privilege has now been waived because an

explanation has been given of that process?

MISS ROSE: I would say two things, first of all, that it's doubtful whether any such privilege exists in the case of the OFT, given its public body nature. But if there is such a privilege, what you have now had by Mr Morris is an unevidenced assertion of what he says the reasons were for the decision being taken not to call the evidence.

LORD CARLILE: So you're saying that this paper trail would be FOI anyway?

MISS ROSE: Yes. He is now seeking to rely, he is seeking to deploy before the Tribunal, without any supporting material, a positive case that a decision was taken by the OFT not to call any of these witnesses and that it was taken for specific reasons that are identified, and to deny that it was taken for the reason that we say is the obvious inference for the reason why it was taken. We submit in that situation we are entitled to the underlying documentation that supports that proposition.

LORD CARLILE: Right. Thank you.

Mr Morris, do you want to consider that application and respond at 2 o'clock?

MR MORRIS: I do. Well, that's what I will do, yes, absolutely.

LORD CARLILE: Then we'll adjourn now until 2 o'clock.

(12.55 pm)

(The short adjournment)

(2.10 pm)

LORD CARLILE: Yes, Mr Morris.

Submissions by MR MORRIS

MR MORRIS: Sir, in relation to the application that was floated or whatever, made, before the adjournment, we have two submissions to make. The first submission is this. In our submission, the application should be dismissed and dismissed immediately. We say that for two reasons. First, the disclosure sought is not necessary, relevant and proportionate for the fair disposal of the issues of substance in this appeal. I take that actually quoted from the Tribunal's judgment on the disclosure application earlier at paragraph 13 which I think comes from Claymore. Secondly, we say that this application is made far too late in the day.

Let me deal with the first of those submissions. This is an issue which goes only to the weight of the documentary evidence relied upon by the Office of Fair Trading and it has been raised in that context specifically, I believe, in the context of section 4 of the 1995 act. If you, the Tribunal, take the view that the explanation given is not satisfactory, then you, the Tribunal, may treat the particular evidence, the hearsay

evidence in question, with such weight as you consider appropriate. There is and can be no case that in some way the OFT's decision not to call witnesses causes or has caused procedural or substantive unfairness to Tesco in this appeal. There is no prejudice to Tesco.

The second proposition, submission, is that it is made far too late in the day. In its defence of 31 January this year, at paragraph 28 [Magnum], the Office of Fair Trading explained that it was content to rely on the strong documentary evidence, specifically in the context, and I don't propose to take you, specifically in the context of the observations that had been made in the Tobacco case.

In its skeleton on 14 March, so two and a half months ago, Tesco complained at some considerable length about the Office of Fair Trading's failure to call witnesses, paragraphs, for example, 17 [Magnum], 58(e) to (g) [Magnum], 64 [Magnum] and 71 [Magnum]. In paragraph 58(g), it referred to the reason given by the Office of Fair Trading not to seek evidence, and it invited, at paragraph 71, effectively the same inference to be drawn as it now says ought to be drawn.

On 4 April, the Office of Fair Trading replied to that considerable and lengthy complaint at paragraphs 75 to 85 of its own skeleton [Magnum] and, in particular,

at paragraph 82. Today is not the first time that the OFT has given a positive explanation as to the fact that it has not called witnesses.

A third point under this head is this. The oral submissions made today have been made in response to specific questions asked by the Tribunal in the context of assisting the Tribunal with section 4 of the Civil Evidence Act and, very specifically, questions about what occurred after the case management conference, and it is in that context that the Office of Fair Trading gave the further oral information given this morning.

I will in due course, sir, come back in a moment to the fact that the question of why Mr Meikle was not called was asked of both parties by the Tribunal at Day 7, page 72, line 2. I don't propose to deal with that now, but that is a relevant consideration.

So for those reasons, it is neither necessary, relevant nor proportionate, it's not relevant and it is made far too late in the day, and we submit that this application should be dismissed summarily and now.

My second submission is this. If the Tribunal were, contrary to my first submission, even minded to countenance such an application then it cannot properly be determined now by the Tribunal. It raises an array of important points of principle. The application must

be made in writing by Tesco with full reasons, including the foundation for the very serious allegation that the explanation given to the Tribunal is untruthful. Secondly, the OFT must be given a full and proper opportunity to respond to any such application. Amongst the issues that such an application, if the Tribunal were even prepared to entertain it, would raise are questions of privilege and questions of public policy and how they apply to the Office of Fair Trading in this particular context.

I would add this, that if, contrary to the foregoing, you are even minded to entertain the application, it cannot properly be dealt with today, and Miss Rose's application, which she could have made much earlier in these proceedings, should not be allowed to divert the proper course of these proceedings.

Those, sir, are my submissions.

LORD CARLILE: Thank you.

Miss Rose, do you want to reply?

Reply submissions by MISS ROSE

MISS ROSE: Sir, the reason why this application is being made now is very simple, it's because the explanation that has been put forward today by the OFT for the first time for its failure to call any evidence is different from the explanation which it has given at all earlier

stages of these proceedings.

Can I just ask you to turn up the pleadings bundle and go first to the defence at tab 15, paragraph 28 [Magnum]. You will recall that in my closing submissions I considered in some detail the explanations that had been given by the OFT for its decision not to call any evidence. The starting point is what is said at paragraph 28:

"In this appeal the OFT will rely on strong documentary evidence. It does not intend to call witnesses to give oral evidence. At paragraphs 20 to 22 of the notice of appeal, Tesco is critical of the OFT's approach to witnesses in this case and, in particular, its failure to interview witnesses. This criticism is misplaced. The documentary evidence in this case is contemporaneous, clear and strong. No amplification of this evidence is required by further documentary evidence or oral testimony when considering the nature of the infringements found by the OFT."

Now, what was very clearly being said by the OFT at that time was that the reason why the OFT had elected both not to interview all the witnesses during the investigation stage and not to call any evidence during the appeal stage was because the OFT considered it was unnecessary to do so because the documents did not

require further amplification. In other words, the OFT was content to rest its case on the documents and, if there were gaps in the evidence, so be it, it would fail to prove its case.

The same position was maintained by the OFT in its skeleton argument. If you go back to tab 14, paragraph 82 [Magnum]:

"It is the case that in the course of its investigation the OFT did not interview particular individuals or ask certain other individuals about the cheese initiatives. This is explained at paragraphs 5.483 and 5.484 of the decision."

You'll recall that we looked at those paragraphs in my closing submission and they basically said that the OFT had decided to prioritise asking questions about milk over cheese.

"Following the lodging of Tesco's appeal, after due consideration the OFT decided not to contact further witnesses. The contemporaneous documentary evidence in this case is strong and is of far greater weight than recollection which would by now be almost ten years after the event."

So again reiterating that they didn't consider that there was any reason for them to call oral evidence, they were content to rely on the documentary evidence.

What is conspicuously absent from those documents, and which has never been said by the OFT until today, is that the OFT considered itself to be constrained by the previous case law of this Tribunal in relation to the OFT calling new evidence and, for that reason, considered that it was inappropriate for it even to seek to do so because it feared that that evidence would not be admitted.

This now is the centrepiece of the explanation given by my learned friend. If you go back to what he said immediately before the short adjournment, it's [draft] page 77, line 6 of the transcript:

"... following the CMC, the Office of Fair Trading considered the issue and reached the conclusion in the light both of the strength of the documentary evidence, the issue of witness recollection, the issue of bolstering and the extent to which any further evidence from -- any witness evidence from a witness would have been met by an objection of bolstering and it concluded that, in those circumstances, it would not seek to adduce witness evidence."

