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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27 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 4)

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 Friday, 27 April 2012

2 (10.00 am)

3 **LORD CARLILE:** Before we get going, can we just sort out
4 where we are with LiveNote. Should we have an automatic
5 connection to Day 2 by now?

6 The second thing is we don't have the fair copy of
7 yesterday's LiveNote received by email, I mean the
8 electronic copy. If someone could sort that out for me
9 in the break, I would be grateful. I thought we were
10 going to receive the fair copy in the evening
11 electronically.

12 **MISS ROSE:** We did.

13 **LORD CARLILE:** I didn't, the Tribunal didn't, so could that
14 be sorted out? Mr Hiendl will provide our email
15 addresses later in the day.

16 Yes, carry on.

17 **MISS ROSE:** Sir, I'm assuming we'll break about 11.20?

18 **LORD CARLILE:** Yes.

19 Opening Submissions by MISS ROSE (continued)

20 **MISS ROSE:** Just before we broke yesterday we were looking
21 at tab 69 of volume 1 of the documents bundle, which was
22 the email from Neil Arthey of Dairy Crest
23 {^magnum ref }.

24 You will recall that I showed the Tribunal the
25 comments of David Storey of Asda in relation to the

1 suggestion that Asda had intended information about its
2 future retail prices to be passed to Tesco, and he
3 expressed surprise at that in the interview that he had
4 with the OFT.

5 One further point I want to make about this before
6 I leave this email is that not only did the OFT have
7 available to it the fruits of its own interview with
8 David Storey of Asda, it also had material concerning
9 the evidence of Mr Arthey, who was the actual author of
10 the email. That was an interview conducted by Eversheds
11 who were the solicitors for Dairy Crest, and that
12 interview is in the investigations bundle 1, tab B/10
13 {^magnum ref }.
14

15 As the Tribunal can see, this is a note of
16 a discussion conducted by Eversheds with Mr Arthey on
17 29 October 2007 which was sent to the OFT for the
18 purposes of their investigation. The relevant passage
19 begins at paragraph 17, where you can see the heading
20 "Email from Neil Arthey", dated 4 November 2002, which
21 is the email we've just been looking at. He explains
22 who the addressees and people who are copied in are.
23 Then he says:

24 "By sending this email, I was showing the Tesco
25 buyer that the suggested price of cheese was the same
across the board and not specific to Tesco. The prices

1 mentioned were only suggested prices and not guaranteed
2 prices. In my view it was not a definite statement that
3 Asda's prices would go up by the amount listed; I stated
4 that it was 'my understanding' that they would do so
5 rather than stating that they definitely would.

6 "I would not consider the lists of prices attached
7 to be commercially sensitive between Dairy Crest and
8 Asda since the figure of £200 per tonne was the same
9 across the industry. It was a widely known
10 industry-wide target and the prices were just setting
11 out what this target would mean in terms of a block of
12 cheese of a certain size.

13 "Asda was not singled out for any particular reason
14 as it could just have easily been Morrisons or
15 Sainsbury's. Tesco would have been sensitive to Asda's
16 prices as all the retailers watch each other like hawks.
17 If they were not interested, I would not have sent them
18 the information. However, the prices listed were
19 suggested prices only and what we had suggested across
20 the board.

21 "I do not remember exactly how I had that
22 information about Asda's prices. I could have known
23 that they were accepting our proposals and worked out
24 the prices but it is also possible that Kenton Robbins
25 gave the list to me. It was not rocket science - it

1 would have been possible to work the prices out."

2 Which was obviously right because all they had done
3 was to take the existing Asda retail prices and increase
4 them by £200 a tonne, which was the proposed cost price
5 increase:

6 "I do not think sending this email crossed the line
7 of passing confidential information to a competitor as
8 it only gave suggested prices. There is a difference
9 between suggested price rises and those you know will
10 happen. Also, if the prices had gone up by a different
11 amount from the one we had suggested that would have
12 been confidential. However the suggested amount was
13 semipublic anyway and not a specific Asda price."

14 So that was information that was also available to
15 the OFT but again was not pursued by them and they did
16 not seek to obtain evidence from the author of the
17 email.

18 If we now turn the page to tab 70 {^magnum ref },
19 this is an email from Stuart Meikle. We will be
20 encountering Stuart Meikle a lot for 2003. In 2002 he
21 was the McLelland account manager for other
22 supermarkets, including here Co-op, and Tom Ferguson was
23 dealing with Tesco. But as we shall see, by 2003,
24 Tom Ferguson had been promoted to a more senior position
25 and Stuart Meikle began to deal with Lisa, and we shall

1 see him in 2003.

2 This is an email from Stuart Meikle to the Co-op:

3 "Mike, as per our conversation I have detailed below
4 what I believe is happening with retail prices over the
5 next 2 weeks. Seriously Strong retails have already
6 moved in some cases. We will be checking stores all
7 this week and I will keep you updated on anything that
8 filters through over the next few days.

9 "I would like to raise your costs from ...

10 [REDACTED] and have attached a file detailing the new
11 costs by line. We will be raising the retail prices on
12 the McLelland random weight brands by 20p per kilo to
13 allow for cash margin to be maintained. Detail on these
14 new retails are also attached. Can you confirm that you
15 are OK with these retails or let me know if you want to
16 use different retails?"

17 Then you can see he says:

18 "What I believe will happen elsewhere is ..."

19 And there are various dates given, some are current
20 and some are future, including two dates in relation to
21 Tesco:

22 "11/11/02 -- random weight McLelland retails.

23 "18/11/02 -- all own label lines."

24 The information here is not said to come from Tesco,
25 it is said "what I believe will happen elsewhere", and

1 our point on this is the same as in relation to other
2 communications, that there is no evidence that Tesco had
3 any intention for Mr Meikle to pass on any information
4 about its future retail price rises to Co-op.

5 Indeed it's not suggested that Co-op were guilty of
6 any infringement, so this is strand six, which is not
7 relied on as an infringement per se but which the OFT
8 relies on as part of the general context.

9 **LORD CARLILE:** I notice on the second page of that email
10 there's a reference to "all the information that we are
11 currently picking up". Is there any significance in
12 that statement?

13 **MISS ROSE:** It's very difficult to know what that statement
14 means in the absence of Stuart Meikle because it could
15 mean all sorts of things. It could mean general market
16 intelligence, it could mean Stuart Meikle simply
17 engaging in the kind of bluff that is absolutely typical
18 of the way that these negotiations are conducted. One
19 simply doesn't know.

20 **MS POTTER:** The other thing that strikes me in the second
21 paragraph of that email is the "We will be raising the
22 retail prices on the McLelland random weight brands by
23 20p per kilo", the extent to which it's being driven by
24 the supplier in terms of -- but I suppose that does go
25 to this question of whether one can make a sensible

1 distinction between cost and retail prices because they
2 are being so closely linked?

3 **MISS ROSE:** Except that he then says in the next sentence:

4 "Can you confirm that you're OK with these retails
5 or let me know if you want to use different retails?"

6 In fact, I would submit that this really does show
7 what is going on here because this is a sales pitch and
8 the effective salesman doesn't say, "Would you like to
9 do X?" We've all watched The Apprentice and we remember
10 Ruth Badger whose fantastic technique, when selling
11 a second-hand car, was to say, "So that's the deal" and
12 to shake hands, and the customer, before they know where
13 they've got to, has just agreed to what's been proposed.

14 That's the technique that Mr Meikle is putting
15 forward here, he is saying "Look, I've already filled in
16 all these future retails, it's all straightforward, all
17 you need to do is just send it back". But he's
18 acknowledging in the last sentence that it's not his
19 decision, it's the buyer's decision and he knows that.

20 That's the problem with taking a sales pitch as if
21 it were a consensual collaborative communication. We
22 always have to remember that this is in itself a piece
23 of written advocacy.

24 **MS POTTER:** Thank you.

25 **MISS ROSE:** So far as your point about costs and retails is

1 concerned, of course, this is another issue where the
2 way that the OFT puts its case, we would say with
3 respect to them, muddies the reality because the actual
4 position is, if there's an agreement to raise the cost
5 price, it's very likely that there's going to be some
6 increase in the retail price at or around the same time,
7 so if the supplier is told that there's agreement on the
8 cost price, they're likely to infer that that means the
9 retail price is going up. It doesn't mean they've
10 actually been given information by their buyer about the
11 retail price. It's an obvious inference for them to
12 make.

13 So this is, again, part of the problem with the
14 OFT's case, that it's constantly seeing something
15 sinister in the course of what are actually normal
16 commercial exchanges between supplier and buyer.

17 **LORD CARLILE:** Sorry, forgive me for interrupting you again,
18 but the thought that has been exercising me for the last
19 few days now, and it's partly based on going back almost
20 to another life, but my recollection is that there's
21 a whole load of market intelligence data which is traded
22 to provide a wide range of people and interested parties
23 with market information about, for example, consumer
24 prices in different supermarkets and different
25 commodities.

1 Now, I can't remember whether this is dealt with in
2 the decision as to how much of the information that we
3 are being asked to draw inferences about is actually
4 widely available in market intelligence and could have
5 been picked up at the press of a button from elsewhere.

6 **MISS ROSE:** What we do know, you'll see this is in Lisa's
7 evidence, is that Tesco itself monitored the shelf
8 prices of its competitors on a weekly basis.

9 **LORD CARLILE:** Yes, there's plenty of evidence for that.

10 **MISS ROSE:** There's plenty of evidence about that. And
11 indeed also that she would use her suppliers to give her
12 additional information about current shelf prices.
13 You'll see this particularly in relation to some of the
14 documents we're going to look at in relation to 2003,
15 that she asks them to send her additional lists of
16 current shelf prices from supermarkets because she is
17 constantly monitoring the shelf prices of her
18 competitors.

19 Of course, in the particular conditions that applied
20 in the autumn of 2002, and as we have seen, it has also
21 been very widely publicised that the cheese processors
22 are looking for an across the board cost price rise of
23 £200 per tonne on cheese. That's why the Asda schedule
24 we've just been looking at is really not confidential
25 information at all because all it is is the current Asda

1 retails with £200 per tonne added. And anybody -- Lisa
2 could have done that, anybody could have done that
3 calculation. It doesn't actually tell you anything
4 exciting. And always in this context of the suppliers
5 pushing, pushing, pushing to get Lisa to actually commit
6 and make the decision. That's what's happening.

7 **MS DALY:** Along those lines, in a world where I'm an
8 experienced operator in the industry and, as has been
9 pointed out, I would infer that the cost price increase
10 would inevitably lead to a retail price increase, when
11 that's known or assumed widely, at what point does just
12 the date of the intended cost increases equal the most
13 important piece of information?

14 **MISS ROSE:** Well, it's going to be an important piece of
15 information. Of course, the pieces of information that
16 are important are the date of the cost price, whether
17 there will be a retail price, it's not inevitable
18 because there might be circumstances where you would
19 absorb the hit, depending on what other people were
20 doing and what the market conditions were, and the
21 amounts of the increases on particular lines. Because,
22 of course, even if you're going to protect your margin
23 across the board, there are lots of different kinds of
24 cheeses. So you could decide to raise the price more on
25 certain lines of cheese and less on other lines of

1 cheese so all of that information is important.

2 But the reason why we stress the fact that what's
3 actually happening here is communication by Tesco of
4 cost price increases, and of retails where necessary for
5 packing, is that what the OFT says is, "No, you were
6 communicating retail price increases that weren't about
7 packing and, therefore, there was no legitimate business
8 purpose and, therefore, you can infer anticompetitive
9 intent". That's the significance of this point, that we
10 say that's nonsense because the fact that it's being
11 understood as a retail price increase, or may be being,
12 it's not clear whether it is or isn't, when it's being
13 onwardly transmitted, it doesn't mean that's what Tesco
14 said.

15 **MS DALY:** Thank you.

16 **MISS ROSE:** Of course the question whether this email at
17 tab 70 is actually passing on dates when Tesco was
18 intending to move its retail prices is very unclear
19 because there is no clear evidence at this date that
20 Tesco had committed to the dates it was going to move
21 its retail prices for these categories to McLelland.

22 On 29 October, we know that Tom Ferguson was seeking
23 to persuade Lisa about dates and amounts of retail price
24 changes. That's at tab 62, and that's an email we
25 looked at before {^magnum ref }. And he pushed her

1 again, if you take up bundle 2 and go to tab 78
2 {^magnum ref }. Now, the email we've just been
3 looking at from Stuart Meikle to the Co-op was dated
4 5 November. Two days later on 7 November, this is
5 tab 78, Tom Ferguson is still pressing Lisa to commit:

6 "Hi Lisa.

7 "Time marches on, guess who goes on holiday now
8 until Tuesday next week. I will be out of the office
9 now until Tuesday and we need to confirm the new retails
10 for packing on Monday the 11th for supply from the 17th.
11 Can you please either send the information to
12 Jim McGregor by completing the initial spreadsheet
13 I sent over and sending it back or phone Jim in the
14 office on Friday.

15 "I will obviously see you on Wednesday and I will
16 catch up on Tuesday when I am back in the office."

17 What we then know is that, the following day, Lisa
18 phones Jim McGregor, and that's at tab 79

19 {^magnum ref }, and says:

20 "Tesco will not commit to moving own brand until
21 they see that Asda have moved and therefore will not
22 give us their rsps."

23 I'm going to come back to this email because it's
24 one that the OFT rely on, but at this stage I just want
25 to make the point, in relation to the Co-op email, that

1 if it's suggested that that email is evidence that Tesco
2 was transmitting to the Co-op via McLelland that it had
3 committed to moving its retail prices on that date, that
4 inference can't be drawn because that was not the
5 position. Tesco had not committed to moving its retail
6 prices on that date, indeed were still being pressed by
7 McLelland to commit two days later and on 8 November was
8 saying that it wasn't committing.

9 So we say that any such inference is contrary to the
10 documentary evidence which the OFT says is so clear it
11 requires no elaboration.

12 **MS POTTER:** Sorry, just to be clear, is it also the case
13 therefore that they hadn't accepted, that Tesco hadn't
14 accepted the cost price increases at that stage?

15 **MISS ROSE:** At that stage. Well, I'm going to show you in
16 a minute, this of course goes back to a question you
17 asked me yesterday, and I'm going to show you that
18 actually there was still foot dragging. We'll see the
19 documents in a minute.

20 **MS POTTER:** That's fine, thank you.

21 **MISS ROSE:** Can we now put away volume 1 and turn to
22 volume 2.

23 So this is Tom Ferguson, the Tesco account manager
24 for McLelland, tab 71, volume 2 {^magnum ref }, 5
25 November 2002, to Sarah Mackenzie of Sainsbury's. This

1 is the core document that the OFT rely on for strand
2 seven:

3 "Hi Sarah, completed details for period seven
4 enclosed. We have slipped against the plan which
5 I expected. Our forward plan from January onwards
6 should still ensure that we hit the annual targets.

7 "A quick update on the generic cheddar area. Asda
8 have moved all sizes of Smart Price mild cheddar to
9 £2.69 per kilo and Smart Price mature cheddar to £3.69
10 per kilo."

11 So that's clearly telling her a price that has
12 already been implemented. Then the words:

13 "This will be matched by Tesco."

14 The OFT's case is that this is another A-B-C
15 communication because they say that it is to be inferred
16 from this that Tesco has told McLelland that they will
17 match the Asda price for those brands with the intention
18 that that was to be passed on to Sainsbury's. We say
19 that is simply an unwarranted inference from that
20 because, as we've already seen, very widely known in the
21 market that Tesco has a policy of matching Asda's
22 prices, and so to say this will be matched by Tesco is,
23 first of all, not saying that information comes from
24 Tesco, secondly a statement of what is likely to have
25 been pretty obvious to everyone anyway, and simply not

1 the basis for an inference of anything that had been
2 said by Tesco. At the most, it's evidence of what
3 Mr Ferguson thought at the time. And this Tribunal, of
4 course, will be hearing evidence from Mr Ferguson about
5 the basis for that statement.

6 Sarah Mackenzie from Sainsbury's in fact told the
7 OFT in her interview with the OFT how she had understood
8 this email. This is volume 2 of the investigations
9 bundle, tab 34, page 24 {^magnum ref }.
10

11 If you go just above the first hole-punch:

12 "If we move on to document 15... this again appears
13 to be a combination of publicly available information
14 [that's the Asda price] but also future information in
15 relation to Tesco. Would that be the sort of
16 reassurance that you would... in terms of what you were
17 just saying actually, in terms when you saw a retailer
18 moving its prices, would you also have received
19 assurances, perhaps of a processor, that other retailers
20 would be following?"

21 She says:

22 "I mean, by the fact that Asda have actually moved
23 in the public domain, that would have given us assurance
24 anyway, because generally Tesco's then would follow
25 Asda, so that would have given us the assurance.

"And why would you have expected Tesco to follow

1 Asda? Because an alternative possibility for Tesco is
2 to keep its lower price and be...

3 "Historically that's what had happened in the
4 market, that's what we'd seen previously.

5 "But the clarification in the email is a bit more
6 emphatic than based upon market traditions as such.

7 "I don't understand your point.

8 "The email states this would be matched by Tesco.
9 Would you say from that, that that is based upon
10 McLelland's previous understanding of how Tesco
11 operates?

12 "It probably is or I'm not sure what Tesco's... what
13 McLelland's were packing for Tesco's but I think they
14 may well have been packing their Value cheese for them
15 at the time. McLelland's weren't packing -- they
16 weren't a supplier for us of Value cheese."

17 And then they move on.

18 So again Sarah Mackenzie of Sainsbury's is saying,
19 "Well, this is a statement of the obvious. We were
20 assured here by the public domain information we were
21 given about Asda, and what's said about Tesco is an
22 obvious statement about historically what always happens
23 and I've no idea whether it's information from Tesco".
24 And yet the OFT, not calling her to give evidence, not
25 calling her to be cross-examined, says this document is

1 sufficient to establish clearly an inference not only
2 that that information comes from Tesco but that Tesco
3 was transferring it to McLelland with the intent that it
4 was to be transmitted to Sainsbury's.

5 If we go back to document bundle 2 and go on to
6 tab 73 {^magnum ref }, this is an internal Safeway
7 document, 5 November:

8 "Need your advice, we are about to execute
9 a market-wide RSP increase on the full range of UK
10 cheeses. This is linked to supporting farmers to the
11 tune of 2p per litre of milk or £200 per tonne.

12 "We will be having to make changes to the range on
13 the 11th and 18th of November of an average of 10p per
14 500g piece [and so on] to show our support.

15 "Can you let me know what impacts this will have on
16 our legality on Commando and what options I have, as
17 I need to return to having 32 pieces of POS on the area
18 to drive the volumes at an early stage.

19 "Our indices will remain the same, as all players
20 will be moving at the same amount on the same day..."

21 We have no idea why Safeway thought that, and of
22 course it wasn't true and Tesco had not committed to
23 anything of that kind by this date, which is 5 November,
24 because as we saw a few minutes ago, by 8 November,
25 Tesco were saying, "Well, we're not sure we are going to

1 move some of our brands". So if that is what Safeway
2 thought, and we've no idea why they may have thought
3 that or what it was based on, it was wrong.

4 Tab 74 {^magnum ref }, this is simply a letter
5 from Dairy Crest to Sainsbury's. Dairy Crest are upset;
6 if you read this letter you will see that Dairy Crest
7 are upset because Glanbia are not increasing the price
8 that they pay to farmers, and Dairy Crest thinks this is
9 making them exposed because it means their cheese is
10 more expensive than Glanbia's.

11 Over the page they say:

12 "I would go further in saying that unless Glanbia
13 and other cheese companies match our increase in full
14 [that means the increase to the farmers] we will have no
15 alternative as a company but to put the whole cheese
16 pricing initiative into reverse. I am sure that you can
17 understand our concern."

18 Clearly this is not a covert document and there's no
19 reason to assume it relates to any secret coordinated
20 retail price rise. What this clearly relates to is the
21 widely publicised initiative that Dairy Crest had been
22 particularly keen to publicise which was that it,
23 Dairy Crest, was going to pay more to farmers and, for
24 that basis, was proposing an across-the-board cost price
25 increase in its cheese.

1 Tab 76 {^magnum ref }, this is McLelland to
2 Sainsbury's about the timings and amounts of price
3 rises. Again, an absolutely typical letter from
4 a supplier proposing retail prices, pushing her, saying
5 "This is in line with the market". It's the usual sales
6 pitch that we are now becoming familiar with:

7 "Busy times. I have updated the spreadsheet with
8 the proposed new retails covering the straight £200 per
9 tonne movement. Can you please sign this off by
10 lunchtime [so again pushing her just to agree the
11 straight retails] and I will complete the planning
12 process... plan to deliver at the new costs and retails
13 in the following way."

14 And dates are given.

15 It's the usual pitch. And in particular you can see
16 the second one where he says:

17 "Details enclosed confirming the changes across the
18 branded area which will be effective from the
19 of November. This will be in line with the rest of the
20 market."

21 **MR MORRIS:** I think you may be reading out confidential --

22 **MISS ROSE:** I'm sorry.

23 **MR MORRIS:** Technically, the red boxes should not be read
24 out.

25 **MISS ROSE:** What we then see in the next tab

1 {^magnum ref } is a press release from Glanbia. We
2 have just seen that Dairy Crest was upset about Glanbia
3 because they thought they weren't helping with the
4 initiative to increase the price to farmers.

5 **LORD CARLILE:** Before we go on, why on earth is there
6 a confidentiality over these prices which are now ten
7 years ago?

8 **MISS ROSE:** I agree, sir, it's extraordinary.

9 **LORD CARLILE:** Nonsense.

10 **MISS ROSE:** It is indeed nonsense.

11 **LORD CARLILE:** Who has imposed this confidentiality?

12 The Tribunal really does need to be able to progress
13 on a realistic basis in this case and that kind of
14 confidentiality is frankly completely futile.

15 **MR MORRIS:** My understanding is this is Sainsbury's request
16 for confidentiality. Sir, I'm not --

17 **LORD CARLILE:** Sorry, can I just give a direction.

