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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/1

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 April 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 –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 1)

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.

1 Thursday, 26 April 2012

2 (11.30 am)

3 **LORD CARLILE:** Miss Rose, I do hope the computer problem is
4 being resolved at least.

5 **MISS ROSE:** We still have no power so can I thank you very
6 much. I'm sure you can imagine my feelings at 7.40 this
7 morning when my opening disappeared and became
8 irretrievable.

9 **LORD CARLILE:** The thought of you with no power is
10 a contradiction in terms, Miss Rose.

11 Can I start by saying that I understand that there
12 is no dispute now about the amendment of the defence and
13 the permission to refer to documents.

14 **MISS ROSE:** Yes.

15 **LORD CARLILE:** It's quite another matter what weight is
16 given to documents.

17 **MISS ROSE:** That's correct.

18 **LORD CARLILE:** So we give permission to amend the defence
19 and we give permission to refer to the documents that
20 have been mentioned. I think that tidies that up.

21 **MR MORRIS:** I am grateful, sir.

22 **LORD CARLILE:** Is there anything else preliminary that we
23 need to deal with?

24 **MR MORRIS:** We don't think there is, no.

25 **MISS ROSE:** The one matter, sir, that is outstanding is we

1 have a request outstanding for the unredaction of
2 a portion of a document. I'm told that it will be here
3 later but we haven't seen it yet.

4 **LORD CARLILE:** If we have to decide on that we will, but we
5 won't at the moment.

6 **MISS ROSE:** No, I just wanted to flag it.

7 **LORD CARLILE:** Does everybody have LiveNote working? We
8 have Rhiannon and Linda who are dealing with LiveNote.
9 Rhiannon, please would you tell us if you need a break
10 at any stage because I know that it's very hard work
11 keeping LiveNote going.

12 Right, so over to you.

13 **MISS ROSE:** Yes. Sir, just to say I appear with Ms Lester
14 and Mr Piccinin for the appellant, Tesco. My learned
15 friend Mr Morris, I believe, appears with Kassie Smith,
16 Thomas Raphael and Josephine Davies for the Office of
17 Fair Trading.

18 **MR MORRIS:** Sir, Mr Raphael is representing the Office of
19 Fair Trading but there's going to be some coxing and
20 boxing and he is not here today.

21 **LORD CARLILE:** Right. Let me just put his name down.

22 **MR MORRIS:** We are at most times going to endeavour to be
23 just three of us at any one time.

24 **LORD CARLILE:** That seems plenty to me.

25 **MISS ROSE:** Sir, I just wanted to flag up one point which is

1 that yesterday evening, at about 8 o'clock, we were
2 served with a sheaf of materials by the OFT which
3 consisted of documents where there had previously been
4 confidentiality redactions that have now been unredacted
5 by the OFT. Those were provided to us at about
6 8 o'clock yesterday evening and were inserted into my
7 bundle immediately before this hearing. It will not
8 surprise you to know that, in the circumstances, I have
9 not read any of that material. I do not, therefore,
10 intend to refer to any of it in opening and I reserve my
11 position upon it.

12 **LORD CARLILE:** Okay, that's understood.

13 **MISS ROSE:** I hope we all have the same documents. Can I
14 just run through what everybody should have. First of
15 all, five volumes of authorities.

16 **LORD CARLILE:** Yes.

17 **MISS ROSE:** Then there are six appeal bundles which are in
18 seven volumes because volume 2 is split into 2A and 2B.
19 Then there are two yellow contemporaneous document
20 files, two green investigation bundles and a pleadings
21 bundle.

22 **LORD CARLILE:** Yes. We have all those documents.

23 **MISS ROSE:** Wonderful. I hope that's all the documents.

24 I hope I haven't missed anything because that's all the
25 documents I have.

1 **LORD CARLILE:** Yes, I'm going to make an attempt as far as
2 possible to use electronic versions of the documents,
3 which I think I have most of on my laptop in front of
4 me.

5 **MISS ROSE:** I hope the pagination is the same as the hard
6 copies.

7 **LORD CARLILE:** We will see how we go.

8 **MISS ROSE:** There is one further item I would like to hand
9 up. We received from the Tribunal a series of questions
10 last week. We've done a note responding to the
11 questions on legal issues and that is accompanied with
12 a supplemental bundle of authorities that deals with
13 those issues. Can I just hand that up now.

14 **LORD CARLILE:** Yes.

15 (Handed)

16 **MISS ROSE:** So that now makes six volumes of authorities.

17 Finally, before I start, can I enquire as to what
18 materials the Tribunal has been able to read, and
19 I realise that that may not be the same for all members
20 of the Tribunal.

21 **LORD CARLILE:** I think we have all read, of course, the
22 skeletons, the pleadings and the statements, the witness
23 statements.

24 **MISS ROSE:** And the decision?

25 **LORD CARLILE:** And the decision, of course, yes, and the

1 decision.

2 **MISS ROSE:** But not the contemporaneous document files?

3 **LORD CARLILE:** Well, I certainly haven't read all of the
4 contemporaneous documents. I have read documents that
5 are referred to in the skeletons.

6 **MISS ROSE:** Yes. That would be a substantial number.

7 **LORD CARLILE:** I think I'm right in saying that we all have
8 a pretty fair bird's eye view of the case, at the very
9 least.

10 **MISS ROSE:** Wonderful. Thank you very much. That's
11 extremely helpful.

12 Opening submissions by MS ROSE

13 Can I then turn first to the issues in the appeal.
14 As the Tribunal knows, Tesco has appealed the OFT's
15 finding made in its decision dated 26 July 2011 that
16 Tesco is liable for participating in two infringements
17 of the chapter 1 prohibition under the Competition Act
18 1998. The two infringements are described at the
19 beginning of the decision itself, and if we just turn
20 that up so that we can see how they are described, at
21 volume 1 of the notice of appeal
22 bundle.{^magnum ref }

23 Paragraph 1.5:

24 "The infringements that are the subject of this
25 Decision are:

1 "i. The 2002 Cheese Initiative: A single overall
2 concerted practice in which Asda, Safeway, Sainsbury's
3 and Tesco indirectly exchanged cheese retail pricing
4 intentions via Dairy Crest, Glanbia and McLelland acting
5 as intermediaries."

6 That's the first infringement. A small note needs
7 to be added to that which is that it is not alleged that
8 Tesco exchanged any information via Glanbia because
9 Glanbia was not a supplier of cheese to Tesco.

10 The second infringement is:

11 "ii. The 2003 Cheese Initiative: A single overall
12 concerted practice in which Asda, Sainsbury's and Tesco
13 indirectly exchanged cheese retail pricing intentions
14 via McLelland acting as an intermediary."

15 As you can see, there is then a third infringement
16 relating to milk in 2003 which is not alleged against
17 Tesco.

18 So the allegation in both cases is that Tesco was
19 involved in a concerted practice which consisted of
20 competing retailers indirectly exchanging information
21 about their future retail pricing intentions through the
22 intermediary of their suppliers.

23 There are two grounds of appeal by Tesco against
24 this decision and you can see those in our notice of
25 appeal, and the notice of appeal is in the pleadings

1 bundle at tab 1. The ground of appeal is the same for
2 each infringement. If you go to page 15
3 {^magnum ref }, you can see that ground 1 is that the
4 evidence does not justify a finding of infringement
5 relating to cheese retail pricing in 2002.

6 If you go on to page 50, you will see the same
7 wording at F, at the bottom of page 50
8 {^magnum ref }:

9 "The evidence does not justify a finding of
10 infringement in relation to cheese retail pricing in
11 2003."

12 In these circumstances, there are two overarching
13 issues that this Tribunal will need to consider. The
14 first question is, what are the facts which the OFT must
15 prove in order to establish an infringement in the terms
16 set out in the decision for 2002 and 2003, first issue.
17 The second issue is, has the OFT proved those facts?

18 The first question, of course, is a question of law.
19 The answer to it is, for the most part, common ground
20 between the parties although there is some disagreement
21 and potentially significant disagreement about the
22 mental element that is required on the part of the
23 retailers who are said to be party to the infringement.

24 The second question depends on the proper
25 interpretation and evaluation of a number of different

1 types of evidence, both written and oral, and it's the
2 second issue which is inevitably going to occupy the
3 main portion of the hearing before this Tribunal. Your
4 task in this case is essentially one of considering the
5 detail of the evidence, evaluating the evidence,
6 deciding what inferences it is or is not permissible to
7 draw from it and reaching a conclusion about whether or
8 not the OFT has or has not proved the case that it has
9 to prove.

10 What I propose to do in my opening is, first of all,
11 very briefly to introduce the first issue, question,
12 what must the OFT prove to establish its case? I shall
13 identify the legal framework and summarise briefly what
14 Tesco's position is in relation to the appropriate legal
15 test that we say the OFT must satisfy. I do not intend
16 to go into the law in any great detail in my opening
17 submissions, that is principally because of the
18 truncation of the openings as a result of the
19 unavoidable contested commitment of the Tribunal.

20 What I then propose to do is to introduce issue two,
21 has the OFT proved its case? Now, obviously, that's
22 a question that can only be decided by the Tribunal
23 after it's heard the evidence, and so the submissions
24 that I will be making in opening will be seeking to set
25 the scene for what we say are the things that the

1 Tribunal needs to look out for and an introduction to
2 the relevant documents. So I will be identifying the
3 various different types of evidence that the Tribunal
4 has before it and what we say are the significance of
5 the different types of evidence.

6 As you've seen from our skeleton argument, there are
7 significant disputes between the parties about what
8 weight ought to be attached to particular documents and
9 what inferences can properly be drawn, and there is
10 a significant area of disagreement about whether the OFT
11 ought or ought not to have called any witnesses and what
12 the implications are of its decision not to call any
13 evidence. So I shall briefly touch on those issues.

14 Finally, I intend to take the Tribunal through the
15 chronological bundles, which are the core documents that
16 the OFT relies upon and says are sufficient in and of
17 themselves to establish its case.

18 What I don't intend to do in opening is to make
19 detailed submissions on the proper weight or conclusions
20 to be derived from the documents which, obviously, the
21 Tribunal can only evaluate after it's heard the
22 evidence. What I also don't intend to do is a detailed
23 analysis of each of the strands because, as you know,
24 the way we've analysed this case is that each alleged
25 indirect communication is treated as a separate strand,

1 and each one needs to be carefully looked at but can
2 only be looked at when you've seen the totality of the
3 evidence.

4 I will, however, seek to identify when we get to
5 them which are the documents which the OFT relies upon
6 as being of central importance in establishing the
7 various strands on which it relies.

8 So can I then turn first to the legal framework.
9 The statutory test, of course, is set out at section 2
10 of the Competition Act which I have in the Butterworths
11 Competition Law Handbook, if I could just invite you
12 briefly to turn it up.

13 Section 2.1:

14 "Subject to section 3 [which is not alleged to be
15 relevant in this case], agreements between undertakings,
16 decisions by associations of undertakings or concerted
17 practices [and it's a concerted practice that is alleged
18 in this case] which may affect trade within the
19 United Kingdom and have as their object or effect the
20 prevention, restriction or distortion of competition
21 within the United Kingdom are prohibited unless they're
22 exempt in accordance with the provisions of this part."

23 In this case, the allegation is of a concerted
24 practice which has, as its object, the prevention,
25 restriction or distortion of competition.

1 And then subsection 2:

2 "Subsection 1 applies in particular to agreements,
3 decisions or practices which directly or indirectly fix
4 purchase or selling prices or any other trading
5 conditions."

6 I start with the statutory test because there is
7 sometimes a slight tendency of competition law to take
8 on a life of its own, and it's an area of law in which
9 there is a great love of jargon, so that what you have
10 in this case is described as a hub and spoke. But all
11 that a hub and spoke is is a type of concerted practice
12 which is alleged to be a method, in this case, of
13 indirectly fixing prices.

14 The argument simply goes like this: that if one
15 competing retailer communicates to another competing
16 retailer whether they intend to increase their prices
17 next week, that assists the retailers because they know
18 that they can raise their own prices with impunity
19 without being uncompetitive in the market and it lessens
20 competition between them, and the effect is that prices
21 go up. That's the simple basis of it.

22 But what happens in this case is that there is no
23 communication between the competing retailers. What
24 happens is that the competing retailers are
25 communicating only with their own suppliers, who supply

1 them with cheese. What is alleged is that, in effect,
2 they are competing with each other because when they
3 communicate with their suppliers they do so with the
4 intention that the supplier will pass that information
5 on to their competing retailer, or at the very least in
6 the knowledge that he will, and the person who receives
7 the information from their supplier knows that that
8 information has in fact come not from the supplier but
9 from the competing retailer and that the competing
10 retailer intended it to be passed on.

11 So the argument is that where you have a three-way
12 situation like that, it is no different in substance
13 from two competing retailers sitting across a table and
14 telling each other what their prices will be next week.

15 Now, it's very important to remember that that's
16 what we're dealing with because, with great respect to
17 the OFT, there are places in its analysis where the hub
18 and spoke takes on a life of its own and departs a very
19 long way from the simple proposition that there is no
20 difference in substance and, therefore the form
21 shouldn't matter, between two competitors sitting in
22 a room telling each other what their prices will be next
23 week and two competitors doing exactly the same thing
24 through an intermediary.

25 The question of a concerted practice and the meaning

1 of a concerted practice is obviously of some importance,
2 and there does not appear to be any real dispute between
3 the parties about what a concerted practice is. There's
4 a mass of EU case law on the topic, including the
5 T-Mobile case, and what is said in the case law
6 essentially is that a concerted practice is the knowing
7 substitution of practical cooperation for the risks of
8 competition. That is said in a number of cases, and one
9 example is paragraph 26 of the T-Mobile case, which is
10 authorities bundle, bundle 5, tab 43. We don't need to
11 turn it up.

12 But I stress the knowing substitution of cooperation
13 for the risks of competition, because a concerted
14 practice, even though it hasn't crystallised into any
15 formal agreement, is still all about consensus and
16 parties knowing that they are cooperating with each
17 other rather than competing with each other. That is
18 the essence of it.

19 Now, of course, if I am sitting in a room with my
20 competitor and I tell my competitor what my prices will
21 be next week, it is most unlikely that there is going to
22 be much argument about whether I intended to tell my
23 competitor what my prices would be next week. It's
24 fairly obvious that, if I sat in the room and told him
25 that, I intended to do it.

1 Of course, there might be some circumstances where
2 I could plausibly argue that I didn't intend to tell
3 him. For example, supposing I had made an error in
4 typing an email address and sent an email that I thought
5 I was sending to my husband but, unfortunately, it went
6 to my competing retailer who had a very similar name.
7 In that situation I might say, "Well, yes, I directly
8 communicated my future retail pricing intentions to my
9 competitor but I didn't intend to do it". But that's
10 the sort of exotic situation you would need.

11 But when you're talking about a situation where the
12 two competing retailers who are said to have exchanged
13 information have no direct contact, the question of
14 whether they intended to communicate with each other,
15 rather than simply intending to communicate with the
16 person they were communicating with, namely the
17 supplier, immediately becomes a critical question which,
18 in many situations, may be difficult to unravel. We say
19 this is precisely that type of case.

20 Of course, the fact that it may be difficult to
21 establish that an infringement has occurred, because it
22 is difficult to prove intent, doesn't absolve the OFT
23 from having to do that because the burden is upon the
24 OFT to establish its case on the balance of
25 probabilities, and that includes establishing its case

1 that the competing retailers in this situation had the
2 necessary intent.

3 The proper legal test that ought to be applied in
4 a situation such as this, where it is said that there
5 has been indirect communication of pricing intentions
6 via a supplier, was considered by the Court of Appeal in
7 the case commonly known as Toys & Kits. I do just very
8 quickly want to look at that, it's volume 2 of the
9 authorities bundle, tab 9.

10 These were two cases, one of which concerned
11 catalogue toys, where the catalogues had to be prepared
12 some months in advance and so there was an obvious
13 advantage in knowing what prices were going to be in
14 your rival's catalogue, because once the catalogue was
15 published that was it for some months ahead.

16 **LORD CARLILE:** Sorry, just hold on. I've got a rogue file.

17 **MISS ROSE:** Ah, I'm sorry. It always happens.

18 **LORD CARLILE:** I will manage for now.

19 **MISS ROSE:** So the first case, the toys case, that's Argos
20 and Littlewoods, concerned toys sold through catalogues
21 where the catalogues had to be printed some months in
22 advance, so there was a very significant distortion in
23 competition if you knew what your competitor was going
24 to put as their retail pricing in the catalogue. The
25 second was a very special situation of a sporting

1 tournament where there was agreement through the
2 supplier on the prices that we charge for football
3 shirts for the duration of that particular tournament.
4 So that was the factual background. But the legal test
5 was considered by the Court of Appeal, if we go to
6 paragraph 139 of the judgment.

7 It should be stressed that this is actually the only
8 case which deals with the type of indirect communication
9 between retailers that is alleged by the OFT in this
10 case. There is no EU case law on this topic and, of
11 course, as a decision of the Court of Appeal it is
12 binding on the Tribunal.

13 So the starting point of the Court of Appeal's
14 analysis, and I stress this was a case not just of an
15 alleged agreement but an agreement or concerted
16 practice, was the observation in the Bayer case that:

17 "... if it is necessary that the manifestation of
18 the wish of one of the contracting parties to achieve an
19 anticompetitive goal constitute an invitation to the
20 other party, whether expressly or implied, to fulfil
21 that goal jointly."

22 Then they say:

23 "We had expressed our view, when discussing the
24 Tribunal's judgment on liability in the football shirts
25 appeal, that the Tribunal may have gone too far at

1 paragraph 659 with its suggestion that if a retailer, A,
2 privately discloses to a supplier, B, its future pricing
3 intentions in circumstances where it is reasonably
4 foreseeable that B might make use of that information to
5 influence market conditions, and B then passes that
6 pricing information on to a competing retailer, C, that
7 is sufficient basis for concluding, even if A did not in
8 fact foresee what was reasonably foreseeable or C did
9 not appreciate the basis on which A had provided the
10 information, that A, B and C are all to be regarded as
11 parties to a concerted practice having as its object or
12 effect prevention, restriction or distortion of
13 competition."

14 But they say it's not necessary to decide that
15 question.

16 Two points emerge. Firstly, that the Court of
17 Appeal were doubtful as to whether reasonable
18 foreseeability was sufficient, but they did not decide
19 the point because it wasn't before them.

20 They then go on to say what clearly would be
21 sufficient to establish an infringement, and this is the
22 test at 141 which we submit is the correct legal
23 approach.

24 "The proposition which in our view falls squarely
25 within Bayer, and sufficient to dispose the point in the

1 present appeal, can be stated in more restricted terms
2 if, one, retailer A discloses to supplier B its future
3 pricing intentions in circumstances where A may be taken
4 to intend that B will make use of that information to
5 influence market conditions by passing that information
6 to other retailers, of whom C is or may be one; B does
7 in fact pass that information to C in circumstances
8 where C may be taken to know the circumstances in which
9 the information was disclosed by A to B; and, three, C
10 does in fact use the information in determining its own
11 future price intentions, then A, B and C are all to be
12 regarded as parties to a concerted practice."

13 Then they say it's stronger where there is
14 reciprocity and the information goes in both directions.

15 So the key points are that there must be an
16 intention, when communicating with the supplier, that
17 that information should be passed on. Elsewhere in this
18 judgment they say foresight that it will is also
19 sufficient, and in my submission there's no difference
20 because you will see in our note on the law that it has
21 long been understood that a foresight that something
22 will happen is very strong evidential basis for an
23 inference of intention that it should.

24 So that's the first ingredient. The second
25 ingredient is that the party that receives the

1 information must know the circumstances in which it's
2 been disclosed by the first supplier. Suspect is not
3 enough.

4 Then the third is that there must be use of the
5 information. Those are the three ingredients that we
6 say must be satisfied. Now, in the decision in this
7 case, the OFT did not rely on any broader proposition
8 than that which was set out by the Court of Appeal in
9 that passage. If you just take up the decision in
10 appeal bundle 1, paragraph 3.46 {^magnum ref }.
11

11 **LORD CARLILE:** Paragraph?

12 **MISS ROSE:** 3.46, sir. The OFT said that:

13 "The OFT considers that, where an undertaking
14 discloses its future retail pricing intentions ... in
15 circumstances in which it is 'reasonably foreseeable'
16 that that information will be passed on to other
17 retailers ... this might well be sufficient to establish
18 a concerted practice in a particular case. However, it
19 is not necessary for the OFT to conclude on this point
20 for the purposes of this Decision given that the
21 evidence set out at section 5 below satisfies the legal
22 framework set out by the Court of Appeal."

23 So the OFT expressly were not considering that
24 question, and expressly decided this case on the basis
25 that there was intent in the sense that the Court of

1 Appeal had described it in Toys & Kits.

2 The position which is now taken by the OFT is,
3 however, somewhat different. If you take up the
4 pleadings bundle at tab 14, you will see the skeleton
5 argument of Mr Morris and if you go to paragraph 64,
6 pleadings bundle, tab 14, paragraph 64

7 {^magnum ref }, what is now said by the OFT is:

8 "... Tesco's approach to state of mind is state too
9 narrowly, emphasising 'intention', 'deliberate'
10 'instruction' and 'consent'. The underlying test for
11 a concerted practice is 'knowing' coordination; such
12 knowledge is not limited to 'intention' but encompasses
13 'foresight'. There are different types of 'knowledge'
14 and the OFT will say, if necessary [we're not sure what
15 'if necessary' means but that's what they say], first,
16 that it certainly encompasses recklessness and secondly
17 that 'suspicion' or 'foresight of the possibility' [of
18 onward disclosure] is sufficient."

19 Then they say:

20 "... the Court of Appeal left the [decision] ...
21 open and its observations on 'reasonable foreseeability'
22 are obiter dicta."

23 We submit that what is suggested by the OFT as its
24 position here is, first of all, not open to it, because
25 it wasn't the basis of its decision and, secondly, is

1 wrong as a matter of principle because the essence of
2 a concerted practice is a knowing substitution, not
3 a negligent or reckless substitution of cooperation for
4 the risks of competition and, specifically, in a case
5 such as this, in order to establish that in substance
6 the communication with the supplier is simply the same
7 as an indirect communication with the retailer, actual
8 intention of knowledge is required, and not simply
9 knowledge of the possibility.

10 There are a number of objections. The principal
11 objection is that we say knowledge of the possibility or
12 recklessness or negligence would not satisfy the vice
13 that's sought to be caught by section 2 of the
14 Competition Act, because the requirement under section 2
15 was a concerted practice, and a concerted practice
16 implies consensus and cooperation, not recklessness,
17 lack of care, negligence or disregard of a possibility.
18 So that's the first principal objection.