So that suggestion that the OFT might have wished to call evidence, but considered that it was precluded or restricted from doing so by the history of the Tribunal's case law, has never been mentioned until

today. That's the context in which my application was made, that the explanation that is now being given by the OFT is different from the explanation that it has given earlier.

Sir, so far as the question of relevance, necessity and proportionality is concerned, it is going to be my submission, indeed it already has been my submission and it will be my submission again in reply, that in the light of the OFT's failure to call the witnesses that it interviewed during the investigative process, in particular David Storey from Asda and Sarah Mackenzie from Sainsbury's, it would not be open to this Tribunal to draw an inference against Tesco that either Sainsbury's or Asda had the requisite intent in these chains of transmission of information, because it will be my submission that it would be procedurally unfair for the Tribunal to draw such an inference in circumstances in which the OFT had available to it the interviews of those witnesses and the power to call those witnesses but chose not to do so.

I will be making that submission as a matter of principle and, in my submission, it is therefore clearly relevant and proportionate to ask the OFT to provide the material to show why it took that decision and why it is now advancing an explanation for its failure to call

evidence which is inconsistent with the explanation it gave in its pleaded case and in its skeleton argument.

I also make the point, first, that the OFT at no stage asked Tesco whether Tesco would object to the admission of fresh evidence and, secondly, that at the case management conference, and the transcript we've just looked at, Mr Morris said that the evidence that the OFT was considering calling was rebuttal evidence, and under Napp, of course, such evidence may be called by the OFT.

So, sir, we say there's no reason why the Tribunal can't consider this application today. The issues are, we say, simple and straightforward. This application is not being made late, it's being made at the first possible opportunity, because this is the first time that this explanation has ever been put forward by the OFT, and we invite you to allow it.

LORD CARLILE: Thank you. We'll retire to our retiring room for a few minutes just to deal with this matter, consider the matter.

(2.23 pm)

(A short break)

(2.35 pm)

JUDGMENT

LORD CARLILE: During the course of argument this morning,

Mr Morris, Queen's Counsel for the Office of Fair Trading, submitted that the OFT had made a deliberated and careful decision not to call or even interview certain potential witnesses. These are individuals whose names feature in documents on which the OFT places reliance.

Mr Morris emphasised two reasons for the OFT's decision in addition to those that are fully pleaded. One, that the OFT might well have been refused permission to call the witnesses on the grounds of impermissible bolstering contrary to legal authority and, two, that the husbandry of public resources made the OFT's decision reasonable given the content of the documents.

Putting the matter at its lowest, the arguments by the OFT were considerably broader than their pleaded comments on this issue.

Miss Rose, Queen's Counsel for Tesco, now applies for specific disclosure of the internal documentary trail leading to the decision in question. The Tribunal bears in mind the overriding objective. We have concluded that Miss Rose's application should be rejected. In our judgment, the case can be disposed of fairly, relevantly and properly without such disclosure. In oral and/or written reply Miss Rose might be able to

avail herself of powerful arguments to deploy against Mr Morris' submissions referred to just now.

We are satisfied that the ongoing trial process will provide the appropriate method of dealing with the concerns expressed by Miss Rose without any prejudice to Tesco.

Right. Can we carry on now?

MISS ROSE: Sir, can I just make one final point which is, in relation to the question of permission to appeal, I would propose to reserve our position until we have the substantive decision because, clearly, the question of any appeal against that ruling would be parasitic on the substantive decision.

LORD CARLILE: We are happy for you to be a parasite for these purposes, Miss Rose, albeit out of character, if I may say so.

Yes, Mr Morris.

Closing submissions by MR MORRIS (continued)

MR MORRIS: Thank you, sir.

I was still in the evidence section, and what I propose to deal with next is the question of admissions. Our case on admissions, on the admissibility and weight of those admissions, is set out in detail at paragraphs 86 to 93 of our skeleton [Magnum]. That is there for you to read. I will be

taking you to the skeleton in a moment, but I don't propose going over that ground in detail and I would ask you to consider those submissions, which I'm sure you will in any event.

There are a number of points that I would like to make. I would like to deal first with the question of financial incentives. It's dealt with at paragraph 89 of our skeleton and, if I may, I would like to take you to paragraph 89 of our skeleton [Magnum].

You will recall that the suggestion is made by Tesco that a party that is admitting is acting on the basis of a commercial incentive to admit to an infringement and, therefore, that undermines any suggestion that there is an actual admission by the party admitting that what is alleged against them happened.

In our submission, at paragraph 89, we actually submit that the financial incentives in fact operate the other way. As we say there:

"By admitting participation in a concerted practice, the admitting party was admitting to participation in a very serious infringement of competition law, was making itself liable to a very substantial fine, a fine far in excess of the reduction upon which Tesco relies..."

You will recall that Tesco says, "Oh, well, they got

a reduction", but if they didn't admit and they didn't really believe it was true they wouldn't have a fine at all.

And thirdly:

"... exposing itself to a very substantial potential liability to follow on damages running possibly into millions of pounds."

That is not a fanciful suggestion, sir. As I'm sure you're well aware, both this Tribunal and the High Court is these days being increasingly occupied with follow-on damages claims. It is a very real prospect.

"In addition, it is highly likely, we say, that the admitting party as a major and well-known corporate enterprise would have substantial concerns about public relations implications of admitting participation. The reputational damage would be particularly acute in the supermarket sector where price competitiveness is at the heart of the public face of the main retailers."

You have heard evidence from Tesco that a reputation for being a price-cutter is at the heart of the public presentation.

"The admitting parties were legally advised at the relevant times. These considerations are powerful factors to suggest that a company is highly unlikely to admit something which it did not do, and those factors

far outweigh Tesco's reliance placed on the discount."

If I may, can I just take you to the Crest Nicholson case. Somebody is going to tell me which tab it is in. It is tab 13 which I think is bundle 2.

This is the judgment of Mr Justice Cranston, and you will recall that it is slightly different because it was a fast track offer. It's paragraph 68 that you've already seen.

LORD CARLILE: Just wait a moment. It's tab 13.

MR MORRIS: Of bundle 2.

LORD CARLILE: Sorry, yes, we have got tab 13.

MR MORRIS: If you go to paragraph 68 on page 921 [Magnum], what you will find, sir, is that paragraph 68 is the paragraph that Tesco rely upon to support their proposition that the decision to make admissions is a commercial decision, and that was:

"The advantage of securing a penalty reduction, should they be liable, outweighed any reputational damage."

That was an argument that the OFT, as Miss Rose fairly put, made to the judge.

You were taken to 68, but you weren't taken to the next paragraphs where the judge dealt with that argument when he said the argument was unattractive:

"A response to the Fast Track Offer was obviously

a commercial decision. However, it involved asking parties to admit liability for serious infringements of the Competition Act 1998. Infringement proceedings under the Competition Act 1998 are of a quasi-criminal nature ... As I have said there is potential damage to reputation. Moreover, a condition of the offer was that a recipient agreed to forego any right to deny liability or make submissions on the contents ... In my judgment, fairness does not countenance a situation where someone who reasonably believes that they are not liable for wrongdoing can be pressured into admitting to liability in this way. As a matter of procedural fairness enforcement authorities must not be able to compel admissions by parties so they blindly admit guilt ...

"Associated with the OFT's 'commercial decision' argument was its contention that acceptance of the Fast Track Offer was voluntary and that parties were free at any time to withdraw from the process. Thus there were no breaches of any principles of public law. Withdrawal was not mentioned in the Fast Track Offer itself, although it was made explicit in the Statement of Objections. At one point in its submissions the OFT seemed to suggest that the Fast Track Offer could simply be resiled from at any time without consequence ... For my part I thought that suggestion was belied by the

context and lacked logic. If the Fast Track Offer could simply have been resiled from at a later date with no consequences it would have been open to any recipient to have purported to accept it, and then waited for the [SO] and decided to withdraw ... Crucially, any withdrawal from the Fast Track Offer was not costless. Acceptance of the offer would have had evidential value and the OFT, as it now accepts, would have been able to rely on it.