18 If Sainsbury's or anybody else wants to maintain
19 this kind of confidentiality they had better be here on
20 Tuesday morning at 10 o'clock, on this sort of issue.
21 If that can be passed on by the Tribunal, because we
22 have to proceed on a realistic basis in this case.

23 Now that the case is unfolding before us, it is
24 absolutely nonsensical.

25 **MR MORRIS:** Sir, I couldn't agree more.

1 **LORD CARLILE:** Could the Tribunal pass that on, please, to
2 Sainsbury's and any of the other retailers we are
3 concerned with here, unless you have any objection?

4 **MISS ROSE:** No, sir, I fully endorse that. I take it that
5 it's the OFT that you're suggesting should be the
6 conduit to Sainsbury's and the others retailers?

7 **MR MORRIS:** Could we also invite, through the chair, Tesco
8 also to make similar consideration about material that
9 it does not wish to be read out.

10 **LORD CARLILE:** Yes, I think so. I'm becoming concerned, as
11 I go through these documents, particularly in the very
12 clear way in which Miss Rose is using them, that we
13 really need to proceed on a realistic basis, and it
14 makes providing a judgment very difficult.

15 **MR MORRIS:** I see that, sir, and I personally entirely
16 endorse that. But there are one or two items that
17 I think are redacted at the request of Tesco --

18 **LORD CARLILE:** Okay. Can that be reviewed by Tuesday
19 morning, please.

20 Sorry, you were moving on to 77?

21 **MISS ROSE:** Yes, we had looked at 76.

22 Now, 77 {^magnum ref }. This is the Glanbia
23 press release, because we've just seen Dairy Crest's
24 dissatisfaction with Glanbia, and Glanbia then on
25 7 November issues a press release:

1 "Glanbia commits to return retail cheese price
2 increase to suppliers. Glanbia Milk is currently
3 meeting with its farmer suppliers around the country to
4 detail how the much-publicised retail cheese price
5 initiative will increase the price paid to the company's
6 milk suppliers."

7 They say they are committed to passing on the full
8 £200 per tonne increase. So, again, any suggestion that
9 this is a covert initiative where there would be
10 fragmentary evidence we say is manifestly false.

11 Now, I want to come back now to two tabs we looked
12 at before in a different context which are tabs 78 and
13 79, which are now in their proper place.

14 So the first is the email we just looked at from
15 Tom Ferguson to Lisa Rowbottom, 7 November, where he is
16 trying to persuade her to confirm the new retail prices
17 for packing purposes. He is going on holiday, he says,
18 and so can she talk to Jim McGregor.

19 The following day she did talk to Jim McGregor, and
20 we have his note of the conversation at tab 79

21 {^magnum ref }:

22 "Lisa called to state Tesco will not commit to
23 moving Own Brand until they see that Asda have moved and
24 therefore will not give us their rsps. While they are
25 relatively confident that everything is in place with

1 Asda, they are taking a 'We won't believe it until we
2 see it' stance."

3 We say that is entirely consistent with the position
4 that Tesco have always maintained which is that they are
5 not interested in being given assurances about what
6 people will or won't do in the future; what matters to
7 them when they're matching their prices with their
8 competitors is to see what is actually in store and can
9 be verified. That's why she is saying, "We will not
10 commit until we see Asda have moved".

11 If we then go on to tab 80 {^magnum ref },
12 12 November, Tom Ferguson again:

13 "Dialogue is still continuing with Tesco regarding
14 the market movement of £200 per tonne. As of today,
15 Tesco have not confirmed any movement on retails and the
16 likely outcome of this is that we could have the
17 confirmation by the end of the week. This scenario
18 obviously makes it very difficult to control our
19 availability of Tesco packed stock. In order to ensure
20 that we continue with our Service levels I propose the
21 following course of action.

22 "1. Communication will be daily with Tesco to
23 target retail movements.

24 "2. Stock packed at the current retails should be
25 made available for supply into next week, this will

1 allow Mauchline to pack today for supply into next week.

2 "3. Stock levels as before should be restricted to
3 1 weeks stock."

4 Now this takes us back to the point that Ms Potter
5 was raising yesterday, that it's clear that the dates
6 that were agreed at the end of October were not then
7 implemented because Tesco back-tracked and they weren't
8 confirming the dates of retail price rises, and that was
9 a problem for McLelland because they were packing the
10 stock. And it's clear that the need for the
11 communication from Tesco is not pursuant to some covert
12 retail pricing initiative but so that McLelland can pack
13 the stock. That's why it's a problem for McLelland.

14 Tab 81 {^magnum ref }, this is an internal
15 McLelland email of 13 November from Stuart Meikle to
16 Jim McGregor, Tom Ferguson and Chris Reid:

17 "I've attached an updated price & promotion check
18 for Asda, Morrisons, Tesco, [Sainsbury's] and Safeway
19 that I completed yesterday. All price changes and new
20 lines that I picked up have been highlighted in bold.

21 "Key points are:

22 "Asda, Tesco, JS, Safeway all have new retails for
23 S Strong on display.

24 "Tesco & Asda had new retails on Cath City. No
25 product on display in [Sainsbury]. Safeway price

1 reduced on Go Low Stay Low.

2 "No price movement on Pilgrim's Choice.

3 "Increased Smart Price retails on

4 Mature/Mild/Red Leicester visible in Asda.

5 "New retails on McLelland random weights filtering
6 through in Asda.

7 "Go Low, Stay Low in Safeway with prices reduced on
8 Cathedral City mature [and some other brands]."

9 This, we say is an entirely typical check on the
10 prices visible on the supermarket shelves, again
11 inconsistent with the idea that there is coordinated
12 exchanging of future retail prices. It is clear that
13 what the suppliers are doing is checking what's actually
14 on the shelves to see what is actually happening.

15 **LORD CARLILE:** These prices are all based on store visits on
16 the date that is set out in the schedule?

17 **MISS ROSE:** Yes, that's right.

18 **LORD CARLILE:** Most have been Scotland.

19 **MISS ROSE:** That's correct, yes. He has been round the
20 actual shelves.

21 **MS POTTER:** I was just going to say, presumably this gives
22 some indication of quite a volume of cheese which is not
23 being retail price labelled by the suppliers but is
24 actually being priced in store?

25 **MISS ROSE:** I'm not sure whether these are all cheeses that

1 wouldn't have been priced by the supplier. I would need
2 to check that.

3 **MS POTTER:** Right. That's something that I think we have
4 probably got outstanding anyway, haven't we?

5 Thank you.

6 **LORD CARLILE:** I've taken it that where there are random
7 sizes they're all priced by the suppliers.

8 **MISS ROSE:** That is correct, and indeed where you see "RW"
9 before the weight that means it's a random weight
10 cheese.

11 **LORD CARLILE:** Whereas where there are fixed sizes, 200
12 grammes, 300 grammes --

13 **MISS ROSE:** Some fixed sizes may also be priced by the
14 supplier, but all the random weight cheese is priced by
15 the supplier. There are prepacks which are priced by
16 the supplier as well.

17 Then 82 {^magnum ref }, Stuart again, the same
18 day, to Asda:

19 "Please find attached updated retail price check."

20 This is the same material that he has been sending
21 internally.

22 "All McLelland random weight brands have moved to
23 increased retail prices in Tesco and Safeway and SELs
24 have changed. There is still some stock on the shelves
25 at the previous retail prices (as there is in Asda) but

1 I would expect this to move through over the next couple
2 of days. We will be making further store checks
3 throughout the week and will be able to forward till
4 receipts to you. In the meantime I will fax receipts
5 from Safeway and Tesco to you highlighting new retail
6 prices."

7 This is exactly what the retailers want. They want
8 checks of the actual prices in store backed up with till
9 receipts. Publicly available information.

10 **LORD CARLILE:** So you're saying why bother to go to the
11 kirk(?) and till at the supermarket if it's all been
12 agreed in advance?

13 **MISS ROSE:** Exactly. If there's a secret coordinated
14 indirect exchange going on, this doesn't make sense.
15 This only makes sense because what the retailers want is
16 hard evidence that the competitors have moved their
17 prices. They're not interested in the sort of puff that
18 they get from their salespeople.

19 **MS POTTER:** Just one point of clarification, and this
20 probably makes complete sense. So it looks as if you
21 can have two different prices for the same product on
22 display provided that they are random weight and,
23 therefore, you haven't got a display on the shelf edge.

24 **MISS ROSE:** Yes, that's right. It's a problem if you've got
25 fixed price packs with a single shelf price which is not

1 the same as the price on the individual packs.

2 I'm not making myself clear, but you take the point.

3 **MS POTTER:** Yes.

4 **MISS ROSE:** If it's a random weight and it's not on the
5 front of the shelf, it's not a problem. But it is
6 a problem if you put the price up and it's not
7 consistent.

8 I'm sorry, I'm not explaining it well.

9 **LORD CARLILE:** Then you have to sell it for the lower price
10 at the till otherwise you're in trouble with the local
11 authority.

12 **MISS ROSE:** That's right. Exactly, you're in trouble with
13 Trading Standards.

14 **MS POTTER:** So with random weight, is there normally a shelf
15 edge price?

16 **MISS ROSE:** There would be a per kilo price. There would be
17 a price per kilo.

18 **MS POTTER:** So the lower price would have to be on display
19 until all stock had been exhausted.

20 **MISS ROSE:** That's probably a good question to ask
21 Lisa Oldershaw who I'm sure knows the answer.

22 **MS POTTER:** Yes, thank you.

23 **MISS ROSE:** If we go on to tab 83 {^magnum ref }, this is
24 the core document that the OFT relies on for its strand
25 nine. It's an email from David Storey of Asda,

1 internal:

2 "Attached audit for English stores.

3 "Smart Price - Tesco have moved RSP in line with
4 Asda on all packs - till receipts available.

5 "Morrisons - mature value cheddar packs with higher
6 RSP than Asda noted, however no evidence of movement yet
7 on mild.

8 "Buyer on holiday, however we are assured this has
9 been planned in for increased RSP this weekend still
10 chasing."

11 That is interesting in relation to Morrisons but not
12 of course in relation to Tesco.

13 "On own label packs, Tesco, Safeway and JS have
14 commenced phasing in higher priced packs, no evidence
15 yet in.

16 "Kwik Save and Morrisons, we will propose increase
17 for December 2 subject to others moving earlier.

18 "Stilton cheese, Asda not yet applied any increase,
19 all have moved up except Kwik Save, will submit proposal
20 to move up 25 November [et cetera]."

21 Then over the page:

22 "NB others have indicated will move back down unless
23 we follow due to moving 2 weeks ago."

24 What the OFT says is that you can infer from this
25 email that Tesco had told its supplier that it would

1 move the price of its stilton cheese down unless Asda
2 followed the price up, and that that was communicated
3 with the intention of it being forwarded to Asda, and
4 was then forwarded to Asda.

5 We submit that you cannot begin to derive that
6 inference from this email for a host of obvious reasons.
7 The first is that Tesco is not even mentioned, it simply
8 says:

9 "... others have indicated will move back down
10 unless we follow due to moving 2 weeks ago."

11 One has no idea who the others are that are referred
12 to there. Secondly, there is no way of knowing what is
13 meant by "others have indicated" and, of course,
14 David Storey is not being called to give evidence to
15 elucidate this point.

16 So, again, we submit it is simply not open to the
17 OFT to ask this Tribunal to mount an ambitious, we would
18 say, wholly unsustainable inference on the basis of
19 a document like this when it could have removed all
20 doubt by calling its author, whom indeed it had
21 interviewed.

22 But what is not open to the regulator is to take
23 a decision not to call the author and then ask you to
24 draw an inference from this completely opaque statement
25 in an email.

1 If we go on, tab 84 {^magnum ref }, this is
2 a press release issued by Somerfields:

3 "Somerfield and its Scottish cheese supplier
4 McLelland have struck a deal to pay an extra £200 per
5 tonne for cheese. This will ensure that Scottish dairy
6 farmers receive an extra 2p per litre."

7 Just to note there is no allegation that Somerfield
8 were involved in any unlawful exchange of information.

9 **LORD CARLILE:** The last paragraph of that email seems to
10 indicate that the negotiations between McLelland and all
11 the supermarket groups have been a matter of public
12 record.

13 **MISS ROSE:** Well, indeed they were, and that their purpose
14 was to obtain a price increase, a cost price increase
15 sufficient to pay the money back to the farmers. That
16 was absolutely a matter of public record and, as we've
17 seen, was repeatedly press released by people including
18 Glanbia and Dairy Crest.

19 But what the OFT says is that doesn't matter because
20 what's clandestine is the secret consensus to have
21 a coordinated retail price rise. That's their case.
22 And they say this very public initiative to have an
23 increased cost price to fund a higher price at the
24 farm gate doesn't impede their case that there's
25 a separate clandestine consensus for a coordinated

1 retail price rise.

2 One of the problems with the OFT's case is the
3 slippery way that they use language like "initiative"
4 and "plan". In some parts they treat the use in
5 documents of the word "initiative", the "cheese price
6 initiative", as if it were suspect. But the cheese
7 price initiative is simply this, which was very, very
8 public and which they don't allege to be unlawful.

9 At tab 86 {^magnum ref }, this is an email
10 from -- sorry, not an email, it's a letter from
11 McLelland, actually it appears to be a fax, from
12 McLelland to David Storey of Asda, sending till
13 receipts:

14 "Reference our conversation please find attached
15 copies of till receipts for new retails on
16 Seriously Strong within Tesco and Sainsbury's."

17 Now, again, obviously this is sending public domain
18 information of the way that prices have actually gone
19 up, but what's interesting, what you can see from this,
20 is that those prices have not gone up by the equivalent
21 of £200 per tonne, because if you look at the Tesco 250
22 grammes, £200 per tonne is 20p per kilo, so for 250
23 grammes it should be a 5p rise. You can see that in
24 fact the price has gone up by 7p. So Tesco has
25 increased the price by more than the equivalent of £200

1 per tonne.

2 Then Tesco 500 grammes, that should be a 10p rise if
3 it's in accordance with the cost price rise. In fact,
4 it's 16p.

5 Sainsbury's, on 250 grammes they've also put it up
6 by 6p, and 500 grammes they have put up by 10p.

7 So only one of the four looked at here has actually
8 gone up by the proposed cash margin. What you have seen
9 throughout all of these documents is the suppliers
10 constantly proposing that the retailers increase their
11 prices by the cash margin, and we can see here a crisp
12 piece of evidence that shows that that happened
13 sometimes but it didn't happen all the time. The
14 retailers retained control over their retail price.

15 Now, tab 87 {^magnum ref }, 22 November 2002,
16 Tom Ferguson to Lisa Rowbottom:

17 "Spreadsheet attached..."

18 This is first of all the 21st:

19 "Spreadsheet attached which will cover off the
20 current supply prices and the new position with the
21 proposed £200 per tonne recovery. I have provided the
22 recommended retail going forward plus the position to
23 protect your own margin."

24 We have already looked at this email before.

25 **MR MORRIS:** Yes, 21 October.

1 **MISS ROSE:** Yes, we've looked at this email before. Then
2 it's updated to 22 November to Rob Hirst, who was Lisa's
3 superior at the time:

4 "Please find enclosed my completed control document
5 which will cover our complete range. I will therefore
6 plan to increase costs on the Tesco own label range from
7 the 1st of December and also move the Deli range from
8 the same date. As agreed I will start packing the Tesco
9 named creamery range at the new retails protecting your
10 existing margin and I would plan to deliver the new
11 retails from the 1st of December."

12 Then there are more suggested retails.

13 Now, the point that was made to me by Ms Potter
14 about dates, you can see here that the cost price date
15 has indeed slipped and it is now being suggested as
16 1 December for some of these lines.

17 We can also see that, on the named creamery range,
18 Tesco had decided to protect its existing margin and not
19 to take simply the cash margin proposal.

20 On that same point, just for your note and
21 particularly for Ms Potter, if you look at Lisa's second
22 witness statement, it's volume 2A of the appeal bundle,
23 tab J, paragraph 128 {^magnum ref }. We can briefly
24 turn it up if you would like. She explains the point.

25 She says:

1 "As can be seen from the following emails, although
2 I had originally planned to move the cost price for
3 Tesco standard own label cheese on 17 November 2002 ...
4 I only eventually accepted the cost price increase on
5 these lines from 1 December 2002, and I was still
6 deciding the retail prices for these lines in late
7 November 2002."

8 She then sets out various emails that show that.

9 Tab 88 {^magnum ref } is the same topic, going
10 back to the bundle, we'll see the same point. And
11 tab 89 {^magnum ref } is information on the new
12 prices, very late in November, 27 November.

13 That concludes the 2002 story and we now come on to
14 2003, the so-called 2003 Cheese Initiative. The
15 situation in 2003 was very different. It is not at all
16 the same situation of heavy pressure being applied by
17 farmers blockading processors' or retailers' depots and
18 an effort to get the money back to the farmers to take
19 the pressure off. That's not the situation.

20 What you have in 2003 is a pretty straightforward
21 negotiation between a supplier who is trying to increase
22 their cost prices with their customers and a particular
23 customer, Tesco, who is not particularly happy with
24 what's being proposed. So it's, we say,
25 a straightforward commercial negotiation.

1 What happened essentially was that McLelland were
2 concerned for a variety of reasons that their cost price
3 was being squeezed and their margins were too low, and
4 they therefore wanted to put pressure on all of their
5 customers to increase the price that they paid for their
6 cheese. We see a variety of tactics being used by
7 McLelland to try to persuade their customers, including
8 Tesco, to accept the price rise.

9 At the same time Tesco is unhappy specifically about
10 the margin which it is obtaining on the Seriously Strong
11 Cheddar brand. What had happened was that McLelland had
12 produced Seriously Strong Cheddar and it had been a big
13 success. The amounts of it that were being sold in
14 Tesco were much greater than had originally been
15 anticipated. Tesco thought, because it was selling more
16 volume, it ought to get a lower price and its margins
17 weren't good enough. So there was friction between
18 Tesco and McLelland on the price of Seriously Strong at
19 the same time that McLelland was seeking to persuade
20 Tesco to agree an across-the-board cost price increase.

21 I don't know if this is true but I have been told
22 that Seriously Strong Cheddar originated in an accident
23 when McLelland forgot some cheese at the back of
24 a warehouse, tasted it two years later and found it was
25 quite tasty. I don't know if that's true.

1 **LORD CARLILE:** I'm sure it's a much more romantic story than
2 that.

3 **MISS ROSE:** Yes, the ancient Scottish farmers on the Isle of
4 Bute found it in a cave.

5 But in any event, it has been a big branded success.

6 Now, there's a key particular document we're going
7 to come on to look at here which the OFT relies on as
8 the centrepiece of its case in relation to 2003, and
9 it's an internal McLelland document written by
10 Stuart Meikle. They assert that that's a document that
11 proves that particular information was given by him to
12 Lisa and that Lisa had responded to it in particular
13 ways.

14 We say that the inferences that are drawn from that
15 document are wholly inappropriate, not least of course
16 because Stuart Meikle is not here to give evidence, but
17 also because when you look at that document it is
18 a document produced by Mr Meikle at a time that he was
19 under pressure from his superiors because the
20 relationship with Tesco was not going well and Tesco
21 were threatening to reduce the distribution of
22 Seriously Strong Cheddar if they couldn't get a better
23 deal. He was trying to justify himself in relation to
24 that and in relation to Tesco's reluctance to agree his
25 increased cost prices and, in fact, when you look at

1 that document it contains some assertions which are
2 demonstrably untrue. But we'll come to that in
3 a minute.

4 So if we go to tab 91 {^magnum ref }, this is an
5 exchange between Lisa Rowbottom and Tom Ferguson
6 in June 2003, I don't propose to go through these in
7 detail but you will note that there is a debate between
8 Lisa and Tom Ferguson about the extent of the margin
9 that Tesco is recovering on a number of lines.

10 Moving on in 2003, tab 95 {magnum ref }, still
11 the summer of 2003, 8 July, this is Stuart Meikle to
12 Lisa:

13 "As discussed the attached file is the full list of
14 Asda own label cheddar prices that we recorded this
15 morning. Hope this is of use."

16 So this is an example of a store check on Asda's
17 prices, and you can see the attached schedule is from
18 Asda Robroyston, I don't know where that is but I'm sure
19 it's a fine store, and it's a check of the shelf prices.
20 This is precisely the sort of information that Tesco did
21 indeed want from its suppliers.

22 We see the same thing at tab 96 {^magnum ref },
23 this time this is from Calum Morrison, who is another
24 McLelland account manager, this time to Sarah Mackenzie
25 of Sainsbury's:

1 "I have been round a few Sainsbury's, Asda and Tesco
2 Stores today looking at the standard cheddar
3 business..."

4 And he gives her some prices.

5 Then we come to tab 97 {^magnum ref }, I hope the
6 Tribunal has the unredacted version of this document
7 that's got lots of red and blue boxes in. I won't read
8 out all these boxes until we know what the position --
9 I assume this is a McLelland confidentiality claim --
10 what their position is on this. But if I can invite the
11 Tribunal to read it, what we submit is clear from this
12 document is that Stuart Meikle, who by now has taken
13 over the Tesco account, he's reporting to his superiors,
14 Mr Irvine is the joint managing director of the
15 business, Tom Ferguson recently promoted, Jim McGregor
16 also a senior commercial person. He's reporting to them
17 the problems that they have with Tesco.

18 **LORD CARLILE:** Just give us a moment to read it.

19 **MISS ROSE:** Yes. And in particular the issue with the
20 Seriously Strong margin. (Pause)

21 **LORD CARLILE:** Yes.

22 **MISS ROSE:** Then at tab 98 {^magnum ref },
23 29 August 2003, a proposal from Jim McGregor of
24 McLelland to Lisa Rowbottom for a cost price increase:
25 "Dear Lisa, I am writing to inform you of a price

1 increase that we will be making across our range of
2 products from 1st October 2003.

3 "I am sure you are aware of the current situation in
4 the dairy market with cheese stocks running low and
5 forecast to become shorter unless returns begin to
6 improve. This, combined with the fact that we have not
7 increased our manufacturing costs outside of
8 fluctuations on the milk price in the last five years,
9 means that we have no option but to make this move.
10 Specifically, rising costs on labour, distribution and
11 insurance have markedly increased year on year and we
12 need to recover against this inflation.