19 The second objection, we say, is that the approach
20 for which the OFT contends would leave commercial
21 operators in a wholly unacceptable situation of
22 uncertainty and risk. If you consider the circumstances
23 of this case, this is a case in which Tesco has to
24 disclose to its suppliers information about its future
25 retail pricing intentions because the suppliers who

1 supply the cheese, cut the cheese, weigh the packs and
2 put the prices on the packs before they -- not with
3 every cheese line, but with a large number of cheese
4 lines, the suppliers weigh and price the packs before
5 they supply them to Tesco. They therefore have to know
6 what is the price per kilo and what date the price per
7 kilo is going to come into effect in Tesco shops.

8 Whatever constraints of confidentiality Tesco places
9 its suppliers under, Tesco would never be able to
10 exclude the possibility that a supplier might succumb to
11 the temptation to pass on information wrongly and
12 illegitimately. The suggestion that there could be
13 a recklessness or negligence or a knowledge of the
14 possibility test would make it, we submit, simply
15 unworkable for Tesco to operate its business. We submit
16 it's extremely unlikely that that was the intention of
17 Parliament, and nothing in any of the case law requires
18 it. The only authority that even touches on this point
19 is the Toys & Kits case in the Court of Appeal where the
20 Court of Appeal give a pretty clear steer that they
21 think it's wrong, and we say they were right to do that.

22 **LORD CARLILE:** So you would say that if Tesco A discloses
23 the relevant material to the intermediary B, merely in
24 the hope that intermediary B might pass it on to C --

25 **MISS ROSE:** That would not be sufficient.

1 **LORD CARLILE:** -- that would not be sufficient because it
2 doesn't involve either intention or knowledge?

3 **MISS ROSE:** Yes. There must be intention or knowledge.

4 **LORD CARLILE:** So that's really the stark difference between
5 the two sides.

6 **MISS ROSE:** Yes. And, similarly, if Tesco were to receive
7 information from a supplier and think it might have come
8 from a competitor, that would not be sufficient. Tesco
9 would have to know that that information comes from the
10 competitor, and came from the competitor in
11 circumstances in which the competitor intended it to be
12 passed to Tesco. Both of those requirements must be
13 satisfied.

14 The reason is that the essence of the so-called hub
15 and spoke is to say there is no difference in substance
16 between two competitors sitting in a room telling each
17 other what their prices are going to be and doing it
18 through their supplier. That's the vice, it's the
19 substance and not the form. And the intention is not to
20 introduce a whole extended type of liability for
21 Competition Act infringements where parties act
22 carelessly or recklessly or even in the hope that
23 something might happen. A hope is not a concerted
24 practice.

25 We deal with this more in our skeleton argument at

1 paragraphs 29 to 35 and I'll turn to it if necessary in
2 closing.

3 That's what I wanted to say about the substantive
4 legal test for establishing the infringements, and can I
5 now turn to the OFT's decision in summary.

6 If we just take the OFT's skeleton argument, again,
7 in the pleadings at tab 14, the OFT summarises its case
8 in relation to both the events of 2002 and the events of
9 2003 starting at paragraph 23 {^magnum ref . 2002
10 goes down to paragraph 52 and then, at paragraph 53
11 {^magnum ref } down to 59 you have a summary of their
12 case in relation to 2003.

13 2002 is, by some margin, the more substantial case.
14 The essential allegation that's made by the OFT is that
15 there were abnormal circumstances in 2002 because what
16 was happening was that dairy farmers were very angry
17 about the fall in the price of farm gate raw milk. They
18 were taking militant action, blockading depots, both of
19 processors and of retailers, and of course this had
20 a potentially catastrophic effect on the retailing of
21 milk and other dairy products.

22 Under that intense pressure, Tesco announced an
23 initiative in early September of 2002 where Tesco said
24 that it would increase the price that it paid for fresh
25 liquid milk. As a result of that, Tesco raised its

1 retail price for fresh liquid milk and other retailers
2 followed. That was the original starting point of the
3 OFT's case, because originally the OFT said that that
4 initiative, led by Tesco, in relation to fresh liquid
5 milk, amounted to a concerted practice which was an
6 infringement of the Competition Act.

7 **LORD CARLILE:** That was done in a blaze of publicity led by
8 the NFU basically.

9 **MISS ROSE:** Yes, and by the then chairman of Tesco. And the
10 OFT has abandoned that case. Now, in its skeleton
11 argument it seeks to say, "Oh, well, just because we
12 couldn't establish it doesn't mean it didn't happen".
13 But with great respect to them they cannot have it both
14 ways. There is, of course, a presumption of innocence,
15 and in circumstances in which they have not contended
16 that any infringement occurred as a result of that
17 initiative led by Tesco, they're not in a position to
18 say there was anything concerted about it.

19 But that's the starting point. What the OFT then
20 says is it was apparent that, in order for the farm gate
21 milk price to rise, there would also have to be price
22 rises in relation to cheese, because a lot of milk
23 doesn't go into fresh liquid milk, it goes into other
24 dairy products, and if the prices of milk used for the
25 manufacture of cheese do not go up, the farmers would

1 not get the full 2p per litre which it was the intention
2 that they should get.

3 From that starting point, the OFT says what happened
4 was that the suppliers, led by Dairy Crest, formulated
5 a plan, and the plan is said to have been a plan for
6 concerted retail price increases. This is the crucial
7 point of dispute between the OFT and Tesco, because
8 a lot of this factual background is, of course, common
9 ground. It is common ground that the farmers were
10 placing intense pressure on processors and on retailers.
11 It's common ground that Tesco had announced an
12 initiative in relation to the price of fresh liquid milk
13 and that the intention was to return an extra 2p per
14 litre to the farmers. It's also common ground that
15 there was a problem doing that if the price paid to the
16 farmers for milk used in the manufacture of cheese
17 didn't go up, because that wouldn't give you the full 2p
18 per litre.

19 The crucial area of difference is what then
20 followed, because Tesco's case is that there was no plan
21 for a concerted retail price increase or, if there was,
22 Tesco certainly was not aware of it. What there was was
23 a proposal made initially by Dairy Crest for an increase
24 in the cost price of cheese. Dairy Crest are the
25 largest supplier of cheese and their proposal was that

1 they would increase the price of cheese that they were
2 selling to the retailers and that, if the retailers
3 would agree to pay them the extra price for their
4 cheese, they would pass on that to the farmers.

5 That initiative, we say, was also highly public and
6 publicised in a number of press releases, and what it
7 did not amount to was any initiative for a concerted
8 rise in the retail price of cheese.

9 The way that it was to be implemented was that
10 Dairy Crest would seek to persuade its various
11 supermarket customers that they should agree to pay more
12 for their cheese and that they should do so by saying,
13 "We promise we'll pass on all the benefits straight back
14 to the farmers".

15 In the course of doing that, Dairy Crest gave
16 various reassurances to its customers, and said "Don't
17 worry, other people are going to put their prices up as
18 well so it won't be a problem", and Dairy Crest
19 certainly made proposals, as is normal for a supplier.
20 They made proposals to their customers of what they
21 recommended the retail prices should do. In particular,
22 Dairy Crest was recommending that the retailers should
23 only increase their margin by the same amount that the
24 cost price was going up in cash terms. It was going to
25 go up by £200 a metric tonne, which is the same as 20p

1 per kilo, and that's because -- apparently it takes
2 approximately 10 litres of milk to make one kilo of
3 cheese, so 2p per litre translates into 20p per kilo of
4 cheese.

5 So the crucial point of distinction is whether there
6 was a secret plan, as the OFT says, for all the
7 retailers to raise their cheese prices in concert, their
8 cheese retail prices in concert, to fund the increased
9 cost price and to fund the price back to the farmers,
10 and we say there was no such a plan, or whether what
11 there actually was was a series of very high pressure
12 bilateral negotiations between Dairy Crest, McLelland
13 and Glanbia and their various customers, seeking to
14 pressurise those customers into agreeing to pay the
15 price rise, the cost price rise for cheese, and seeking
16 to persuade them that they should only apply the same
17 margin to their retail price.

18 The point about the retail price was that
19 Dairy Crest was worried about the political pressure it
20 was under from the farmers, and it was worried that, if
21 the supermarkets protected their percentage margin, they
22 would put up their cheese prices by more than 20p per
23 kilo, and the effect of that would be that they would be
24 seen to be profiteering from the attempt to give more
25 money back to the farmers.

1 So that was the reason why Dairy Crest was
2 suggesting -- and I stress "suggesting" -- that they
3 shouldn't put the retail price up by more than the cash
4 margin. As we shall see, Tesco did not accept that
5 suggestion. In some cases it put its cheese price up by
6 the cash margin, in some cases it put its cheese price
7 up by an amount that was equivalent to protecting its
8 percentage margin, in some cases it shows a figure
9 between the two, because the incentives of
10 Lisa Oldershaw, then Rowbottom, who was the cheese buyer
11 for Tesco, were not to abide by any coordinated retail
12 price initiative across the industry, but to protect
13 Tesco's margin and to ensure that her own key
14 performance indicators were met, which included
15 protecting Tesco's margin.

16 So we say that essentially there is
17 a mischaracterisation by the OFT, on an accepted factual
18 background of the pressure from the farmers, of what
19 were actually a series of difficult and pressured
20 bilateral negotiations being treated as if it were
21 a single consensual practice across the market.

22 That error, we say, undermines the heart of the
23 OFT's case. It's the whole basis, really, for the OFT's
24 case against Tesco.

25 In 2003, the situation is very different. There is

1 none of the political pressure that we see in 2002. All
2 that we have in 2003 is a perfectly normal negotiation
3 between Tesco and one of its chief suppliers, McLelland,
4 where McLelland wanted to put its cost price for cheese
5 up across the board and Tesco was not very happy about
6 that. Indeed, Tesco thought that it wasn't getting
7 a sufficient margin for the Seriously Strong brand,
8 which was one of McLelland's most successful cheese
9 brands, and thought it ought to be paying less for that,
10 certainly not more.

11 So what happened in 2003 was that Stuart Meikle, who
12 was at that time the account representative from
13 McLelland, engaged in a series of interactions with
14 Lisa Oldershaw in which he tried to pressure her to
15 agree a cost price increase, and in which she was
16 resistant, and in which he made a number of loose
17 statements to her. But there is no evidence at all of
18 any concerted practice in 2003, we say.

19 The OFT has identified what it contends are eight
20 instances of A-B-C transmission from retailer to
21 supplier to retailer in 2002, on which it relies,
22 against Tesco, and five on which it relies in 2003.
23 There's an extra one from 2002 known as strand six which
24 the OFT doesn't directly rely on but which it says
25 supports its case. So that makes a total of 14.

1 Eventually we will have to look at the evidence in
2 relation to each of those.

3 Our submission is going to be that in virtually
4 every case on which it relies, the OFT cannot even
5 establish the facts that there was a transmission of
6 retail pricing information from retailer A to the
7 supplier to retailer C. We say that in no case can the
8 OFT establish the requisite state of mind and, for both
9 of those reasons, we say that the OFT has failed to
10 establish its case.

11 Now, the OFT's case on intent is thus central to the
12 sustainability of its decision, and we can see how the
13 OFT puts its case summarised at paragraph 10 of its
14 skeleton argument. At paragraph 10 they say
15 {^magnum ref }:
16 ^make a note of this ref as it appears below several
17 times}

18 "Tesco denies that such transmissions were effected
19 with the requisite state of mind on it (on the other
20 retailer's part)."

21 The first point to make of course is that the OFT
22 here minimises the extent to which Tesco doesn't even
23 accept that there were in fact transmissions of future
24 retail pricing intentions, and we will come back to that
25 factual point later.

1 **LORD CARLILE:** Forgive me for interrupting you. Are we to
2 take Tesco and Ms Oldershaw as being the same in respect
3 of state of mind? Is that the reality of the case?

4 **MISS ROSE:** Sir, you will have seen that we engaged with
5 quite lengthy dialogue with the OFT on this question
6 because they were remarkably coy. Eventually after
7 I think two requests we did manage to shoehorn out of
8 them the rather fundamental fact that they were saying
9 that the individuals whose state of mind were relevant
10 here were primarily Lisa Oldershaw and John Scouler who
11 are the two witnesses who are being called by Tesco.

12 It's a remarkable -- I'll return to it in closing,
13 I don't have time to deal with it now, but it's
14 a remarkable chain of correspondence between us and the
15 OFT where, first of all, they wouldn't even name them
16 and just referred to them as the "relevant personnel",
17 and we actually had to ask them who were the "relevant
18 personnel". It's a fascinating aspect of the OFT's
19 decision how reluctant it is to name the people that it
20 says had the intent, and we see repeatedly through the
21 decision and the defence and the skeleton argument
22 simply a reference to "Tesco's" intention without
23 specifying who.

24 It's obvious that a corporate entity cannot have an
25 intention.

1 You will see, sir, in the note that we've submitted
2 that we accept that liability can be attributed to
3 a corporate entity for the purposes of a competition
4 infringement where a person is acting with the authority
5 of that entity. So we accept that where Lisa and John
6 were acting with the authority of Tesco, as they were
7 when negotiating for the cost price of cheese, then that
8 would attribute liability to Tesco. So it is their
9 state of mind that's central. That means essentially
10 that the OFT will have to demonstrate to this Tribunal
11 that both of those witnesses are not telling the truth
12 to this Tribunal when they give evidence.

13 Just coming back to paragraph 10
14 {^same magnum ref }, as a matter of fact we say
15 there's only one instance, and this is in terms of,
16 before we get on to intent, just establishing the facts
17 of the A-B-C transmission. We say there's actually only
18 one occasion on which the OFT can show that there was
19 factually a disclosure of future retail pricing
20 intentions from Tesco to a supplier to a competing
21 retailer. That is in relation to one cheese, it's the
22 WeightWatchers cheese, in relation to which
23 Lisa Oldershaw informed her suppliers that there was an
24 intention to raise the retail price and that information
25 was then passed to Sainsbury's. In relation to that

1 case, obviously the question of intention is going to be
2 decisive. In relation to the other questions(?), we say
3 they don't even establish the A-B-C. But in any event
4 we say their case on intent fails.

5 So if we just look at the basis on which they say
6 the Tribunal should infer intent, it's set out at
7 paragraph 10 {^same magnum ref }. They say:

8 "First --"

9 It's interesting, you will see here that they say
10 that those involved, including Tesco, clearly had the
11 requisite state of mind. That's the point I was making
12 before, they always talk about Tesco, they don't talk
13 about the people. They say:

14 "First, there was a plan for a co-ordinated retail
15 price increase and Tesco was well aware of that plan."

16 Now, they put that as one proposition, of course
17 it's actually two, first that there was a plan and
18 secondly that Tesco was aware of the plan, and they have
19 to prove both of those propositions.

20 Now, we say actually that is the essential heart of
21 their case and, if they fail to show either that there
22 was a plan for a coordinated retail price increase, or
23 that Tesco was aware of that plan, their case will fail
24 because that's really at the heart of it.

25 Question: what do they mean by a coordinated retail

1 price initiative? Because, on the face of it, that's
2 a somewhat ambiguous term. It could simply mean
3 happening at the same time, but we asked them in
4 a request for further and better particulars what they
5 meant by "coordinated" and they replied to this
6 question. It's in the pleadings bundle, it's at tab 5
7 and, if you go to page 8, paragraph 29

8 {^magnum ref }, you can see that we ask a question:

9 "Please explain what the OFT means by ...
10 'coordinated' ... in relation to cost and retail price
11 increases in its description of the 'plan' ..."

12 The reply is:

13 "These terms mean acting on the market otherwise
14 than independently."

15 That's crucial, because it means what they are
16 alleging is that there was a plan for the retailers to
17 collude in the increase of the retail price. That is
18 the heart of their case.

19 So that's their first proposition, which is actually
20 two.

21 The second is they say, this is back at paragraph 10
22 {^same magnum ref as before }:

23 "... Tesco's willingness to raise its retail prices
24 was conditional upon its competitor retailers also
25 raising their prices and Tesco indicated that this was

1 its position."

2 Now, again, there is some ambiguity here and we'll
3 come back to this in more detail later in closing. But
4 you will see that, in fact, what's alleged in the
5 decision is that Tesco, on a number of occasions, gave
6 what the OFT calls conditional commitments. By
7 conditional commitments, the OFT means that Tesco
8 indicated to its suppliers that it was willing to raise
9 its retail prices but only on the basis that other
10 retailers did the same. What is said is that that's
11 information that's of great importance in relation to
12 distorting competition because that means that the
13 suppliers can then give comfort to the other retailers
14 that, if they raise their retail prices, so will Tesco.

15 We say that the evidence does not establish that any
16 conditional commitment of that type was given by Tesco,
17 that at the most all that Tesco has ever said was the
18 blindingly obvious, that Tesco is competing with other
19 supermarkets and Tesco will not or will be very
20 reluctant to raise its retail prices if others don't.
21 There is obviously a very significant difference between
22 a party saying, "I wish to be competitive so it's
23 unlikely I will raise my retail prices or I won't raise
24 my retail prices if others don't", and a party saying,
25 "I am willing to raise my retail prices but only if

1 others do".

2 Indeed, of course, it was a statement of the
3 blindingly obvious that Tesco was competing with other
4 supermarkets and, in particular, that Tesco competed
5 very hotly on price with Asda. And it was very well
6 known that Tesco's policy was that it shouldn't be any
7 more expensive than Asda in relation to key products.

8 **LORD CARLILE:** This is the basket.

9 **MISS ROSE:** That's the basket policy, yes. And that was
10 very well known, so there would be many people who would
11 be in a position to say, well, Tesco won't raise its
12 price unless Asda does, or even to express their opinion
13 that, if Asda did raise its price, Tesco might well
14 follow. It doesn't follow that Tesco had said anything
15 of the kind.

16 Thirdly, back to paragraph 10

17 {^same magnum ref as before :}

18 "... Tesco was aware that one or more processors to
19 whom it disclosed its own retail pricing intentions was
20 acting as a conduit for the passing of such
21 information."

22 The argument here is that, when Tesco gave its own
23 future retail pricing information to its suppliers, it
24 already knew that suppliers had passed that information
25 to Tesco from other retailers and, therefore, should

1 have known that it would pass its information on. We
2 say that the evidence just doesn't establish that.

3 Fourthly, it is said:

4 "... in key instances, Tesco has been unable to
5 illustrate that it disclosed or received such
6 information for any legitimate commercial reason; and
7 even if, in particular instances, Tesco is able to show
8 that part of the motivation for a disclosure may have
9 been legitimate (such as labelling), that does not mean
10 that the disclosure was not made with the requisite
11 state of mind."

12 This is the point, that in fact Tesco had an
13 extremely good commercial reason for disclosing its
14 future retail pricing information in relation to cheeses
15 that were packed by suppliers, in fact it was necessary
16 for it to do so or it couldn't operate its business with
17 those suppliers. One of the oddities of the OFT's case
18 is that it maintains the position that in a situation
19 where it hasn't called any witnesses, and says the
20 documents speak for themselves, you can infer that
21 a retailer disclosing information to a supplier where
22 they have an acknowledged legitimate reason for doing so
23 is nevertheless to be taken to have been doing so with
24 an illegitimate and anticompetitive intent. We say that
25 is a quite remarkable proposition on the state of the

1 evidence in this case.

2 So that's the essence of the OFT case on intent.

3 That then brings me to my next topic, and I'm going
4 to deal with this very briefly because there's a lot to
5 say on it and I don't have time to do it justice.

6 Questions on the types of evidence and the OFT's
7 approach to the evidence in this case. You will have
8 seen from the skeleton arguments that this is going to
9 be a major area of controversy when we come to closing
10 submissions.

11 The OFT's position in this case is very simple. The
12 OFT says the documents speak for themselves. They are
13 absolutely clear, they are sufficient on their own to
14 establish these infringements and they require no
15 elaboration. The OFT said that in terms at paragraph 28
16 of its defence. You can see the amended defence now at
17 tab 15 and paragraph 28 {^magnum ref }:

18 "... the OFT will rely upon the strong documentary
19 evidence. It does not intend to call witnesses to give
20 oral evidence ... Tesco is critical of the OFT's
21 approach to witnesses ... in particular, its failure to
22 interview witnesses. However this criticism is
23 misplaced. The documentary evidence in this case is
24 contemporaneous and it is clear and strong. No
25 amplification of this evidence is required, by further

1 documentary evidence or oral testimony, when considering
2 the nature of the infringements found by the OFT."

3 Now, the OFT makes the point that it is relying on
4 contemporaneous documents but, of course, there are
5 different types of contemporaneous documents and there
6 are a number of different types of contemporaneous
7 documents in this case.

8 In the first place there are documents written by
9 employees of Tesco, and those documents are indeed
10 excellent evidence of what employees of Tesco were
11 thinking and doing at the time they wrote those
12 documents.

13 Secondly, there are documents that were not written
14 by Tesco but which were seen by Tesco at the time and
15 the weight of those documents will depend on the
16 circumstances in which they were written, whether they
17 were formal or informal, and what they're being relied
18 on for.

19 But next, and this is crucial to the OFT's case,
20 there are documents that are internal to other parties
21 or which were exchanged between other parties and which
22 were never seen by Tesco.

23 Now, it's quite difficult to see how those documents
24 can be relied on against Tesco at all, because at the
25 most what you have are statements, which are of course

1 hearsay statements for the purposes of this court, being
2 made by other parties, in some cases asserting what
3 those parties say in that document they think might be
4 Tesco's position, in other cases not even naming Tesco,
5 documents written for particular purposes for particular
6 audiences, unelaborated and unexplained by oral
7 evidence.

8 In my submission, it is very difficult first of all
9 to interpret what those documents mean and, secondly, to
10 take them as any sort of evidence with any weight
11 against Tesco.

12 Indeed a number of the documents as we'll see,
13 including some of those that the OFT relies on, are
14 certainly not neutral documents. They are in themselves
15 pieces of advocacy that were written for particular
16 purposes. As we shall see, one of the key documents
17 that the OFT relies on in relation to 2003 is a briefing
18 note that was written by Stuart Meikle, who was the
19 McLelland account manager, seeking to justify to his
20 bosses why it was that Tesco was refusing to agree
21 a cross-price increase and was threatening to cut the
22 distribution of Seriously Strong cheddar. So Mr Meikle
23 was in a very difficult situation inside McLelland when
24 he wrote that document and was seeking to justify
25 himself.

1 We submit that for the OFT to say that that document
2 on its own, without any evidence from Mr Meikle to
3 explain what he meant, to rely on that as any sort of
4 reliable evidence against Tesco is an extremely
5 dangerous proposition. That's just an example.

6 Then you come to documents that are not
7 contemporaneous. They include transcripts of interviews
8 which the OFT conducted with a number of individuals
9 from various parties. The OFT conducted an interview
10 with a total of 14 individuals, who included individuals
11 from Glanbia and individuals from the major competing
12 retailers, including Asda and Sainsbury's. We'll see
13 that they interviewed the key buyers from Sainsbury's
14 and Asda whose intent is in issue in this case,
15 Sarah Mackenzie is one and David Storey is another.