"In my view, the key point is that acceptance of the Fast Track Offer was not something without legal import. Acceptance was a commercial decision, but a commercial decision with significant legal consequences. Even if withdrawal was a possibility, a party could not in practice have withdrawn its admission because it would have suffered from the fact of having made it. Neither the commercial nature of a decision to accept the Fast Track Offer nor any ability to resile from doing so, lessened in my judgment the duty of the OFT to act fairly and to observe the principle of equal treatment."

The point there is that this is a decision of legal significance, and the recognition that those admissions contained in an acceptance of an offer would have evidential value upon which the OFT can rely.

LORD CARLILE: Against whom?

MR MORRIS: Well, I'll come to that in a moment. We say we can rely, and it is evidence that can be relied on in this appeal, and we say that the European authorities established that it can be relied upon as against another party to the concerted practice. We accept, of course, it is a matter of weight and we accept, of course, that it is a matter where it is corroborative evidence, and that's what the European court authorities say. But we do not accept the proposition that they cannot be relied upon at all as against another party to the concerted practice.

That you will find in our skeleton at paragraph 93 [Magnum], and that is the case of JFE. We say that that case law establishes that the admissions can be relied upon. They can be relied upon as evidence as against another party. They can constitute proof where they are supported by other evidence:

"The admissions are detailed and specifically directed at the comprehensive evidence put to the admitting party, and are themselves corroborated by the strong documentary evidence."

We also say this, sir, that whilst criticisms were made of what the party was admitting to, these admissions are not pro forma in the sense of, "Please sign on the dotted line", because if you look at the ERA

itself, they refer specifically in the annex to the statement of objections. The statement of objections, and I can't remember, is a very substantial and lengthy document with detailed allegations. This is not a question of "Did you or didn't you do it?" It is, "Here are the allegations we make, they are detailed in the statement of objections, look at them, and then it's up to you whether you wish to sign an early resolution agreement"; coupled with the opportunity to make material factual corrections.

In those circumstances it is our submission that -- and this is in fact effectively paragraph 87 of our skeleton -- that they are -- this is 87 [Magnum], I think I may have said 78, line 4:

"It is clear from the terms of the ERA, including the appendix, that the infringements refer not simply to their summary description in the appendix but to the underlying facts and reasoning set out in the detail of the statement of objections".

I can take you to the ERA if that would assist, sir, but in the footnote what we point out is that what is being referred to is a decision in terms of the statement of objections, and the words in the appendix are "the following initiatives described in the statement of objections". So it is a detailed case put

to the party and, by entering into the early resolution agreement, that party is admitting liability for all parts of the infringements and all the material facts relied upon in the statement of objections, save to the extent that they have the opportunity to make factual corrections, and we have seen how, in one instance at least, those corrections were made.

Now, it was suggested by Tesco in its closing that the Tribunal could not conclude that each admitting party had carried out internal enquiries such that it was satisfied that all the elements of the case alleged by the OFT were well-founded on the facts. In our submission, that is not -- that is a submission which is not well-founded. There is no explicit requirement in those circumstances for any particular steps to be taken by a party before it makes its admissions, so, in particular, there is no necessity for an admitting party to carry out its own internal enquiries by interviewing its employees or former employees.

Indeed, we suggest that the nature of the documentary evidence, which will have been presented with a statement of objections, is such that the party may well have been satisfied without needing to speak to the employees.

Can I just give you some examples. In relation to

McLelland, the position is that we know this much. Interviews were conducted because of an ongoing breach of warranty claim, however, because McLelland's lawyers, Salans, asserted legal privilege over those, it is not possible to know precisely what took place. We understand that in any event Mr Ferguson was involved in those enquiries.

MISS ROSE: I'm sorry, that was never put to Mr Ferguson, and it's certainly news to me.

LORD CARLILE: I think it was news to me as well. It may be somewhere in the papers, but I had certainly not registered that interviews had been conducted by Salans.

MR MORRIS: I'll come back to it, if I may. I thought it was in the materials ...

LORD CARLILE: It may be, but the first I recall hearing of breach of warranty was when it was mentioned in the course of evidence.

MISS ROSE: Mr Irvine.

It was certainly never put to Mr Ferguson that he had been involved.

LORD CARLILE: Well, somebody can check.

MR MORRIS: I think the point was raised in Mr Irvine's cross-examination.

LORD CARLILE: It was certainly mentioned during Mr Irvine's cross-examination. My recollection is that Mr Irvine

told the Tribunal that he was pretty fed up because he hadn't had an opportunity to deal with the matter and had been faced with a breach of warranty claim.

Is that right?

MISS ROSE: It's correct, sir, and that was not challenged by the OFT.

LORD CARLILE: No. That's my clear recollection.

MR MORRIS: We will revert -- we will come back on it.

There is then the Morrisons letter which was relied upon at paragraph 67(b), and I'm trying to run through these points, if I can. We submit that letter doesn't demonstrate that enquiries had not been made of Safeway employees. The letter states:

"Morrisons is not able to secure the cooperation of Safeway's former directors, officers, employees or agents, and that the retained Safeway documents and email archives have been reviewed by Morrisons as the then owner of Safeway. This does not mean, in our submission, that Morrisons had not satisfied itself by its own internal enquiries, including the review of the Safeway archive, that the facts and matters set out in the SO were correct."

LORD CARLILE: I think the point that's being made by Tesco at paragraph 67(b) was that enquiries had not been made of Safeway's employees. This is a section 4 analogous

point.

MR MORRIS: Well, it is, but we would suggest that if they had not been made, that does not mean that they had not conducted enquiries as to whether they considered the material to be probative or not. It may or may not be that an individual company didn't go and talk to the particular employees, but nevertheless, in our submission, the submission that's being made is that they just didn't look at it and they signed it willy nilly, it was a totally commercial decision.

In our respectful submission, let's leave to one side the question of Tesco specifically. There are documents in this case in relation to other people which are, in our submission, highly probative and, in those circumstances, we would suggest that the decision that a company takes, given all the incentives which I've just referred you to, and given all the material it will have been shown, would have been a serious considered decision and there is no reason to suppose that the admitting party had not done its own enquiries, looked at the material and taken a decision based on its assessment of what had happened based on those documents.

Now, some may have spoken to particular employees, some may not. Some plainly did. Glanbia, Asda and

Dairy Crest plainly did, and they took their decision based upon that. But the mere fact that Miss Rose points out that, well, one company didn't go and talk to an employee, does not, in our submission, undermine the weight or strength of the admissions being made by the company having made proper enquiries.

LORD CARLILE: Has there ever been an instance in which an ERA was withdrawn as a result of the failure of a company to seek the assistance of potential witnesses?

MR MORRIS: I will have an answer for that in a moment. We need to check.

LORD CARLILE: Thank you.

MR MORRIS: Now, the next point that is made is that, well, there was a variation, and the OFT sort of withdrew the admission they had made, and that shows that this was all effectively a game and people were admitting something and then not admitting something. That, in our submission, is an improper characterisation of what happened when the variations were made. It's paragraph 91 of our skeleton [Magnum].

What happened, as you will recall, is that the Office of Fair Trading decided not to proceed in relation to milk 2002 and milk 2003 in relation to Tesco. In those circumstances, the case did not proceed. It must therefore have followed that it was

necessary to modify the terms of the early resolution agreements.