13 "Your account manager will be able to provide you
14 with further detail on our position, and will forward
15 a breakdown of the cost implications by product line."

16 Absolutely standard proposal by the supplier to
17 Tesco that they want to increase their cost price.

18 At tab 99 {^magnum ref }, Mr Meikle forwards the
19 same letter to Lisa:

20 "Please find attached an electronic copy of the cost
21 increase letter that will be in the post tonight.

22 "I will send you an agenda for next Thursday but
23 main topics will be [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 "Have a good weekend."

2 Now, he refers to a meeting and there is a set of
3 slides which are at tab 100A {^magnum ref },
4 "Business Meeting, 4th September 2003, Lisa Rowbottom,
5 Stuart Meikle".

6 You can see his agenda and they include cost
7 recovery and Seriously Strong, which were the two
8 contentious issues. You will also notice target setting
9 and KPI tracking.

10 "Cost recovery. £200 per tonne cost increase
11 required on all business from 1 October 2003. Protect
12 margin by moving retail prices in line with cost
13 increase."

14 Again, that was his proposal, a standard sort of
15 proposal to be made by a supplier. Then we can see
16 slides that deal with the Seriously Strong problem.

17 Now, at the same time that McLelland made this
18 proposal to Tesco, initially in the letter and then at
19 the meeting they were making similar proposals to their
20 other customers. If you go to tab 100
21 {^magnum ref }, you can see a very similar letter
22 from Jim McGregor to Safeway, which is very similar to
23 the letter that was sent to Tesco.

24 Now, presentations, it would appear, were also given
25 to at least some of McLelland's other customers. One of

1 the presentations was given by Calum Morrison, who was
2 the account manager of Sainsbury's, to Sarah Mackenzie
3 as Sainsbury's. That's at tab 101 {^magnum ref },
4 5 September 2003:

5 "Please find attached our rationale for moving
6 prices in October. I will give you a call this
7 afternoon to discuss."

8 So this is pretty much the same time that
9 Stuart Meikle was meeting with Lisa Rowbottom. They met
10 the day before this and we've seen the slides for her
11 meeting. Here are the slides that Calum Morrison
12 prepared in relation to Sainsbury's and they are quite
13 strikingly different from those which were shown to
14 Tesco:

15 "Price increase. £200 per tonne increase on all
16 business from October 2003.

17 "This is to bring margin back into cheese for the
18 manufacturer.

19 "Not related to milk prices.

20 "This will be a total market move. All major
21 suppliers. All major retailers. All RSP's will move.
22 Contract and brand."

23 The OFT relies on this slide as evidence that there
24 was some covert coordinated retail price initiative
25 across the market that was being organised by McLelland

1 in 2003. We respectfully say that is wholly
2 unsustainable, not least because, of course, this is not
3 what was said to Tesco and, secondly, what this would
4 appear to be is a somewhat overambitious presentation by
5 Mr Morrison given that McLelland have only 7 per cent of
6 the cheese market. The idea that they're going to move
7 the whole market, all suppliers and all customers, is
8 perhaps a little overambitious. But you can see here
9 perhaps a rather hyperbolic piece of sales puff being
10 used by one account manager to Sainsbury's, nothing
11 whatever to do with Tesco.

12 Now, we've seen the presentation that Stuart Meikle
13 gave to Lisa, which was at tab 100A, and her reaction to
14 that was to ask him to put his rationale for the cost
15 price increase in writing, and that was provided to her
16 on 12 September. So they meet on the 4th, she asks him
17 to put the rationale in writing and he provides that on
18 the 12th.

19 That document, his rationale, is at tab 110
20 {^magnum ref }. Unfortunately, it's got out of
21 chronological order because it's attached to a later
22 email, but what we need to look at here is the bottom
23 email here from Stuart Meikle to Lisa Rowbottom on
24 12 September 2003:

25 "Lisa,

1 "As per our conversations, our rationale can be set
2 out as follows:

3 "The £200 increase has come about mainly because of
4 current market pressures. Recently, butter, curd and
5 dried milk have all been sold at a better return than
6 mild cheddar, and in order to ensure that we continue to
7 support cheddar and its manufacture rather than move
8 into other milk products, we need to have the increase.
9 The reason for £200 is that £200 is the level that
10 butter, curd and milk powder is currently being sold
11 above mild cheddar. As a business, we do not want to
12 manufacture more noncheese products than we do at
13 present, but currently we could achieve better returns
14 with other milk products and achieve these returns more
15 quickly than laying down milk for cheese.

16 "Currently, cheese manufacturers generally are
17 suffering as we have not had a price increase for 5
18 years - all the price increases in the last 5 years have
19 been related to milk ... some businesses losing money
20 ... and Dairy Crest have blamed cheddar for their lower
21 than expected annual results. Even at McLelland, we
22 have experienced our first ever year of our margin going
23 backwards (turnover was up, but profit stayed the same).

24 "The extra £200 will be used to invest back into the
25 business, both to address our margin for the city and

1 banks, and to drive our brands through capital
2 expenditure and marketing. This will secure cheese for
3 your business for the future, and ensure our business
4 continues to focus on cheese."

5 So you can see that is a completely normal
6 commercial proposal that was being made, without any
7 suggestion of moving the whole market or all suppliers
8 and all brands or any coordinated initiative. He is
9 just saying "We are not making enough money for our
10 cheese, and if you don't pay us more money we will stop
11 making cheese or we will make less cheese".

12 We also submit that it's clear from this email that
13 he knows perfectly well, as of 12 September, that Lisa
14 has not yet agreed to pay him the extra £200 per tonne
15 but is asking him to put forward a reasoned argument for
16 why he says he needs it. That's going to be significant
17 a little later, but we submit that this email strongly
18 indicates that he knows, as at 12 September, that she
19 has not agreed that.

20 If we go back now to tab 103 {^magnum ref }, this
21 is an internal email from Stuart Meikle,
22 16 September 2003, so that is four days after he sent
23 his rationale to Lisa. This is an internal one to
24 Tom Ferguson and Jim McGregor:

25 "Tom/Jim, I have summarised the currently

1 Seriously Strong situation in Tesco following our recent
2 discussions and Lisa's email to me highlighting that our
3 distribution is about to be reduced."

4 You can imagine that that was a big problem for
5 McLelland.

6 "Can you please read through this and let me know
7 your thoughts as to how we best resolve this?"

8 I am not sure if I'm allowed to read out the stuff
9 that is in blue boxes or not?

10 **LORD CARLILE:** Well, we can read it for ourselves.

11 **MISS ROSE:** You can read it for yourselves, but you can see
12 what's being said.

13 **LORD CARLILE:** I presume the larger sums are per tonne
14 price, are they?

15 **MISS ROSE:** Yes, that would be per metric tonne.

16 Just below those figures:

17 "The current margin level is compromised by the
18 Tesco policy of matching Asda's retail price on
19 Seriously Strong 250 grammes.

20 "Therefore the two issues that need resolved are.

21 "1. Increase the Asda retail price to allow Tesco
22 to match this and this will restore some margin.

23 "2. Achieve our objective of the £200 per tonne
24 increase and still meet Lisa's margin expectation."

25 Now, it is difficult for me to make submissions on

1 this because some of the important text here is in red
2 boxes, and it may be that I will need to return to this
3 in closing when we've resolved the issue of
4 confidentiality, but I would urge you, please, to read
5 the text in the red boxes because my submission is that
6 the text that's in these red boxes makes it absolutely
7 clear that there is no strategy at all for any
8 coordinated price increase.

9 **LORD CARLILE:** You're talking about the second line of the
10 second red box after "is"? I don't think I'm breaching
11 confidentiality by referring to the word "is".

12 **MISS ROSE:** Sorry, I can't find "is". Are you referring to
13 the words ?

14 **LORD CARLILE:** Yes, but that might be breaching
15 confidentiality.

16 **MISS ROSE:** But yes, indeed, sir. I will return to this
17 email in more detail later.

18 **LORD CARLILE:** So you're saying it looks like a lot of
19 bilaterals, basically.

20 **MISS ROSE:** It looks like a lot of bilaterals. And what is
21 being said by McLelland internally is, look, big problem
22 because Tesco are saying the margin on Seriously Strong
23 is not good enough. Of course it would be fine if they
24 just increased their retail price because then they
25 would get a better margin, but they're saying they won't

1 increase their retail price because they've got to
2 compete with Asda.

3 How about if we can [gesturing], then there wouldn't
4 be a problem, but that's not a coordinated retail price
5 strategy.

6 Sir, I'm not sure if gestures go on the record but
7 you get the point.

8 Again the date is significant, this is 16 September,
9 so it shows the extent of the dispute at that date.

10 I now want to go, with that background, to the
11 document that the OFT relies on at the core of their
12 case for the 2003 initiative and that's at tab 112
13 {^magnum ref }, and this is a document headed "Tesco
14 Briefing" which is another internal McLelland document.
15 It doesn't say on it but it's fairly obviously been
16 created by Mr Meikle.

17 It's clear that this document, from internal
18 evidence, it's clear that this document is dated to
19 early October, and I'll show you what the internal
20 evidence is for that in a moment but if you could just
21 write on it "early October":

22 "Tesco Briefing.

23 "Present situation is that Tesco are not accepting
24 the £200 cost increase. I had a meeting with Lisa on
25 4th September at which we discussed the £200 increase."

1 That is of course correct as we've just seen.

2 "We ran through all the arguments as to why we were
3 looking for an increase at that time. Lisa requested
4 a further explanation as to why we arrived at the figure
5 of £200 and I subsequently emailed this to her detailing
6 the fact that butter, curd and powder are currently
7 being sold at £200 per tonne above mild and that £200
8 was required to redress the balance and make sure that
9 we continued to manufacture cheese rather than other
10 products. At the close of the meeting my understanding
11 was that Lisa had accepted the cost increase on the
12 basis that we would work to increase retail prices
13 across the market to maintain retailer margin."

14 You can see why the OFT seize upon that phrase.

15 But we submit there are serious problems with this
16 document. The first problem is that Stuart Meikle is
17 writing this document when he's in a bit of a fix,
18 because this is now early October and he's having to
19 tell his bosses that Tesco won't agree to the £200 per
20 tonne increase and that's a big problem. So he's got to
21 justify his conduct over the preceding month. So he
22 starts by explaining that he thought they'd agreed it
23 right back at the beginning of September.

24 Now, we've seen the documents that were produced on
25 12 and 16 September and my submission is that it's

1 pretty clear from those documents that no such thing had
2 been agreed by Tesco on 4 September, and you will hear
3 evidence from Lisa as to that, and that Stuart knew that
4 she hadn't agreed it and that he was still in a position
5 of having to persuade her to agree it.

6 So we submit that that is an extremely dubious
7 statement, that he thought that she had agreed a cost
8 price increase, and that his statement that that was
9 agreed on the basis that they would work to increase
10 retail prices across the market is also, we say, simply
11 not true.

12 "Lisa also stated she might even move her retail
13 price prior to 1st October."

14 Again you will hear from Lisa on this, she says that
15 is simply not true.

16 "All conversations subsequent to this meeting
17 focused on what was happening to retail prices with my
18 understanding that the £200 increase was agreed."

19 Again, we say simply not true.

20 "Lisa rang me last Friday and I told her that it was
21 our understanding that Asda would move retail prices
22 from Monday 29th September. That being the case she
23 said she would enter her new case costs on
24 Monday/Tuesday to be effective from [REDACTED]."

25 That is what the OFT rely on as an instance of

1 McLelland passing information about Asda's future retail
2 prices to Tesco, and Tesco saying they would act on
3 them. Again, denied by Tesco and, of course, no
4 evidence at all about Asda's intent.

5 "At no time during the last few weeks has Lisa told
6 me that Tesco would not accept the increase or asked for
7 further justification of our need for an increase. On
8 Tuesday morning, I had a discussion with Lisa and told
9 her that Asda had not moved retail prices as expected
10 but that Safeway and JS had started to move and that
11 I still believed Asda would move. At this time Lisa
12 told me that she would not enter her new case costs
13 without evidence of Asda moving on retail prices. On
14 Tuesday afternoon I spoke to Lisa to ask her to increase
15 her costs and to help start the ball rolling on retail
16 prices. It was at this time that Lisa said she had not
17 agreed to the £200 cost increase and that further
18 justification was needed before Tesco would consider
19 accepting the increase."

20 It's possible that Mr Meikle genuinely had
21 misunderstood the whole of his engagement with Lisa,
22 that's a possibility, we don't know. It's equally
23 possible that he was slightly rewriting history because
24 of the difficult situation in which he found himself.

25 **MS DALY:** Excuse me, to whom do we believe he sent this?

1 **MISS ROSE:** We believe this is an internal document, as the
2 ones we've seen from him previously, to Jim McGregor,
3 Alistair Irvine, his superiors. We've seen a series of
4 emails from him internally in which he's tried to
5 explain why there's a problem with Tesco. The problem
6 has got worse because it's now early October and Tesco
7 won't agree the cost price increase.

8 **MS DALY:** Thank you.

9 **MISS ROSE:** "This morning Lisa has scheduled a meeting with
10 her and John Scouler for next Monday to discuss the cost
11 increase and the rationale behind £200."

12 So that explains why this is a crisis. "Next
13 Monday" is 6 October, that's how we know this document
14 dates from early October, because there was in fact, we
15 say, an important meeting between Lisa, John Scouler and
16 McLelland on 6 October.

17 The point I was making is that we don't know, of
18 course, what was in Mr Meikle's mind when he wrote this,
19 whether there had been a genuine misunderstanding or
20 whether he was rewriting the history of his relationship
21 with Lisa in order to make himself look good and get
22 himself out of a difficult employment situation. The
23 problem is, of course, that he is not here to give
24 evidence. But what you will have is Lisa's account, and
25 I make it clear that what he's saying about her

1 interactions with Mr Meikle in this email are disputed
2 by her.

3 Sir, that might perhaps be a convenient moment.

4 **LORD CARLILE:** Is there anything else you want to say about
5 this document?

6 **MISS ROSE:** Let me just check before I stop.

7 **LORD CARLILE:** We've read the full document.

8 **MISS ROSE:** Yes, I just want to check.

9 No, I think that is a good place to stop.

10 **LORD CARLILE:** In which case we'll have a quarter of an hour
11 so that hopefully everyone can have a cup of whatever,
12 if they want it.

13 (11.20 am)

14 (A short break)

15 (11.50 am)

16 **LORD CARLILE:** Sorry we took rather long than we intended.

17 **MISS ROSE:** We have just looked at the internal Tesco
18 briefing, and I indicated that that was a key part of
19 the OFT's case.

20 If you just take up the decision, appeal bundle 1,
21 tab 1, page 214 {^magnum ref }, you can see at
22 paragraph 5.498 that the OFT sets out the first
23 paragraph of the document we've just been looking at,
24 and then at 499 says:

25 "This document demonstrates [note the word

1 "demonstrates"] that Lisa Rowbottom accepted McLelland's
2 proposed cheese price increase on behalf of Tesco on
3 condition that both Tesco and its competitors increased
4 their cheese retail prices in order to 'maintain' their
5 margins ...

6 "In making this conditional commitment, Tesco
7 effectively expressed its willingness to participate in
8 a co-ordinated cheese retail price increase - it had
9 informed McLelland it would be prepared to increase its
10 cheese wholesale and retail prices if McLelland also
11 managed to achieve retail prices across the market.
12 This proposition is not consistent with the principle
13 that competitors should determine their prices
14 independently..."

15 So you can see the weight of inference that the OFT
16 freights onto this document in which it says it
17 "demonstrates" in circumstances where it had not sought
18 any elucidation or clarification from any witness.

19 Not only that, of course, at the date of this
20 decision the OFT was in possession of the internal
21 McLelland document that was partly redacted, which the
22 Tribunal saw just before the break, which is
23 inconsistent with the proposition here developed, and we
24 were not shown that material until very shortly before
25 this hearing and, of course, there is apparently no

1 consideration of the material that's in that.

2 Coming back to the documents bundle, tab 104

3 {^magnum ref }, this is 24 September 2003:

4 "Hi Lisa,

5 "In anticipation of our cost increase of £200 per
6 tonne I have attached a file detailing our new case
7 costs by lines.

8 "On the McLelland random weight brands we will be
9 increasing the retail price by 30p per kilo. I have
10 also detailed the new retail prices for these lines.

11 "Can you please advise when these costs will be live
12 on your system and also what changes you wish to make to
13 the retail prices on the Tesco label random weight
14 products?"

15 So here, again, a typical approach. We've seen
16 a number of these in relation to 2002 before where the
17 salesman sends what is proposed as the cost price and
18 the proposed retail price increase and invites the
19 retailer to accept it.

20 Tab 106 {magnum ref }, an internal McLelland
21 document, 24 September. Gerry Doyle appears to be
22 involved within McLelland on the cheese packing side and
23 he says to Jim McGregor and Tom Ferguson:

24 "Further to my telephone conversation with Tom who
25 confirmed that Asda will be moving to new retails

1 effective from Monday the 29th.

2 "I urgently require the following information before
3 I can proceed with the price change."

4 He sets out the various items that he needs. He
5 says he is collating a list of current retail stocks.

6 "It is highly unlikely that we will be in a position
7 to supply the new retails from Monday given that we only
8 have one and a half days of production left and they
9 already have this time booked for our other lines."

10 So he is concerned that he hasn't got the
11 information that he needs internally.

12 Tab 107 {^magnum ref }, this is Calum Morrison
13 who, you will recall, was the account manager for
14 Sainsbury's, writing to Sarah Mackenzie on 25 September.
15 He says:

16 "Find attached updated spreadsheet. We need to pack
17 our catchweight brands today (Galloway, McLelland mature
18 et cetera). Please could you confirm the 30p moves on
19 our brands (everybody has agreed this with us) so we can
20 pack this today."

21 We say this is significant because it is
22 demonstrably the case that Tesco have not agreed any
23 increase, let alone a 30p increase, at this date,
24 25 September. That does not deter Calum Morrison, when
25 writing to Sainsbury's, from assuring her that they

1 have. This, we say, is entirely consistent with the
2 understanding of everybody in this market that that's
3 what the suppliers do. They say things like, "Tesco
4 will move if Asda does. Tesco will match Asda's price.
5 Everybody has agreed a 30p move. The whole market will
6 move". It's just what they say, and on this case
7 demonstrably not true.

8 Tab 108 {^magnum ref }, another internal
9 McLelland email from Brian Skeffington to somebody
10 called John Bolton:

11 "To confirm earlier telephone call in which I asked
12 for your assistance to provide photocopy examples of all
13 pre-pack labels that have been packed with the new
14 retail prices as advised by Alistair and Gerry late last
15 week.

16 "This information is to send to the buyers this
17 afternoon [in other words, 29 September] so that they
18 can be encouraged with proof that retailers have moved and
19 expedite price increases across the board."

20 So what you see here is the supplier looking for
21 ways to put pressure on the retailers and a questionable
22 proposal to send labels from stock that is currently
23 being priced for sale to the retailers to tell them that
24 the prices have moved. Now, there is no evidence
25 whatsoever that Tesco had any knowledge that this was

1 what McLelland were intending to do or that Tesco had
2 signed up to that course of conduct.

3 We see what happened next and it is quite important.

4 Tab 110 {^magnum ref }, the following day
5 Stuart Meikle sent an email to Lisa:

6 "Lisa,

7 "Copy of email as requested.

8 "I have faxed copies of the Safeway and
9 [Sainsbury's] labels to you...

10 "Safeway savers mild has increased in price by 26p
11 per kilo and JS Isle of Bute has increased by 20p per
12 kilo."

13 It is of interest that the labels that are faxed to
14 Lisa on 30 September are at least some of the labels
15 that are being discussed internally on the 29th. In
16 other words, they're not labels from cheese bought in
17 a shop, they are pristine labels from the packing
18 process.

19 As a matter of fact, the information that was
20 imparted to Lisa here about Sainsbury's was not future
21 pricing information. We can see that if you go back to
22 109 {^magnum ref }, which is Calum Morrison:

23 "Sainsbury's prices are effective from today on
24 pre-pack and tomorrow on deli lines."

25 The pre-pack labels sent to Lisa Rowbottom appear to

1 relate to Sainsbury's prices in store on the 30th.
2 However, Lisa was troubled when she received this email,
3 and she was troubled because it appeared that she was
4 being sent pristine labels that were not labels that had
5 come from a shop. It is her evidence that, on receipt
6 of this email, she telephoned Mr Meikle and objected and
7 said that she did not wish to be sent such material
8 because she was concerned that it might be future
9 pricing information.

10 Tesco explained that this was Lisa's position to the
11 OFT in its response to the SSO. The OFT rejected that
12 explanation in its decision and what it said was that it
13 rejected that explanation because there was no
14 contemporaneous evidence that Lisa had been concerned
15 about the possibility that McLelland was providing her
16 with future pricing information or had objected or
17 complained about it doing so.

18 We see that in the decision, if we take the decision
19 up again. Appeal bundle 1, tab 1, paragraph 5.544
20 {^magnum ref }.

21 If you look at the top of that page, 5.541, we see
22 the OFT referring to the email we've just been looking
23 at from Stuart to Lisa, faxing the label. Then
24 a conclusion at 5.543 that this was an A-B-C exchange
25 with the requisite intent on all parties. Then at

1 5.544:

2 "There is again no contemporaneous evidence to
3 support the proposition that Ms Rowbottom either
4 rejected the information received or was in any way
5 uncomfortable in receiving it. Accordingly, having
6 received this information, Tesco could not have failed
7 to take it into account when determining its own future
8 pricing behaviour..."

9 And that conclusion is elaborated on at
10 paragraph 5.618 {^magnum ref } where the OFT
11 considers the submissions that have been made to it by
12 Tesco:

13 "In its representations on both the SO and the SSO,
14 Tesco submitted that it did reject the retail pricing
15 information it received from McLelland on
16 30 September 2003 and 2 October 2003. In particular,
17 Tesco represented that:

18 "During the cost price increase negotiations, Lisa
19 Rowbottom informed McLelland that she was not interested
20 in hearing from them how others ... would behave.