16 But they have not been called to give evidence. The
17 OFT says that, in those circumstances, their evidence
18 cannot be relied on by either party. Now, we submit
19 that that is a very troubling approach for the OFT to
20 take in this case. The position is that all of those
21 parties entered into early resolution agreements with
22 the OFT. Under those early resolution agreements all of
23 those parties agreed to provide full and continuous
24 cooperation with the OFT, including agreeing to use
25 their best endeavours to get those individuals to give

1 evidence for the OFT before this Tribunal, on any
2 appeal. The OFT therefore effectively had control over
3 whether or not those witnesses should be called.

4 What the OFT seems to be suggesting is that it is
5 entitled, where they've given evidence in interviews
6 which may be ambiguous or may be partially exculpatory
7 of Tesco, the OFT is entitled not to call them to give
8 evidence and then to argue that Tesco cannot rely on
9 that exculpatory evidence. In other words, the OFT by
10 that means is able to exclude from the Tribunal evidence
11 that might be exculpatory of Tesco. We say that's very
12 troubling.

13 We do say, however, that the OFT cannot rely on the
14 evidence given in those interviews against Tesco, and
15 the reason for that is very simple. It was within the
16 OFT's power to call those individuals to give evidence
17 to this Tribunal so that we would have had an
18 opportunity to cross-examine them and to challenge their
19 evidence. What is unfair is for the OFT to decide, as
20 it did in this case, not to call any witnesses and then
21 to say, "Oh, well we can still rely on what they said
22 against Tesco".

23 Then you have another category which is notes of
24 interviews of individuals made by their own solicitors
25 and sent to the OFT for the purposes of its

1 investigations. Those exist for particularly
2 Dairy Crest.

3 One of the oddities about this case is the OFT
4 itself never interviewed a single witness from
5 Dairy Crest, never interviewed a single witness from
6 McLelland, never interviewed anyone from Tesco. The
7 three key players not even interviewed by the OFT in the
8 course of its eight-year investigation. They say,
9 "Well, we thought the documents were so strong we just
10 didn't need to do it". But you will see that there are
11 a number of interviews that were sent to the OFT from
12 Dairy Crest personnel.

13 The next category of material that the OFT seeks to
14 rely on, and seeks to rely on quite heavily, is
15 corporate admissions that were made by the other
16 companies said to have been involved in these
17 infringements, the retailers and the suppliers, for the
18 purposes of their early resolution agreements. The OFT
19 says that it is entitled in these proceedings to rely on
20 those admissions because, it says, they effectively
21 admitted the truth of every fact that was in the
22 statement of objections, that they didn't seek to
23 correct, and that those admissions are evidence with
24 weight.

25 Now, I'm not going to deal with this point in detail

1 because there's actually quite a lot to say about it,
2 but simply to say that we do not accept that those
3 admissions, unaccompanied by any witness here to give
4 evidence about the circumstances in which they were made
5 or the reasons for which they were made, those
6 admissions carry no weight whatsoever because they are
7 wholly ambiguous.

8 We do not know whether those were pragmatic
9 commercial decisions taken because the companies felt
10 that it wasn't worth risking the costs of the appeal
11 given that they could get a multi-million pound
12 reduction in their fine by agreeing to take early
13 resolution agreement, we don't know if that was the
14 decision. We don't know to what extent enquiries were
15 made before the admissions were made.

16 The OFT has adopted a quite remarkable position on
17 this. If you take the skeleton argument and go to
18 paragraph 88, the OFT says {^magnum ref }:
19

20 "Tesco's objection that the admissions were not
21 signed by individuals 'whose mental state is relevant'
22 is unfounded."

23 Because all of these admissions are signed by board
24 directors, none of them are signed by Sarah Mackenzie or
25 David Storey or any of the people who are said to have
 been involved in this.

1 "The Tribunal is entitled to, and in this case
2 should, assume that when concluding an ERA containing
3 relevant admissions, the company making the admission
4 had carried out its own internal inquiries such that it
5 was satisfied that all the elements of the case alleged
6 by the OFT were well founded on the facts. In this way,
7 the Tribunal can properly conclude that the company
8 admitted the infringement on the basis that one or more
9 particular individuals had the requisite state of mind."

10 Now, we say that statement is manifestly wholly
11 flawed.

12 **LORD CARLILE:** You say it's an elementary proposition: you
13 were deprived of the opportunity of testing whether it
14 was done on the basis of truth or for commercial reasons
15 or a mixture of the two.

16 **MISS ROSE:** Exactly. Or an assessment of risk. We have no
17 idea of the basis on which it was done.

18 The OFT, which is in a position to require all these
19 people to come here and give evidence, took a decision,
20 having considered it so carefully, took a decision not
21 to call any of them and now says that the Tribunal
22 should assume in its favour that those admissions can be
23 relied on as evidence of the truth of every fact in the
24 statement of objections. We say that is wholly
25 inappropriate.

1 **LORD CARLILE:** This is a matter of weight, not
2 admissibility, isn't it?

3 **MISS ROSE:** Yes, sir. We say everything is a matter of
4 weight and we say the answer is no weight whatsoever.

5 The matter goes even further than that because at
6 the time that -- that statement was made in the skeleton
7 argument and we were aware that there was a partially
8 redacted letter which had been provided to us by the OFT
9 which came from the solicitors of Safeway in relation to
10 the admissions. We asked them to unredact the letter.

11 (Handed)

12 The original redacted version is in the first
13 investigations bundle at tab 26 -- sorry, tab --

14 **LORD CARLILE:** The first document bundle?

15 **MISS ROSE:** Sorry. I think it's tab 24. So here you can
16 see at tab 24 the redacted version. This unredacted
17 version was supplied to us at 2 o'clock this morning by
18 the OFT.

19 **MR MORRIS:** Sir, I should point out it was asked for two
20 days ago.

21 **LORD CARLILE:** Anyway, we have it.

22 **MR MORRIS:** If we're making points about time and working,
23 the OFT have been --

24 **LORD CARLILE:** Let's have a look at the content.

25 **MISS ROSE:** {magnum ref investigations bundle? } The

1 unredacted version says this:

2 "Following Morrisons' acquisition of Safeway in
3 March 2004, almost all employees of Safeway (including
4 all those employees identified as being named in the SO)
5 were not retained by Morrisons. Therefore, as was made
6 clear in the without prejudice negotiations preceding
7 the Agreement and in our letter of 11 January 2008,
8 Morrisons as the current owner of Safeway is not able to
9 secure the cooperation of Safeway's former directors,
10 officers, employees or agents in this matter. The OFT
11 has been provided with a list of those former Safeway
12 employees ... with their last known address ... If the
13 OFT requires any further assistance in contacting those
14 individuals, Morrisons ... will assist where possible."

15 Sir, it's a matter of great concern that the OFT
16 made the submission that it did at paragraph 88 of its
17 skeleton argument where it asked this Tribunal to
18 proceed on the assumption that all those who had
19 concluded ERAs had done so having made the necessary
20 enquiries into the state of mind of the individuals when
21 it had redacted the very sentence which showed that
22 Morrisons was unable to make those enquiries.

23 **MR MORRIS:** One other correction, we did not redact it.

24 **MISS ROSE:** Sir, the point is that the OFT made that
25 submission without first securing the unredaction of

1 that passage. We submit that that is a very surprising
2 approach for any public authority to have taken.

3 Now, the question of the implications for the OFT of
4 taking a decision not to call any evidence has been
5 considered in a number of cases and I will, if I may,
6 just take these quickly before we break for lunch.

7 First of all, it was considered in the construction
8 cases and if we take up authorities bundle 2 --

9 **LORD CARLILE:** Just give us a moment to clear the decks.

10 **MISS ROSE:** Sorry, sir. Yes, we can clear everything away.

11 **LORD CARLILE:** Authorities bundle 2?

12 **MISS ROSE:** Authorities bundle 2, the first case is Durkan
13 which is at tab 18. Paragraphs 108 to 110:

14 "At the hearing before us, four witnesses from the
15 Appellants provided statements and were tendered for
16 cross-examination on this issue. But there was no
17 witness statement provided by the OFT and therefore no
18 cross-examination to test the OFT's version of events."

19 They say that the evidence was a transcript, the
20 Claremont Close Report and other documents.

21 "The OFT's decision not to lodge witness statements
22 in support of its case caused us some concern, as we
23 made clear at the outset of the hearing in this appeal.
24 The OFT was asking us to uphold a finding of
25 infringement -- for which it had imposed a fine of over

1 £3 million -- on the basis of a transcript of an
2 interview with a person who was apparently not the
3 person who had written the notes on the key
4 contemporaneous document."

5 That's exactly the same as the position here, sir,
6 that the OFT is asking this Tribunal to uphold an
7 infringement having not interviewed any of the
8 individuals who it is alleging wrote the relevant notes.

9 "Mr Beard argued that criticism of the OFT's
10 approach ... [was] 'a ... triumph of form over
11 substance' ... no real difference between the transcript
12 ... and a witness statement ... supported by a statement
13 of truth."

14 Then there are comments about the OFT's response,
15 and then this:

16 "The significance of the failure to produce
17 a witness statement is two-fold. First, Mr Goodbun has
18 not been pressed about any of his answers -- his
19 comments in the interview in 2007 appear to have been
20 simply taken at face value throughout the investigation
21 and this appeal. If, once the appeal has been lodged,
22 the OFT had gone back to Mr Goodbun to take a witness
23 statement they may well have filled in many of the gaps
24 that currently exist in the account of what happened.
25 Faced with only the transcript of the interview, we do

1 not know ... whether Mr Goodbun's evidence was based on
2 what Mr Hart had told him had actually happened or
3 whether he was simply inferring from the marks on the
4 document the same 'facts' as any person familiar with
5 what went on generally in the industry could infer."

6 That point, that it's not clear from a document
7 whether somebody is passing on what they've been told or
8 simply expressing an opinion or inference that they've
9 derived from the market, you will see applies to a large
10 number of the documents on which the OFT rely in this
11 case.

12 "We do not know what Mr Goodbun's reaction would
13 have been had he been told that Mr Sharpe vehemently
14 denied that he had given a cover price.

15 "The second disadvantage ... is that Mr Goodbun's
16 evidence has not been tested by cross-examination ...
17 We reject the OFT's suggestion, made both at the hearing
18 and in their letter ... that because it was open to
19 Durkan ... to call Mr Goodbun as a witness ... and they
20 decided not to do so, that Durkan is somehow restricted
21 in the extent to which it can challenge what is recorded
22 ... It is not the task of the Appellant to supplement
23 the evidence relied on by the OFT."

24 So that's Durkan.

25 Then the case of Willis which is at tab 17,

1 paragraph 66, "Postscript: the OFT's evidence":

2 "As we stated at paragraph 19(3) above, difficult
3 and important questions arise in relation to the
4 'evidence' adduced by the OFT. We have already noted
5 that the transcript of Mr Russ' interview ... does not
6 appear to have been satisfactorily reviewed by or
7 attested to by Mr Russ ... he has not endorsed the
8 transcript with a statement of truth or even signed it.

9 "... we have considerable doubts as to whether
10 material contained in transcripts of interview ... is
11 a satisfactory means of evidencing alleged infringements
12 in cases of this kind."

13 The OFT says that the effect of this is that we
14 can't rely on exculpatory material. We say that's not
15 what the Tribunal were saying; they were saying the OFT
16 could not rely on it in support of its case that it
17 evidenced an infringement.

18 "It is one thing to use a transcript of interview as
19 evidence of relevant admissions by the interviewee; it
20 is quite another thing to attempt to use it as evidence
21 against a third party."

22 If I just invite the Tribunal to read down to the
23 end of 68 where they make the obvious points about the
24 need for cross-examination. They say at 68:

25 "... it may ... be very difficult to resolve the

1 issues in the absence of evidence from a witness who has
2 been deposed in the ordinary way and whose assertions
3 are available to be tested in cross-examination..."

4 Then this:

5 "Where central issues of fact cannot be resolved,
6 the outcome may have to turn on the burden of proof. It
7 is therefore all the more important from the OFT's
8 perspective that there should be probative evidence
9 before the Tribunal."

10 That's the point, that the OFT has to prove its
11 case. If it doesn't call the necessary people to give
12 evidence, it may simply be unable to do so.

13 The third case is Quarmby which was a case in which
14 you, sir, presided. Tab 19, paragraph 86. Here, sir,
15 you made the point that circumstantial evidence could be
16 taken into account and in some circumstances might be
17 sufficient, and we certainly don't disagree with that
18 proposition.

19 Then finally the Tobacco case, that's at tab 21. If
20 you go to paragraph 81, page 30 -- do we have it,
21 tab 21?

22 "For each bilateral agreement, the Tribunal and the
23 parties were provided at the outset of the appeals with
24 a witness statement from at least one Imperial executive
25 who had managed that retailer account for part, if not

1 the whole, of the infringement period and, similarly,
2 a statement from the tobacco buyer employed by that
3 retailer. All those witnesses made their statements
4 specifically for the purposes of the appeal and were
5 able to comment directly on the evidence and reasoning
6 relied on in the Decision. This was first hand evidence
7 from the people who negotiated and operated the
8 arrangements as to the content and meaning of the
9 written trading agreements and of the various emails and
10 letters on which the OFT relied. Their evidence in the
11 witness box confirmed what they had said in their
12 witness statements.

13 "The appellants complained at several points before
14 and during the main hearing that the OFT had not put
15 forward any signed witness statements in support of its
16 case other than that of Mrs Bayley."

17 Then they say it wasn't clear what they were relying
18 on it for. Then at paragraph 83, she had signed it in
19 2005 before the issues crystallised. Then the gaps
20 became apparent.

21 Then at paragraph 87:

22 "We recognise that the OFT has to adopt a sceptical
23 attitude to the evidence of company executives who deny
24 the existence of anti-competitive agreements in the
25 teeth of unambiguous documentation showing the contrary.

1 The Tribunal has emphasised the importance of
2 contemporaneous documents and the difficulties which
3 competition authorities often face in obtaining clear
4 evidence of infringing activity."

5 Then they refer to the Aalborg Portland case and the
6 point about, you can infer anticompetitive activity if
7 there's a number of coincidences which, in the absence
8 of plausible explanation, constitute evidence of
9 infringement.

10 "However ... there were other factors which were
11 important here. The comment of the Court of Justice in
12 Aalborg was made in the context of agreements which the
13 parties operate in a clandestine fashion because they
14 know they are acting illegally. The agreements
15 condemned in the Decision were not operated covertly.
16 The appellants' case has always been that there was
17 nothing unlawful about [them]. This was not a case ...
18 where evidential difficulties arose because the
19 participants deliberately failed to record or retain
20 information about what they were doing."

21 We've asked the OFT whether it is their case that
22 John Scouler and Lisa Oldershaw deliberately failed to
23 record or document what they were doing and they have so
24 far declined to answer that question.

25 Then it's said:

1 "Secondly, in relation to 10 of the 15 bilateral
2 agreements ... one party ... had either benefited from
3 the OFT's leniency programme or entered into an early
4 resolution agreement... Non-confidential copies of the
5 early resolution agreements were annexed... They
6 require the undertaking to 'maintain continuous and
7 complete co-operation' throughout the investigation and
8 until the conclusion of any action by the OFT, including
9 any proceeding before the Tribunal. Such co-operation
10 expressly includes, in relation to any Tribunal
11 proceedings, using reasonable endeavours to facilitate
12 and secure the complete and truthful co-operation of its
13 current and former employees in attending those
14 proceedings, speaking to any relevant witness statements
15 and being cross-examined on any such witness statements.
16 Despite this, we were not provided with any evidence
17 from these parties confirming that they had entered into
18 agreements of the kind defined as Infringing Agreements
19 or that they had imposed or been subject to the
20 paragraph 40 restraints."

21 We say that situation applies a fortiori here where
22 the OFT has early resolution agreements with every other
23 alleged party to this concerted practice and has not
24 called any evidence from any of them.

25 The final point that I want to make in relation to

1 this is the Polarpark point which we are very grateful
2 to the Tribunal for drawing to our attention. Polarpark
3 is in the supplementary bundle of authorities. It's
4 tab 7 and the relevant passage is from paragraph 30 to
5 33. In particular, paragraph 30, Mr Justice Briggs
6 cites the summary by Mr Justice Mann of the implications
7 of a party failing to call a witness:

8 "In certain circumstances a court may be entitled to
9 draw adverse inferences from the absence or silence of
10 a witness who might be expected to have material
11 evidence to give on an issue in an action. If a court
12 is willing to draw such inferences, they may go to
13 strengthen the evidence adduced on that issue by the
14 other party or to weaken the evidence, if any, adduced
15 by the party who might reasonably have been expected to
16 call the witness."

17 That, we say, is the principle that applies here.
18 It is all about weight, it is not about admissibility,
19 and that the OFT's failure to call the obvious people
20 that it should have called will strengthen the weight of
21 Tesco's evidence and weaken the weight of the
22 documentary evidence that the OFT relies on without any
23 assistance. Then they go on to say that there must be
24 some evidence adduced by the other party. Then:

25 "If the reason for the witness' absence or silence

1 satisfies the court, no such adverse inference may be
2 drawn."

3 Then they consider their own case which wasn't
4 a trial and the summary of Mr Justice Briggs at the end
5 of paragraph 53:

6 "Putting it in my own words, inferences which may be
7 drawn from the failure to call witnesses go to the
8 relative weight of competing evidential cases but only
9 where the evidence which such witnesses might have been
10 expected to challenge is itself inherently incredible."

11 In this case the OFT never interviewed any witness
12 from Dairy Crest or from McLelland, who were the two
13 alleged hubs in this case, even though they did
14 interview 14 other people and even though their case, as
15 you will see, in relation to 2002 was that Dairy Crest
16 was the main architect of the so-called plan to
17 coordinate retail price rises.

18 The OFT never interviewed anyone from Tesco, in
19 particular they never interviewed John Scouler or
20 Lisa Oldershaw.

21 The OFT's explanation of this is in its skeleton
22 argument at paragraphs 82 to 83. Paragraph 82,
23 {magnum ref } it says:

24 "It is the case that in the course of its
25 investigation the OFT did not interview particular

1 individuals or ask certain other individuals about the
2 Cheese Initiatives. This is explained at
3 paragraphs 5.483 and 5.484 of the decision."

4 Sir, if we just turn those paragraphs up, volume 1
5 of the appeal bundle, tab 1, 5.483. The explanation is
6 in fact at 5.484:{magnum ref }

7 "Given the volume and nature of the contemporaneous
8 documents relating to the 2002 Cheese Initiative, the
9 OFT decided not to prioritise interviewing witnesses
10 relevant to that allegation."

11 So, simply, they just decided not to do it. They
12 didn't think it was necessary.

13 Then if you go back to their skeleton argument,
14 paragraph 83, {magnum ref } they say there's no rule
15 of law that the oral evidence of a witness can't be
16 contradicted by inferences from documents. We don't
17 suggest that there is a rule of law; we suggest that
18 everything is a matter of evaluation and weight and that
19 these are significant to that.

20 If you then go over the page, {magnum ref } they
21 say:

22 "... Tesco's suggestion that an individual knowingly
23 involved in clandestine price fixing is likely to give
24 'reliable evidence' is unrealistic. Such a person is,
25 to put the matter at its lowest, likely to be most

1 reluctant to say he was involved, however good his
2 recollection might be. Tesco's suggestion assumes that
3 such a person will tell the truth or will willingly and
4 openly answer questions when interviewed."

5 Again, we say this is an extraordinary position for
6 them to adopt. They seem to be saying, "Well, we know
7 you're guilty anyway so there's no point asking any
8 witnesses about it because they'd be bound to lie". And
9 this in a situation where they have early resolution
10 agreements with all the other parties that obliged them
11 to cooperate fully with the OFT. We say that
12 explanation is wholly inadequate.

13 They say:

14 "Both a person who was involved in price fixing and
15 a person who was not so involved will each say he was
16 not involved."

17 That's not really the point. The point is that, if
18 they attended to give evidence, they can be
19 cross-examined and the credibility of their position can
20 be tested against the contemporaneous documents.

21 **LORD CARLILE:** Choose your moment.

22 **MISS ROSE:** Sir, that is a very convenient moment because

23 I am in fact about to turn now to the documents.

24 **LORD CARLILE:** We'll resume at 2 o'clock.

25 **MISS ROSE:** Yes. Can I ask how long the Tribunal is able to

1 sit? We lost some time this morning.

2 **LORD CARLILE:** We can sit on today. We can't sit on
3 tomorrow; tomorrow we will finish at 4.30.

4 **MISS ROSE:** Yes. How long can you sit on today?

5 **LORD CARLILE:** How long do you want to sit on?

6 **MISS ROSE:** What I would like to achieve today is if I can
7 cover -- the final task I have to do is to show you the
8 documents. If I can achieve showing you the documents,
9 and if not the whole of the 2002 initiative, at least
10 the bulk of it today, we will finish comfortably by
11 lunchtime tomorrow.

12 **LORD CARLILE:** I wouldn't want to sit much beyond 5.00.

13 **MISS ROSE:** Shall we see how we go and then evaluate the
14 position at 5.00?

15 **LORD CARLILE:** We can always sit half an hour early
16 tomorrow.

17 **MISS ROSE:** Yes, we could do.

18 (1.02 pm)

19 (The short adjournment)

20

21 (2.00 pm)

22 **LORD CARLILE:** Miss Rose, will you bear in mind that the
23 LiveNote team will need a break about halfway through
24 the afternoon, please.

25 **MISS ROSE:** Yes, if we aim to break about 3.30?

1 **LORD CARLILE:** Maybe just a little bit earlier than that,
2 3.20. Right.

3 **MISS ROSE:** Can we now turn to the documents, and if we take
4 up the first document bundle, what I intend to do is to
5 go through the bundles identifying the salient documents
6 and the key points that we make on them, but obviously
7 I'm not going to develop the whole of our case on each
8 document.

9 First of all, in volume 1, if you go to tab C,
10 tab 1, C, so this is before you get to tab 1
11 {^magnum ref }. This is a letter which Tesco wrote
12 to the OFT on 10 April 2000, because it was concerned
13 about letters that were being sent by other milk
14 retailers concerning the price of milk. It's got
15 a confidentiality marking which I think means I can't
16 read it out. Yes, I'm getting nodding. But if I can
17 invite you to read it you can see what Tesco are saying,
18 and in particular what they say in the paragraph
19 opposite the second hole-punch.

20 We say that that shows that Tesco was sensitive to
21 the idea that communications in relation to future
22 retail price in this very area could be a breach of the
23 Competition Act and that it was drawing the OFT's
24 attention to such communications in 2000.

25 You can see the letters that Tesco was complaining

1 about are in the two preceding tabs, if the Tribunal
2 wants to look at them. And the response of the OFT is
3 at tab D {^magnum ref }, and the OFT agreed with
4 Tesco's analysis. In fact those are its responses to
5 the other retailers, it's response to Tesco is at tab F
6 {^magnum ref }.