The OFT is not saying, and has never said, that the conduct did not occur, it has accepted that it did not have the evidence in order to establish the case that it was making. What then happened was the OFT narrowed the scope of the case that was being made and, accordingly, there was a need to vary the scope of the ERAs. The fact that the admitting party then changed the nature of their admissions in the terms of that agreement does not, in our submission, indicate that they, having admitted something for form's sake, were then withdrawing it for form's sake, and nothing -- and that indicates that the admissions, the original admissions, and any admissions, are not worth the paper they're written on.

If the case being made against somebody is narrowed, then it follows that the response to that case, from the party against whom the allegation is made, will also be accordingly narrowed. The OFT did not believe in relation to those aspects that the admissions alone, alone, were sufficient to establish an infringement and so, for that reason, didn't pursue the matter.

Can I make two further points on admissions and they are these. First, you will note that in this case every

party other than Tesco involved in these two initiatives has admitted its involvement. Secondly, we would point this out to you, we are sure that you are aware of the fact that signing an ERA does not prevent a party appealing against the decision. It does not bind you for all time, and if you wish to change your mind you can do so. An ERA party is still able to bring an appeal against the decision, and you will also be aware that, in the Tobacco case, that is precisely what Asda did. No party has done so in this case and it was open to them to do so.

Now, the next topic I would like to deal with on the evidence, and I'm going to deal with this briefly because you're well aware of it, is how the Tribunal should assess the balance between documentary and oral evidence. The principles are well known and they are addressed in detail by the Tribunal in that judgment in Kit at paragraph 286 to paragraph -- my reference is 299 [Magnum], and we deal with this in our defence at paragraph 24 [Magnum], dealing with the importance of documentary evidence.

I don't need to remind you, sir, of the importance of documentary evidence in the context of cartel cases. But we would say this, that in any case, in any case, given issues about witness recollection, it is often,

and we would say importantly, a good starting point to start with the objective facts that can be seen from the case. So you start with the common ground, and then you go to the documents because the documents speak for themselves. It doesn't mean that, obviously, you don't weigh everything in the balance, but documentary evidence in any case is powerful evidence and, in our submission, in the present case, documents written at a time before -- perhaps in an unwitting way, contemporaneously, may well be, and we would say are, evidence of great weight to be taken into account. That is why we put our case on the documents.

Now, you may say, well, on the one hand you've got the word of the witness against a document, but the situation is that documentary evidence is powerful and important and, in our submission, contemporaneous documents are materials that should be given great weight to.

The Tribunal at 312 in the Toys case [Magnum] said:

"The correct approach is for the Tribunal to give weight to contemporaneous documents unless there is good reason not to do so."

Now, the next topic, before I come to looking at the oral evidence in this case, is I want to just return to a point which we -- I do wish to make, and it is this.

You have considered, and will continue to consider with care and specificity, the Office of Fair Trading's conduct in relation to witnesses. That is an issue which is well before the Tribunal and you have made your indications very clear about your concerns about it.

But we do say this, that the Tribunal should also consider Tesco's position as regards witnesses. The old adage: no property in a witness. Of course we take into account the position of the OFT as the body that brings the case in the first place and the powers that they have and they don't have, but if we leave that for the moment, I've dealt with that. What is the position as regards Tesco?

Now, when you first made your observation about Mr Meikle at Day 10, page 72, you observed that Mr Meikle had not been called by either party. With respect, we do submit that it is legitimate for you to enquire as to why Tesco itself has not called evidence from certain witnesses. That goes both to the question under section 4 and any issue that continues to concern you in relation to the Polarpark line of authority.

At various points in its case which it presents to this Tribunal, Tesco positively relies upon documents emanating from and statements made by particular individuals. In particular, throughout this appeal,

Tesco has positively asserted reliance on witness interview notes. That's the first aspect. The second aspect is that it also positively relies on documents written by Mr Meikle.

Specifically, just to give you some examples, it relies upon document 103 [Magnum], which is the document -- the paragraphs you will recall concerning the Seriously Strong issue. Some considerable reliance has been placed throughout the course of this appeal by my learned friend on that document, and it also relies on other aspects of emails that he has sent for their own particular meaning. Thirdly -- as regards the witness interviews, Mr Arthey, Mr Haywood and Mr Beaumont it relies on extensively.

Thirdly, it relies positively upon statements recorded to have been made by Mr Hirst at the Tesco supply group meeting. For your note, you can see that reliance at paragraphs 75, 76, 78, 172, 174 and 179 of the written closing.

Tesco is and would have been able to adduce any evidence it wanted from any witness. It did call witnesses from ERA parties, but the OFT does not know why, for example, Tesco chose not to call Mr Hirst, not to call Mr Arthey, not to call Mr Meikle. That's a particularly relevant question in respect of Mr Hirst

in circumstances where, at the administrative stage, he had put in a witness statement.

These individuals may or may not be the individuals to whom Tesco spoke in 2011 as referred to in Freshfields' letter of 27 July. But both in the context of section 4 of the 1995 act and the Polarpark case, the Tribunal has expressed interest in knowing the reasons why the OFT has not called particular witnesses, and we would respectfully submit that, insofar as Tesco is seeking to rely upon hearsay evidence from those witnesses, then Tesco should also explain why it has also chosen not to call those witnesses.

If the Tribunal is concerned about weight and inferences, we submit that in respect of the material that Tesco relies upon the same considerations should apply.

Can I now move on to the question of the assessment of the oral evidence that you have heard before the Tribunal, and I would like to make some brief observations. Of course, sir, you are a very experienced Tribunal, you have heard and seen the witnesses and, in some ways, one hesitates before trespassing because --

LORD CARLILE: Feel free. It's always helpful.

MR MORRIS: It's a matter for you ultimately but I would

like to make these observations. Can I first of all make some general observations, they are perhaps trite but I will make them nonetheless.

First, full and true recollection of events is rare indeed, particularly in relation to events a long time ago. I don't know the science behind it but I do recall hearing recently about passage of time, and there's some... but I had better not give evidence so I won't say any more.

I make the general proposition that full and true recollection is a rare event. Recollection is likely to be partial only, first point. Second point, recollection may well be mistaken. Trite, you can't get much more trite than that.

But just as an illustration, we have the example of Mr Ferguson and Mr Scouler plainly having different recollections of who chaired the Tesco Dairy Supply Group meeting. Both were clear in their evidence of their recollection but it appears that one of them must have been mistaken. That's the first point.

The second point, again familiar but one that is very important here, is that there is a distinction to be drawn between recollection and reconstruction. Reconstruction arises where there is no actual recollection of the event but rather the witness

constructs in his or her own mind what must have happened without actually having the actual recollection. So, for example, you're reminded of a document or something which happens and you work out in your own mind, "Well, that must have been what happened".

LORD CARLILE: I think psychologists call it confabulation.

MR MORRIS: I'm grateful for that indication. Can I use "reconstruction"?

LORD CARLILE: You can.

MR MORRIS: There are too many new words arising in this case and I can't really take them all on board.

In my submission, recollection is most likely where there is a particular aspect of an event which acts as a spur or trigger to the memory. For example, perhaps, although we didn't explore it, when it was put to Lisa Oldershaw that she had document 64 in front of her when she made the phone calls of 30 October, that might have been an example of a trigger which would cause her to actually remember.

We also had, I think, when I asked people about evidence about how the office was laid out, and I think Ms Smith did the same, you started getting a picture from the witness of what was happening in the office because it was triggering a specific memory.

Nevertheless, we would suggest that given the lapse of time in this case, much of the oral evidence you have heard has been based on confabulation rather than clear recollection.