21 "When Ms Rowbottom did receive the Safeway and
22 Sainsbury's price labels on 30 September 2003 she
23 escalated her concerns to John Scouler ...

24 "[She] contacted Stuart Meikle ... (by an
25 unspecified means ...) to complain about him sending

1 inappropriate information.

2 "Ms Rowbottom and Mr Scouler then complained about
3 Mr Meikle's emails to James McGregor, Tom Ferguson and
4 Alistair Irvine during a meeting ... on 6 October 2003."

5 Then there's a reference to the signed witness
6 statement.

7 Then at 5.619 {^magnum ref }:

8 "The OFT has carefully considered Tesco's
9 representation, and has concluded that it is not
10 consistent with the contemporaneous documentary evidence
11 in its possession."

12 That's the finding of the OFT.

13 "First, there is no contemporaneous documentary
14 evidence that substantiates or even supports Tesco's
15 representation. Tesco itself has confirmed that it does
16 not have a contemporaneous written record of any
17 complaints it purports to have made to McLelland.
18 Moreover, having received Tesco's representations, the
19 OFT asked McLelland if they had any record of any such
20 complaint and was informed no record of such a complaint
21 could be found."

22 Now, as a matter of fact, when it reached that
23 conclusion the OFT was in possession of contemporaneous
24 written evidence which supported Tesco's submission that
25 Lisa had rejected what she considered might possibly be

1 future retail pricing information and had complained
2 about it.

3 The document in question is in volume 2 at tab 110A
4 {^magnum ref }. This document is a briefing note
5 prepared by Lisa for John Scouler, who was her boss, in
6 preparation for the meeting that they were due to have
7 with McLelland on 6 October 2003, which we have seen
8 referred to in the internal McLelland Tesco briefing.

9 First of all, she sets out the current position in
10 relation to sales, volume, profit and margin, and then
11 "Points":

12 "Requested a cost increase on the following
13 grounds."

14 And then she summarises the grounds McLelland have
15 put to her for why they want a cost increase. Then she
16 comments on her response and says, "Well, do we really
17 care if McLelland make butter instead of cheese?" And
18 so on.

19 Then point 7:

20 "Competition commission training desperately
21 needed."

22 Lisa has explained that that comment, "Competition
23 commission training desperately needed", is a response
24 to the 30 September email and expresses her concern with
25 what was being said to her by McLelland.

1 Now, this document is important for a number of
2 reasons. The first reason it's important is this: it
3 was supplied by Tesco to the OFT back in 2005 in
4 response to a section 26 document request. However, at
5 the time it was supplied, amongst the mass of other
6 paper, neither Tesco nor the OFT appreciated what it
7 was. Nobody is to blame for this, and I don't blame the
8 OFT for failing to realise what they had, but neither
9 party understood what it was. It was simply one piece
10 of paper that was supplied.

11 What subsequently happened was that Lisa gave
12 a witness statement. At the time that Lisa Oldershaw
13 gave her witness statement, she did not have possession
14 or sight of this document.

15 Let us see what she said. It's her second witness
16 statement, it's at volume 2A of the appeal bundle,
17 tab J. If you go first to paragraph 154
18 {^magnum ref }, she says:

19 "I was surprised to receive these labels. I recall
20 telephoning Stuart Meikle, to tell him that he could not
21 send me information like this. I have no specific
22 recollection of his reaction, but I was so concerned
23 about his behaviour that I raised it with John Scouler,
24 and we agreed to address it at our next commercial
25 meeting with McLelland. The next meeting with McLelland

1 was subsequently arranged for 6 October 2003, to discuss
2 their request for a cost price increase and my concerns
3 about the poor margins I was making on McLelland's
4 Seriously Strong brand. I describe this meeting at
5 paragraphs 159 to 162 ..."

6 If you then go on to paragraph 160
7 {^magnum ref }, where she describes the meeting, at
8 160 she says:

9 "I recall that I prepared a one-page briefing for
10 John, highlighting the margin issue for Tesco on
11 Seriously Strong, and presenting the other figures for
12 McLelland."

13 She then describes the meeting, and over the page at
14 161 {^magnum ref }, during the meeting, she says that
15 she recalls that:

16 "... in an attempt to persuade Tesco to accept the
17 cost price increase, Alistair Irvine suggested that
18 Tesco's margins could be preserved by an increase in
19 retail prices. He suggested that if Tesco went first,
20 the rest of the market would follow. I immediately
21 objected and said that this sort of discussion was
22 inappropriate. I recall that John intervened in
23 support, stating that Tesco would not discuss other
24 retailers' future retail pricing policy in any
25 circumstances. John suggested that McLelland put in

1 place some competition law compliance training."

2 Then she says she showed the labels and said that
3 was inappropriate, and he appeared to be unaware of what
4 had happened.

5 Now, what's significant is that at the date that she
6 made this statement in October 2011 she did not have
7 before her the document we have just looked at. And
8 yet, with great accuracy, she recalled first of all that
9 she had raised with John Scouler, in advance of this
10 meeting, the behaviour of Stuart Meikle; secondly, that
11 she had prepared a one-page briefing document for
12 Mr Scouler in advance of the meeting; and thirdly and
13 specifically, that one of the things that was said in
14 the meeting was that McLelland should put in place
15 competition compliance training, which is of course
16 exactly what her advance briefing note suggests to
17 John Scouler.

18 That document, therefore, strongly corroborates her
19 credibility, and her credibility on what is a central
20 issue in this case, namely her intent. Because if this
21 Tribunal accepts that Lisa did write that briefing
22 document to John Scouler in advance of the meeting
23 because she was concerned at the labels that had been
24 sent to her by Mr Meikle, saying "Competition commission
25 training desperately needed", and accepts her account of

1 the reasons by she did that, then the OFT's case fails.

2 The reason that the OFT's case fails is that that
3 conduct is wholly inconsistent with their case which is
4 that Lisa Oldershaw was both disclosing information with
5 the intention it should be passed to her competitors and
6 receiving future information on the understanding that
7 it had been passed to her with the intention that price
8 rises should be coordinated.

9 If we then go back to the documents, and going back
10 to the period prior to the meeting, tab 111
11 {^magnum ref }, 1 October, we see in this period
12 prior to the meeting of 6 October escalating pressure
13 being put by Mr Meikle on Lisa to agree a cost price
14 increase, which is consistent with his deep concern at
15 the problem of Tesco not agreeing it, which we've seen
16 he was expressing internally. So tab 111:

17 "Hi Lisa, we have picked up some more retail price
18 movement today. JS have increased the price on
19 Seriously Strong [and they give the figures].

20 "I have faxed a copy of this receipt..."

21 So this is him seeking to tell her that prices have
22 already gone up and that, therefore, she can raise her
23 prices.

24 At 113 {^magnum ref }, the following day, Stuart
25 to Lisa, 2 October:

1 "Sainsbury's have moved retail prices across more of
2 their own label products. Details as below...

3 "I have copies of the labels so let me know if you
4 need them faxed to you."

5 Again, this is the result of purchases in stores.

6 Lisa replies to him on the same day at tab 114

7 {^magnum ref :

8 "Stuart,

9 "Can you please produce me a matrix of all your
10 lines, who stocks what and what retail they are
11 currently at.

12 "Many thanks.

13 "Lisa."

14 Again, an important document because it is
15 absolutely explicit that she is not asking Stuart Meikle
16 to send her evidence of future retail pricing
17 information. She is asking him to send her information
18 about the current retail prices of retailers.

19 What we're going to see over the succeeding
20 documents is that he does just that. He sends her
21 a matrix which he gradually fills in with retail prices
22 as they become current. But the OFT persists in
23 regarding those exchanges as further instances of where
24 not only he is sending her future retail prices, but
25 where she knows that he is doing that and is intending

1 to receive them. We submit that any such contention is
2 inconsistent with this document where she is expressly
3 asking him to give her current retail prices.

4 Tab 115, this is his response to her request for the
5 matrix of current retail prices, and the OFT relies on
6 this as its core document for strand three of the 2003
7 so-called initiative:

8 "Hi Lisa,

9 "The attached is a matrix of our pre-pack and deli
10 brands showing the prices across the multiples. I have
11 included the old/current retail and the new retail price
12 where relevant. I will keep this updated as changes
13 become visible and also let you know on any own label
14 moves that we identify.

15 "Give me a call if you want any more information."

16 What you have behind it is a table which shows old
17 retail prices for the various supermarkets and, in some
18 but not all cases in relation to Sainsbury's, Safeway
19 and Co-op, new retail prices. We submit that,
20 consistently with the request that Lisa had made, this
21 was indeed a matrix of the current retail prices
22 identifying those retailers who had moved their retail
23 prices up already. The OFT contends that there were
24 future prices here and that Lisa knew they were future
25 prices.

1 We say the prices are in fact current. If you
2 compare this spreadsheet with tab 109 {^magnum ref },
3 tab 109 is Calum Morrison telling Somerfield:

4 "Sainsbury's prices are effective from today on
5 pre-pack and tomorrow on deli lines."

6 So the pre-pack prices that you have in the attached
7 schedule are prices that were effective on 30 September.

8 **LORD CARLILE:** It may not be hugely germane, but I'm
9 slightly puzzled as to why all random weights seem to
10 have a fixed weight of 227 grammes or 454 grammes.

11 **MISS ROSE:** I think the answer is that there was a tolerance
12 around that weight, that it was approximately. Because
13 the point is, if it's -- the idea is that the packs
14 should be approximately 450 or 227 grammes but there is
15 a tolerance either way, and that's why they have to be
16 individually weighed and price labelled, because you
17 have a price per kilo. But the idea is that that's the
18 sort -- they're not just completely random. I think
19 this is actually in the evidence somewhere. That's the
20 reason.

21 So you have, as it were, a central weight and it can
22 be a certain number of grammes either side of that.

23 Now, in fact -- and we'll come back to this in
24 closing -- behind tab 115 are prices that were already
25 current by that date as is demonstrated by the schedule

1 behind the 109, none of them are future.

2 Even if we were wrong about that, we would say that
3 the OFT cannot establish its case on intent given that
4 this is a response to a specific request for current
5 retail prices.

6 Moving on to tab 116 {^magnum ref }, this is
7 another internal McLelland document, Gerry Doyle who is
8 in the packing department is still trying to get the
9 dates so that he can sort out the packing.

10 Tab 117 {^magnum ref }, a further update from
11 Mr Meikle to his matrix:

12 "Hi Lisa,

13 "Quick update on the retail price position of
14 Seriously Strong.

15 "Asda [gives the prices]...

16 "These prices are taken from the Asda website. We
17 will buy some product from store this morning and I can
18 fax the receipts to you as confirmation."

19 So he's still responding to her email on the 30th --
20 no, 30th? Anyway, her earlier email where she says she
21 wants the current prices and he is still trying to give
22 her the current prices.

23 Then on the same day, slightly later that morning,
24 tab 118 {^magnum ref }, another email from Stuart on
25 the same lines:

1 "Hi Lisa,

2 "Please find attached an updated spreadsheet [so
3 this is the same matrix that she had asked him for,
4 matrix of current prices] including the new retail
5 prices that Asda will run on McLelland random weight
6 branded lines.

7 "The only Asda label line we do [so that's McLelland
8 brands in the first paragraph] is Extra Special Mull of
9 Kintyre... where the retail price has moved from £1.48
10 to £1.68."

11 Now, the OFT rely on this as their core document for
12 strand four in 2003 and what they say is this is future
13 Asda pricing, and Lisa must have known it was future
14 Asda pricing because Mr Meikle says "the new retail
15 prices Asda will run", not "are running".

16 We submit that that is factually incorrect, these
17 are not future Asda prices, they are current Asda
18 prices, and that to suggest that because of the
19 reference to "will run" she should have understood that
20 she was being given future information, and she had
21 specifically asked for current and was actually getting
22 current, is simply fanciful.

23 Of course, the next paragraph refers to "where the
24 retail price has moved". This is an email, it's not
25 a statute.

1 The following page is the matrix, it's the same
2 matrix that we saw before but now there are a number of
3 Asda prices included on it. These are in fact not
4 future but current Asda prices as can be seen from the
5 documents at tabs 116A to 116C.

6 So the date of this email to Lisa sending her these
7 prices is 7 October. If you go back now to 116A
8 {^magnum ref }, we have internal Asda emails, first
9 of all McLelland to Asda:

10 "... find attached new prices... I will get someone
11 send the labels to you later this afternoon."

12 That is on September 29.

13 Then Jonathan Betts:

14 "To confirm we will apply cost increases requested
15 effective this weekend through deli and prepack ...

16 "I will advise Friday pm what changes we will be
17 making, if any, to our retail position."

18 You will note there that the cost price and the
19 retail price are not going up on the same date.

20 "I assume that Melanie and [question mark] will
21 confirm the effective dates."

22 Then at 116B {^magnum ref }, here is a schedule
23 signed by Tom Ferguson, "Asda Retails Effective from the
24 6th October 2003". In fact, if you compare this
25 spreadsheet with the prices that were sent to Lisa on

1 7 October, you will see they are the same prices. These
2 prices were effective the day before they were sent to
3 Lisa.

4 At 116C {magnum ref }, Jonathan Betts to
5 McLelland:

6 "Attached ... please find the revised retails per
7 [kg] I would like applying to your brands supplied to
8 Asda. Products priced at these levels should be sent
9 into our depots from Monday 6 October onwards."

10 So these were not future prices, they were what she
11 asked for, namely the new current prices and there is no
12 basis for the suggestion that she would have had any
13 idea that they would or might be future prices.

14 You can see further, at 119{magnum ref }, that
15 Mr Betts confirms that:

16 "Retail prices on our branded products moved this morning
17 in line with increased costs."

18 So the latest date that the retail prices moved was
19 7 October, first thing in the morning, before the email
20 was sent to Lisa.

21 Tab 120 {magnum ref }, what we know about the
22 meeting of 6 October, and you will hear in the evidence,
23 is that, in the course of that meeting, the Tesco
24 representatives, John Scouler and Lisa, agreed to the
25 cost price increase but there was still disagreement

1 over the position in relation to the margin for
2 Seriously Strong. That remained an issue. On
3 8 October, we see a proposal, internal, Stuart Meikle to
4 his superiors, setting out their final position on
5 Seriously Strong in Tesco, the proposal to pay
6 a particular increased retro and you can see the details
7 of what's being suggested there.

8 Tab 121 {magnum ref }, the same date, 8 October,
9 Stuart to Lisa:

10 "Following our conversation, I have updated the
11 attached spreadsheet on all the points that we
12 discussed.

13 "... random weight brands.

14 "The file is updated to show the new retail prices
15 that we will pack the McLelland random weight brands at
16 for supply to Tesco. We will begin packing at the new
17 retail prices with immediate effect. As discussed
18 I will inform Sarah the day before we supply any of
19 these lines at the new retail prices. I would expect us
20 to begin supply of these lines to Tesco early next
21 week."

22 She responded to that the following day, if you go
23 to tab 123 {magnum ref }, and she amended some of
24 his suggested selling prices:

25 "Stuart,

1 "I have amended some of the suggested RSP's - for
2 ease I have highlighted them in red, please pack to
3 these RSP's ASAP - thanks.

4 "As for costs, as clearly pointed out at our meeting
5 on Monday [that's 6 October] we will increase your cost
6 price by £200 [per tonne], it is our wish that this is
7 passed back to the farmers but as they are your costs
8 you must do as you see fit. I do not foresee any
9 further cost increases being needed by your business
10 until potentially at the next round of milk price
11 negotiations in spring 2004.

12 "Costs on Seriously Strong prepacks will move on
13 [REDACTED] October. Costs on all other McLelland lines
14 ... on [the] [REDACTED] ..."

15 This document that we just looked at is the document
16 that the OFT relies on as the basis for strand five.
17 The OFT's case is that, in this email, Lisa Rowbottom
18 was not sending a normal commercial communication to her
19 supplier, notifying the new retail prices at which she
20 wished him to pack her goods, but was in fact intending
21 that information to be passed on to her competitors to
22 facilitate a coordinated retail price increase. We
23 submit that is a wholly fanciful and unsubstantiated
24 suggestion. It is quite obvious, when you look at this
25 email on its own and in the context of all that preceded

1 it, that it is exactly what it looks like. It is
2 a notification by her to her supplier for a legitimate
3 business reason, so that they can pack at the new
4 prices.

5 The OFT says that the reason why this is an
6 illegitimate communication is because, they say, it
7 includes retail prices for deli cheeses, which were not
8 packed by McLelland. That is factually incorrect and
9 Lisa Oldershaw's evidence on that is in her third
10 witness statement. That's at volume 2B of the appeal
11 bundle, tab J1. Paragraph 26 {magnum ref }, she
12 addresses this. She says:

13 "I understand that the OFT alleges ... that the
14 information I provided in the spreadsheet attached to my
15 9 October 2003 email went beyond what was required by
16 Stuart Meikle for any legitimate commercial purpose
17 because it included retail prices for deli cheese, which
18 is priced in store and not by the processor. That is
19 not correct as I explain below."

20 Then she refers to tab 10 {magnum ref } behind
21 this statement where you can see that she has marked up
22 this schedule, if you look at it, with a "D" opposite
23 the deli cheeses on the far right-hand side. She says:

24 "As can be seen from the spreadsheet, the 'New
25 Retail Price' column is blank for all the lines marked

1 with a 'D'."

2 She says there is only one exception:

3 " ... 'Seriously Strong White 8x2.5 [kilos]' for
4 which there is a [REDACTED] price. However [that] is not
5 a future retail price I intended to implement, but
6 a suggested retail price included in the original
7 version of the spreadsheet... [it] was the new retail
8 price Stuart suggested I move to on Seriously Strong
9 White... When I emailed the revised version of the
10 spreadsheet ... I entered 'on hold' in the 'New Cost
11 Effective From' column for Seriously Strong White ...
12 and also for Seriously Strong Coloured... As I stated
13 in my email, I wanted to discuss the two
14 Seriously Strong deli lines with Stuart and so the cost
15 price increase was on hold for those lines for the time
16 being."

17 So we submit that that final strand of the OFT's
18 case is demonstrably unfounded.

19 If we go back to the documents bundle 2, tab 124
20 {magnum ref }, this is an internal Asda email from
21 10 October:

22 "Peter, further update below.

23 "Tesco have now moved to increase retails on [own
24 label]. Value and Territorials have moved between 23p
25 and 29p per [kg] and I have line detail. Cheddar has

1 moved on average 35p per kilo though I have no
2 visibility on exact prices. These packs should be in
3 store in [around] 10 days time. On balance the extent
4 of their price changes suggests they have maintained
5 margin % across the cheese category."

6 This is relied on by the OFT as completing their
7 strand five because they say this is evidence that the
8 information that Lisa Oldershaw supplied to Mr Meikle in
9 the email we've just been looking at was relayed by
10 McLelland to Asda. There is, of course, no evidence
11 that this information was relayed by McLelland to Asda,
12 even though there could have been had the OFT sought to
13 obtain it from the relevant witnesses. There is nothing
14 in this email at all to suggest where the information
15 there comes from and, in fact, what is said there about
16 Tesco's future retail pricing intentions on cheddar is
17 incorrect. Cheddar did not move on average 35p per
18 kilo.

19 Tab 125 {magnum ref }, 22 October -- I beg your
20 pardon, that's the one we've just looked at. The later
21 one, 23 October:

22 "The position on deli is fairly similar ... only
23 Morrisons left to move...

24 "Cost increases have been agreed in principle with
25 all British cheese suppliers...

1 "Territorials, Stiltons ..."

2 Et cetera. No, sorry, it is the one at the bottom
3 I want to look at:

4 "Tesco have now moved with increased retails through
5 their entire range of British cheeses. Price increases
6 vary from 23p per [kilo] on Value to 39p per [kilo] on
7 [own lines]. These packs are now filtering through to
8 stores."

9 Again, no indication of whether this is future or
10 current. It appears to be current. No indication of
11 where it's from. Also, the interesting comment:

12 "So, at least for a few weeks we've managed a small
13 gap!", where Asda is congratulating itself on having
14 kept its price below Tesco for some time.

15 That concludes the documents that I want to show to
16 you in opening. Our submission, in summary, is that
17 what you have seen simply does not support the edifice
18 of inference that has been constructed by the OFT to
19 demonstrate a case of infringement. What the OFT has in
20 fact done is to take pieces of evidence, string them
21 together to produce a false picture of coordination when
22 what they actually show is bilateral commercial
23 negotiations, yes, in 2002, taking place in
24 a particularly pressured environment, in 2003, perfectly
25 normal commercial negotiations.

1 What they do not show is any intent on the part of
2 Tesco either to pass its own confidential information to
3 its competitors or to receive confidential information
4 from them. For those reasons, we will ultimately be
5 submitting that this appeal should be allowed.

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

7 Right. Yes, Mr Morris.

8 **MR MORRIS:** Would you allow me a moment or two to just
9 organise my papers?

10 **LORD CARLILE:** Of course. Do you want a five-minute break?

11 **MR MORRIS:** I think it would be helpful because I haven't
12 got a lecturn set up and I anticipated Miss Rose to
13 finish at lunchtime. So I would be grateful, thank you
14 very much.

15 **LORD CARLILE:** Okay.

16 Can I just tell you, we will be rising today at
17 4.15.

18 **MR MORRIS:** Thank you very much.

19 (12.34 pm)

20 (A short break)

21 (12.42 pm)

22 **LORD CARLILE:** Yes, Mr Morris.

23 Opening Submissions by MR MORRIS

24 **MR MORRIS:** Thank you, sir, members of the Tribunal. In
25 this opening I propose to adopt the following course.

1 First, and by way of introduction, I will address you on
2 a number of important features of the case in the round;
3 secondly, I will open the OFT's case on the facts.