7 So if we then go on to tab 6 {^magnum ref }, this
8 is the press release that was issued by Tesco on
9 3 September 2002 in relation to fresh liquid milk. You
10 can see that it explains that there had been a meeting
11 between Terry Leahy and Ben Gill, president of the
12 National Farmers' Union, and the statement that's made
13 by Tesco director John Gildersleeve is:

14 "It is clear that British dairy farmers are
15 currently struggling in a difficult and complex market.
16 Tesco is committed to helping those farmers get through
17 this and we believe that there is a strong case for them
18 to receive a significant price increase in the
19 forthcoming negotiations with processors."

20 So what Tesco is talking about is more money for the
21 farmers at the farm gate.

22 "While Tesco cannot directly deliver this price
23 increase we can help to create a more sustainable
24 industry which delivers better returns for producers.
25 We are already working hard to bring this about by:

1 "involving Tesco in detailed discussions with
2 processors and producers to discuss issues, including
3 pricing, explore opportunities and encourage
4 communication throughout the supply chain;

5 "sourcing 100% of our milk ... from British
6 suppliers;

7 "cutting the retail price of organic milk to reduce
8 surplus;

9 "increasing the amount of British cheese we sell ...

10 "promoting British suppliers ...

11 "sourcing over 7000 regional lines from the UK..."

12 So that was the first press release.

13 That was followed by a second press release which is
14 at the following tab {^magnum ref }:

15 "Although we cannot determine the price paid to
16 farmers, we are today calling on all milk processors to
17 pay them at least two pence per litre more because of
18 the need to sustain the UK dairy industry.

19 "Tesco is the biggest supporter of the British milk
20 industry -- sourcing all our milk ... from the UK. We
21 urge other retailers and manufacturers to examine their
22 sourcing policy and do more to support the British dairy
23 industry."

24 That's the very public announcement by Tesco that
25 farmers ought to get an extra 2p per litre, and an

1 acknowledgement that Tesco couldn't itself determine
2 that but urging the industry to take action. That is
3 now not alleged by the OFT to be in any way
4 anticompetitive.

5 Now, although, as I say, the OFT has accepted that
6 there was no unlawful plan or unlawful initiative in
7 relation to fresh liquid milk in 2002, it still seeks to
8 rely on what Tesco did in relation to milk in 2002. We
9 can see this in the OFT's skeleton argument. If we just
10 take that up in the pleadings bundle, tab 14,
11 paragraphs 26 to 29 of the OFT's skeleton argument
12 {^magnum ref }.

13 I invite you to re-read these, but essentially what
14 the OFT says is that Tesco in relation to milk
15 recognised that in order for there to be an increase in
16 the farm gate price, there would have to be a cost price
17 increase in relation to milk, that you couldn't expect
18 the milk processors to take the hit so there would have
19 to be an increase in the price that Tesco was paying to
20 the processors for fresh liquid milk which could then be
21 passed on to the farmers.

22 They say that you can deduce from that that the same
23 would apply to cheese. If you look at paragraph 29
24 {^magnum ref }, there's the heading "Extension to
25 other dairy products, including cheese". And it said:

1 "Following the 9 September increase in the retail
2 price of liquid milk, attention turned to other dairy
3 products, including cheese. It is common ground that in
4 order to achieve the overriding objective of returning 2
5 [pence per litre] to farmers in general, all processors
6 would have to increase what they paid to farmers for all
7 raw milk..."

8 That is indeed common ground, that's not disputed.

9 "Only 50% of raw milk is sold ... as liquid milk..."

10 Then this:

11 "If, as processors required and Tesco appreciated,
12 the processors were to fund the increased farmgate price
13 through an increase in their cost price, then there
14 would have to be a cost price increase for these other
15 dairy products, including in particular cheese."

16 They use that as part of their jumping-off point for
17 saying that Tesco must have appreciated that there would
18 have to be a cost price increase in cheese, and that
19 leads them into what they say eventually is Tesco's
20 awareness of the plan for the retail price,
21 a coordinated retail price rise.

22 We say that there is, of course, a non sequitur
23 there because it doesn't follow from the fact that Tesco
24 considered, in order to fund an increase in the price
25 paid for milk to be sold as liquid milk that there would

1 have to be an increase in the cost price for that milk,
2 that the same was true of cheese.

3 We'll see in a minute from the documents, and this
4 is also the evidence of Tesco's witnesses, that in fact
5 those who were involved in buying cheese for Tesco
6 considered that the cheese processors had done rather
7 well during 2002, because what had happened in 2002 was
8 that the farm gate milk price had fallen significantly,
9 so the processors were buying their milk for less, but
10 Tesco had not cut its cost price that it paid for
11 cheese.

12 So Tesco's internal view was actually that the
13 margins for the processors had improved during 2002 in
14 relation to cheese. It was not necessarily the case
15 that Tesco considered that any return of 2p per litre to
16 the farmers would have to be funded by an increase in
17 the cost price of cheese.

18 The next point I want to come to, coming back to the
19 documents, is the dairy supply group meeting. The
20 starting point is, if we go back to document 1 in this
21 file ^magnum ref , you can see the origins of the
22 Dairy Supply Group. This is an email from Robert Hirst
23 of Tesco to Dido Harding and copied to John Scouler,
24 dated 26 February 2002, "Subject: Dairy Supply Group":
25 "Dido, Jacqueline,

1 "You asked me to look at the options for setting up
2 something similar to the Meat dept Producer Clubs.
3 Having consulted with the industry and farmers I would
4 make this recommendation,

5 "We instigate a Dairy Supply Group along the
6 following lines:

7 "Attendees - Tesco commercial.

8 "- Direct farm supply representatives, eg Express
9 Milk Partnership (Dairy Farmers)

10 "-Milk buying groups eg First Milk

11 "-Milk & Cheese processors, eg Arla, North Downs
12 Dairies

13 "-Frequency - 3 times per year ...

14 "-Objectives - Continuous improvement in Supply
15 chain

16 "-Improve understanding of Farmer/Processor/Tesco
17 ways of working

18 "-Give our Dairy farmers a voice

19 "-Prioritise & implement 3/4 joint initiatives (with
20 owners from each group)"

21 Then they discuss venues, and then:

22 "NB. This is very similar to the Meat Producer
23 clubs. I believe they have approx 20 Farmers attend
24 whereas I would anticipate the Dairy group would have
25 8-10 with a similar number of representatives from the

1 Milk buying groups and our suppliers. I believe this is
2 necessary as we have a larger supply base than Meat."

3 And then various other comments.

4 So that is the origin. The idea was that Tesco
5 would get together with the companies that were
6 supplying it with milk and cheese and also with the
7 farmers who were supplying the raw milk to those
8 suppliers of Tesco and that they would discuss general
9 problems in the industry.

10 So there are three groups --

11 **LORD CARLILE:** No other retailers?

12 **MISS ROSE:** Absolutely. That was the point I was about to
13 make. Three groups attending this meeting: farmers,
14 Tesco suppliers and Tesco. No other retailers are
15 attending this meeting.

16 There have been attempts by the OFT at various
17 points in the investigation to somehow suggest that this
18 is a "smoke-filled room" meeting. Of course it has
19 nothing of that character at all, it is a perfectly
20 legitimate forum in which Tesco, very publicly, is
21 meeting with a large group of those who supply it and
22 their ultimate suppliers.

23 The next point I wanted to make is that there are
24 conflicting interests between the people who were in the
25 room with Tesco because the farmers, very militantly at

1 this time, are seeking to improve the amount of money
2 that they get paid for their raw milk, and the milk
3 processors are trying not to pay the farmers any more
4 than they absolutely have to. Tesco, of course, ideally
5 wouldn't want to pay any more than it has to pay for its
6 milk or its cheese either.

7 So there are conflicting interests in the room.
8 Equally Tesco's communication strategy with those groups
9 is quite a delicate matter. First of all, of course, it
10 certainly doesn't want to say anything about the cost
11 prices that it's prepared to pay for cheese in a room
12 filled with all of its cheese suppliers because that
13 would be wholly against Tesco's own commercial
14 interests; to give anything away about the cost price it
15 was paying for cheese from one supplier, that would be
16 against its interests with the others. And it certainly
17 doesn't want to suggest to its suppliers that it's
18 willing to pay for more cheese.

19 Equally, there are farmers in the room and the
20 farmers are blockading Tesco's depots, so Tesco does not
21 want to suggest to the farmers that there is no prospect
22 whatsoever of Tesco paying more for its cheese because
23 that is likely to lead to an escalation circulation of
24 the action that's being taken against Tesco. So what
25 you would expect to see at the Dairy Supply Group

1 meeting, a meeting in that situation, in that political
2 context, is words of general anodyne comfort suggesting
3 that everything might be all right but not committing to
4 anything, so essentially saying nothing of great
5 significance.

6 Our submission is that that is in fact, when you
7 look at the notes, precisely what did happen and
8 precisely what was perceived by those who attended the
9 meeting to have happened at that meeting, that it was
10 simply a general talking shop.

11 The Dairy Supply Group meeting is an important part
12 of the OFT's case. You can see this at paragraph 33 of
13 their skeleton argument. If you start at 32
14 {^magnum ref }, they describe the DSG meeting here
15 and they say:

16 "What happened at that meeting is of considerable
17 importance to the 2002 Cheese Initiative."

18 What they say at paragraph 33 is that the various
19 notes of the meeting:

20 "... establish that at that meeting: first,
21 increases in retail prices for cheese were discussed as
22 part of a discussion of prices for cheese; secondly,
23 that Tesco disclosed, to the array of gathered
24 processors, that it was contemplating increasing its own
25 retail prices for cheese ..."

1 That's the crucial allegation. It said that Tesco
2 disclosed it was contemplating increasing its cheese
3 retail prices.

4 "... and thirdly that Tesco also disclosed that it
5 would only increase those prices on condition that other
6 competitor retailers also increased their cheese retail
7 prices; this is the first of Tesco's statements of
8 'conditionality'. Essentially, Tesco indicated to all
9 the processors, at one and the same time, that it would
10 be willing to participate in a market wide scheme to
11 raise retail and cost prices on other dairy products so
12 that 2 [pence per litre] could be passed back to the
13 farmers on raw milk; and Tesco challenged the processors
14 to work out the detailed mechanics of the scheme."

15 So that is the allegation: Tesco signalled its
16 willingness to participate in a coordinated scheme to
17 increase the retail and cost prices for milk at this
18 meeting.

19 There are four contemporaneous or near
20 contemporaneous notes of the DSG meeting. The OFT's
21 case is that they're all completely clear, they all
22 corroborate each other and they all lead to the
23 conclusion that you've just seen expressed at
24 paragraph 33.

25 I've already made the point that the OFT did not

1 interview any of the people who attended this meeting
2 about what happened at the meeting. That's an important
3 qualification because, as a matter of fact, the OFT did
4 interview one of the people who attended this meeting.
5 Not only that, the OFT in fact interviewed one of the
6 people who made a near contemporaneous note of this
7 meeting. That was David Peat from Wiseman, a dairy
8 supplier.

9 The OFT interviewed David Peat and asked him no
10 questions at all about this meeting or about his note of
11 the meeting. If I can just show you his interview, it's
12 in the investigations bundle, volume 2, tab 42
13 {^magnum ref }, transcript of OFT interview with
14 David Peat of Wiseman, 16 July 2008, four years ago,
15 when memories would have been significantly fresher than
16 they are now. You can see at the bottom of the page
17 that "TH", who is Tom Heideman from the OFT, says:

18 "Thank you. Just to note that all the questions
19 relate to 2003 only and milk."

20 The most detailed note of this meeting was a note
21 taken by an Express Dairies employee called
22 John Southwell, and that note is at tab 14 of volume 1
23 of the documents bundle {^magnum ref }. The OFT did
24 not interview John Southwell, even though its case
25 depends heavily on his note of the meeting, and even

1 though the OFT did actually interview another Express
2 employee, Tim Smith, and said that the reason it
3 interviewed him was because he was the author of
4 a document that it proposed to rely on.

5 As a matter of fact, there was only one person whom
6 the OFT ever asked any questions at all about this
7 meeting. That person was Frank Robinson. If you turn
8 to investigations bundle 1, tab 7 {^magnum ref },
9 Frank Robinson was an employee of Arla which, as the
10 Tribunal may be aware, successfully applied for leniency
11 in relation to milk infringements.

12 If you go to page 29 of this interview, at the top
13 of page 29 {^magnum ref }:

14 "Okay. Can we move on to the next document, and
15 this is Tesco milk supply group. I think you said this
16 was the group that Rob Hirst set up ... meeting on the
17 13th of September.

18 "Yes.

19 "Did you go to that one ...

20 "I didn't, no."

21 **LORD CARLILE:** I think Ms Lester noticed me shaking my head
22 and that was because I was looking through the other
23 document referred to. He referred to the list of
24 attendees.

25 **MISS ROSE:** Oh, I see, right. He wasn't on the list of

1 attendees.

2 **LORD CARLILE:** No, he wasn't on the list of attendees
3 because he wasn't there.

4 **MISS ROSE:** He wasn't there. And they're told that
5 Matthew Lee attended on behalf of Arla. Matthew Lee was
6 never asked about this meeting.

7 **LORD CARLILE:** He wasn't there either.

8 **MISS ROSE:** That's not a complete list of attendees so it's
9 possible that he was there.

10 Then:

11 "I just wonder if there's a couple of bullet points
12 in the discussion. The second bullet point says that
13 'Tesco and the processors were cautiously optimistic
14 that there's a mood to address the problem with
15 cheese'."

16 The Tribunal will note that that is a statement that
17 is heavily relied on by the OFT now as indicating that
18 Tesco was saying it was willing to raise the retail
19 price of cheese.

20 "What do you understand about the problem with
21 cheese?"

22 "It doesn't mean anything.

23 "Right, okay.

24 "It looks like one of ..."

25 And we can see that has been redacted. We've asked

1 for that statement to be unredacted and so far have not
2 been provided with it. I'm still hoping that it will
3 emerge.

4 **LORD CARLILE:** Hold on a second, I think there may be some
5 conjuring going on.

6 **MISS ROSE:** I'm told it's coming.

7 **LORD CARLILE:** Hats and rabbits.

8 **MR MORRIS:** I'm told it is on its way, that we are in the
9 process and have been in the process of checking with
10 Arla. It's coming.

11 **MISS ROSE:** Obviously I'll reserve my position until I see
12 what it says, but the point is that the only person the
13 OFT ever interviewed about this meeting, which forms
14 such a central part of its case, is a person who didn't
15 go. They never asked anyone else about it even though
16 they did later interview a person who was not only there
17 but took a note at the time.

18 Eversheds, who were solicitors for Dairy Crest, did
19 interview one of the attendees at the DSG, that was
20 Colin Beaumont of Dairy Crest, and they sent the OFT
21 a note of their interview with Colin Beaumont. That's
22 in the investigations bundle, bundle 1, tab 11. Sorry,
23 that is the wrong reference. It is B/11, there are two
24 sets of numbered tabs, one is A and one is B. So it's
25 B/11 {^magnum ref }.

1 **LORD CARLILE:** B/11, got it.

2 **MISS ROSE:** So this is a note that Eversheds took of an
3 interview with Colin Beaumont and sent to the OFT. You
4 can see that this is 29 October 2007. Page 3 -- you can
5 see at the bottom of page 2 {^magnum ref }there's the
6 heading "Tesco Dairy Supply Group Meeting". He explains
7 that it was an open forum, he explains the timing, and
8 then at 10:

9 "I do not remember what was discussed at the meeting
10 in detail. I do not recall a discussion regarding the
11 need to increase the price of cheese and butter as well
12 as milk, despite such comments being referred to in the
13 minutes. I'm sure that no reference was made to, and
14 there was no open dialogue about, pricing. At most
15 there may have been a reference to a 2 pence per litre
16 increase that the farmers required but in no more detail
17 than [that]. Tesco took the lead in the running of this
18 meeting."

19 So that's what they were told by Dairy Crest about
20 somebody who attended the meeting. They never
21 interviewed Colin Beaumont and they never explored this
22 with any other witness.

23 Now, the suggestion made by the OFT that the notes
24 that they have of the DSG meeting are absolutely clear
25 and therefore don't require any elaboration by oral

1 evidence is particularly surprising because the OFT's
2 own interpretation of those notes has changed very
3 significantly between the time that it issued its
4 statement of objections in 2007 and the time that it
5 issued its decision in 2011, even though the OFT was, on
6 both occasions, relying on precisely the same written
7 notes of the meeting.

8 If I can ask you to take up the statement of
9 objections, this is in appeal bundle 4 at tab U,
10 paragraph 1338. The passage that deals with this
11 meeting, it's dealt with in considerable detail by the
12 OFT starting at paragraph 1300 on page 286
13 {^magnum ref }, and they summarise their overall
14 conclusions and inferences drawn from the supply group
15 meeting notes at paragraph 1338 {^magnum ref . They
16 say:

17 "On the basis of the three meeting notes prepared by
18 Express, Arla and Dairy Crest, and relevant extracts
19 from Wiseman's account [which are the same materials
20 they rely on now] ... the OFT concludes that:

21 "i. Attendees at the Tesco milk supply group ...
22 discussed a plan to increase farmgate prices by an
23 aggregate of 2p [per litre] ...

24 "ii. These discussions focused upon extending the
25 price initiative that had been implemented in respect of

1 [fresh liquid milk] to other dairy products, in
2 particular cheese."

3 Just pausing there, of course, at this stage the
4 OFT's case was that the Fresh Liquid Milk Initiative was
5 an infringing initiative. So the whole thrust of their
6 argument about the DSG group meeting was that there was
7 a covert anticompetitive initiative to fix the price of
8 fresh liquid milk and that this meeting was intended to
9 extend it to cheese. That case, of course, collapsed
10 once the OFT's case on fresh liquid milk collapsed.

11 "iii. Tesco expected its processors to play an
12 important role in the extension of the FLM initiative to
13 other products ...

14 "iv. Discussions regarding a cheese price initiative
15 involved the implementation of retail price increases.

16 "v. It was intended that cheese retail price
17 increases would be coordinated across the retail market
18 and that the proposal was not based on an unilateral
19 price movement by Tesco."

20 Then this:

21 "This conclusion regarding the nature of discussions
22 will be supported by subsequent evidence which will
23 demonstrate that Tesco would not have been willing to
24 increase its cheese retail prices unilaterally."

25 The significance of this point is that if you read

1 the paragraphs where they analyse the evidence in the
2 SO, it is not suggested by the OFT at that stage that
3 Tesco made any conditional commitment or conditional
4 indication that it was prepared to raise its retail
5 price for cheese provided other retailers did the same.

6 What it said is that it made such a commitment or
7 conditional commitment after the meeting on subsequent
8 occasions, and that you can draw the inference from the
9 subsequent conditional commitments that that was the
10 plan at the meeting.

11 So that was the OFT's first interpretation of these
12 notes, but when we get to the decision the whole
13 business of this being an extension of the illicit milk
14 initiative to cheese has gone, because that's no longer
15 relevant, and instead the focus becomes being what these
16 notes clearly and unequivocally demonstrate is Tesco
17 making a conditional commitment to increase the retail
18 price for cheese at this meeting.

19 We say, if the notes are as clear as the OFT
20 suggests, that is quite a strange course of events.

21 So if we now go to the notes and start with the
22 Express note which is, by some margin, the most
23 detailed. This is documents bundle 1, tab 14
24 {^magnum ref }. So John Southwell who made this
25 note, if you look at the first page of tab 14 you can

1 see an email in which he forwarded this note to a number
2 of other employees within Express Dairies. "Subject:
3 notes on Tesco Producer Forum":

4 "Peter asked me to circulate notes on the Producer
5 Forum which are attached -- for the last hour we were
6 just going nowhere and at times throughout Scouler and
7 Hirst appear to have had different views."

8 Now, that is, in my submission, the overall message
9 that John Southwell, the author of the longest and most
10 detailed note of the meeting, took from the meeting. He
11 did not take from the meeting that Tesco was suggesting
12 any across-the-market coordinated retail price
13 initiative for cheese. He did not take from the meeting
14 that Tesco was making any kind of conditional commitment
15 to increase its cheese retail price. What he took from
16 the meeting was that it had been going nowhere for the
17 last hour, and that the two Tesco employees who attended
18 didn't even seem to agree with each other.

19 As we shall see in a minute, his view of the meeting
20 was shared by the Wiseman representative, David Peat,
21 who attended it.

22 So then we go over the page and there is a list of
23 attendees, and you can see that that's not an exhaustive
24 list because he says:

25 "Plus a few others whose names I did not get."

1 Two of the people who were at this meeting will be
2 giving evidence, they are John Scouler of Tesco and
3 Tom Ferguson, described here as being from McHollands
4 but that is a misprint for McLelland.

5 "Expectations of the meeting (points raised around
6 the table by various)."

7 So this is not Tesco, this is people just suggesting
8 and throwing out ideas. And you can see the list there,
9 various topics, not surprisingly focused on what was
10 going on with fresh liquid milk, with the initiative to
11 raise the farm gate price to farmers, and the concern
12 about how do you extend that to other dairy products,
13 price move from fresh milk into cheese.

14 Then we have "Discussion", and there's
15 a introduction from Rob Hirst from Tesco. Then in the
16 second paragraph:

17 "Challenge to processors was that Tesco wanted to
18 see a better return to farmers and the decision
19 therefore taken to facilitate a price increase back to
20 the farmer (this kind of action probably won't be
21 repeated). All retailers have moved except for Safeway
22 (internal price problem but down to Safeway to solve).
23 The challenge to processors was to put 2p [per litre] on
24 all milk but recognising that supermarket milk is only
25 25% of total. Want processors to settle this quickly

1 with farmers so that they are confident going into the
2 winter.

3 "The price since March has dropped 3.25p [per litre]
4 and processors are therefore expected to help in
5 achieving the price increases. Fresh milk was the
6 easiest to start moving forward and Tesco looking to
7 processors for a response in the next two weeks. Accept
8 that it is a complex situation but liquid simplest to
9 kick start and Tesco now looking at other areas."

10 Just pausing there, you can see the point made by
11 Mr Hirst that the price, this is the farm gate price,
12 had dropped since March by 3.25p per litre and
13 processors were expected to help.

14 So Tesco is not saying, "We accept that the whole of
15 any price increase will have to be funded by an increase
16 in the wholesale price", it's saying "You processors
17 have done pretty well".

18 We can see that that point was also emphasised by
19 the Arla attendee. If you just go back to tab 13, the
20 Arla note is obviously not detailed at all, it's simply
21 one page of very general bullets of things that struck
22 this person as interesting. If you look at the fifth
23 bullet under "Discussion", it says {^magnum ref }:

24 "3 to 3.5p [per litre] has come off producer price
25 since March 2002 and it must be returned. Tesco expects

1 it to be returned ...