The final and general point is this, a witness -- and this is a very important point in this case -- may genuinely believe that his or her recollection or, more likely, reconstruction is correct, and yet it may in fact be wrong. Most particularly, and we would suggest frequently, a witness may have convinced him or herself of the truth of the recollection or reconstruction in circumstances where it is actually inaccurate. There may be many reasons why a witness has done this, amongst them would be a desire for the witness to avoid recognising that their conduct may have been something which is open to criticism. I call that defensive reconstruction, defensive confabulation.

If we then apply that, Miss Rose says that in order for the Office of Fair Trading to succeed in this case, the Tribunal must find, and I will be interrupted if I'm not quite deliberately quoting, but this is... must find that Ms Oldershaw was deliberately not telling the truth when she gave her evidence, and she further submitted that, in the circumstances, that was hardly likely.

In our submission, that submission is not correct.

It is not the case that the OFT can succeed only if you were to find that Ms Oldershaw was a dishonest witness. For the reasons I've just given you, you may conclude that although Ms Oldershaw genuinely thought what she was recalling was correct, it was in fact not correct. The reason why it was not correct is that she had wrongly convinced herself of the truth of her recollection.

Now, why would she do that? Miss Rose in submission referred to Ms Oldershaw's personal circumstances, you will recall, and made some submissions based on the fact of why on earth would she go out of her way to give evidence in this way before the Tribunal? She mentioned her personal family circumstances and the like.

However, I would remind you of the following. First, as a senior buyer for cheese at Tesco, and given the responsibility for setting costs and retail prices, Lisa Oldershaw plainly occupied a position of very substantial responsibility at Tesco at the time. Without making any observations -- well, without making any observations based on a foundation of particular fact but rather an observation of Ms Oldershaw, it is likely that she had that job at a relatively young age. This is ten years ago. I've no idea how old Ms Oldershaw is but it was a position --

LORD CARLILE: Young by our standards.

MR MORRIS: I will agree. I was going to resist but nevertheless.

LORD CARLILE: Mr Morris, forgive me for interrupting you, but both Miss Rose and you have had a decent go, and I use your word, at some pretty trite witness psychology. The issue for us was, was the witness correct or incorrect, really.

MR MORRIS: Yes, I'm grateful for that.

LORD CARLILE: There can be a myriad reasons.

MR MORRIS: But I have to respond -- of course Miss Rose is going to say that you've got to find she's deliberately untruthful or else the case collapses, and I'm saying you don't have to do that.

LORD CARLILE: If it helps you, we have the point about balancing witnesses and their reasons for saying things, and there's no jury present.

MR MORRIS: Yes.

Can I give you some examples of where we say her evidence was not reliable and is indicative of the fact that we suggest that her evidence on crucial aspects should not be relied upon. I will probably -- there's a danger of repeating because a lot of these points go, of course, to the substance as well. The first and obvious is her explanation of document 63 [Magnum], and why she

was telling all the processors at one and the same time about cost price increases for products which processors did not supply and, most particularly, that she was telling Neil Arthey about numerous categories of cheese which Dairy Crest didn't supply.

The only explanation she could give for this was that it was inadvertent, and that was -- inadvertent in her witness statement was referring "I did it inadvertently". But when -- and I will probably come back to the references when I come to the substance of it. When she was pressed in cross-examination, she could not explain whether the mistake was one she had made at the time, or whether she was saying it was only later that she had made an error. Her explanation, we would submit, at Day 9, pages 84 to 85 was not a convincing explanation as to how that mistake came to be made.

Secondly, in cross-examination, she insisted on sticking to her evidence that the Dairy Crest briefing document was a proposal for a cost price increase, that's Day 8, pages 89 to 90 and 93. She would not even accept that there was in that document a suggestion of retail price increases in circumstances where, we submit, it is obvious from the document that that was the case.

Thirdly, on Day 8, pages 140 to 144 and 151, you will recall that, in relation to document 52 [Magnum], we had the debate about what the 4th and 11th means, you recall that? Her evidence was, "This was me having told --" I've gone blank for a moment -- "Tom Ferguson that these were Tesco's proposed dates for their price increases". I put it to her on a number of occasions that that can't have been the case because at no stage anywhere was it ever suggested by anybody, Tesco or otherwise, that they would be moving their deli prices on 11 November. If you recall in that passage of cross-examination, she said, "Well, can you give me a moment to look at document 64 [Magnum]", and I think we had a break, and we came back and I asked her again whether there was anything in the documents, and eventually she accepted that there was no evidence whatsoever that she had ever proposed the 11th as a date for Tesco's deli price increase.

Fourthly, her initial evidence was that, in general, when Asda went up on Smart Price, she would raise her prices quickly on Value. That was Day 9, page 138 and page 159. I then came back to the topic on Day 10 when I referred her to, I think, document 10 [Magnum] in the bundle, which showed that in at least two instances she had been lower on Value than Smart Price, not for

a matter of days or even weeks but for 40 weeks.

In those circumstances, what I suggest is this, that she was very good at making bland assertions -- "bland" is the wrong word -- general assertions about what the position was, but when it was probed and she was confronted with concrete evidence, she was required and forced to step back from the general proposition.

The final point I make just in this run-through is, we would submit, her refusal to accept that any information she ever received about other retailers' pricing intentions would be of any interest to her. In our submission, that was just not credible evidence, not least because when it was put to her that she had -- it was put to her that if she had been told that the other retailers were not going to participate, that would have been of interest to her.

We do submit that, given the circumstances in autumn 2002, her blanket refusal to accept that the information she received about what other retailers would be doing would be of any interest to her is not credible and should not be accepted. Now, of course, that goes to the substance as well because it goes to the speculation argument, but we submit that what she was doing there was that she knew that was a difficult point for her and she had convinced herself that that was something -- she

had convinced herself that she would always blanket refuse to acknowledge that this information was of any interest to her, and we submit that that is just not credible on the facts.

LORD CARLILE: We're going to have a short break, a very short break, and I'd remind everyone that we're sitting until 4.15 but not beyond today.

MR MORRIS: We're aware of that. Can I ask this, given the time that has arisen today on various matters, I don't know what the Tribunal's plans are in terms of starting on Thursday, but if the Tribunal were able to start some time before 10.30 that would assist me.

LORD CARLILE: We will try to start at 10.00. I have a medical appointment which I think is at 9.00 somewhere near Euston Station, so we can start as soon as I get here, with a target time of 10.00 but it may be 10.15.

MR MORRIS: I'm grateful.

(3.20 pm)

(A short break)

(3.32 pm)

LORD CARLILE: Yes, Mr Morris.

MR MORRIS: Thank you, sir. I have made some observations about Lisa Oldershaw and I now wish to make some observations about Mr Scouler.

In our submission, his evidence did not in the main

assist the Tribunal much further. We would suggest that his evidence was vague, that he frequently -- and I haven't counted up, but something I was going to do -- he frequently said when something was put to him that he had no recollection. His evidence about the DSG, it seems that there was little actual recollection. Given that poor recollection, the Tribunal may consider that his oral evidence doesn't really add much.

But more than that, we would submit that at times he too had convinced himself of things which were, in our submission, plainly not correct. I give you two examples, although they're interrelated and I'm going to develop that a little bit in a moment. But his evidence about suggesting -- that Tesco were suggesting to processors that they should absorb the 2p per litre was unreliable and not correct, and I'm going to develop that in one of my general points in a moment. And very specifically, on the suggestion that the increase should only be £180 per tonne, Day 11, page 129, where he sought to suggest that in the context of the 2002 initiative he could have negotiated a cost price of 180 rather than 200, was itself not credible or reliable evidence.