4 Before turning to the facts, I start by making
5 a number of overarching observations about the features
6 of this case. This case concerns a major product in
7 a major, country-wide consumer market. It concerns the
8 retail grocery sector and within that sector it concerns
9 dairy products and, in particular, cheese. Cheese is
10 a product bought up and down the country in very large
11 quantities. It is part and parcel of our national diet
12 to be found, I would imagine, almost in every fridge in
13 the country. This case concerns the unlawful
14 coordination of retail prices for this everyday product.
15 It concerns the unlawful coordination of retail prices
16 by large public companies including leading supermarkets
17 and leading processors. The victim of all this is the
18 consumer, the everyday shopper at our main supermarkets.

19 Now, in its careful and detailed decision taken in
20 July of last year, the Office of Fair Trading found
21 that, in total, the four leading supermarket retailers
22 and three dairy processors had participated in an
23 unlawful retail price coordination in relation to cheese
24 in 2002 or in 2003 or both. This was a serious finding
25 of unlawful conduct in a major consumer sector.

1 After the OFT had put the detail of its case, three
2 of those supermarkets, Sainsbury's, Asda and Safeway,
3 and the three processors, Dairy Crest, McLelland and
4 Glanbia, admitted their participation in this retail
5 price coordination. The OFT, nevertheless, in the
6 decision went on to set out in great detail the evidence
7 which clearly establishes that each of those six
8 companies acted unlawfully and you will see the
9 important parts of that evidence in the course of my
10 opening.

11 What is more, although entitled to do so, none of
12 these six companies has appealed against the Office of
13 Fair Trading's decision and each has now paid the fines
14 imposed upon it. The OFT relies both on its findings of
15 fact in the decision in relation to those six companies
16 and the admissions of those facts made by the companies
17 as relevant evidence in this appeal.

18 One of the seven companies, Tesco, has sought to
19 challenge the decision made by the Office of Fair
20 Trading. That, of course, is Tesco's entitlement and it
21 is only right and proper that this Tribunal should
22 consider with care whether the evidence relied upon by
23 the Office of Fair Trading establishes the facts which
24 it found against Tesco. Tesco says that it, Tesco, did
25 not participate in this retail price coordination with

1 the other supermarkets and processors. It did not know
2 about any plan to raise retail prices and it acted
3 unilaterally throughout.

4 We submit that it is clear that, in the course of
5 the relevant events in 2002 and in 2003, Tesco did pass
6 on and did receive information about its own and about
7 its competitors' future, and I stress the word "future",
8 future retail pricing intentions.

9 Tesco appears now not to accept the fact of
10 transmission but we say that the documents show clearly
11 to the contrary. In any event, Tesco says, if and where
12 it did pass on information about its future retail
13 pricing intentions, it had no idea that this information
14 was going to be used for the purpose of reducing
15 uncertainty as to retail prices amongst the
16 supermarkets. Or as Miss Rose put it yesterday, Tesco
17 had an extremely good commercial reason for disclosing
18 its future retail pricing information in relation to
19 cheeses that were packed by suppliers.

20 Tesco says that where it received information about
21 the future retail pricing intentions of its competitors,
22 it did not realise that the information had come from
23 those competitors, although we can show that in fact it
24 had come from those competitors; rather Tesco at the
25 time dismissed it as pure speculation, sales hussle on

1 the part of processors. These claims, we say the
2 evidence shows, are unfounded. That evidence shows
3 quite clearly that Tesco was a willing and knowing
4 participant in the coordination of retail prices by the
5 disclosure and receipt of future pricing information.

6 The evidence will show that Tesco disclosed and
7 received information on future pricing on a number of
8 occasions and that Tesco had the requisite state of
9 mind. In many instances, the information was not needed
10 to enable the processor to pack the cheese and,
11 moreover, even where it was, that does not indicate that
12 Tesco did not have the requisite state of mind to
13 establish an infringement.

14 As regards the suggestion that Tesco considered what
15 processors were telling them to be no more than sales
16 pitch, it is simply not credible that the processors
17 would be giving their major customer false information
18 in circumstances where they would be found out for
19 having done so practically immediately, and Tesco would
20 have known this too.

21 An important element of the Office of Fair Trading's
22 case on state of mind is the fact that there was a plan.
23 Let me at this stage state clearly the OFT's case in
24 relation to that plan. The plan was for a market-wide
25 increase in cost and retail prices. That plan set the

1 context for the subsequent infringement. The
2 infringement consisted of the disclosure and receipt of
3 future retail pricing intentions and the reason that
4 constitutes an infringement is because it reduces
5 uncertainty amongst the retailers as to what their
6 competitors are going to do. It is this element of
7 reduction of uncertainty that is at the heart of the
8 OFT's case and is at the very heart of the legal concept
9 of a concerted practice as clearly set out in the
10 original European Court jurisprudence. An element of
11 a concerted practice is to substitute cooperation for
12 competition in circumstances where the uncertainty as to
13 what your competitor is going to do is reduced.

14 Now, the reason the plan is important is that Tesco
15 and all the retailers were aware of that plan and their
16 actions in transmitting and receiving information has to
17 be assessed in the context of their knowledge of the
18 plan. We say, once the Tribunal has considered all the
19 evidence, you will be satisfied that Tesco, along with
20 Asda, Safeway, Sainsbury's and the three processors,
21 took part in the coordination of retail prices.

22 Let me make four further points, general points.
23 First, it is for the Tribunal to reach its conclusion on
24 the facts on the basis of the evidence that has been
25 placed and will be placed before you. The OFT's case

1 stands or falls on the evidence it has brought forward
2 and we say that, when you look at all that evidence
3 together and you consider the continuum of events and
4 all the documents, the OFT's case is established
5 overwhelmingly on that evidence.

6 The OFT's case is and always has been based on
7 contemporaneous documentary evidence and the Tribunal
8 will be more than familiar with the proposition, well
9 recognised in European and UK competition jurisprudence,
10 that contemporaneous documentary evidence in cartel
11 cases is likely to be fragmentary and that it is often
12 in those circumstances appropriate to draw inferences.

13 Sometimes, of course, there may be just two or three
14 incomplete and perhaps even cryptic notes of meetings.
15 Classic cartel case, you find the odd scrap of paper
16 with codes, people referred to by numbers, not names,
17 numbers, codes, and in such cases there may only be
18 a very few pieces of the jigsaw, and still in those
19 cases the picture may be completed by circumstantial
20 evidence and inference. Here, however, in the case of
21 the Cheese Initiatives, this is not a case of one or two
22 documents, this is a case of actually a lot of
23 documents. There are very many contemporaneous
24 documents, it has taken Miss Rose the best part of a day
25 to go through them.

1 As you will see, and as you will have seen, these
2 documents provide a consistent and clear picture. They
3 build up one upon another. It is not a case of one
4 document, the odd document here or there, it's a series
5 of documents telling the same story and they tell
6 a compelling story. Even if you were to conclude that
7 one or two pieces of the jigsaw are missing, they've
8 fallen out of the box, that irritating moment when you
9 get to the jigsaw and you can't find the last three
10 pieces, even if you were to conclude that one or two
11 pieces of the jigsaw are missing, even without those
12 pieces, you can see full well what the picture is in
13 this case. That's my first of my four points.

14 My second of my four points is this, as I've
15 just said, this case is about disclosing future pricing
16 intentions which reduced uncertainty as to conduct on
17 the market. Now, a constant refrain of Tesco and of
18 Miss Rose has been, "We set our own prices, we acted
19 unilaterally when fixing our prices". That, with
20 respect, is beside the point. That's not what this case
21 is about. It's not the OFT's case that Tesco and its
22 competitors entered into an agreement to fix prices or
23 that Tesco fixed or agreed specific prices for specific
24 lines of cheese on specific days. Nor is it the OFT's
25 case that Tesco and the processors entered into an

1 agreement for retail price maintenance. Miss Rose, in
2 opening, referred constantly to the fact that the
3 processors could not dictate Tesco's retail price and
4 that Tesco was free to set its own exact retail prices
5 and these were just suggested prices. But that's not
6 the point.

7 What the point is is that what Tesco and each of its
8 competitors did, via the processors, was to make
9 disclosures to each other indicating that, in general,
10 it would raise its retail prices or their retail prices
11 at certain intervals of time. We'll come to that in due
12 course, what we call the waves. But it's not about
13 individual prices, it's about accepting the scheme of
14 the waves and indicating an intention to raise prices at
15 particular periods of time.

16 This case is not about a crude price fixing cartel
17 entered into by people in a smoke-filled room who know
18 no better. This case is about improper coordination by
19 much more subtle and indirect means. Tipping off the
20 middleman in such a way as to reduce uncertainty and
21 risk on the part of your competitor as to what you're
22 going to do.

23 There's a very important point here. It is for this
24 very reason that it is important that competition law
25 catches within its net the indirect transmission between

1 competitors of future pricing intentions. That it does
2 so has actually been established for quite a long time.
3 It was established in Suiker Unie at paragraph 174 of
4 the European Court of Justice's judgment which is, for
5 your reference and I'm not going to take you there, in
6 authorities bundle 3, tab 23. This is what the Court of
7 Appeal built upon in the Replica Kit and Toys case in
8 developing the so-called A-B-C test. What that does is
9 put beyond doubt that competition law does and must
10 catch this sort of behaviour.

11 It is also the case that the Hasselblad case, which
12 I don't propose to take you to at the moment, also was
13 a clear case of indirect means of establishing
14 a concerted practice.

15 I don't know whether that would be a convenient
16 moment.

17 **LORD CARLILE:** If it's a natural break in the flow --

18 **MR MORRIS:** It's a natural break for me. I will go to my
19 other points of the four --

20 **LORD CARLILE:** In that case we'll break until 2 o'clock.

21 **MR MORRIS:** I'm very grateful.

22 (1.00 pm)

23 (The short adjournment)

24 (2.00 pm)

25 **LORD CARLILE:** I understand there's a major situation in

1 Tottenham Court Road, some kind of hostage-taking event.
2 So if anybody has any difficulties, it is not
3 a terrorist event, but if anybody has any difficulties
4 arising from that, they should feel free to let us know
5 obviously. It shouldn't disturb us.

6 The other thing I was going to say is about the
7 case. We asked a question before the hearing started in
8 relation to the different categories of cheese and
9 pricing and we were very politely told to wait. We feel
10 that it would be very helpful to us if the parties could
11 possibly try to agree some kind of note for us which
12 would help us to know a little bit more about the
13 proportion of the different categories of cheese which
14 were priced in the, I use the term "creameries" because
15 it's the term that's more familiar to me, the suppliers.
16 The proportion of cheese that was generally treated as
17 deli, random, fixed price.

18 We're just concerned to get a better picture of how
19 the pricing of cheese was organised so that it brings
20 this situation a little more alive for us. I'm sure the
21 parties can help to do that.

22 Mr Morris.

23 **MR MORRIS:** We hope to do that. I hope that shortly I may
24 be able to cast a little bit more light on that aspect,
25 not fully the question you asked, but I am in a moment

1 going to talk a little about types of cheese, but we
2 will obviously do what we can to meet your request.

3 Before the adjournment, sir, I was making four
4 general points, and I'd made two and I was coming to my
5 third.

6 The third point is that it is worth considering the
7 position of Tesco in particular. Tesco was at the time
8 and remains the largest of the large national multiple
9 supermarket retailers. Indeed it was and remains in the
10 Premier League of national and international retailers
11 and very much at the top of that league. Indeed,
12 drawing on the earlier experiences of this Tribunal, you
13 might say that Tesco is the Manchester United or even
14 now the Chelsea of supermarket retail.

15 **LORD CARLILE:** But not the Barcelona.

16 **MR MORRIS:** I was going to say the Barcelona but I thought
17 in the light of recent events I thought I'd add in
18 a reference to Chelsea, irk me though it does
19 personally, being an Arsenal person.

20 It is worth noting, for example, that at the Tesco
21 Dairy Supply Group meeting, Tesco wasn't comparing
22 itself to Asda, it was comparing itself to Asda's US
23 parent, Walmart. In 2002, Tesco had a United Kingdom
24 turnover of almost £22 billion, representing at least
25 20 per cent of the entire UK grocery market. Its cheese

1 business alone was worth well over £200 million a year
2 and it bought and sold twice as much cheese as any other
3 supermarket.

4 Then look at Tesco's involvement in the relevant
5 events in 2002. In fact it was Tesco, the biggest
6 player in the market, that set the ball rolling when its
7 most senior executives publicly backed the farmers' call
8 for an increase in farm gate prices. I will return to
9 that in a little more detail in due course.

10 Fourthly, and in a related way, this large and
11 sophisticated organisation, Tesco, was fully aware of
12 its obligations under the law not to distort or stifle
13 competition to the detriment of consumers. Tesco in its
14 skeleton now says that communications between retailers
15 and their suppliers of future retail pricing intentions
16 are both normal and a lawful business practice. See
17 Tesco's skeleton, paragraph 54 {^magnum ref }.

18 But Tesco knows and indeed knew full well that that
19 is not the position. Such discussions are not normal.
20 Tesco had a compliance programme, as we now know, and
21 had one at the time.

22 On 6 December 2007, in the course of the
23 administrative stage, Tesco told the Office of Fair
24 Trading in its response to the statement of objections
25 that it had instructed its buyers that these types of

1 discussions should only occur in, and I quote, "very
2 limited circumstances". For your reference, that's the
3 response to the statement of objections, paragraph 3.17,
4 notice of appeal bundle 4, tab T, page 39
5 {^magnum ref }.
6

7 What is more, by 2000, Tesco knew full well that
8 this very sort of retail price coordination through
9 disclosure of future pricing intentions as a response to
10 farmer pressure from the FFA was unlawful. You've
11 already seen that and we'll come back to it in a moment.
12 They wrote to the Office of Fair Trading and they knew
13 that this was not the response that could lawfully be
14 taken to farmer pressure.

15 Now, you would have expected then that when the very
16 same issue arose two years later in 2002, there would
17 have been alarm bells ringing throughout Tesco. In
18 those circumstances, when a plan for a market-wide
19 retail price increase was floated, you would have
20 expected Tesco to do everything it could not to get
21 involved and, what is more, to be seen not to get
22 involved.

23 You might have expected to have found a notice in
24 big red letters within the company, "Do not go there for
25 heaven's sake", and you would have expected that those
who had contact with the processors at the time to have

1 said loudly and clearly, "I cannot discuss this". And
2 you would have expected that where there was a genuine
3 commercial need to pass information for packing
4 purposes, the relevant Tesco personnel would have said
5 loudly and clearly, "This is for packing only, do not
6 pass it on". You might even have expected Tesco to go
7 back to the OFT as it did in 2000.

8 In short, given its sophisticated understanding of
9 the law, you would have thought that Tesco would have
10 made sure that it distanced itself from the initiative
11 and that it was seen to do so. But Tesco has produced
12 no evidence that any of this happened in 2002, nothing
13 from senior management and nothing from those dealing
14 with the processes.

15 With those general observations in mind, I turn now
16 to look at the facts of the case in more detail. What
17 I propose to do in this second section of my opening is
18 to give you some summary about the facts, the narrative,
19 and some facts about cheese, and then I'm going to go
20 and look at the documents. When I get to the documents,
21 I'll tell you how I'm going to try to approach it.

22 Now, there has been a lot of talk about cheese,
23 everybody thinks they know about cheese, there has been
24 a lot of talk, but there are at the outset some
25 important distinctions which have already been touched

1 upon and I identify three important distinctions.

2 The first distinction is between pre-packed and
3 deli. Pre-packed cheese is packed by the processor,
4 deli cheese is supplied in large cheeses, from my
5 recollection, cut and wrapped in the shop in those
6 supermarket outlets which have a deli counter. That's
7 the first distinction.

8 Then, within pre-packed cheese itself, cheese may be
9 packed either in random weight or in fixed weight.
10 Where it is in random weight, the retail price is set by
11 the retailer per kilo, and then the specific retail
12 price for each random weight piece of cheese is put on
13 the label affixed by the processor. And, as indeed was
14 pointed out this morning by those from Tesco, in the
15 store itself, you will not see a specific price for the
16 piece of cheese on the shelf, you will see a per
17 kilogram price on the shelf and then, when you pick up
18 the individual piece of cheese, you will see how that
19 piece of cheese is priced depending on its random
20 weight.

21 However, where a cheese is pre-packed fixed weight,
22 there is generally no price fixed on the packet, and the
23 price is instead found on the edge of the shelf in the
24 supermarket. In that case, the processor is not told
25 the retail price and has no reason to be told.

1 Now, one wrinkle to that is there is something
2 called PMP, which is price marked pack, which is a fixed
3 weight cheese but where the price is affixed by the
4 processor. But this was limited to cases where there
5 was promotional activity and for fixed weight this is
6 very much the exception rather than the rule. So the
7 basic rule is: fixed weight priced by the retailer,
8 random weight priced by the processor.

9 A third distinction, and I think this is for the
10 moment probably the limit of my categorisations but
11 there's probably going to be a lot more as we go on, is
12 between branded pre-pack and own label pre-pack.
13 Branded pre-pack bears the brand of the processor and
14 the two most commonly cited examples in this case are
15 Seriously Strong Cheddar, which is a McLelland brand,
16 and Cathedral City, which is a Dairy Crest brand. Both
17 of these brands were at all times, and this is an
18 important point, fixed weight and not random weight.

19 Own label, by contrast, bears the label of
20 a supermarket: Tesco own label, Sainsbury's own label,
21 Asda own label.

22 Now, I hesitated before doing this, and you may not
23 find it particularly useful, but I certainly found it
24 useful. I have some examples just to illustrate. If
25 I could hand them up, I don't know if you would find it

1 useful. I personally, having been involved now in
2 cheese for some months, rather enjoyed going to the
3 supermarket.

4 What I'm handing up is three pieces of cheese.

5 (Handed)

6 What you see there is you see two fixed weight
7 branded pre-pack, Seriously Strong and Cathedral City,
8 and one Tesco Value random weight with the price on it
9 and the random weight -- the random weight and the price
10 marked. I hope that that illustrates what I've been
11 explaining.

12 I should say that what I don't have is an example of
13 Tesco own label random weight apart from that Value.
14 Value cheese is a subset of Tesco own brand. I should
15 also add, and no doubt when my opponents have a look at
16 the pieces of cheese, that the actual label of
17 Tesco Value has now been revamped and that is not the
18 label, the Value branding that was in place in 2002.
19 There are still some of those around --

20 **LORD CARLILE:** You haven't had that cheese hanging around
21 since 2002?

22 **MR MORRIS:** Sir, it has been hanging around since this
23 morning, and I was little bit worried about whether we
24 could get refrigeration facilities.

25 **LORD CARLILE:** So the labels could have been quite different

1 then, but it's a useful illustration.

2 **MR MORRIS:** Yes, but the basic principle is there.

3 Essentially, own label was generally random weight, and
4 at the time Tesco own label, other than Value, was
5 random weight, but we haven't been able to find any --

6 **MS DALY:** And this is random weight?

7 **MR MORRIS:** That is random weight, that's Tesco Value. It's
8 a subset of an own label, but it's not the main range of
9 own label because there's standard own label and there's
10 Value which is a cheaper version.

11 **LORD CARLILE:** Would you like your cheese back?

12 **MR MORRIS:** Yes, thank you very much.

13 I was just going to make one more point and it was
14 this. There are in the shops now no examples of Tesco's
15 standard own label random weight. At the time we think
16 there were. This now appears to have changed and we
17 believe that now all or the vast majority of Tesco's own
18 label are in fact fixed weight.

19 So apart from Value, if you go to a Tesco
20 supermarket these days, most of the products are fixed
21 weight so they will not have been priced by the
22 processor. But that was not the situation in 2002. We
23 believe that Value is the only remaining random weight
24 and therefore it appears now to be the only Tesco
25 branded product that the processor labels with the

1 retail price. Now, I stand to be corrected obviously,
2 but that's my understanding.

3 The next point to do with this sort of factual
4 background is that at the time, and indeed now, when the
5 price was printed on the pack by the processor, it would
6 take some time for that retail price change to work its
7 way on to the shelves, because the existing stock at the
8 old price, marked with the old price, held by the
9 processor and/or by the retailer, would have to be sold
10 through first before the new stock with the new price
11 label by the processor could be put on to the shelf.

12 So in a random weight, in the case of a random
13 weight, there is a time lag between making the decision
14 to change your price and it appearing on the shelves.
15 As we understand it, that time lag was between one and
16 three weeks. It is for that reason that you will have
17 seen and you will see in the documents references to the
18 concept of managing stocks and labelling.

19 Now, with that introduction to cheese, brief though
20 it is, I'm going to turn to the narrative of the events
21 of 2002.

22 **MS DALY:** Can I ask one just clarifying point?

23 **MR MORRIS:** Yes.

24 **MS DALY:** So the price marked packs are actually fixed
25 weight cheeses labelled by B, the processor, is that

1 accurate?

2 MR MORRIS: No.

3 MISS ROSE: Yes, it is.

4 MR MORRIS: Sorry, the price marked -- PMPs.

5 MS DALY: PMPs, price marked packs are fixed weight but
6 labelled by the processor, is that right?

7 MR MORRIS: Yes, correct. That was very much, in fixed
8 weight, the exception rather than the rule, because we
9 understand that it was to do with where you had
10 a promotion, two for one or something like that, you
11 would put them on beforehand. But normally with a fixed
12 weight you don't need to, and you can change the price
13 of a fixed weight by just changing it on the shelf.

14 MS DALY: Thank you.

15 MR MORRIS: Now, the story will no doubt be beginning to
16 be -- it probably is very familiar to you by now but, if
17 I may, I'm going to summarise the narrative because I'm
18 going to ask you to keep that narrative in mind when
19 I get to the documents.

20 The farmers had been complaining for some years
21 about the low prices they were getting for their raw
22 milk, known as the farm gate price. There was pressure
23 from the farmers for those prices to be increased and,
24 in particular, from a more militant element known as
25 Farmers for Action. Mr Handley was the leader.

1 In the summer of 2002, there were protests and there
2 were blockades, and that caused major and costly
3 disruption to the processors, in particular Dairy Crest,
4 and to the supermarkets and their distribution chain.

5 This was a matter of the utmost concern to the
6 processors and to the retailers alike. As a result, far
7 from being normal, the circumstances in 2002 were
8 exceptional. Now, although, as Miss Rose said
9 yesterday, in normal circumstances suppliers and
10 retailers' interests might be expected to diverge, in
11 2002, in those exceptional circumstances, their
12 interests coincided. They wanted to get the farmers off
13 their backs.