2 "'Tesco did not chase any price reduction' ..."

3 So the point that is being made is when the farm
4 gate price came down, so it was less expensive for the
5 cheese processors to buy their milk, Tesco did not cut
6 the price that it paid for its cheese so your margins
7 have improved.

8 Then there's a comment from M Stephens
9 {^magnum ref - they're now back at previous ref, tab
10 14} } who, you can see, is a farmer. They just say they
11 just want 2p per litre across the board.

12 Another farmer says milk under 20p per litre is
13 unsustainable."

14 Mr Scouler asks Express Dairies what it thinks about
15 doorstep delivery and gets a rather gloomy response:
16 it's in decline.

17 Then this is a paragraph that the OFT relies upon:

18 "R Hirst - Cheese and spread values have crashed
19 over the last 3 years and Tesco has been selling them at
20 a loss. Cautiously optimistic that Tesco can now start
21 to move retail prices forward in this area but Tesco
22 still needs to sell 'value products' (21% of sales).
23 Price problem in dairy victim of shopping basket values
24 and very difficult to move out of line with other
25 competitors but RH senses there is a mood to move some

1 of these prices forward. The decision was taken
2 opposite liquid milk because it was:

3 "Highly visible.

4 "Gave a big kick start to the process.

5 "But need to follow through on other markets."

6 Now, a number of points to make about this. First
7 is that the OFT has interpreted the sentence:

8 "Cautiously optimistic that Tesco can now start to
9 move retail prices forward in this area" as being
10 Mr Hirst saying that Tesco is cautiously optimistic that
11 it can increase cheese and spread prices. But that is
12 a misinterpretation, because when it refers in the first
13 sentence to "cheese and spread values", he is not
14 talking about the price paid for cheese and spread; he
15 is talking about Tesco's Value products, and anybody who
16 shops in Tesco will know that Tesco has different
17 ranges, the Tesco Finest and the Tesco Value. Tesco
18 Value is the budget range and the Finest range is the
19 top end of the market.

20 I am sure that members of this Tribunal buy only
21 Tesco Finest. But the Tesco Value range --

22 **LORD CARLILE:** You're educating me.

23 **MISS ROSE:** Sir, I had assumed you bought your own cheese.

24 **LORD CARLILE:** I'm not answering that question.

25 **MISS ROSE:** The point is that Mr Hirst is not saying the

1 value of cheese and spread has crashed and we make
2 a loss selling cheese and spread, that would be an
3 extraordinary thing for Tesco to say. He's saying the
4 Value market, the bottom end, that's the market that has
5 gone down and those are the products where we're selling
6 at a loss. He's saying that market is so low that it
7 may be possible to raise the prices of those bottom
8 range of products.

9 **LORD CARLILE:** So one has to take those first two sentences
10 together, you're saying, to make sense of them?

11 **MISS ROSE:** Yes. You can see in the second sentence, it
12 says:

13 "Cautiously optimistic that Tesco can now start to
14 move retail prices forward in this area but Tesco still
15 needs to sell 'value products' (21 per cent of sales)."

16 It's clear that he's only talking about Value
17 products, he's not talking about cheese generally. You
18 can see the misinterpretation by the OFT of this
19 particular sentence if you go to the decision, volume 1,
20 the notice of appeal bundle, paragraph 5.81 of the
21 decision {^magnum ref }.

22 "The OFT notes that there are several direct and
23 indirect references to retail prices being increased in
24 this passage of the Express file note. First, Mr Hirst
25 is unambiguously recorded [says the OFT] --"

1 **LORD CARLILE:** Sorry, I'm not with you.

2 **MISS ROSE:** Paragraph 5.81.

3 **LORD CARLILE:** I have too many files open, bear with me for
4 a moment.

5 **MISS ROSE:** Yes. Obviously the main one you need open is
6 the documents bundle.

7 **LORD CARLILE:** Let me just get rid of a couple of files.
8 I'm trying to do some of them on the screen as well
9 because it makes it simpler.

10 **MISS ROSE:** I would retain volume 1 of the documents bundle
11 because we're going to be going backwards and forward.

12 **LORD CARLILE:** Right, so notice of appeal bundle 1.

13 **MISS ROSE:** Notice of appeal bundle 1, tab 1, paragraph 5.81
14 .

15 **LORD CARLILE:** Thank you very much.

16 **MISS ROSE:** "The OFT notes there are several direct and
17 indirect references to retail prices being increased in
18 this passage of the Express file note. First, Mr Hirst
19 is unambiguously [please note the word 'unambiguously']
20 recorded as being 'cautiously optimistic that Tesco
21 cannot start to move [and then they've put in brackets
22 "cheese and spread"] retail prices forward'."

23 So clearly the OFT has misinterpreted this sentence
24 that it regards as unambiguous because it is in fact not
25 referring to cheese and spread, it's referring to Value

1 products.

2 The reason I stress this point is that it shows what
3 can happen if a party like the OFT, that is not expert
4 in the industry and that didn't attend the meeting,
5 seeks to rely in isolation on notes of a meeting without
6 talking to the people who were there and who knew what
7 was being discussed. It just shows the errors that can
8 be made.

9 Going back to the Express note
10 {^magnum ref - doc/1/tab 14 again p3 }, the OFT
11 also relies on the point that is made in this paragraph
12 that it is:

13 "... very difficult to move out of line with other
14 competitors but RH senses there is a mood to move some
15 of these prices forward."

16 The OFT says, "Ah, look, that's a conditional
17 commitment, saying that Tesco is contemplating raising
18 its cheese retail prices but will only do so if others
19 do the same". We say that is clearly
20 a misinterpretation of an anodyne comforting statement
21 being made to a room full of processors and farmers.
22 Tesco are obviously not going to say, "We'll never raise
23 our retail prices" because the farmers would be furious,
24 and they're not going to say to the processors "Yes,
25 we're prepared to pay whatever you like for your cheese"

1 and raise the price. So what Tesco says is, "It's all
2 very difficult but maybe it's possible, maybe it could
3 be done". It's simply an anodyne comment.

4 The statement that it's very difficult because it's
5 a competitive market is hardly something that could be
6 regarded as a sensitive piece of confidential
7 information. So we say that there is simply, by the
8 OFT, overanalysis of this and elevating it into
9 something that it clearly is not.

10 If we go now over the page in the Express note
11 {^magnum ref - same ref, p4 }, the question is asked:

12 "What are Tesco expecting in response?"

13 Hirst says:

14 "We want a plan from processors on
15 the 2p [per litre] increase."

16 Then Wiseman says:

17 "Optimistic in getting 2p [per litre] back across
18 sectors and passing it back (but not necessarily
19 2p [per litre] depends on the success) but will take
20 time and processors all will have different profiles."

21 Hirst says:

22 "Tesco did not chase the April price down although
23 price decreases were offered to them which they
24 accepted. Need to get price back to March levels and
25 not just the 2p [per litre]."

1 That's the point I've made before. Tesco are not
2 accepting that any increase in the price paid to farmers
3 would have to be funded by a cost price increase.

4 Scouler:

5 "Needs to be at least 2p [per litre]."

6 Then there's various other comments, and then the
7 Arla salesperson says:

8 "Good opportunity. Tesco -- led the market.
9 Concern is cheese side. If base price of cheese raised
10 then imports drawn in and price collapses. Could we
11 perhaps relate premiums on commodities to UK farm
12 assurance schemes? How can UK differentiate and would
13 the consumer recognise and pay?"

14 So it's actually Arla and not Tesco which first of
15 all makes the point that it's very difficult to raise
16 cheese prices because this is an internationally traded
17 commodity, and if British cheese is more expensive the
18 market will just be flooded with cheap imports. And it
19 also says, well, would it be possible to charge
20 a premium for British cheese on the basis that consumers
21 would be more prepared to buy British? A question
22 raised by Arla.

23 There is then discussion of the Red Tractor Scheme
24 and Rob Hirst says he doesn't think much of it. Then
25 there's discussion about internet sales, they say that's

1 not -- they don't see much future in that, about
2 internet cheese auctions.

3 "Can we use assurance schemes to improve price in UK
4 or look at regionality on milk?"

5 Hirst then says:

6 "Looking at other dairy segments £1850/tonne for
7 cheese can't be right but how can the price be moved
8 forward? Recognition that prices paid next
9 January/February for mild cheddar could reflect change
10 in milk prices now."

11 The point there is it takes time for the milk price
12 to filter through to the cheese price because cheese has
13 to take time to mature.

14 Scouler:

15 "At the end of the day we must be competitive.
16 Highlighting that they are up against Walmart's view of
17 'lowering the cost of the living for the world', so how
18 to tackle other sectors."

19 Again, the OFT says that is a conditional
20 commitment. Walmart is a reference to Asda because
21 Walmart owns Asda. And the OFT says it's absolutely
22 clear from that statement by John Scouler that he is
23 saying Tesco is prepared to raise the price of cheese
24 provided Asda does. We say that is a fantasy
25 interpretation.

1 Then there's discussion of the good old days
2 because, of course, the milk price in the UK used to be
3 regulated by the Milk Marketing Board, and they all say
4 it was great in those days because there wasn't the same
5 kind of volatility in the market.

6 "Are there too many processors?"

7 Hirst says:

8 "... the bottom end is already there in the form of
9 the 'value lines'."

10 "Can we have an industry wide support for British
11 cheese? The last meeting suggested an umbrella support
12 for British cheddar."

13 The Tribunal can see, going through this, that it is
14 just an undirected debate with all sorts of different
15 questions being raised, sort of how can we solve the
16 cheese problem, without any clear idea of what the
17 answer is.

18 Scouler says:

19 "If all cheese branded British not one tonne more
20 will be sold although it might help the industry in the
21 short term it is not a sustainable solution."

22 He says the real thing that matters is price, not
23 where the cheese comes from, price is always the issue.

24 Scouler then says:

25 "A gloomy prospect for all dairy farmers. What does

1 the farmer do?"

2 Then Hirst says:

3 "Don't believe putting 8p on a pack of cheddar will
4 save the dairy industry."

5 So Hirst is there expressing the view that
6 increasing the price of cheese will not help, which is
7 an oddity if this is the meeting at which a plot is
8 hatched to introduce a coordinated retail price rise of
9 cheese.

10 "Can people be marginalised within the industry to
11 help achieve market management?"

12 "Any further ideas on how better to take this idea
13 forward please get back to Rob."

14 "Issues put back on the board for further
15 consideration at a meeting next January.

16 "How to tackle other dairy sectors, especially
17 cheese.

18 "Is there a premium to be paid for UK farm assurance
19 (ethical advantage).

20 "Are there ethical considerations that disadvantage
21 UK dairy farmers."

22 So our submission is that when you look at that note
23 you can see that Tesco is certainly issuing a challenge
24 to the processors saying, "Look, we want to get
25 2p per litre back to the farmers, it's obviously not

1 enough for that to be only applicable to fresh liquid
2 milk, you have to look at the other dairy sector". Then
3 they look at cheese and say "Well, it's incredibly
4 difficult, it's a very competitive market, there's
5 foreign imports, people won't pay more if it's buy
6 British, what are we supposed to do?" Answer, no idea.

7 That's why you can understand that the covering
8 email from John Southwell says:

9 "... for the last hour we were just going
10 nowhere..."

11 So that's the Express note.

12 The Arla note

13 {^magnum ref - docs bundle, A, tab 13 } , you will
14 note that it's divided into two sections, first "Tesco"
15 and then "Discussion". The bit about Tesco:

16 "Challenge to processors to return a [different]
17 price to farmers.

18 "Decided to facilitate a price increase by
19 increasing retail by 1p [per] pint."

20 That's talking about milk, that's not talking about
21 cheese, so that is not alleged by the OFT to be an
22 unlawful initiative.

23 "Safeway not yet increased (price point problem).

24 "Expectation that price increase to farmers should
25 be at least 2p [per litre].

1 "Tesco expects processors to report how they're
2 going to achieve this."

3 Then there's "Discussion", there's the point about
4 "doorstep". Then:

5 "Tesco/processors cautiously optimistic that there
6 is a mood to address the problem with cheese."

7 Again the OFT says that should be interpreted as
8 a conditional commitment, like Tesco saying, "We're
9 contemplating raising our retail price for cheese but
10 only if other retailers do it". We say that is simply
11 not a sustainable interpretation of that sentence.

12 "Ask the customers to pay for it.

13 "Problems with butter are on the point of being
14 sorted."

15 Then the points about the money that has come off
16 the cost price:

17 "'Tesco didn't chase any price reductions'."

18 Reference to farm assurance, Red Tractor Scheme,
19 and:

20 "Value of sterling remains an uncontrollable price
21 driver."

22 We say, yes, broadly consistent with what's in the
23 Express note but not suggestive of any conditional
24 commitment at all.

25 Then we have the handwritten Dairy Crest note. Now,

1 it is absolutely clear that this note is not absolutely
2 clear. This is tab 12
3 {^magnum ref - same as above but tab 12 }. The
4 handwriting of the person, who I believe to have been
5 Stuart Marsden -- his name is at the top -- is not
6 entirely legible, and this is a photocopy. There are
7 a number of uncertain words in this note.

8 Now, there have been various exchanges between the
9 parties of what they think this note might mean but, in
10 my submission, it was up to the OFT, if they wanted to
11 rely on this note, to call in Mr Marsden and ask him to
12 read his own handwriting but they did not do that. So
13 they're in no position to seek to ask the Tribunal to
14 resolve any of the verbal uncertainties in this note in
15 their favour.

16 So I submit that we ought to look at the handwritten
17 note and not at the attempts of the parties to
18 transcribe it which have no authority since none of them
19 are the result of any consultation with Mr Marsden.

20 So "Background":

21 "No prospect of rising prices.

22 "Not sustainable for UK dairy industry.

23 "Wish to maintain standards.

24 "Help facilitate increased price back to producer,
25 create head space (unlikely to be repeated)."

1 That appears to be a reference to the Milk
2 Initiative which you can see more fully developed in the
3 Express note.

4 "Challenge processors to put back at least 2p."

5 "Aware retail only 25 per cent of market."

6 This is talking about milk, that milk is only
7 25 per cent of the market:

8 "Price drop 3.25/3.5 ppl.

9 "Taking initiative on fresh milk, looking at other
10 sectors."

11 So that's all talking about the milk issue.

12 "Producer":

13 "Manage expectations.

14 "Expect/need minimum 20p [per litre] to deliver
15 standards.

16 "Majority will realise 2p [per litre] on liquid is
17 not 2p [per litre] producer."

18 "Bottle":

19 "Market in decline.

20 "Balance say increase in price will accelerate
21 market's decline [or 'accelerating market decline'].

22 "Express deliberating.

23 "Mood to see increase in other products,
24 butter/cheese."

25 Then:

1 "Ultimately consumer [something]".

2 It actually looks like "pulrth", but it's not clear
3 what it is. It could be "perth", it could be "pref", it
4 could be "pay".

5 "Need balanced portfolio, customer spread.

6 "Dairy suffered as part of basket price comparison."

7 Now what I submit is quite interesting here is the
8 reference to a balanced portfolio and a customer spread.
9 That's not found in the more full Express note. But
10 it's possible that what he means is explained at what
11 appears to be, and everything here is tentative, at what
12 appears to be a summary of his understanding of the
13 meeting at the end of the note.

14 If you go over the page, the heading "Tesco". At
15 point 1 it says:

16 "Mild, customer choice, price, 20% market."

17 Now, "20% market" seems to chime with the point in
18 the Express note that the Value lines are 21 per cent of
19 the market. So the reference here, "Mild, customer
20 choice", may chime with the comment here earlier that
21 you need a balanced portfolio.

22 The point may be that when you're selling cheese you
23 have to provide a Value range for one end of the market
24 and other kinds of cheese for other sectors of the
25 market. And that may provide some support for this

1 reference here to being consumer preference rather than
2 consumer pays. But this is all speculation, as it has
3 to be in the absence of the author of this note.
4 "Move on liquid, transparent.
5 "Other sectors more complex.
6 "... conscious that 2p [per litre] not industry
7 saviour.
8 "Need to return to at least March.
9 "Risk - focus on liquid, build false door.
10 "Sustainability key, total market needs to move.
11 "... keen to tackle other sectors especially cheese.
12 "Is there a premium to be paid for farm assurance.
13 "... support 'Red Tractor'.
14 "... are there ethical considerations ..."
15 You can see the themes here.
16 "... are there ethical considerations that [it's not
17 clear what that is] disadvantage UK farm.
18 "Currency and powder prices are outside our control.
19 "The Way Forward (re [it is not clear what that is]
20 issues)."
21 It appears to be "issues".
22 "Sustainability key.
23 "Problem - deregulated market, price volatility.
24 "How can we solve price stability at producer level.
25 "Not simply question of price per se.

1 "For growing retailers, Tesco, Asda, Morrison &
2 Alde, key buying criteria, price, quality, location.
3 "Need some form of market management."
4 Again, that seems to be a reference to deregulation
5 that you see in more detail in the Express note.
6 Then something that is unclear, something that
7 appears to say "competitive" and another word that's
8 unclear.
9 "All buy in..."
10 Note these initials appear to be references to the
11 Dairy Industry Association Limited and the British
12 Retail Consortium.
13 "Need government intervention/support."
14 "No ideal solution."
15 "Slowly [it's not clear what that is, something]
16 January, farmer pressure, communicating T message.
17 "Tesco very concerned about state of industry."
18 "Howard Organ."
19 Then there's the bit we've looked at:
20 "Mild customer choice, price 20% market."
21 "Sustainable dairy industry, concerned about current
22 state.
23 "Facilitating [increasing] price back to producer."
24 "Risk focus on liquid, build false dawn."
25 "Total mkt needs to move, sustainability key."

1 "Mood to see [increasing] prices.

2 "Dairy suffered as a result of basket companion."

3 LORD CARLILE: Or:

4 "Total market needs to move [towards] sustainability
5 [which is the] key."

6 And that's an emphasise on sustainability.

7 MISS ROSE: It could be.

8 LORD CARLILE: That's how I understood it.

9 MISS ROSE: The point is that one simply cannot tell exactly
10 what is meant, and what one is left with, looking at
11 those notes, is that there was a broad-ranging
12 discussion of the problem with cheese and no solution.

13 The final note is Wiseman, and this is the note that
14 David Peat, who was interviewed by the OFT but not on
15 this topic, wrote for the Wiseman board at tab 40. This
16 was on 4 October 2002, so this is a couple of weeks
17 after the meeting. Just below the second hole-punch,
18 the first page of tab 40 {^magnum ref
19 same as above few but tab 40 }, he says:

20 "This was followed the next day with the Tesco
21 farmers' forum at Heathrow Airport ... attended by both
22 milk and cheese suppliers and was totally dominated by
23 the 2 pence per litre initiative mentioned above.
24 Initially the meeting started on liquid prices but by
25 the middle of the session the meeting had moved on to

1 discuss what was felt the crux of the matter -- namely
2 the prices currently being achieved on products with
3 most of the discussion centred on cheese. There was no
4 real conclusion to this discussion perhaps other than
5 the realisation that this is a very difficult task and
6 there seemed to be hope that this could be tackled in
7 some way."

8 Now, we submit that that conclusion that David Peat
9 expresses there is entirely consistent with the cover
10 note on the email to the Express note.

11 So it's a rather long-winded discussion on this
12 meeting but we submit that, at the end of the day,
13 nothing was discussed at that meeting that wasn't
14 obvious and anodyne, and it certainly cannot be elevated
15 into the centrepiece of evidence to sustain any
16 allegation of a competition law infringement.

17 We then turn to the next document which is regarded
18 by the OFT as crucial to its case. Actually, before
19 I leave this, there's one further Wiseman note I want to
20 refer to which is that the OFT, although it didn't rely
21 on this in the course of its decision, for the purpose
22 of this appeal has produced another administration
23 report that was made to the Wiseman board which you also
24 have behind tab 40. This is on the pink paper. If you
25 go to the back of this section, on the internal

1 numbering, it's page 201 {^magnum ref }, you see the
2 heading "Raw Milk Pricing". Then at the bottom of the
3 page:

4 "A suppliers meeting organised by Tesco was devoted
5 to these topics and concluded that the only way for such
6 an initiative to be sustained was for the value of milk
7 in the manufacture sector to rise. As the cheese and
8 butter markets are international ones, it was difficult
9 to see how this could be achieved without compromising
10 the commercial position of the supermarkets. Only by
11 creating a pointed differentiation as a 'British' or
12 'quality assured' product could this be achieved, and
13 only then if the retailers were receptive."

14 Again, wholly inconsistent with the suggestion that
15 any conditional commitment was given by Tesco at this
16 meeting to raise the retail price of cheese if other
17 retailers followed suit.

18 So that's the dairy suppliers' group meeting. And
19 the next document which the OFT says is central to its
20 case is a memo sent by Dairy Crest to all of the main
21 supermarkets. We see what the OFT says about this
22 document if you take up its skeleton argument in the
23 pleadings bundle at tab 14, paragraph 34. Before we go
24 to 34, it's worth re-reading 33 having now looked at the
25 notes of the DSG meeting. The conclusion in particular,

1 in the middle of that paragraph {^magnum ref }:

2 "Essentially, Tesco indicated to all the processors,
3 at one and the same time, that it would be willing to
4 participate in a market wide scheme to raise retail and
5 cost prices on other dairy products so 2ppl could be
6 passed back to farmers on raw milk ..."

7 We say that is simply not what the notes say. So
8 then "The Dairy Crest Briefing Document":

9 "In response to Tesco's challenge [it is said, there
10 is no evidence this was in response to Tesco's
11 challenge, the fact is there was sustained pressure
12 being applied by the farmers in relation to cheese
13 throughout September], between 20 and 23 September ...
14 Dairy Crest sent to each of Asda, Safeway, Sainsbury's
15 and Tesco the document referred to as 'the Dairy Crest
16 Briefing Document'. This document is of central
17 importance in the events of 2002."

18 What they then say at paragraph 35 is:

19 "Thus, Dairy Crest proposed to each of these
20 retailers increases in cost price and in retail prices
21 for butter, cream and cheese across the market. The
22 increase proposed for cheese was £200 per tonne. The
23 proposal was for a uniform retail price increase across
24 the market, on a 'cash margin' basis. This reference to
25 the retailers' margin ... made it quite clear that

1 Dairy Crest was proposing retail price increases.

2 "The proposal was sent to the main retailers; and
3 Tesco, at least, knew that fact. As a result, each
4 retailer knew that Dairy Crest was proposing a market
5 wide retail price initiative, for a uniform price
6 increase (a 'plan')."

7 This then morphs in the OFT's case into a plan for
8 a coordinated retail price increase, in other words
9 nonindependent. We say that is a clear misreading of
10 the Dairy Crest memo. Of course it's right that the
11 Dairy Crest memo was a proposal for a cost price
12 increase in milk, Dairy Crest after all is -- sorry, in
13 cheese. Dairy Crest is selling cheese to all of these
14 supermarkets and it was proposing to all of them that
15 they should pay more for their cheese, and it was
16 seeking to justify that proposal by saying that all of
17 the benefit would be passed back to the farmers and that
18 Dairy Crest would not profit.