Then on Day 12, at pages 16 to 19, he was asked repeatedly whether he or anyone had ever suggested that

the cost price increase should be £180. In our submission, he was consciously at that stage avoiding the question until eventually he had to accept this had never been suggested.

You will also recall the incidence at Day 12, page 12, where he gave an answer, and that's one item(?), which made no sense in relation to the question that was asked. We would submit that he didn't assist and he was avoiding the difficult questions that arose.

Mr Reeves, who now seems quite a long time ago.

LORD CARLILE: The first witness.

MR MORRIS: The first witness, Day 5, I can't tell you what day of the week or date that was, somebody else will. We would suggest Mr Reeves was in general an honest and straightforward witness and that in the main the Tribunal should accept his evidence.

You will recall that his answers were brief, frequently brief, "yes", "no", when things were put to him. He was trying to be helpful, and an illustration of that is that he clarified the situation in relation to document 29A [Magnum]. I don't know if I need to remind you of what that document is.

Do you remember there were two slide presentations, and I have to say that I was always baffled by which was which and which had been presented at the meeting. I'm

now getting confused myself.

There's 29A, which is the staggered cost price increase document.

LORD CARLILE: 29A was presented by Mr Reeves to the Dairy Crest sales team.

MR MORRIS: Yes, at a much earlier meeting. What he disclosed, just to remind you, is that if you go to document 28 [Magnum], you will see -- this is some context. That's a very important document in this case, we say. That is the internal cheese price increase meeting of 24 September, and I think it appears that that was the second meeting, because if you go to paragraph 4:

"These matrices to be presented to cheese price increase meeting number 3 held on Tuesday 4th October..."

My understanding is that 29 [Magnum] is a document that was presented at that meeting. But he then gave evidence that 29A was a document that had been presented earlier in the process, and he revealed the fact that there had been an earlier, presumably cheese price increase meeting number 1, which I think he put at some time in the middle of September, and that then put in context why the statements in 29A were of a much more general nature. My recollection is that that document,

29A, came before the Dairy Crest briefing document, whereas the meeting, document 28, came after it.

He gave clear and useful evidence about the nature of the Dairy Crest proposal. Now, the main point in his evidence upon which Tesco rely is his evidence that there would be bluff and bluster from the processors when giving pricing information. We would suggest that when it came to giving evidence on that aspect, Day 5, pages 107 to 109, he was naturally reluctant to depart from what he had said previously about this in his witness statement.

We would suggest that, at one stage, when it was put to him by Ms Smith about the bluff and bluster and that he couldn't be correct, he used the words along the lines "I think I want to stick with what I said earlier". Now, it's a matter of impression but, in my submission, it's a slightly odd way of explaining or putting why he wouldn't accept, indicated a reluctance to accept or to be seen to accept what was being put to him about the bluff and bluster issue.

Nevertheless, it is important to note that, ultimately, he accepted that in relation to Neil Arthey's email of 4 November, that's document 69 [Magnum], strand 5, same bundle, just to remind you, he accepted that that, which is the:

"My understanding is Tesco will be applying £200 per tonne."

He accepted that in the difficult pressurised circumstances of autumn 2002, Dairy Crest had stepped over the line into anticompetitive behaviour. We would suggest that was an honest answer and actually a revealing answer as to what was going on.

Mr Ferguson, we would suggest, was an unsatisfactory witness. He was evasive and he was defensive. His credibility, we would submit, was substantially undermined, if you go perhaps back to document 47 [Magnum], when he sought to deny what was clear on the face of the document and, in particular, paragraph 1:

"Seriously Strong pre-pack will move on costs and retails from the 21st of October."

It is document 47, Day 6, page 22, where he sought to suggest that the reference to the words "and retails" were not what Sarah Mackenzie had told him but were simply his market assessment, when it is clear on the face of the document that that is what he was saying Sarah Mackenzie had told him. You will remember there was a passage about, well, it's all to do with the language.

We would also point out that his original witness statement made no reference at all to document 47, and

we would submit that that is, at the very least, an oddity. What we suggest is that the reason document 47 was not dealt with in the witness statement, even in circumstances where the beginning of his witness statement actually acknowledges that he had seen that document, is that it was indicative of the fact that he knew all too well that this was future pricing information that he had received and which he had passed on and that he had no positive answer to document 47.

Document 52 [Magnum], we keep coming back to the same documents, I've gone over the page, it was put to him that there was no reason for Sainsbury's to have told him the prices of Seriously Strong, that's the last sentence, where it was put to him that "branded pre-pack" must be a reference to Seriously Strong, and that was fixed weight. When it was put to him that there was no reason for Sainsbury's to have told him that information, he suddenly suggested that the reference in the email to "branded pre-pack" must have been a reference to random weight Galloway. That had never been suggested before and was clearly inconsistent with document 51A [Magnum]. Then at Day 6, page 64, he eventually had to accept that it wasn't and couldn't be a reference to Galloway.

Finally, at Day 6, pages 70 to 72, he completely

refused to give a straightforward answer to questions when he knew the answer would be unwelcome in relation -- these are questions posed by you, sir, as to his motive for sending document 52.

Finally, Mr Irvine. One may take the view that Mr Irvine regarded himself some way as a player, an important person in the industry. It is plain from document 33, there's an indication in document 33, that he was talking to other processors, certainly Glanbia, and document 33, paragraph 2 [Magnum]:

"I had a further lengthy discussion with Alastair Irvine on the same subject."

Indicating that there had been perhaps another discussion. But in any event, he was in contact at least with Glanbia.

He gave his evidence by way of rather long answers and, in that way, often didn't answer the question being asked and was not prone to giving a straightforward answer. Nevertheless, we do submit that he gave evidence -- he did give evidence which was honest, and some of his evidence, perhaps unwittingly, rather gave the game away. So, for example, at Day 7, page 82, he recognised that in 2002 McLelland was seeking to create an environment where retailers would be happy to put up their prices.

Similarly, Day 7, page 78, where he referred to the idea of creating a sort of general consensus. And Day 7, page 81, where he suggested that actually the cost -- Tesco didn't need much persuasion about the cost price increase because it was in fact their idea.

In 2003, he accepted that McLelland was following a strategy that suggested a total market move, Day 7, page 112, and were trying to obtain a safe scenario for everybody to put their prices up, Day 7, page 114. He thought that there was nothing wrong with giving Tesco general information about what other retailers were doing and, in our submission, he was unable to draw the line between acceptable and unacceptable behaviour.

So those are the observations I wish to make about the witnesses and their general reliability.

What I propose to do in the remainder of this afternoon is make some points. I'm going to move now to the facts, but I'm going to make some points about general issues that have arisen rather than deal with the specifics of each of the infringements which I will deal with on Thursday morning, perhaps at a canter, because you're very familiar with each of the strands by now.

LORD CARLILE: By then we'll have your document.

MR MORRIS: Yes, that is true.

Can I first of all deal with a point which was raised in questions and was in fact also put in Tesco's written closing. This is the question of the possibility of price rises without collusion, which was a question that you raised quite a long time ago now.

At paragraphs 108 and 109 of its written closing, Tesco claims that the logic of the Office of Fair Trading's position -- I don't need to take you to it, I'm just giving it to you -- is that in this case:

"It would be impossible to achieve a retail price increase for cheese, or almost any other product, without unlawful coordination."

Let me state here and now that this is not the Office of Fair Trading's position. The position is as follows. First, there are certain features of the grocery market as a whole which gives rise to a risk that, in general, cost price negotiations may result in the coordination of retail price increases. These features are that the market is relatively concentrated, transparent and competitive on retail price, as reflected in the KPIs and, in particular, the basket policy.