14 On 3 September Terry Leahy, the CEO, I think was his
15 title at the time, of Tesco, met with the president of
16 NFU, Ben Gill. Immediately following that meeting Tesco
17 made a public announcement, and in that public
18 announcement, or two public announcements, they
19 positively called for the processors to pay 2p per litre
20 more for all their raw milk. That at the time was
21 regarded by Tesco as an important publicity coup because
22 they wanted to be seen to be the champion of the farmers
23 in order to get the farmers off their backs.

24 What then happened, the first thing that then
25 happens is that Tesco leads an increase in the retail

1 price for liquid milk and others follow. However, as
2 everyone realised at the time, that would not do the
3 trick because it wasn't enough to increase price --
4 increasing the price for fresh liquid milk alone was not
5 enough to get the full 2p per litre back to the farmers.
6 In fact, a calculation by Dairy Crest at the time
7 thought that it would only get 0.77p per litre back to
8 the farmers if only the retail price of liquid milk --
9 it's often referred to as FLM, fresh liquid milk -- was
10 increased. That is due to what is referred to as the
11 pooling effect.

12 If you would like to just turn briefly to my
13 skeleton, the pooling effect is explained in
14 paragraph 30 {^magnum ref }.

15 I should say our skeleton actually, not my skeleton.

16 **LORD CARLILE:** They'll forgive you. Paragraph 30.

17 **MR MORRIS:** I'm not sure they will actually, you don't know
18 them.

19 As we, the OFT, explains there:

20 "If only one retailer (X) increased the cost price
21 it paid to its particular processor (Y) by 2p [per
22 litre], and only in respect of liquid milk, that would
23 have fallen far short of achieving the objective of
24 farmers receiving 2p [per litre] for their raw
25 milk: first, because the raw milk bought by [that]

1 processor would be sold on to a number of retailers (as
2 well as [that particular retailer]); secondly [and this
3 is the point that is particularly relevant to cheese]
4 because the raw milk bought by processor Y would be sold
5 to retailers [not just in the form of liquid milk but
6 also] in the form of other dairy products ... [including
7 cheese]; and thirdly because farmers would be selling
8 their raw milk to processors other than processor Y."

9 What that meant was that, in order to get close to
10 the 2p per litre, and this is in paragraph 31 of the
11 skeleton, in order to get close to that 2p per litre,
12 the increase would have to be paid by all retailers to
13 all processors in respect of all dairy products into
14 which the raw milk was processed. That is the pooling
15 effect, and that is why it soon became apparent that
16 price increases for other dairy products other than
17 liquid milk would be necessary in order to achieve the
18 objective which Tesco's senior executives had so
19 recently called for.

20 **MS POTTER:** Sorry, could I just ask a point of
21 clarification.

22 I've been conscious that all of us have been talking
23 about retail of cheese and butter, which is obviously
24 the force of this investigation, but presumably in
25 relation to the pooling effect, there must be

1 a proportion of milk that's going into cheese for
2 manufacture, and similarly butter and milk for
3 manufacture, so that there was always going to be -- but
4 I've no feel at all for the proportions.

5 **MR MORRIS:** Sorry, that's cheese not sold for retail --

6 **MS POTTER:** So cheese not sold for retail, which would all
7 go into this farm gate price issue.

8 **MR MORRIS:** Yes. I would have to take instructions on that
9 as to --

10 **MS POTTER:** It would just be intriguing to know whether it's
11 not --

12 **MR MORRIS:** I'm aware -- I think you'll find that the
13 initiative, and I'll be corrected, was centred upon
14 retail sale, and other aspects, which may have been
15 catering and the like, I think you do find it being
16 considered in some of the documents.

17 I don't know what proportion was going -- I will
18 come back to you on that if I may.

19 **MS POTTER:** That's great, thank you.

20 **MR MORRIS:** But I'm conscious that that is another little --

21 **MS POTTER:** Just in terms of this farm gate increase by 2p
22 per litre, it seems to be relevant.

23 **MR MORRIS:** Yes. Somebody might pass me a piece of paper in
24 a moment and I might be able to give you a better
25 answer.

1 **LORD CARLILE:** I think we were told somewhere that
2 25 per cent of the milk that came from the farm stayed
3 in the form of fresh liquid milk. Is that right or is
4 that wrong?

5 **MR MORRIS:** I can never remember whether it's 25 or 50.

6 **LORD CARLILE:** Anyway, we can be told later.

7 **MR MORRIS:** It will differ from processor to processor
8 depending on the balance of their business. So
9 McLelland were only cheese makers, as I understand it.
10 Dairy Crest had a fresh liquid milk business as well as
11 a cheese business and presumably a butter business and
12 the like. And Express and Wiseman will have been more
13 fresh liquid milk, I imagine.

14 **LORD CARLILE:** Yes. There are specialist processors of many
15 different kinds.

16 **MR MORRIS:** Yes. I mean, McLelland is a cheese maker.

17 **MS POTTER:** Thank you. Sorry.

18 **MR MORRIS:** So, as I say, it became apparent very soon that
19 other products would have to be brought in in order to
20 achieve the 2p per litre, and that is what was discussed
21 at the Tesco Dairy Supply Group meeting on 13 September,
22 a meeting called by Tesco and attended by farmers and
23 all its main processor suppliers.

24 The major part of that meeting was taken with the
25 need for farmers to receive 2p per litre on all their

1 raw milk, and in particular on their raw milk which was
2 processed into cheese and other dairy products. The
3 reason it was focusing on cheese is that the initiative
4 in relation to liquid milk had happened by then, or
5 was -- in fact, it had happened and was in the process
6 of being achieved.

7 Now, I'm going to go to the Tesco Dairy Supply Group
8 meeting when I get to the documents. I'm going to go to
9 it as briefly as I can because I don't want to go over
10 the ground that we've been to but I will want to go to
11 it.

12 As you will recall, the notes of that meeting
13 indicate consistently that the outcome was that Tesco
14 set the processors a challenge. Dairy Crest, as the
15 processor which was the most targeted by the FFA, took
16 up the gauntlet. That's the next stage in the
17 narrative. Dairy Crest came up with a proposal. The
18 objective of that proposal was to raise the farm gate
19 price for all towards the target of 2p per litre. That
20 proposal was for an industry-wide across-the-board price
21 increase. It was a proposal based on a price increase
22 of £200 per tonne. It was a proposal for cost prices
23 and for retail prices. It was a proposal for all its
24 cheese lines and for all its customers. This was the
25 plan of Dairy Crest.

1 What then happened, you will know by now, is that
2 Dairy Crest put together a document which it circulated
3 to its principal retailers. We know that it sent it to
4 Asda, Safeway, Sainsbury's and Tesco. I'm not sure how
5 much we know whether it sent it to others, but certainly
6 those four.

7 That document, I don't know who coined the phrase,
8 whether we did at the OFT, but the Dairy Crest briefing
9 document was sent to those retailers consistently
10 between 19 and 23 September 2002. What then happened is
11 other processors joined it, McLelland and Glanbia, and
12 they had contact with retailers and the three processors
13 received indications from the retailers that they were
14 on board with this plan.

15 The next stage, from 24 September, consisted of
16 Dairy Crest and the processors setting about putting
17 together the mechanics of the proposal of the
18 initiative. How were they going to achieve what they
19 wanted to achieve?

20 You see that, between 24 and 27 September, you see
21 for the first time Dairy Crest proposal for waves. I've
22 used that phrase shorthand. This is the stages of price
23 increases for different categories of cheese in
24 different weeks. That wave proposal modified over time,
25 we'll see it when we come to the documents. It was

1 initially 20 September and I think the initial -- we'll
2 see in the documents, the first time it's raised is
3 20 September and then a three-week programme thereafter.
4 That becomes modified and that's the period of 24 to
5 27 September.

6 On 3 and 4 October, or 3rd or 4th, you see McLelland
7 approaching Sainsbury's with a similar wave approach.
8 I'm using the word "wave" to distinguish -- I don't want
9 to use the word "staged" because it gets into another
10 issue which is referred to as staggering, which is
11 a separate issue, which is the issue that Miss Rose
12 referred to yesterday where there's the mismatch between
13 the milk being used and the maturing of the cheese.
14 That's a separate and different issue which you will see
15 in the document. But when I talk about waves, I'm
16 talking about the increases in prices for different
17 lines over a period of three or four weeks.

18 We then come to the week of 14 to 18 October and
19 a firmer wave idea becomes formulated in some more
20 detail. What we are seeing then is a first wave of 20
21 or 21 September -- I correct myself, 20 or 21 October,
22 and then waves of 4 and 11 November. In that week, we
23 know that Dairy Crest spoke to Sainsbury's and they
24 spoke to Tesco, and we know that McLelland was also
25 speaking to Sainsbury's and Tesco at least at the same

1 time. We also know that in that week Glanbia too were
2 involved.

3 What emerges is a proposal that, in fact,
4 Sainsbury's are going to go first, and they're going to
5 go first with fixed weight cheese. Now, that is an
6 important point. The reason that that's an important
7 point is that that change can be made quickly, because
8 it doesn't need to wait for stocks to run through, can
9 be visible in the shops quickly and it can be a tester
10 of the scheme, because Sainsbury's can put their price
11 up, if they're going to go first, and if the others
12 don't follow they can bring it back down again quickly.
13 Whereas in the case of random weight, that would not
14 have been possible. And the purpose of Sainsbury's
15 going first was to test the reaction, to see whether
16 others would follow through, and to build confidence,
17 the confidence that everybody needed that everybody was
18 going to go up.

19 As I say, by the end of that week, I think the
20 Friday was 18 October, the overall structure of the
21 waves was settled. And on 22 October, which I think was
22 the Tuesday, the following Tuesday, Sainsbury's did in
23 fact move their fixed weight branded which I think --
24 certainly Seriously Strong fixed weight.

25 We then get to the week of 21 to 25 October. There

1 were further exchanges, Sainsbury's having moved on
2 branded fixed weight, and this is a document I think we
3 got to -- I'll come back to it later. But having moved
4 on branded fixed weight, then hesitated about its own
5 label, so its own label products, because it was
6 concerned that others were not going to move, so it
7 sought assurance effectively I think that it was Tesco
8 and Asda would move. I think that's the 24 October
9 document from memory, we'll come back to that in
10 a moment.

11 Now, there's an important point here. Cartels
12 are -- I use the term broadly -- cartels are, I won't
13 say always, often unstable. They are prone to cheating.
14 A participant is going to take part and then he steals a
15 march and doesn't do what was agreed.

16 What Sainsbury's were doing there, when they
17 hesitated, was doing more than expressing the classic
18 anxiety that the others might not do what they were
19 expecting them to do, and that is what was going on on
20 24 October and that is the explanation for why they
21 waited and hesitated.

22 We then get to the week of 28 October and you will
23 bear in mind that the first proposed wave for Tesco --
24 Tesco weren't in the first wave of the 20th -- was
25 4 November and it was coming up. This is the key week

1 when Tesco finally gave the green light to all its
2 processors, or certainly its main processors, that it
3 was going to participate in the scheme. What it did was
4 it indicated in that week that it was going to raise its
5 retail prices in the envisaged waves. At that stage,
6 the indication that they gave was retail prices were
7 going to go up, depending on the product, on 4, 11 and
8 18 November, in the weeks of.

9 A decision was taken in principle by Tesco, by that
10 time at the latest, to accept cost and retail prices in
11 waves. And it is with the key events of 29 and
12 30 October 2002 that this decision is concerned and at
13 which we will look in more detail in due course in the
14 case.

15 What then happened in the weeks that followed was
16 that there were further exchanges. Prices did go up in
17 the waves anticipated and, in particular, I do ask you
18 to note, this is something that was not made clear in
19 opening, the 4 November wave happened. I'm not talking
20 about the 11th or the 18th. The own label came at the
21 end, Tesco standard own label, and that, as you will
22 see, got pushed back. But the original wave, 4 November
23 wave, happened.

24 There were then concerns again, in the light of what
25 I've just referred to about cartels being unstable,

1 there were concerns about whether the other retailers
2 were complying, and it was for that reason that checks
3 were being made as to whether or not people were acting
4 as they had said they would act, or indicated they would
5 act. The dates for some of the later waves got moved
6 back by a week or two but in the end there were
7 across-the-board increases for all or most of the lines
8 by the main retailers and in respect of cheese supplied
9 to them by the main processors. In that way, the plan
10 was broadly respected.

11 That, we say, is the narrative of the events of 2002
12 and we say that they present a totally coherent picture
13 of what was happening and why it was happening, why
14 these communications were happening.

15 Now, before turning to the documents, I would just
16 like to take a few minutes to set out the overall logic
17 of what was happening at the time in a series of
18 propositions -- I don't like the word "propositions",
19 but in a series of steps in the logic.

20 The first step is that if there is a cost price
21 increase, in general Tesco would wish there to be
22 a retail price increase. The reason for that is, pretty
23 obvious, they don't want a cut in their margin, but it's
24 slightly more sophisticated than that because Tesco
25 internally and their key personnel had key performance

1 indicators, and one of the key performance indicators
2 was maintaining margin. Not just maintaining margin but
3 maintaining percentage margin. So a key performance
4 indicator for Mr Scouler and Ms Oldershaw, and I suspect
5 for the company as a whole, is that the percentage
6 margin should be maintained.

7 Now, what that meant actually, in fact, is that if
8 there is a cost price increase of let's say 100, there
9 would have to be a retail price increase -- and I did
10 work out the figures once -- of something more than 100
11 to maintain the percentage margin that was being
12 achieved before the increase. The KPI that was the
13 driver for Tesco's desire to raise prices was
14 maintaining percentage margin. So that's the first
15 proposition.

16 However, and this is the second proposition, another
17 of the key performance indicators dictated that Tesco
18 would not be able to raise its prices on products within
19 the basket, and I'm sure you're familiar with it by now,
20 if it meant that it would be higher than its lowest
21 competitor and specifically Asda. So that meant that if
22 there was a cost price increase there would be pressure
23 to go up, and there would be pressure not to go up,
24 because if you went up and were out of line with your
25 competitor, and your competitor didn't go up, you would

1 be forced under the basket policy to bring the product
2 down.

3 Now, the basket policy did not apply to every
4 product and it did not apply to every cheese line, but
5 it did apply to a lot of the cheese lines and it did
6 apply to Value products and it did apply to standard own
7 label products. Although I don't have the figures
8 immediately to hand, that represented a very substantial
9 part of Tesco's cheese business.

10 Now, the basket policy dictated that you could not
11 be out of line for a certain period of time, and the
12 period of time within which you could remain out of line
13 was different on different products. For some products
14 it was a matter of weeks, perhaps one to two I think --
15 two weeks. For other products it was 24 hours. So you
16 could -- Tesco could not, as a matter of -- well, it
17 would be a breach of the key performance indicator to be
18 out of line higher on those products, I think the Value
19 cheese products, for more than 24 hours.

20 Now, that obviously creates a tension and it means
21 that if you want to go up, you're going to want your
22 competitor to go up.

23 So those are the two KPIs which form the background.

24 The third proposition in the logic is this. Once
25 Tesco's senior management makes the public announcement

1 of the 2p per litre for all raw milk, Tesco recognise
2 and have to recognise that, ultimately, to achieve this
3 there would have to be a cost price increase.

4 The next step is Tesco would wish, as I've just
5 said, to recoup this cost price increase because of the
6 margin KPI, but Tesco couldn't go up, or wouldn't go up
7 unless others went up too. Basket policy.

8 The next step in the logic was this. Tesco was not
9 the only retailer with a basket policy. The others also
10 had a basket policy, so they wouldn't go up unless Tesco
11 went up. That is militating towards everybody going up.

12 But there's another factor in this particular case
13 militating towards them all having to go up, and that
14 brings us back to the pooling effect, because unless
15 all -- and when I say "all", I'm talking about the
16 principal retailers -- unless all the principal
17 retailers go up, then the 2p per litre publicly stated
18 objective of Tesco's senior management could not be
19 achieved. It wasn't enough just for one retailer to go
20 up, they all had to go up. So those factors lead to the
21 conclusion that what's going to be needed is an
22 across-the-board retail price increase.

23 Now, the next and perhaps penultimate proposition is
24 this: no one would go first or would want to go first,
25 and no one would want to be out of line, and no one

1 would wait to see if anybody else had gone up first
2 because the person who went up first wouldn't go,
3 because if he went he would then be out of line and
4 wouldn't be able to come back down again and he would
5 have his own basket policy.

6 So, essentially, it wouldn't happen and they would
7 wait. There's no point waiting until it was in store
8 because it would be too -- if you waited for somebody
9 else to go, you would be waiting forever, I'm not
10 expressing that very clearly, because the other people
11 wouldn't go up because they would be out of line.

12 So what each required in order to make the thing
13 work was to know that they were not going to be alone.
14 It is for that reason why each required reassurance that
15 the others would -- and that's the conditional,
16 future -- would go up. That is the essential logic of
17 the narrative, and it is for that reason why the tipping
18 off as to what people were going to do was so critical
19 to the working of the across-the-market retail price
20 increase.

21 That is the essential logic at the heart of the
22 whole narrative, and the key, as we said in our
23 skeleton, is this: the key is that once Tesco make their
24 public announcement they've publicly staked their
25 colours to the mast of the increase, the farmers. That

1 was the thing, as we'll see from the evidence, that
2 I think probably caused consternation further down the
3 ranks in Tesco because they realised that that would
4 have to happen. That is why that announcement is so
5 important to the whole sequence of events.

6 **MS POTTER:** Sorry, can I just stop briefly. Just thinking
7 about, before we come to the 2p per litre issue, the
8 general propositions about basket and KPIs would
9 presumably apply to any price increase in the
10 supermarket sector, and that would suggest one wouldn't
11 have had price inflation across the supermarket sector
12 without coordination.

13 I'm just struggling a little bit to see how much
14 weight you attach to something which would suggest that
15 one would never have price increases --

16 **MR MORRIS:** I think I can give two immediate answers. The
17 answer is, of course, that as a matter of logic that's
18 right. I think one finds that, in fact, cheese prices
19 hadn't gone up -- I'm looking behind me -- generally,
20 and that there hadn't been cost price increases or
21 increases historically. They had been going down
22 because of this competition.

23 Secondly, of course that structure would mean that
24 in a normal situation -- I'm using the normal versus the
25 exceptional events -- a retailer would not very readily

1 accept a cost price increase. But here it was different
2 because, effectively, there had been an announcement.
3 They knew there would have to be a cost price increase
4 across the board.

5 What's unusual here is everybody was talking --
6 people talk merrily in this case about, "Oh, it's fine,
7 it was a uniform cost price increase". Well, that in
8 itself was pretty extraordinary. They were negotiating
9 across an industry for a uniform cost price increase.
10 That's not normal.

11 What set this apart -- the logic of the first two
12 propositions, you're right, applies in every situation;
13 but what made this different was that the interests of
14 the processors and the farmers were aligned and they
15 both recognised that they needed to get the farmers off
16 their back by accepting this increase. And once you
17 feed that in, that's the thing that distinguishes it
18 from the normal situation.

19 **MS DALY:** I have a related question which you might be able
20 to answer, or maybe Miss Rose at another time.

21 From a management point of view, there must be
22 internally within all these retailers someone who
23 decides what's in their basket policy. Who is it who
24 decided at Tesco the components of that basket policy,
25 and how quickly could they have ripped a product out?

1 **MR MORRIS:** That I don't know, and I suspect Miss Rose will
2 have to answer that.

3 The answer I've been given is that we think it's the
4 commercial director for the product category, and at the
5 time that person was Dido Harding.

6 **LORD CARLILE:** There are certain items it would be pretty
7 difficult to take out of the basket case, though, aren't
8 there, like butter and probably cheese?

9 A different thought was going through my mind, and
10 as you have already been interrupted I might as well
11 join in. I was thinking about commodities, and the
12 obvious example is motor vehicle fuel. When OPEC puts
13 the price of oil up, the supermarkets do not raise their
14 prices at the same moment. And when the price of oil
15 goes down, price wars break out. I recall last week
16 I think that Morrisons put their diesel price down 4p
17 and then were followed by the others.

18 **MR MORRIS:** Yes.

19 **LORD CARLILE:** I don't think anybody is suggesting, at least
20 for the present, that that was as a result of any kind
21 of improper concerted practice. And milk is similarly
22 a kind of commodity in the context of this case in that
23 a decision had been made in a blaze of publicity to give
24 the farmers an extra 2p per litre. It's not absolutely
25 inevitable that the companies would feel it necessary to

1 get together and increase prices any more than they
2 would with motor vehicle fuel, is it?

3 **MR MORRIS:** No, but I think the immediate response I'd give
4 is that cheese is a slightly more complex product.

5 **LORD CARLILE:** Yes, there are other commodities sold in
6 supermarkets. Potatoes would be obvious example.

7 **MR MORRIS:** The first point is that moving up is different
8 from moving down. You would expect people to move
9 down -- well, no...

10 **LORD CARLILE:** You see, you're sort of trying to persuade
11 us, Mr Morris, that in order for Tesco to maintain their
12 margins whilst their staff were keeping to their KPIs,
13 whatever those KPIs were, they would have had to collude
14 in some way, or enter into a concerted practice,
15 otherwise they would lose market share or fail their
16 KPIs or whatever. But that's not necessarily the case
17 without clear evidence that that was what they were
18 doing.

19 **MR MORRIS:** We say there is clear evidence of what they were
20 doing, and we say they were plainly tipping off each
21 other, and we do say -- I mean, the key fact here is
22 that the cost price increase was practically a given,
23 there was no debate about the cost price increase, and
24 that this wasn't a case of pushing back to the processor
25 saying, "No, no, no, you can't justify this. Why are

1 these costs going up? We're not going to have it".

2 This was a case of recognising that it was going to
3 happen. If they didn't move out they would breach their
4 KPIs. And as we will see from Lisa Oldershaw's
5 evidence, she was the person, she says, who made the
6 decision on particular prices and she lived and died by
7 her KPIs.