19 In the course of that proposal, Dairy Crest makes
20 a suggestion which is that the retailers, on this
21 occasion, should only raise their retail prices to
22 maintain cash margin and not percentage margin. In
23 other words, it's not saying to raise by the higher
24 amount but by the lower amount. It says that that is to
25 avoid accusations of profiteering.

1 The first thing that's obvious is that that is
2 simply a suggestion because Dairy Crest recognises that
3 setting the retail price is not its business, it's the
4 business of the retailers. The second point to make is
5 that the proposal that's made says nothing whatever
6 about coordination.

7 Now, if we go to the communication itself, the
8 communication to Tesco, document 25 in the documents
9 bundle, Colin Beaumont of Dairy Crest, so again the
10 obvious person for the OFT to interview and to seek to
11 call as a witness on this document which, on the OFT's
12 case, is of central importance, would have been
13 Colin Beaumont. He's not even interviewed by the OFT.
14 This is his email to Rob Hirst

15 {^magnum ref - docs/A/tab25 }:

16 "Following our conversation on Friday [and that
17 would have been 20 September] I can confirm that
18 Dairy Crest are to increase prices on cheese, packet
19 butter and cream with effect from [a date which is
20 confidential] in October.

21 "We are fully committed to passing all revenue
22 gained from this increase to our supplying farmers. The
23 attached briefing document clarifies all of the issues
24 associated with the increase.

25 "I'll contact you tomorrow [that would have been

1 24 September] to discuss any questions which you may
2 have."

3 So we say it is clear immediately from this covering
4 letter that this is a proposal from a supplier for an
5 increase in the cost price of their product, justified
6 on the basis that the money will be passed back to the
7 farmers.

8 Then we see the memo itself, "Background":

9 "There is enormous pressure from the British Farming
10 Community to address the very low level of milk prices
11 at present. Retailers and processors alike face a
12 prolonged and increasingly bitter period of protest and
13 disruption if this issue not addressed.

14 "Objective:

15 "Dairy Crest aims to build on the recent retailer
16 initiative on liquid milk pricing, by requesting
17 significant increases in pricing for packet butter,
18 fresh cream and cheese. All prices recovered as
19 a result of this initiative will be passed back to
20 farmers effective from date given."

21 Quite clearly a proposal for an increase in the
22 wholesale cost price.

23 "Butter pricing, they say £200 a tonne.

24 Cream, a 10 per cent increase.

25 "Cheese:

1 "We propose to increase all Dairy Crest supplied
2 cheeses by £200 per tonne. The reason for an immediate
3 move on all grades is that our objective is to pass the
4 revenue gained straight on to farmers immediately."

5 So they're simply saying we're going to increase the
6 cost prices for our cheese and pass the revenue to the
7 farmers.

8 "UK Sourced Dairy Products versus imports:

9 "We're seeking to address an immediate problem in
10 farming today. If however we jointly change the
11 competitive set of British dairy products versus
12 imports, damage could be done to this initiative. We
13 ask that you bear this in mind when considering your
14 retail pricing decisions."

15 That, we say, is very significant because it makes
16 it absolutely clear that Dairy Crest knows perfectly
17 well that it is not up to it to dictate retail pricing
18 decisions but they are the decisions of the retailers.
19 And what Dairy Crest is saying to the retailers is
20 "Please don't put the retail price up too much because,
21 if you do, there will be a collapse in the sales of
22 British cheese and cheap foreign imports will come in".
23 It's the problem that was identified at the meeting.

24 But what Dairy Crest are not doing is seeking to
25 dictate the retail price. They're acknowledging there

1 that it is not for them to dictate the retail price.

2 "Raw Milk Pricing Effect:

3 "If we are successful in persuading the market to
4 move, the resultant revenue gained will enable us to
5 increase raw milk prices in total between 1.0 and 1.5ppl
6 ... cannot affect ... butter and powder prices [because
7 they're] internationally traded commodities.

8 "It should be noted in the current climate cash
9 margin maintenance should, in our view, be the rule.
10 Percentage margin maintenance will only create
11 accusations of profiteering."

12 So again they're not seeking to dictate to the
13 retailers that there should be a coordinated retail
14 price rise that maintains the cash margin, they're
15 expressing an opinion, just as they expressed an opinion
16 at the bottom of the previous page about UK sourced
17 dairy products versus imports. In both cases their
18 opinion is "Please don't put the price up by too much,
19 because if you put it up by too much that will [mean]
20 cheap imports, and if you put it up more than cash
21 margin maintenance you will be seen to be profiteering".
22 That is all they're saying.

23 "... clearly vital neither retailer nor processor is
24 seen to benefit from this process in margin terms. We
25 will create a market pricing supplement to our milk

1 prices shown separately for milk, cream, cheese and
2 butter. Should our margins or volumes be affected going
3 forward, these supplements will alter.

4 "Timing:

5 "We promise to pay our farmers all revenue recovered
6 from the market from the RSPs and costs have moved."

7 The OFT rely on that. They say that proves that
8 this was a scheme to coordinate rises in RSPs. Again we
9 say this is building a mountain on a molehill, because
10 it's obvious that if you're going to increase cost
11 prices by very significant amounts, as they're proposing
12 here, pretty likely there's going to be an increase in
13 the retail price because this is a very competitive
14 market where margins are tight.

15 So it's hardly rocket science that there's likely to
16 be an increase in the retail price. It doesn't follow
17 that that's a coordinated retail price initiative.

18 "Raw milk prices will alter from [the date in]
19 October and the supplements will come into effect from
20 then. All increases gained on milk before [that date]
21 ... paid in lump sum ... We propose butter, cream and
22 cheese price increases will move up on [that date]."

23 Again, we say that is clearly a reference to the
24 rise in the cost price which is what they are proposing:

25 "Media Policy:

1 "We have already made public statements about our
2 intentions to review butter, cream and cheese pricing.
3 Please note we will never comment on any aspect of
4 individual retailer business decisions, intentions or
5 discussions."

6 The OFT make the point that that's under the heading
7 "Media Policy", which is of course correct, but it makes
8 clear again the appreciation of Dairy Crest that there's
9 a distinction between what it is doing, namely proposing
10 an across-the-board increase in the cost price of cheese
11 and butter, and what is a decision for the individual
12 retailers, which is their own particular retail price.

13 If you turn the page {^magnum ref
14 same as previous ref but tab 26 }, you will see that
15 the same memo was also sent to Chris Rigby of Tesco, and
16 he was in charge of butter. He had nothing to do with
17 cheese at Tesco, he was the butter buyer. You can see
18 that from the bottom paragraph:

19 "The increase that is required on butter is £200 per
20 tonne. I've outlined what this means per case below.
21 It is our intention to implement these cost price
22 increases on [the particular date] across the range of
23 products supplied to Tesco."

24 So it's absolutely clear and explicit in that letter
25 to Tesco that this is a proposal for cost price

1 increases on that date, not retail price increases.

2 Now, we submit that internal Dairy Crest documents
3 support the interpretation that the proposal that
4 Dairy Crest were making was a proposal for an
5 across-the-board cost price increase and not for
6 a coordinated retail price increase plan.

7 For example, if you go to tab 28, this is an
8 internal Dairy Crest note, and the Tribunal will be
9 hearing from Arthur Reeves, who was a senior employee of
10 Dairy Crest at the time. This, in fact, is a note that
11 he wrote

12 {^magnum ref - same as previous ref but tab 28 }:

13 Action points from cheese price increase meeting,
14 24 September, 4.00 pm:

15 "It was agreed that we should set a cheese price
16 implementation date for retailers of 20th October.

17 "Each account team to persuade their respective
18 retailers to move a section of their cheese category on
19 the 20th October followed by a three week programme
20 during which the remainder of the cheese category
21 moves."

22 Now, the OFT's case theory is that what Dairy Crest
23 were suggesting was coordinated retail price moves on
24 particular dates in waves. But, in our submission,
25 that's clearly not what this note is talking about.

1 What it's talking about is coordinated cost price
2 increases, coordinated in the sense that each separate
3 team of Dairy Crest account managers is, in the words of
4 this memo, to persuade their respective retailers to
5 increase their cost prices on those dates.

6 So what is envisaged here is a series of bilateral
7 negotiations between different Dairy Crest account
8 managers and different retailers, buyers, seeking to
9 persuade them to pay more for their cheese.

10 "Commercial Directors to clear with their senior
11 contacts ... Dairy Crest intention of making a public
12 statement to the effect that farmers could expect to see
13 retail prices for cheese increasing from mid October
14 onwards."

15 Again, we submit, clearly, no more than the obvious
16 inference that, if you significantly increase the cost
17 price for cheese, you're going to increase the retail
18 price. What's absolutely clear is that this is not
19 a covert initiative because it's very clearly being set
20 out what they intend to do and it's being suggested they
21 should press release it.

22 "... It would be helpful if some key individual
23 accounts, Tesco, Sainsbury, Asda, Morrison, or Waitrose
24 could endorse such a statement.

25 "Each Account Manager to present a matrix showing

1 cheese price implementation plans ... to be presented to
2 cheese price increase meeting [number] 3 on ...
3 4 October...

4 "It was agreed that we would communicate to
5 retailers that we would not move individual cost prices
6 for cheese lines. Instead we would provide a total
7 tonnage summary of all British Cheese shipped on
8 a monthly basis and apply a £200 [per tonne] Invoice
9 charge. Our recommendation here is in major support of
10 our proposals for price transparency."

11 Again, abundantly clear this is talking about cost
12 price.

13 Then there is discussion of the possibility of the
14 red tractor logo.

15 Sir, that might be a convenient moment to break.

16 **LORD CARLILE:** Thank you. We'll break until 3.30.

17 (3.18 pm)

18 (A short break)

19 (3.34 pm)

20 **LORD CARLILE:** Before you go on, Miss Rose, I think

21 Ms Potter wanted to ask you a question.

22 **MS POTTER:** Yes, thank you. Before we leave the document we
23 were just looking at, number 28, the Dairy Crest one,
24 but also if you could have open the briefing that was
25 sent to Tesco, so that's tab 26, isn't it?

1 **MISS ROSE:** Yes.

2 **MS POTTER:** I was just intrigued in relation to dates
3 because the one that was sent to Tesco on 23 September
4 talks about cost price increases on October ■ and yet
5 this internal meeting on the 24th seems to be talking
6 about increases in prices towards the end of October.

7 **MISS ROSE:** Yes.

8 **MS POTTER:** Which did make me wonder whether we are talking
9 about different prices, ie retail prices in 28 and cost
10 prices in 26.

11 **MISS ROSE:** That can't be right if you look at paragraph 5
12 on 28, it's clear that that's talking about a cost price
13 because it says:

14 "It was agreed that we would communicate to
15 retailers that we would not move individual cost prices
16 for cheese lines. Instead we would provide a total
17 tonnage summary..."

18 **MS POTTER:** 5 is definitely dealing with cost prices but
19 what about the earlier ones?

20 **MISS ROSE:** Yes, if you look at the covering letter, it
21 says, the bottom paragraph --

22 **MS POTTER:** Sorry, when I meant the earlier ones, the
23 earlier paragraphs in 28. So if we start with
24 paragraph 1, that could be retail, could be cost?

25 **MISS ROSE:** No. We submit it's clearly cost because you

1 have to read the paragraphs together.

2 **MS POTTER:** And the fact that this is talking about dates
3 from 20 October whereas 26 is talking about 26 October --

4 **MISS ROSE:** Yes, there has obviously been a slippage.

5 **MS POTTER:** In 24 hours?

6 **MISS ROSE:** Between those dates.

7 The date -- Arthur Reeves will be giving evidence so
8 that's probably a question you need to ask him and he
9 will explain.

10 **MS POTTER:** Okay.

11 **MISS ROSE:** But if you look at his witness statement, you
12 will see that he is clear that this is all about cost
13 price.

14 **MS POTTER:** All about cost price.

15 **MISS ROSE:** But that's a matter that will have to be dealt
16 with by him.

17 **MS POTTER:** That's fine. Thank you very much.

18 **MISS ROSE:** Of course the OFT's case is that these documents
19 are absolutely clear and we don't need to hear from
20 Arthur Reeves.

21 I've been told I have to make an application for the
22 unredaction of the transcript of Mr Robinson because the
23 OFT has been unable to get the formal agreement of Arla
24 to its unredaction.

25 **LORD CARLILE:** We had better look at the unredaction.

1 **MISS ROSE:** I'm told I can show it --

2 **MR MORRIS:** No, I think it's just a matter of having
3 formally an order which extends the confidentiality
4 order to cover that document, I think. That's all it
5 is.

6 **MISS ROSE:** Okay. (Handed)

7 **MR MORRIS:** I think there is agreement from Arla. We just
8 need somebody to extend the terms of the confidentiality
9 order already made to include that document.

10 **MISS ROSE:** To include that document, I see, all right.

11 **LORD CARLILE:** We'll certainly so order for the time being
12 anyway so that we can get on.

13 **MISS ROSE:** Yes. You can see the bit in red that was
14 redacted. It's startling anybody thought that was
15 confidential but, without reading it out, you can
16 obviously anticipate what I would say about it.

17 **LORD CARLILE:** Right, yes, okay.

18 **MISS ROSE:** By the way, I said one thing that wasn't quite
19 right about tab 28 which is that it had been written by
20 Arthur Reeves. In fact he says he was present at the
21 meeting but he can't recall who actually wrote this
22 document at 28.

23 If we then go on to 29A {magnum ref }, this is
24 another note for a Dairy Crest internal meeting. It
25 appears to be a Powerpoint, dated September 2002, and

1 Mr Reeves says that he did write this one.

2 "Cheese Price Increase[s] - September 2002.

3 "Need for change.

4 "Management of change.

5 "Retailer action.

6 "Modus operandi.

7 "The alternatives."

8 "Need for Change", this is the familiar background

9 situation.

10 "Management of Change.

11 "Market driven change will not happen in the near

12 future, due to high stocks.

13 "[Dairy Crest] unable to break market alone (despite

14 our efforts in H1 2002).

15 "The market must be actively managed to prevent

16 short-term imbalances creating long-term distortions.

17 "Retailer action is needed to break vicious circle.

18 "Retailer Actions.

19 "Accept cost price increase £200 [per] tonne for

20 6 months minimum."

21 So Ms Potter will see from that clear reference

22 there from Dairy Crest that this is about cost price.

23 "Commit to buying British.

24 "Favour suppliers who pay sustainable premium prices

25 to their milk suppliers.

1 "Resist switching to imports."

2 Now, that's very important because that's the
3 internal Dairy Crest concept of what they're trying to
4 do and it does not include a coordinated retail price
5 rise.

6 "Modus Operandi.

7 "Retailers pay [Dairy Crest] a cost price increase.

8 "[Dairy Crest] pay a market supplement to our milk
9 suppliers based on sales price increases (size and
10 percentage).

11 "Use immediate movement to generate positive PR for
12 retailers and their suppliers.

13 "Transparent flow through of the premium."

14 Again, what's envisaged is Dairy Crest is going to
15 push for a cost price increase, retailers are not part of
16 the plan.

17 "The Alternatives.

18 "Retailers just accept a liquid milk price
19 increase."

20 They say why that won't do it because it's only part
21 of the market.

22 "Retailers stagger their cost price increases on
23 mild... medium... mature ..."

24 The point here is that the milk that's being used to
25 make mild, medium and mature cheese is milk bought at

1 different times because that cheese matures for
2 different periods. There was obviously a concern within
3 Dairy Crest that retailers might say, "I'm only going to
4 pay more for the cheese that you've had to buy -- where
5 you've had to buy the raw milk for that cheese at
6 a higher price so I'm only going to increase the price
7 for mature cheese in two years' time when the cheese has
8 actually matured". So they were worried about that.

9 **LORD CARLILE:** So this is literally because the block of
10 mature cheese sits in the creamery for a longer period?

11 **MISS ROSE:** It sits there for 18 months. Yes, exactly.
12 Seriously Strong cheddar, I believe, is something like
13 18 months to two years to mature. So the argument is,
14 "You bought that 18 months ago at a cheap price so why
15 should we pay you more for it now", and that was a big
16 concern within Dairy Crest.

17 "Do nothing.

18 "-Current scrutiny on milk prices paid to producers
19 versus retail cheese prices will intensify."

20 So we say that that note at 29A, dated
21 September 2002, is inconsistent with the OFT's case.

22 **LORD CARLILE:** Is this an internal document?

23 **MISS ROSE:** Yes, this is an internal Dairy Crest Powerpoint
24 for an internal Dairy Crest meeting.

25 There are then Dairy Crest letters to other

1 retailers and there are a number of these in the bundle.
2 Just to give you two examples, there's one at tab 21,
3 which is a letter to Asda{magnum ref }, and another
4 one at tab 24{magnum ref }. Now, obviously, these
5 are not documents that were seen by Tesco at the time
6 but we submit that they're consistent with the analysis
7 I've just given that what was being proposed by
8 Dairy Crest was a cost price increase.

9 There is then a press release at
10 tab 23{magnum ref }, this is from Dairy News. Sorry,
11 not a press release, this is an article in Dairy News:

12 "MILK processor Dairy Crest is calling on the major
13 retailers to increase the retail price of cheese, butter
14 and cream vowing that it will pass any extra cash back
15 to its farmers.

16 "... managing director of direct milk supplies for
17 the dairy, told farmers weekly: 'It is a similar
18 initiative to when the retailers increased the price of
19 milk - and all the extra cash will be passed back to the
20 producer'.

21 "He defended Dairy Crest's position of asking
22 supermarkets to fund any increases rather than dipping
23 into its own coffers. 'We always pay some of the best
24 prices for our milk, so we are already doing this'."

25 So that is simply the perception of Dairy News.

1 Then tab 30 {magnum ref }, this is a Dairy Crest
2 letter to Sainsbury's and this is 25 September. Again,
3 we submit, if you read that letter, it is clearly
4 talking about increases in cost prices.

5 **MS POTTER:** Sorry, just coming back to 21 {magnum ref },
6 which was the letter to Asda, the second paragraph of
7 that talks about the price printed labels. So again
8 that does seem to be talking about retail prices,
9 doesn't it?

10 **MISS ROSE:** "We would ideally like the change in cost prices
11 to be effective for all deliveries from ■ October, but
12 various [own label] cheese lines still have pre price
13 printed labels and the time lines would need to be
14 reviewed to reflect what's involved in having the prices
15 removed."

16 The difficulty here is that it's recognised by
17 everybody that, if you increase the cost price by the
18 significant amount that Dairy Crest are proposing, it's
19 virtually inevitable that there will be some increase in
20 the retail price.

21 **MS POTTER:** So what we're saying is, when we seek to say
22 it's cost price or it's retail price, actually that's
23 a slightly artificial distinction because really we're
24 saying they're the same thing and this letter implies
25 that?

1 **MISS ROSE:** Madam, they're not the same thing because what
2 is clear is that Dairy Crest is saying to all of its
3 customers, "We're going to increase the cost price for
4 our cheese across the board and our rationale is to help
5 the farmers and we'll pass it all back". They recognise
6 that it's virtually inevitable as a result that their
7 customers are going to increase their retail prices and
8 that will have to be managed. But the point is that
9 what the OFT say is that the Dairy Crest plan was for
10 a coordinated retail price initiative, and that's the
11 vice. There's no problem, there's nothing
12 anticompetitive about one cheese supplier or even
13 a number of cheese suppliers saying to all their
14 customers, "We want you to pay £200 a tonne more for our
15 cheese".

16 **MS POTTER:** And from the second paragraph, by implication,
17 "We accept that --"

18 **MISS ROSE:** "We recognise you'll probably have to raise your
19 retail price".

20 **MS POTTER:** "To the extent that we recognise, we won't move
21 the cost price until the timing on the labelling is
22 sorted out", which does sort of suggest that the two are
23 so --

24 **MISS ROSE:** Well, they wouldn't necessarily move on the same
25 date although it's very likely that they would. Of

1 course, there might then be a problem because, if the
2 retailer found that their prices were out of line with
3 their competitor, they might move their retail price
4 back and they'd still have to pay the higher cost price.

5 What you'll see over the succeeding weeks is a lot
6 of brinkmanship where the retailers are delaying
7 agreeing to the cost price increase because they don't
8 want to move their retail prices. That's the tension.

9 Part of the flaw in the OFT's analysis with respect
10 to it is that it doesn't appreciate the extent to which
11 there is a conflict of interest and suspicion between
12 the supplier and the customer, that they have different
13 interests and different agendas. The Dairy Crest agenda
14 here is, "Let's do all this as quickly as possible.
15 We'll increase your cost prices, we'll sort out all your
16 labelling so you can raise your retail prices and
17 everything will be great".

18 What you see from the suppliers is that message
19 constantly, "Hey, here's my proposal for the increased
20 cost price, let's move it on this date and we'll
21 increase your retails. Here are my proposals for your
22 new retails that will protect your cash margin", and
23 that's the typical proposal.

24 **MS POTTER:** Yes, and what's more I think elsewhere in the
25 documentation there is an indication that indeed the

1 suppliers need the retail prices to move because that
2 will be the evidence to the farmers, to show the
3 farmers. So therefore, to that extent, they are
4 actually looking for the retail prices for the
5 visibility.

6 **MISS ROSE:** But they recognise that it's not up to them,
7 that it's up to the retailers. The movement in the
8 retail price is generally treated as inevitable given
9 that this is quite a significant increase in the cost
10 price and it's a competitive market.

11 But the issue is whether the plans, the OFT says, is
12 for a coordinated retail price rise where all the
13 retailers were going to surreptitiously tip each other
14 off about when their retail prices were going to go up
15 and by how much, so that nobody would lose out
16 competitively. That's the issue here.

17 **MS POTTER:** Although what we are perhaps seeing is
18 a coordinated cost price with inevitable retail price
19 movement.

20 **MISS ROSE:** It depends what you mean by coordinated. This
21 is why we ask the OFT, in the extract I showed you this
22 morning, what they mean by coordinated. Because it's
23 absolutely right that Dairy Crest is making the same
24 proposal to everybody across the board, and to the
25 extent that Dairy Crest is a supplier to all of the

1 supermarkets and wants them all to pay £200 more per
2 tonne for their cheese, they're coordinating a cost
3 price increase because they're one supplier doing that.
4 And we see the other suppliers jump on to the bandwagon,
5 Glanbia rather later, but they jump on to the same
6 bandwagon, not surprisingly because Dairy Crest is
7 making it very public that that's what they're doing.
8 That's not objectionable.