That position, far from being unsupported by expert or factual evidence, is entirely consistent with and supported by the detailed findings of the Competition

Commission in its report dated 20 April 2008, so this is the second report, on the supply of groceries in the UK. That report is actually in bundle 6 of the materials before the Tribunal.

I don't propose taking you to that but I would like to give you the references and we do invite you to consider that. But there, at paragraphs 8.1 to 8.41, the Competition Commission considers the possibilities and risks of collusion in the market because of the way of, the nature of competition operating. You will see that they distinguish on the one hand between -- maybe it's worth a quick look at it. I see, sir, that you're going for it. It's bundle 6, tab 1B.

I believe this is material that Tesco placed before the Tribunal, somebody will correct me if that was wrong.

LORD CARLILE: Tab?

MR MORRIS: Tab 1B. 1A is the 2000 report, 1B is the 2008 report.

We put it in, and it's referred to in the decision.

It's page 147 [Magnum], at the bottom of page 147:

"Coordination between grocery retailers. This section considers coordination between grocery retailers in the supply of groceries. Competition law draws a distinction between explicit coordination which we

refer to --"

It's double-sided, so it's at the top of the next one.

"... in this section as collusion and which includes cartel activity where parties agree to fixed prices, production levels, et cetera, and tacit coordination where competitors recognise their mutual independence and, as a result, compete less vigorously without explicitly communicating either directly or through third parties their intention to do so."

That, if I may say so, is a very succinct explanation of the distinction of things which are caught by the act which we're looking at and things which may be the subject of investigation by the Competition Commission.

"The structure of the UK competition..."

Then it deals with collusion first, which is active coordination.

At paragraph 8.10, it says this:

"Increased concentration in the grocery supply chain may make collusion more likely. The exchange of information between retailers via their suppliers is simpler when there are fewer suppliers of a particular product or category. We note that the alleged conduct identified by the OFT..."

Then that's a reference back to this case.

Then at paragraph 8.14, it says:

"Category management can introduce efficiency as a result of suppliers' better knowledge of consumer demand."

Then:

"Extensive use of category management may also bring about environments which could facilitate collusion between retailers and suppliers."

LORD CARLILE: This is oligopoly.

MR MORRIS: Yes, but the first bit of this is dealing with people -- it's dealing with this market, it's dealing with the risk -- the conditions of competition in this market are such that it carries a risk of active collusion, and that is what's dealt with all the way up to 8.19.

"Our review of emails between buyers at Tesco and Asda and their suppliers [this is 8.19] for the five-week period ..."

This is a completely different period. It shows supplier information, there are some examples where...

The point is simply this. We say it is not inevitable but we say that there are features of the market, and this is the answer to the question asked by the Tribunal, which make collusion more likely.

Now, specifically, structural features of the cheese market made a unilateral cost price and retail price move more difficult, especially if it was to be across the board. Specifically KPI targets which retailers give to their employees both to maintain margins on the one hand and not to be out of line on price on the other, the number of product lines and the time lag for random weight products to come into stores.

I'm going to come back in a moment to the issue -- the specific issue in this case about time lag and what the time lag was.

So what we say is that these features did not make a cost and retail price impossible without collusion, but they rendered an across-the-board unilateral retail price move on all cheese difficult and risky. When you add to that the exceptional circumstances of 2002, you then have a further incentive to coordinate because the buyers were under pressure to achieve their KPIs in the context of trying to implement a cost and retail price increase intended to subsidise a farmgate price increase, that's the first point, coupled with the objective publicly endorsed by senior management under the particular pressure from the farmers.

So in those circumstances, in 2002, that risk that there was was heightened by what was going on in the

particular unusual circumstances of the farmer protest and the management. Thus we say that a unilateral increase in prices would have been possible and open to retailers in autumn 2002 but it was an unattractive possibility. Conversely, collusion gave buyers a relatively straightforward and less risky means of achieving their KPIs when considering whether to accept the across-the-board increase on cost prices.

I'll add this further point, sir. I've dealt with the general situation, I've dealt with what happened in 2002. What about 2003?

Well, we say that the general structural features of the market made coordination plausible in 2003, even in the absence of farmer pressure, and it is further plausible that the coordination in 2003 was encouraged by what had occurred in 2002. The experience of 2002, we suggest, may well have affected buyers' and processors' behaviour and provided them with an easier method of achieving their KPIs in the context of the negotiations for a cost price increase.

Now, that is the economic and structural background. In any event, as we submit, for cheese 2002 and 2003, the evidence shows that, in fact, certain supermarkets were not acting unilaterally, and were taking their pricing decisions with the knowledge that their

competitors were also intending to increase their retail prices.

We say, contrary to what is said against us, that it is Tesco's arguments which prove too much. It appears that it is now Tesco's case that it is not inevitable that retail prices will rise if cost prices rise. This means that behaviour on the cheese retail market, and Tesco's behaviour in particular, is not entirely predictable in the face of a cost price increase. In other words, there was, I come back now all the way to the law, uncertainty as to what conduct could be expected, and it is that uncertainty which we submit was removed or reduced by the conduct of Tesco and the other retailers in 2002 and 2003.

Can I deal with two specific issues which are perhaps interrelated but I'll deal with them in sequence.

The first issue is the issue which I just dealt with in passing in relation to the £200 per tonne pass-through and Mr Scouler's suggestion. The other is this question about volume discounts and additional monies. In relation to the first, the Tribunal is invited by the Office of Fair Trading to find as a fact that at no time following the Dairy Crest proposal, made between 17 and 23 September, did John Scouler,

Lisa Oldershaw or anyone else at Tesco ever suggest to Dairy Crest, or any other processor, that the processor should absorb any part of the 2p per litre farmgate price increase. In other words, no one at Tesco suggested that it should not pay the £200 per tonne at all, or it should pay less than the £200 per tonne.

The evidence to support that finding is, in our submission, overwhelming. First, Lisa Oldershaw in her witness statement (sic) accepted that she recognised that eventually, given what was going on, she would have to accept the £200 per tonne cost price increase. That is Day 8, page 63, line 207, and Day 8, page 70, lines 19 to 25.

Secondly, when she was asked directly in cross-examination whether in the course of all her discussions with the processors there was ever any suggestion that the processors should absorb the 2p per litre, she replied:

"Not that I can recall, no."

That was consistent with her written evidence:

"I could not afford to accept this cost price increase without increasing Tesco's retail prices."

Now, pausing there for a moment, that paragraph in her witness statement, paragraph 66 [Magnum], is also of great significance when we come to this issue of the

additional monies, which I will come to in a moment. But that statement was her original statement in her witness statement:

"I couldn't afford to accept this cost price increase without increasing Tesco's retail prices."

Thirdly, if Tesco had ever suggested that it would not be paying the £200 per tonne cost price increase, that would have engendered a strong adverse reaction from the processors, and you will recall I put that to Mr Scouler in cross-examination. But given the nature of the entire proposal, based on pass-through, it would have been a matter of great concern for the processors if Tesco had turned round and said, "We're not going to fund it".

We submit that you should conclude that the processors would have felt aggrieved and might well have publicly sought to shift the blame for the failure on to Tesco. Given the intense pressure upon Tesco in the lead-up to Christmas, and given what the senior management had been saying publicly, we would suggest that that's a position senior management would not have been prepared to countenance.

It is for those reasons that we invite you not to accept Mr Scouler's evidence, where he sought to suggest that, in fact, there was -- I'll put it another way. He

sought to suggest that there was doubt about whether Tesco would have to accept the £200 per tonne cost increase, and we suggest that that evidence should not be accepted, and that there was never any suggestion by anyone that retailers would take a hit on -- sorry, a suggestion by anyone that the processors should absorb the £200 -- the 2p per litre.