8 **LORD CARLILE:** I suppose where it leaves us is the sooner
9 Ms Oldershaw is in the witness box the better.

10 **MR MORRIS:** Yes. The point I was going to make is that
11 petrol and milk are much more predictable because
12 they're effectively a single product. Cheese is a much
13 more complex product with different lines, there is the
14 labelling issue and the timing issue. It's not
15 a commodity in the same way as petrol or milk is. We
16 would say that is a key distinction, and that is a key
17 distinction between what was going on in respect of
18 liquid milk, which happened pretty quickly, and the
19 cheese price increase which happened but took more time
20 to, we would say, more time to organise frankly.

21 **LORD CARLILE:** Yes, thank you. And to Ms Smith.

22 **MR MORRIS:** Yesterday Miss Rose submitted on a number of
23 occasions, and this is probably a related point, that
24 once you know that the cost price will go up it is
25 inevitable -- and I think I have page 110 of the

1 transcript of yesterday and somebody will tell me if
2 that's right or not -- it is inevitable in a competitive
3 market where margins are tight that retail prices will
4 go up.

5 We say that that is both a flawed analysis and it is
6 not in tune with commercial reality. First, as a matter
7 of fact, you should know that retail margins on cheese
8 at that time were substantial. They were not remotely
9 tight. At paragraph 4.65 of the decision
10 {^magnum ref }, you will see that retail margins were
11 in the region of 60 per cent and they were much more
12 substantial than the processors' margins. We make that
13 point at paragraph 21, sub-1 of our skeleton.

14 **LORD CARLILE:** We noticed that the processors' margins were
15 not very small.

16 **MR MORRIS:** No, they were around about 20. Mature
17 cheddar -- those are gross margins.

18 **MISS ROSE:** I'm sorry to interrupt but I didn't say it was
19 inevitable, I said it was pretty likely.

20 **MR MORRIS:** It doesn't matter because you corrected yourself
21 this morning but let's just explore the point of logic.

22 So certainly margins weren't tight and we say you
23 can dismiss that idea, and that was said.

24 Secondly, in a competitive market, particularly with
25 margins such as these, competitors, we would say, would

1 be seeking to steal a march by not raising retail prices
2 and, far from being inevitable that retail prices will
3 go up if there's a cost price increase, there is at the
4 very least uncertainty as to what your competitor will
5 do in those circumstances. They may not go up at all in
6 normal market situations, they may not even accept the
7 cost price increase.

8 What the disclosure of the future retail pricing
9 intentions did in this case was to reduce that
10 uncertainty so as to give each retailer the confidence
11 to raise its prices and to keep up its margins.
12 I understand that certainly this morning, [draft]
13 page 10 of the electronic transcript, Miss Rose in fact
14 said that it wasn't inevitable -- not inevitable.

15 But I use the point as I try to illustrate what you
16 would expect to happen and what did happen and why this
17 tipping off or disclosure of future intentions was so
18 central to what in fact happened.

19 **LORD CARLILE:** Have I got this right, what you're saying is
20 that some retailers might decide not to increase their
21 prices but to go for increased market share.

22 **MR MORRIS:** Yes, you would expect that -- if they've got
23 a decent margin, in a competitive market you would
24 expect them not necessarily to raise their retail prices
25 but to actually maybe not to accept the full amount --

1 **LORD CARLILE:** Ordinary market logic.

2 **MR MORRIS:** Yes, ordinary market competition.

3 Now, sir, finally, before turning to the documents
4 themselves, can I say a few words about the word
5 "strand". This is a term devised for the first time by
6 Tesco in the notice of appeal to describe each
7 particular instance where the OFT found that there was
8 a transmission of future retail pricing information.
9 I have to say that, although it obviously hurts to give
10 any recognition to one's opponents, I have come
11 gradually to recognise that this term "strand" is, at
12 least for the purpose of convenience, a useful
13 shorthand. I think it assists everybody.

14 However, in our submission, it must be used with
15 some care. Too rigid adherence to these strands runs
16 the risk of failing to see the facts as they really are.
17 And I make two points here. First, in relation to each
18 of the two initiatives, what is in issue is a continuum
19 of events from September to November in the year in
20 question. Each event has to be seen in the context of
21 what has gone on before and indeed in the light of what
22 happens thereafter.

23 Secondly, in a number of instances, the facts of one
24 strand are inextricably linked to the facts of one or
25 more other strands, such that a particular disclosure or

1 transmission of information you will find might appear
2 in more than -- under the heading of more than one
3 strand. In this way, weaving the strands together gives
4 you the fabric of the infringement. It is for this
5 reason that, in the main, when I run through the
6 documents as I propose to do now, I will take the
7 material broadly in a chronological order and not
8 necessarily in a strand order. I will, of course, as
9 Miss Rose did, remind you where a particular document is
10 directly relevant to one or more particular strands.

11 Finally, of course, the Tribunal will have the point
12 by now that each and every individual transmission of
13 information from A to B to C gives rise to a separate
14 breach of the Chapter I prohibition.

15 **MS DALY:** So without playing a word game, "strand" and
16 "wave", how do you relate the two?

17 **MR MORRIS:** Strands are the transmissions of information,
18 the disclosure by A to B and then by B to C. The waves
19 are the big picture of when prices for particular groups
20 of lines of cheese were broadly going to go up, and at
21 the beginning it's 20 October, 21 October, 4th and
22 11th -- in fact for Tesco it's 4th, 11th and 18th.
23 That's a sort of factual way, whereas the strand is
24 a sort of slightly artificial analysis to, I suppose,
25 express the facts in terms of the hub infringement

1 identified by the Court of Appeal in Kit.

2 **LORD CARLILE:** I think on that maritime note we should give
3 the stenographer ten minutes.

4 (3.05 pm)

5 (A short break)

6 (3.15 pm)

7 **LORD CARLILE:** Yes, Mr Morris.

8 **MR MORRIS:** I'm now going to turn to the documents and I'm
9 going to take you through the document bundles, and I'm
10 going to do it with one eye, or more than one eye, both
11 eyes on the fact that you've been through them already.
12 But I do say that it will be necessary to go to certain
13 documents and passages that you have seen before.

14 It is our submission that when you read through
15 these documents and you see them in the actual form in
16 which they were at the time, and in their chronological
17 order, they tell a very compelling story. That will
18 emerge as we go through. Now, we have produced
19 a substantive chronology which I think you may have.

20 **LORD CARLILE:** Somewhere.

21 **MR MORRIS:** I'm not going to follow it immediately but I am
22 going to keep it to one hand --

23 **LORD CARLILE:** Just bear with me for a moment.

24 **MR MORRIS:** We have spare copies here.

25 **LORD CARLILE:** If I could have a spare copy.

1 I think I may have left it on my desk.

2 **MR MORRIS:** Does anybody else want one?

3 There are some red boxes on it, yes, which means
4 Tesco can't see it.

5 **LORD CARLILE:** There are some red boxes in the chronology?

6 **MR MORRIS:** Yes.

7 **LORD CARLILE:** Yes, I have a black and white copy, that's
8 why I asked that question.

9 **MR MORRIS:** Have my coloured version. There are two
10 coloured versions here. (Handed)

11 **MISS ROSE:** I've just looked through this and looked at the
12 red boxes and they seem to be entirely anodyne. It does
13 seem to me to be wholly disproportionate to suggest that
14 my clients can't look at this document because of the
15 matters in red. If I can invite the Tribunal to look at
16 what they are.

17 **LORD CARLILE:** I'm inclined to agree. They look completely
18 anodyne to me and I think this ultimately is in the
19 discretion of the Tribunal, isn't it?

20 **MR MORRIS:** Yes. Well, yes.

21 **LORD CARLILE:** Shall we see how we get on?

22 **MR MORRIS:** Let's see how we get on. If it's really
23 necessary I would have thought we could produce a
24 version -- for those people from Tesco who are actually
25 here, we can produce a version without those bits of

1 information in it so they can see the rest of it in any
2 event, and we'll endeavour to do that as soon as --

3 **LORD CARLILE:** Miss Rose?

4 **MISS ROSE:** Sir, that, with respect, is not a satisfactory
5 way to proceed. What is being proposed by my learned
6 friend is a document that the OFT wishes to put forward
7 as an essential part of its presentation of its case in
8 opening should not be able to be seen by my clients.

9 In my submission, that is an extreme step in any
10 litigation which should only be taken where there is
11 genuinely sensitive confidential information --

12 **LORD CARLILE:** You don't need to say any more at the moment,
13 Miss Rose.

14 Can we sort that out. That seems to be a completely
15 self-evidently correct proposition.

16 **MR MORRIS:** We can indeed, but I have held myself back on
17 this confidentiality issue, sir. I am speaking now not
18 for myself but for the people behind me.

19 Everything that the OFT has done about
20 confidentiality has been totally for the purpose of
21 observing the OFT's statutory duties. Any suggestion
22 made at any stage that we are in some way trying to
23 steal a march or render this unfair for Tesco is
24 resisted, and I'm resisting on behalf of those people
25 sitting behind me.

1 **LORD CARLILE:** Don't be sensitive, Mr Morris. Just bear
2 with me for a moment.

3 I just wanted to look at schedules to the
4 Enterprise Act. Schedule 10?

5 **MR MORRIS:** Sir, can I suggest this, can we just not use the
6 chronology for the next hour and sort it out? Because
7 it really --

8 **LORD CARLILE:** Yes, okay. But what I was going to say was,
9 under one of the schedules to the Enterprise Act...

10 Yes, I'm looking at the Enterprise Act 2002,
11 schedule 4, part 1, paragraph 1, subparagraph 3.
12 I think I'm right in saying that at the end of the day
13 it's for the Tribunal to determine what does or does not
14 remain confidential.

15 **MR MORRIS:** Of course.

16 **LORD CARLILE:** It seems to me, and I'm sure my colleagues
17 will agree, that it's entirely wrong -- it's entirely
18 helpful that a chronology should be used, but it would
19 be entirely wrong for a chronology to be used, some of
20 which was concealed from Tesco and their
21 representatives.

22 So far as we are concerned, and we've discussed
23 this, in the absence of something that we had not
24 noticed being pointed out to us, an awful lot of the red
25 material is, to use the word I think somebody used

1 earlier, anodyne. Therefore, it would be our
2 expectation that certainly the substantive chronology
3 should be disclosed in full so that the Tribunal can
4 proceed towards its decision on a proper basis.

5 **MR MORRIS:** I personally, and the OFT, has no objection to
6 that, and the point I am making is because the OFT has
7 been acting in accordance with a procedure that has been
8 fully agreed.

9 **LORD CARLILE:** I don't doubt that.

10 **MR MORRIS:** I make two further points if I may. First,
11 Tesco's counsel and representatives have had it and can
12 see it. It is only people outside the ring. Secondly,
13 they have had this skeleton since the 25th, no objection
14 has been made by Miss Rose until now. Subject to those
15 observations, I of course am more than happy to abide by
16 the views of the Tribunal.

17 **LORD CARLILE:** I've looked at the red bits in this
18 chronology, there are six that I've spotted. Every
19 single one of them appears in one of the documents to
20 which we've already been referred, so this is --

21 **MR MORRIS:** In a red box though.

22 **MS POTTER:** But the actual information is information that
23 is littered through the documents, not just in red
24 boxes.

25 **LORD CARLILE:** That's right.

1 **MR MORRIS:** I'm not arguing against you, I totally agree
2 with the position that this is all very old information.

3 I am not making representations on behalf of anybody --

4 **LORD CARLILE:** Let's short-circuit this, Mr Morris. This
5 chronology should be disclosed. If anybody wants to
6 appeal on the basis that we've reached our decision on
7 an improper basis, resulting from the disclosure of
8 those few red items in the chronology, they can do so.
9 I wouldn't expect the Court of Appeal to be very
10 sympathetic, not on that point anyway.

11 **MR MORRIS:** Very well. I am obliged.

12 **LORD CARLILE:** Let's get on.

13 **MR MORRIS:** Let's get on, I agree.

14 **MISS ROSE:** Can I then take it that that can now be shown to
15 my clients?

16 **LORD CARLILE:** Yes.

17 **MISS ROSE:** I'm grateful.

18 **LORD CARLILE:** So you can take instructions properly,
19 Miss Rose.

20 **MISS ROSE:** Sir, I'm grateful.

21 **MR MORRIS:** Okay. Let's start at the beginning of the story
22 and let's go to document 1A. This is the first item in
23 the chronology, this is what happens in April 2000.

24 **MS DALY:** Which bundle are we in?

25 **MR MORRIS:** Document bundle 1, yellow spine. These are two

1 letters, 1A and 1B, written by Waitrose and Safeway
2 respectively, written at the behest of the FFA, the
3 Farmers for Action, over two years before the relevant
4 event.

5 The first letter, from Waitrose, is addressed to
6 Derek Mead, who was of the FFA, head of buying at
7 Waitrose {^magnum ref }:

8 "... I wish to confirm the deep concern we have
9 about the current viability of milk production at
10 current producer returns."

11 This is Waitrose to the farmers.

12 "This view was endorsed fully in our communication
13 with the Monopolies and Mergers Commission in January of
14 last year..."

15 Then in the next paragraph:

16 "Although we acknowledge that in the short term this
17 might create a more competitive situation for consumers,
18 retailers and processors, we also felt that it could
19 lead to farmers taking short cuts and lowering standards
20 which potentially could lead to poorer welfare
21 practices. This scenario appears to have already
22 developed and our concern for a viable and sustainable
23 supply chain of fresh milk is such that I would have no
24 problem in agreeing to a price increase which would
25 return producer prices to a more viable level, perhaps

1 in the low 20s per litre if [in capital letters] this
2 could (a) be passed back through the supply chain to
3 producers and (b) ensured that we would not be
4 uncompetitive in the market place as a whole."

5 So that is a statement by Waitrose to the farmers
6 that Waitrose would support a price increase but as long
7 as they would not be uncompetitive in the market place.
8 That, in our submission, is plainly a reference to
9 retail prices. So they will go up if others do.

10 Over the page you see a similar letter
11 {^magnum ref } written three days later, again to
12 Derek Mead from Safeway, second paragraph:

13 "We substantially agree with Waitrose's position, as
14 outlined in Richard Sadler's letter to you of 7 March.
15 We would support a significant increase in the retail
16 price of milk [retail price] provided that the dairy
17 farmers were the sole beneficiaries and that we did not
18 thereby disadvantage ourselves in what is a very price
19 sensitive product market. Unilateral action by any
20 major retailer to increase prices would be of no use to
21 anyone."

22 Now, these two letters caused some consternation for
23 Tesco. They make clear that the indication was for an
24 increase in retail prices conditional upon others going
25 up.

1 If you then turn the page to document 1C
2 {^magnum ref }, you will see, sir, that this document
3 is marked yellow -- certainly there's a version of it
4 which has yellow all over it -- and this is a document
5 which Tesco insists is confidential. We do not accept
6 it is. Now, unless Miss Rose is to indicate otherwise,
7 I shall respect their client's wishes for the time being
8 and not read it aloud. We would, perhaps, in the light
9 of recent events, invite Tesco to reconsider its
10 position about whether this document can be read aloud.
11 If not, I would ask you to read the letter again and, in
12 particular, paragraphs 2, 4 and 5.

13 (Pause)

14 Can I hand up, once you've read it, a piece of
15 paper. Because of Tesco's insistence, I make my
16 submission on that document in writing.

17 (Handed)

18 **LORD CARLILE:** Yes.

19 **MR MORRIS:** So we move on to see the Office of Fair
20 Trading's response, which I can read out to you
21 {magnum ref }. This is a letter from Mr Mason to
22 Lucy Neville-Rolfe at Tesco, and he wrote to Edward
23 Whitehorn:

24 "I think that in approaching the issues you raised
25 we need look no further than the guideline that OFT has

1 issued ...

2 "It seems to me that the sort of letter that you
3 have in mind, along the line of those you enclosed,
4 would be an indication of the sort of action you would
5 be willing to take on the basis that others (ie your
6 competitors) followed suit. This sort of concerted
7 arrangement whereby the parties indicate their
8 willingness to follow a particular course of action
9 would appear to fall within what we would regard as an
10 agreement or concerted practice within the meaning of
11 the ... Chapter I prohibition ...

12 "The next question is whether such agreement would
13 have an appreciable effect on competition and/or might
14 be capable of benefiting from an exemption. I have
15 little doubt that we would regard the type of agreement
16 or concerted practice in contemplation as having an
17 appreciable effect. What we are talking about is
18 essentially an agreement to raise consumer prices in
19 order to pass on the increase to farmers. Whatever one
20 might think about the desirability of helping
21 a hard-pressed sector of the economy, the guidelines
22 make it clear that we are likely to regard such
23 agreements as significant where they involve a combined
24 market share in excess of 25% ... or where they fix
25 prices ..."

1 Then in the final paragraph:

2 "In summary, the sort of letter you contemplate
3 would in our view be likely to suggest a breach of the
4 Chapter I prohibition. I am making this view clear to
5 both Safeway and Waitrose (but without referring to
6 Tesco in any way)."

7 Then what you have, sir, is at document 1D and E
8 Mr Mason writes -- that's back two tabs -- in similar
9 terms to both Waitrose and Safeway. So what we have
10 here is the OFT making it absolutely clear that
11 a statement indicating a willingness to raise prices
12 would be caught by the 1998 Act and would be unlawful.
13 It was to that background context that I referred you in
14 opening.

15 We can now jump ahead two years, we come to the
16 events in 2002. Tab 1 you have already seen and that is
17 the background to the establishing of the Dairy Supply
18 Group and Miss Rose took you to the detail of that.
19 I don't propose to say any more about it other than to
20 note that the idea had been thought of several months
21 before.

22 Documents 2 and 3 {magnum ref }, which I believe
23 you weren't taken to, are FFA press releases dating from
24 July 2002. In July 2002, the farmer agitation was
25 building up, essentially, and serious pressure was

1 beginning to be placed on the processors and the
2 retailers. I invite you perhaps just to read the first
3 part of document 2:

4 "Following negotiations that have taken place with
5 dairy processors over the last few days, to no avail,
6 Farmers for Action have been left with no alternative
7 other than to take direct action against certain milk
8 processors. All major supermarkets have been notified
9 that they are about to see disruption to their supply of
10 milk and dairy products as they have all been honest
11 enough to denounce any price reduction that has been
12 made by the milk processors."

13 Then over the page {magnum ref }, four days
14 letter, headed "Successful Dairy Blockades" you see an
15 announcement of successful blockades of sites belonging
16 to Dairy Crest and Robert Wiseman, at six sites. Then
17 in the third paragraph a reference to demonstrations,
18 this is line 3:

19 "These protests will [continue] to escalate over the
20 coming weeks until the said companies act in a
21 responsible manner."

22 We say that this is very important context for what
23 happens at the beginning of September and, although it's
24 common ground and although you're well aware of it, it's
25 still important to get a feel for what's actually going

1 on at the time in the street, the sense of urgency, the
2 sense of urgency it must have caused within the
3 processor companies and within the supermarkets. It is
4 effectively disruption to the supermarket distribution
5 chain.

6 Whilst we are there, could I invite you to take up
7 bundle 4 of the notice of appeal bundles and go to
8 tab T, paragraph 3.43 and following, this is on page 44
9 {magnum ref }. This is Tesco's response to the
10 statement of objections. There's a section here where
11 Tesco describes the economic impact of the blockades.
12 If you go to paragraph 3.45:

13 "In order to show the extent of the potential harm
14 to Tesco's business, Tesco has assessed the commercial
15 impact of a single blockade action, by focusing on four
16 depots that were hardest hit over the 2002-2003 period
17 (Crick, Southampton, Middlewich and Chepstow) and then
18 estimating the direct costs of a one-off farmers'
19 blockade on each depot. The estimates assume
20 a four-hour period of full disruption and take into
21 account the costs of stock waste, stock cover, in-store
22 availability and additional labour costs associated with
23 dealing with delays. The estimated cost is a total of
24 £2.7 million for the four depots.

25 "However, in reality, the situation faced by Tesco

1 was much worse than this, as it was threatened with
2 a series of blockades nationwide across a protracted
3 period. In addition to magnifying the impact of the
4 direct costs set out above, this would also have led to
5 a potentially significant additional amount of sales
6 being lost through diversion of trade to other retailers
7 as a result of gaps in Tesco's product range -
8 a sizeable proportion of these customers could well be
9 lost permanently. Consequently, the £2.7 million cost
10 associated with a single four-hour blockade of just four
11 depots materially underestimates the true potential
12 impact of FFA's threatened actions against Tesco.

13 "Therefore, it was clear to Tesco's senior category
14 executives that the potential ramifications of a series
15 of blockades would be highly damaging, and even more so
16 in the run up to Christmas when the supply chain is
17 particularly vulnerable due to significantly increased
18 sales volumes."

19 There is then a passage in yellow which I will not
20 read out but I will invite you perhaps to read. I'm
21 grateful, sir.

22 (Pause)

23 Then we go to document 4 {^magnum ref }, which is
24 a document dated -- we have now moved forward to the end
25 of August, 28 August. This is a letter from the NFU of

1 Scotland, Mr Ed Rainy Brown, who is the chief executive
2 of the NFU Scotland, to Sainsbury's:

3 "Dear Ian.

4 "You are aware of increasing pressure amongst milk
5 producers for action to support their call for an
6 increase in the farm gate price of milk. We have tried
7 to keep you informed of this issue as it has developed,
8 and are now writing to advise you that action focusing
9 on supermarket distribution centres is likely in the
10 coming weeks.

11 "I know that you fully understand the range of
12 issues behind the current price situation, but you will
13 also appreciate that most farmers see the supermarkets
14 as the most powerful players in the chain, and therefore
15 those with the best ability to change the situation.
16 Their concerns are about both the milk and Cheddar
17 cheese markets, and they are looking for real upward...
18 movement as the autumn milk round approaches."