9 But what the OFT says is, in parallel with this very
10 public across-the-board, I'd rather use the word
11 "across-the-board" than "coordinated", because they're
12 using "coordinated" to mean not independent. They're
13 saying that in conjunction with this across-the-board
14 cost price increase there is a plan that the retailers
15 should collude with each other so that they're able to
16 facilitate that plan to be implemented by all raising
17 their retail prices on the same date, by the same
18 amount, so that none of them is going to lose out
19 competitively, so smoothing the way by eliminating the
20 competitive risks.

21 That's their case, and that's the point where we say
22 it simply breaks down, because what you actually see in
23 these documents is a series of pressured and sometimes
24 rather scratchy negotiations, bilateral negotiations,
25 between Dairy Crest and McLelland and different

1 retailers in which you constantly see the suppliers
2 pressuring the retailers to agree to move their prices
3 on particular dates, you know, "Agree to pay us and
4 we'll put your retails up and it will all be fine. Here
5 are our proposals". And the retailers are dragging
6 their feet saying, "Not sure about that, could be
7 a problem for me".

8 That's the conflict, and that's precisely what
9 Lisa Oldershaw says in her evidence, that they were
10 pressuring her to go up and she's delaying for as long
11 as possible because the longer she can delay, the better
12 her margins and the better her KPIs.

13 We say that the essential failure of the OFT is to
14 not recognise the friction and the different agendas so
15 that when you get proposals from Dairy Crest making it
16 all look incredibly smooth and easy, that's not them
17 implementing a plan or dictating the market, that's
18 a sales pitch basically. And this document that's sent
19 to all retailers has to be read as a sales pitch.

20 **MS POTTER:** Thank you very much.

21 **MISS ROSE:** So now if we go to tab 32

22 {^magnum ref - same as above but tab 32 }, this is
23 a note of a meeting between Asda and Dairy Crest on
24 27 September 2002. This is the core document that the
25 OFT relies on to establish strand one of its 2002 cheese

1 case.

2 The OFT's allegation, on the strength of this, is
3 that by this date, by 27 September, Tesco had indicated
4 to Dairy Crest that it was willing to increase its cost
5 and retail prices across all cheese sectors. If I can
6 just show you that in the OFT's skeleton argument, so
7 that's tab 14 of the pleadings bundle, paragraph 101
8 {^magnum ref }:

9 "The OFT contends that the evidence establishes the
10 following:

11 "(1) In the course of the extensive dialogue
12 between Dairy Crest and Tesco which occurred, in
13 particular, at the [DSG] meeting ... and during
14 discussions between Dairy Crest and Tesco on or about
15 20, 23, 24 and 25 September ... Tesco disclosed to
16 Dairy Crest that it had agreed in principle to raise or
17 at least was contemplating increasing its cheese retail
18 prices but that such an increase was conditional on
19 other retailers also increasing retail prices."

20 It is said that, in making that disclosure, Tesco
21 had the requisite state of mind to amount to
22 infringement. We say that, in fact, there is no
23 evidence that any such disclosure was made by Tesco.
24 Indeed, the evidence is inconsistent with Tesco having
25 made any such decision by that date. In fact, as

1 I shall show you, the evidence shows that Tesco did not
2 agree, in principle, to increase its cost price or
3 consequently its retail price for some weeks after
4 27 September.

5 So if we go to this document, which is the document
6 that the OFT relies on as establishing this proposition,
7 the first point obviously to note is that this is not
8 a document that relates to any meeting attended by any
9 Tesco person, and that the OFT is not calling evidence
10 from anybody who attended this meeting. So "Action
11 Proposed" {^magnum ref - docs/A/tab 32 }:

12 "Move manufactured product prices forward
13 during October."

14 And there are suggestions about dates.

15 "Mechanics -- Cheese:

16 "It is proposed the cheese sector moves on the
17 20th October."

18 **LORD CARLILE:** This is the section that causes you
19 difficulty, isn't it, if one reads it as a whole?

20 **MISS ROSE:** Well, sir, no, it doesn't cause me any
21 difficulty at all for the reasons I shall come back to.

22 "Catch will be needed in the 'middle ground'
23 accounts and the management of labels/stocks will need
24 closely monitoring.

25 "Proposed that by early November all accounts will

1 have followed the market moves."

2 And they're listed.

3 "Latest position is that [Sainsbury's]/Tesco have
4 agreed to move all sectors."

5 We submit that this is a clear instance of what I've
6 just been describing as the sales pitch, that what is
7 being depicted here is a meeting between the Dairy Crest
8 salespeople and the Asda buyers, where Dairy Crest are
9 pressuring Asda to move their cost price and they're
10 doing so by trying to persuade them that everyone else
11 is doing the same. Hence we get the statement:

12 "Latest position is that JS/Tesco have agreed to
13 move all sectors."

14 We say that is a statement that is simply untrue.
15 Tesco had not agreed to move all sectors by this date
16 and that is abundantly clear from other evidence.

17 What, of course, the OFT cannot establish from this
18 statement is whether that statement came from anything
19 that had been said by Tesco to Dairy Crest or whether it
20 was simply being invented by the Dairy Crest salespeople
21 who attended this meeting. The OFT is in no position to
22 establish that, having decided not to call any evidence.

23 Now, in fact, one of the people who attended this
24 meeting was interviewed by the OFT, and that's
25 Harvey Bennett from Asda. The OFT -- their interview

1 with him is in volume 2 of the investigations bundle,
2 tab 46 {^magnum ref }.

3 If you look at that interview, you will see that he
4 was only asked questions about the alleged
5 Milk Initiative in 2002 and the Milk Initiative in 2003.
6 He was asked no questions at all about the
7 Cheese Initiative in 2002 and he was asked no questions
8 about this meeting.

9 The following tab, tab 33 {^magnum ref }, this is
10 a document that the OFT relies on for its proposition
11 that Tesco had made a conditional commitment, in other
12 words it said it was willing to increase its prices but
13 only if other retailers did the same.

14 This is an internal Glanbia document, and at the
15 second paragraph Colin Stump, who is the author of this
16 note, says:

17 "I had a further lengthy discussion with
18 Alistair Irvine."

19 Alistair Irvine is one of the co-owners, or was at
20 the time one of the co-owners of McLelland and he was
21 the joint managing director of McLelland at the time.

22 "He tells me that Tesco will go if one other major
23 player moves. He also told me Dairy Crest is seeing
24 Asda this afternoon."

25 Now, again, this tells you absolutely nothing about

1 Tesco's intention or Tesco's involvement. At the most,
2 what it tells you is what the processors were discussing
3 amongst themselves. The obvious point is that it was
4 well known that Tesco, generally, sought to match its
5 prices to Asda's prices on basket products, many of
6 which were cheeses, and so the comment that Tesco would
7 probably move if Asda did is not surprising. But where
8 that came from, whether it was the product of any
9 information from Tesco, there is simply no evidence on
10 this document that it has anything to do with anything
11 said by Tesco.

12 Mr Irvine is going to give evidence and he can be
13 questioned about the source of that statement.

14 If you go now to tab 39 {^magnum ref }, this is
15 an email from Tom Ferguson who is, at this date,
16 a cheese buyer for McLelland, to Sarah Mackenzie of
17 Sainsbury's.

18 "Good morning, Sarah. Please find enclosed details
19 which will cover off the proposed £200 per tonne
20 movement across the cheese range we supply."

21 So just pausing there, obviously a cost price
22 increase.

23 "Our target date is the 20th October, we can work
24 together to achieve this. With regard to new retail
25 levels, I've left this open for discussion and we can

1 agree on this position as time develops. A movement of
2 £200 per tonne on retail will protect your cash margin
3 though percentage margin will probably drop slightly."

4 It is not probably, it will obviously drop slightly
5 if you only increase by the same cash equivalent.

6 But the point that's clear here is that what
7 McLelland are proposing is a cost price increase on
8 20 October, they are expressly leaving open to
9 Sainsbury's the consequences of that for their retail
10 price and are simply suggesting options. So, again,
11 inconsistent with the OFT's case of coordinated retail
12 price increase.

13 We see similar letters from the processors to other
14 retailers. If you go to tab 42 {^magnum ref }, this
15 is McLelland again, for Somerfield on 8 October.

16 References to the issues with the farmers:

17 "In order for us to be able to pay 2p per litre more
18 for farmers we would need to get £200 per tonne more for
19 our cheese [again talking about cost price increase] ...

20 "It would seem that the current market conditions
21 are that over the next few weeks there will be an across
22 the board increase on all cheddar ... In light of this
23 I thought it appropriate to outline our position with
24 regard to the situation, and we will keep you updated as
25 the situation develops."

1 Similarly, also from McLelland to Asda on 9 October
2 in similar terms, all proposing an across the board cost
3 price --

4 **LORD CARLILE:** Which tab was that?

5 **MISS ROSE:** Sorry, did I say 34? I meant 44.

6 All proposing an across-the-board cost price
7 increase in the light of the well publicised problem
8 with farmers, in the light of the publicised position of
9 Dairy Crest, all proposing £200 per tonne, which is
10 obvious following the 2p per litre milk increase but not
11 seeking to dictate retail prices.

12 Now, tab 46 is another internal Dairy Crest dated
13 15 October {^magnum ref }:

14 "The purpose of this document is to propose the
15 methodology for collecting and accounting for the cheese
16 price increases. This will fund increases in milk price
17 to farmers."

18 They say they're going to do it through
19 a combination of levy invoices.

20 Then "Methodology":

21 "The National Account Manager [so that's essentially
22 each individual account manager for each retailer] will
23 agree with customers the individual product lines which
24 are subject to the price increase. We propose to
25 invoice our major customers weekly for a levy of £200

1 per tonne on the agreed cheese product lines. The
2 amounts recovered from retailers will be compared
3 against the maximum potential recovery to calculate
4 a percentage. The total percentage recovered will
5 provide the basis for calculating the funds to be passed
6 back to farmers. The amounts will only be paid to
7 farmers once cash is recovered from retailers."

8 We submit that that really does tell you what this
9 scheme is; it's to fund an increase in the farm gate
10 price by an across the board cost price increase.

11 "The levy approach will not be appropriate for all
12 customers. We recommend the Impulse, Convenience and
13 Foodservice sectors are treated consistently. It is
14 intended to move the prices for all Dairy Crest brands
15 by changing invoice prices across all customers."

16 So, again, we say very clear that this is an
17 initiative about increasing cost prices to pass the
18 money back to farmers.

19 Then the following tab {^magnum ref - tab 47 },
20 this is Tom Ferguson from McLelland to Jim McGregor who
21 is his line manager at the time, talking about
22 Sainsbury's. This is the information that Sainsbury's
23 had given to its supplier, McLelland, about its
24 intention to move its cost price and retails for
25 Seriously Strong pre-pack, that's a cheese that's packed

1 by McLelland, so McLelland has to price the cheese:

2 "Sainsbury own label and pre-pack brands will move
3 on the 4th of November, allowing for the proper market
4 conditions etc.

5 "Deli and Taste the Difference ... on the 11th
6 of November.

7 "Sainsbury would also like from us an official
8 statement of our intentions or actions to ensure the
9 recovery on costs will be passed directly back through
10 the Milk price ..."

11 So that, again, is Sainsbury's to McLelland. No
12 evidence from the OFT that Sainsbury's intended that
13 information to be passed to Tesco. The OFT was in
14 a position to have called evidence from Sarah Mackenzie
15 whom it interviewed but chose not to do so. The
16 significance is that this is information that the OFT
17 says was then passed on to Tesco as part of strand two,
18 as we shall see in a minute.

19 Now, we know that as at this date McLelland had in
20 its possession quite a lot of information about the
21 intentions of various of its customers, and we see this
22 at tab 51A in this bundle {^magnum ref }. The first
23 paragraph deals with Sainsbury's.

24 Tesco, it said:

25 "Will probably commence moves from [REDACTED],

1 staggered across Brand/Own label.

2 "Want to maintain percentage margin (this would mean
3 on Galloway an increase of [blacked out] per tonne).

4 "Asda:

5 "Moving across the board on 4th November, to be
6 confirmed. No info on margin position but will probably
7 maintain cash position.

8 "Safeway:

9 "Commence 4th November.

10 Moving across the board. Intention is to maintain
11 cash margin."

12 Then there's comment about McLelland's position.

13 We then see what happens between McLelland and
14 Tesco. This is an important document which the OFT
15 relies on as the core document for strand two of the
16 infringement. If you go to tab 52 {^magnum ref },
17 this is Tom Ferguson, the account manager, writing to
18 Lisa Rowbottom of Tesco on 21 October 2002, another
19 sales pitch, seeking to persuade her to agree the cost
20 price increase.

21 "Hi Lisa. Spreadsheet attached which will cover off
22 the Current supply prices and the new position with the
23 proposed £200 per Tonne recovery. I have provided the
24 recommended Retail going forward plus the position to
25 protect your own margin. As we discussed last week

1 other parties are confirming that they will protect Cash
2 Margin on this occasion but not % Margin. We will need
3 to discuss this as time develops this week and reach
4 a conclusion. The timescales are as we proposed.

5 "Ie 4th of November for Pre-pack and the 11th of
6 November for Deli. Sainsbury are confirming that the
7 new retails on Branded pre-pack will be in place Tuesday
8 this week."

9 Now, there are two items of information that the OFT
10 identify as being passed on here by McLelland to Tesco.
11 The first is:

12 "As we discussed last week other parties are
13 confirming they will protect Cash Margin but not %
14 Margin."

15 And the second is the specific information about
16 Sainsbury's.

17 Dealing first with the second piece, which is the
18 specific information about Sainsbury's, we know when
19 that information was in the possession of McLelland
20 because it was the information at -- sorry, I'm just
21 trying to find the tab. It's tab 47 {^magnum ref }.
22 We know that by 16 October, Tom Ferguson knew that
23 specific information about Sainsbury's. He is
24 disclosing it to Tesco here at 16.59, five days later,
25 21 October, and he says that those prices will be in

1 place Tuesday this week. Tuesday is 22 October, it's
2 the following day.

3 So by the time this information about Sainsbury's
4 was disclosed by McLelland to Tesco, it was 5.00 pm on
5 the day before the new prices were to be implemented.
6 That would have made it impossible for Tesco to act on
7 that information before the prices were in the public
8 domain. They were going to be in the store the next
9 day.

10 If the OFT were right and these transfers of
11 information were in fact covert indirect transfers
12 between the retailers, designed to assist them and to
13 substitute cooperation for competition, this course of
14 action doesn't make any sense because, on the OFT's
15 case, what Sainsbury's would have intended in
16 transferring that information to McLelland was that it
17 should be transmitted on to Tesco before it was public
18 to mitigate competitive pressures and encourage Tesco,
19 as soon as possible, to raise its price in conjunction
20 with Sainsbury's.

21 So it doesn't make any sense, if the OFT's case
22 theory is right, that McLelland would sit on that
23 information for five days until the eve of the
24 introduction of the price in store. So that's the first
25 point.

1 The second point, of course, is that you can't
2 satisfy the third element in any event which is it can't
3 be used anticompetitively. If the price is going to be
4 in store the next day anyway it will be in the public
5 domain.

6 Then turning to the other piece of information that
7 the OFT rely on:

8 "As we discussed last week other parties are
9 confirming they will protect Cash Margin on this
10 occasion but not % Margin."

11 Now, there are two oddities about that, if the OFT's
12 theory is correct, because if we go back to the internal
13 McLelland document, that is at tab 51A
14 {^magnum ref }, this tells us what McLelland knew.
15 The first point to note is that it is not correct that
16 other parties were confirming that they would protect
17 cash margin but not percentage margin. Specifically,
18 Asda, who were the competitor about whom Tesco were most
19 concerned, they were the keenest price competitor for
20 Tesco:

21 "No info on margin position, but will probably
22 maintain cash position."

23 So McLelland did not know whether Asda intended to
24 maintain cash margin position.

25 So the information that's given is inaccurate,

1 again, inconsistent with the OFT's case that this is an
2 indirect transfer of information from Asda or other
3 retailers to Tesco, rather than being supplier puff,
4 which is what we say it is, with the suppliers trying to
5 persuade Tesco to do what they want it to.

6 There's a second problem with the OFT's theory here
7 and that is that McLelland is in possession of
8 a valuable piece of confidential information about Asda,
9 and that is that Asda is moving across the board on
10 4 November. Now, if the OFT were right and there was
11 a plan for the coordination of retail price rises, to be
12 facilitated by covert information exchange via the
13 supplier, between retailers, the most obvious piece of
14 information for McLelland to give to Tesco on 21 October
15 would have been the information that Asda was planning
16 to move across the board on 4 November. Because Tesco
17 is not that bothered about Sainsbury's, Tesco is
18 bothered about Asda. So, again, inconsistent with the
19 OFT's case.

20 What we then see, if you go back to tab 48
21 {^magnum ref }, this is from 16 October, this is
22 inside Dairy Crest, that information about Sainsbury's
23 intentions was circulated to a number of individuals
24 within Dairy Crest. That, of course, is not something
25 that Tesco had any knowledge of at the time.

1 If you now go to tab 49 {^magnum ref }, this is
2 another internal file note which I understand comes from
3 Glanbia, a third supplier, who is not actually a Tesco
4 supplier. This is a summary of what Glanbia understands
5 to be going on. We can see here what Glanbia says about
6 Tesco:

7 "Apparently DC have argued strongly that all cheese
8 prices move simultaneously so they can repatriate
9 revenues direct to farmers on all cheeses. To be
10 finally confirmed Wednesday 16 October and communicated
11 to CRS Thursday 17 October."

12 Now, what's interesting about that, we have no idea
13 where this information came from or what its provenance
14 is, but what's interesting about it is that it's
15 inconsistent with the OFT's proposition that what was
16 being suggested by Dairy Crest was a plan for the
17 simultaneous increase of cost and retail prices in
18 waves. Because what's said here is that actually
19 Dairy Crest was seeking to get Tesco to raise all its
20 prices simultaneously.

21 In the meantime, while all of this is happening
22 between the suppliers and other retailers and
23 internally, of course, unknown to Tesco, Tesco's buyer,
24 Lisa, is coming under pressure from her suppliers.
25 You've already seen the pressure that she's coming under

1 from McLelland, which is at tab 52, on 21 October,
2 trying to persuade her to move, and she comes under
3 similar pressure from Dairy Crest at tab 51
4 {^magnum ref }. This is Neil Arthey who is the
5 account manager from Dairy Crest, 18 October:

6 "Lisa, I have put the attached spreadsheet together
7 to outline the £200/tonne cost price increase across our
8 cheese line sold to you.

9 I've calculated some possible [retail selling
10 prices] based both on 20p/kg increases and the increase
11 required to maintain your current POR levels."

12 That's the margin levels, percentage margin levels.

13 "Some of the price points are not that 'sexy' and no
14 doubt you may look at changing these. I will try and
15 give you a call later Monday."

16 Again, we say that both this email and the email at
17 tab 52 from McLelland to Lisa show that, as at this date
18 in mid-October, Tesco had not agreed to increase its
19 cost prices or its retail prices, and its suppliers were
20 pressuring it and trying to persuade it to do so. That,
21 of course, is inconsistent with the OFT's case on strand
22 one, which is that Tesco had agreed as early as before
23 27 September to increase its cost prices across the
24 board by £200 per tonne. Weeks later they're still
25 trying to persuade Lisa to do so.

1 The second point that emerges from this email with
2 crystal clarity is that there is no across the board
3 retail price increase, that it's expressly recognised by
4 Neil Arthey that, first of all, Lisa may seek to protect
5 her cash margin; secondly, she may seek to protect her
6 percentage margin; and, thirdly, she may seek to adopt
7 a different price point because it's sexy.

8 You can see -- of course there's the obvious point
9 that if you're close to a pound you'll want to go just
10 below it, so you'll go for £2.98 instead of for £3.01.
11 Those sorts of points.

12 You'll see that the schedules that he attaches to
13 this email include proposed retail prices maintaining
14 the cash margin. You can see that where it says "cash
15 margin maintained", and there are two pages of that.
16 And there's another one where it says "percentage margin
17 maintained". And his recognition in the email that the
18 price points are not very sexy and she might want to
19 change them.

20 So it's a proposal for a cost price increase
21 including recommendations and suggestions for retail
22 prices but no assumed across-the-board retail price
23 increase.

24 Lisa's reaction to this you can see at tab 53. She
25 asks for the same information about the proposed

1 different retail prices and cost prices for deli as
2 well. That was provided, as you can see, at tab 55
3 {^magnum ref }. And she forwarded it to her
4 assistant at tab 61 {^magnum ref }. You can see that
5 Tesco identifying numbers were then added by
6 Neil Arthey, and she then forwarded it to Alain Guilpain
7 who was assisting her.

8 If you then go to tab 59 {^magnum ref }, there's
9 a Dairy Crest press release of 24 October:

10 "Following several weeks of discussion, Dairy Crest
11 is pleased to confirm that the major supermarkets have
12 decided to increase the price of UK produced cheese.

13 "This follows the earlier supermarket initiative to
14 increase the price of liquid milk and Dairy Crest's own
15 decision to increase the price of milk on the doorstep.

16 "Dairy Crest will pass on these increases in full."

17 So again nothing secret about the Dairy Crest
18 initiative.

19 If we now turn to tab 60, this is another internal
20 Dairy Crest document, 24 October --

21 **LORD CARLILE:** Sorry, just on that last document, document
22 59, I noticed the word "Agreed" at the top.

23 **MISS ROSE:** Yes, it seems to be an agreed press release.

24 **LORD CARLILE:** Agreed?

25 **MISS ROSE:** Of course, one doesn't know without them being

1 here, but I assume it means it's an agreed text for
2 a press release. That's what it appears to be.

3 **LORD CARLILE:** Agreed with the industry or?

4 **MISS ROSE:** No, sir, it's a Dairy Crest --

5 **LORD CARLILE:** Agreed within Dairy Crest.

6 **MISS ROSE:** Yes, it's an agreed Dairy Crest text.

7 **LORD CARLILE:** That may be a matter of evidence but I just
8 happened to notice that word.

9 **MISS ROSE:** Yes, but that's what it appears to be.

10 **LORD CARLILE:** It's just that taking the word "Agreed"
11 together with the first paragraph seems to suggest
12 broader agreement than just an agreement among a few
13 executives at Dairy Crest. Again, this will be a matter
14 of evidence, but at face value...

15 **MISS ROSE:** Sir, I don't think that is the position, but
16 it's obviously a matter that Mr Reeves should be able to
17 assist with.

18 Now, I wanted to go next to tab 60
19 {^magnum ref }, which is an internal Dairy Crest
20 document. 24 October, in fact it's the same date as
21 this press release:

22 "After raising [retail prices] on [Cathedral City],
23 [Sainsbury's] have now stated that they want to wait to
24 raise prices on own label products until they have
25 evidence that Asda and Tesco are moving. Arthur Reeves

1 is in [Sainsbury's] tomorrow and will push for them to
2 continue on track rather than wait, based on
3 intelligence that he has on Tesco and Asda.

4 "We're now packing blank labels for Asda and packing
5 the new priced packs for M&S so the movements are in the
6 pipeline. This needs to be communicated so that the lag
7 created by everyone waiting for each other to move in
8 store can be reduced."