Finally, there's no written evidence anywhere in any document recording that Tesco would not pay the full amount.

Now, against that background, the second point is this point about the additional monies. You will recall, I am sure, my questions about the three options, that when faced with what was going on, particularly once you accept that there was going to have to be a cost price increase, which we suggest Tesco recognised was inevitable, there were three options. You could not go up at all, you could go up first or unilaterally without being concerned about what everybody else did, or you could go up only when you had confidence that the others would go up too. I'm sure you will recall vividly that, when I put that to Ms Oldershaw, she didn't accept that they were the only three options.

We then explored the proposition that the -- the second option, which is the option of going up, being

out of line and having to come back down again, and the proposition which I put to Ms Oldershaw, that in those circumstances she'd be down by a lot of money. This was the 6 million or the 18 million or whatever.

Ms Oldershaw's evidence in cross-examination for the first time, and Mr Scouler suggested that that could be compensated for by bringing in additional monies to support any margin loss. These additional monies included some apparent direct cash benefit such as volume discounts, marketing budgets, promotional money, alterations to payment terms and some efficiency advantages, the idea presumably that those improvements would be available to set off against the notional net loss arising from the fact that you'd accepted a cost price increase across the board of £200 per tonne, which we will put conservatively at £6 million, and you go up, the others don't go up, and the basket policy makes you come back down again. These monies are the monies that, according to the evidence, would compensate for that £6 million net loss, I use the word "loss"; difference, shortfall.

MS POTTER: I don't know if you're going to come on to it, but it is interesting in the 2003 documents the comment that effectively on Seriously Strong the increase in cost price, net increase in cost price, was only £50 per

tonne once the volume overriders and other things had been taken into account.

MISS ROSE: It was only £8 per tonne.

MS POTTER: £8 per tonne.

MR MORRIS: I will address that.

MS POTTER: It might be useful to address that.

MR MORRIS: On the general proposition, however, this evidence about additional monies, we invite the Tribunal not to accept that this was a genuine reason, and was a factor which would have operated in the thinking of Mr Scouler and Ms Oldershaw once they had accepted the £200 per tonne cost increase across the board, and there is no evidence to suggest at the time it was.

In our submission, the net cost of between 6 and £18 million was such that it must have been a very material disincentive to Tesco raising its prices across the board without having any confidence or comfort that others would also raise their prices.

First, neither Lisa Oldershaw nor John Scouler had ever previously raised these additional monies as a relevant consideration in their deliberations about accepting the £200 per tonne cost price increase being proposed across the board in 2002.

There is no reference to these additional monies as a compensation in any contemporaneous documents relating

to the £200 per tonne increase proposal, nor is there any reference to them as a factor in their witness statements. The sole reference to such monies does come in paragraph 14 of Lisa Oldershaw's third witness statement [Magnum], and you will recall that, when I was at the point of the cross-examination, my learned friend pointed us to that paragraph.

That paragraph is a paragraph which is dealing -- nothing to do with the events of 2002, but is a general statement relating to how she would generally manage her KPIs. She says:

"Controlling the cost price of my products was the best way of managing my KPIs because retail prices were constrained by the basket policy. My margin KPI performance is particularly affected by how effective I was at negotiating with the supplier not just on headline cost prices but on a variety of other aspects like volume discounts and ways of enabling volume targets and hence cost discounts to be met. It was these issues which drove my relationship with cheese suppliers."

Our submission is that that is a general statement about -- in the section in her witness statement which deals with her normal cost price negotiations and is not evidence at all which is relevant to the considerations

that were operating in her deliberations and discussions in relation to the very different and, we would submit, abnormal circumstances of a £200 per tonne cost price increase across the board.

There is, in our submission, an enormous difference between an individual negotiation with an individual supplier about one or more individual lines of cheese, and a request for a cost price increase, and the horse trading, the normal horse trading that would go on when interests are not aligned. There's an enormous difference between that circumstance and the situation that we were in, in 2002, when it was £200 per tonne for every line of cheese from every producer.

Secondly, sir, the point that we make is this additional monies evidence arose in this context for the very first time in the entire case in the course of cross-examination.

You will then also recall that Ms Oldershaw suggested that they may -- these additional monies may have been worked out in her annual budget, and that was the first possibility. We would say that, if and insofar as those additional monies had already been included in the annual budget plan with a processor, before the acceptance of the £200 per tonne across-the-board increase, then as a matter of

mathematics or calculation, those sums had already been taken into account in Lisa Oldershaw's calculations that she made before accepting the cost price increase. The subsequent acceptance of a £200 per tonne cost price increase across the board, with no concurrent retail price increase, would have left Lisa Oldershaw between 6 and £18 million down on her pre-cost price acceptance plans as budgeted.

So that's what would happen if you tried to get the money back before.

What would happen if you tried to get the money back afterwards? The suggestion that following the acceptance of the £200 per tonne cost price increase Tesco would have made up this 6 to £18 million by going back to the processors and negotiating then for volume discounts or additional monies to make up the difference is, with respect, fanciful. That simply would not have happened. First, given the nature of the initiative itself, the processors would not have given back to Tesco with one hand what they had just received in the other hand.

In those circumstances, they would effectively be unwinding the agreement that Tesco was going to pay the £200 per tonne, and the reason they wouldn't unwind it is that every penny or every pound taken off the £200

per tonne would mean an equivalent reduction in the amount going back to the farmers, and the more that the processors were unable to meet the 2p per litre, or get close to it, the more they faced the prospect of renewed blockades.

Secondly, even if Lisa Oldershaw or John Scouler could have recouped some sums by negotiating particular discounts, perhaps on particular lines, with a particular processor, it is our submission that any sums recouped in this way would not remotely have gone to meet the overall shortfall running to in excess of £6 million. You will recall that Mr Scouler, when asked about that, indicated that anything above £5 million would be a very material -- or material, I'm not -- a material sum for Tesco's business. You will recall we had the whole debate about how many tonnes of cheese it actually was. But on Mr Scouler's evidence, it is plain that it was a material and substantial sum.

Now, I come back in that context, just to remind you, and I said it was important, of what Lisa Oldershaw says in her second witness statement before these questions about the loss of having to go up and come back down were put, and she says, quite plainly:

"I couldn't afford to accept this cost price increase without increasing Tesco's retail prices to

protect my margin."

She also says, at paragraph 95 [Magnum], that given the volume of cheese Tesco was selling at the time, making the wrong move to be very costly, even being out on retail price by 1 penny could cost millions of pounds. She made those statements, she made no reference to the so-called additional monies.

In those circumstances -- and I should add, as I've said, there is no suggestion in any document that there was a proposal at any time to the processors to the effect that they should agree volume discounts, or as a result of or in return for the £200 per tonne cost price increase under the initiative.

In those circumstances, we do ask the Tribunal to find that this additional monies explanation just does not make sense, and that to accept the second -- there were effectively three options, there was no(?) option 3B, 3C, 4, which is the additional monies, and the stark facts that were facing Lisa Oldershaw and John Scouler at that time were as we say they were, and that gave rise to very stark choices that had to be made, caused by the basket policy and the KPIs.

It is that sequence of steps which we say is very compelling evidence as to why Tesco chose to go with option three, which is to raise prices once they had the

comfort and confidence that the others were going to raise their prices too.

LORD CARLILE: That sounds like the end of a sub-topic to me.

MR MORRIS: It is, and it may be that that's the best time. I'm grateful for that indication.

LORD CARLILE: Thursday morning, as near to 10 o'clock as we can decently manage.

MR MORRIS: I'm grateful for that, sir.

(4.10 pm)

(The hearing adjourned until Thursday, 31 May 2012 at 10.00 am)

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