19 So the first point to note is that they are talking
20 about cheese then.

21 Then in the next paragraph:

22 "The demands of NFU Scotland members are for clear
23 visible action, and we are now preparing contingency
24 plans for such demonstrations. We hope very much that
25 those of you with such strong positions at the retail

1 end of the supply chain can act before mid-September.
2 If our milk producing members do not clearly see that
3 action on both fronts [and there I would say that that
4 refers back to milk and cheese], we will be faced with
5 potentially disruptive demonstrations around
6 distribution centres, a situation which I am sure we all
7 wish to avoid."

8 Now, the reference to "visible" there is important.
9 We will see that as a theme coming up again because this
10 refers to the concept of transparency. The farmers
11 needed to see that something was being done, and the
12 way, the only way they could see that something was
13 being done was by seeing retail prices going up in the
14 supermarkets.

15 You will note just in passing, this is a Sainsbury's
16 document, that there is a manuscript note at the top of
17 the page, "3/9 - possible price movement". We would
18 suggest that's a manuscript note made by somebody from
19 Sainsbury's.

20 We then go to document 4A, this is a document from
21 Lucy Neville-Rolfe who, as you will recall, was the
22 person engaged in the correspondence with the OFT two
23 years earlier, to Terry Lee yeah, effectively setting up
24 the all important top level meeting with Mr Gill.
25 Addressed -- cc John Gildersleeve, Dido Harding, Colin

1 Smith, Philip Clark:

2 "I wrote this note before I heard from Claire Miles
3 that Colin Smith was in today and had provisionally
4 suggested a meeting with Terry and Ben Gill on Tuesday
5 morning. This sounds good in principle, expect that
6 Dido will be in the United States and I understand the
7 NFU's leading concern is on milk.

8 "We spoke yesterday about the FFA action at the
9 Snodland depot on Tuesday night (which was contained
10 very well).

11 "Since then Jim Walker of the NFU Scotland has come
12 out with a public threat to lead supermarket depot
13 demonstrations on 19th September (after the Results)
14 unless there is a clear signal that farm gate milk
15 prices will rise. This has had little press coverage,
16 however, I understand there was a bad 5 minute piece on
17 national radio last night, saying that the FFA were
18 supporting them and calling on the NFU to do so.

19 "My own view is that this is extraordinary and
20 stupid behaviour by Jim Walker especially after the
21 conversations he had with you and Dido last week. We
22 need to make clear our view to him appropriately! We
23 were however, able to get our cheese story away by
24 giving it in advance to the Scotsman Group...

25 "The NFU have been very responsible. But Jim's

1 action has made them very jumpy. Richard MacDonald has
2 asked for a meeting with Ben Gill in the next 2 weeks
3 with you. I said I would consult but he was adamant
4 that it would need to be you, especially as Jim has
5 already made a lot of your telephone discussions last
6 week. Dido and I think you should agree to a meeting
7 and sooner rather than later.

8 "Dido is in the US until Thursday evening, but
9 perhaps you would agree in principle and we could sort
10 out a suitable time [table] on her return so she can
11 attend as well."

12 That is the background to the meeting which we know
13 took place between Mr Gill and Mr Leahy on 3 September.

14 This leads then to documents 6 and 6A which are the
15 two press releases issued by Tesco on successive days,
16 the first of which records the meeting between the chief
17 executive and the president of the NFU.

18 **LORD CARLILE:** I don't think I have a 6A.

19 **MR MORRIS:** It's 6 and 7, I apologise.

20 **LORD CARLILE:** Right.

21 **MR MORRIS:** It is 6 {^magnum ref } and 7

22 {^magnum ref }, it's the two press releases. They
23 are obviously issued following the meeting, and it is
24 the second one where you see the public statement:

25 "... we are today calling on all milk processors to

1 pay them [the farmers] at least two pence per litre more
2 because of the need to sustain the UK dairy industry."

3 I am not quite sure, from not having looked back at
4 the transcript in detail although somebody will tell me,
5 but the fact is these were not statements or
6 announcements about fresh liquid milk. They were
7 statements about increasing the farm gate price of raw
8 milk. As is common ground, that ultimately required
9 action in respect of other dairy products and so, to
10 that extent, press statements are not confined in any
11 way to fresh liquid milk.

12 You can see, if you look back at the first of those
13 press releases, at document 6, that there are express
14 references not just to milk, but in the fourth and six
15 bullet points on tab 6, to British cheese, and yoghurts
16 and cheeses in the last one.

17 As I have said on many occasions, and it's perhaps
18 beginning to get a little bit strained, but these two
19 statements are crucial context.

20 **LORD CARLILE:** Let me get this clear. This is 2p per litre
21 on all milk, not just milk being sold as fresh liquid
22 milk, but milk that's being sold to other processors,
23 for example making yoghurt or whatever?

24 **MR MORRIS:** Yes, it's calling on all milk processors to pay
25 farmers at least 2p per litre more because of the need

1 to sustain the UK dairy industry.

2 Just looking -- in the light of your comment, I'm
3 looking in detail at 6. It absolutely confirms that
4 this is a statement about the price, the farm gate price
5 for all raw milk.

6 **LORD CARLILE:** The situation being that a bulk tanker turns
7 up at the farm and it may take that farm's milk to
8 a milk dairy, and it may take it to Mullers to make
9 Fruit Corners or whatever. There are all kinds of
10 different -- and creameries where cheese is made is
11 another example.

12 **MR MORRIS:** Yes.

13 **LORD CARLILE:** Yes.

14 **MR MORRIS:** I think you have the point, but just to make
15 sure Ms Smith reminds me that if you look at items 4 and
16 6 on document 6 you can see that this is proposed action
17 in relation to what -- British cheese, and in relation
18 to yoghurts and cheeses, so it's not just about milk.

19 **LORD CARLILE:** It's about everything that goes into the bulk
20 tanker.

21 **MR MORRIS:** Yes. There's no direct statement that prices
22 are going to go up, but if you look also at bullet point
23 1 at 6, there's the statement that:

24 "Involving Tesco in detailed discussions with
25 processors and producers to discuss issues, including

1 pricing..."

2 It's a general statement, but the key point is that
3 they are standing up publicly and backing the farmers.

4 From this point on in the story, this has become an
5 objective not just of the FFA but a positive objective
6 of Tesco's.

7 As you will see from our chronology, at the time of
8 this second press release, Dido Harding, John Scouler
9 and Rob Hirst were in America, and I'm assuming you're
10 aware of the chain of seniority within Tesco.
11 Dido Harding is senior to John Scouler, and John Scouler
12 is senior to Rob Hirst, and Rob Hirst is senior to
13 Lisa Oldershaw, as she now is.

14 On the first page of the chronology, you see that
15 those three individuals are in America, in New York, and
16 that they are due back on the morning of the 6th. On
17 the day they get back, Mr Hirst notifies Diana Thompson
18 of Express that he wanted to change the agenda for the
19 upcoming Tesco Dairy Supply Group meeting. We'll see
20 that from document 8A, which is a file note made by
21 someone called Tim Smith at Express. If you look down
22 that document, under the heading "Friday 6 September",
23 Rob Hirst from Diana Thompson, and then you'll see that
24 he also said he would need to change the agenda for the
25 supplier meeting planned for the 13th to: how can we

1 help the farmers?

2 The same day, the 6th, that's the Friday, September,
3 Tesco decided to raise its retail price on fresh liquid
4 milk.

5 Documents 9 and 11. Document 9 {^magnum ref }
6 is an internal Sainsbury's email, the one on the lower
7 half of the page, this is 10 September so this is the
8 Tuesday, from Finn Cottle to Sarah Mackenzie:

9 "I am with the NFU tomorrow and although milk
10 pricing has increased, they will still be pursuing the
11 little return that Cheese Dairy farmers get. In
12 preparation and by lunchtime tomorrow, can you please
13 prepare a rough summary of the retail price movements on
14 standard JS Cheese lines in the last 12 months due to
15 competitive pressures from Tesco."

16 That would suggest, in answer to one of the points
17 that you made, that there is a category of cheese dairy
18 farmers and I will obviously get some input on that;
19 rather than a farmer sending his milk somewhere, there
20 are farmers who are producing milk specifically for
21 cheese producers.

22 I am looking behind me and I'm not getting any
23 enlightenment.

24 But that's not the point I'm making. The point I'm
25 making is even though liquid milk has gone up, cheese is

1 very much on the agenda and the pressure is coming from
2 cheese. This is on 10 September.

3 Then if we go over to 11 {^magnum ref }, we see
4 an internal Asda email on 12 September, so that's the
5 next -- two days later, this is the Thursday. This is
6 the day before the Tesco Dairy Supply Group meeting, and
7 this is concerning potential action by the NFU for
8 Scotland. Ed Rainy Brown again, telephone conversations
9 over NFUS picketing retail premises, so there is
10 picketing of retail premises:

11 "I am concerned that despite earlier conciliatory
12 messages, there appears to be a hardening of position.
13 Despite Asda opening the dialogue, NFUS is making
14 statements directly in the press responding to the milk
15 price rise this week:

16 "Jim Walker, NFUS president [said] 'Liquid milk only
17 accounts for half the market [this is getting onto the
18 percentage] so we will continue to look for a similar
19 commitment to be made on cheese and other dairy
20 products'.

21 "I have spoken to Ed Rainy Brown [that's NFUS] about
22 this statement. I gained the view that the cheese
23 manufacturers [ie the processors] had argued that retail
24 cheese price had to move to allow them to increase milk
25 price and that pressure on retailers would be needed to

1 achieve this. Ed Rainy Brown confirmed that retailer
2 response was being sought. No request for debate or
3 meeting has been made despite previous offers.

4 "NFUS had mentioned Grangemouth depot as a primary
5 target for demonstrations in previous conversations."

6 So right from the very beginning, cheese processors,
7 there's an indication that they wanted and intended to
8 get retail prices to move for cheese to enable them to
9 allow the increase in the raw milk price to go back
10 through the system.

11 We now get to the Tesco Dairy Supply Group meeting
12 with which you will be familiar. You will be familiar,
13 this is 13 September, and you will be familiar with the
14 fact that there are four notes of the meeting, there are
15 three contemporaneous notes taken by attendees of the
16 meeting at the time, they are at documents 12
17 {^magnum ref }, 13 {^magnum ref } and 14
18 {^magnum ref }. And there is a subsequent document
19 at document 40 {^magnum ref } which is a Wiseman
20 report of the meeting which was written on 4 October or
21 for a meeting for 4 October, so some time after but
22 broadly contemporaneous, but not taken at the meeting.

23 A couple of observations to make generally. There
24 is, we say, a number of tell-tale wording similarities
25 between the different notes which speak to their

1 veracity. There is no suggestion that the -- I'll put
2 it the other way. We submit that these documents are
3 not only contemporaneous but are a good and likely
4 record of what was actually said. One of the key points
5 we make to support that proposition is that you will see
6 the same phrase pop up in all three of them. It has the
7 ring of truth if all people are recording "cautiously
8 optimistic", "mood for change" -- I'll show you in
9 a moment -- "market management". They crop up. We say
10 that that is important when considering the weight to be
11 placed on these notes.

12 Let me start by dealing head on with one particular
13 passage in the Express note of which Miss Rose made much
14 in the course of her opening yesterday. That passage is
15 to be found at tab 14 {^magnum ref } and it is on
16 the third page of the Express note. It is the passage
17 right at the bottom of that page beginning "R Hirst".

18 It reads as follows:

19 "R Hirst - cheese and spread values have crashed
20 over the last three years and Tesco has been selling
21 them at a loss. Cautiously optimistic that Tesco can
22 now start to move retail prices [retail prices] forward
23 in this area but Tesco still needs to sell Value
24 products. 21% of sales. Price problem in dairy, victim
25 of shopping basket values and very difficult to move out

1 of line with other competitors, but RH [Rob Hirst]
2 senses that there is a mood to move some of these prices
3 forward."

4 Then in a passage to which Miss Rose paid less
5 attention but which we say is equally if not more
6 important:

7 "The decision was taken on liquid milk..."

8 We know by now that that has happened, Tesco has
9 made the decision on liquid milk.

10 "... because it was:

11 "Highly visible.

12 "Gave a big kick start to the process.

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

14 Now, Miss Rose says that the statement about moving
15 retail prices forward is confined to Value, with
16 a capital V, products, by which I mean Tesco's Value
17 range. This explanation of this passage of the Express
18 notes of the Tesco Dairy Supply Group meeting emerged
19 for the first time in five years, maybe, in Tesco's
20 skeleton argument. It had never been previously
21 suggested that the words "cheese and spread values"
22 refers to Value products. It is our submission that it
23 is plainly not the case that that is referring to Value
24 with a capital V products but is referring to the word
25 "values" with a small V, meaning prices.

1 I will, if I may, explain to you why we say that is
2 plainly the case. It is plainly the case both from the
3 words in the Express note themselves and from the
4 parallel wording in the Dairy Crest and Arla notes.

5 First, the natural meaning of the word "values" in
6 the first line, where it first appears, is a reference
7 to prices generally. This is confirmed --

8 **MISS ROSE:** I'm sorry to interrupt, but what has just been
9 said is simply untrue. The reference to this is at
10 paragraph 57 of the notice of appeal {^magnum ref ,
11 which in turn refers to Mr Scouler's witness statement.
12 It's simply untrue to say that this point was taken for
13 the first time in our skeleton argument.

14 **MR MORRIS:** Well, I stand to be corrected. I'll put the
15 point another way: it was made for the first time in the
16 notice of appeal. It was not made in the administrative
17 process and, presumably...

18 Nevertheless, I shall continue to demonstrate why it
19 cannot mean what Miss Rose or Mr Scouler says it means.
20 First of all, the natural meaning of the word "values"
21 is, as I've said, prices. If you then look at the word
22 in line 4, "values", that is not talking about Value
23 cheese, that is talking about shopping basket values
24 with a small V, prices. By contrast, when Mr Southwell,
25 the author of this note, is referring to Tesco's Value

1 range of products, he says so, and in the note he puts
2 the word in quotation marks. So in line 3 of that
3 passage, you see.

4 "... Tesco still needs to sell 'value products' ...
5 within quotes.

6 You might think that is a clever, neat point that
7 I've just noticed and maybe it's fortuitous that he did
8 it that way.

9 Just turn over the page for the moment and see what
10 the writer says at page 5, line 6, "R Hirst":

11 "... but the bottom end is already there in the form
12 of the 'value lines'."

13 He's talking about how do we create more value at
14 the bottom end of the market. Even there it's
15 interesting, I hadn't spotted that:

16 "M Stephens -- how do we create more value at the
17 bottom end of the market?"

18 He doesn't mean more Value products there, he means
19 higher prices presumably.

20 "... the bottom end is already there in the form of
21 the 'value lines'."

22 So what we say is that where he is referring to
23 Value products, he puts them in quotation marks, and the
24 word "value" where he uses it otherwise is referring to
25 prices generally.

1 **MS POTTER:** The remainder of that sentence though, talking
2 about selling them at a loss, given what you were saying
3 about margins, does that not suggest that he is actually
4 talking about Value products with lower margins? This
5 is the R Hirst sentence you have just read out.

6 **MR MORRIS:** On page 3?

7 **MS POTTER:** On page 3, I'm sorry, yes. So:

8 "Cheese and spread values have crashed over the last
9 three years and Tesco has been selling them at a loss."

10 In the opening, we were emphasising that Tesco was
11 making significant margins across its cheese ranges so
12 I'm not quite sure how that statement would be being
13 made.

14 **MR MORRIS:** Well, I'm not sure either and, if I may, I'll
15 come back to you on that. But I would say that
16 nevertheless it doesn't undermine the points I'm making
17 about the language that is being used.

18 **MS POTTER:** No, but it might suggest an alternative
19 interpretation of "value" there. I think it's worth
20 just looking at that.

21 **LORD CARLILE:** Something has crashed, whatever it means has
22 crashed, that suggests to me that there has been
23 a sudden decline -- in sales?

24 **MR MORRIS:** No, I think in prices. There is other evidence
25 to suggest that price had been going -- it doesn't

1 necessarily mean that margins has been going down, does
2 it? I think what you'll find is actually that, of
3 course, the farm gate price has been crashing and the
4 prices will have come down. The point about selling at
5 a loss, I can see that is -- that is inconsistent with
6 margins being high, that point does appear from that,
7 obviously. But it doesn't mean that they may have been
8 going down because everything has been going down.

9 **MS POTTER:** No. I'll just leave that with you to think
10 about.

11 **MR MORRIS:** And you don't know -- I mean, you don't know why
12 he is saying this and the like.

13 **MS POTTER:** Absolutely.

14 **MR MORRIS:** The facts are, they're not disputed, that
15 margins certainly between -- the passage in the decision
16 to which I referred you, and I haven't got it in front
17 of me, I can come back to it because there's other data.

18 **MS POTTER:** That's fine.

19 **MR MORRIS:** The passage which shows margins increasing in
20 the decision, somebody will remind me of what that was,
21 it was 4 something.

22 **LORD CARLILE:** There's a large amount of room for misuse of
23 language or imprecise language here because most of the
24 attendees were not from Tesco.

25 **MR MORRIS:** Yes.

1 **LORD CARLILE:** So they would not be using, presumably, the
2 term "value lines" as a term of art as Tesco employees
3 seem to have done.

4 **MR MORRIS:** They wouldn't, in that sentence, no. But
5 I would suggest that -- I mean, there is a concept, it's
6 not capital V here, but plainly in the market, and
7 I don't know what people in the market use, but there is
8 a brand of economy line, there is a section in the
9 market which is economy. Tesco calls them value with
10 a capital V, Asda calls them Smart Price. It may be
11 that when people talk about that sector they talk about
12 them as value lines, as that sector. So when he's
13 talking about value, he's talking about that segment.

14 But the point I'm trying to get across is that this
15 statement is not about -- starting to move retail prices
16 forward is not confined to Value products but is
17 a general statement about cheese and spread prices.

18 The next point that one gets from the words is the
19 word "but" in the second sentence, because what you have
20 is:

21 "Cheese and spread values have crashed... Cautiously
22 optimistic that Tesco can now start to move retail
23 prices forward in this area [we say in the area of
24 cheese and spread generally] but Tesco still needs to
25 sell "value products" (21% of sales)."

1 And in those it's going to have more difficulty
2 moving them forward.

3 "Price problem in dairy, victim of shopping basket
4 values and very difficult to move out of line with other
5 competitors..."

6 So the word "but" is an indication, we say, that
7 there might be more difficulty in achieving an increase
8 for Value products, and indeed as we shall see in due
9 course that is in fact what happened, and it was harder
10 to move prices up on Value products, and we'll see that
11 as we get later in the story.

12 Thirdly, if I could invite you to then look back at
13 tab 13 {[^]magnum ref }, you will see, and this is
14 where the wording matching comes in, under the second
15 section of the note at tab 13, this is the Arla note,
16 under "Discussion", you will see the second tab:

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

19 Obviously, the "cautiously optimistic" wording is
20 exactly the same, and the "mood" word is the same, and
21 it's a problem with cheese generally, no reference to
22 Value lines.

23 Similarly in the Dairy Crest note, when we get to
24 the Dairy Crest note, Miss Rose took you to the
25 manuscript version. I understand that the current

1 position is that there is agreement between the parties
2 that there is a transcribed version which both parties
3 can live with for the time being.

4 **MISS ROSE:** That's not correct.

5 **MR MORRIS:** Okay, then I won't refer to it. I had been told
6 that.

7 **MISS ROSE:** I have no objection to my learned friend
8 referring to a transcribed version, but what I want to
9 make clear is that Tesco is in no position to agree any
10 transcribed version of this note because we don't have
11 access to the person who wrote it and we're not in
12 a position to give an authoritative interpretation of
13 his handwriting, any more than I would have said the OFT
14 was. But if they wish to put forward their nonexpert
15 opinion of what his handwriting says, I have no
16 objection to them doing that, subject to submissions I
17 may make about its weight.

18 **LORD CARLILE:** Has anyone asked Dr Marsden to transcribe his
19 own note?

20 **MR MORRIS:** Not that I'm aware of.

21 The transcription issue has arisen as follows.
22 Tesco, not the OFT, Tesco included in the bundle
23 a transcribed version. Tesco has put forward
24 a transcribed version, which is helpful. I'm not going
25 to refer to it in the light of Miss Rose's remarks. If

1 she doesn't want to rely on a document she has put
2 forward, so be it, we'll go to the manuscript.

3 All that happened was that the OFT then looked at it
4 and said, "Looks fine to us, but here are one or two
5 suggested things that we think might be slightly
6 different". It really is not worth having any more
7 discussion about.

8 The point is simply this, on page 1 of that
9 document, about two thirds of the way down, you will see
10 the statement:

11 "Mood to see [and I'm going to say 'increases'
12 although it's an arrow and a S] in other products,
13 butter [and] cheese."

14 Butter and cheese are cheese and spreads. No
15 reference to value with a capital V. In our submission
16 it is plain that Mr Hirst is not limiting his statements
17 about increases to Value products, and the attempt by
18 Tesco to persuade you otherwise does not succeed.

19 That is then, if I may take you back to tab 14
20 {^magnum ref }, to the actual passage that I referred
21 you to, that is then borne out by the final passage of
22 that paragraph at the bottom of page 14, the passage to
23 which Miss Rose did not take you, or did not certainly
24 take you in any detail, the clear statement that the
25 increase in retail prices which had by then happened

1 needed to be followed through on other markets, in other
2 words, by a similar retail price increase in other dairy
3 products including cheese.

4 **LORD CARLILE:** Choose a convenient moment, Mr Morris.

5 **MR MORRIS:** I'm just discussing it with my...

6 With that indication, I'm going to choose this
7 moment if I may.

8 **LORD CARLILE:** Right. Can we sit at 10 o'clock on Tuesday?

9 Does that inconvenience Ms Smith because I know
10 you'll want her here.

11 **MR MORRIS:** Yes, that's fine.

12 **LORD CARLILE:** Okay. Right, in which case we'll adjourn
13 until 10 o'clock on Tuesday. Thank you very much.

14 I hope everyone has a good weekend.

15 (4.12 pm)

16 (The hearing adjourned until
17 Tuesday, 1 May 2012 at 10.00 am)

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19 Opening Submissions by MISS ROSE1

20 (continued)

21 Opening Submissions by MR MORRIS80

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