9 Now, this is quite an important document which,
10 again in my submission, is inconsistent with the OFT's
11 case that Tesco is aware of a plan to coordinate the
12 retail price rises and indirect communication between
13 retailers to facilitate that. Because the first thing
14 it shows is that Sainsbury's are getting cold feet, and
15 the reason they're getting cold feet is that they want
16 to see evidence that "Asda and Tesco are moving", note
17 the words "are moving".

18 One of the themes of the interviews that the OFT
19 conducted, and of the evidence that you will hear, is
20 that the buyers for the supermarkets were not impressed
21 by general assurances given by their suppliers, "Oh,
22 don't worry, Tesco will put its prices up next week".
23 What they wanted to see was hard evidence that Asda or
24 Tesco had put its price up and that meant a till receipt
25 from a product that had actually been purchased in

1 a store.

2 The first point, obviously, is that that's not
3 anticompetitive information because it's not information
4 about future retail pricing intentions, it is a current
5 public domain price that is actually being charged. But
6 the point here is that if the OFT were right and there
7 was a covert consensus or concerted practice between
8 these retailers to exchange information about their
9 future pricing intention, Sainsbury's cold feet would be
10 wholly unnecessary because Sainsbury's would have been
11 getting under-the-counter reassurance that Asda and
12 Tesco were going to move as part of a coordinated retail
13 price rise and there wasn't a problem.

14 But instead, what's clear is that there are
15 negotiations between Dairy Crest and each of the
16 retailers individually and Sainsbury's are not
17 particularly happy about having gone first and not being
18 sure if other people are going to raise their prices or
19 not.

20 The solution that Dairy Crest proposes is, first of
21 all, that Arthur Reeves should try to give them
22 reassurance and that's the typical supplier solution, to
23 say "Oh, don't worry, everything will be okay", and then
24 the suggestion that the movements that are in the
25 pipeline should be communicated so that the lag created

1 by everyone waiting for each other to move in store can
2 be reduced.

3 Again, what that shows is that as at this date,
4 which is 24 October, the retailers are not setting their
5 behaviour by reference to intelligence about future
6 pricing, they're waiting to see what is actually in
7 store, and that Dairy Crest are trying to break that
8 deadlock by giving them reassurance that everything is
9 going to be okay in the future.

10 Now, that raises questions about Dairy Crest's
11 conduct but it doesn't, with respect, raise any
12 questions about Tesco's conduct because this is nothing
13 that Tesco could have known about at the time.

14 This note written by Richard Wilkinson and again,
15 Richard Wilkinson is not called as a witness.

16 Moving on now in the bundle to tab 62
17 {^magnum ref }, this takes us to strand three.
18 29 October 2002, this is the point at which Lisa does
19 actually agree to increase her cost prices. So
20 29 October 2002, at the bottom of the page there's an
21 email from Lisa Rowbottom to a number of individuals who
22 are her contacts at different suppliers: Butlers
23 Cheeses, Joseph Heler, North Downs Dairy, Kerrygold,
24 McLelland and Dairy Crest:

25 "Hi. I will call you all tomorrow with Confirmation

1 of cost price changes and Retails where relevant.

2 "At the moment the plan is for the following to be
3 changed from Sunday 3rd [November] (we have to change
4 costs on a Sunday, please note you must change on
5 a Sunday also).

6 "3rd [November].

7 "Brands.

8 "Regionals.

9 "Stilton.

10 "Speak tomorrow. Cheers Lisa."

11 A number of points to note about this. The first is
12 that she's obviously operating under very considerable
13 time pressure because she is proposing on 29 October
14 a change in the cost price on 3 November.

15 The second point is that she says:

16 "I will call you all tomorrow with Confirmation of
17 cost price changes and Retails where relevant."

18 That is significant, because a key part of the OFT's
19 case is that, when she does call them the next day, she
20 tells them her retail price changes. We submit that's
21 not right, what she does is she tells them about her
22 cost price changes and retails where relevant. Where
23 are retails relevant? When they need to know the retail
24 price because they will be packing and labelling the
25 cheese and the price change is imminent.

1 The response from Tom Ferguson of McLelland is that
2 he is suggesting that some of the retails should be
3 delayed because they have stocks, current retails they'd
4 prefer to supply until 9 November.

5 So what we then see is that Lisa, on 30 October,
6 takes her work home. Tab 64 [^magnum ref }, an email
7 from Lisa Rowbottom to Lawrence Oldershaw, now Lisa's
8 husband, with whom she was living, and she has
9 effectively emailed to herself an attachment, as she's
10 put it:

11 "Just in case."

12 You see the heading on the next page, "Cheese £200 T
13 Plan. Cost and Retail Moves."

14 And then there are dates given for the different
15 categories where she's proposing to move the cost and
16 retail prices on those dates.

17 Over the page:

18 "Any lines currently on promotion will not move
19 until the promotion has finished."

20 Then there's a schedule with proposed prices which
21 she explains in her witness statement is a work in
22 progress. It's a working document, these are not final
23 prices.

24 What we then know is that on 30 October, as she had
25 said she would on 29 October, she did speak to her

1 suppliers and she communicated to them the cost price
2 dates, the dates for the changes in the cost price, and
3 the retail prices where relevant, where they were going
4 to pack the cheeses.

5 If you go to tab 63 {^magnum ref }, this is an
6 email from Neil Arthey from Dairy Crest to a wide range
7 of people within Dairy Crest. Of course, there is no
8 evidence that Tesco had any idea that Neil Arthey would
9 transmit Tesco's information so widely within
10 Dairy Crest.

11 He says:

12 "Following a conversation late this afternoon Tesco
13 have confirmed that all branded Pre Pack cheese will go
14 up as of Monday 4th November.

15 "The only exception is [Cathedral] City 400 grammes
16 due to promotional activity -- this line will move on
17 [15 December]. Their regional cheeses and Stilton are
18 also due to increase at this time.

19 "They have confirmed the price for WeightWatchers
20 [Mature] at £8.19 per kilo, targeted to move
21 [11 November]."

22 Then there are further dates given for the movement
23 of speciality cheeses and cottage cheese and own label
24 lines.

25 The key point about this is that the WeightWatchers

1 cheese is the only retail price on this list.
2 WeightWatchers cheese is a cheese that was packed by
3 Dairy Crest for Tesco. The other prices are simply
4 Lisa's dates that she indicated in her internal memo
5 were the dates for the movement, cost and retail, and
6 all she is doing is telling her supplier the legitimate
7 information about the date she's going to move her cost
8 price.

9 The case for the OFT is that this is a disclosure by
10 Tesco, intended by Tesco or foreseen by Tesco as
11 something that's going to be transmitted to its
12 competitors. Again, we submit that that simply breaks
13 down because this is a completely normal, legitimate
14 disclosure. As you can see from the preceding emails
15 from Lisa, she was engaged in a normal negotiation
16 process with McLelland and Dairy Crest which culminated
17 on 29 October with her saying, "Okay, I'm going to talk
18 to you tomorrow about costs and retails where relevant",
19 and then she has that conversation with her various
20 suppliers on 30 October.

21 We submit that the OFT would need very strong
22 evidence to show that that completely normal course of
23 commercial conduct by her was to be regarded as an
24 anticompetitive disclosure for Dairy Crest. There's
25 simply no evidence that she had that intention at all.

1 Of course, putting the matter at the very highest
2 for the OFT, the chain of correspondence here indicates
3 that there are ambiguities and points that need to be
4 explored, both in terms of what was the intention of
5 Dairy Crest and McLelland, and in terms of what was
6 Lisa's intention. Yet those points were not explored by
7 the OFT because it took the view that this material was
8 so clear that it did not require any elaboration.

9 If we then go to tab 67{magnum ref }, this is the
10 following day, Paul Feery from Dairy Crest discloses to
11 Sarah Mackenzie at Sainsbury's information about Tesco's
12 price increases. You can see that there is a striking
13 similarity between the information that Neil Arthey
14 disseminated internally at Dairy Crest on the 30th, to
15 a distribution list which included Paul Feery, and the
16 information which Paul Feery then disclosed to
17 Sainsbury's the next day.

18 That's why I said in my opening submission that the
19 only A-B-C transfer that the OFT can identify is this
20 one. It's the retail price of the WeightWatchers cheese
21 which is disclosed by Lisa to Dairy Crest and then
22 disclosed by Dairy Crest to Sainsbury's. But what we
23 say is very clear, that the OFT cannot establish that
24 Lisa had the requisite intention because her disclosure
25 for Dairy Crest was a normal piece of commercial

1 activity and there is no basis for the suggestion that
2 she had any idea, let alone the intention or the
3 knowledge, that Dairy Crest would disclose that
4 confidential information to Sainsbury.

5 **MS POTTER:** Just in terms of what's being passed on here,
6 presumably it is also the timing of retail increases?

7 **MISS ROSE:** Well, that's a question because, of course, what
8 Lisa has to disclose is the timing of the cost price
9 increases. Now, we'll see from subsequent documents
10 that there's a lot of discussion about timing of retail
11 price increases and, in fact, they don't come in on
12 these dates, but what she is agreeing to is the timing
13 of the cost price increases. Her intention from her
14 internal memo at that time seems to have been costs and
15 retails on the same date. We don't know whether
16 Neil Arthey and Paul Feery drew the inference that the
17 cost prices and retail prices would increase on the same
18 dates. There might be a fairly obvious inference given
19 the size of the cost price increases, we don't know, but
20 the point is that she had to tell her suppliers when she
21 was going to increase the price she was going to pay
22 them for their cheese. You cannot draw the inference
23 from that that she is intending to transmit to her
24 competitors the date she is going to raise her retail
25 prices. That's the difficulty and that's the hole in

1 the OFT's intention case, that she's behaving perfectly
2 normally and has no idea what they're doing with her
3 information.

4 **LORD CARLILE:** How are we doing time-wise? Just so we can
5 decide when to finish this afternoon.

6 **MISS ROSE:** If we can go on until 5 o'clock, that would help
7 me very, very much.

8 **LORD CARLILE:** Right.

9 **MISS ROSE:** The timing of this is interesting because the
10 Tribunal will recall the document that I showed you
11 a few minutes ago, the internal Dairy Crest document
12 from Richard Wilkinson at tab 60 {magnum ref } .
13 That was 24 October and that was distributed to an email
14 chain that included Paul Feery. So that's tab 60 and
15 that was the email that I said was inconsistent with the
16 OFT's case because it shows Dairy Crest are very worried
17 because Sainsbury's are getting cold feet and won't
18 move, and so they're trying to encourage Sainsbury's.

19 You may think that there's an inference that
20 Paul Feery is looking for information to shore up
21 Sainsbury's and stop them backtracking on their previous
22 agreement. That's why he passes this information on and
23 that would seem to be consistent with the strategy
24 within Dairy Crest that is suggested at tab 60. But
25 there is simply no evidence at all that Tesco was

1 a party to that and it had no reason to be.
2 Essentially, this is an unilateral strategy by
3 Dairy Crest which is seeking to break what it perceived
4 to be a dead lock on the pricing.

5 Tab 66 {magnum ref }, this is another email from
6 Lisa on 31 October, so this is the day after her
7 conversations with her suppliers where she told them, as
8 she said, about cost prices and retails where relevant.
9 She says:

10 "Hi there.

11 "As you can see from my hiding away and changing all
12 the figures this week, the [£]200 [per tonne] price
13 increase is happening. What I would like from you now
14 is to outline

15 "(a) How you are proposing to get this money back to
16 the farmers ... and

17 "(b) How you [and] we address the issue of Tesco for
18 x number of months ... paying a [£]200 [per tonne]
19 inflated price for cheese made with milk [that was]
20 cheaper than on the New cost implementation date."

21 Again, in my submission, this is a revealing
22 document because, first of all, it shows very clearly
23 that what Lisa Rowbottom was communicating to her
24 suppliers was her agreement to their increased cost
25 price increase, so it's consistent with her talking

1 about cost price increases.

2 Secondly, it shows you her attitude to her
3 suppliers. She's not at all happy about agreeing the
4 cost price increase when the cheese that she's buying
5 was made with milk that wasn't costing the extra £200
6 per tonne. She's saying, "What are you going to do
7 about it?" We submit that's entirely consistent with
8 the Lisa you will see, who will give evidence, who is
9 absolutely committed to getting the best deal that she
10 can for Tesco and doesn't particularly trust her
11 suppliers and is constantly in a negotiating
12 relationship, not a collaborative relationship with her
13 suppliers.

14 If we now go to tab 69 {^magnum ref }, this is an
15 email from Neil Arthey of Dairy Crest to Lisa Rowbottom,
16 4 November 2002. This is relied on by the OFT as strand
17 four:

18 "I have attached a spreadsheet which shows the
19 suggested [retail sales prices] of cheese lines that we
20 supply Asda following the price increase.

21 "My understanding is Asda will be applying £200 per
22 tonne ie 20p per Kilo to RSPs of Smart Price Mild &
23 Mature.

24 "Please could you confirm the RSPs that you wish me
25 to pack Tesco lines with for deliveries targeted week

1 commencing [10 November 2002] following the cost price
2 increase in Tesco (not actually implemented until
3 [17 November]), asap or to Chris if later in the week."

4 Now, a couple of key points. The first, again, that
5 this confirms that Lisa's communication with her
6 suppliers on 30 October was about her agreement to the
7 cost price increase, and clear that she had not
8 communicated her agreement for any -- or her decision to
9 make any particular retail price increases because he is
10 pushing her in this email to do that. He is pushing her
11 to say what she's going to do about her retail prices.

12 Also, of course, it's clear from this that there is
13 no plan for coordinated retail price increases
14 automatically maintaining the cash margin, because,
15 again, he's recognising that it's up to her where she's
16 going to put the retail price.

17 What the OFT rely on is that he says that it's his
18 understanding that Asda will be applying £200 a tonne,
19 and that he attaches a schedule of suggested RSPs of
20 cheese lines supplied to Asda following the price rise.

21 Now, two points. The first thing is that the
22 schedule that is attached to this is nothing more than
23 the previous retail price of Asda products, which was in
24 the public domain, with an addition of £200 a tonne.
25 That's all it is. So it is a simple arithmetic

1 calculation.

2 The second point is that there is no evidence that
3 that information came from Asda to Dairy Crest or that
4 that was actually Asda's decision at this time.

5 The third point is that he doesn't suggest that
6 these are Asda's actual retail prices. What he says is:

7 "... a spreadsheet which shows the suggested RSPs of
8 cheese lines we supply Asda following the price
9 increase."

10 Now, it's obvious that that would be the suggested
11 RSPs because the suppliers were indeed suggesting to the
12 retailers that they should simply maintain the cash
13 margin at the retail level. But that's not Asda
14 confidential information, it's simply supplier puff
15 saying, "Oh, look, this is what we've suggested for Asda
16 and we're suggesting it to you".

17 Then he says:

18 "My understanding is that Asda will be applying £200
19 per tonne ..."

20 And the OFT says that you can infer from that
21 statement that Asda had disclosed to McLelland that it
22 would be applying £200 per tonne, that Asda had made
23 that disclosure with the intention or in the knowledge
24 that McLelland would pass that on to Tesco, and that
25 Lisa, when she saw that email, understood that that was

1 the situation.

2 Now, in my submission, it's quite clear that that
3 statement in the email will not bear the weight of
4 inference that is required, particularly in the absence
5 of any evidence from Asda, who the OFT were in
6 a position to call.

7 **LORD CARLILE:** It's a bit pointless referring to Asda at all
8 if it's not a document that means what it says.

9 **MISS ROSE:** Well, it is a document -- all it says is, "This
10 is my understanding". It doesn't say how he's got the
11 understanding.

12 **LORD CARLILE:** Right, but I'm just concerned about
13 inferences, Miss Rose.

14 **MISS ROSE:** Yes.

15 **LORD CARLILE:** If we have a series of documents or
16 a collection of documents in which B says "I have
17 acquired information from C, D, E, F, G to a certain
18 effect", and it's passed to A in that form, I suppose an
19 inference we could draw is that these business documents
20 have a consistency which supports the truth of the
21 inference.

22 **MISS ROSE:** Sir, you have to look very carefully at what the
23 documents actually say and the context in which they're
24 sent.

25 The context here is a relationship in which the

1 supplier is constantly trying to persuade the retailer
2 to up the price or to move on the price and, knowing
3 that the retailer is in a very competitive relationship
4 with other retailers, seeking to reassure the retailer
5 that it will all be okay because others are doing the
6 same.

7 So that's the context. And the retailer knows, this
8 is crucial, the retailer knows that that is the
9 supplier's game. So the retailer is constantly getting
10 stuff from the supplier saying, "Oh, Tesco will move
11 next week" or "Asda will move next week so why don't you
12 agree our price increase?"

13 But Tesco's reaction, as you will hear from Lisa
14 herself, is to discount that because it's sales pitch,
15 it's sales puff. Her consistent position is, "I don't
16 believe anything that I'm told about the intentions of
17 my competitors until I've actually got hard evidence of
18 what they've actually done on their retail prices in the
19 form of a till receipt or a label from a product
20 actually bought in a shop", that they have actually
21 moved their price.

22 Because the incentive on the supplier to over-egg
23 the pudding is very great, and we've seen already that
24 there are incidents where the suppliers have said things
25 that are simply not true. We saw, for example, that on

1 21 October, Lisa was told other parties have agreed to
2 protect cash margin in a situation where McLelland's
3 internal information showed that they had no information
4 about Asda's position in relation to margin.

5 That's important because it shows that Lisa's belief
6 that what they say to her cannot necessarily be trusted,
7 because they have an incentive to say it, is actually
8 correct, that they're not simply passing on information,
9 what they're doing is pursuing their agenda which is to
10 persuade her that competitors are moving their prices.
11 And that's completely different from the A-B-C situation
12 that the OFT has to prove.

13 **LORD CARLILE:** So they're giving the impression.

14 **MISS ROSE:** They're giving the impression. They're seeking
15 to give the impression. And we've seen -- this takes
16 you back to the document at tab 60 {^magnum ref },
17 that's why I say the document at tab 60 is quite
18 revealing about the actual thought processes of the
19 suppliers, because what you see at tab 60 is the
20 frustration of the supplier confronted by retailers who
21 are saying "I want to see evidence that my competitors
22 have actually moved their retail prices in store". The
23 suppliers are thinking, well, that's incredibly
24 frustrating because it means deadlock, so we're trying
25 to persuade them that the moves are already in the

1 pipeline, and they'll say that whether they have the
2 evidence of that or not. The retailers know they'll do
3 that so they discount it.

4 **MS POTTER:** Just to be clear, by this stage Tesco have
5 agreed a cost price increase, so the only incentive
6 we're talking about in terms of Dairy Crest is ensuring
7 that the retail prices are moved.

8 **MISS ROSE:** Well, it's not actually clear whether or not
9 Tesco implemented the dates that it agreed the cost
10 price increase on the 30th. There's actually
11 significant movement later, as you will see from the
12 documents. So there is a certain amount of movement on
13 that, which is also consistent with Lisa saying she was
14 resisting that as long as she could.

15 **MS POTTER:** Right.

16 **MISS ROSE:** That position is somewhat muddy.

17 So far as Asda is concerned on this occasion --
18 sorry, if we go back to the document at tab 69
19 {^magnum ref } that we were looking at. In terms of
20 Asda's intention and, of course, the Tribunal will bear
21 in mind that the OFT has to establish intention at both
22 ends of the chain, it has to establish both that Asda
23 intended or knew that this information would pass to
24 Tesco and that Tesco knew that that was the position.

25 The OFT did, in an interview, ask David Storey of

1 Asda about this email, and we see that in the
2 investigations bundle, volume 2, tab 39, page 38
3 {^magnum ref }.
4

5 Just to be clear, this is an interview on
6 26 June 2008, after Asda had admitted an infringement
7 and entered into an early resolution agreement. So this
8 is an interview with David Storey, formerly an employee
9 of Asda, pursuant to the early resolution agreement.

10 At page 38, if you look in the middle of the page,
11 you can see that "GB", and that is Genevra Debaradino(?)
12 from the OFT, takes Mr Storey to the document we've just
13 been looking at:

14 "... a Dairy Crest email from Neil Arthey to Tesco,
15 to Lisa Rowbottom, and he attaches a spreadsheet,
16 showing the suggested RSPs ... that Dairy Crest supply
17 Asda ... What is your reaction to seeing this email?"

18 Then lower down.

19 "Would you ever, I mean, are you surprised that
20 Neil Arthey was telling Lisa that, well providing her
21 with a spreadsheet showing the suggested ...?"

22 "Yes I am, yes.

23 "So I take it you wouldn't expect that to happen
24 then?"

25 "No.

"Not even under the pressure of, you know, at the

1 time of farmers and ...

2 "No, although as we said earlier I think it was
3 accepted that, across the industry, that Dairy Crest
4 were trying to pass down to farmers 20p a kilo, so we
5 all naturally assumed that all retails would go up by
6 20p.

7 "But you wouldn't have expected them to ...?"

8 "No.

9 "... circulate around a spreadsheet relating to your
10 own ...

11 "Certainly not, no."

12 Then again, over the page:

13 "... I'm just trying to recall if we -- we do ask
14 them in most emails not to divulge that information to
15 other retailers. Because we have to provide that
16 information to them for pre-price packs.

17 "But it would be confidential information.

18 "It would be confidential information, yes."

19 Now, it's of some concern, in my submission, that
20 having conducted an interview with Asda in relation to
21 this email, which is a critical part of the OFT's case,
22 in which the OFT has to prove intention from both
23 retailers at both ends of the chain, and having been
24 told by David Storey, pursuant to an interview under the
25 ERA, that there was no such intention by Asda that the

1 information should be passed on, that the OFT then takes
2 the decision not to call Mr Storey to give evidence so
3 that we are deprived of the opportunity of
4 cross-examining him on this question.

5 We submit that that's going to be a matter of great
6 significance when you ask the question that you quite
7 rightly put to me, sir, the question of what inference
8 can you draw from this document. We say a key part of
9 that inference is that the OFT didn't need to rely on an
10 inference. It could have called positive evidence. It
11 was obvious to the OFT from the interviews it had
12 conducted that that evidence might not support its case,
13 or might be of dubious benefit to its case, and it seems
14 to have taken a decision on that basis to deprive the
15 Tribunal of the opportunity of hearing it. We submit
16 that's quite inappropriate conduct for a public
17 authority in a quasi-prosecutorial role.

18 So that actually might be a logical point to finish
19 because I was about to move on to a different document,
20 a different strand.

21 **LORD CARLILE:** What time do you want to start tomorrow?

22 **MISS ROSE:** How early can you start, realistically?

23 **LORD CARLILE:** I suppose realistically 10 o'clock.

24 **MISS ROSE:** I would then ask to start at 10.00.

25 **LORD CARLILE:** Because there are a lot of people involved

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